Case Number: 2403947/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**SOUTHAMPTON**
BEFORE:	**EMPLOYMENT JUDGE EMERTON**
MEMBERS	**MS A SINCLAIR, Mr N A KNIGHT**
BETWEEN:	**Ms V Barnard**
	Claimant
	AND
	Hampshire and Isle of Wight Fire and Rescue Authority (Operating as Hampshire and Isle of Wight Fire and Rescue Service)
	Respondent
ON:	**30 November – 11 December 2020**

APPEARANCES:
For the claimant: **Mr D Matovu (Counsel)**
For the respondent: **Mr T Dracass (Counsel)**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The equal pay claim is not well founded.

2. The claim of unfair dismissal claim is not well founded.

REASONS

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Summary of the case

1. This is a case involving different terms and conditions between two groups of the respondent's employees, together with the claimant's attempts to resolve her concerns through internal processes.

2. At the heart of the claim is the issue that staff trained as operational firefighters (to use what is perhaps an over-simplified description) are on nationally agreed terms and conditions of service, known as the "grey book". Staff who are not trained firefighters are on different nationally agreed "green book" terms and conditions. If promoted to the Assistant Chief Officer level, any staff (whatever their background) would move onto different "gold book" terms and conditions, which are not the subject of this claim.

3. Green book terms and conditions are essentially local government terms and conditions of service.

4. Grey book employees have more generous arrangements for pensions, wages and annual leave. As for working hours, grey book staff, regardless of the particular role they are fulfilling, are contractually entitled (under the national agreement) to be paid for 42 hours a week, inclusive of main meal breaks.

5. Green book staff are generally paid for 37 hours a week, and are not entitled to be paid for lunch breaks.

6. In essence, the other side of the bargain is that the respondent's grey book staff were required (at the relevant time, before the Isle of Wight service was merged) was to be available to be re-deployed to a new job anywhere within Hampshire, and to work outside Hampshire if required to do so. They may be required to carry out operational duties at any stage, which may of course require them to risk their lives in reacting to difficult and dangerous incidents. They are required to remain trained and operationally prepared, and to be physically fit, so as to be ready to deal with any operational task which may be assigned to them. They may be required to go on an on-call rota.

7. No such obligations apply to the employees under a green book contract.

8. The claimant was at all material times, until her resignation, a green book employee.

9. The claimant made it clear that she did not wish to cross-train as a firefighter, which would have required her to accept all the additional liabilities which a new contract of employment would entail. She nevertheless wished to be paid as if she had done so.

10. In the equal pay claim, the tribunal was satisfied that the claimant had identified suitable, male, grey book comparators relating to the three (main) relevant roles she carried out between late 2011 and mid-2017. Notwithstanding some slight differences in duties, and the possibility of being called away to operational duties, the tribunal was satisfied that not only was it clear that the jobs were broadly similar, but they fell within the definition of "like work". The success or failure of the claim, however, hinged on the material factor defence.

11. The tribunal considered that there was no force in the argument that the differences in financial terms and conditions amounted to direct sex discrimination. In respect of indirect discrimination, the statistics on balance supported a finding of disparate impact – in other words, women were placed at a particular disadvantage, in the sense that very few were on grey book terms. There were, however, legitimate aims for paying trained operational firefighters at a more generous grey book rate, as nationally agreed with the recognised trade union, and the tribunal found that the different financial package was a proportionate means of achieving those aims. The tribunal found that material factors relied on by the employer were the cause of the difference in pay. The relevant factors were non-discriminatory, were genuine and were material, in the sense of being significant and relevant.

12. In a nutshell, the tribunal found that it was necessary and in the wider interests of society that grey book staff, who carry out (or may carry out) an important but sometimes onerous and dangerous role, and may be deployed to do so at short notice, and be moved away from their home area to do so, be given a nationally-agreed remuneration package which reflected these responsibilities. Green book staff would never be required to do many of these things. The tribunal recognised that the issues were not always clear-cut, and that the differences between green and grey book conditions of service could result in apparent unfairness in individual cases. Notwithstanding that it may well be time for nationally agreed terms and conditions to be reviewed, the non-discriminatory material factors had not evaporated, and the differences in pay did not breach equal pay legislation.

13. In relation to constructive dismissal, there was no fundamental breach of contract relating to equal pay. Although, perhaps inevitably, some minor criticism can be made of the arrangements for dealing with the claimant's concerns and complex grievance relating to equal pay, any procedural flaws or delays fell, cumulatively, well below breach of the implied term of mutual trust and confidence. At the time that the claimant resigned (which was before her grievance appeal was heard), the respondent was not in fundamental breach of contract. The claimant failed to show that she was constructively dismissed, and in consequence the claim of unfair dismissal cannot succeed.

14. Promulgation of this judgment has been delayed by ill-health. The tribunal's conclusions were, however, reached unanimously in December 2020, and the judge made a contemporaneous note of the panel's findings. Those conclusions are reflected in these very detailed written reasons, which took a long time to finalise.

Background to the hearing

15. The claimant presented an ET1 claim form on 15 August 2017, having completed two sets of ACAS early conciliation. The first notification was received by ACAS on 13 February 2017 and the certificate was issued 13 March 2017. The dates for the second certificate were 10 April 2017 and 10 May 2017.

16. The grounds of claim set out in detail the basis of the claims for unfair constructive dismissal, and for equal pay. The claimant referred to being paid consistently less than her grey book counterparts over an extended period of time; the constructive dismissal referred to her resignation after the respondent failed to deal properly with her grievance.

17. The respondent resisted the claims, denying that the claimant was undertaking equal work. It was also denied that the respondent was in fundamental breach of contract such as to entitle the claimant to resign and claim constructive dismissal.

18. It may be helpful to summarise, if only in summary, developments during the period of over three years between the presentation of the claim and the final hearing.

19. Throughout the period, the claimant was represented by Mr Matovu, Counsel, albeit instructed on a direct access basis, solely for representation at hearings.

20. The first preliminary hearing for case management was conducted on 10 November 2017 by Employment Judge Pirani. He listed a four-day preliminary hearing for May 2018, in order to determine preliminary issues relating to whether the claimant and her male comparators were employed in work of the same or broadly similar nature, whether any differences between her work and that done by her comparators were of practical importance, whether the claimant and her comparators were employed at the same establishment, and if not were common terms and conditions applied to the establishments in which the claimant and her comparators were employed. The Order summarised the facts and the law relating to the case. Various case management orders were made to prepare for the preliminary hearing and for the parties to clarify their respective cases.

21. At a subsequent preliminary hearing for case management on 5 March 2018, Employment Judge Pirani varied the orders and replaced the four-day preliminary hearing with a two-day preliminary hearing, to determine

solely whether the equal pay complaints relating to the "Business Support Officer" role from 3 January 2012 to 14 October 2012, and the "Inspecting Officer" role from 15 October 2012 to 15 June 2014, had been brought in time. Further orders were issued. Arrangements were also put in place for a further five-day preliminary hearing.

22. The two-day preliminary hearing went ahead as listed on 8 – 9 May 2018 before Employment Judge Kolanko. Counsel for both parties were the same Counsel who represented the parties at the final hearing.

23. The tribunal ruled that the claimant's stable working relationship ended when the claimant transferred from being a Business Support Officer to Fire Safety Officer, and when the claimant transferred from being a Fire Safety Officer to Office Manager; accordingly, the complaints in respect of the equality of terms relating to the above roles were brought out of time and were therefore dismissed.

24. The claim relating to the move from Officer Manager to Community Safety Delivery Manager did involve a continuing stable working relationship and the equal pay claim relating to those roles were brought in time.

25. The claimant appealed against this decision. The appeal was successful and the matter was remitted for rehearing to a differently constituted Employment Tribunal.

26. A two-day preliminary hearing was listed for 19 - 20 November 2018 before Employment Judge Hargrove, setting with non-legal members Mr Bompas and Mrs Earwaker. Counsel representing the parties remained the same.

27. Having dealt with the matter remitted by the EAT, the Judgment of the Tribunal that there was no end in the stable relationship on the claimant's removal from BSO to FSO, but there was an ending of the stable working relationship when the claimant took up the post as Office Manager on 16 June 2014. The Tribunal also made Case Management Orders in relation to a further hearing. The claimant also appealed against this Judgment.

28. The EAT hearing was listed for 30 October 2019 before Eady J sitting with Members, and Judgment was handed down on 19 December 2019.

29. The EAT allowed the appeal, setting aside the tribunal's decision and substituting a finding that there was no end in the stable working relationship on the claimant's move to the position of Officer Manager in June 2014. This had the effect of permitting the claimant to bring equal pay claims relating to the period of time from, broadly speaking, January 2012 until employment terminated in June 2017, after the claimant resigned.

30. Following the EAT decision, the case was listed for a preliminary hearing for case management on 7 February 2020, before Regional Employment Judge Pirani. Counsel remained the same.

31. Judge Pirani listed a 10-day final hearing, to commence 30 November 2020, again summarised the background and issues, together with some of the relevant law, and made comprehensive case management orders. Disclosure was to be completed by 6 May 2020, the bundle agreed by 15 June 2020 and witness statements exchanged 5 October 2020.

32. There was considerable correspondence and disagreement between the parties as to disclosure of documents and information.

33. In order to get matters back on track, an additional preliminary hearing was listed for 10 September 2020 before Employment Judge Emerton. The parties were encouraged, by reference to rule 3, to seek to settle the case. The Judge expressed some concern that the failure to consider Judicial Mediation, and the apparent absence of any serious attempts to settle the case, appeared to result in part from the claimant refusing to countenance accepting a sum lower than that set out in her Schedule of Loss, which appeared to include claims for compensation somewhat in excess of what might reasonably be expected, even if the equal pay and unfair dismissal claims succeeded. Issues relating to disclosure were raised, and rulings were made. The tribunal gave permission for the claimant to increase the size of her witness statements, and for the bundle size to be increased. Further case management orders were issued including for the parties to agree a list of issues, which should have been agreed previously.

34. A final "catch up" preliminary hearing for a case management was listed before Employment Judge Christensen on 22 October 2020. She confirmed that the parties were ready for the hearing, or at least on track, subject to compliance with final orders. It was subsequently confirmed with the parties that the hearing would be in person, albeit with limitations as to the number of people able to be physically present in the hearing room, due to restrictions as a result of the pandemic. It proved to be possible to make arrangements for observers from each party, and witnesses waiting to give evidence, to watch the hearing over a video link.

The hearing

35. In advance of the hearing, the parties provided witness statements for each witness, a main bundle of something over 1000 pages, and a supplementary bundle containing the full "grey book" (terms and conditions for operational firefighters) and the grey book "role maps". The parties also provided a chronology, cast list, a reading list referring to key documents, a list of issues, a proposed hearing timetable and opening submissions. This enabled an efficient start to proceedings, and greatly

assisted the tribunal in being able to understand the issues in the case, and commence their reading in a meaningful way.

36. At the start of the hearing, on the first Monday morning, the tribunal confirmed that it had the correct documentation, and both parties confirmed that the list of issues had been agreed by counsel and correctly set out the agreed matters to be determined (see below). The timetable was agreed and it was confirmed that the tribunal would deal only with at this hearing, and not with remedy, save for those matters where the parties would need to call relevant evidence to establish any disparity in pay. If it was necessary to deal with remedy, then a subsequent remedy hearing could be listed, although the parties might be able to agree compensation.

37. The parties were able to keep, broadly, to the timetable. In fact the hearing was initially able to get ahead of the timetable, but because some of the evidence took longer than expected, closing submissions took place as originally timetabled. Although it had been intended to call the parties back at some point on the final (10th) day to hear oral judgment and reasons in respect of liability, in the event the parties were notified after lunch on the ninth day that the tribunal had reserved its judgment, which would be sent to the parties with full written reasons, and that they need not attend on the 10th day.

38. Although the hearing had been allocated to the largest hearing room in Southampton, there was (as indicated above) insufficient space for all witnesses and potential observers to fit in the room. The parties had requested in advance that arrangements be made to enable others to watch the hearing remotely, and the tribunal was able to set up a camera and microphone so that others could watch the hearing (or at any rate see the and hear the witnesses and the questions asked of them) via the CVP video system. The clerks were able to set that up in time for the first witness on the second day, and the tribunal satisfied itself that both parties were content with the arrangement and that it was, for the most part, working satisfactorily.

39. Other than the tribunal querying some of the matters in the list of issues, including matters relating to remedy, the management of the case and the preparation by the parties proved to be effective, such that after than an hour on the first day, the parties were released and the tribunal was able to commence its reading.

40. The claimant's oral evidence commenced on the morning of the second day, and continued until the lunch break on the third day. The claimant then called as a witness Mr Alan Murray (former grey book colleague and

line manager), followed by Mr Gary Jackson (former grey book colleague and Fire Brigades Union Branch Secretary). That completed the claimant's case.

41. The respondent's case commenced on the morning of the fourth day, with oral evidence from Mr Gavin Ison (male grey book comparator in the BSO role). This was followed by oral evidence from Mr Justin Turner (male grey book comparator in the subsequent roles). After the lunch break the respondent called Mr Paul Parry (grey book station manager, who had previously been named as a comparator; although no longer a comparator, he was able to give relevant evidence). The respondent then called Mr Tom Simms (former grey book area manager, who had heard the claimant's equal pay grievance). His evidence concluded on the morning of the fifth day. Before the lunch break on the fifth day, the respondent called Mrs Shantha Dickinson (who had joined as a green book employee after service in the army, and is now Assistant Chief Officer - Director of Performance and Assurance, on a gold book contract; she heard the claimant's grievance appeal after the claimant had submitted her resignation). Her evidence completed mid-afternoon. The respondent then called Ms Molly Rowland (Head of HR and Workforce Development, formerly HR Business Partner, who had involvement in the claimant's grievance).

42. On the morning of the sixth day (Monday of week two), the respondent called its final witness, Mr Stewart Adamson (Assistant Chief Officer – Director of Operations; formerly an operational grey book employee, and now gold book). Mr Adamson had attended the entire hearing, sitting at the back of the hearing room, and it had been established at an early stage that his role included giving case instructions on behalf of the respondent. The tribunal had previously given notice that it expected Mr Adamson to be ready to answer general questions about the policies and operation of the Fire and Rescue Service, where evidential gaps had not been sufficiently filled by previous witnesses. The tribunal had also notified the parties that evidence having been called in respect of two pieces of 2004 legislation, that it wished to be provided with an explanation for the statutory and policy basis of operations. Mr Adamson was able to give further oral evidence to answer the tribunal's questions, and to give an overview of the organisation, and Mr Dracass was given permission to ask extra questions in chief, to deal with various issues which had arisen in the course of the evidence so far. Following this evidence, the tribunal took a longer than usual morning break, after which Mr Matovu confirmed that he was ready to commence cross examination. Mr Adamson's evidence continued until early afternoon, after which the tribunal adjourned to allow both parties to complete their written submissions.

43. The parties exchanged written submissions on the morning of the seventh day, and the tribunal was able to read both sets of submissions before calling the parties back in for oral submissions. A summary of the closing submissions appears below.

44. Oral submissions completed at 1323 on the seventh day, after which the tribunal adjourned to deliberate on liability. In the event the tribunal reserved its judgment, and the parties were notified that they need not return on the 10th day to hear oral judgment. The tribunal had at an earlier stage made enquiries as to the likelihood or otherwise of written reasons being requested by either party. It appeared clear to the tribunal that whatever the outcome of the case, it was very likely that there would in any event have been a request for written reasons.

45. In the event, the tribunal completed its deliberations and made its decision (in chambers) on the afternoon of the 10th day of the listed hearing, and noted the tribunal's findings of fact and conclusions. These written reasons were subsequently prepared and approved. It has, unfortunately, taken longer than expected to finalise the written reasons, in consequence of ill-health of a member of the tribunal.

The Issues

46. The claimant brings claims of **equal pay (like work)** and **unfair constructive dismissal**. The liability issues, as agreed by the parties, were set out in a list of issues which is attached (with no changes) as an Annex to this judgment.

47. At the start of the hearing, the parties confirmed that they both accepted that the list of issues set out the issues to be determined by the tribunal. The judge queried the clarity of some of the issues, including the claimant's case as to constructive dismissal (in respect of breach of the implied term of mutual trust and confidence), but the parties confirmed that they had nothing to add or change.

48. Later, during cross-examination of the claimant, Mr Dracass indicated that he would not be cross-examining the claimant as to events post-dating her resignation, in the context of the constructive dismissal claim, because they had no bearing on the claimant's decision to resign. Mr Matovu intervened, and appeared at that point to be putting forward the argument that events between resignation and the effective date of termination were relevant to whether or not the constructive dismissal claim succeeded. The judge expressed doubt that these were matters capable of being directly relevant, albeit evidence as to subsequent events could sometimes shed light both on matters pre-dating the resignation, and on

the claimant's reason for resignation. The tribunal declined to interfere with these areas of cross-examination, as long as the time was used effectively by both counsel. The relevance of the evidence (or lack of it) could be a matter for submissions.

49. It was agreed that the tribunal would deal initially with liability only. If it was possible to deliver oral judgment on liability, the tribunal could then address matters relating to remedy.

50. It was agreed that the parties would be ready to deal with remedy on the final day, although it appeared to be unlikely that there would be sufficient time to address all matters. But if the claims succeeded in part or whole then it might in any event be necessary to list a separate remedy hearing. In consequence, the tribunal discussed remedy at this point (on day one), only to the extent that it was necessary to establish how long it might take to resolve, and how much evidence might be needed.

51. The amount of any compensation which might be payable would be in dispute. Mr Dracass also expressed concern that the claimant appeared to have an unrealistic expectation of how much compensation she might receive, if her claim succeeded. She appeared to be seeking a compensatory award for constructive dismissal in excess of the statutory cap, and very large sums for injury to feelings (plus interest) as a remedy for the equal pay claim, when injury to feelings was not available as a remedy. The judge suggested to Mr Matovu that the tribunal's understanding of the law was that compensation for injury to feelings was not available, and invited Mr Matovu to consider withdrawing this part of the remedy claim. Mr Matovu chose not to do so.

The parties' submissions as to liability

52. Both parties provided very detailed submissions, and the tribunal made a full note of oral submissions and retained copies of written submissions. What appears below is, although detailed, intended to be an overview of the salient points rather than a comprehensive summary of every argument put forward.

The respondent's submissions

53. Mr Dracass, for the respondent, provided a written opening note of 13 pages, and further written closing submissions of 21 pages.

54. The respondent's opening submissions were clearly designed to provide a broad overview of the case being advanced on the respondent's behalf. They confirmed that the issues were those set out in the parties' agreed list of issues.

55. In respect of equal pay, the respondent pointed out that the claim related to three different roles, spanning a five-and-a-half year period, namely (1)

the Compliance Officer/Business Support Officer ("BSO"), (2) the Fire Safety Officer ("FSO"), and then finally (3) Office Manager/Community Safety Delivery Manager ("OM/CSDM") in which latter job the claimant was at the time of her resignation. Mr Dracass stressed that employees of the respondent were broadly on two sets of nationally agreed terms and conditions, namely the "grey book" for operational uniformed firefighting employees from the levels of firefighter to area manager, and "green book" to local authority employees working in the Fire and Rescue Services in non-operational roles. Reference was made to the comparators; while the point was not formally conceded, the respondent accepted the claimant was likely to be able to establish that these were appropriate comparators. As set out in the list of issues, the respondent did not accept that the claimant was in "like work" in respect of all three of the roles in question, and the differences in the roles between the claimant (on green book) and her comparators (on grey book) was set out in some detail.

56. The respondent invited the Tribunal to conclude that the differences in the roles were such that it should find that they were not employed to do like work. It was however, accepted that the terms of the claimant's contract in relation to pay and annual leave were less favourable than those of the grey book comparators, whilst the respondent suggested the differences were not as great as they might seem. In the event that the Tribunal found that the claimant was engaged on like work with those comparators, the respondent would rely on the material factor defence, for which the specific matters relied upon are set out in the list of issues. In essence, however, they were the differences between two nationally agreed terms and conditions, which the respondent maintained were not tainted by sex discrimination. One of the key arguments set out in these written submissions is set out at paragraph 5 namely that "*this distinction between green book and grey book staff is the issue that lies at the very heart of the case*".

57. In respect of the unfair constructive dismissal, the respondent's initial argument is that there was no breach of the Equality Clause (ie the equal pay claim should not succeed) and that therefore the claimant could not rely upon this factor as a fundamental breach of contract. In respect of the breach of implied term of trust and confidence, the respondent's case is that the matters relied upon do not amount either individually or cumulatively to breach of the implied term (taking into account the guidance in *Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833*). Noting that part of the constructive dismissal case is based upon the respondent's handling of the claimant's grievance, it is argued that the grievance was appropriately handled and that any delays fell well below a fundamental breach of contract; at the time that the claimant resigned, the respondent was not in fundamental breach.

58. Further submissions were made in respect of remedy, which the Tribunal did not need to consider. Nevertheless, the Tribunal would note that it

agrees with the respondent's analysis that the claimant's Schedule of Loss appears to have been unrealistic. Her claim includes the argument that she should receive £45,000 in respect of injury to feelings with associated interest (over £77,000 in total), whereas the Tribunal was of the preliminary view that there would be no legal basis for such compensation. Similarly, Mr Dracass pointed out that the claimant appeared to be claiming as the compensatory award for unfair dismissal, a sum in excess of the statutory cap, which would also not be recoverable under sections 123 and 124 of the Employment Rights Act 1996.

59. Mr Dracass' written closing submissions to some extent cover the same ground, but set out the respondent's case in greater detail in the light of the evidence called. The issues for determination remained the same, and Mr Dracass elaborated the respondent's arguments as to why the roles should not be seen as "like work", even if the job descriptions were the same or very similar. He highlighted differences in the work done, suggesting these were of practical importance: such as the requirement to provide operational cover or be redeployed operationally in accordance with demands of the service, the requirement for operational training, physical fitness and maintenance of competencies, AFA responding (ie the rota that Mr Ison and Mr Turner were on for part of the period, responding to fire alarms which had not resulted in the immediate calling out of a fire crew), the difference between the green book and grey book of the 37/42-hour working hours covering paid lunch breaks. He went on to make comment on specific differences in the three roles identified, inviting the Tribunal to conclude that there was sufficient difference that the equal pay claim should fall at the first hurdle. In the alternative, the claimant would in any event rely on the material factor defence relying on much of the same evidence with different labels. The tribunal was referred to:

> *Glasgow City Council v Marshall [2000] IRLR 272*;
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> *Newcastle Upon Tyne NHS Hospitals Trust v Armstrong [2010] ICR 674*;
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> *Waddington v Leicester Council for Voluntary Services [1977] IRLR 32;* and
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> *Shields v E. Coombs (Holdings) Limited [1978] ICR 1159.*

60. Mr Dracass explained that the respondent's case was that any differences in terms and conditions were based on the important and justifiable differences in the overall roles and terms and conditions, as set out in the grey book for firefighting staff and green book for non-operational staff. He argued that this material factor defence was not tainted by reason of indirect discrimination (the respondent maintaining that there was no sustainable argument of direct discrimination). The statistics were ambiguous, but even if they supported an argument of disparate impact,

the respondent would rely on the legitimate aims of the respondent being able to provide an effective and efficient service in respect of its various functions and to ensure the safety of the public, their property and the environment, and/or to reward those employees who are competent, available for operational duties and deployment.

61. In respect of the constructive dismissal claim, similar comments were made on alleged breach of the equality clause. On the wider issue of breach of the implied term of mutual trust and confidence, the respondent maintained its arguments that none of this amounted to fundamental breach. Reference was made to the Judgment in *Aldi Stores v Blackburn [2013] IRLR 846* in respect of failure to adhere to a grievance procedure not necessarily amounting to fundamental breach. The respondent would minimise the significance of the delays in dealing with the original grievance and the grievance appeal; the delay on appeal was particularly minor at the time of resignation. It was also argued that the claimant's evidence in fact indicated that she herself did not believe that trust and confidence had broken down to the extent that she genuinely felt that she needed to resign. The claimant indicated that she might withdraw her appeal if she was paid the money she was seeking, and her decision to resign appeared to have been caused by her misunderstanding of the ACAS early conciliation procedures.

62. In his oral submissions of just under 45 minutes, Mr Dracass confirmed that the respondent conceded that the work carried out by the comparators was broadly similar, but that in highlighting differences, the respondent relied upon the requirement of operational staff to be available for other duties and that this was more than a "theoretical" requirement. He relied upon his written submissions and highlighted certain specific points. He argued that reference had been made throughout the hearing to the question of "fairness", but that whatever the view of the tribunal, this was different from the question of equal pay.

63. Similarly, there were various instances where the claimant was arguing that she was professionally competent to carry out other duties and should have been allowed to, even if in fact she was never required to do so. Mr Dracass stressed the differences in the contracts of employment for the claimant as a green book employee, and the comparators as grey book employees, as including the very different flexibility/mobility clauses. Grey book employees had no right to remain indefinitely in any role, or in any place, with no limit on the power to redeploy them. This was different from the much more limited ability of the employer to move green book staff. He made various comments on the claimant's written closing submissions, arguing that emphasising the job description did not tell the whole story as to the underlying differences, and that it was wrong to argue that all differences in responsibilities in the contracts were catered for by special extra allowances such as CPD payments, arguing that the evidence did not support the claimant's arguments. The fact that some grey book employees may have fallen behind on operational or fitness training, did

not undermine the underlying argument that they were required to remain operational and available for deployment.

64. Mr Dracass argued that it was a red herring to argue that because a decision had been made to align some of the terms and conditions at the Head of Service ("HOST") level, that this somehow indicated that there should be no difference between contracts at the claimant's (lower) level. The respondent suggested that this is not a sustainable argument. Whilst it helps to explain why the claimant felt she was treated unfairly, this was a different matter from establishing an equal pay claim. Mr Sims had *not* said in evidence that he would uphold the grievance, had it been submitted by a man, and in fact his oral evidence did not support the claimant's case. There was no basis for a claim of direct discrimination and the respondent would argue that the differences in pay did not have discriminatory effect as indirect discrimination.

65. In a brief reply to Mr Matovu's oral arguments, Mr Dracass repeated what he had said already, and disputed the significance of the decision to align some terms and conditions at the HOST level, which did not answer the question that the Tribunal would need to resolve in dealing with the material factor defence.

The claimant's submissions

66. Mr Matovu, for the claimant, presented written opening submissions of seven pages and closing submissions of 12 pages, and also made oral closing submissions.

67. Mr Matovu's opening note summarised the two statutory claims. In respect of the equal pay claim he summarised the three roles that the claimant carried out between late 2011 and her termination of employment in 2017. The comparators were appropriate, and were employed on like work, in light of the test in *Brunnhofer v Bank De Osterreichischen Postsparkasse [2001] IRLR 571*. In relation to each of the three roles, there was in fact no real difference. Any additional training carried out was minimal and to the extent that grey book employees were required to remain operational, this was separately rewarded by receipt of a CPD payment. Relying on the statutory test and the EHRC Code of Practice (2011), the focus should not be on what the comparators *might* be required to do, but what they *actually* did, and what they did was almost identical.

68. In respect of the material factor defence, Mr Matovu referred to *Glasgow City Council v Marshall [2000] ICR 196*, and argued that it was highly relevant that the respondent had decided in respect of the Heads of Service Team (HOST), whether previously on grey or green book terms, that they should have their terms and conditions aligned, a decision made in January 2015. This showed that nationally agreed terms and conditions were not a stumbling block to equal pay. In accordance with their public sector equality duty under Section 149 of the Act, the respondent should

have had regard to need the need to eliminate pay disparity between the claimant and her comparators and had the power to do so, yet deliberately chose not to. He argued that differences in terms and conditions was effectively a proxy for discrimination, or had a disproportionate adverse effect on women, and could not be justified. In respect of constructive unfair dismissal, very brief opening submissions argued that if the equal pay claim was well founded, constructive dismissal should succeed. But that in any event the claimant had established breach of the implied term of mutual trust and confidence, which clearly caused the resignation, and there is no question that the contract had been affirmed or the breach waived.

69. In his 12-page written closing submissions, Mr Matovu provided a general overview and suggested that in reality the contested issues in the case were fairly narrow, because effectively the appropriateness of the comparators had been conceded and the same core issues related to like work, and the material factor defence. This was the differences in the roles between grey book operational employees and green book non-operational employees. In respect of like work, for each role the job description was almost identical. He went through the alleged differences in the roles and argued that the reality was that there was no difference of practical importance, as confirmed by the respondent's witnesses, when one took into account the guidance in the Code of Practice on Equal Pay. He referred again to the case of ***Brunnhofer***, focussing on the work done by the claimant and her comparators in the roles they were actually performing at the material time.

70. In relation to the material factor defence, taking to account paragraphs 75 and 76 of the Code, and *Glasgow City Council v Marshall*, it was argued that the defence should fail. The decision on staff at the HOST level was highly relevant, addressing the same issue but aligning salary, length of the working week, and leave allocation. There was no reason why the same equalisation could not have been imposed at lower levels. The respondent could have complied with its public sector equality duty by so doing. The respondent could not show that the defence should succeed. It was contended that the defence offered was not the real reason for the difference in pay, was not causative of the difference in pay, was not material, and did involve some form of sex discrimination. Each of these four arguments were developed in greater detail.

71. The fact that the issues had been resolved at the HOST level between grey book and green book shows that the matter could be addressed. The real reason for maintaining the difference was fear of the wider cost implications of the equalising pay. This was reflected in in the evidence as to how the grievance was handled. Although the HOST decision had equalised pay, when the claimant's grievance was dealt with the matter remained unresolved, and was still subject to the difference in hours of 37 per week as against 42 per week. This was not material, as the claimant in fact worked the same hours as her male comparators; alternatively,

taking a wider pool, the claimant was the sole green book employee while her comparator and three other crew managers on grey book terms were all male. That was in relation to the BSO position. Similar arguments applied to the FSO and CSDM positions.

72. Insofar as the facts relied on were indirectly discriminatory, the respondent would need to justify the disadvantage by showing that it was a proportionate means of achieving a legitimate aim. The claimant's case was that the first aim (in relation to an effective and efficient service) could be achieved by selecting the best candidate for each post and it is not clear what relevance a second aim (to reward employees for being on call and/or competent and available for operational duties and deployment) would have on those specifically employed to perform what were fundamentally non-operational office-based roles. Equalisation of pay was perfectly achievable at HOST level. The maintenance of a disparity of pay based on nationally agreed grey book and green book terms and conditions was not a proportionate means for achieving the respondent's aims.

73. In respect of constructive unfair dismissal, Mr Matovu argued again that if the equal pay claim was well founded, it should inevitably follow that the respondent acted in repudiatory breach of contract. It was also clear from the claimant's resignation email that the claimant was resigning because she was being treated unfairly due to the disparity of pay and conditions afforded to other CSDMs, and the protracted nature of the grievance, in failing to follow procedures. These were plainly the correct reasons for resignation and the managers dealing with the grievance and grievance appeal agreed with the claimant that she had been treated unfairly, the procedure was unduly and inexcusably protracted, and there was a failure to follow procedures. This amounted to breach of mutual trust and confidence and the claimant had plainly not waived the breach.

74. Mr Matovu made oral closing submissions of just over an hour, wide-ranging in their scope and to a large extent summarising or developing arguments set out in the written closing submissions. He covered a large number of individual issues, including the following: He started off by pointing out that the statutory duties on the respondent included fire safety as well as firefighting, and the claimant's role was very much dealing with the former. The core of the case was that the job description for the claimant, and her priorities, was for practical purposes the same, and the day-to-day duties of green book and grey book employees carrying out these roles were also for all practical purposes the same. There was a strong argument for "like work".

75. In respect of the material factor defence, the respondent, as set out in written submissions, had failed on the four factors relating to whether it was a general reason, causative, whether it was material and whether it was tainted by sex discrimination. It was the same issue as had been addressed in the HOST decision, where terms and conditions had been

aligned. The respondent had failed to acknowledge the significance of this point. The evidence showed that the day after the HOST decision, all job evaluations were frozen. This was a cynical move to block anyone else from achieving the same. The respondent knew of this issue, knew how to get around it, and then had to deal with the claimant's grievance on this very point. The claimant had acted promptly and properly in accordance with the procedures; the respondent did not. Although the respondent accepted there was unfairness, they already had the solution to that unfairness, which was to align pay and conditions as they had done at the HOST level.

76. Mr Matovu went on to deal with constructive dismissal, reiterating the argument that it should succeed if the equal pay claims succeeded. He reaffirmed that the fundamental breach of contract was the reason for dismissal, and the contract had not been affirmed. In respect of delays in the process and the other failures in dealing with the grievance, this amounted to a fundamental breach of the implied term of mutual trust and confidence. The constructive unfair dismissal claim should succeed.

77. Mr Matovu then returned to the issue of equal pay to deal with the question of discrimination. He argued that, in essence, this was direct discrimination, suggesting that the case of ***Essa*** was authority for the conclusion that this should be seen as direct discrimination; the differences in terms and conditions were a proxy for sex discrimination. On the question of indirect discrimination, women were plainly put at particular disadvantage. The argument remained that even though the claimant took exception to the precise wording of the aims, in any event the respondent could not objectively justify the disparate impact on the claimant, of the less favourable green book terms and conditions.

The Facts

78. This is a case which very much turns upon its particular facts, in a context where the Tribunal was presented with a very considerable quantity of evidence, of varying degrees of relevance.

General findings of fact

79. The Tribunal found all the witnesses broadly credible, and few if any of the facts were actually in dispute. Rather, the issues related to identifying which facts were relevant, and drawing inferences from those facts relevant to the various equal pay issues and to the constructive dismissal. Insofar as comment on individual witnesses may be appropriate, this is dealt with below in the findings of fact. The tribunal found that Mr Adamson's explanations as to the context in which the respondent operates, to be extremely clear and helpful, and it accepted his evidence as accurate.

80. This is also a case where the specific facts relating to the claimant and her comparators, and the narrative of events, must be seen in a broader context, albeit the parties have a very different interpretation as to how that broader context should be assessed, and how it was relevant to the claimant's situation. The overview of the background facts necessarily includes understanding the broader national picture, as well as the broader position within Hampshire, as well as the specifics relating to the claimant's comparators, the locations where the claimant worked, and her own personal situation.

81. As both parties accepted throughout, the key background to the case is the differences between the green book (non-operational) employees of the respondent, and the grey book, which provides terms and conditions to what may very broadly be described as uniformed operational Firefighters.

82. The grey book governs the contracts of employment from the lowest level of Firefighter, up to and including Area Manager. At the most senior levels (namely Chief Fire Officer, Assistant Chief Fire Officer and equivalent) employees are placed on a "gold book" contract, which is different from both the green book and grey book, and which reflects their particular strategic and senior management responsibilities. Further background is set out below.

83. The Tribunal heard from Mr Adamson that although many of the ranks and structures of the fire and rescue service had been based on a military or naval model, in recent years terminology had changed to reflect a more managerial structure. This is explained further below. The operational firefighters, sometimes described as "uniformed," would wear a uniform and what most observers would consider to be a badge of rank, albeit green book employees carrying out roles at a similar level may in fact also wear a uniform for the duration of carrying out that specific role.

84. The Tribunal recognises the importance of the fire and rescue service in the local and national life of the country, including the crucial service to the public which it carries out. It also recognises that from time to time grey book employees would be required to risk their lives and carry out inherently dangerous and difficult tasks, well beyond those which most members of society employed by organisations would ever have to do, and well beyond those which green book employees would be required to carry out. The tribunal also recognises that any fire and rescue service, like the armed forces, needs to be ready to deal at short notice with a very wide range of local and national emergencies, even if some may be extremely infrequent.

85. The tribunal notes that the claimant had the opportunity to train as a firefighter, and to move onto grey book terms and conditions of service. She did not wish to do so. The tribunal draws the strong inference that, throughout the relevant period, she did not wish to subject herself to the

more onerous commitments and flexibility demanded of employees on a grey book contract, preferring to remain on a green book contract. The tribunal considers it a point of some significance in the equal pay case that the claimant appears to have wanted the financial benefits of the grey book contract, without subjecting herself to those aspects of the contract which she found less appealing. This underlines the material differences between the two sets of contracts, and that demands placed on grey book employees may be onerous, and that some, including the claimant, would not wish to be subject to them.

86. The current statutory framework for the fire and rescue services around the UK is based upon two pieces of primary legislation, dating from 2004. These are the Civil Contingencies Act 2004, and the Fire and Rescue Services Act 2004. Mr Adamson explained that some matters changed in 2004. For example, up to the 2004 legislation, the military could provide cover during industrial action, but the arrangements thereafter were that the fire service would need to be able to provide its own internal cover in the event of industrial action, albeit to avoid crossing picket lines and exacerbating the conflict, military establishments might be used as temporary bases for fire and rescue service fire crews who were not involved in the industrial action.

87. As Mr Adamson explained to the Tribunal, under the legislation three main substantive duties were placed upon each fire and rescue authority (broadly on a county basis).

88. First of these duties was fire safety, and provision of information to keep the public safe.

89. Second was firefighting (including protecting property and life).

90. Third was dealing with road traffic accidents.

91. However, by way of a catch-all, the Secretary of State can issue an Order assigning additional responsibilities. An Order has been issued, which covers responsibility for chemical, biological, radiological and nuclear matters. Another area covered by this Order, for example, is collapsed structures. However, as Mr Adamson explained, within the broader statutory framework, as well as specific duties, the Authorities had powers to deal with any eventuality and was required to produce a framework document in accordance with priorities set by the government.

92. Each Authority produces a detailed integrated risk management plan (“IRMP”). This must set out a plan, specific to their area, regarding preventing risk, protecting people and buildings and responding to emergencies. The plan would set out the Authority’s contingency plans in respect of a broad range of matters covering not only firefighting but adverse weather etc. These were priorities set by the Hampshire Fire and Rescue Authority (as it then was), whose constitutional arrangements are

broadly similar to the traditional model of a Police Authority, albeit there is no equivalent to the new role of Police and Crime Commissioner. The Authority has representation from the three relevant local authorities, namely Hampshire County Council, and the Southampton and Portsmouth Unitary Authorities.

93. Mr Adamson was also able to explain various matters which may not be immediately apparent to those unfamiliar with the Fire and Rescue Service. These included, for example, that the Service was involved in many multi-agency matters. In respect of the current pandemic, the Fire and Rescue Authority would take the lead (as required) on arrangements for matters such as logistics, temporary morgues, moving dead bodies etc.

94. It is clear that there is a wide range of matters that the Hampshire Fire and Rescue Authority was responsible for, some of which fall more in line with the day-to-day expectation of supporting fire safety and responding to 999 calls relating to burning buildings, but also much more broadly relating to road accidents (relatively frequently) but also to natural and man-made disasters on a less regular basis. And also contingency arrangements to ensure that during periods of industrial action by the Fire Brigades Union, staff may be mobilised to provide cover, which would necessarily involve using grey book staff removed from a job where they would, otherwise, not normally be expected to carry out firefighting duties. For all these reasons, it is essential that the Fire and Rescue Authority can rely upon grey book employees to be sufficiently physically fit and operationally current, to be able to respond as required and be deployed to deal with the various operational eventualities, sometimes at very short notice.

95. For example, during the period covered by the claimant's equal pay claim, there was industrial action nationally. In Hampshire, the Fire Brigades Union took industrial action on various dates from 2013 to 2015, as was widely reported in the media at the time. This plainly disrupted the services provided by the Fire and Rescue Authority and involved the mobilising of a number of grey book staff, whose usual day-to-day responsibilities did not include covering firefighting or other emergency services provided by the Authority.

96. Another event, for example, that happened during the relevant period, was serious flooding in the Winchester area in early 2014. The respondent carried out an important role in this, albeit in cooperation with other services. This plainly had the effect of diverting fire crews from firefighting duties, and also requiring additional people to backfill. And to carry out additional roles to help deal with the emergency, albeit for a relatively short period of time. Green book staff (including the claimant) also provided temporary support for the flood support, albeit under their contract of employment there was more limited ability of the employer to *require* additional duties, or to move job locations.

97. Green book employees are subject to a national agreement, agreed at the National Joint Council for Local Government services who produce the "National Agreement on Pay and Conditions of Service".

98. This is the agreement between representatives of the Local Authorities (the Local Government Association) and the relevant trade unions, in this case GMB, Unite and UNISON. This is very much aligned to standard local government terms and conditions of service. This includes, for example, the local government pension scheme. In that respect, green book employees were in the same position as other local government employees. The agreement includes matters to do with equality, and recognising the importance of equality. It also provides, for example, for procedures for pay and grading, and for job evaluation. The agreement, therefore, provides a fairly comprehensive and prescriptive framework for the terms and conditions of all green book employees.

99. The overarching terms and conditions set out in the green book terms are reflected in the wording of contracts of employment between green book employees and the respondent.

100. As an example of a green book contract, the Tribunal was taken to the claimant's own contract of employment in what was initially referred to as a "Code Compliance Inspector" from the end of 2011. This was a temporary secondment, albeit it is clear that the terms and conditions broadly reflected usual green book contracts. For example, the hours of work were expressed to be 37 hours a week, hours which are specified in the national green book agreement. The salary was expressed as a particular grade and NJC spinal common point range, based on the national green book. Annual leave was again based on the agreed entitlement as per the green book.

101. The claimant's contract provided for flexibility to the extent that the employer might move her to another location "should this be necessary for carrying out service responsibilities". She might also be required to undertake alternative duties appropriate to her grade and capabilities and she might be transferred to another post in the service, with the caveat that it must be "*within a reasonable distance of your initial place of appointment*". The other terms and conditions reflected what was set out in the green book, including such matters as pension arrangements. The Tribunal notes that the terms and conditions including the flexibility clause are broadly what one would expect for a Local Authority employee.

102. The claimant's green book contract from October 2012 as a Fire Safety Officer (Protection) is broadly similar. This contained similar provisions. When, for example, the claimant became Community Safety Delivery Manager on 1 January 2016, her contract again reflected green book terms and conditions, including the calculation of salary, the 37-hour week, and leave and pension arrangements. It included the same flexibility provisions.

103. As for the grey book: As referred to above, this governs the terms and conditions of employees who are variously described as “uniformed” or “operational” or more broadly as “firefighters”, albeit the latter is also the description of a particular level within the hierarchy. The grey book “Scheme of Conditions of Service” is published by the National Joint Council for Local Authority Fire and Rescue Services, made up of the Fire Brigades Union and representative of the various Local Authorities, with an additional role for the “Middle Managers Negotiating Body” (MMNB) representing Station Managers and above.

104. The grey book covers all roles from Firefighter through to Area Manager. It includes various equality provisions, including “fairness and dignity at work” and specifies conditions of service relating to roles, pay and allowances, hours of duty and leave, discipline, appeals and welfare arrangements.

105. The Tribunal notes that paragraph 1 of the preface to the sixth edition 2004 (updated 2009) sets out the role of the Local Authority Fire and Rescue Services, consistent with the analysis set out above. It would be helpful to set out this paragraph in full:

- “The role of local authority fire and rescue services in the United Kingdom is a reduction in the loss of life, injury, economic and social cost arising from fire and other hazards. The service is responsible for:
    - Risk reduction and risk management in relation to fires and some other types of hazard or emergency.
    - Community, fire safety and education.
    - Fire safety enforcement.
    - Emergency responses to fires and other emergencies where it is best fitted to act as the primary agency responsible for the rescue of people including road traffic accidents, chemical spillages and other largescale incidents such as transport incidents.
    - Emergency preparedness coupled with the capacity and resilience to respond to major incidents of terrorism and other chemical, biological, radiological and nuclear threats”.

106. The preface makes it clear that the principal role of the National Joint Council is to reach agreement on a national framework of pay and conditions for local application throughout the fire and rescue service in

the United Kingdom. Paragraph 3 of the preface is also relevant to the overall context. It reads as follows:

- "The NJC's overall aim is to support and encourage the delivery of high-quality services by a competent, well-developed, motivated, and diverse workforce, with security of employment. The following principals are fundamental to the achievement of this aim:
    - Equality in employment and employee relations, the removal of discrimination and the promotion of equality as a core principle that underpins service delivery.
    - The highest standards of health and safety at work consistent with providing a frontline, life-saving emergency service.
    - The provision of a fire and rescue service that can be adapted to meet the local needs of the community, employers and employees.
    - Stable industrial relations achieved by consultation, negotiation between fire and rescue authorities as employers and recognised trade unions".

107. The grey book specifies a number of matters of relevance to this case.

108. It sets out a broad framework of roles and responsibilities and of associated competencies and pay grades for the various roles from Firefighter through to Area Manager. It also refers to the "role map", and "job role".

109. The fire and rescue services role maps/job roles set out competencies at different roles, and the grey book specifies that fire and rescue authorities will require any reasonable activity to be carried out by an individual employee within his or her role map. The grey book covers the framework for a number of matters which would normally be specified in the contract of employment: For example, it deals with hours of duty and duty systems, and specifies that the contract shall be basic working hours averaging 42 hours per week, inclusive of paid meal breaks, as well as how the various shifts and working systems are required to operate. It specifies the arrangements for pay, with rates of pay set out in circulars issued by the National Joint Council. The pay entitlement shall be based on the employee's role, whether the employee is in the training development or competent stage for his or her role, and whether for roles above crew manager the employee is in an A or B job category. It specifies, for example, the precise arrangements for annual leave and other entitlements in some detail.

110. The detail is of a nature which one would normally expect to see within an employer's staff handbook. But for grey book staff, the grey book itself set out much of the required detail, but at a national level. The grey book also provides for such matters as grievance and legal procedures, in terms which are in fact different (albeit perhaps not significantly so) from those specified for green book employees.

111. As Mr Adamson explained to the Tribunal, in the transition from a hierarchy based more on military rank structures, the term, "role" was preferred to "rank". It appears to the Tribunal to be used both in the more general sense normally understood in employment, but also as a more appropriate alternative expression, or even synonym, for the term "rank". It is clear that the hierarchy is based on the expectation that a grey book employee promoted to a specific "role" (albeit usually with the rates of pay being based on "training", "development", or "competent") should be capable of carrying out a range of duties, even if those are not necessarily part of the day-to-day job they are carrying out under their contract of employment at any given time.

112. The Tribunal was provided with the complete 247-page document headed "Fire and Rescue Services Role Maps", published by the National Joint Council for Local Authority Fire and rescue services, and referred to its contents as appropriate. The defined roles are Firefighter, Crew Manager, Watch Manager, Station Manager, Group Manager and Area Manager. For every role below Area Manager there is also the separate role with the words "control" after it, albeit this specific point was not a matter which appeared to be relevant to any of the issues in this case.

113. As Mr Adamson explained to the Tribunal (paragraphs 8 – 10 of his witness statement), "*each role in the grey book has a role map setting out the different units of vocational standards required. The requires of each role are defined by the integrated personal development system, which sets out the national standards applicable to each role*."

114. Mr Adamson stressed, and the Tribunal accept, that there were numerous operational competencies which must be maintained by ***all*** grey book contracted firefighters regardless of the role, albeit these related to the level of the role and the type of operational role they can be expected to carry out. As he put it, "*these include knowledge relating to firefighting tactics and operations, equipment and the risks present in emergencies of different kinds*".

115. Within the published role maps, for example, the Watch Manager role map has 11 sections related to the managerial responsibilities at that particular level. For example, within the eleven units for Watch Manager WM1, to "lead the work of teams and individuals to achieve their objectives", is broken down into precisely how the role is to be carried out, and what is expected of a grey book employee at this level. The Tribunal would note that this is extremely prescriptive, and goes into very considerable detail

as to what is required, going well beyond the detail which one would expect to see within an individual job description or the terms of a contract of employment.

116. Another example within WM7, is to "lead and support people to resolve operational incidents". Element WM7.1 relates to "plan action to meet the needs of the incident". This specifies in considerable detail what the Watch Manager must ensure, and what he or she must know and understand. Similarly, for example, WM7.2 "Implement action to meet planned objectives" again lists in detail what the Watch Manager must ensure and what he or she must know and understand, ranging from health and safety through organisational to personal and interpersonal.

117. Against that prescriptive national framework, grey book employees would of course receive an individual contract of employment in whatever role they were carrying out. For example, the Tribunal was taken to the contract commencing 4 January 2009 for Mr Justin Turner as a Crew Manager. The contract is expressed to be in accordance with the conditions of the grey book, and also cross-refers to various Service Orders regulating the local arrangements. One significant example of particular terms and conditions which differ from green book contracts is the specified place of work. In individual grey book contracts, the place of work and flexibility clauses are dealt with together at Article 3. Although a particular location for the role is specified, it also contains the following text:

> "…In the course of your duties you will be required (and/or mobilised) to work at different locations within Hampshire and you may be required to be mobilised outside of Hampshire to meet the requirements of the Fire and Rescue Service Act 2004 to provide mutual assistance in the UK. You may be mobilised outside the United Kingdom if you take on a specialist role that includes fire cover or response outside the UK.
>
> At any point during your employment within Hampshire Fire and Rescue Service you may be asked to move to a specialist role/post or be posted to a different duty system. There is no right to remain indefinitely in any role/post or at any location, this includes day crewing…"

118. The contract also provides for the salary by reference to the arrangements set out in the grey book, and such matters as the 42-hour week and annual leave, also reflecting the prescribed arrangements set out in the grey book. There are detailed contractual provisions relating to health, safety and welfare which are not replicated in the green book contract. For example, it contains the following provisions:

> "It is part of your conditions of employment that you assume personal responsibility to maintain an acceptable standard of health

> and fitness for the role that you undertake. Annual health and fitness testing will be carried out for all operational personnel to assess fitness for role. Employees who fail to meet the standard required may be removed from operational duties and/or referred to the Occupational Health Unit in order to remove any potential health, safety and welfare risks/implications, and a suitable fitness training programme will be implemented to improve health and fitness. Action under the capability support procedure and/or discipline procedure may also be considered. See service order 8/7/1 "fitness training/assessment" for further details."

119. The Tribunal also notes that Clause 14 of this contract specifies that as well as the job description coming with the post, that the role map was applicable, albeit duties, responsibilities and objectives may be reviewed and revised as appropriate. The Tribunal also notes that Clause 16 expressly incorporates the grey book terms, explaining that terms and conditions of employment "will be in accordance with the scheme of conditions of service negotiated and agreed by the National Joint Council for Local Authority Fire and Rescue Services (referred to as the grey book) as supplemented by fire authorities rules and set out in service".

120. The Tribunal notes that other contracts of employment for grey book staff, brought to the Tribunal's attention, are set out in similar terms.

121. The Tribunal notes, in essence, that there are significant differences in terms of the contracts under the green book and the grey book. One similarity is that each contract is subject to the nationally negotiated separate agreements, albeit those agreements are very different in character and cover different matters.

122. Within individual contracts of employment, albeit reflecting the national rules relating to grey book and role maps, grey book staff had more generous financial package, including the following.

123. Grey book staff had a more generous pension arrangement than those green book staff, albeit this is not a matter relied upon in the liability issues relating to equal pay, and the tribunal were not taken to any specific differences.

124. Grey book staff largely had more advantageous salary rates, albeit based on a completely different salary structure from that for green book employees.

125. There were more generous annual leave arrangements for grey book employees, in accordance with the agreed level in the national grey book and green book.

126. There were provisions for the grey book staff which were more generous in relation to a week's pay, in that as nationally agreed all grey book staff

would as a starting point be on a basic salary of 42 hours a week whereas green book staff were on a salary based on 37 hours a week. It is clear that the difference is accounted for by the agreement that all grey book staff would have paid meal breaks, which equated for staff working in weekly office hours for a paid one-hour lunch break each day of the week.

127. On the other hand, however, grey book staff were subject to more onerous requirements to ensure that they kept themselves fit, and (albeit not reflected in the wording of the contract of employment itself) that they were operationally up-to-date and available for any operational role at their rank or role, consistent with their operational background. This was not a requirement placed on green book employees. Similarly, grey book employees were subject to a much more onerous regime of being required to move at managements' discretion to anywhere within the Hampshire area, and as required to work outside the area as the need dictated, and in some cases to be deployed abroad. Similarly, they could be redeployed for temporary operations, again, at the discretion of management.

128. The green book employees were under less onerous requirements, and in terms of changing their permanent place of work, for example, this was qualified by the need that it should be within reasonable travelling distance of their initial contractual place of work.

129. As Mr Adamson put it at paragraphs 15 and 16 of his witness statement, "*green book employees have to demonstrate competency in relation to the role they are undertaking and do not have to demonstrate any of the functions in the grey book role maps or undertake maintenance of skills and workplace assessments for operations as grey book employees are required to do*". He also explains that the mobility clause in grey book employees' contracts is "*so that the service can prioritise and maintain operational cover as a core function of an emergency response*".

130. The matters referred to above relate to generic differences. There were other specific differences relating to more generous financial packages available to grey book employees, which did not necessarily apply to all.

131. For example, the Tribunal was told about a flexible duty system (or "FDS") providing for a 20% uplift in pay for some staff who had additional duty/call out liability. This did not apply to the comparators relied upon. Similarly, the Tribunal heard about additional payments under the retained duty system ("RDS") which, for example, applied to the comparator Mr Turner for part of the period, but this is not a matter relied upon because it was a specific additional responsibility which was reflected in a separate contract of employment. This would not appear to have any impact on the generality of the arguments.

132. One matter which the claimant did rely upon, is the eligibility for continuing professional development ("CPD") payments for grey book staff.

133. The claimant's argument was that any additional requirements to remain operationally current and fit, were met by this additional allowance and that this area could not therefore explain any difference in basic terms and conditions. It was common ground that staff were generally expected to carry out continuing professional development, but in respect of grey book employees were required to maintain professional competencies over a whole range of operational matters, albeit it was much easier to remain up to speed if one was working at a fire station, rather than in an office or headquarters. The Tribunal heard evidence, for example, that both green book and grey book staff would meet regularly, and that after the meeting, grey book staff would normally go off to a fire ground in order to maintain/update their firefighting and similar skills. Some training could be carried out online, some training required attendance at a particular site in the presence of a trained instructor or specialist equipment. The Tribunal was not taken to any document setting out the precise arrangements, but it was clear that this was a requirement to remain competent in the operational competencies associated with the role. The Tribunal was however, shown an example of a policy document headed "Maintenance of Competency Scheme" for "grey book – operation personnel". This set out the policy for the respondent to deliver an effective service to their communities by ensuring that staff were adequately trained for the tasks they are expected to carry out for all of the operational personnel roles. This policy set out a framework for the maintenance of the competency framework and how skills should be maintained. It specifies, for example, how workplace assessments are to be carried out with specialist instructors/assessors in areas such as breathing apparatus, manual handling, trauma/casualty-care/defibrillator etc.

134. Service Order 8/7/1, for example, deals with service fitness, explaining that the purpose was to ensure that all operational employees have the required level of strength, muscular endurance, aerobic fitness and body composition to effectively and safely perform their roles. The policy required the maintenance of minimum levels of fitness to ensure that they are "capable of meeting the physically demanding requirements of their role. This is an essential element of operational effectiveness". Individuals are personally responsible for maintaining their fitness and the policy set out not only the requirement but explaining the need and arrangements for regular fitness assessments. The Tribunal notes that this reflects broader references in the contract of employment. The Tribunal heard oral evidence, for example, that grey book staff were expected to spend two hours a week maintaining fitness; there was no such requirement for green book staff.

135. The Tribunal also heard how it had been agreed nationally that grey book staff should receive continual professional development (CPD) payments which were set, as of July 2017, as being £636 for Hampshire.

136. The claimant expressed her belief (albeit as an employee who was not herself eligible for such payments) that the CPD payments reflected in its entirety all training and fitness requirements, and separately reimbursed grey book staff accordingly, such that other remuneration did not need to cover this activity.

137. Mr Adamson, however, gave oral evidence supplementing his witness statement and other documentary evidence, explaining that the claimant's beliefs were incorrect. The Tribunal notes that the policy sets out the importance of remaining operationally trained, and the mechanism for doing so, but that the documents it was taken to do not expressly link the requirements to the arrangements for payment of CPD. It was put to Mr Adamson that grey book staff received the CPD payment in return for ensuring their operational effectiveness. Mr Adamson disagreed. Grey book staff would only access CPD if they were operationally competent, but that there was a separate contractual requirement to remain operational. He disagreed that this contractual requirement was covered by CPD. Before CPD would be paid, not only would staff have to show that they were competent, but they would have to apply for CPD. There were other requirements, including additional matters which must be confirmed by a line manager. It was not a question simply of getting CPD for maintaining competency, even though that was a baseline they must achieve, but they must additionally prove to the line manager that they were open to new ways of working, and learning and maintaining relationships with the public and colleagues, as well as other matters. The qualifying arrangements for CPD were agreed through the National Joint Council, rather than a local arrangement. His evidence was that there was a requirement for grey book employees to remain physically fit as set out in the operational orders, and a contractual requirement for them to remain operationally competent, with guidance as to the levels of competency required. But there was not a direct relationship between achieving this and receiving CPD payments. The Tribunal also heard evidence that grey book staff were not immediately eligible for a CPD payment until they had served for a number of years. (Mr Jackson in his evidence on behalf of the claimant confirmed that CPD could not be paid to grey book employees until they had completed five years' service.) All grey book staff were, regardless of eligibility for CPD payments, required to maintain fitness and operational effectiveness regardless of any additional payments they may or may not receive.

138. The Tribunal accepts Mr Adamson's evidence, and although it is unfortunate that the precise written rules for paying CPD were not supplied to the Tribunal by either party, agrees with the respondent that they claimant's understanding was incorrect. This indicates that all grey book staff were required to maintain fitness and operational effectiveness under their contract of employment regardless of the additional remuneration which some might be eligible for.

Narrative findings of fact

139. In respect of the narrative of relevant events, the Tribunal makes the following findings of fact upon a balance of probabilities:

    a. As indicated above, the respondent is responsible for fire and rescue services in Hampshire and the Isle of Wight. As at 9 June 2017 (the date that the claimant's employment ended) the authority employed a total of 1,744 people. Five of these were employed at gold book level. Of the remainder, the large majority were grey book uniformed operational staff (1,447). The minority were green book staff in supporting rules (292).

    b. Of the green book staff (including the claimant) the breakdown between women and men was 127/165 (see page 199 of the bundle). In other words, just over 43% of green book employees were female. For grey book the figures were 91/1,356; in other words, just over 6% were women.

    c. As requested by the claimant, the respondent has also provided other breakdown of the statistics. As a percentage of total employees, male grey book staff were 77.8%, female grey book staff were 5.2%, male green book staff were 9.5% and female green book staff were 7.3%.

    d. The claimant first worked for the respondent as long ago as 2005, as a technical fire safety administrator at Redbridge in Southampton. She resigned the following year because the job was not as technical as the title suggested.

    e. The claimant never worked as an operational firefighter, whether on grey book terms or otherwise. She had not, for example, carried out firefighting duties in the Armed Forces, as the tribunal understand the case some respondent employees.

    f. The claimant re-entered the respondent's employment in 2009, at Redbridge station. This initial period of employment is not relied upon in the equal pay claim. She was engaged on national green book terms and conditions, and indeed throughout her employment with the respondent, this remained the case.

    g. The claimant was keen to develop her career. She was interested in the role of fire safety officer.

    h. In 2011, Mr Adamson (who was at that point a Crew Manager) created a business support officer trial, to consider how better to support business, other than using fire safety officers for enforcement purposes. This appeared to be a possibly more cost-effective use of resources; it was decided by management to conduct a year's trial with one grey book employee, and one green book employee,

carrying out this role. It was intended to assess whether operational experience and background was required to fulfil this particular role.

i. To this end, two separate job descriptions were created, one for a green book employee with the title "Compliance Officer – Protection" and one for a grey book employee intitled "Crew Manager – Fire Safety Advisor".

j. The two job descriptions were deliberately almost identical. Other than the title, the only substantive difference in the post specific details was the additional requirement for the green book employee to "*perform specific inspection activities in simplistic premises where the use of the CLG guidance would identify all the needs to fulfil the requirements of the Fire Safety Order 2005*". The grey book job description did not contain this caveat. In both cases the job purpose was as follows:

> "To provide a high quality fire safety advice service, ensuring that designated premises are visited and possible operational risks are identified, enabling the service to meet its statutory obligation. Work within the scope of the better regulation agenda, achieve the aims of the published Hampshire Fire and Rescue Service Plan and raise the standards of fire safety awareness in the community".

k. As a grey book role this was set at Crew Manager level, and as a green book role this was at grade F.

l. The claimant, and a firefighter, Mr Gavin Ison, expressed interest and were selected to carry out this trial for a year. For both of them this amounted to a promotion.

m. The claimant remained in this role of Compliance Officer/Business Support Officer (sometimes referred to as 'BSO') from 12 December 2011 to 14 October 2012. Her comparator for the purposes of the equal pay claim covering this period is Mr Gavin Ison.

n. The claimant remained on green book terms and conditions and Mr Ison remained on grey book terms and conditions. This meant, for example, that although their office hours were the same, Mr Ison remained on his paid 42-hour week, which effectively meant that he had a paid lunch hour Monday to Friday. The claimant was paid for 37 hours, and effectively her lunch hour was unpaid. Both attended the induction training, and both carried out what was effectively the same role, visiting licenced premises etc. In respect of the training, however, Mr Ison explained that when he and the claimant attended training days together at Winchester fire station it would be the same technical competency training 0900 – 1100, but from around 1100 green book employees would continue their fire safety duties while grey book staff, including Mr Ison, would carry out fire ground

operational training until lunchtime. Mr Ison also described how he carried out one week of training every six months on the essential competencies required at Crew Manager level to enable him to be competent to attend an incident as part of a firefighting crew, covering such matters as breathing apparatus, hose management, site safety, casualty handling and also maintaining first aid qualifications and driving assessment so to enable him to drive fire engines. The claimant was not required to attend such training. The Tribunal notes that Mr Ison also received CPD payments as well as his basic contractual entitlements.

o. The Tribunal also notes that during this period Mr Ison was subject to the role map, which required him to be able to carry out the wider duties of this level, going well beyond what would be required on a day-to-day basis within this particular job description.

p. The Tribunal also notes that around the same time, a separate trial was being carried out. This related to the response to automatic fire alarms. The Tribunal notes that many premises have automatic fire sensors, and that frequently alarms sound when there is not in fact a fire, which may require the attendance of a fire crew. Plainly it would not be good use of resources if fire crews were automatically called out to deal with what turned out to be a false alarm. These matters, it would appear, are dealt with in a different way in different parts of the country under different fire authorities. At this time, the arrangement in Hampshire had been that alarm automatically triggered a fire crew callout. The trial was to try out a new arrangement to deal with automatic fire alarms (APAs), whereby grey book inspecting officers working in community safety would be put on a rota to respond to automatic fire alarm activations, where a fire crew had not been called out to attend by someone dialling 999.

q. This trial required the establishment of an additional rota, for which grey book staff were not paid any additional remuneration. They were expected to carry out these duties in addition to their day-to-day job role. This was not a requirement placed upon the claimant, who as a member of green book staff was never required to go on this rota. The claimant's believed that she was personally competent to go on this rota, albeit she was never asked to and there was no obligation under her contract of employment to accept to task. The tribunal accepts the clear evidence of the respondent that it would not in any events be acceptable for the claimant to go on the rota. Although she clearly had knowledge of fire alarm systems and fire safety, and the good general understanding of the processes, it had been determined by those setting up the trial that there was a requirements requirement for a competent operational fire officer to respond. The responsibility was not merely to attending the site of the fire alarm, to inspect the premises and to give advice, but it turned out that there was an incident which would require response of a fire crew, the fire

officer attending would need be qualified to commence all the necessary arrangements. This might, for example, involve setting up a perimeter, the gathering of the information which a fire crew would need, to ensure that life and property was preserved, to be able to brief the fire crew on arrival, and if necessary take charge of the incident.

r. The Tribunal accepts that an actual fire triggering an automatic alarm was a relatively rare occurrence. The large majority of such call outs would not require any fire-fighting action. The claimant gave evidence to say she believed she would be competent to carry out this role, but the reality was in any event she was never required to under her contract of employment. Whilst the tribunal does not doubt the claimant's competence, and indeed her ability to recognise whether the incident be escalated and to inspect the premises and advise local management, it accepts that she was not qualified or suitably experienced the deal what would have been expected, had there in fact been a fire. Indeed, this highlights the differences in the skill set between grey book and green book employees of the same or broadly similar managerial level: a green book employee of the claimant's background and expertise might be competent to carry out a large number of duties, but that skill set did not include dealing with fires. In any event, whatever the claimant's level of competence, the fact remains that under her contract of employment, the claimant was never required to take on the additional task of going on the on-call rota.

s. Mr Adamson explained that there were maximum reaction times for different types of incidents, and that the maximum was an hour for responding to automatic fire alarms, albeit he would expect the grey book employee attending to arrive much more quickly and not wait for the full hour to elapse before arriving at the premises in question.

t. Because of the nature of his duties, and the fact that he was frequently away from his office, Mr Ison did not provide the cover very often. When he did, he was on duty between 0900 – 1600 and was required to carry a pager. He was called out on two separate occasions to an automatic fire alarm activation.

u. The Tribunal would therefore make the two following observations:

v. Firstly, the job description and the day-to-day duties of carrying out this role were essentially the same for the claimant as a green book employee and Mr Ison as a grey book employee. However, he remained under grey book terms and conditions of service, with a continuing requirement to carry out additional operational training, and to remain operational, as well (as for all grey book employees) to keep himself physically fit to the required standards. He was also required to comply with the role map criteria, and could have been

moved at short notice for operational reasons to anywhere within the area or potentially elsewhere, and to have covered any operational requirements which might accrue temporarily or short notice. In the event, the only extra duties he was required to carry out during this period was the relatively undemanding requirement to be on the APA rota every now and then. His overall terms and conditions of service did not change whilst he carried out this temporary role. In common with all grey book employees at this level, he continued to be paid on the basis of a 42-hour working week, rather than a 37-hour working week, he remained under more generous annual leave arrangements, and of course he was under a more generous pension arrangements (albeit this was not a matter relied upon by the claimant). He was also in receipt of CPD payments during this period. He was paid at the appropriate grey book Crew Manager rate, and under the different pay scales within the green book the role had been assessed at level F. This meant that not only was his basic salary higher if calculated on an hourly rate, but that it was proportionately because he was paid for more working hours per week than the claimant.

w. From information supplied to the Tribunal, when the claimant and Mr Ison commenced this temporary role at the end of 2011, the hourly rate under the green book contract was £11.52, whereas the hourly rate for the grey book applicable to Mr Ison was £13.69. Clearly there was a disparity in income on the hourly rate, increased by the fact that Mr Ison was paid for more hours per week.

x. The differences in salary (and annual leave entitlement) are set out below, under the separate heading of "Difference of pay and conditions", from paragraph 140, with the specific rates at different period of time set out. These findings of fact should be read in conjunction with that section below.

y. In August 2012 both the claimant and Mr Ison were initially posted together at the same premises, and then from August 2012 they were posted at separate stations to establish an additional post in an office to support the fire safety officer. The claimant remained at the Southampton Group based in Redbridge, whilst Mr Ison was moved to the New Forest based in Lyndhurst. Throughout this time the claimant was the only green book employee carrying out this role, and the only female employee carrying out this role.

z. The claimant informally raised the differences in pay, in discussion with managers. It was explained (correctly) that the differences were as a result of differences in the contract.

aa. At the end of the trial, Mr Ison returned to his substantive role as firefighter, although he was subsequently promoted. This does not form part of the claimant's case. The claimant, however, expressed

an interest in promotion to the higher-level role of Fire Safety Officer ("FSO") – Community Fire Protection. This was a role which, in grey book rank or role terms, would be carried out at the higher level of Watch Manager, rather than at the level of Crew Manager, which her present role related to.

bb. The claimant was interviewed by Mr Adamson, and was successful. She was promoted to be an FSO, and was permitted to remain based at Redbridge fire station which was convenient to her home location. At the time of her promotion she was the only green book female FSO. All the other FSOs based in Redbridge were male, and were on grey book contracts. The claimant commenced the new FSO role on 15 October 2012, and initially remained at grade F on the same green book pay grade and spinal column point.

cc. For the purposes of the equal pay claim covering the claimant's employment as a FSO in the period 15 October 2012 to 15 June 2014, her comparator is Mr Justin Turner.

dd. On 3 June 2013, once the claimant had completed her development programme, she was placed on pay grade G and given backdated salary to the start of carrying out this role.

ee. At the time of the claimant's promotion, Mr Turner was already a Fire Safety Officer, based in Winchester. This job was at the Watch Manager level. The claimant's job description and Mr Turner's job description were identical, save that he was based in Winchester and she was based in Southampton. Their day-to-day duties, under the job description, were effectively the same.

ff. The claimant remained within the FSO role until further promoted in June 2014. Mr Turner remained in the Winchester role until 25 March 2013, after which management moved him to Redbridge, working in the same office as the claimant. The Tribunal notes that whilst at Winchester Mr Turner was paid additional money because he had an extra call-out liability on the reserved duty scheme at Winchester fire station. This forms no basis of the claim and as it was paid under a separate contract, and in any event this arrangement came to an end when he moved to the same office as the claimant.

gg. During this period (and indeed after the claimant was further promoted into a new role), industrial action by grey book employees took place on various dates between September 2013 and February 2015. This was in relation to the firefighters' pension scheme. Grey book staff at Mr Turner's level who were not taking part in industrial action would be required to be available to redeploy, to ensure continuity of fire and rescue services during the industrial action and to cover as required for staff who were not available due to the industrial action.

hh. As it happens, because Mr Turner was himself taking industrial action, at least on the days when he was scheduled to work under his contract of employment, he was plainly not called upon to carry out additional duties as a result of others carrying out industrial action. Had he not been involved in industrial action, then of course he might very well have been required so to do.

ii. During the period in question (in early 2014) there was flooding in the Winchester area. The Tribunal notes that this flooding took place in the period after Mr Turner had been redeployed from Winchester to Southampton. Mr Turner told the Tribunal that he was available and ready to be redeployed at short notice to carry out an operational role in relation to the flooding, but in the event, he was not needed and was not redeployed. The tribunal accepted his evidence.

jj. The Tribunal notes that during the flooding the claimant in fact carried out a role at headquarters in respect of operationally deploying vehicles in the area, and she was content to carry out this role. She was not required, or asked, to carry out any activities at the site of the flooding. This temporary additional responsibility did not breach her contract of employment.

kk. During this period Mr Turner was (in accordance with his contract) required to carry out training, maintain his operational effectiveness and to remain physically fit.

ll. Like Mr Ison, Mr Turner was also put on the rota for the AFA response once he had been redeployed from Winchester to Southampton, because (unlike Winchester) his new office fell within the geographical area of the AFA trial. Unlike Mr Ison, who did the occasional day on the rota, Mr Turner would be on the rota for a week at a time, during which he would carry a pager. Like Mr Ison, he received no additional remuneration for this additional task, which was not specifically related to his job description. He would use his own vehicle when carrying out inspections as an FSO, but when on duty for the AFA rota would be provided with a service vehicle to use. He was called out to two fire alarm incidents during the period that he remained on the rota.

mm. During this period when the claimant and Mr Turner were carrying out FSO roles, they were both on their green book and grey book contracts of employment respectively, the relevant contents of which were described above. Plainly they remained on the same working hours, on the basis that although they would expect to work for the same number of hours per week (unless Mr Turner was called out during his lunch hour in the AFA role), Mr Turner was paid for 42 hours and the claimant was paid for 37. He also remained on the more generous leave arrangements and was in receipt of the CPD

allowance. He remained liable for other duties, as indicated above, and was required to keep himself operationally trained and physically fit.

nn. The claimant remained on grade F until she completed the FSO development programme, after which her pay increased to the green book grade G level and was back-dated to 1 March 2013. After promotion to grade G the claimant was on an hourly rate of £13.76, while Mr Turner as a grey book watch manager had an hourly rate of pay of £14.73. The applicable grade G rate from April 2013 was subject to an annual increment, whereas the grey book was not. Consequently, the difference in hourly rate reduced, but was there was still a different hourly rate. As before, the disparity in wages was greater because of the 42-hour calculation rather than 37 hours per week.

oo. Around this time, the claimant was focussing on the disparity in pay between her own wages, and what Mr Turner was receiving. She began querying this in writing.

pp. In February 2013 the claimant raised the issue that she believed that she should be paid at grade G, which was the equivalent of a Watch Manager, whereas her pay was still based on the green book grade F, which she understood was the equivalent of a Crew Manager. Management initial response was to point out that there were not actual equivalence “as the pay scales were so different”. Once the claimant had achieved the relevant competency status, however, it was raised with HR that she should now be moved to a G grade and pay backdated back-dated, and this is what in fact happened.

qq. The Tribunal notes that the contents of the green book, and indeed the evidence of the respondent witnesses and in particular Mr Adamson (which it believes to be accurate), indicated that when a new green book job was created, the following process was followed. The job description was considered, and it was concluded what appropriate pay level under the green book should be allocated. This decision could be reviewed after six months, and would in any event be susceptible to the usual green book job evaluation process. This could then result in the job being evaluated at a higher level.

rr. In the claimant’s case, the usual procedure was followed. It would appear that in this instance HR readily accepted that once the claimant had achieved the necessary competencies, that this role should be reclassified as G grade. Even if there was not direct equivalence, it appears to be broadly accepted that Watch Manager and grade G were similar, albeit the grey book terms and conditions were more generous.

ss. For the remainder of the claimant's time as FSO, however, her pay continued to be lower than that of Mr Turner.

tt. Mr Turner remains a comparator for the FSO role until he was promoted to Station Manager from 16 June 2014. The claimant remained in the FSO role until she was promoted to Office Manager on the same date.

uu. For the purposes of the equal pay claim covering the claimant's employment as Office Manager/Community Safety Delivery Manager ('OM/CSDM') from 16 June 2014 to 9 June 2017, her comparator remains Mr Turner.

vv. The Tribunal notes that in fact the claimant carried out two different roles during the remainder of her employment for the respondent, albeit for the purposes of the equal pay claim they have been treated as if it is effectively the same role.

ww. There had been a job advert for a temporary Office Manager post in Community Safety, still at Redbridge. This role had appealed to the claimant, who believed she would be sufficiently experienced to carry out the duties. She was initially unsure if she was ready for the additional responsibility, but was encouraged by Mr Adamson and others to apply, because she had performed the role of FSO to a high standard and was a fast learner.

xx. Indeed, it is common ground that management, and in particular Mr Adamson, were impressed by the claimant's performance and were keen to facilitate the development of her career within the service.

yy. The claimant applied and was interviewed. She scored higher than other candidates in interview, and was promoted to Temporary Office Manager in Southampton.

zz. Mr Turner was also promoted and became Temporary Office Manager in the New Forest (Lyndhurst). The claimant was able to remain at the Redbridge office, which suited her. It was accepted that this role was equivalent to Station Manager role in the grey book.

aaa. The claimant was again the first green book employee to carry out such a role, and the usual procedure was followed in assessing the appropriate pay grade.

bbb. Initially, the claimant's new role was assessed at being at grade H. At this point, there had been no job evaluation, and the grade H was based on another broadly similar post which had been evaluated as grade H. The claimant queried whether the grade H level was appropriate. When the claimant raised this, HR considered the matter and agreed to raise it to grade J, which would be on a higher salary.

After some uncertainty in relation to whether the claimant's development in the role would justify a grade above J, her competency in the Office Manager role (As Community Safety Delivery Manager - CSDM) was confirmed on 13 April 2016 as grade K, and backdated to 1 January of that year, as requested by the claimant's line manager. There were some difficulties in the claimant completing all the development programme which had been identified, but her line manager was content to sign her off at that stage.

ccc. The Tribunal notes that, as before, the claimant remained on a green book contract of employment, and Mr Turner remained on a grey book contract of employment, with the usual differences in the remuneration package.

ddd. As far as the job description went, the Tribunal notes that this is based on a generic job description for Station Manager/green book grade H, covering various potential locations, and to be either on the 42-hour grey book contract or the 37-hour green book contract. It was plainly intended that the job was interchangeable between green book and grey book, and the specialist skills under the heading "technical skills and knowledge" did not presuppose any particular professional background, related either to green book or grey book staff.

eee. Meanwhile, there had been discussions about remuneration packages for the Heads of Service (or "HOST" - a senior management role above the claimant's level, but below the most senior "gold book" levels). On 8 January 2015, a decision was taken to move several affected senior managers at HOST level from green book to grey book terms, so that they were all on broadly the same reward packages. The tribunal heard from Ms Dickinson that this local experiment was not seen as a success, and by the time of the hearing no employees remained on this scheme. Employees subsequently appointed to the Head of Service Team (HOST) remained on green or grey book contracts, as the case might be. Staff had moved on, retired or been promoted, and at the time of the hearing all members of the Team who had previously been on green book terms were still on green book terms.

fff. On 9 January 2015, the day after the decision on HOST, there was a general freeze placed on the respondent's green book job evaluations (with a few exceptions). This was as a result of a Professional Services Redesign project, and applied across all the respondent's green book posts. The claimant was included in this freeze.

ggg. On 7 September 2015, the claimant emailed her managers to record her frustration regarding her pay grade, although this was not

presented as a formal grievance or under any particular HR policy. She referred to the green book pay structure, comparing her own situation to the decision to equalise pay for HOST managers.

hhh. Although a job evaluation form was completed for the claimant's role and submitted to HR on 17 November 2015, a job evaluation was not completed at this stage, in light of the general freeze.

iii. Issues relating to pay levels were raised on a number of occasions by the claimant, and as indicated above the claimant was substantively promoted to CSDM on 1 January 2016, and on 13 April 2016 grade K (spine 42), pay was agreed and backdated to the beginning of the year.

jjj. The backdated pay award did not satisfy the claimant. Further pay issues were raised: for example, on 10 June 2016, the claimant again raised the issue of equalising her pay to grey book equivalents, and referred again to the HOST pay arrangements.

kkk. On 29 July 2016 Claimant was invited to attend a meeting to discuss pay issue, but in the event the meeting did not take place;

lll. On 15 September 2016, a job evaluation form for the claimant's CSDM post was completed, and on 13 October 2016 the evaluation was confirmed as being grade K.

mmm. The tribunal notes that the respondent's grievance policy provides, in conventional terms, that concerns should normally be raised informally with the line manager. A formal grievance may be raised if it is not possible to settle the matter informally, and the employee is required to set out the following:

- The nature of the grievance.
- Why the action taken at the informal stage was not acceptable.
- Their suggested course of action to resolve the matter and expected outcomes.

nnn. The policy, at paragraph 2.5.2, provides that the final decision on which manager is appropriate to hear the grievance will rest with the service, but that the manager approached by the employee must respond to the employee "*within seven days of receiving the grievance by inviting the employee to a meeting and informing them of their right to be accompanied by workplace colleague or trade union representative*." It goes on to specify, paragraph 2.5.3, that "*if, for the reason stated above the line manager who would usually hear the grievance is not doing so, the person hearing the grievance should inform them of the matter at the earliest opportunity, if appropriate to do*". Paragraph 2.5.7 provides that the manager should respond in writing within seven days of the grievance meeting, or

within seven days of completing further investigations. An employee who wishes to appeal the state their detailed reasons repealing in writing within seven days of receiving the written decision. The arrangements for hearing an appeal are similar to those for the original grievance meeting. The procedure does provide for second appeal hearings in appropriate circumstances.

ooo. On 17 October 2016 the claimant raised a grievance over equality issues, albeit this was headed "job evaluation" and couched as a detailed notification as to why the claimant was intending to commence ACAS early conciliation preparatory to lodging an Employment Tribunal claim, rather than seeking to resolve a grievance through internal means. The claimant set out a list of her concerns, in some detail. She did not request any particular outcome, but set out the matters with which she was unhappy. She did not ask for her email to be acknowledged, nor suggest what action (if any) she wished management to take.

ppp. The following day, 18 October 2016, the claimant emailed her line manager, explaining that as they had gone through the job evaluation process, the grievance procedure now applied, "*as it is no longer about job grading but equal pay*." *She explained this by adding, "this must be done prior to early conciliation so can you please take this as formal notification of my grievance*." Although now referring to the grievance process, the claimant did not indicate what action she wished taken, or what outcome she was seeking.

qqq. Management then treated the claimant's email as a formal grievance. The claimant's line manager acknowledged the grievance by email on 18 October, adding that he thought he should allow somebody else to hear the grievance rather than him. The claimant agreed, and the claimant's line manager passed the matter on to HR. There was initially some uncertainty as to who should deal with the grievance, and in consequence, the claimant was not immediately invited to a grievance meeting.

rrr. It had been intended that Mr Stewart Adamson would deal with the grievance, but he was not available, and on 5 November 2016, the grievance was re-allocated to Mr Tom Simms, Area Manager.

sss. On 7 November 2016, Mr Simms having agreed to take over, the claimant was formally invited to a grievance meeting, to be heard on 28 November 2016 under the grievance procedure (which was provided to the claimant). She was reminded that she could bring a trade union representative or colleague, although in the event she chose not to do so. The letter described the grievance as being, "*in respect of the outcome of the recent job evaluation of your post*."

ttt. At the request of the claimant, the timing of the meeting on 28 November was changed. When the claimant made the request she did not express any concern that she had wanted a grievance meeting to be held earlier.

uuu. On 28 November 2016, the grievance meeting went ahead between the claimant and Mr Simms. A member of the HR team was also present. The tribunal has been provided with a record of that meeting. Mr Simms explained that the meeting was to hear from the claimant the basis of her grievance and to give her the opportunity to present the facts; Mr Simms did not expect to be able to give an outcome the same day. The claimant took Mr Simms through her concerns and the background to the grievance, referring, amongst other things, to the equalisation of pay at the HOST level. She explained that her desired outcome was to be paid the same as grey book colleagues, including being paid for her lunch break. She provided various additional documents.

vvv. At the end of the meeting, Mr Simms confirmed that he needed to look into the issues raised by the claimant, and explained that he hoped to be able to give an outcome by Christmas. If not, he would be in touch. The claimant was invited to contact him with any queries.

www. Meanwhile, the claimant was informed that her backdated pay would be given to her in her December salary, reflecting an increase in the rate of her pay which had been approved.

xxx. Faced with reviewing the background to the grievance, and the need to understand the impact of equal pay legislation, Mr Simms was not able to provide a written outcome before Christmas.

yyy. On 12 December 2016, the claimant politely asked for an update. Mr Sims replied by email the same day, explaining he had been reviewing the information provided, "*and to be honest I need some legal advice and I'm trying to organise a meeting this week, I will let you know as soon as I find out what the timescale may look like*." The claimant replied, thanking Mr Simms and saying "much appreciated!". She did not ask for the outcome to be hastened.

zzz. On 15 December, Mr Simms explained to the claimant that he still did not have all the advice he needed and would not be able to provide the outcome before Christmas, but would resolve it as soon as he could. The claimant acknowledged his email and expressed no concern.

aaaa. On 16 January 2017, Mr Simms gave the claimant an update, explaining the current situation, and hoping there would be an outcome "*end of January/beginning of February*".

bbbb. A grievance outcome having not yet been sent to her, on 5 February 2017 the claimant emailed Mr Simms to ask about progress, requesting an outcome by Friday 10 February. Mr Sims replied, hoping to get a response to her by 10 February. However, on 9 February he let the claimant know that he was being given a further report, apologising for further delay but hoping to complete the grievance outcome by the end of the following week. The report in question was emailed to Mr Simms on Saturday 11 February.

cccc. Meanwhile, on 13 February 2017 the claimant commenced ACAS early conciliation, with a view to presenting an equal pay claim in the Employment Tribunal (an early conciliation certificate was issued on 13 March 2017). It is not clear to the tribunal why the claimant chose to commence early conciliation before she knew the outcome of her grievance, but the claimant did explain that she believed that she was under a time constraint to commence the litigation steps.

dddd. On 5 March 2017, Mr Simms email the claimant to give her an update, explaining that he had had all he needed and would provide a response that week; he wanted to meet with the claimant if possible, to discuss the outcome and the way forward. He apologised for this taking longer than he had first thought, explaining "*but it has been a really complex and challenging issue*".

eeee. The tribunal has some sympathy with Mr Simms in his assessment of the grievance and in his extended attempts to try to resolve this matter. The grievance had been expressed as an equal pay argument, rather than in terms which a manager could be expected to address with greater confidence, and it is unsurprising that Mr Simms found it to be complex and challenging.

ffff. The claimant replied, confirming that she would be happy to meet, and ending her email, "*I appreciate this is a complex and challenging issue… But it has dragged on several years prior to your involvement, so a resolution would be much appreciated*!" She did not express any concern that he had not yet sent her the grievance outcome.

gggg. On 10 March 2017, Mr Simms provided a written grievance outcome to the claimant.

hhhh. The tribunal has carefully considered the contents of the grievance outcome letter. In summary, Mr Simms explained that he had considered these matters and taken advice and had concluded that the claimant's role had been properly job evaluated. He referred to the legal framework for equal pay claims, and that the claimant was asserting she was undertaking like work to male grey book comparators. His view was that the comparators relied upon were not valid. But that in any event the pay differential was very small, once one took into account the fact that grey book staff were required to

work a 42-hour week, rather than 37. The current difference in the hourly rate of pay was just 10p. The reason for the difference in pay was that the claimant and her comparators were subject to different nationally agreed terms and conditions, with additional requirements on grey book staff. Any inequality in pay was not gender related. He referred to the HOST staff, whom he stated were undertaking "*very different roles to you… The fact that there may not be a difference in pay between HoST members does not create an equal pay claim for you*."

iiii. Mr Simms concluded that he was unable to uphold the claimant's equal pay complaints, because he had not found that there was a gender-related equal pay issue. The tribunal considers that his analysis of the issues is a fair one, and that his conclusion was, and remains, justifiable. Indeed, the tribunal has also found that the equal pay claim should not succeed.

jjjj. Mr Simms might have left matters there, but he did not. Rather, he made it very clear that he had sympathy for the claimant, because she saw herself as performing a similar role to grey book equivalents. While the equal pay argument did not succeed, "*this does not help with the Service's aim to create a fair and inclusive culture*." He explained that he wished to review this issue further with the senior management team, and ended, "*I would very much like to ensure that you play a part in this process and will talk to you further about this after I have liaised further with the senior management team*."

kkkk. The tribunal would observe that the practical effect of Mr Simms' decision was that he rejected the legal basis for any argument that the claimant was entitled to equal pay, but made it entirely clear that in the interests of fairness he would take practical steps to try and resolve matters, and wanted the claimant to be part of that process. Any reasonable employee would understand that there would be grounds for cautious optimism for finding a way to mutually resolve pay issues in future, and that the grievance officer was plainly sympathetic to the claimant's situation.

llll. The claimant was reminded that she had a right of appeal.

mmmm. On 13 March 2017 ACAS issued the claimant with her early conciliation certificate, so that she could now proceed with her equal pay claim in the Employment Tribunal.

nnnn. The claimant stated on 16 March that she was appealing, to ensure that she met the specified timescale, but was told that in any event the seven days could be extended until after she met Mr Simms.

oooo. An informal meeting went ahead between the claimant and Mr Simms on 21 March 2017. Afterwards, the claimant emailed Mr Simms, thanking him for meeting her, and showing her appreciation for his giving up his time to talk to her. She stated that she disagreed with his outcome on equal pay and explained that her ideal outcome, "*is for this to be resolved without further conflict through an equal pay award, recognising the role I performed the organisation as being equal*."

pppp. On 3 April 2017, Mr Simms emailed the claimant to explain that he had passed the appeal on to the HR team, and that a senior manager would be in touch with her in due course. She was invited to get in touch with him if she needed anything else.

qqqq. Rather than make enquiries as to the progress of the appeal, and who might hear it (and when), and without waiting to be contacted further, on 10 April 2017 the claimant resigned by email, announcing that she would in any event be on leave for the next two weeks. This was just under a month after the date on the claimant's ACAS Early Conciliation certificate.

rrrr. The actual resignation was by way of a short email at 1220 on 10 April 2017. Shortly afterwards, the claimant forwarded the email to Mr Simms, with an explanation.

ssss. The claimant pointed out in her resignation email that it was over three weeks since she had appealed, and she did not yet have an appeal hearing date; this was outside the specified timescale. She would however give notice to enable the respondent to resolve the situation. The claimant stated:

> "As you know, the clock is ticking on the tribunal certificate, and therefore my trust and confidence in the service trying to resolve this before it reaches that stage has diminished."

tttt. The tribunal would observe that the claimant's oral evidence reinforced the impression that her understanding was that she had to resign at this stage, or that she would be out of time for bringing a claim in the employment tribunal. This was, of course, a misunderstanding, but the tribunal draws the strong inference that would have triggered the claimant's rather surprising decision to resign at this point, without waiting for the appeal to be heard. The decision to resign at this stage was all the more surprising in light of the final comments by Mr Simms, encouraging the claimant to work with him in trying to resolve this matter with the senior management team. The tribunal has agreed with Mr Simms that it was right to refuse to treat the claimant as being entitled, as a matter of law, to be paid the same as her grey book comparators. That was the way that the claimant had framed her grievance, and his conclusion on that

matter was justified. However, the claimant must clearly have understood that notwithstanding the position under the Equality Act, Mr Simms had opened the door to finding a way to address the claimant's concerns and increase her remuneration package.

uuuu. The tribunal considers that it would have benefited the claimant, had she viewed the grievance process as a mechanism to resolve her concern that she was underpaid, rather than as the precursor to litigation based on equality legislation, with a premature resignation.

vvvv. The claimant's resignation email went on to explain:

- "I believe I am treated unfairly due to the pay and conditions afforded to the other CSDMs
- The grievance has been protracted in the conduct of the service has been outside of its own policies and procedures-therefore in breach of contract
- I will be claiming constructive dismissal due to the breakdown of trust and confidence in the service to resolve these issues"

The initial ACAC Early Conciliation certificate had, as referred to above, been issued on 13 March 2017, and that was the certificate relied upon in the claimant's Employment tribunal claim. However, on 10 April 2017, the date of the claimant's resignation, she also commenced ACAS Early Conciliation for the second time. A certificate was subsequently issued (but not used in these proceedings) on 10 May 2017.

wwww. The grievance appeal was assigned to Ms Shantha Dickinson (Assistant Chief Officer), assisted by Sarah Strathearn, HR adviser. The tribunal accepts that Ms Dickinson was ready to approach the appeal with an open mind, and to engage with the claimant's concerns. At the time of the claimant's resignation, however, it had not been decided who would hear the appeal. Strictly speaking, the subsequent events have no bearing on the case, at least in respect of the constructive dismissal, but a summary of subsequent events provides relevant background.

xxxx. Both the claimant and Ms Dickinson had been on leave, and after her return from leave Ms Dickinson prepared for the appeal hearing. On 26 April 2017, she wrote to the claimant to formally invite her to an appeal meeting the following day.

yyyy. At the appeal meeting, the claimant raised the issue of the changes to HOST staff terms and conditions, which she believed had set a precedent which should apply across the organisation. The claimant stated that the outcome she sought was to be paid the same as a grey book CSDM and to receive backdated pay.

zzzz. Ms Dickinson did not believe that there was any basis to overturn the grievance decision on the equal pay case, but agreed with Mr Simms that it was important to try and resolve this matter. She noted that it had been determined that the hourly difference in pay was only 10p, and although the claimant had resigned, she hoped that she could persuade the claimant to remain with the service. Ms Dickinson wanted to offer the claimant the opportunity of carrying out firefighting training and transferring to grey book terms and conditions; the Chief Fire Officer was supportive of exploring this proposal.

aaaaa. Ms Dickinson confirmed on 5 May 2017 that she had concluded her investigation and made arrangements to meet with the claimant. She made an initial draft of the outcome letter, but wanted to meet with the claimant before finalising her decision.

bbbbb. The claimant and Ms Dickinson met on 12 May 2017 (two days after the date of the claimant's second ACAS Early Conciliation certificate). Ms Dickinson explained that she was trying to resolve the situation, and that the respondent wished to retain the claimant's services. She explained that if the claimant trained in firefighting she would be able to go on the station manager rate, albeit at the developmental rate until successful completion of all the requirements to become competent, and could after that go fully onto grey book terms and conditions including working hours and annual leave. Some matters would, however, need to be resolved as they went on. Ms Dickinson indicated that she would be prepared to look at some form of ex-gratia payment as part of the implementation of this. She explained that, as per Mr Simms's suggestion, if the claimant stayed with the service she could be involved in the process of following it up.

ccccc. The claimant was angry and said she wanted to seek legal advice.

ddddd. On 15 May 2017 Ms Dickinson emailed the claimant to summarise this possible solution, inviting the claimant to a further meeting and asking her to confirm whether she would be interested in exploring this possible solution further. They met on 23 May, and the claimant made it clear that she did not wish to take it further forwards.

eeeee. The claimant having rejected this possible avenue for resolving her grievance, Ms Dickinson sent her a grievance appeal outcome on 26 May 2017.

fffff. Ms Dickinson upheld the original grievance decision, concluding that the difference in pay and conditions were due to the difference between green and grey book terms, which did not engage equal pay issues. She recognised that the claimant's core CSDM duties were largely the same. She recognised that the different terms had been

addressed at HOST level, but the situation was different from the claimant's level of management. She explained that the claimant had not wished to pursue being employed on grey book terms and conditions. Although the grievance, as submitted, was not upheld, important issues had been raised which Ms Dickinson had hoped to address. A second appeal hearing might be considered.

ggggg. On 2 June 2017, the claimant emailed Ms Dickinson to complain about the conduct of the appeal meeting, but confirmed that she did not want a grey book contract if it was conditional upon her becoming operational.

hhhhh. The claimant's employment ended on 9 June 2017.

iiiii. On 15 August 2017 the claimant presented an Employment Tribunal claim.

Differences in pay and conditions

140. This was a liability hearing only. The list of issues did not refer to the remedy for the equal pay claim save in the most general terms (paragraph 11).

141. Although an important factor in the equal pay claim (and hence also the constructive dismissal) was the actual difference in pay at various stages, the list of issues did not set out the parties' precise positions in respect of the actual differences in pay between the claimant and her comparators, at various stages, save that (in general terms) those were based on the differences between entitlements in the claimant's green book contract, and the comparators' grey book contracts. At paragraph 6 of the list of issues, this is expressed as "can the claimant show that the terms of her contract in relation to her pay and/or entitlement to annual leave were less favourable than the corresponding terms of her comparator". However, this paragraph also contains a note that "by its counter-schedule the respondent accepts that there was a difference in pay and annual leave entitlement at any rate in respect of the OM/CSDM role." Those differences were not referred to in the list of issues. In respect of the material factor defence, the list of issues (at paragraph 10) refers to whether the material factor is accounted for all the differences in pay, and "if not, for what proportion of the difference in pay did it account?".

142. In his opening written submissions on behalf of the claimant, Mr Matovu referred to the "CPD payments" given to grey book employees for maintaining operational competency, albeit it was made clear that the additional pay received by Mr Turner under the retained duty system contract was not relied upon. In his closing written submissions, Mr Matovu did not elaborate upon the specifics of differences in pay, although repeated some of the general points at paragraph 10.

143. In oral submissions, Mr Matovu concentrated on other matters in the claimant's case, rather than the actual differences in pay and conditions.

144. Mr Dracass's opening note again concentrated on the distinction between the green book and the grey book, rather than the detail of differences in pay and conditions. He did, however, confirm that the undisputed evidential position in respect of working hours per week was that the grey book contracts provided for a basic 42 hours per week, compared to the claimant's 37 hours per week, the underlying theoretical basis of this being that grey book staff could be called upon to work during the lunch break. At paragraph 29, he referred to the counter schedule of loss, and stated that the respondent "does not accept the disparity was actually as extensive as the claimant appears to be claiming". [*It should be noted that the claimant did not in fact refer to the extent of any disparity in closing submissions*]. He submitted, albeit without providing precise examples, that if one took into account the differences in working hours per week, there were some periods when the differences in pay was "almost negligible". He pointed out that the scale of the difference may be relevant to the material factor defence. In respect of remedy (paragraph 48 of the opening submissions), reference is made to a dispute between the parties of the level of salary arrears payable. In written closing submissions, the main thrust of the submissions did not deal with the precise differences in pay, and no further arguments in respect of this was set out.

145. In oral closing submissions, Mr Dracass, like Mr Matovu, concentrated on other matters.

146. The claimant produced a schedule of loss dated 19.11.20, and the respondent a counter-schedule, commenting on the schedule of loss, dated 19.11.20. The claimant also produced an updated (but similar) schedule of loss dated 30.11.20, with a lower sum for arrears of pay, but a higher sum for arrears of pension contributions.

147. The figures in the claimant's schedule of loss do not refer to the CPD payments, and are not always easy to follow, also using unexplained abbreviations

148. The summary figures relied upon by each party, covering the totality of the period to which the equal pay claim relates, are as follows. The respondent does not, of course, admit breach of the equality clause, but does appear to accept, at least in broad terms, the figures used by the claimant. The respondent argues, however, that the figures should be based on the hourly rates, taking into account the fact that the claimant had lower contracted hours per week:

    a. Gross salary arrears said by the claimant to be due, covering the period 12 December 2011 to 9 June 2017: £24,203.00.

b. Gross difference in salary calculated by the respondent over the same period: £4,539.78.

c. Gross arrears of holiday pay said by the claimant to be due during the period: £2,642.

d. Gross difference in entitlement to holiday pay calculated by the respondent over the same period: £2, 250.

e. Arrears of employer's pension contribution said by the claimant to be payable relating to the same period: £4,624.

f. Additional employer's pension contribution payable if claim succeeds, calculated by the respondent: £1,077.26.

149. The period covered by the equal pay claim, as indicated above, is 12 December 2011 to 9 June 2017, a period of some five-and-a-half years. The claimed difference in wages (before adding on consequential holiday pay and pension contributions), is, taken at it its very highest, some £4,400 (gross) per annum or some £367 (gross) per month. The claimant's gross salary at the start of the period was £22,221 (gross) per annum, and by the end of the period had risen to £37,306.

150. On the basis of the respondent's calculation (based on the pro-rata calculation taking into account the longer contractual working week for grey book employees), the difference in wages would equate to some £825 per annum, or just £69 per month.

151. Further comment on these figures will be made in the tribunal's conclusions.

152. In respect of the changing position over time, the following figures, provided by the claimant, would not appear to be in dispute (at least not in any significant way). This factual summary should be read in conjunction with the overall narrative findings of fact, above. The tribunal therefore makes the following findings of fact on a balance of probabilities.

a. At the start of the period, when the claimant became a BSO on 12 December 2011, her salary was £22,221, compared to her comparator's (Mr Gavin Ison's) salary of £29,971.

b. The claimant's annual leave entitlement was 24 days; her comparator's was 27 days, a difference of 3 days per annum. This remained the position until 16 June 2014.

c. The claimant's salary rose to £22,958 on 1 April 2012, and on 1 July 2012 her comparator's salary rose to £30,271. This remained the position until the end of this initial period on 15 October 2012.

d. When the claimant became an FSO on 15 October 2012, her salary initially remained at the same level (£22,958), and her comparator's (Mr Justin Turner's) salary was £32,259.

e. On 1 March 2013 the claimant's salary rose to £26,539, and her comparator's to £35,311.

f. The claimant's salary rose to £27,323 on 1 April 2013, and on 1 July 2013 her comparator's salary rose to £35,664.

g. The claimant's salary rose to £28,127 on 1 April 2014.

h. When the claimant became an OM/CDSM on 16 June 2014, her salary was raised to £31,160, and her comparator's salary was initially £37,096, and then rose to £37,467 a few days later, on 1 July 2014.

i. The claimant's annual leave entitlement rose to 25 days on 16 June 2014, and her comparator's 31 days. This remained the position until 1 January 2016, when the claimant's leave entitlement rose to 29 days, and her comparator's was 34 days.

j. As for salary, in this final period of time until the claimant's resignation, income for her and her comparator continued to rise in line with green and grey book annual increments/annual increase on 1 April and 1 July each year, and an additional increase for the claimant on 1 January 2016 when her Grade K Spine 38 development programme was completed. The details are as follows:

    i. On 1 April 2015, the claimant's income rose to £32,778.

    ii. On 1 July 2015, her comparator's income rose to £37,842.

    iii. On 1 January 2016, the claimant's income rose to £36,571, and her comparator's to £41,737.

    iv. On 1 April 2016, the claimant's income rose to £36,937.

    v. On 1 July 2016, her comparator's income rose to £42,154.

    vi. On 1 April 2017, the claimant's income rose to £37,306.

k. On 9 June 2017, the claimant's employment ended.

153. It should be noted that these figures do not include any extra allowances or payments that the Grey Book comparators might have been entitled to, which are not relied upon for the purposes of the differences in income.

The tribunal's conclusions - liability

General comments on conclusions

154. These conclusions relate solely to the question of liability. As the tribunal did not find the claimant's favour, questions of remedy do not need to be addressed, albeit the tribunal repeat its concerns that the claimant appears to have had an unrealistically high expectation of what she might receive in compensation, even if she succeeded on all liability points, including a sizable claim for injury to feelings, which did appear to be arguable.

155. The Tribunal also notes that there was some lack of clarity in what use the claimant wished to make of certain additional allowances, which do not appear to be part of her equal pay claim in the sense of the calculation of the differences in contractual wages. Rather, this appears to be evidence relied upon supporting the claimant's contention that the alleged differences in the work of grey book employees were more apparent than real. If in fact these figures were incorporated in those relied upon in the schedule of loss, this has not been made plain. The overall figures are, of course, relevant to the question of what the differences were, and to the respondent's material factor defence, and the question of proportionality when it came to any indirect discrimination.

156. In any event, it would appear, as referred to above, that the calculation in the differences of pay is broadly agreed in mathematical terms. The main difference between the parties as to what those differences actually were, relates to the approach taken to the contractual weekly working hours. As set out above, this makes a material difference to the financial value of the claim, and therefore to the size of the disparity between the claimant's income and her comparators. On the one hand, this area can be looked at in the round, as part of the material differences in pay and conditions of service, but on a more analytical approach there is something of a gap in the claimant's arguments. The claimant argues that all the differences are discriminatory in some way, without differentiating between different aspects of those differences. If, for example, the tribunal had been minded to conclude that the material factor defence clearly succeeded in respect of the difference between a 37 or 42 hour working week (with pay calculated accordingly), but was less strong in respect of the differences in hourly rate of pay, the practical effects of that conclusion would be that the equal pay claim would be based on a much smaller material difference material difference in wages. This point is considered further below.

157. In fairness to both parties, the tribunal would wish to put a number of points on record. Although plainly emotions were running high, and the claimant's plainly felt a strong sense of grievance and unfairness, both as to the position she was in whilst employed, and in the conduct of litigation, this seems at times to have inhibited her from taking a more balanced view as to what was in reality happening. It is unfortunate that she chose

to resign and to resort to litigation, before her grievance process was exhausted, and when it should have been clean to her that both the grievance officer and the appeal officer were sympathetic to her case and were trying to find ways of working constructively with her to seek a mutually agreed way ahead. Although there were issues which needed to be addressed, it certainly does not automatically follow that the claimant must therefore have a good case under the relevant legislation.

158. That said, although aspects of the claimant's claim were somewhat exaggerated, the tribunal also recognises that the claimant has raised legitimate points. As a woman working within a predominantly male environment, with terms and conditions set nationally, albeit some scope for local variation, the tribunal readily understands why the claimant would have felt frustrated that there appeared to be institutional resistance to giving her the remuneration package which she felt she deserved. Although the decision of the tribunal is unanimous, this is by no means an open-and-shut case, and the tribunal discussed the claimant's case at some considerable length before reaching those unanimous conclusions.

159. Similarly, it may well be that the nationally agreed terms and conditions are something of a blunt instrument for dealing with local circumstances, which was reflected in the respondent's attempts to bring senior management (above the claimant's level, but below the "gold book" level) onto the same conditions of service at the HOST level. Although the claimant not unreasonably felt that if an exception could be made for more senior employees, it might also have been made at her lower level, the tribunal accepted the respondent's evidence that in fact this experiment was highly problematical and simply did not work effectively. After the experiment, management reverted to the previous model. Indeed, the sensible and thoughtful evidence from Ms Dickinson, who had been an inadvertent beneficiary of this experiment, before she was promoted on merit to Assistant Chief Officer (on gold book terms), was plainly herself uneasy with the package she had received. She confirmed that there was now nobody subject to these arrangements. The position remains that below Chief Officer/Assistant Chief Officer level, all employees remain either on green book terms, or on grey book terms.

160. There was also recognition by the respondent witnesses that the nationally agreed scheme may very well be due for reform.

161. The tribunal heard how any movement to review national green and grey book agreements was slow, and it would not be unreasonable to conclude that the Fire Brigades Union would strongly resist any suggestion of what they might see as eroding firefighters' terms and conditions. and treating firefighter as if they were "normal" local authority employees. It may well be that the claimant has identified flaws in the system, which might sensibly be addressed. And, again, the tribunal has sympathy with the claimant's position.

162. It does not, however, follow that the existing system applied by the respondent therefore falls foul of the equal pay provisions of the Equality Act, nor that it was tainted by discrimination. Neither does it follow that the claimant was justified in treating herself as being constructively dismissed.

163. It is also absolutely plain that the claimant was respected by colleagues and superiors as a highly effective employee, with good potential. That remained the case throughout, and was evidently still the case when she chose to resign. It was reflected in the proposal that she could cross train, at a senior level, and become an effective operational firefighter.

164. Indeed, one of the factors in this case is clearly that the claimant's professional skills enabled the respondent to experiment in giving her greater responsibility than would usually be the case for a green book employee, putting her in roles where there was little or no track record of green book employees. There was not, therefore, any clear model to follow. In those circumstances it is perhaps unsurprising that there was a degree of uncertainty as to how her terms and conditions of employment should be configured, and what rate of pay she should be on. She was very much a trailblazer. In carrying out these roles she was fully aware throughout, that terms and conditions for grey book operational firefighters were very different from those with local government employee terms and conditions, on green book contracts of employment. Nevertheless, she made it clear that she had no wish to train in firefighting and keep current all the operational skills required of grey book employees. It is evident that she wished to have the same financial package, for carrying out, in her view, the same role, whilst consciously choosing not to take on the necessary additional responsibilities which fell to grey book colleagues. That might include risking her life,. The claimant explained to the tribunal that the commitments would not suit her domestically, but she nevertheless wished to be paid the same as grey book colleagues who were ready to carry out other roles, where and when required.

165. The claimant had evidently reached the conclusion that any differences in pay must be discriminatory, because from her perspective she carried out same role on a day-to-day basis. Whilst, at the same time, she turning a blind eye to the telescope when that telescope focused on other significant differences in contractual liabilities, which were less attractive to her.

166. In any event, the tribunal's conclusions are set out below in respect to the equal pay claim, and the constructive dismissal. The tribunal has not made findings of fact, nor reach conclusions, upon every issue raised by the parties, but only upon those matters which appear to be material to deciding the case. If anything relevant has inadvertently been missed from these written reasons, the tribunal nevertheless confirms that it has taken account of all issues raised. The tribunal has considered all the matters raised by the parties, and has also considered the evidence in the round. Although it is necessary to set out conclusions in a sequential format,

applying the relevant law to acts of the case, the conclusions should be read as an organic whole.

167. Both parties having confirmed that the list of issues correctly set out the matters to be determined is, the tribunal has concentrated upon dealing with matters, albeit this does not prevent the tribunal from making necessary findings of fact or considering the law on relevant matters which the parties did not include in the list of issues.

168. The structure below broadly follows that of the list of issues, even though, the tribunal has in some areas slightly varied the approach.

169. A summary of the tribunal's conclusions is set out at the start of these written reasons.

Conclusions as to the equal pay claim

170. The claim having been more as "like work" under section 65(1)(a) of the Equality Act, the tribunal's first task is twofold: to determine whether the comparators are appropriate (referred to in the list of issues as "did the claimant and her comparator work in the same establishment?"). And whether the claimant was carrying out work like that of her comparators during the three main periods in contention. The grey book comparator for the Compliance Officer/Business Support Officer ("BSO"), 12 December 2011 to 14 October 2012, was Mr Gavin Ison. The comparator was Mr Justin Turner for both of the subsequent periods: inspecting Officer/Fire safety Officer ("FSO"), 15 October 2012 to 15 June 2014, and office manager/community safety delivery manager ("0M/CSDM"), 16 June 2014 two 9 June 2017.

Did the claimant and her comparator work in the same establishment?

171. In respect of the appropriateness of the comparators, clearly both are male, and plainly not wholly inappropriate (see below for the analysis of "like work"), but a remaining issue relates to the establishments in which worked (section 79(3) of the Equality Act). Whilst the respondent did not formally concede the point, it was accepted that it was likely that the claimant would be able to succeed on this argument, relying in any event on the "common terms" provisions set out at section 79(4).

172. In the circumstances, the tribunal considers that only a brief analysis is required, in circumstances where the main underlying issue is a nationally agreed set of common terms set out in the grey and green book, and it is plain that within Hampshire, staff would be moved around and the roles they would carry out at different locations would be on standard terms. The tribunal had no hesitation in coming quickly to the conclusion that the comparators were entirely appropriate, and the geographical location from which they carried out their role at any given period is not material to the equal pay claim. In fact, as it turned out, the Supreme Court judgment in

Asda Stores Ltd v Brierley and others [2021] UKSC 10 is entirely consistent with this conclusion.

173. As Mr Matovu points out, it is not in dispute that the claimant and her comparators were all employed by the same employer and within the same department (Community Safety Protection), and for some periods in the same location, and the common terms conditions applied generally. The tribunal agrees with Mr Matovu, having had regard to the EHRC Code of Practice on Equal Pay (2011) paragraphs 51 to 57, that it is uncontroversial that the comparators relied upon by the claimant should be studied appropriate.

Was the claimant employed in "like work"?

174. The next substantive issue, linked to the appropriateness of the comparators, is whether those comparators were employed on "like work". Here, the respondent's case was originally put with more firmness: the comparators were not employed on like work, and the case must therefore fail for that reason, without going on consider the "material factor" defence. This is reflected in the list of issues for the tribunal to determine, and the tribunal was not invited to depart from that list of issues in considering the case. To the extent that the respondent conceded the "like work" point, the evidence and arguments are still highly relevant to the "material factor" defence which is unequivocally relied upon in its entirety. It is in any event helpful to go through the like work arguments, in the structure set out in the list of issues.

175. Section 65(2) and (3) provides as follows:

> (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.

176. As the ECJ held in *Brunnhofer v Bank Der Osterreichisechen Postparkasse [2001] IRLR 571*, in order to determine whether employees perform the same work or work of equal value it is necessary to ascertain whether, when the number of factors are taking to account, such as the nature of the activities actually entrusted to each of the employee is in question, the training requirements for carrying them out in the working conditions in which the activities are actually carried out, those persons are in fact performing the same work, or comparable work.

177. The tribunal has been referred to other case law, but it is not necessary to summarise all the cases raised by the parties. The tribunal has, however, taken them into account. If has also had regard to the contents of the EHRC Code of Practice on Equal Pay (2011), especially paragraph 37, which reminds the tribunal of the need for a detailed examination of the nature and extent of the differences, and how often they arise in practice. The tribunal notes that a contractual requirement is not sufficient.

178. In defending the claim, there is a considerable evidential overlap between what the respondent relies upon in terms of "like work" and the material factor defence. This is a permissible approach, but the tribunal remains itself that tests are different. Indeed, both parties have made overlapping on the evidence under both heading. The tribunal has considered these points in the round, but has not found it necessary to deal with every matter raise in respect of like work, some of which did not greatly assist the tribunal's analysis. The tribunal would also draw a distinction between matters relating to the effective job description, and how the work was actually carried out on a day-to-day basis, and differences in terms and conditions service which, for the vast majority of period in question, had somewhat less impacts on the working day.

179. In respect of the period when the claimant carried out the **BSO role**, Mr Matovu sensibly points out that this was a newly created trial role, and that both the claimant and Mr Ison were recruited from other functions to carry out what was essentially the same role, starting on the same date after attending induction together, and (at least initially) working together. The tribunal also agrees that the two job descriptions were virtually identical. No specific operational experience was required. Although the tribunal has had regard to all the detailed argument made by the parties, it would observe that a common-sense starting point is that the day-to-day work looks remarkably similar.

180. The Tribunal notes that the claimant commenced this role as a temporary secondment from her existing substantive post, and that it was a term contract, albeit Mr Ison remained on his existing contracts. The tribunal finds, however, that that has little impacts on whether the work carried out during the relevant period was like work or not. The respondent accepts that the day-to-day tasks and once abilities were the same or certainly broadly similar. The principal dispute relates to specified differences set out at paragraph 3(b) of the list of issues, and whether any such differences were of practical importance in relation to the terms of the claimant and Mr Ison's work.

181. Mr Dracass correctly points out that, unlike the claimant, Mr Ison was required under his Grey book terms and conditions to provide operational firefighting and control cover, and/or be redeployed operationally in accordance the demands of the service. The tribunal recognises that that a significant difference in the terms and conditions of the claimant (on green book terms) and her comparator (grey book terms). Similarly, he

was required to maintain his operational skills and fitness, and regularly undertook relevant training (including establishing his operational competencies) during the period.

182. The tribunal also recognises (and this is a potentially significant point) that Mr Ison on was required from time to time to be on call as an "AFA first responder". The tribunal accepts that the claimant was not qualified to carry out this role, and as a responder, had she attended the scene of a fire alarm discovered that there was a real fire, would not been qualified carry out first steps. Mr Ison was called out on two occasions during the period. Mr Ison on was paid on the basis of 42 hours per week, which effectively meant that he could be on call during his lunch hour and available for operational duties as required.

183. The tribunal also recognises that there might have been other emergencies or exigencies of the service which could have caused Mr Ison to be called away, or redeployed at short notice, albeit this did not in fact happen.

184. Overall, without wishing to downplay the potential significance of differences in terms and conditions of service, the tribunal has focused very much on the work actually carried out during the period in question, as proposed by the EHRC Code of Practice and ***Brunnhofer***. The tribunal has had little hesitation in coming to the conclusion that during this initial period, the claimant and her comparator were indeed employed on like work. There were some differences in the activities actually carried out during the period, but the vast majority of the work was essentially the same. That does not, of course, mean that the underlying differences in the contracts cannot be relied upon for the material factor defence.

185. In respect of the period when the claimant carried out the **FSO role**, and then the **OM/CSDM roles**, some broadly similar issues arise, when the claimant's work is compared to that of Mr Turner. Again, as Mr Matovu points out, the day-to-day role was non-operational and predominantly office-based, and "*the claimant was basically performing the same job in carrying out the same duties as her comparator*". For part of the period the as FSO the claimant worked at the same location as Mr Turner, with no difference in the job description. The same fire safety training was provided for the job, albeit Mr Turner was additionally required to maintain fitness levels and firefighting operational competencies generally.

186. When the claimant moved from the FSO to the OM/CSDM role, both she and Mr Turner were interviewed as part of the same selection process, and started on the same date (16 June 2014) carrying out the same day-to-day role. Both were referred to as "temporary station managers", and the claimant's job evaluation questionnaires, approved by her line manager, confirmed that it was the same role. Again, the claimant's personal green book contract of employment was significantly different from Mr Turner's grey book contract. As well as Mr Turner being required

to maintain operational competency, he needed to remain available for other duties (albeit some additional responsibilities under the flexible duty system carried additional remuneration, and neither party relies upon this in respect of the equal pay claim). As it was, although Mr Turner was available for redeployment or other operational duties at short notice, in the event he was not required to carry out such duties. For example, during flooding in the Winchester area, when many grey book colleagues were required to carry out operational roles in the field to deal with the flooding, Mr Turner was not required to assist. However, the tribunal accepted his explanation, that he was ready and able to respond, had he received the call. Furthermore, had he still been based in Winchester at the time, the tribunal accepts that it was extremely likely that he would have been redeployed at short notice to deal with the flooding, instead of carrying out his day job. Like Mr Ison, Mr Turner also participated in the AFA trial, in addition to his job description duties, and as a grey book manager was also required to assist with a disciplinary investigation and process during the relevant period; on a green book contract, the claimant was required to do neither.

187. As with the initial BSO period, where Mr Ison on is the comparator, the latter two periods with Mr Turner as a comparator share the principal central themes: the job description that went with the principal role was identical for all practical purposes, with the same training/induction and day-to-day duties. Whilst both male comparators had additional duties/requirements/on call/availability for redeployment, in reality these had very little impact on the day job.

188. As set out above, the tribunal accepts that it is required to focus upon the particular work done by the claimant and her comparators in the roles they were actually performing at the material time. It accepts that the focus should also be upon the work carried out under the relevant job descriptions. Taking a broad view, it is tolerably clear that there were few if any differences in the principal day-to-day roles carried out, as had been the case during the initial period relied upon.

189. The tribunal agrees with Mr Matovu that the additional responsibilities reflected in the grey book contracts of the claimant's comparators did not, during the period in question, greatly impinge upon the day-to-day activities which were also carried out by the claimant. The tribunal considers that at this point in the analysis is different from that required in considering the respondent's material factor defence.

190. The tribunal has come to the clear conclusion that for the whole of the period in question, the claimant was doing like work with that of her comparators. The tribunal is satisfied that at the material time the work of the claimant and both of her comparators was the same or broadly similar. In reality, the "broadly similar" test is comfortably met. Such differences as there were between their work were not of practical importance in relation to the terms of their work. Although the claimant's grey book colleagues

were required to remain operationally trained, and liable and ready to carry out additional or alternative duties (possibly at a distant location), the reality was that during the specific period covered by the claim, the additional responsibilities turned out not to be particularly onerous, and were comparatively infrequent. Although this does not prevent the same matters being relied upon by the respondent for the material factor defence, the tribunal is satisfied that the claimant was engaged in equal work for the purposes of section 65 of the Equality Act 2010.

Were there differences in pay and annual leave entitlement?

191. The tribunal having accepted the claimant's work was like work to that of her comparators, the next issue is whether the claimant can show that the terms of her contract in relation to her pay and/or entitlement to annual leave were less favourable than the corresponding terms of her comparator, so as to engage the sex equality clause modification provisions under section 66 of the Act.

192. In this case, the respondent accepted, in the list of issues, that "there was a difference in pay and annual leave entitlement at any rate in respect of the OM/CSDM role". In Mr Dracass's opening note, the respondent went further and accepted that "broadly speaking, the terms of the claimant's contract in relation to pay and annual leave entitlement were less favourable than that of her grey book comparators".

193. On the basis of the above concessions, the tribunal considers that the claimant has indeed established differences sufficient to engage the Act.

194. It remains the position, however, that there is some dispute as to the nature, extent and reasons for the differences. Whilst the tribunal does not consider that this impacts on the hurdle of establishing that there was a material difference in pay and conditions, it is relevant overall to the question of the material factor defence and the question of whether the material factor is tainted by sex. Further comment would be appropriate.

195. The evidential position is considered above at paragraph 140 onwards, under the heading "differences in pay and conditions".

196. Throughout the period relied upon for the equal pay claim, green book employees (including the claimant) had a contract for a 37-hour working week, and were paid accordingly. Grey book employees (including the comparators) had a contract for 42-hour working week, and were paid accordingly. No explanation for the difference in working hours has been put forward, other than that these were the nationally agreed terms, and the argument that grey book employees might be called upon to carry out duties during what would otherwise have been the lunch hour. The comparators were therefore paid for five additional working hours per week, but would not necessarily be required upon to carry out actual work during those additional hours.

197. Throughout the period relied upon for the equal pay claim, the comparators were entitled to a few more days annual leave than the claimant, as a result of the more generous annual leave arrangements for grey book employees (see above).

198. Throughout the period relied upon for the equal pay claim, whilst carrying out like work, the comparators were on a higher annual wage, albeit the differences changed over time, including the fact that green and grey book employees received their pay awards on different dates. This is summarised above, and as set out there, the overall average differences in pay (before adding on consequential holiday pay and pension contributions), is as follows:

    a. On the claimant's case, taken at it its highest, some £4,400 (gross) per annum or some £367 (gross) per month.

    b. On the respondent's case (based on the pro-rata calculation taking into account the 47-hour contractual working week for grey book employees), the difference in wages would equate to some £825 per annum, or just £69 per month.

Material factor defence

199. The respondent must therefore rely on the "material factor" defence, under section 69 of the Act, as set out below. Particularly relevant here are sections 69(4), 69(1) and (2). The issue of sex discrimination is dealt with in the next section.

69 Defence of material factor

(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.

(4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.

(5) "Relevant matter" has the meaning given in section 67.

(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.

200. It is therefore for the respondent to show that the difference in pay or other contractual terms was due to a material factor that was not the difference of sex.

201. The tribunal was referred to relevant case law. It has also had regard to the guidance in the EHRC Code of Practice at paragraphs 75 to 90. Both parties referred to *Glasgow City Council v Marshall*, which essentially summarises the approach set out in the Act (and further explained in the Code of Practice). *Marshall* also points out (also relevant to the discussion of sex discrimination, below) that there is a rebuttable presumption of sex discrimination "*once the gender-based comparison sows that a woman, doing like work […] to that of a man, is being paid or treated less favourably than the man.*" The tribunal has also noted that *Marshall* is authority for the proposition that historical pay agreements are capable of beinga material factor, albeit that tribunal would approach this with some caution, as more recent case law has sometimes found that what may have been material at the time may not be so material some years later (albeit, in this case, the nationally agreed grey book terms dated back only to the updated version of 2009, only shortly before the material period started in December 2011.

202. The tribunal was referred to *Waddington v Leicester Council for Voluntary Services*. Although a relatively old EAT case (1977), this remains authority for the proposition that where pay is fixed by widely negotiated wage scales, there would be a strong case for saying that a material fact explanation is present. That is plainly relevant to this case, albeit the tribunal is also alert to the fact that tis would not prevent such a factor from being discriminatory, on the facts of the case. The tribunal has also taken account of other cases it was referred to. It notes that

203. The following initial questions (which replicate the EHRC Code of Practice paragraph 76) are set out at paragraph 7 of the list of issues, in respect of the respondent needing to show "that one or more of the factors on which it relies was:"

(a) The real reason for the difference in pay and not a sham or pretence;

(b) Causative of the difference in pay;

(c) Material, that is a significant and relevant difference between the Claimant's case and that of her comparators; and

(d) Did not involve direct or indirect sex discrimination.

204. Paragraph 8 of the list of issues sets out the specific material factors relied upon by the respondent, which will be considered below. Whilst the tribunal is mindful of the need to take an overall view, and to consider the purpose of the statute and the legal tests in the round, it is nevertheless helpful to structure the analysis below in terms of the material factors set out in the list of issues. For the sake of clarity, the list of issues paragraph numbers are referred to, with analysis of the real reason for the material differences in pay. Reference is also made to sex discrimination, albeit issues of discrimination are further considered under separate headings below.

205. As summarised above, the claimant's case was, in essence, that the respondent could not show that the material factor defence should fail, and that the respondent's decision on the HOST incomes showed that there was no reason why the claimants pay could not have been equalised. The real reason for the disparity in pay was discriminatory, and the factors relied upon by the respondent were not the real reasons, nit causative, and not material. In contrast, the respondent's case was essentially that the difference in pay and conditions between the claimant and her comparators was not tainted by discrimination, and that it was genuinely due to one or more material factors that were not the difference of sex. The respondent suggested that the key factor was 9(a) (see below), and the others stemmed from that.

206. <u>Paragraph 8(a): Differences between the nationally agreed terms and conditions that apply to Grey Book (operational) as opposed to Green Book (non-operational) employees.</u>

207. This is in many ways the heart of the case. The differences were negotiated nationally, and the background is set out in detail at paragraphs 81-138 above.

208. In essence, the respondent's employees were divided into grey book and green book employees, both subject to nationally agreed terms and conditions of service.

209. Green book employees were subject to the national agreement, agreed at the National Joint Council for Local Government Services, who produce the "National Agreement on Pay and Conditions of Service", reflecting agreement between the Local Government Association and the relevant trade unions (GMB, Unite and UNISON). The agreement is aligned to standard local government terms and conditions of service. The overarching terms and conditions set out in the green book terms were reflected in the wording of contracts of employment between green book

employees and the respondent. The Tribunal has already noted that the terms and conditions, including the geographical flexibility clause, are broadly what one would expect for a local authority employee.

210. As for the grey book, this governs the terms and conditions of employees who are variously described as "uniformed" or "operational" or more broadly as "firefighters". The grey book "Scheme of Conditions of Service" is published by the National Joint Council for Local Authority Fire and Rescue Services, made up of the Fire Brigades Union and representative of the various local authorities, with an additional role for the "Middle Managers Negotiating Body" (MMNB) representing Station Managers and above. The grey book covers all roles from firefighter through to Area Manager. It includes various equality provisions, including "fairness and dignity at work" and specifies conditions of service relating to roles, pay and allowances, hours of duty and leave, discipline, appeals and welfare arrangements. The tribunal has noted that the comparators contract of employment reflected the national grey book agreement (updated 2009). The contract also contained requirements for flexible deployment and to move green book employees as required.

211. As the tribunal has recognised (see paragraph 81 onwards, above), as well as the respondent being bound by the national agreements, there are fundamental differences between what operational firefighters can be expected to do, particularly at times of local or national emergency, and what is expected of green book employees. The tribunal has concluded that these are fundamental differences, which might require far more domestic disruption, as indeed the claimant herself appears to have recognise in not pursuing this career option, and ultimately to risk life and limb and potentially a requirement to deal with difficult, dangerous and harrowing public duties. These are important differences.

212. At all times the claimant was on green book contracts and her comparators were on grey book contracts. The tribunal has not been provided with any evidence that in non-operational green book employee at the claimant's level had ever been placed on a grey book contract, as if he or she was an operational firefighter. The only similar example brought to the Tribunal's attention was when the respondent, for a relatively brief period, experimented with moving green book employees to grey book terms and conditions at a more senior grade. Whilst the respondent accepts that it was within their discretion to do that, and to replicated at other levels, the tribunal accepts that this was a one-off decision, which was later reversed, with no suggestion that it was ever replicated.

213. The tribunal considers that the differences between green and grey book employees were causative of all the differences in pay (and other conditions) between the claimant and her comparators, and were plainly the real reason and not a sham or pretence. These were material differences. This reflected not only the presence of a national agreement, agreed between the employing bodies and the relevant trade unions, but

the genuine underlying differences in what an operational firefighter might be required to carry out. It provides an entire explanation for the differences.

214. The tribunal considers that there is nothing obviously or inherently discriminatory about either the nature of the national differences, or the differences in what operational firefighters were expected to do. The question of discrimination is dealt with later in the judgment, but the tribunal has had no hesitation in coming to the conclusion that there was no direct discrimination. The tribunal has also concluded there was no indirect discrimination or discriminatory taint, as discussed below.

215. Paragraph 8(b): Grey Book employees were required to be available for operational work and/ or to respond to/ or be redeployed operationally during emergencies or other major incidents (such as when there was widespread area flooding) while Green book employees were not so required.

216. The tribunal considers that this and most of the other factors are in reality part of the underlying point about the difference between green and grey book employees. These are, however, evidentially relevant matters, although the tribunal's analysis should be read as a whole.

217. On this specific point, even if operational firefighters (when carrying out largely management roles) might go for some considerable time without being called out for operational duties, they remained available as required, and as explained above. Ultimately, the respondent could require grey book employees to carry out operational duties, and to assist with incidents. Although the claimant may assist with supporting operational duties, she had a considerably lesser contractual obligation to do anything other than her day-to-day job.

218. The tribunal agrees with the respondent, that the background to differences between grey and green book employees, is one of the causative and real reasons for the difference in pay and is not a sham or pretence. Similar conclusions apply in respect of sex discrimination, as for paragraph 8 (a).

219. Paragraph 8(c): Grey Book employees were required to be "on call" and at the disposal of the Respondent during lunch breaks and were therefore required to work a 42 hour week and paid on that basis, while Green Book employees were not so required and worked a 37 hour week.

220. The tribunal agrees with the respondent that even if in many cases, grey book employees were not required to give up their lunch break or to remain on call, they were required to be available on call if needed. Even if, in the roles specifically considered in this equal pay claim, call out during the lunch hour was uncommon, it was nevertheless a material factor. The tribunal recognises that one way to deal with this might be to

move grey book employees between different rates of pay depending on what they were contracted to do any given period of time, but it also recognises that this may well be impracticable, and would in any event breach the national agreements as to the terms and conditions of service. Although the claimant did not like this difference, and the tribunal can understand why on any given day the claimant and her comparator might have the same lunchtime arrangements, for which the claimant would not be paid, the tribunal sees nothing objectionable in this requirement (or potential requirement) being linked to a particular difference in pay, namely the greater number of paid working hours per week to account for paid lunch break.

221. The tribunal accepts that this was the real reason difference in the weekly paid working hours, which was plainly causative of a difference in pay and that it is material.

222. Whilst similar conclusions apply in respect of sex discrimination, as for paragraph 8 (a), some additional comment is required here. The tribunal found absolutely nothing in this point that was in any way related to the claimant's sex. Quite plainly the different weekly working hours were based on the different contractual provisions, not the fact that the claimant was a woman, and these were generic contractual provisions for grey book/Green book employees. The fact that the claimant herself has referred to examples when her comparators were required to be on call at lunchtime, even if she complains that this was infrequent, or if on call they probably would not be called out, does in fact support the respondent's argument. There is no arguable case at all that this would be direct discrimination, and as further discussed below, the tribunal has rejected any case that this was either indirect discrimination or in some other way tainted by discrimination.

223. The tribunal considers that the disparity between 37 hour and 42 hour working weeks, one of the claimant's main bones of contention, and the explanation for the majority of the difference in monthly pay, was simply not discriminatory.

224. <u>Paragraph 8(d): Grey Book employees were required to maintain competencies for operational duty at the appropriate Grey Book role while Green Book employees were not so required.</u>

225. The tribunal agrees with the respondent that this requirement was fundamental to the role of grey book staff. They might at any point be required to carry out operational duties at short notice, including at a managerial level, where they might need to take charge of major incidents. But this also had a career dimension: even if a grey book employee was for the time being assigned to a role with less likelihood of carrying out operational duties, he or she would clearly also need to maintain skills ready for the next role, at the same level or on promotion,

which might require the application of operational competence on a day-to-day basis.

226. The tribunal also accepts the respondent's argument that this is a causative and real reasons for the difference in pay, and is not a sham or pretence. Similar conclusions apply in respect of sex discrimination, as for paragraph 8 (a).

227. Paragraph 8(e): Grey Book employees were required to maintain fitness and undergo fitness assessments (in accordance with the Service Fitness Order) while Green Book employees were not so required.

228. The tribunal agrees with the respondent: this is a similar point to the one made at paragraph 8(d), and the same arguments apply. The tribunal accepts the argument that operational firefighting duties could be very physical in nature, requiring grey book staff to maintain personal fitness levels. The nature of the contractual duties for green book staff did not require measurable levels of fitness.

229. Paragraph 8(f): Grey Book employees were expected to provide operational cover during periods of industrial action while Green Book employees were not so required.

230. The tribunal agrees with the respondent; again, for similar reasons. This is another fundamental difference between green and grey book employees, which emphasises the key nature of fire and rescue activities, which would still need to be maintained if some staff were unavailable because of industrial action. Even if the chosen comparators were not in fact required to provide cover during the material period, and union members who would were themselves on strike, or would be on strike were not in fact required to do so in all the circumstances, this was an expectation which was not applied to green book employees. Indeed, green book employees would not be capable of providing operational cover.

231. Paragraph 8(g): Grey Book employees were issued with Fire Kit bags (for use if they were needed to provide an operational response) while Green Book employees were not.

232. The tribunal agrees with the respondent, again for similar reasons. Although in itself an apparently more minor point in some respects, the tribunal attached some weight to this. It underlines the point that grey book employees might actually need to carry out operational duties at minimal notice: they needed to be ready to do so. Plainly green book staff would not be required to be ready to carry out any such operational duties.

233. Paragraph 8(h): Grey Book employees (at Station Manager/ CSDM level) were eligible to be a Station Manager for a Retained Station while Green Book employees were not so eligible.

234. The tribunal agrees with the respondent, again for similar reasons. Although this role might be time-consuming, and was separately remunerated, it again underlines the differences in roles. A retained station did not need a full-time Station Manager, so a grey book employee at the appropriate level could carry out this operational role as an additional responsibility, even if their main job description was for a role which the claimant would be capable of fulfilling. Clearly no green book employee (including the claimant) could be expected to carry out such an additional role, for which they would not be qualified. A grey book employee, having maintained personal fitness and operational competences, would be able to do so.

235. Paragraph 8(i): Grey Book employees (at Station Manager/ CSDM level) were able and available, due to their previous operational experience, to carry out health and safety assessments or accident assessments while Green Book employees were not so able.

236. The tribunal broadly agrees with the respondent's position on this, although it is perhaps not a very significant factor. Clearly this was something that grey book employees were able to do, albeit the claimant had sufficient professional experience to do much of this too, unlike most green book employees. This probably does not take either party's case much further, albeit it is part of the background evidence relating to the professional expertise that would be expected of all grey book employees at this level. The claimant also, as indicated, had expertise too, but that would not be expected of green book employees. The key underlying argument really relates back to 8(a), above, and the tribunal accepts that as part of the differences between grey and green book employees, was again one of the causative and real reasons for the difference in pay and is not a sham or pretence.

237. Paragraph 8(j): Grey Book employees could be required to be moved to a different discipline, department and or to a different location within Hampshire or mobilised within the UK whereas Green Book employees were not so required and have a specific place of work.

238. The tribunal agrees with the respondent, again for similar reasons. This was an ongoing liability for all grey book staff, but not for green book staff, and a potentially significant and onerous requirement. The tribunal heard credible evidence that this did indeed happened from time to time.

239. Paragraph 8(k): Grey Book employees (at Crew Manager/ BSO level and at Watch Manager/ FSO level) could be required to be on the rota for the Automatic Fire Alarm Response while Green Book employees were not so required.

240. The tribunal agrees with the respondent that this is factually correct. Under their contracts of employment, the grey book comparators could be required to go on this rota – the claimant could not be so required. the

tribunal also agrees with the respondent that the decision not to ask the claimant if she would agree to go on this rota was a perfectly sensible and defensible decision. The tribunal agrees that whilst the claimant may have been able and suitable experienced to carry out some of the possible actions, and all the actions if the alarm turned out to be a false alarm, there was rather more to the role that. If there was a need to escalate the incident (or if such a need had already been recognised and the respondent was first on the scene), then there would be a number of important activities to be carried out which could only be carried out by a grey book employee with the necessary operational experience. The tribunal accepted that they would need to assess the situation, set up a perimeter, take charge of the initial fire response etc. The claimant would not have the operational competence to do so. It is not material that the incident would often turn out to be a false alarm: that would not always be the case, and the respondent needed a suitably-qualified grey book employee to be ready to deal with any emergency or situation which might reasonably arise.

241. As for the other matters raised above, this example of an on-call rota (covering the lunch-break period) is again one of the causative and real reasons for the difference in pay and is not a sham or pretence. It is, again, unrelated to sex.

242. Paragraph 8(l): Grey Book employees (at Crew Manager/ BSO level) were required to carry out fire ground competencies while Green Book employees were not so required.

243. The tribunal agrees with the respondent that this is an important part of maintaining the operational capability which underlies the national agreement which informs the grey book contractual terms. Similar conclusions apply, as for the paragraphs above.

244. Paragraph 8(m): Grey Book employees (at Watch Manager / Station Manager FSO/CSDM level) were able and available due to their operational experience to carry out training and assessments for Grey Book employees of operational activities.

245. The tribunal agrees with the respondent. This is a very similar point to the previous one, save that in addition grey book employees at the appropriate level would have the operational experience and competences to supervise other grey book employee operational training. The claimant would not.

246. Paragraph 8(n): In addition to the above (generic) factors, the Respondent relies on (and hereby repeats) the same facts and matters set out in the paragraphs above in respect of the particular differences between the Claimant and her comparators for each role (as being relevant to the question of like work), as also potentially being material factors for the difference in pay/ annual leave entitlement.

247. The tribunal considers that there is little to be gained by rehearsing the matters referred to above, as there is substantial overlap, and the underlying arguments are dealt with elsewhere in this section. As a general point, the tribunal has accepted the respondent's arguments that even if the differences in the job description for the main day-to-day duties was sufficiently similar to satisfy the "like work" test, differences in the requirements and expectations for grey book employees was the causative and real reason for the difference in pay, and not a sham or pretence. Similar conclusions apply in respect of sex discrimination, as for paragraph 8 (a).

248. **Overall**, the tribunal is satisfied that the respondent has made out the material factor defence, subject to the further comments below in relation to discrimination. This conclusion is very much anchored in the difference between the two sets of national agreements, which governed the local contracts. The tribunal is satisfied that these were the genuine reasons for the difference in pay, and not a sham or pretence. They were causative of the differences in pay and material. The tribunal is also satisfied that they were not discriminatory, as discussed below.

"Sex-taint": Was there direct sex discrimination?

249. Under section 69(1)(a) of the Act (see above, under the "Material factor defence" heading), the respondent must show that reliance on the material factor "does not involve treating A less favourably because of A's sex…". This echoes the direct discrimination provisions of section 13.

250. Reference to relevant case law (and EHRC Code of Practice) has been made above, in respect of the material factor defence more generally. The tribunal has taken account of the case law, albeit the parties' relatively succinct submissions concentrated more on basic principles and the facts, rather than seeking to construct an argument based on case law.

251. On "sex taint", the tribunal notes that in *Villalba v Merrill Lynch and Co Inc and ors (2007) ICR 469, EAT*, Mr Justice Elias identified that the first type of taint envisaged under the Act relates to direct discrimination. In approaching this topic, the tribunal sought to avoid technicalities and focus whether there was a causative link between the claimant's sex and the fact that she was paid less than her name comparators. As set out below, the tribunal has found no such causal link.

252. The claimant relies upon direct sex discrimination. In the list of issues, at paragraph 9, the claimant puts forward the following arguments: (1) In respect of the period December 2011 to October 2012, when the claimant was the only female on green book terms in the relevant pool, that the nationally agreed terms and conditions that apply to Grey book and Green book employees "*insofar as the division between advantaged and disadvantaged groups was directly related to gender*". (2) In respect of the

period October 2012 to June 2014, when the claimant was again the only female on green book terms, the same argument is made. Finally, (3) in respect of the period June 2014 to June 2017, most of the period the claimant was the only female on green book terms in the relevant comparison pool, the same argument is again set out. In respect of all of these, the claimant also relies upon indirect discrimination and taint.

253. It is not clear from the list of issues what the basis could be of asserting that the claimant was treated less favourably because she was a woman. Mr Matovu's opening submissions do not really explain the claimant's case, save to assert in general terms that the differences between grey and green book conditions of service were a proxy for direct sex discrimination. The written closing submissions (at paragraphs 33 to 35) do not go further than the case set out in the list of issues. Mr Matovu had the opportunity to clarify his arguments in his oral closing submissions. He had little to add to explain the claimant's case in any other detail, save to emphasise that Mr Simm had conceded that he would have dealt with the claimant's grievance differently, had she been a man. This point was disputed by Mr Dracass, for the respondent.

254. The tribunal noted that there had been nothing in Mr Simms's witness statement which indicated that he would have dealt with the grievance differently, had the claimant been a man. Mr Simms was cross-examined at length, and Mr Matovu put to him that the grievance would have had a different outcome had the claimant been a man. Mr Simms would not be drawn into speculation, but accepted that he understood the claimant's arguments as to why she should be paid the same as grey book colleagues, but ultimately decided the grievance against her, and considered that his conclusions were fair. Although he was sympathetic to the claimant, the tribunal is clear that he did *not* make the concession alleged.

255. The written submissions from Mr Dracass were relatively brief on this point, because the respondent's position was that there was no basis for any tenable argument that the claimant was paid less because she was a woman. The respondent's case, in a nutshell, was that the claimant was paid at a different rate because she was a non-operational green book employee, and not subject to the national agreements with operational firefighters, that would have entitled her to grey book terms and conditions of service.

256. The tribunal considers that the arguments in relation to direct discrimination are not capable of passing the initial burden upon the claimant. The tribunal considers it absolutely clear that the central argument was that the claimant never was, and did not wish to be, an operational firefighter with all the additional skills, responsibilities and contractual liabilities that would go with that role. It is also abundantly clear that if the claimant had opted to train as, and become, an operational firefighter and had consequently been placed on grey book terms and

conditions, she would have been treated identically to other grey book employees.

257. To put it in simple terms, the claimant's lower pay was because she was a non-operational green book employee. It was not because she was a woman. Conversely, had the claimant been a man, who was also not trained as an operational firefighter, but instead employed on green book terms and conditions, she would have been treated identically. There is some irony in the underlying factual matrix, which is that the respondent did in fact go some way to recognise the claimant's additional responsibilities by paying her more than she would otherwise have received, and indeed, at the time when she resigned, the grievance process was actively looking at ways that the claimant's individual position might be improved. The undeveloped arguments as to this in some sense being a proxy for discrimination simply fall away.

258. There is no arguable case that the differences in pay were because the claimant was a woman. The differences in pay are not tainted by direct discrimination.

"Sex-taint": Was there indirect sex discrimination?

259. Paragraphs 9 and 10 of the list of issues deal with the question of both direct and indirect discrimination, essentially relying upon the same factual matrix. The claimant identifies the following three provisions, criteria or practices (PCPs):

    a. PCP 1 (at Paragraph 9(b)(i)) (For the period 12 December 2011 to 14 October 2012): The requirement to be a Grey Book employee.

    b. PCP 2 (at Paragraph 9(b)(ii)) (For the period 15 October 2012 to 15 June 2014): The requirement to be a Grey Book employee.

    c. PCP 3 (at Paragraph 9(b)(iii)) (For the period 16 June 2014 to 9 June 2017): The requirement to be a Grey Book employee.

260. Similar arguments to each of the three periods of time, where the PCP is essentially the same.

261. Taking a strict view, the actual PCPs quoted above are perhaps not realistic, as there was in fact no such requirement. But the tribunal has been content to read in the implied words "in order to be paid at the same rate as grey book employees", or similar wording at the end of each PCP. No point as been taken on this.

262. General comments on the law relating to taint have been made above, in the context of direct discrimination. Under sections 69(1)(b) and 69(2) of the act, indirect discrimination does not occur where the employer is able to show that the difference in treatment is because of a material factor and

"*A [in this case the claimant] 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*".

263. In the case of *Villalba* (see above), Elias P identified that the second type of taint was indirect discrimination, with the adoption of an apparently gender-neutral PCP. He also identified a third category of sex taint, based on disparate impact, where no PCP needed to be identified (based on the ECJ decision in *Enderby v Frenchay Health Authority (1994) ICR 112*). The third category has not been relied on here, but if it had been, that would have made no material difference to the tribunal's conclusions.

264. Thus, the test turns on the employer's reliance on a material factor and there is in fact no express need for the employer to have applied a PCP. However, the usual approach to indirect discrimination (applying section 19 of the Act) uses a PCP, and in this case that is how the claimant has put her case. In general terms, the material factor may well amount to an ostensibly gender-neutral PCP that is applied equally to all relevant employees but which nevertheless disadvantages women as a group, with regard to pay. Where this is so, there will be a taint of sex discrimination, requiring the employer to objectively justify the pay disparity between the claimant and her male comparator — see *Jenkins v Kingsgate (Clothing Productions) Ltd 1981 ICR 715, EAT*. The tribunal has considered these arguments in the round.

265. In order to establish sex taint by way of the 'PCP route', the claimant must show that the employer's material factor adversely affects members of one sex more than the other or, to use the statutory language, puts them at a particular disadvantage.

266. As far as the PCPs are concerned, which the claimant has relied upon, the tribunal considers that the overlap is such that it is more logical to consider them together, albeit the factual position was slightly different at the three main stages under consideration. A key point is that the differences in the comparators' pay levels, as reflected in the wording of the claimant's PCPs, were essentially because they were grey book employees. The tribunal recognises that the actual arrangements for being on call at lunchtime, for example, varied from time to time. However, the grey book pay rates were agreed nationally not on the basis of the particular job description or in arrangements in force at any one place or any one time, but based rather on the sort of responsibilities which operational firefighters might be liable for at different levels of responsibility. In that sense, the tribunal considers that taking the evidence in the round, similar arguments apply to different stages. Indeed, there is nothing in the parties' submissions suggesting otherwise. One argument put forward by the claimant relates to the temporary arrangements for HOST salary levels. This matter is considered below in

relation to proportionality, as it is not part of the actual PCP applied to the claimant at her particular management levels.

267. It is not in dispute that the respondent did indeed apply the PCPs relied upon (with, at any rate, a pragmatic *Carreras*-type interpretation). Indeed, whether one chooses to label them as "PCPs", clearly the central theme in this clip case is the extent to which relying on a difference between green and grey book employees may be indirectly discriminatory, or to put it another way, may be tainted by sex.

268. It is uncontroversial that the particular disadvantage complained of (which would apply to the claimant and other green book employees) was the less favourable contractual terms, at least in respect of wages, holiday and pension. It was a financially less generous package, with a different pay scale, and payment for a smaller number of weekly working hours. That said, of course, the respondent points out that the grey book employees had considerably more onerous contractual commitments. Unlike the claimant, they had to make themselves available for lunchtime callouts if required within the particular job role, and to be redeployed operationally, including to a different geographical area, as well as the need to carry out difficult and dangerous operational tasks from time to time, whereas the claimant did not.

269. The tribunal notes that the respondent seeks to minimise the size of the difference in salary (see below, in relation to proportionality). In respect of the "particular disadvantage", discussed below in respect of proportionality, the tribunal notes that (at least in the UK jurisdiction) there is no general rule of how a big the disparity must be to qualify as a "particular disadvantage" (see for example *McCausland v Dungannon District Council (1993) IRLR 583*). Reference is made below the actual overall sums relied upon. But in terms of proportions, the tribunal note that the disparity varied over time, with the disparity gradually decreasing over time. But, in broad terms, at the start of the period, the claimant was paid just over 74% of her comparator's wages. This had risen to some 88.5% at the time of the claimant's resignation, with a disparity of only 11.5%. These are the tribunal's calculations, based on the claimant's own figures.

270. Although, on one analysis, the disparity was not great (certainly, as time went on, and certainly, at the point of resignation), and on the respondent's arguments was considerably less, the tribunal accepts that it is broad enough, in the circumstances, to amount to a "particular disadvantage". Indeed, Mr Dracass did not appear to be arguing otherwise. This is more relevant to the question of proportionality.

271. The tribunal would need to be satisfied that the difference in the financial package for grey and green book employees puts women at a particular disadvantage, as the protected group.

272. The tribunal heard various arguments relating to the statistics of grey and green book employees, some of which made better sense than others. As at 9 June 2017 (at the time that the claimant resigned) it is clear that the majority of the green book employees were in fact male (165 men to 127 women), whereas only a small percentage of grey book employees were female. That said, at the material times, especially noting that the claimant followed an unusual career path in being promoted to new green book roles that had previously only been carried out by grey book employees, she was in fact the only green book employee carrying out those particular management roles. Although the tribunal has not been provided with the full statistical picture, it understands that all the grey block employees in those particular (or equivalent) roles were in fact men. To that extent, it might be said that the claimant was in a group of one.

273. Considering the statistical evidence in the round, however, the tribunal wishes to take a pragmatic but fair view, especially against the background is that operational (grey book) firefighters have traditionally been men, with women only comparatively recently making inroads into that career and working their way up to the more senior ranks. Taking a broad view, even though clearly grey book employees were not exclusively male (and indeed the tribunal heard evidence from Ms Dickinson, as an example of a woman rising to the higher ranks of the service, albeit as a gold book employee), it is fair to say that at least in Hampshire, grey book employees remain predominantly male, whereas the position for green book employees is much more balanced.

274. The tribunal considers that the statistical position is somewhat more nuanced than the claimant would seek to argue, but it does accept the general point that women were somewhat less likely to be eligible for receipt of the higher grey book salaries.

275. In light of the matters above, the tribunal accepts that the claimant has successfully established that (in the language of section 19 of the Act) the respondent did apply a PCP which put the claimant at particular disadvantage, as a woman. The respondent applied, or would apply, that PCP to persons with whom the claimant does not share the characteristic of being a woman, but that is because of the preponderance of men on grey book terms and conditions. This put women at a particular disadvantage compared with men, and did indeed put the claimant at that disadvantage.

276. The tribunal also recognises that section 69(2) does not necessarily require a statistical comparison or indeed even a PCP. See, for example, *Enderby v Frenchay Health Authority* (above). The tribunal accepts that the discrepancy in pay between green and grey book employees, and the preponderance of men on grey book contracts, establishes a sufficient *prima facie* case, such that the employer must objectively justify the pay differential.

277. That being the case, to return to the familiar structure of section 19 of the act, section 19(d) provides that there is discrimination if the employer "cannot show it to be a proportionate means of achieving a legitimate aim."

278. The respondent must first identify the legitimate aim.

279. The respondent relies upon the same legitimate aims for all the periods of time covered by the equal pay claim, namely

    a. To enable Hampshire Fire and Rescue Service to provide an effective and efficient service in respect of its various functions and to ensure the safety of the public, their property, and the environment; and

    b. To reward employees for being 'on call' and/or competent and available for operational duties and deployment.

280. Although there may, inevitably, be some debate about the precise wording of the legitimate aim, the tribunal accepts that both of these aims are legitimate. Clearly the underlying argument, about which the tribunal heard much evidence, relates to the statutory and ministerial requirements placed upon the respondent to carry out functions which have been satisfactorily summarised as to "ensure the safety of the public, their property, and the environment." The tribunal has also given weight to the importance to society in maintaining a service of highly trained firefighters who can deal not only with the type of emergencies which arise on a day-to-day basis (which may well involve a firefighter risking his or her life), but which is available to deal with significant large-scale emergencies or disasters on a local or national scale. The tribunal recognises that this aim does not relate merely to a particular individual, carrying out a particular role at a snapshot in time, but the need to maintain career skills available for deployment in subsequent jobs, or if it is necessary to re-deploy a grey book employee at short notice, even if much of the work in their current job description is of a routine administrative nature. The tribunal found Mr Adamson's oral evidence particularly persuasive on these points. The tribunal also accepts that although these were the specific aims of the respondent, as the employer, they are clearly reflected in the contents of the grey book, which were binding on the respondent.

281. The tribunal considers the first of legitimate aims very much encapsulates the argument, albeit it requires a linked argument that the operational effectiveness needs an appropriate remuneration package. The second aim picks up on the remuneration, relating to at least some of the reasons for paying grey book employees more. The tribunal readily accepts the underlying argument that it is legitimate to seek to reward employees (in line with the terms of the grey book) to reflect those more onerous terms and conditions, which did not apply to green book employees.

282. On the specific point of the aim of rewarding employees for being on call, even if the comparators were in an actual on call rota (which included the lunch period) for only part of the time, again the national terms and conditions for grey book employees are relevant. The tribunal does accept that it is a legitimate aim to provide financial rewards to recompense for the requirement to be available to give up a lunch hour if required. This is relevant to the question of proportionality, and even if an employer who had not been bound by the agreed grey book terms and conditions might have dealt with this in a different way, it remains a legitimate aim. In a sense, it could be said that a grey book employee is always "on call", in the sense that grey book employees might at any point be called out to deal with an unforeseen emergency which needed additional deployment of grey book staff.

283. On the liked question of reward for being "competent and available for operational duties and deployment", this very much feeds into the first aim. The tribunal accepts the respondent's arguments that the nationally agreed terms and conditions provide an appropriate framework for each Authority to ensure that it can attract and retain suitably experienced employees, for a specialist, challenging and sometimes onerous job.

284. The respondent has been able to show, therefore, that the aims are legitimate. The issue is therefore whether the respondent can also show that the PCPs are a proportionate means of achieving those aims.

285. In relation to the question of proportionality, there is considerable overlap with more general arguments of the material factor defence.

286. The tribunal has some sympathy for the claimant as being something of a trail-blazer, in carrying out successful trials of (for the first time) appointing green book employees to specific management roles which had hitherto only been carried out by grey book employees. It is hardly surprising that this required new initiatives, and re-consideration of job evaluation and pay scales, and the tribunal accepts that the claimant was a little frustrated that the bureaucracy took some time to respond. Although the initiative for recruiting the claimant into these new roles was very much the respondent's, it may well be that had the claimant not pushed to ensure that her pay was kept under review, bureaucratic inertia may well have resulted in her remaining on lower rates of pay. Looking at matters from the claimant's perspective, as a talented employee meriting promotion and greater responsibility, it is not perhaps unsurprising that the claimant felt that she was in some way being held back by not treated as if she was a grey book employee. However, the fact remains that the claimant was clear throughout that she did not wish to become a grey book employee and for no doubt perfectly good personal reasons, did not want to take on the more onerous commitments in the alternative career stream which would have resulted in higher rates of pay.

287. In principle, the tribunal accepts the respondent's arguments that it was a proportionate means of achieving those legitimate aims by keeping employees at the claimant's level on to separate terms and conditions of service, as governed by national agreements with the unions. In its analysis above, in relation to the actual differences in pay, the tribunal considers that they are not as significant as the claimant would argue, and particularly if one takes into account the general requirement that grey book employees may be required to be on call over lunch hour, and therefore to be paid for five additional working hours each week, the difference in wages (approached as a "per hour" rate of pay) is not nearly as great (less than £70 (gross) per month, on average). But even taking the claimant's case at its highest, the average gross difference in annual pay was some £4,400 (or less than £370 per month). Although not insignificant, this was not a particularly great disparity, given the more onerous grey book contractual requirements. Comment has been made above, in considering "particular disadvantage, as to he relatively modest difference in terms of % disparity.

288. The Tribunal agrees with the respondent that when Mr Adamson was giving evidence, although some of what he said was challenged in cross examination, it was *not* suggested to Mr Adamson that the legitimate aims relied upon could have been achieved in some other way. This is a telling point.

289. The particular challenge in this case is the extent to which broader criteria are relevant to the actual day-to-day work, with the claimant sharing identical, or near identical, job descriptions with her comparators. If, as the claimant sought to do, one looked *purely* at the job description, it may look as if the claimant was indeed being underpaid in comparison with male comparators, for doing the same job. However, even on a day-to-day basis, the actual job was not the same, as her comparators were required to do things which were not in the role description, but which were required under the grey book and associated role maps. It was almost as if grey book employees were subject to two separate contracts: one which related to the job description of the specific role they were appointed to, and anther relating to what was required of a grey book employees at their level. This is not part of the tribunal's legal analysis, but perhaps helps to explain the claimant's perspective: she focussed on the day-to-day activities relating to the job description, rather than all the other activities covered by the grey book contract and role maps (supplemented by local Orders).

290. At various stages, grey book comparators were required to be on an on-call rota, which continued over the lunch break, they were required to retain levels of personal fitness (even if there was some margin of appreciation), and to attend (and/or deliver) regular continuation firefighting training to ensure they remained operationally effective. These were not requirements that the claimant had to meet, as referred to extensively above. As described, whatever particular job role a grey book

employee was carrying out at any given stage, which included the comparators carrying out core duties near identical to the claimant's, they remained available for redeployment at a moment's notice, either to deal with the overall operation overall operational needs, or to deal with specific emergencies.

291. The consideration of proportionality has required the tribunal to conduct a balancing exercise (see, for example, *Barry v Midland Bank Plc (1999) ICR 859*). As referred to elsewhere, the tribunal has given weight to the arguments relating to nationally agreed salary scales, with the aim of ensuring an efficient fire and rescue service. Whilst Mr Matovu is right that the respondent *could* have achieved its legitimate aims by unilaterally placing the claimant (as a green book employee) on a grey book financial package (but without the associated liabilities), it was under no obligation to do so, and this does not undermine the proportionate means of achieving the legitimate aim. It is ironic that, over time, the claimant's desire to improve her financial package was increasingly being met, and that a the time of resignation she was very close to her comparator's salary level, with a promise of working with her to see what other improvements could be made. The respondent was taking incremental steps to help the claimant, but without undermining the distinction between grey and green book for staff at the claimant's level. The tribunal considers that it was proportionate to maintain the distinction between the two types of contract, for staff at the claimant's level and below.

292. The claimant understandably questioned why an exception was not made for her, when the respondent did indeed experiment with making an exception for a more senior tier of management, namely the "HOST" level, where a local decision was taken to pay the Heads of Service on grey book terms, regardless of whether they had previously been (or would otherwise have been paid) on green book terms. The tribunal accepts that it shows that it was open for the respondent to depart from nationally agreed terms and conditions, at least on the basis of paying green book employees more money, without eroding the terms and conditions for grey book employees. Clearly, had this been rolled out more generally it would have had significant financial implications for the respondent's budget, and the tribunal accepts that one consequence might have been that grey book employees would query why they should have to be on call, to remain physically fit and trained to high operational standards, and keep themselves available at a moment's notice to be redeployed or to risk their lives, if they could receive the same pay without those requirements. That would somewhat undermine the respondent's ability to meet the legitimate aims. Furthermore, the Tribunal notes the persuasive evidence of Ms Dickinson, that although she was a beneficiary of this trial, she was in fact quickly promoted beyond that level, and in fact the trial has been discontinued. Whilst the tribunal was not provided with direct evidence as to why the decision was subsequently taken for managers at the HOST level to remain on green or grey book terms and conditions, it is plain that

senior management took the view that this trial was not successful and that it did not benefit the organisation.

293. The tribunal considers that the particular disadvantage suffered by women (being in the minority of the operational grey book employees), by being paid slightly less under green book terms, was a function of the different contractual commitments, and balanced by the absence of onerous requirements in respect of training and remaining operational, keeping fit, mobility clauses, availability for on-call if required (including through lunch breaks) and the requirement to be deployed to dangerous and potentially life-threatening situations. It was open to any green book employee, male or female, who wished to transfer across to grey book terms as an operational firefighter, to apply to do so, accepting both the slightly higher remuneration package, but also the liabilities. The claimant did not wish to do so. The aims were not only legitimate, but sensible and in the wider public interest, and the different financial package for grey book employee was proportionate and reasonable.

294. Overall, the tribunal, while not wishing to minimise the claimant's own concerns, or to characterise her equal pay claim in any way as being fanciful, has come to the unanimous conclusion that the specific differences in the remuneration package for grey and green book employees at the claimant's level of responsibility, was a proportionate means of achieving a legitimate aim. It was not tainted by sex discrimination, and was not indirectly discriminatory.

Overall conclusions on equal pay

295. The tribunal is satisfied that the differences in the pay and remuneration package between the claimant and her comparators does not fall foul of the equal pay provisions of the equality act 2010. The equality clause was not breached.

296. The equal pay claim is not well founded, and is dismissed.

Conclusions as to the unfair constructive dismissal claim

The legal framework

297. If there is an unambiguous express dismissal of an employee, it is a relatively straightforward matter for the tribunal to determine that there has a dismissal. However, Section 95(1)(c) of the Act allows for there to be a dismissal of an employee when "*an employee is entitled to terminate the contract by reason of the employer's conduct*". This reflects well established principles under contract law that if an employer is in fundamental breach of the contract of employment, an employee is entitled to accept that breach and treat himself as constructively dismissed.

298. In this case, there was no express dismissal.

299. The claimant resigned with immediate effect by email of 10 April 2017, giving notice that her employment would end on 31 December 2017.

300. The claimant must show, on a balance of probabilities, that her resignation amounted to a constructive dismissal.

301. For a claim of constructive dismissal to succeed, it is well-established law that:

    1. The employer has to commit a breach of contract that is so serious as to show that it intends to abandon and altogether refuse to perform the employer side of the bargain (see for example *Tullet Prebon plc v BGC Brokers LLP [2001] EWCA 131*, adopting the words of Etherton LJ in *Eminence Property Developments Limited v Heaney* [2010] *EWCA Civ 1168*, para 61) (albeit a gloss is put on this in respect of the Respondent's intentions – see below); and

    2. The Claimant has to resign, at least in part, because of this breach without, before choosing to do so, behaving in such a way as to indicate an acceptance that the contract can continue notwithstanding the breach.

302. The term of the contract relied upon in respect of the fundamental breach may be an express term or an implied one. In this case, the claimant relies on the equality clause, inserted into the contract of employment by the equal pay provisions of the Equality Act 2010, as well as the implied contractual term of mutual trust and confidence.

303. A good summary of the law relating to the doctrine of breach of trust and confidence and the law relating to the "last straw" situation (which is not expressly relied upon in this case), is well summarised in the judgment of Dyson LJ in the case of *Omilaju v Waltham Forest London Borough Council [2005] ICR 481*. Paragraph 14 of that judgment sets out the following basic propositions of law derived from the authorities:

    1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Weston Excavating (ECC) Limited v Sharp [1978] ICR 221*.

    2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see for example *Mahmoud v Bank of Credit and Commerce International SA [1997] ICR* 606, 610E, 611A (Lord Nicholls of

Birkenhead), 610H to 622C (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see or example, Browne Wilkinson J in *Woods v W M Car Services (Peterborough) Limited [1981] ICR 166,* 672A. The very essence of the breach of implied term is that it is calculated or likely to destroy or seriously damage the relationship.

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As lord Nicholls said in *Mahmoud*, at P610H, the conduct relied upon as constituting the breach must:

> "impinge on the relationship in the sense that, looked at ***objectively***, it is likely to destroy or seriously damage the degree of confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put in Harvey on Industrial Relations and Employment Law, paragraph D1 [480]:

> "many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action but when viewed against the background of such incidents it may be considered by the courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to determinate a deteriorating relationship".

304. The tribunal has also noted the case of *Kaur v Leeds City Teaching Hospital [2018] EWCA Civ 978*. The Court of Appeal confirmed that further contributory acts can effectively revive a claim for constructive dismissal, notwithstanding earlier affirmation of the contract of employment.

The initial matter to be determined in this case

305. The initial matter for the Tribunal to determine is whether, individually or cumulatively, there was a fundamental breach of contract. The Tribunal has considered this in the round, albeit it is necessary to look at the individual allegations.

306. As set out at paragraph 12 of the list of issues, the claimant relies upon:

(i) Breach of the equality clause; and/or

(ii) Breach of the implied term of mutual trust and confidence in that the Respondent had failed, without reasonable and proper cause, to deal with her grievances over a protracted period or to address the inequality in her treatment over pay.

307. The list of issues sets out at paragraph 12 (ii) (a)-(p) the alleged acts or omissions which are said to amount individually or cumulatively to breach of the implied term of mutual trust and confidence. No last straw is relied upon. The respondent denies repudiatory breach.

Was there a repudiatory breach of contract by the respondent?

308. The tribunal has found, in rejecting the equal pay claim, that there was no breach of the equality clause. In relation to constructive dismissal, there was therefore no fundamental breach of contract in relation to this point, although that would not prevent the same evidence being relevant to the issue of breach of the implied term of mutual trust and confidence.

309. In approaching the question of breach of the implied term of mutual trust and confidence, the tribunal has reminded itself of the correct legal approach, and has considered the cumulative effect of the matters raised by the claimant. It recognises that a number of matters may add up to a fundamental breach of contract, even if individually they fall below that level, and in particular recognises that a failure to deal satisfactorily with a grievance can on its own amount to a fundamental breach. However, it is simplest to structure these written reasons around the specific (and broadly chronological) acts and omissions specified by the claimant. These conclusions are structured around the agreed contents of the list of issues.

310. It should also be noted that the purpose for considering these matters is to enable the tribunal to conclude whether the claimant has established that she was constructively dismissed.

311. Whilst each case turns on its own individual facts, the tribunal recognises that an employee may feel legitimately upset by developments in the workplace, and to come to a conclusion that the job is no longer congenial to her. It does not, of course, follow that an employee who chooses to resign because of the situation she faces in the workplace, can necessarily show that her employer is in fundamental or repudiatory breach of contract. In this case, the tribunal would wish to repeat that it is very clear that the claimant was a good employee, who was entrusted with additional responsibilities in a way which might perhaps be seen as blazing a trail for others, and that she was genuinely unhappy that her employers seemed slow to move, and did not pay her in the way which she felt she should have been paid. The tribunal has some considerable sympathy with the claimant's position, and as noted elsewhere in this judgment, accepts that at the time of the claimant's resignation, there was

a sensible argument that it was time to revisit the national terms and conditions of employment agreed with the relevant trade unions. The tribunal has considered with great care whether the claimant has discharged the burden upon her. The tribunal's analysis and conclusions are below.

312. Paragraph 12(ii) of the list of issues sets out a comprehensive list of all those matters said by the claimant to amount individually or constructively to fundamental breach of contract. Although somewhat lengthy and wordy, and with some of the events providing a more cogent basis for argument than others, the tribunal considers that it would be appropriate to set out these matters in full, as expressly relied upon by the claimant. That said, some may be grouped together.

313. Paragraph 12(ii)(a): Claimant informally raised issue of difference in pay as between herself and her Grey Book equivalent doing the same job in verbal discussions with various Group Managers (Gates, Watts and Neat) and Station Manager Thomson in 2012 and the Claimant alleges that she was repeatedly told that it was due to the difference in contracts and therefore 'legal';

314. The tribunal agrees with the respondent that this complaint is "seemingly anodyne in nature" (like (b), (f) and (g)). It is not adequately explained why this is said to amount to any sort of breach of contract, let alone a fundamental breach of contract. At risk of oversimplifying the issues, it is plainly right that the differences in contractual pay were indeed due to differences in contracts, and the fact plainly remains that the claimant had a green book contract, not a grey book contract. It was reasonable and proper for her to be given such an explanation. This is not a point of any significance in contributing to any fundamental breach of contract, although it is relevant background.

315. Paragraph 12(ii)(b): On 2 May 2014 GM Neat issued an advertisement to all staff in Community Safety for temporary OM posts which were open to competent Grey or Green Book staff equally to apply for (Claimant also sent an email dated 6.5.14 to GM Neat querying pay for OM role);

316. It is hard to discern how this is said to contribute to any fundamental breach of contract. There was reasonable and proper cause for the differences in pay scales. The tribunal finds nothing inappropriate either in the advertisement being issued, or in the claimant querying the rate of pay.

317. Paragraph 12(ii)(c): On 16 June 2014 Claimant became first female and first Green Book to be appointed to OM role but was paid less than other male OMs appointed at the same time to the same role;

318. The claimant was indeed the first green book employee to be appointed to the OM role, which was a credit to her, and also advantageous in that the

respondent had sufficient confidence in her to promote her and to increase her pay. She was not however a grey book employee, as discussed above. The male OMs she refers to were grey book employees on a different contract, and the tribunal does not consider that this is capable of contributing to breach of contract, for the same reasons as set out above. There was, again, reasonable and proper cause for the differences between green book and grey book pay scales. This perhaps relates more obviously to the equal pay claim, which the tribunal has found not to be well founded.

319. Paragraph 12(ii)(d): On 24 June 2014 after discussion with GM Watts Claimant's pay was increased from Green Book Grade H to Grade J and backdated, which narrowed difference in pay but did not resolve it;

320. The tribunal agrees with the respondent that this issue in fact refers to an increase in pay, advantageous to the claimant. To the extent that the claimant was not paid as a grey book employee, there was no contractual entitlement, and as indicated above this was not discriminatory. This also does not contribute to any breach of contract.

321. Paragraph 12(ii)(e): On 8 January 2015 the Respondent's Directors decided to equalise pay as between Grey Book and Green Book staff at Heads of Service Team level only (equivalent to Grey Book Area Manager) but did not publicise this and the Claimant was not informed of this significant decision;

322. The tribunal does not consider that decisions made in relation to a more senior management grade impacted to any significant degree on the implied term of mutual trust and confidence in the claimant's own contract. The respondent was plainly under no duty to inform the claimant about the personal contractual arrangements for her superiors. The respondent points out that this is a factor in the equal pay claim, but argues that it is not capable of assisting the claimant and her constructive dismissal claim relating to mutual trust and confidence. The tribunal agrees. This episode did not undermine mutual trust and confidence, albeit it provides relevant background to the concerns which the claimant raised.

323. Like (c) above, this issue perhaps relates more obviously to the equal pay claim, which the tribunal has found not to be well founded.

324. Paragraph 12(ii)(f): On 9 January 2015 the Respondent placed a freeze on all Green Book job evaluations, which effectively meant that there was no formal avenue open to the Claimant to complain about her grading (for complaints in respect of failure to apply the Respondent's Equal Opportunities policy SO/1/6/3 regarding grading/re-grading could not otherwise be dealt with under the Grievance procedure by virtue of para. 2.3.2 of that procedure);

325. The tribunal does not consider that a general freeze on green book job evaluations is capable of significantly undermining mutual trust and confidence in relation to the claimant's own contract of employment. This was a legitimate management step, for reasonable and proper cause, which did not in fact prevent the claimant expressing her disappointment or having the course to the grievance policy, or prevent any subsequent pay award from being backdated. The tribunal considers that this is not a significant factor contributing to any argument that there was a fundamental breach of contract.

326. Paragraph 12(ii)(g): On 6 March 2015 Claimant nevertheless sent an email to GM Gates again querying her pay;

327. As well as somewhat undermining the claimant's arguments in relation to the previous paragraph, the tribunal finds nothing in this point capable of assisting the claimant's case. The claimant sent an email, but this was not any sort of behaviour by the respondent, and it is not clear why the claimant sought to persuade the tribunal that this was breach of contract by the respondent.

328. Paragraph 12(ii)(h): In September 2015 Claimant discovered that pay had been equalised at HoST level and in the light of this queried her pay by email dated 7.9.15 to GM Gates and GM Murray highlighting issue of pay discrimination at lower ranks below HoST level;

329. As above, although this may be relevant to the claimant's equal pay claim, in the absence any discrimination, however, it is hard to see how it is relevant to constructive dismissal for breach of the implied term of mutual trust and confidence. Again, it relates to what the claimant did, not to her employer's response.

330. Paragraph 12(ii)(i): On 30 October 2015 permanent Green Book CSDM role was advertised by GM Murray - HR eventually agreed to allow job evaluation to be carried out for CSDM role;

331. The claimant appears to be referring to matters beneficial to her, which can scarcely be said in any way to undermine her contract.

332. Paragraph 12(ii)(j): Job evaluation form was duly completed for Claimant's role as approved by GM Murray and submitted to HR on 17 November 2015 but job evaluation was then not carried out;

333. The tribunal considers that the lack of job evaluation being carried out at that stage was unfortunate for the claimant, but fell somewhat below the level of making any significant contribution fundamental breach of contract. There had been a freeze in job evaluations, and in any event the claimant was promoted shortly afterwards. The claimant continued to be paid her contractual pay, and subsequently job evaluations, and matters raised by the claimant, were dealt with. This particular event adds very

little to the sequence of events relied upon as contributing to a cumulative fundamental breach of contract.

334. Paragraph 12(ii)(k): On 14 April 2016 Claimant received pay rise to Grade K as a temporary measure;

335. The tribunal does not consider that there is anything in this assertion which is capable of undermining mutual trust and confidence.

336. Paragraph 12(ii)(l): On 10 June 2016 Claimant sent email to GM Ash forwarding earlier email dated 13 April 2016 from GM Murray to AM Adamson affirming agreement to realign Claimant's pay to match Station Manager B competent pay (which would have resolved pay issue) but this was not actioned;

337. The tribunal agrees with the respondent that although the claimant was unhappy with the way her pay was handled, the respondent dealt with matters appropriately. The claimant's pay was subsequently confirmed, and she was paid her contractual rate. This makes no substantial contribution to any cumulative fundamental breach of contract.

338. Paragraph 12(ii)(m): On 29 July 2016 Claimant was invited by James Yates, Senior HR Adviser, to attend a meeting to discuss pay issue but meeting never took place;

339. The tribunal again agrees that, taken in the overall context of the sequence of events, this particular event adds very little. The claimant had, a few weeks earlier, received a backdated pay award. Not long after 29 July, a job evaluation was completed. The fact that this particular meeting did not go ahead is of little or no significance in contributing to a cumulative fundamental breach of contract.

340. Paragraph 12(ii)(n): On 18 October 2016 Claimant, having gone through job evaluation process, submitted a formal grievance and should have been invited to a meeting within 7 days in accordance with the Respondent's Grievance procedure, a meeting was held on 28 November 2016 yet the final outcome was delayed until 10 March 2017, despite chasing emails sent to Area Manager Simms by Claimant on 12 December 2016, 15 January 2017 and 5 February 2017;

341. Relevant evidence as to the sequence of events is set out in the findings of fact. Relevant evidence is also summarised below.

342. The tribunal is entirely familiar with the situation, frequently described in Employment Tribunal cases, where a policy sets out a target or limit for dealing with grievances, but for various reasons matters take rather longer to resolve than the policy anticipated. In this case, it was plainly a highly complex matter, and the tribunal does not consider that there was any intention to delay matters unnecessarily. There were reasonable and

proper causes for the delay, and the claimant was kept in the picture. There was no wholesale failure to engage with the grievance – the claimant knew from correspondence that the matter was indeed being dealt with. The tribunal does not consider that the delay was sufficiently gross or unjustified that it contributes to a fundamental breach of contract in any significant way.

343. The Tribunal notes the case of *Aldi Stores v Blackburn [2013] IRLR 846*, referred to by the respondent, where HHJ Richardson stated (at paragraph 25):

> "In our judgement failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether in any particular case it does so, is a matter for the tribunal to assess. Breaches of grievance procedures come in all shapes and sizes. On the one hand it is not uncommon for grievance procedures to lay down quite short timescales. The fact that such a timetable is not met will not necessarily contribute to, still less amount to, a breach of the term of trust and confidence. On the other hand, there may be wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to contribute to a breach of the implied term of trust and confidence. Where such an allegation is made, the tribunal's task is to assess what occurred against the *Malik* test."

344. The tribunal agrees with the respondent that it is significant that the claimant's line manager immediately acknowledged receipt of the grievance, and explained he would pass the matter to HR. The tribunal heard evidence how the matter was referred to Mr Adamson, but he did not feel he was the right person, as he was about to move roles and he sought further advice from HR as to the appropriate person. After chasing HR, it was proposed the matter be handed over to Mr Simms. Mr Simms then acted in a timely fashion once he was seized of the grievance, and invited the claimant to a grievance meeting. The tribunal considers that the claimant appears to have had a somewhat unrealistic expectation of her line manager immediately resolving this highly complex matter.

345. The Tribunal notes that Mr Simms took some time to resolve the grievance, which might be characterised as something of a "hospital pass" from Mr Adamson. It is not surprising that he took his time to try and resolve such a difficult and complicated grievance. As the respondent points out, the claimant herself acknowledged in her email of 6 March 2017 that she appreciated that "*this is a complex and challenging issue*". Indeed it was. The claimant understandably hastened the results but did not make any major complaints at the time relating to the delay. As, again, the respondent points out, although the claimant submitted detailed grounds of appeal, this was not a particular concern which she raised at the time. While it would plainly have been desirable for matters to be dealt with more quickly, the tribunal considers that the extent of the delay, and the reasons for its, are not matters of great significance. Although capable

of contributing to breach of mutual trust and confidence, this matter was in itself not an egregious breach and had limited impact. The tribunal also agrees with the respondent, that whilst acknowledging that there was some delay in dealing with the grievance, there was no legitimate criticism which can be made of the substantive basis of the decision which Mr Simms eventually delivered to the claimant.

346. Paragraph 12(ii)(o): On 16 March 2017 Claimant appealed against grievance outcome and should have been invited to a grievance appeal meeting within 7 days in accordance with the Respondent's Grievance procedure;

347. The claimant knew that the grievance had taken some time to resolve, for reasons which she herself appears to have acknowledged. The tribunal does not consider that she would genuinely have expected that a grievance appeal meeting would realistically be heard within the specified seven days. The Tribunal notes that Mr Simms had acknowledged the appeal relatively swiftly, confirming it had been forwarded to HR and that a senior manager "*will be in touch with you in due course*". The claimant made no attempt to find out what was happening with the appeal, and submitted her resignation only four working days later, without troubling to find out more.

348. The tribunal agrees with the respondent that considering the efforts the claimant had previously taken to query matters and follow them up, the fact that she failed to do so before resigning suggests that this short delay was not a matter which she considered significant at the time. It was not a significant matter, and indeed, when seized of the appeal, Ms Dickinson did in fact deal with matters relatively quickly and sympathetically, notwithstanding the fact that the claimant had already resigned. These matters are, of course, after the resignation (which was never withdrawn, and which cannot therefore impact directly on the constructive dismissal claim).

349. The reality, however, is that although the claimant initially appealed on 16 March 2017, a meeting was arranged for Tuesday 21 March with Mr Simms. The claimant confirmed her appeal late on the evening of 21 March 2017, received acknowledgement on the evening of Monday 3 April 2017, and was told that she would hear in due course from a senior manager. She was also invited by Mr Simms to "*get in touch if you need anything from me*", but she did not do so, before she resigned just a week later, on 10 April 2017.

350. The Tribunal concludes that this minor delay, although contributing to earlier delay, did not have a significance effect on mutual trust and confidence, and even in combination with earlier matters falls well short of the required threshold. The claimant knew that her appeal had been acknowledged, knew that she would hear from a senior manager, and that the senior manager would arrange an appeal meeting with her. But she

decided to resign anyway. She could have been invited by Mr Simms to attend an appeal meeting within 7 days, but this would inevitably have needed to be postponed until the designated senior manager had been appointed, and was ready and available to her the appeal. This technical breach was not significant.

351. Paragraph 12(ii)(p): On 10 April 2017 Claimant, having still not received any invitation to an appeal meeting, sent resignation email with reasons stated in email to AM Simms of same date, including delay in addressing grievance appeal, unequal treatment as regards pay and conditions afforded to other CSDMs and failure to adhere to Respondent's own timescales and procedures in dealing with her unduly protracted grievance.

352. See above. This does not, individually or cumulatively, amount to breach of the implied term of mutual trust and confidence.

353. Although criticism can be made of the arrangements for dealing with the claimant's grievance relating to equal pay, any procedural flaws or delays fell, cumulatively, well below breach of the implied term of mutual trust and confidence. The tribunal recognises that it is not infrequent for an employee to be upset by the way she is treated, and indeed this is the reason that organisations should have adequate complaints policies. The claimant was perfectly entitled to raise issues with management, and expect to have them considered. However, as indicated above, the issues of concern to the claimant, and the way they were handled, were not of a nature that they amounted to fundamental or repudiate a breach of contract. Indeed, it is perhaps ironic that although the claimant's grievance was not upheld in the way she wanted, it should have been abundantly clear to her that her concerns were being treated even-handedly, and the grievance officer was seeking to find ways to enable a mutually agreed way ahead. She resigned just four working days after her appeal had been acknowledged by email.

354. Although this could have had no impact on the decision to resign, the tribunal also notes that it should (shortly afterwards) have been readily apparent that Ms Dickinson (also, of course, a woman who was promoted from a non-operational background), was sympathetic and would do her best to find a workable way ahead. It was unwise of the claimant to resign at a stage when there had been no fundamental breach of contract, before an appeal hearing date was confirmed, and before waiting to see how her grievance would ultimately be dealt with on appeal.

355. At the time that the claimant resigned (which was before her grievance appeal was heard), the respondent was not in fundamental breach of contract. The claimant failed to discharge the burden of showing that she was constructively dismissed.

356. There was no dismissal.

Overall conclusions as to unfair dismissal

357. The tribunal having concluded that the respondent was not in fundamental or repudiatory the breach of contract, the tribunal does not need to address issues of causation, waiver or affirmation, or any other matters relating to unfair dismissal.

358. As there was no dismissal under section 95 of the Employment Rights Act 1996, no claim of unfair dismissal is capable of succeeding. The tribunal therefore records that the claim of unfair dismissal is not well founded.

Employment Judge Emerton
Date: 26 May 2022

Judgment and reasons sent to the parties: 31 May 2022

FOR THE TRIBUNAL OFFICE

Annex to Written Reasons:–

The Parties' Agreed List of Issues:

Equal Pay claim

Like work

1. Was the Claimant employed in 'like work' to that of her comparators (within the meaning of s. 65 (2) EqA 2010) in respect of the following positions and periods?

a. Her role of Compliance Officer/ Business Support Officer ('BSO') from 12 December 2011- 14 October 2012 (comparator: Gavin Ison).

b. Her role of Inspecting Officer/ Fire Safety Officer ('FSO') from 15 October 2012 - 15 June 2014 (comparator: Justin Turner)

c. Her role of Office Manager/ Community Safety Delivery Manager ('OM/ CSDM') from 16 June 2014 - 9 June 2017 (comparator: Justin Turner)

2. In respect of each of the above, are the comparators appropriate (under s. 79 EqA 2010)?

a. Did the Claimant and her comparator work at the same establishment?

It is accepted that at all relevant times the Claimant and her comparators were all employed within the same department and function[1], namely Community Fire Safety (Protection) from 12 December 2011 to 2015 and Community Safety (CS) department and Business Fire Safety (BFS) function from 2015 to 9 June 2017 and within the same service operated by the Respondent, whose headquarters was located in Leigh Road, Eastleigh. They were all employed by the same employer, although they were, at times, based at different fire stations within the County.

The Respondent contends that each fire station, in effect, comprised a different establishment.

[1] Note – In respect of Justin Turner there was a period (1 October 2015- 27 March 2017) when he was Station Commander based at Havant Fire Station in the Response Department and a period (28 March 2017- 30 September 2017) when he was Station Manager, FSE Technical Training Department at Service Headquarters.

b. If not, were common terms applied to the establishments at which the Claimant and her comparators worked (either generally or as between the Claimant and her comparators)?

It is agreed that at each of the fire stations at which the Claimant and her comparators were based, the same two sets of terms applied to non-operational staff ('Green Book') and operational staff ('Grey Book'), while from February 2015 at the level of Heads of Service/ Area Manager the same terms in respect of basic pay[2] applied equally to all staff, both non-operational and operational staff alike, paid for the same number of hours (42) each week.

3. <u>In respect of the BSO role</u>:

a. Was the Claimant's work the same or of a broadly similar nature to the work carried out by Gavin Ison?

b. Were there any differences between the work done by the Claimant and that done by Gavin Ison and, if so, were such differences of practical importance in relation to the terms of their work?

It is agreed that the Claimant and Gavin Ison were each employed in a newly-created trial role of Compliance Officer/Business Support Officer within the same department and function.

The Claimant also contends that for the first few months she and Mr Ison worked from the same office before they were each posted to different fire stations from the summer of 2012.

The Respondent relies on the following alleged differences:

i. Gavin Ison was required under his Grey Book terms and conditions to provide operational firefighting and control cover and/or be redeployed operationally in accordance with the demands of the Service.

The Respondent however has disclosed no dates on which it is said that Mr Ison actually provided operational cover or was redeployed operationally to a fire or non-fire incident

other than an Automatic Fire Alarm (AFA) response.

ii. Gavin Ison was required under his Grey Book terms and conditions to be "on call" during his lunch break and thus could be called upon to provide operational cover during that period.

The Respondent however has disclosed no dates on which it is said that Mr Ison was actually called upon during his lunch break to provide such operational cover.

iii. For the period 11 December 2011 to 14 October 2012, Gavin Ison provided an operational response to Automatic Fire Alarms (AFA) in Southampton and acted as an AFA first responder on two occasions in June 2012 (being on call between the hours of 0900- 1600 on each day);

The Claimant contends that Mr Ison was never in fact called upon to attend a fire or non-fire incident other than an Automatic Fire Alarm (AFA) response.

iv. Gavin Ison undertook operational and/or fitness training specific to Grey Book employees during the relevant period.

Mr Ison's training records show that he undertook such training during the relevant period on two dates: 1, 10 and 19 April 2012.

v. On 4 occasions between 1 May and 2 October 2012 Gavin Ison carried out fire ground operational competencies (4 x 2 hours sessions - between 1100 and 1300hrs).

4. <u>In respect of the FSO role</u>:

a. Was the Claimant's work the same or of a broadly similar nature to the work carried out by Justin Turner?

b. Were there were any differences between the work done by the Claimant and that done by Justin Turner and if so, were such differences of practical importance in relation to the terms of their work?

[2] Note – Area Managers received an allowance of 20% for performance of the Flexible Duty System as

The Respondent relies on the following alleged differences:

i. Justin Turner was required under his Grey Book terms and conditions to provide operational firefighting and control cover and/ or be redeployed operationally in accordance with the demands of the Service.

The Respondent however has disclosed no dates on which it is said that Mr Turner actually provided operational cover or was redeployed operationally to a fire or non-fire incident other than an Automatic Fire Alarm response. Otherwise Mr Turner was additionally remunerated for attending operational incidents under a separate RDS contract.

ii. Justin Turner was required under his Grey Book terms and conditions to be "on call" during his lunch break and thus could be called upon to provide operational cover during that period and was called upon to attend an operational incident as an AFA first responder on 16 December 2013 and 26 February 2014.

It has not been disclosed however that Mr Turner was ever actually called upon to provide operational cover during his lunch break to a fire or non-fire incident other than an Automatic Fire Alarm response.

iii. During the period between 12 April 2013 and 10 June 2014 Justin Turner attended as an AFA first responder on some 13 occasions;

The Claimant contends that Mr Turner was never in fact called upon to attend a fire or non-fire incident other than an Automatic Fire Alarm response..

iv. Justin Turner undertook operational/ and or fitness training specific to Grey Book employees;

v. Justin Turner was required to train Grey Book employees for operational duties (Rope Pack Training, Fitness Assessments and AFA responses) and undertake assessments of Grey Book employees for operational activities.

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did CSDMs performing the same.

5. In respect of the OM/CSDM role:

a. Was the Claimant's work the same or of a broadly similar nature to the work carried out by Justin Turner?

b. Were there were any differences between the work done by the Claimant and that done by Justin Turner and if so, were such differences of practical importance in relation to the terms of their work?

It is agreed that when the OM role was advertised on 2 May 2014 to all staff in Community Safety either Grey Book or Green Book competent inspectors could apply for it.

The Respondent relies on the following alleged differences:

i. Justin Turner was required under his Grey Book terms and conditions to provide operational firefighting and control cover and/ or be redeployed operationally in accordance with the demands of the Service.

The Respondent however has disclosed no dates on which it is said that Mr Turner actually provided operational cover or was redeployed operationally.

ii. Justin Turner was required under his Grey Book terms and conditions to be "on call" during his lunch break and thus could be called upon to provide operational cover during that period.

It has not been disclosed however that Mr Turner was ever actually called upon to provide operational cover.

iii. Justin Turner was required under his Grey Book terms and conditions of Service to move from the Community Fire Safety Department to the role of Station Commander in the Response department during the period 1 October 2015 to 27 March 2017.

The Claimant does not seek to rely upon Mr Turner as a comparator when he later applied to transfer to the role of Station Commander instead of the OM/CSDM role.

iv. Justin Turner undertook operational and/ or fitness training specific to Grey Book employees;

v. Justin Turner was required to perform or assist with Health & Safety investigations or Accident assessments and undertook an investigation between 03 March 2015 to 24 June 2015.

Difference in pay/ annual leave entitlement

6. If, in respect of one or more of the above roles, the Claimant's work is found to have been like work to that of her comparators, can the Claimant show that the terms of her contract in relation to her pay and/ or entitlement to annual leave were less favourable than the corresponding terms of her comparator (so as to engage the sex equality clause modification provisions under s. 66 EqA 2010)?

By its counter-schedule the Respondent accepts that there was a difference in pay and annual leave entitlement at any rate in respect of the OM/CSDM role.

Material factor defence

7. If so, can the Respondent rely on the 'material factor' defence (under s. 69 EqA 2010) by showing that the difference in pay or other contractual terms was due to a material factor that was not the difference of sex. More particularly in this regard, can the Respondent show that one or more of the factors on which it relies was:

(a) The real reason for the difference in pay and not a sham or pretence;
(b) Causative of the difference in pay;
(c) Material, that is a significant and relevant difference between the Claimant's case and that of her comparators; and
(d) Did not involve direct or indirect sex discrimination.

8. The alleged material factor(s) relied upon by the Respondent are:

(a) Differences between the nationally agreed terms and conditions that apply to Grey Book (operational) as opposed to Green Book (non-operational) employees.

(b) Grey Book employees were required to be available for operational work and/ or to respond to/ or be redeployed operationally during emergencies or other major incidents (such as when there was widespread area flooding) while Green book employees were not so required.

(c) Grey Book employees were required to be "on call" and at the disposal of the Respondent during lunch breaks and were therefore required to work a 42 hour week and paid on that basis, while Green Book employees were not so required and worked a 37 hour week.

(d) Grey Book employees were required to maintain competencies for operational duty at the appropriate Grey Book role while Green Book employees were not so required.

(e) Grey Book employees were required to maintain fitness and undergo fitness assessments (in accordance with the Service Fitness Order) while Green Book employees were not so required.

(f) Grey Book employees were expected to provide operational cover during periods of industrial action while Green Book employees were not so required.

(g) Grey Book employees were issued with Fire Kit bags (for use if they were needed to provide an operational response) while Green Book employees were not.

(h) Grey Book employees (at Station Manager/ CSDM level) were eligible to be a Station Manager for a Retained Station while Green Book employees were not so eligible.

(i) Grey Book employees (at Station Manager/ CSDM level) were able and available, due to their previous operational experience, to carry out health and safety assessments or accident assessments while Green Book employees were not so able.

(j) Grey Book employees could be required to be moved to a different discipline, department and or to a different location within Hampshire or mobilised within the UK whereas Green Book employees were not so required and have a specific place of work.

(k) Grey Book employees (at Crew Manager/ BSO level and at Watch Manager/ FSO level) could be required to be on the rota for the Automatic Fire Alarm Response while Green Book employees were not so required.

(l) Grey Book employees (at Crew Manager/ BSO level) were required to carry out fire ground competencies while Green Book employees were not so required.

(m) Grey Book employees (at Watch Manager / Station Manager FSO/CSDM level) were able and available due to their operational experience to carry out training and assessments for Grey Book employees of operational activities.

(n) In addition to the above (generic) factors, the Respondent relies on (and hereby repeats) the same facts and matters set out in the paragraphs above in respect of the particular differences between the Claimant and her comparators for each role (as being relevant to the question of like work), as also potentially being material factors for the difference in pay/ annual leave entitlement.

9. In relation to 7(d) above, whether the Respondent can show that:

(a) The factor did not involve treating the Claimant less favourably because of her sex than it treated her comparators; and

(b) If the Claimant has shown that, as a result of the factor, she and women doing work equal to her work were put at a particular disadvantage when compared with men doing work equal to her work, that the factor was a proportionate means of achieving a legitimate aim?

(i) For the period 12 December 2011 to 14 October 2012, in the relevant comparison pool the Claimant was the only female and on Green Book terms, whereas her comparator and all the other Crew Managers in Community Fire Safety were male and on Grey Book terms, so that the disadvantaged group comprised female only and the advantaged group all men.[3]

The Claimant therefore contends that the factor set out at paragraph 8(a) involved direct sex discrimination insofar as the division between advantaged and disadvantaged groups was directly related to gender. Alternatively, insofar as more favourable terms were dependent upon being a Grey Book employee (PCP being the requirement to be a Grey Book employee), that PCP put women at a particular disadvantage when compared with men.

With regard to the alleged indirect discrimination, if and insofar as the Respondent will seek to show that the said PCP could be objectively justified, the Respondent will contend that it was a proportionate means of achieving one or more of the following legitimate aims, namely:

- To enable Hampshire Fire and Rescue Service to provide an effective and efficient service in respect of its various functions and to ensure the safety of the public, their property, and the environment.
- To reward employees for being 'on call' and/ or competent and available for operational duties and deployment

[3] Note – For the period 11 December 2011 to 14 October 2012 Community Fire Safety was divided into two parts Protection and Prevention. The BSO/Code Compliance role was within Protection. In

The Claimant further contends that all other factors relied on by the Respondent by reference to Grey/Green Book differences were similarly tainted by direct and/or indirect sex discrimination.

(ii) For the period 15 October 2012 to 15 June 2014, in the relevant comparison pool (restricted to full time FSO or Watch Manager B equivalents within her department) the Claimant was the only female and on Green Book terms, whereas her comparator together with all of the other FSO/Watch Manager B equivalents (roughly 20 in number) were male and the vast majority were on Grey Book terms, so that the Claimant being the only woman was in the disadvantaged group and the advantaged group comprised mostly men. Alternatively, (taking a wider pool across the whole proportion of female employees who were on Green Book terms (40%) was considerably greater than the proportion of men who were, 14 out of 150 (9.3%), and the proportion of female employees who were on Grey Book terms (60%) was significantly smaller than the proportion of men including her comparator who were (90.6%).

Either way, the Claimant contends that insofar as more favourable terms were dependent upon being a Grey Book employee (PCP being the requirement to be a Grey Book employee), that PCP put women at a particular disadvantage when compared with men and, consequently, the factor set out at paragraph 8(a) involved indirect sex discrimination. The Claimant further contends that all other factors relied on by the Respondent by reference to Grey/Green Book differences were similarly tainted by indirect sex discrimination.

If and insofar as the Respondent will seek to show that the said PCP could be objectively justified, the Respondent will contend that it was a proportionate means of achieving one or more of the following legitimate aims, namely:

- To enable Hampshire Fire and Rescue Service to provide an effective and efficient service in respect of its various functions and to ensure the safety of the public, their property, and the environment.
- To reward employees for being 'on call' and/ or competent and available for operational duties and deployment

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Community Fire Safety (CFS) Protection there was 1 Female Green Book and 1 Male Grey Book, the split was 50:50 Grey Book/Green Book and 50:50 Male/Female.

(iii) For the period 16 June 2014 to 9 June 2017, in the relevant comparison pool the Claimant was the only female and on Green Book terms (apart from the period from 30 January 2017 when a male on Green Book terms was also employed as CSDM), whereas her comparator together with all of the other CSDMs were male and on Grey Book terms (apart from the period from 1 May 2017 when a female on Grey Book terms was also employed as CSDM) , so that during most of the relevant period the disadvantaged group comprised women only and the advantaged group men exclusively.

The Claimant contends therefore that the factor set out at paragraph 8(a) involved direct sex discrimination insofar as the division between advantaged and disadvantaged groups was directly related to gender. Alternatively, insofar as more favourable terms were dependent upon being a Grey Book employee (PCP being the requirement to be a Grey Book employee), that PCP put women at a particular disadvantage when compared with men.

With regard to alleged indirect discrimination, if and insofar as the Respondent will seek to show that the said PCP could be objectively justified, the Respondent will contend that it was a proportionate means of achieving one or more of the following legitimate aims, namely:

- To enable Hampshire Fire and Rescue Service to provide an effective and efficient service in respect of its various functions and to ensure the safety of the public, their property, and the environment.
- To reward employees for being 'on call' and/ or competent and available for operational duties and deployment

The Claimant further contends that all other factors relied on by the Respondent by reference to Grey/Green Book differences were similarly tainted by direct and/or indirect sex discrimination.

10. In relation to all or any of the factors set out above at paragraph 8, whether the material factor(s) accounted for all the difference in pay? If not, for what proportion of the difference in pay did it account?

Remedy on equal pay claim

11. (i) If the Tribunal finds that the Claimant's equal pay claim is made out, what if any remedy by way of back pay and/ or damages for economic loss is the Claimant entitled to as a result?

(ii) Can the Claimant recover damages for non-pecuniary loss (i.e. injury to feelings) in the event of a successful equal pay claim? *The Respondent maintains that the law is clear here – injury to feelings awards are not recoverable in equal pay claims.*

Constructive Unfair Dismissal claim

12. Did the Respondent commit a repudiatory breach of contract entitling the Claimant to resign without notice?

The Claimant relies on

(i) *Breach of the equality clause; and/or*

(ii) *Breach of the implied term of mutual trust and confidence in that the Respondent had failed, without reasonable and proper cause, to deal with her grievances over a protracted period or to address the inequality in her treatment over pay.*

The Claimant relies on the following particular alleged acts or omissions which are said to amount individually or cumulatively to a breach of the implied term of mutual trust and confidence:

(a) Claimant informally raised issue of difference in pay as between herself and her Grey Book equivalent doing the same job in verbal discussions with various Group Managers (Gates, Watts and Neat) and Station Manager Thomson in 2012 and the Claimant alleges that she was repeatedly told that it was due to the difference in contracts and therefore 'legal';

(b) On 2 May 2014 GM Neat issued an advertisement to all staff in Community Safety for temporary OM posts which were open to competent Grey or Green Book staff equally to apply for (Claimant also sent an email dated 6.5.14 to GM Neat querying pay for OM role);

(c) On 16 June 2014 Claimant became first female and first Green Book to be appointed to OM role but was paid less than other male OMs appointed at the same time to the same role;

(d) On 24 June 2014 after discussion with GM Watts Claimant's pay was increased from Green Book Grade H to Grade J and backdated, which narrowed difference in pay but did not resolve it;

(e) On 8 January 2015 the Respondent's Directors decided to equalise pay as between Grey Book and Green Book staff at Heads of Service Team level only (equivalent to Grey Book Area Manager) but did not publicise this and the Claimant was not informed of this significant decision;

(f) On 9 January 2015 the Respondent placed a freeze on all Green Book job evaluations, which effectively meant that there was no formal avenue open to the Claimant to complain about her grading (for complaints in respect of failure to apply the Respondent's Equal Opportunities policy SO/1/6/3 regarding grading/re-grading could not otherwise be dealt with under the Grievance procedure by virtue of para. 2.3.2 of that procedure);

(g) On 6 March 2015 Claimant nevertheless sent an email to GM Gates again querying her pay;

(h) In September 2015 Claimant discovered that pay had been equalised at HoST level and in the light of this queried her pay by email dated 7.9.15 to GM Gates and GM Murray highlighting issue of pay discrimination at lower ranks below HoST level;

(i) On 30 October 2015 permanent Green Book CSDM role was advertised by GM Murray - HR eventually agreed to allow job evaluation to be carried out for CSDM role;

(j) Job evaluation form was duly completed for Claimant's role as approved by GM Murray and submitted to HR on 17 November 2015 but job evaluation was then not carried out;

(k) On 14 April 2016 Claimant received pay rise to Grade K as a temporary measure;

(l) On 10 June 2016 Claimant sent email to GM Ash forwarding earlier email dated 13 April 2016 from GM Murray to AM Adamson affirming agreement to realign Claimant's pay to match Station Manager B competent pay (which would have resolved pay issue) but this was not actioned;

(m) On 29 July 2016 Claimant was invited by James Yates, Senior HR Adviser, to attend a meeting to discuss pay issue but meeting never took place;

(n) On 18 October 2016 Claimant, having gone through job evaluation process, submitted a formal grievance and should have been invited to a meeting within 7 days in accordance with the Respondent's Grievance procedure, a meeting was held on 28 November 2016 yet the final outcome was delayed until 10 March 2017, despite chasing emails sent to Area Manager Simms by Claimant on 12 December 2016, 15 January 2017 and 5 February 2017;

(o) On 16 March 2017 Claimant appealed against grievance outcome and should have been invited to a grievance appeal meeting within 7 days in accordance with the Respondent's Grievance procedure;

(p) On 10 April 2017 Claimant, having still not received any invitation to an appeal meeting, sent resignation email with reasons stated in email to AM Simms of same date, including delay in addressing grievance appeal, unequal treatment as regards pay and conditions afforded to other CSDMs and failure to adhere to Respondent's own timescales and procedures in dealing with her unduly protracted grievance.

The Respondent denies that it committed any such alleged repudiatory breach

13. Did the Claimant accept the breach and/or was there delay or other conduct on her part which constitutes waiver of the breach and/or affirmation of the contract?

14. Did the Claimant *in fact* resign in response to that breach (as opposed to some other reason, such as the fact that she had obtained a new job)? *The Respondent disputes the issue of causation.*

15. If the Claimant was constructively dismissed, can the Respondent show what was the reason or principal reason for the dismissal?

None has been pleaded nor is relied on by the Respondent other than denying any repudiatory breach.

16. Was the dismissal fair or unfair (having regard to the reason shown by the Respondent) in all the circumstances of the case in accordance with the provisions of section 98(4) of the Employment Rights Act 1996?

Remedy on unfair dismissal claim

17. If the Tribunal finds that the Claimant was constructively unfairly dismissed, what remedy by way of basic and/ or compensatory award is the Claimant entitled to as a result?

18. Would the Claimant's employment have terminated (for a fair reason) in any event and if so, within what time-frame or by reference to what percentage chance (*Polkey* deduction)?

No fair reason has been pleaded or proposed by the Respondent for terminating the Claimant's employment.

19. Has the Claimant taken reasonable steps to mitigate her loss?