



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Kennedy

**Respondents:** 1. Spooner Industries Limited  
2. Aegeus Industries Limited

**Heard at:** Leeds      **on:** 6 to 8 December 2022

**Before:** Employment Judge Cox

**Representation:**

**Claimant:** Ms Firth, counsel

**Respondents:** Mr Holloway, counsel

## REASONS

1. The Claimant claims equal pay for work of equal value naming six comparators with whom she worked when employed by the First Respondent. At the Stage One Hearing, the Claimant withdrew her claim against the Second Respondent and it was dismissed.
2. The Respondent defends the claim on the basis that the Claimant's work was not of equal value to that of her comparators and, even if it were, her lower pay was due to a material factor other than the difference in sex between herself and her comparators. The Respondent puts forward two material factors to explain the difference in pay. The Tribunal decided that at the Stage One Hearing it would determine whether the difference in pay was explained by one of those factors, namely that the Claimant's salary was set by the market rate for the job. The other factor that the Respondent put forward, namely that the comparators' higher pay was due to their specialist knowledge, skills and experience, was left to be determined at the main Hearing. The Tribunal took the view that these matters were closely linked to the issue of whether the jobs were of equal value and to decide them at this preliminary stage might prejudice or complicate the

work of an independent expert or the Tribunal in determining the question of equal value.

### The issue

3. The Claimant's job with the Respondent was titled "Head of Human Resources". Her claim relates to the period of her employment with the company, which ran from 19 January 2019 to 18 March 2021. The issue for the Tribunal was whether for some or all of this period, and on the assumption that the Claimant's work was of equal value to that of her six comparators, the Respondent had shown that the difference between her pay and theirs was because of a material factor reliance on which did not involve treating her less favourably because of her sex than the Respondent treated the comparators (Section 69(1) of the Equality Act 2010). (The Claimant did not allege that the factors put forward by the Respondent to explain the difference in pay involved indirect sex discrimination, so Section 69(2) did not apply.)
4. Applying the guidance in Glasgow City Council v Marshall [2000] ICR 196), in order to establish its defence, the Respondent needed to satisfy the Tribunal that:
  - a. The reason it was putting forward for the difference in pay was genuine, not a sham or a pretence.
  - b. The Claimant's lower pay was due to that reason – the factor relied upon was the cause of the disparity. In that sense, it had to be a material, that is, significant and relevant, factor.
  - c. The reason was not "the difference of sex", that is, it did not involve direct sex discrimination.
5. The Claimant did not argue that the market rate for her job or those of her comparators was directly or indirectly discriminatory on the basis of sex. Rather, she argued that Mr Clarke, the person who fixed her salary, was influenced by the fact that the jobholder was likely to be a woman when he decided what salary to offer. The Respondent submitted that in those circumstances it was sufficient for it to show that the Claimant's salary had in fact been fixed on the basis of the market rate; it did not need to explain the reason why the comparators' pay had been set at the level it was. The Tribunal rejected that submission. Even if the Tribunal was satisfied that the Claimant's salary was fixed by reference to market rate, the Respondent would still need to explain the difference between her salary and that of her comparators, because it was the difference that was the focus of Section 69(1). Even if her salary was fixed at a market rate that was not based upon or influenced by sex, her comparators' salary might be based upon, or might be affected by, matters that involved some form of sex discrimination in their favour because of their sex. The Tribunal was therefore satisfied that it

needed to examine whether the comparators' rate of pay was also based on the market rate.

6. In summary, the Tribunal approached its task by asking whether, on the basis of the evidence with which it was presented, the Respondent had shown that the difference in pay between the Claimant and her comparators was genuinely due to the difference in the market rates for their respective jobs. The Tribunal took the market rate for a job to mean the level of remuneration that is generally paid in the relevant job market for doing that job. In that context, it took into account that a job market may be delimited not only by reference to the type of job involved but also by the geographical area in which it is done.

### **The evidence**

7. The Tribunal heard oral evidence from the Claimant. For the Respondent, the Tribunal heard oral evidence from: Mr Lee Bhandal, co-founder and Managing Partner at Parkinson Lee, a recruitment consultancy; Ms Helen Easter, Director of Folk Recruitment Limited, a recruitment consultancy; and Mr Stephen Clarke, Group Chief Executive Officer (CEO) of Aegeus Industries Limited, which owns and manages the Respondent. The Tribunal was also referred to various documents in an agreed Hearing file running to nearly 900 pages.
8. On the basis of that evidence, the Tribunal reached the following findings.

### **Salary surveys**

9. The Claimant relied on various salary surveys that she said undermined the Respondent's case on market rates. She had analysed the data from them and argued that they showed that her salary had been set lower than the market rate and some at least of comparators were being paid higher than the market rate.
10. Some of these surveys were published by the nationwide recruitment consultants Reeds and Michael Page and covered various roles in the areas of specialism of the Claimant and her comparators. One, by Wavelength, a small recruitment consultancy, had been commissioned by the Claimant and covered pay rates for HR "Leaders" (including those with and without "Director" in their job title) and non-HR Directors in manufacturing organisations.
11. The Tribunal did not consider these surveys to be of any significant probative value for the purpose of identifying the market rate for the specific roles involved in this claim, for a number of reasons. The Wavelength survey was based on a relatively small sample size, the largest being that used to calculate figures on the average remuneration of HR "Leaders" with Director in their job title, which covered 88 individuals in 50 manufacturing organisations. None of the surveys provided data that was specific to the type of manufacturing in which Spooner operates or the particular area in which it is based. More fundamentally, the

surveys were compiled by reference to job titles, without giving any indication of the assumptions that were being made about the content of a job to which the surveys, or the employers involved, had given that title.

### **The Claimant's salary**

12. The two Aegeus Group companies, of which the Respondent ("Spoooner") is one and Dowson Food Machinery is the other, are involved in the design, manufacture and supply of process equipment and related services for industrial applications. They export worldwide. The business's premises are in Ilkley, West Yorkshire, which is outside any major conurbation. When Mr Clarke joined the Group in May 2018, Spoooner had around 140 employees and Dowson had around 60.
13. At this time, the business was struggling financially and Mr Clarke initially advised the business as an external consultant. By the time he was appointed as an employee, Spoooner was losing millions of pounds a year, was facing a number of million-pound contract disputes and had a number of projects behind schedule. Mr Clarke took on the role of Managing Director of Spoooner as well as CEO of the Group. He identified that the main reason for the business's problems was poor management of costs and performance against contract. There was no-one doing roles that he saw as essential for both companies in the Group, namely senior finance, procurement and human resources (HR). He also identified a need for roles dealing with health and safety and quality functions. There was a lack of some basic support functions and poor organisation and clarity of roles. Because there was no HR Manager, basic HR-related tasks and responsibilities were being dealt with by the Operations Director or individual managers and team leaders.
14. Having identified a need to create an HR management role, Mr Clarke contacted Ms Easter, whose business is based in West Yorkshire and specialises in HR recruitment. Ms Easter had many years' experience in recruiting HR personnel in the region and was therefore ideally placed, Mr Clarke believed, to guide him through the process. Because the business had no HR function at all, the appointee would need to put in place standard HR policies and procedures and support managers in implementing them. The role would also involve a large element of hands-on repetitive and fairly basic level of duties once the policies and procedures were in place. The role would have no direct reports. He wanted to recruit a competent and experienced HR professional, who could provide core HR advice and support and be comfortable with dealing with all levels of senior management. Mr Clarke had no idea what salary the business would need to offer to attract suitable candidates as this was a completely new role and he looked to Ms Easter for guidance on pay and remuneration and the scope and title of the role.

15. After discussing the business's requirements and the scope of the role with Mr Clarke, Ms Easter suggested that a salary of £60,000 plus benefits (to include a pension, private medical cover and a 30% bonus scheme) would be appropriate and Mr Clarke agreed that the post should be advertised on those terms. Contrary to the Claimant's contention, the Tribunal was satisfied from the evidence of Ms Easter and Mr Clarke, which was clear and mutually consistent, that the figure of £60,000 came from Ms Easter, not Mr Clarke. The Claimant applied for the post, stating in her application that she was seeking a salary of £60,000 plus benefits. Ms Easter put forward the Claimant and five other applicants as suitable candidates for Mr Clarke's consideration and, after interviewing the Claimant and one other female candidate, Mr Clarke decided to appoint the Claimant to the job. She accepted the job on the salary proposed. She had asked for the salary to be increased to £68,000. In order to secure her acceptance, Mr Clarke agreed that a car allowance would be included in her benefit package.
16. The Claimant alleged that in deciding on the salary to offer for the job Mr Clarke had been influenced by the fact that he believed the role was likely to be filled by a woman and that it was "women's work". As evidence of Mr Clarke's discriminatory attitude towards women, the Claimant relied on an email that Mr Clarke sent to Keely Tomlinson-Bowler on 18 October 2018. Ms Tomlinson-Bowler was a junior project manager who also did reception and administrative duties. In the email, Mr Clarke asked for her help in co-ordinating the directors to meet with the Claimant when she visited the company premises before she was recruited. At the foot of the email Mr Clarke said:
- "NB: another woman in a senior role – there is another candidate but as they are both women...) Next thing you know they will be getting the vote, doilies on desks, cushions, pot pourri..."
17. The Claimant submitted that this email was evidence the Mr Clarke had a discriminatory attitude towards women. The Tribunal found that the opposite was in fact the case. This was an email sent to a female employee that Mr Clarke had identified when he joined the business as being underutilised and having potential for development. He wanted to encourage her to have confidence in herself and her ability to progress in the company by pointing out that there was another woman being appointed to a senior position in the business. (The first was Mr Clarke's appointment of a female interim Finance Director a few months earlier.) His comments about women getting the vote and so forth were ironic, made "tongue in cheek", and indicated that he believed these attitudes towards women were ridiculous, not that he supported them. By the time of the Tribunal Hearing, Ms Tomlinson-Bowler had progressed to fully-trained project manager on an increased salary and was doing, in Mr Clarke's opinion, "a great job".
18. In arguing that Mr Clarke had a discriminatory attitude towards women, the Claimant also relied on the fact that the female interim Finance Director had not

been confirmed in post and had left the business. The Tribunal accepted Mr Clarke's evidence, which was clear and credible, that he was keen to see more women in senior positions in the company. He had wanted to confirm the interim Finance Director in post but had needed the approval of the Chairman of the Group to do so. Because the Chairman was seriously ill at the time, there were delays in that approval being obtained, by which time the interim Finance Director had found a permanent job elsewhere.

19. In summary, the Tribunal found that there was no evidence that Mr Clarke was influenced in any way either by the sex of the Claimant or by the fact that most HR professionals are women when setting the salary for the role. His evidence, which was clear and authoritative and supported by that of Ms Easter and the documentation relating to the recruitment process to which the Tribunal was referred, was that he decided on the Claimant's salary on the basis of Ms Easter's advice as to the market rate for this type of role in the geographical area in which the company is located.

#### **Salary of comparator Mr Lewis-Jones, Group Finance Director**

20. Another role that Mr Clarke identified as necessary for the business when he joined in 2018 was a senior finance manager. As this was a new role to the business, Mr Clarke again decided that he would need external expert advice on defining the role, finding the right person to fill it and setting an appropriate remuneration package. He knew Mr Bhandal from work he had done in previous roles where he had used Mr Bhandal's consultancy to find senior finance people and so contacted him to assist with recruitment to this role. He told Mr Bhandal that he needed to recruit urgently, and that he would be happy with an interim appointment, with a view to the role later becoming permanent. They discussed the appropriate salary and remuneration that the business would need to offer to get the right person. Mr Clarke initially set his budget at a maximum of £100,000, but Mr Bhandal said that that he would struggle to attract a suitable candidate for a budget of less than around £120,000, or £700 a day. (Those filling interim roles often want to work on a self-employed basis at a daily rate and tend to be looking for higher rates than they would be paid as a permanent employee, because they have to provide their own pension, holiday pay and sickness cover.)
21. In the event, Mr Bhandal identified a woman candidate, SM, who appeared suitable for the role. Mr Clarke found her a very good fit for the company's requirements. He offered her the interim role as Finance Director on the daily rate that she was asking for, namely £560 per day, on a self-employed basis. Taking into account the expenses she needed to meet, this equated to being paid an employed salary of around £100,000 to £110,000 a year. It amounted to an annual cost of around £130,000 to the business. She started work in July 2018. She left after a few months, having found a permanent role elsewhere, and Mr Clarke contacted Mr Bhandal again for his help in recruiting a replacement. Again, Mr Bhandal suggested that Mr Clarke should consider offering £120,000

to attract suitable candidates but Mr Clarke stuck to his budget of £100,000. They agreed that if a suitable candidate could be identified, they would be offered a salary of £100,000. After a degree of difficulty in identifying a short list of suitable candidates, Mr Bhandal eventually was able to put forward Mr Lewis-Jones for the role. Having interviewed him, Mr Clarke decided to offer him the job at £100,000, and he accepted.

22. The Tribunal accepted the evidence of Mr Bhandal and Mr Clarke, which was authoritative, clear, mutually consistent, and supported by the documentary evidence, that Mr Clarke's decision to offer Mr Lewis-Jones the salary that he did was based on Mr Bhandal's assessment of the market rate for the role. Mr Bhandal is highly experienced in the area of recruitment to financial posts, having spent 22 years dealing with recruitment to senior finance roles and around 20 years recruiting to manufacturing businesses in Yorkshire. His evidence was authoritative on the market rate for this particular role, as he was able to assess the effect on salary of the duties the job was to cover, the sector in which it was to be done and the location of the business. If anything, it appears that the salary that the company ended up offering to Mr Lewis-Jones was towards the bottom of the market rate range, given the difficulty Mr Bhandal had in identifying appointable candidates.
23. The Tribunal saw no evidence that Mr Clarke was influenced in any way by Mr Lewis-Jones's sex in offering him the salary he did. In particular, his predecessor in the role had been on broadly similar remuneration, after taking into account the different costs between salaried and self-employed status.
24. As the Tribunal was satisfied that the difference between the Claimant's salary and that of her comparator Mr Lewis-Jones was entirely explained by the business's decision to pay them the market rate for their roles, the claim for equal pay with Mr Lewis-Jones failed and was dismissed.

### **Salary of comparator Mr Cassingham, Sales and Marketing Director**

25. When Mr Clarke joined the business, a Sales and Marketing Director had been newly appointed. Whilst still working as a consultant to the business, Mr Clarke had advised against selecting this candidate and his employment turned out to be unsatisfactory and he left. Mr Clarke was clear that the business needed someone with very specific knowledge of selling capital equipment as well as technical expertise. Finding a suitable candidate with sector-specific knowledge was going to be difficult, so Mr Clarke engaged a "headhunter" business, Fortitude Dynamics, that he had used previously to help with the task. Mr Clarke's contact there, Monika Juneja, advised that it would be necessary to do a nationwide search to find candidates with the experience required. They agreed that the salary would need to be between £85,000 and £100,000.

26. Eventually, Mr Cassingham was identified by Mr Clarke as the sole suitable, and indeed a very good, candidate who fitted well with the requirements of the role. Mr Cassingham was based in Kent. There were negotiations on what his salary was to be. He was looking for the top end of the salary range on offer. Eventually, because Mr Cassingham was a strong candidate and had previously been in a senior role, Mr Clarke agreed to offer £95,000, together with a relocation package and an allowance towards the cost of temporary local accommodation.
27. The Tribunal was satisfied that the difference between the Claimant's salary and that of her comparator Mr Cassingham was entirely explained by the business's decision to pay them the market rate for their respective roles. The Claimant's claim for equal pay with Mr Cassingham therefore failed and was dismissed.

### **Salary of comparator Mr Proctor, Operations Director/Principal Engineer**

28. When Mr Clarke arrived in the business, Mr Proctor was working as Operations Director, having been with the business for over thirty years. Given the time since Mr Proctor's appointment, it was perhaps not surprising that the Respondent presented no evidence on how the business decided on his initial salary. By the time the Claimant joined the business, Mr Proctor's salary was £83,677.92.
29. Due to certain personal circumstances of Mr Proctor, in January 2020 Mr Clarke agreed with him that he would move into a new role and the company recruited a successor for him as Operations Director. Mr Clarke and the Claimant worked with TS Grale, executive recruitment consultants, to assist with this process. Having discussed with the Grale advisor what the company could afford and what the advisor considered an appropriate rate to attract the right candidate, they agreed on a salary of between £80,000 and £85,000.
30. From this evidence, the Tribunal was satisfied that the difference between the Claimant's salary and that of Mr Proctor was explained by the fact that the business was paying them the market rate for their respective roles, The Claimant's claim for equal pay with Mr Proctor in relation to his period as Operations Director, covering 17 January 2019 to 5 January 2020, therefore failed and was dismissed.
31. On 6 January 2020, Mr Proctor moved into the role of Principal Engineer, a new role created as part of Mr Clarke's decision to restructure the Technical Department. In setting the salary for this post, Mr Clarke was advised by the Claimant that the benchmark salary was £60,000. The Tribunal heard no evidence on whether this benchmark was external, by reference to the market rate, or internal, by reference to other salaries within the business. Mr Clarke's evidence was that he was not willing to offer Mr Proctor more than this, because the salary needed to sit fairly among internal benchmarks. The figure that was finally agreed with Mr Proctor was £71,750.



32. Mr Clarke's evidence was that he agreed to this higher figure because he need to retain Mr Proctor's skills in the business and because Mr Proctor said he could not afford to bear any greater pay reduction. The Tribunal made no findings on this evidence other than to conclude that, in the light of it, the Respondent had not shown that the difference between the Claimant's salary and Mr Proctor's salary as Principal Engineer was explained by market forces.
33. The Respondent's defence of material factor by reference to market rates therefore failed in relation to Mr Proctor for the period from 6 January 2020 to 18 March 2021. Whether the difference between his pay and the Claimant's can be explained by reference to specialist knowledge, skills and experience may need to be decided on a later date, if their work is found to be of equal value.

### **Salary of comparator Mr Rankin, Commercial Director**

34. The role of Commercial Director was another role that Mr Clarke created after joining the company. He designed the role with Mr Rankin in mind. Mr Rankin had worked for Spooner for over 30 years and had substantial knowledge of the business. In deciding on the salary to be attached to the role, Mr Clarke relied on the advice of Andrew Ward, an experienced recruiter at the recruitment agency Page Executive. From the documentary evidence to which the Tribunal was referred relating to the basis of Page's fees, the Tribunal accepts that the salary that the agency had suggested and that Mr Clarke had agreed was £80,000.
35. In the event, the job was offered to Mr Rankin at £85,000 and he joined the business on 17 January 2019. Mr Clarke's evidence was that he offered Mr Rankin more than £80,000 because he asked for it and Mr Clarke decided to give it to him. The Tribunal made no findings on this evidence other than that the difference between the Claimant's salary and that of Mr Rankin was explained by the market rates for their jobs only to the extent of the difference between the Claimant's salary and £80,000. The parties agreed that the salary of all the posts involved in this claim was increased by 2.5% on 1 July 2019 and 2% on 1 July 2020. The Tribunal therefore accepted that market rates also explained the difference between the Claimant's increased salary and that of Mr Rankin, which rose to £61,500 and £82,000 respectively from 1 July 2019 and £62,730 and £83,640 respectively from 1 July 2020.
36. Whether the further difference between the Claimant's salary and that of Mr Rankin was explained by specialist knowledge, skills and experience may need to be decided at a future date, if their work is found to be of equal value.

### **Salary of comparator Mr Marson, Technical Director**

37. The Tribunal heard no direct evidence on the market rate for the job of Technical Director, held by Mr Marson. The Tribunal does not accept the Respondent's submission that, because Mr Clarke did not feel the need to address any issues of underperformance by Mr Marson, he was being paid the market rate.
38. The Respondent's defence of material factor by reference to market rates therefore failed in relation to the comparator Mr Marson. Whether the difference between the Claimant's salary and that of Mr Marson was explained by differences between their levels of specialist knowledge, skills and experience may need to be decided at a future date, if their work is found to be of equal value.

### **Salary of comparator Mr Bentley, Operations Director**

39. As already mentioned above in its findings on the recruitment exercise for this post, the Tribunal accepts that the market rate for the post of Operations Director was in the range from £80,000 to £85,000. Mr Bentley was in fact paid less than this, namely £73,000 (rising to £74,460 with the July 2020 pay increase). Mr Clarke's evidence was that Mr Bentley was paid less than the rate initially proposed because he was less experienced than the sort of person the company was initially looking for. On the other hand, he was paid more than he was seeking by way of salary because Mr Clarke thought that he would not have stayed if he was paid only £60,000, once he realised all that the job involved.
40. The Tribunal made no findings on this evidence beyond finding that, in the light of it, the difference in pay between the Claimant and that of Mr Bentley was not explained by the difference in the market rates for their jobs. The Respondent's defence of material factor by reference to market rates therefore failed in relation to the comparator Mr Bentley. Whether the difference between the Claimant's salary and that of Mr Bentley was explained by differences between their levels of specialist knowledge, skills and experience may need to be decided at a future date, if their work is found to be of equal value.

Employment Judge Cox

Date: 27 January 2023