



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs C Schofield-Coldwell

**Respondent:** Hoyer Gas & Petroleum Logistics Ltd

**Heard at:** Leeds                      **On:** 27-28 April 2022

**Before:** Employment Judge Parkin  
Ms J Hiser  
Mr J Howarth

**Representation**

Claimant: Ms R Mellor, Counsel  
Respondent: Mr R Hutchinson, Solicitor

## RESERVED JUDGMENT

**The unanimous Judgment of the Tribunal is that:**

- 1) The proper name of the respondent is Hoyer Gas & Petroleum Logistics Ltd;
- 2) The respondent has not proved its material factor defence within section 69 of the Equality Act 2010;
- 3) In accordance with section 66 of the Equality Act 2010, the claimant's terms of work (the terms of her contract of employment) are treated as including a sex equality clause and modified to include a term as to pay making it not less favourable than the equivalent term as to pay in the terms of work (the contract of employment) of her male comparator, Mr R Dyson;
- 4) The respondent is in breach of the sex equality clause; and
- 5) Determination of remedy for the breach is adjourned to a date to be fixed.

# REASONS

1. This is a reserved judgment following an in person hearing over two days. At the hearing, the parties agreed that the proper name of the respondent was now Hoyer Gas & Petroleum Logistics Ltd. Evidence and submissions were concluded but there was insufficient time both to determine and deliver judgment on the second day. The Tribunal reserved its judgment but was able to conclude its deliberations that day.

## The Proceedings

2. In her ET1 claim form presented on 29 September 2021, the claimant claimed Equal Pay in respect of her male comparator, Roderick Dyson, with whom she worked on a part-time rotating shift and jobshare basis as a Receptionist. She had made her Early Conciliation notification to ACAS on 26 July 2021 and the certificate was issued on 31 August 2021.

3. The respondent resisted the claim in its response presented on 4 November 2021, relying upon the material factor defence which it contended was non-discriminatory of appointing the male comparator when he was at risk of redundancy from his original position but had applied for the part-time receptionist role. It contended it was partially protecting his previous salary, rather than aligning it to the claimant's salary, expressly citing 6 aspects supporting its material factor: his length of service, seniority and understanding of its business and its desire to retain this; his skill set and experience, meaning he may be able to assist outside the receptionist role; the costs it would have incurred recruiting and training a new recruit; his redundancy payment; the difficulty he would have re-entering the job market; his goodwill and loyalty and its desire to retain this. It also contended that other senior employees had similarly received salary protection when accepting less senior roles including two females and maintained the claimant had subsequently received higher salary increases than her comparator.

## The Issues

4. The Claims and Issues were clarified and summarised succinctly by Employment Judge Davies in her Case Management Order following the preliminary hearing on 9 December 2021. She set out that: the Claimant still works for the Respondent as a receptionist. She shares that job role with a male colleague. He is paid more than her. The Respondent accepts that they do like work. The Claimant brings an equal pay claim. The only issues in the claim relate to whether the Respondent can show that the difference in pay is caused by a material factor that is not tainted by sex discrimination.

5. Judge Davies therefore set out the issues for this hearing as:

5.1 What is/are the reason(s) for the difference in pay and are/were they material factor(s) for the purposes of s 69, Equality Act 2010?

5.2 If so, has the Respondent shown that reliance on the material factor(s) does not involve treating the Claimant less favourably because of her sex -

s.69((1)(a)?

5.3 Has the Claimant shown that as a result of the factor(s), she and other women are put at a particular disadvantage compared with men doing equal work - s.69(2)? The Claimant relies on two factors:

5.3.1 Paying longer servers more; and

5.3.2 Paying other administrative staff more than receptionists.

5.4 If so, has the Respondent shown that that the factor is a proportionate means of achieving a legitimate aim S.69(2) and (1)(b)?

However, in closing submissions at the hearing, the claimant did not pursue the indirect discrimination claim based upon section 69(2), such that only issues 5.1 and 5.2, the direct discrimination issues, remained live. The claimant acknowledged that there was no statistical evidence to base an indirect discrimination claim within issue 5.3 upon and the Tribunal indicated that it would not be prepared to take judicial knowledge of any general gender disadvantage in these particular proceedings.

## **6. The hearing**

There was an Agreed Bundle (1-127) and the claimant provided a supplementary bundle (C1-16) containing Gender Pay Gap Reporting materials. Ms Hannah Brook, the respondent's Human Resources Manager gave evidence first, followed by Mr Michael Linney, its Finance Director, who had dealt with the claimant's grievance appeal. The claimant gave evidence. After some research overnight, Ms Brook was able to confirm that there had also been a female internal applicant for the receptionist role when Mr Dyson was appointed but no further documents were disclosed.

## **7. Witness evidence and credibility**

7.1 These matters go together with the Tribunal's fact-finding which follows. Whilst the Tribunal makes its determination on the basis of evidence adduced, involving primary fact-finding and drawing appropriate inferences, it is noteworthy that the respondent did not call evidence from its former Managing Director, Mr Mark Binns, (who is still within the Hoyer group of companies, on Mr Linney's evidence) or from Mr Dyson, the comparator employee (who is still employed) who would have been able to give direct evidence about the full content of the discussion between them before Mr Dyson accepted the receptionist role.

7.2 As well as a dearth of contemporaneous documentation explaining the process undertaken to determine Mr Dyson's salary, the Tribunal found a reticence which went as far as lack of transparency on the respondent's part and which continued to this hearing. Despite their lengthy witness statements, important new evidence was given orally by the respondent's witnesses. Ms Brook accepted in oral evidence that given the lack of documentary evidence in support, her evidence, credibility and integrity were central to the Tribunal's findings as to the reasons for Mr Dyson's increased salary. However, she was unable to recollect whether she had a direct conversation with Mr Dyson or only conversations via the intermediary of his line manager, Diane Kamavasi. She repeatedly used the expression about important matters: "I don't have that detail...", "I honestly couldn't tell you (the date when Mr Dyson accepted the job)",

“I don't know if Mr Dyson was under notice when he accepted the role”. This level of uncertainty was entirely inconsistent with the clarity she professed to have about the reasons for her suggesting to senior managers that they offer Mr Dyson the specific salary of £13,300 (which was her evidence). Her witness statement contrasted with her oral evidence that she sought authority not just from Mark Binns on “sign off” but via her Head of HR, Tanya Cressy, and the Financial Director Greg McLeen up to Mr Binns. Mr Linney had not been involved in the salary offer to the male comparator Mr Dyson in 2018 yet felt able to repeat in his oral evidence about each of Hannah Brook, Tanya Cressy (Head of HR), Greg McLeen (Finance Director) and Mark Binns (Managing Director) in very much the same terms: “I think I know (her or him) pretty well... I don't believe she/he would discriminate on the basis of gender”. His witness statement omitted the important feature of him learning about the pay disparity from his predecessor Mr McCleen during handover as early as before taking over the Financial Director role in March 2019.

7.3 The claimant gave her evidence clearly and with precision. The extent of her feelings on learning of Mr Dyson's salary in early 2021 and her reaction to this, in particular her grievance about it, was well documented within the Bundle. Her preparation and questions at the internal stages, revealing a very clear understanding of the principle of equal pay between people of different sexes doing equal work, was mirrored at the hearing.

7.4 Ultimately, the Tribunal did not accept Ms Brook's evidence that she proposed the enhanced salary for Mr Dyson in the sum of £13,300 and concluded instead that Mr Binns made the decision after a personal meeting with Roderick Dyson. It inferred from all the evidence including the almost complete lack of documentation surrounding the appointment and salary of Mr Dyson that the initiative to offer the £13,300 salary was from Mr Binns who had this personal contact with Mr Dyson. The fact of such a meeting was asserted internally by the claimant on 16 June 2021 (having been recounted by Mr Dyson to the claimant); it was not disputed by the respondent at that time and indeed is consistent with Mr Linney's rejection letter on the grievance appeal and his oral evidence.

## **8. The facts**

From the oral and documentary evidence, the Tribunal made the following key findings of fact on the balance of probabilities.

8.1 The respondent is part of an international group of companies and has 1300 employees in the UK, in particular at the Huddersfield site where the claimant and her comparator and managers were based as were senior managers and directors.

8.2 The respondent has not conducted an equal pay audit but completes Gender Pay Gap returns as part of its Corporate Governance.

8.3 From October 2016 the claimant was employed by the respondent as a part-time receptionist on a jobshare basis alongside one other receptionist. She worked rotating shifts for 23.75 hours and by 2018 her pay was £10,787 per annum.

8.4 For a few months in 2017, she had worked as an Organisation Support Administrator at a higher salary, being successful after interview, but she then approached Ms Brook and asked to return to the receptionist role and was permitted to do so.

8.5 From 2008 onwards, the respondent had employed only women in the role of Receptionist, both for long-term permanent jobshare partners including the claimant and temporary employees, except for the male comparator Roderick Dyson who occasionally covered the role at times throughout the period of Ms Brook's employment from 2008 onwards.

8.6 In October 2018 the claimant's job share partner left and the vacancy was advertised internally. No detail was provided of how the post was advertised, but it is likely the salary would not have been set out in an internal advertisement,

8.7 There was no detail of any other job vacancies at that time beyond the receptionist role available to Mr Dyson and others to apply for.

8.8 Mr Dyson applied for the job share receptionist role, at a time when he was at risk of redundancy from earlier in 2018 as a result of reorganisation involving his HCC role as Resource Administrator. He was then redeployed to suitable alternative employment on a trial basis in July 2018 in the Fleet Support Department but it was mutually agreed between him and management within a fortnight that it was not successful redeployment. He was then told he was still at risk of redundancy and given temporary roles while other opportunities were sought (62). His previous salary in his HCC role working full time (37.5 hours) was £24,510.

8.9 A female applicant also applied for the receptionist post when it was advertised internally; She had no experience of the receptionist role and obviously was not appointed.

8.10 No formal application form from Mr Dyson or less formal expression of interest or copy of any supporting CV were put in evidence. There were no notes of any interview by Ms Brook with Mr Dyson prior to the offer of employment as receptionist work provided.

8.11 Significantly, there were no notes of any discussion about pay with or about Mr Dyson or recommendation or proposal of what level of pay should be offered to him to take the offer of employment as receptionist provided.

8.12 There was no pay policy within the respondent at this time. Whilst the respondent worked broadly within benchmarking guidelines provided by Hays Recruitment, individual levels of pay were determined following a proposal by the department line manager which was then agreed by senior management and put within the departmental budget.

8.13 At some stage, Mr Dyson expressed concern about the reduction of hours and salary; there is no evidence that he refused to accept any offer of employment as receptionist at the same salary as the claimant.

8.14 His application for the receptionist role was not as a suitable alternative employment, albeit still a form of redeployment to seek to avoid being made redundant.

8.15 Mr Dyson and the then Managing Director, Mark Binns, were friendly and shared an interest in cricket. Mr Dyson met with Mr Binns individually at some length before accepting the receptionist role. In finding such a meeting took place, the Tribunal relied upon the evidence of the claimant who said Mr Dyson told her so, backed up by Mr Linney's evidence: "Knowing Mark Binns as I do, it is likely he did (end up in a room with Roddy Dyson)...that rings true". The Tribunal inferred that the discussion was amicable and covered the salary which could be offered to Mr Dyson to take the receptionist jobshare role and his agreement to accept the role offered was on the basis of those discussions.

8.16 Mr Dyson was a single man (in his fifties and had worked for the respondent for over 30 years). Whilst it would not have been his sole job in his working lifetime, it was by far his most significant and longstanding employment and he very much wished to remain with the respondent. Before Mr Dyson took up his appointment, he explained to the claimant that he had been in the private lengthy meeting with Mr Binns.

8.17 The salary offered to and accepted by Mr Dyson was £13,300 for the part-time jobshare. Whilst the Tribunal did not accept Ms Brook's evidence that she proposed the figure, there is no substantial evidence even from her as to how the figure was arrived at. No costing of the saving to the respondent in retaining Mr Dyson and not recruiting and paying a redundancy payment was made at the time.

8.18 There is no recorded authorisation such as by the then Head of HR Tanya Cressy or then Finance Director Greg McLeen or the MD Mr Binns himself, although the variation record relating to Mr Dyson's change of job has a specific place for recording such authority which is blank (63). Since the salary level of £13,300 was well above the benchmark range for the role, authorisation had to come from a senior level i.e. director level.

8.19 No consideration was given or recorded as given to the claimant's position as to salary or her feelings were she to learn of Mr Dyson's salary by any of the respondent's directors or managers. As was known within the respondent, the claimant is a married woman, who is not the main earner in her home alongside her husband who runs his own business.

8.20 There was no openness or transparency in relation to the salary granted to Mr Dyson and there was no recorded consideration by the respondent at the time of appointment to time limit the disparity between and the advantage to Mr Dyson.

8.21 No evidence was provided by the respondent of commercial or economic disruption which may be caused, for instance by raising the claimant's salary to the same as Mr Dyson was starting on.

8.22 There was thus no awareness demonstrated at the time of appointing Mr Dyson on pay of £13,300 that this may cause an issue or problem for the

claimant. However, given the lack of transparency, she had no way of knowing directly of the disparity.

8.23 Mr Dyson commenced the receptionist role on 1 November 2018 and the claimant trained him to carry out the full elements of the role. During her time as receptionist with the company, she has trained (or refresher trained) 15 others including more senior employees in filling or covering the role including Mr Dyson (119).

8.24 The original disparity in salary in 2018 (albeit for just two months after Mr Dyson became a receptionist) was £2,513 per annum between him and the claimant. The respondent then introduced a company pay increase for 2019, and the claimant received a 3% pay increase from £10,787 to £11,105 and Mr Dyson a 2% pay rise from £13,300 to £13,566, reducing the disparity to £2,461. In 2020, the equivalent pay increases were 3% (to £11,438) for the claimant and 2.5% (to £13,905) for Mr Dyson, slightly increasing the disparity to £2,467. The higher increases for the claimant were entirely deliberate on the part of the respondent's managers, in particular Louise Gallagher and Mr Linney, in recognition of the disparity and inconsistency between two employees filling the same role. In 2021, there were no company pay rises because of the pandemic and the disparity remained the same at £2,467. The managers followed the same approach for 2022 in giving the claimant a larger increase of 5.5% to £12,067 per annum and Mr Dyson a 3% increase to £14,321, leaving a disparity of £2,254 (although by this point the ET1 Claim had been presented).

8.25 On 27 April 2021, the claimant accidentally learned of Mr Dyson's salary when assisting him log into an HR management programme on his computer when his own salary as his pay and benefits page appeared when he logged on.

8.26 She was very shocked and upset, believing at first that there may be an innocent explanation for the considerable disparity between her pay and his. Her feelings were particularly enhanced given that she had trained Mr Dyson fully to be able to fulfil the role and she continued to be utilised as the main trainer of other receptionists covering the position.

8.27 The claimant knew that she had considerably more experience than Mr Dyson in the receptionist role in which she was highly regarded. She was aware had largely trained Mr Dyson in the full aspects of the role and knew that members of the respondent's business including managers often brought reception tasks to her rather than Mr Dyson.

8.28 Her sense of upset was aggravated when she felt the level of Mr Dyson's pay had been kept from her and that there was a closing of ranks by the respondent's senior personnel and a distancing from and coldness towards her as she persisted with her grievance.

8.29 She raised an informal grievance with her line manager, Louise Gallagher Organisation Support Coordinator who became her manager in March 2019 (and had appreciated at that stage that there was the pay disparity between the claimant and Mr Dyson). Initially she felt she had a sympathetic response from Ms Gallagher who told her to raise a formal grievance, but considered that Ms

Gallagher and other members of management cold-shouldered her when she pursued it vigorously.

8.30 Promptly the same day she had raised it informally with Ms Gallagher she presented her formal grievance dated 5 May 2021 (73). This was very brief and stated:

“Following our meeting this morning I wish to raise my grievance in writing.

My grievance is that by law, I am entitled to equal pay, and I'm not receiving equal pay.

Myself and my competitor are doing the same job, same hours, the only difference is that I am female and he is male.”

8.31 On 21 May 2021, she attended a formal grievance hearing with Ms Gallagher (90-93), having prepared a detailed opening statement, with points she wished to make and questions she wished to ask (79-84). Within the meeting, Ms Gallagher expressly referred to a “material factor” explaining Mr Dyson’s salary but, when the claimant pressed her as to what this was, did not tell her what the factor was (91).

8.32 On 2 June 2021, there was a follow-up to the grievance meeting when Ms Gallagher answered the claimant’s detailed questions (99-100). These answers were then built into the formal written response to the grievance provided on 8 June 2021 (101-104). To the question about any pay policy and salary guidance and who was responsible for implementation, she replied: “We do not have a pay policy, but I sent you a link to the Code of Conduct which is available to all on the Internet. Salary reviews are held across the company at different times. When a new role is required, whether new or replacement and at times of restructure or particular changes, HR are involved with supplying industry data and internal information to the line manager and decisions are made using the data supplied at the time. HR frequently review salaries against the benchmark salary role, industry and location”. As to who determined salaries, she replied: “As stated just now, HR are involved with supplying industry data and internal information to the line manager and decisions are made using the data supplied at the time.” To: “What would a male receptionist receive as a salary, she replied: “This would depend on their skills, experience, the location of the role, and in line with the salary band in place”. To: “What is Hoyer’s process for equal pay?”, she replied “I emailed you the Hoyer Code of Conduct linked to the Internet which outlines the company stance on discrimination. We review pay based on the role, the industry, the location and the individual depending on experience and skills.” When asked about the details of the comparator including salary, she replied: “I advised you in the meeting that I was unable to provide details of the comparator’s salary or any of their personal details due to data protection restrictions. Whilst we cannot provide “this” I did look at the salary and awarded higher increases to you as a result on an annual basis.” To whether Ms Gallagher agreed the job responsibilities were equal and identical to that of the comparator, she replied “I answered in the meeting that it is the same role with the same duties”. When asked how the pay increases closed the gap and what the time frame and plan forward was, she replied: “I can assure you that we will continue



to review your salary on an annual basis but I will confirm that the current higher increases for you will not close the gap. This is due to the review being against the benchmark for the role and not against other people in the role. The salary for your role is set within a band relating to industry and location benchmark and unless there are exceptional circumstances (as was the case for your comparator) all new and retained employees (regardless of sex or any other personal characteristics) are paid within that band. For your comparator some adjustments will be put in place and they will be advised of this. We are aware that such disparity even for material factor reasons may not be well received and as such, in accordance with the appropriate circumstances, we will continue to review over time.”

8.33 Thus on 2 and/or 8 June 2021, Ms Gallagher gave the first express statement of the material factor explaining Mr Dyson's pay (102). She wrote:

“The material factor for the difference in pay for your comparator related to the personal circumstances surrounding how and why Roddy entered the role. While some of the information may have been restricted from provision due to data protection, as you have already confirmed your knowledge of it, I will include it in my explanation. As you stated in the first meeting, before Roddy moved into the role, he was at risk of redundancy (from the role he had been occupying at the time) and had significant length of service with the company. He was in a different role, where the skills were transferable and also had years of reception experience within the Company. Retention of employees is important to the organisation particularly where those employees have significant experience, skills and understanding of the business' operations. We also, where possible, try to support our colleagues along difficult journeys. So the reasons for Roddy being on the higher salary was due to his length of service, his loyalty to the company, the desire to retain his experience/understanding of our operations and the goodwill he had built up with us. We also wanted to support him to retain a role within the organisation without major detriment to his personal circumstances.

8.34 Notably, Ms Gallagher's letter included, in response to the claimant's assertion that someone was hiding and keeping quiet the difference in salary:

“This is not the case, we would not discuss a colleague's personal details with their other colleagues both on grounds of respect for privacy and legal obligations. The decisions made at the time were not based on gender. They were not hidden.”

There is an obvious inconsistency between the first and third sentences and the Tribunal found the final assertion was incorrect; the decisions when Mr Dyson's salary was fixed would have remained hidden but for the claimant's accidental discovery of the salary.

8.35 On 15 June 2021, the claimant lodged a full formal grievance appeal (106-107), which led to a grievance appeal hearing before Mr Linney on 19 July 2021. In her further detailed points for the appeal hearing (117-118), she spelt out that

she was aware of the lengthy private meeting between Mr. Binns and Mr Dyson (118).

8.36 Mr Linney rejected her appeal. His grievance appeal outcome letter dated 20 July 2021 (125) maintained that following his investigation of the matter, he had reached the conclusion that although the claimant did the same job as the comparator and there is a difference in remuneration the difference was not as a result of gender. He stated:

“The comparator you have identified was previously employed for a considerable period of time in the more senior role which unfortunately became redundant. In order to retain his knowledge and loyalty it was decided to offer him redeployment to the role of receptionist. In making this decision it was decided by the former Managing Director to partially protect his previous salary rather than reducing it fully to the appropriate role for his new role.”

Mr Linney therefore referred to the decision of the former MD (Mr Binns), making no suggestion that the salary figure had been proposed by Ms Brook, then approved by Tanya Cressy and Mr McLeen.

He did not repeat Ms Gallagher’s statement of the material factor but concluded his letter:

“On this basis I have concluded that previous loyalty and cost control have been the primary reasons for the pay differential, rather than gender.

On this basis I decided to uphold the previous decision made by Louise Gallagher, Organisation Support Coordinator, to reject your grievance.”

8.37 Whilst his letter referred to Mr Dyson being offered redeployment to the role as a result of his former role being redundant, it made no mention of the earlier trial redeployment to the Fleet Department being unsuccessful. Although Mr Linney spoke of cost control, he made no costing of the savings achieved by the respondent in employing Mr Dyson at the enhanced salary until the day before this hearing. Mr Linney did not deal with the claimant’s assertion that she knew Mr Dyson had met with Mr Binns before accepting the appointment (although, in oral evidence, he accepted this may well have been so).

8.38 Despite references to the anti-discrimination principles in its Code of Conduct, no principle of equality of pay between employees of different sex was put in evidence beyond the statement in the Gender Pay Gap reports, referring to “equitable pay”:

“Hoyer believes in offering equal opportunities for both men and women to find worthwhile careers with the company. We are committed to equitable pay for employees in similar roles and we firmly believe that a diverse workforce means we are stronger as an organisation...” (C3)

8.39 The respondent lacked an over-arching company-wide pay policy. It used some benchmarks from national providers but retained no records as to benchmark brackets of pay for different positions. Thus, its approach to pay was

hugely personal to the employee as proposed by the line manager agreed by senior management and built into the budget.

8.40 The respondent's Gender Pay Gap statistics taken from its Corporate Governance documentation showed a consistent pattern of lower basic pay (excluding bonus figures) for female employees. Whilst no specific gender breakdown of the workforce was provided, the respondent had a large preponderance of male employees many of whom are on TUPE-protected terms of employment from former transferor companies. In each year the report showed an average gender pay gap with higher pay for men than women, as follows: 2017/2018 (5 April 2017) (C5) - 27.5% median gender pay gap;

2018/2019 (5 April 2018) (C8) - 28% median gender pay gap;

2019/2020 (5 April 2019) (C11) - 24% median gender pay gap;

2020/2021 (April 2020) (C3) - 25.4% median gender pay gap; and

2021/2022 (5 April 2021) - 27.9% median gender pay gap

8.41 The respondent also made special arrangements to protect the salary of 3 other employees, two women and one man in different circumstances and at different times. In May 2015, Carin Schrader, the very senior female Training Manager with 39 years' service who was facing redundancy was redeployed to Customer Service and SHEQ Coordinator, with full salary protection at her previous salary £40,365 instead of the benchmark salary for new role of £25-28,000 (61).

8.42 In October 2018, Bob Hewson, a male Resource Administrator with 24 years' service who was facing redundancy was redeployed to Payroll Administrator with full salary protection at his previous salary £23,541 (but no attendance bonus) instead of the benchmark salary for that role of £19-21,000. Although this redeployment coincided closely in timing with Mr Dyson's move and appears to be part of the same restructure, there is no documentary evidence relating to it.

8.43 In January 2020, Emma Moorhouse, the female Business Improvement Manager with 6 years' service was redeployed to Organisation Support Coordinator with full salary protection at £32,800 (71-72). She was however a maternity leave returner who had raised concerns at the disappearance of her role whilst she was absent on maternity leave in circumstances where she felt another employee had replaced her. Mr Binns visited her at home whilst she was on maternity leave before she returned to discuss arrangements for her role once she returned.

## **9. The parties' submissions**

9.1 The claimant confirmed that her focus was direct discrimination; in the event, she did not pursue the claim of indirect discrimination. Section 69 EA 2010 gives rise to a rebuttable presumption of discrimination entitling her to equal pay unless the respondent proves its material factor defence; the factor, which could be an accumulation of matters, must be both significant and relevant. The respondent's case here was broadly pay protection; it needed to prove each matter within its material factor defence was both significant and relevant yet the

comparator's financial circumstances could never be significant and relevant to the receptionist role. Unconscious bias operates all the time and the claimant did not have to show that the respondent's managers including two women had consciously discriminated against her. The claimant relied upon CalMac Ferries v Wallace 2014 ICR 453 (EAT) for the principle that the respondent must fully explain the pay difference; it was not sufficient to say the male comparator was paid what he was without considering the claimant's pay. The respondent had not been transparent but back-filled an explanation once challenged; but it had no records of pay discussions, no pay policy, no records of a request by Mr Dyson for more than the ordinary receptionist's salary or how the agreement on pay came about and no record of senior discussions about his salary. This was astonishing for an international company with 1300 UK employees when the salary for the man was outside the benchmark making him overpaid for the role, on Mr Linney's evidence. Overall, the respondent's evidence was pretty poor: limited documentation and Ms Brook in oral evidence showing a lack of recollection how Mr Dyson applied for the job, who raised his salary level, who else had applied and the whole sequence of events how the salary came about. She said she did not look at the actual role or how the claimant was paid and gave no more detail than of ad hoc conversations in the shared offices. It was submitted the decision was probably made personally between Mr Binns and Mr Dyson. What were the individual factors the respondent relied upon? Some could be dismissed immediately such as cost-saving, when Ms Brook accepted she did not look at the actual costs of recruitment and training and when recruitment costs would amount to only 15% of salary, with no evidence of saving. The respondent was worried for Mr Dyson and wanted to provide him with an income because of his loyalty and concern that he would not survive in the open labour market; this could not be a significant and relevant factor. Skill set, experience and length of service could be material, but he did not need them as receptionist and there was no evidence of expectations as to his flexibility. It may have been subconscious or unconscious bias why the respondent ignored the claimant particularly given her evidence that Mr Dyson was the only breadwinner in his family in the context of being aware all previous post-holders had been women, as was the unsuccessful applicant. The whole point of Equal Pay legislation is to stop two blokes sitting in a room and sorting out the salary for one of them. How could such a factor explain this fundamental difference in pay? There was no consideration how long the pay protection should last for when Mr Dyson's salary was fixed, yet the respondent plainly recognised the inconsistency by giving Mr Dyson lower pay rises than the claimant potentially reducing the disparity. Ms Gallagher and Mr Linney both questioned the disparity but still confirmed an ongoing disparity with each pay rise. There was little evidential value about the 3 other employees protected by the respondent as there was insufficient information for clear comparisons; even the case on loyalty was inconsistent as Emma Moorhouse only had 6 years. The Tribunal must concentrate on this male comparator and the claimant in the receptionist role. The respondent's decision-making was opaque with its ad hoc decision on Mr Dyson's pay leading to an outcome between him and the claimant very much in line with its general gender pay gap statistics. Since the respondent failed to prove its material factor defence, the claimant's equal pay claim succeeded.

9.2 Building on its skeleton submissions, the respondent acknowledged there was a rebuttable presumption of equal pay. It contended that all the circumstances relating to the difference of pay must be considered in determining

whether it proved its material factor defence, which may well go beyond what is described as “the personal equation” i.e the personal qualities, skill, experience, level of training, which an individual brings to the job relying on Rainey v Greater Glasgow Health Board (HL) 1987 ICR 129. So whereas material factors may often arise in cases where the employer relied upon market forces for a higher salary, all the circumstances must be considered. As to transparency the respondent accepted in hindsight that more documentation would have assisted, but there is no obligation to have a pay policy even if it would have been beneficial nor any requirement for a time limit to be put upon any disparity in pay. Fearnon v Smurfit Corrugated Cases (NICA) [2009] IRLR 209 suggested it should be reviewed, as happened here, and a different pay increase was made between Mr Dyson and the claimant showing the respondent addressing the pay disparity year on year. The claimant's criticism of its attempts to renew to narrow the gap was strange in the circumstances since the gap was narrowing. The elements of the material factor defence were set out at paragraph 22 of the grounds of resistance and the respondent had provided a genuine reason not tainted by sex for the pay difference whereas the claimant was unable to show anything to suggest it was because of sex. This was not an unscrupulous employer but one trying to do right by its staff which had tried to develop the claimant as well. It was concerned that Mr Dyson faced a drop in income of over 40% when he applied for the role; later it had taken steps to deal with the disparity with the claimant by giving him a lower pay rise. In these circumstances, the respondent had proved its material factor defence

## 10. The Law and the legal principles

10.1 The relevant statutory provisions governing equal pay are in the Equality Act 2010, in particular at section 127 and 129-30 in respect of jurisdiction and time limits, and 65, 67 and 69 in respect of equal work, sex equality clauses and the material factor defence. On equal work, section 65 sets out:

- (1) For the purposes of this Chapter, A's work is equal to that of B if it is—
  - (a) like B's work,
  - (b) rated as equivalent to B's work, or
  - (c) of equal value to B's work.
  
- (2) A's work is like B's work if—
  - (a) A's work and B's work are the same or broadly similar, and
  - (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.
  
- (3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—
  - (a) the frequency with which differences between their work occur in practice, and
  - (b) the nature and extent of the differences...

Section 66 provides for sex equality clauses:

- (1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.

- (2) A sex equality clause is a provision that has the following effect—
- (a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;
  - (b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term...

The material factor defence is at Section 69:

- (1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—
- (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
  - (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.
- (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.
- (3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim...
- (6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.

10.2 The provisions, closely based upon those in the Equal Pay Act 1970, have been considered extensively by the higher courts over the years. In Glasgow City Council v Marshall (HL) [2000] ICR 196, Lord Nicholls, giving the leading judgment stated:

“The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a 'material' factor, that is, a significant and relevant factor. Third, that the reason is not 'the difference of sex'. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is... a 'material' difference, that is, a significant and relevant difference, between the woman's case and the man's case.”

10.3 The earlier authority of Rainey v Greater Glasgow Health Board (HL) {1987} AC 224 had shown that to decide whether the factor relied on established a significant and relevant difference between the comparator's and the claimant's cases involved considering all the relevant circumstances and might go beyond the personal qualifications or merits of the individual by way of skill, experience and training. Accordingly, since it is admitted that the claimant did equal work (here, like work) and is of a different sex to the comparator who is paid more, the burden of proving that the difference in pay is because of a material factor untainted by sex discrimination lies with the respondent. It should be noted that discriminatory treatment does not need to and may often not involve conscious or deliberate less favourable treatment of the individual with a protected characteristic; unconscious or unintentional discrimination is still unlawful.

## **11. Conclusions**

11.1 The Tribunal concluded that it simply could not accept the respondent's case in full and instead drew the inference that the respondent had bolstered its case during 2021 in response to the claimant's grievance, even as late as after the grievance hearing held by Louise Gallagher on 21 May 2021 and by the adjourned hearing on 2 June 2021 and full written grievance outcome provided on 8 June 2021. This inference is amply supported by the complete lack of detail and contemporaneous documentation explaining the reasoning behind Mr Dyson's pay of £13,300 and by Ms Brook, still at the final hearing, being unable to recollect detail on many matters. At the grievance hearing on 21 May 2021, Ms Gallagher did refer to there being a material factor explaining Mr Dyson's pay but she was wholly unable or unprepared to spell out what that was. However, by 2 and 8 June 2021, she was setting it out expansively by reference to Mr Dyson's exceptional personal circumstances. She referred to how and why he entered into the receptionist role when at risk of redundancy, his significant length of service, transferable skills, years of reception experience and the respondent's desire to retain his experience, skills and understanding of the business, together with supporting colleagues during a difficult journey and retaining his loyalty and goodwill without major detriment to his personal circumstances. This was in substance the cumulative material factor relied by the respondent in the proceedings, although set out in much fuller terms than Mr Linney's letter when he later rejected the grievance appeal.

11.2 The evidence which related to 3 other employees in different positions and with different lengths of service whose salaries were protected did not assist the Tribunal greatly. The documentary and other evidence as to their redeployment was limited, especially in the case of Emma Moorhouse who was also a maternity leave returner, with no detail as to whether there were already others employed in the same or similar roles at different salary levels. The Tribunal accepted the claimant's submission that it is the comparison between Mr Dyson and herself and the respondent's reason for the enhanced salary for Mr Dyson which is in focus in determining the material factor defence.

11.3 It is evident that this respondent intentionally strongly favoured its male employee, Mr Dyson, in offering him the much higher salary for the same job as the claimant, knowing what the claimant's salary i.e. the going rate for the job

was. Authorities such as Marshall on the material factor defence have shown that to succeed the material factor must be “untainted” by sex. The Tribunal could not conclude that the respondent's reasoning was untainted by sex in circumstances where until Mr Dyson was appointed as a receptionist (albeit having sometimes covered the post in the past), all the longstanding and even temporary receptionists within the period of Ms Brook’s employment (that is, by 2018, for the past ten years) had been women. Thus, the role of receptionist was and was regarded traditionally as being a woman’s role. There is the most stark contrast between the intense personal consideration given to the situation of Mr Dyson, notwithstanding his outstanding length of service of some 30 years, by the Managing Director, Mark Binns, and the disregard for the position of the female receptionist, the claimant, and the fact of her being paid her significantly lower salary for doing the same job. The Tribunal comments that in its experience it is highly unusual for the MD of a major company such as this to involve themselves personally in the redeployment or alternative employment arrangements for a relatively junior employee, even though Mr Linney regarded this as typical of Mr Binns who also showed a highly personal approach when dealing with Emma Moorhouse’s return to work after maternity leave.

11.4 The Tribunal relied on the grievance appeal outcome letter (125) from Mr Linney in which he referred to “...the decision of Mark Binns”. Whilst acknowledging that this letter was written well after the initial decision to offer the enhanced salary to Mr Dyson (which he was not party to), Mr Linney made no reference whatsoever to an initial salary recommendation by Ms Brook or to getting approval from Ms Cressey and Mr McLeen (evidence as to the input of those two only materialising for the first time in Ms Brook’s oral evidence under questioning). Ultimately, the Tribunal inferred that late on in the grievance process and for these proceedings, the respondent had constructed and developed a case of trying to establish a recommendation upwards from the HR Manager, Ms Brook, supported by detailed reasons for the level of Mr Dyson’s salary which went far beyond what actually happened and was thought about at the time. Notwithstanding Ms Brook’s own personal sympathy for Mr Dyson’s position, this was a top-driven decision which was not founded on any scientific or solid basis beyond Mr Binns (and no doubt Ms Brook and the others) wanting to “do the right thing for Roddy Dyson” in circumstances where it was felt he would struggle to find a new job in the outside labour market and with the considerable drop in income he would face if he was paid the usual receptionist’s salary. Mr Binns therefore personally proposed a salary for a man with whom he had an affinity (their interest in cricket) which salary was accepted or not challenged by Greg McLeen, Finance Director, Tanya Cressy, Head of HR and Ms Brook herself. It was a decision by the male Managing Director in favour of the male who was facing redundancy, set in the context that receptionists in the company were usually women and where the unsuccessful applicant for the role was a woman (albeit with no experience).

11.5 Moreover, the Tribunal concluded that the respondent’s more elaborate explanation for its decision on pay, set out fully in Ms Gallagher’s letter of 8 June 2021 was still unsatisfactory and unsupported by firm evidence. Even acknowledging the saving of a substantial redundancy payment to Mr Dyson, no careful costing of the savings in retaining him was carried out at the time and no



significant consideration was given to where Mr Dyson may be able to fit in flexibly because of his detailed knowledge of the respondent's business. To the extent that the actual figure of salary agreed with Mr Dyson was explained in any way, it seems to have been because that was the least amount he felt able to support himself on. It was of course the case that the respondent had reorganised and concluded that his existing post was simply redundant – a post which the business had no need for. Clearly the Tribunal does acknowledge that, as part of its aim to “do right by Roddy Dyson”, the respondent was recognising his length of service and understanding of the business.

11.6 In summary, the Tribunal concluded that the respondent failed to prove that the reason for the pay disadvantage to the claimant was not tainted with sex i.e. was nothing to do with sex. Its material factor defence is therefore not proved and the claimant therefore succeeds in her like work equal pay claim.

12. Consideration of remedy is postponed to a date to be fixed. The parties are to notify the Tribunal by 28 days from the date this Reserved Judgment and Reasons is sent to them whether they wish the Remedy Hearing to be listed, giving dates of availability.

Employment Judge Parkin

Date: 13 May 2022