EMPLOYMENT TRIBUNALS

Claimant: Mrs A Morton

Respondent: East Lancashire Hospitals NHS Trust

HELD AT: Manchester (in private by CVP) **ON:** 11 May 2022

BEFORE: Employment Judge Holmes

REPRESENTATION:
Claimant: In person
Respondent: Mr G Bredenkamp, Solicitor

RESERVED JUDGEMENT AND CASE MANAGEMENT ORDERS

PRELIMINARY HEARING
Employment Tribunals Rules of Procedure 2013
Rule 53(1)(a)

It is the judgment of the Tribunal that:

1. The respondent has permission to amend its response to plead a material factor defence under s.69 of the Equality Act 2010.

2. The material factors relied upon are:

   a) The claimant was employed in the Family Division;

   b) Although the claimant did like work to the SDAs in the SAS and Medicine Divisions, there were material factors which accounted for her pay being less than that of her comparators in those Divisions , namely , that the size and complexity of the SAS and Medicine Divisions was greater than that of the Family Division, and, as a consequence of this, the new SDA roles in those Divisions had been evaluated at the higher grade 8b.

   c) Those factors are significant and relevant, and are untainted by any sex discrimination.

CASE MANAGEMENT ORDERS

It is the Order of the Tribunal that:

1.The claimant shall by **1 July 2022** provide to the Tribunal and the respondent a written reply to the respondent's material factor defence, setting out, in particular, what elements of it she disputes factually.

2.The respondent shall by **15 July 2022** inform the Tribunal and the claimant in writing what further evidence it proposes to call , or adduce in written form , in support of the material factor defence.

3. The claimant is also to indicate by **29 July 2022** whether she considers that she will need to make or serve any further witness statement addressing specifically the material factor defence now relied upon, and whether she wishes any previous respondent witness to be recalled for further cross – examination, and if so, which ones.

4. The respondent shall by **12 August 2022** provide to the Tribunal and the claimant an estimated length of hearing, any further proposed case management orders as may be required, and dates to avoid for the further hearing.

REASONS

1. By a judgment sent to the parties on 13 January 2022, the claimant's claim for equal pay was successful in respect of the period of her employment from 24 August 2012 to 16 May 2016. The other claims were dismissed, and the Tribunal invited the parties to notify it by 11 April 2022 as to whether a remedy hearing is required.

2. Following the promulgation of this judgment the respondent , by email of 20 January 2022 raised the issue, which had been referred to in paragraphs 111 and 112 of the Tribunal's reasons, of a potential material factor defence. In the respondent's letter it was confirmed that the respondent did wish to pursue this further line of defence. The Tribunal had provisionally indicated that permission to amend would be required, and in subsequent correspondence the respondent indeed made such application.

3. There was some discussion in the correspondence as to whether the respondent had previously pleaded, or at least indicated, a material factor defence. In the respondent's most recent letter to the Tribunal of 17 March 2022, it was conceded such a defence had not been expressly pleaded.

The Application.

4. Mr Bredenkamp , solicitor, appeared for the respondent, and the claimant appeared again in person. The hearing was held by CVP, to which neither party objected.

5. There was no bundle for use in this hearing, which is not a criticism , as indeed none was actually required. The claimant was familiar with the exchange of correspondence leading up to the hearing, and was able to deal with the application without a further hearing bundle.

6. The Employment Judge invited the respondent's solicitor to elaborate upon the application made thus far correspondence, which he duly did. He took the Tribunal through the history of the List of Issues, referring in particular to a List sent to the claimant in September 2019 in advance of the commencement of the first part of the final hearing. His understanding was that this was an agreed List of Issues, and at paragraph 6 the following appears:

   "Was the difference between the contractual terms in Claimant's contract and those of the comparators due to a material factor within section 69 EqA(2010)?"

7. He contended that the respondent had for some time intended to rely upon a material factor defence. This had been discussed (as the Employment Judge has in fact noted) at the commencement of the final hearing in September 2019. He accepted that this defence had not, however , been pleaded , which may have been due to a misapprehension of the nature of the claimant claim (which appeared to be an equal value claim) or, he accepted, oversight on the part of the respondent or its legal advisers. Whatever the position, he accepted that this was no fault of the claimant's, and that the respondent now needed to make this application.

8. He relied upon the overriding objective, and contended that it would be unfair on the respondent if it were not permitted to advance this defence, as the Tribunal's finding of "like work" , which was not challenged, did not involve any evaluation of the reasons for the disparity in pay that the claimant had experienced. In other words, no investigation into the role that gender played in determining the claimant's rate of pay had taken place, which was the very objective of the equal pay provisions of the Equality Act. If the respondent were not permitted to advance this defence, there would be no such enquiry, and the claimant would simply succeed on the basis of like work.

9. He therefore submitted that the interests of justice required the respondent to be given permission to amend its response in order to advance this defence.

10. In reply, the claimant did not disagree that she had seen a draft List of Issues in September 2019, in which reference to a material factor defence was made. She could not recall this specifically, and would not have been sure what this meant. She did recall some discussion of it at the start of the hearing, and how given the time limitations, there was discussion of this issue being "parked".

11. She appreciated the respondent's position, but would prefer not to have to proceed with a further hearing. She very fairly did not , however, contend that she would be unable to deal with this further line of defence, and did not

advance any specific prejudice, other than the delay that would arise, that she may suffer if the application were granted.

12. The claimant did, however , question whether the respondent would be able to show that such a factor was in fact applied, in that she did not believe that any relevant banding exercise actually took place in 2012 or 2013. That will of course, potentially be a factual issue for the Tribunal to decide, but this was a further indication that with appropriate time for preparation the claimant would be likely to be able to deal with this further line of defence if it were permitted.

13. The discussion did, however, highlight the need for the respondent to be very precise about what factor or factors are being relied upon, and Mr Bredenkamp agreed to provide the Tribunal with a further, precisely formulated , proposed pleading of the factor or factors being relied upon.

14. Consequently, on 18 May 2022, the respondent did provide to the Tribunal and the respondent further particulars of the proposed material factor defence that it wishes to rely upon.

15. The further particulars provided set out the facts to be relied upon, which in summary, relate to the decision to create two SDA roles in the SAS and Medicine Divisions, and the subsequent evaluation of those roles as band 8b positions.

16. Breaking down the further particulars provided, the respondent's material factor defence appears to amount to this:

d) The claimant was employed in the Family Division;

e) Although the claimant did like work to the SDAs in the SAS and Medicine Divisions, there were material factors which accounted for her pay being less than that of her comparators in those Divisions , namely , that the size and complexity of the SAS and Medicine Divisions was greater than that of the Family Division, and, as a consequence of this, the new SDA roles in those Divisions had been evaluated at the higher grade 8b.

f) Those factors are significant and relevant, and are untainted by any sex discrimination.

17. The Employment Judge trusts that he has understood the proposed material factor defence correctly, as summarised above, and has proceeded on that basis.

Discussion and ruling.

18. As discussed in the course of the hearing, the decision whether to permit a party to amend involves the Tribunal exercising its discretion, and in doing so having regard to the principles set out in ***Selkent Bus Company v Moore .***

19. Ultimately, the issue comes down to one of prejudice. Save perhaps for an initial period between August 2012 and May 2013, if the respondent is not

now permitted to advance this material factor defence it will be liable to meet the claimant's claims for shortfalls in her pay during the whole of the period from July 2012 to May 2016. That is clearly significant prejudice. Against that, the claimant potentially loses the benefit of the Tribunal's finding in her favour this far, which potentially means that she succeeds in these claims in full. To the extent that the respondent is being deprived of an opportunity to advance a defence to a significant part of her claim, however, this is something of a windfall for the claimant.

20. The application, it is true, is made late. This defence could and should have been fully pleaded much sooner. Against that, it was clearly indicated in September 2019, although not then fully particularised. It was at least mentioned at the start of the hearing in September 2019. Given that the Tribunal's primary task in that hearing was to determine whether the claimant and her comparators were engaged upon like work, it was understandable that consideration of a potential material factor defence was deferred, as it would only arise in the event, as has now occurred, of a finding of like work.

21. In practical terms, therefore, had this defence been fully pleaded and considered before , or at the outset of the final hearing when it began in September 2019, it seems unlikely that the hearing would have followed any different course. In other words a separate and subsequent hearing of any material factor defence, after determination of the like work issue, was always likely to be the way in which such an issue was to be dealt with.

22. Thus, whilst unfortunate, the late application formally to amend the response to plead this defence has made little difference to the timetable and listing of the hearings required to complete the determination of these claims. More importantly perhaps, although the events in question occurred some time ago, they are well documented, and are likely to be primarily matters of submission rather than of recollection by witnesses. In short, it is likely that a fair determination of the material factor defence is still possible even at this late stage.

23. Given the considerable prejudice to the respondent if it is not permitted to advance this defence, and the relatively minor prejudice to the claimant of needing a further hearing to determine it, the Employment Judge does consider that the interests of justice do, on balance, tip in favour of the respondent being granted permission to amend its response to plead formally its material factor defence.

24. The respondent has now submitted final terms of the amendment sought, and the Tribunal has granted permission for the respondent to amend its response in the terms set out in the Order, as summarised in para. 16 above.

Further case management.

25. Whilst it is unusual for the Employment Tribunal to require a claimant to serve any form of "Reply", it would be of assistance in this instance if, having seen the respondent's final formulation of its amended response, the claimant could

formally indicate in writing her response to that defence, especially on any factual issues.

26. The parties need to consider now what further evidence (if any) will be required in the subsequent hearing. Two witnesses were not called by the respondent, one of whom Peter Dales, allegedly carried out the banding exercise relied upon by the respondent in May 2013. It is unclear at present whilst the claimant would have any issue with his witness statement, or wish to cross-examine him on any allegedly discriminatory aspects of the exercise that he undertook, or whether she is content to accept his evidence in its entirety, in which case, in the absence of any challenge the Tribunal is likely to accept it.

27. In terms of the respondent , in respect of the other witness Michael Potter, the Employment Judge was unconvinced by the relevance of his evidence . He carried out a further exercise in 2017 and again in March 2018. Other than to confirm the correctness of the previous exercise carried out by Mr Dales, the Tribunal cannot see any immediate relevance to the material factor defence that his evidence is likely to have, and it is long after the event.

28. Once the claimant has indicated what her response will be, it may be necessary to call re-call witnesses who have already given evidence to the Tribunal. As the burden of proving the defence rests upon the respondent, it would primarily be for the respondent to indicate whether any of its witnesses are to be recalled, and for the claimant as to whether she would have any further questions in respect of this new defence, which may not have been pursued in the “like work” hearing. The claimant may also wish to address any further factual issues in a Supplemental Witness Statement (or indeed call further witnesses of her own on these issues). If so, the Employment Judge considers that any such statement(s) should be exchanged after service of the respondent’s further evidence (or confirmation of what parts of its existing evidence are relied upon).

29. To that end the Employment Judge has made the case management orders above in order that the parties may address the evidential requirements for the determination of the material factor defence, and the Tribunal can be given an estimated length of hearing to enable it to list a further hearing as soon as possible. If necessary a further telephone preliminary hearing can be held, but this may not be necessary.

Postscript.

30. As a final observation, the respondent is clearly alive to the possibility (see para. 25 of the further particulars document) that the material factor defence, if successful at all, may only avail the respondent from the date when the Evaluation Panel concluded its grading , which was not until May 2013, giving the claimant the period from July 2012 to May 2013 when her claim may still be upheld.

31. That, of course, is well short of the further three year period that the claimant seeks. It may, however, be the basis for some sensible and practical discussions, perhaps through the agency of ACAS, as to whether some compromise cannot now be reached, so that the costs of a further hearing (which may well be a further two or three days) can be avoided, and this matter finally concluded.

32. To that end, and looking ahead, with no criticism of the claimant who has put a "global" figure in her Schedule of Loss of £32,000, the Employment Judge notes that there does not appear to be (apologies if it has been missed) any material in the bundle as to quantum. Whilst the claimant seeks the difference between what she was paid as a band 8A and what she would have been paid as a band 8B, no exercise comparing her salaries on the two scales appears to have been carried out by either side.

33. From research , it appears that the yearly difference in rates between band 8A and band 8B for 2013/2014 varies between £6,468 for the lowest point on the grade , to £9416 for someone at the top of it. Clearly, this exercise may need to be carried out at some stage, but should be in the parties' contemplation when considering how to deal with this claim going forward. The claimant's case needs quantifying for this exercise. The claimant's total claim , if successful spans just under 4 years. The annual pay differential in terms of her actual position needs to be ascertained, so that the value (i.e the net value, as any arrears of pay will be taxable) of the claim, at its highest, can be calculated. Then both sides, particularly the respondent , can give serious consideration to the proportionality of incurring the costs associated with a further hearing.

Employment Judge Holmes
Date : 31 May 2022

JUDGMENT SENT TO THE PARTIES ON
20 June 2022

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.