EMPLOYMENT TRIBUNALS

Claimant: **Ms S Mueller**

First Respondent: **Utopia Leisure Limited**

Second respondent: **Peter Hinchcliffe**

Third respondent: **Deborah Hinchcliffe**

Fourth respondent: **Ian Heath**

Heard at: **Bury St Edmunds (by CVP)**

On: **12, 13, and 14 July 2023 and 31 August 2023 in chambers.**

Before: **Employment Judge Skehan**
Ms S Williams and Ms J Costley

Appearances
For the claimant: Mr Gloag, counsel instructed on a direct access basis.
For the respondents: Mrs Skeaping, solicitor.

RESERVED JUDGMENT

1) The claimant's claim for direct sex discrimination against all respondents is successful.
2) The claimant's claim for equal pay against the First Respondent is successful.
3) The claimant's claim for breach of contract/ unauthorised deduction from wages against the First Respondent in respect of a holiday pay is partially successful to the extent set out below.
4) The claimant's claim for breach of contract/ unauthorised deduction from wages against the First Respondent in respect of a 33% pay cut between March 2020 and January 2021 and underpayment of holiday pay arising from that pay cut is unsuccessful and dismissed.
5) Remedy in this matter will be determined at the forthcoming remedy hearing.

REASONS

1) At the commencement of the hearing we revisited the issues to be determined. We raised various queries with both representatives and requested that the parties use the tribunal reading time to clarify the issues. We revisited the issues when the tribunal had concluded its initial reading. Mr Gloag confirmed that the equal pay claim was being advanced on the basis of 'like work' only. There is no claim based upon 'work rated as equivalent' or work of 'equal value'. We revisited the list of issues again prior to submissions.

The Issues

2) EQA, section 13: direct discrimination because of sex
   a. It is not in dispute that R1 reduced the claimant's salary by 33% in the period March 2020 to January 2021.

   b. Was that treatment "less favourable treatment", i.e. did the respondents treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators: Mr Montagnier, Mr Jurca, Mr Perry Perry, Mr Routier. The parties agree they were all general managers like the claimant, but the respondents say they were not valid comparators because they were on a lower pay grade than the claimant.

   c. If so, was this because of the claimant's sex? The respondent's agree that the named comparators had their pay reduced by 25% but say this was based on pay grades. It says that the claimant was paid significantly more than the other general managers; and that the other managers/directors who were paid a higher salary had a 33% reduction in pay also. The respondents' say the claimant was still paid more than the other male managers even after the reduction.

3) Unpaid annual leave – under Working Time Regulations or contract
   a. The claimant is claiming for:
      i. Underpayment of pay when on holiday during the period March 2020 to January 2021, when she was paid a reduction of 33% of salary;
      ii. Pay in lieu of holiday on termination of employment.

4) Unauthorised deductions and breach of contact
   a. The claimant says that R1 had no authority to make a deduction from her pay during the period March 2020 to January 2021. This covers the period when the claimant was on furlough and the period when she was working. The respondents concede that the reduction in pay was imposed on the claimant.
   b. Did the claimant impliedly accept the reduction in pay by failing to complain about it?

5) Equal Pay
   a. The equal pay claim relates to 23 March 2020 and 8 January 2021. The

claimant makes a complaint in respect of 'like work' only. The claimant identifies two comparators - as Mr Jurca & Mr Perry.

b. The respondent says that the two individuals are not comparators as they were not doing 'like work'. They were performing the role of the general manager (similar to the claimant) and the role of a spa manager in addition.

c. The respondent runs a material factor defence: The variation is a consequence of the respondent's decision to apply a reduction different /lesser amount 25% as opposed to 33% by reference to each role only.

The Hearing

6) The hearing was heard by video on the CVP platform over three days, with a further deliberation day. We encountered some technical difficulties, particularly with sound issues that were overcome with assistance from the participants concerned. This caused some delay to our timetable and necessitated our further deliberation day. However, the tribunal was satisfied that a fair hearing was conducted with all parties being able to participate properly by video link.

The Facts

7) As is not unusual in these cases, the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance in determining the issues set out in the above agreed list of issues. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.

8) All witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined. We heard from the claimant on her own behalf. Witness statements were produced on behalf of Mr Montagnier and Mr Routier and we were informed that they were available for cross examination. The respondent had no cross examination questions for the witnesses and the statements were accepted as their evidence. On behalf of the respondent, we heard from Mr Heath, the respondent's operations director, Mrs Hinchcliffe, a director and owner of the company and Ms Collick, the group's payroll manager in respect of holiday. We did not hear from Mr Hinchcliffe and draw no adverse inference from his absence as there was medical evidence relating to his ill health that provided good reason for his absence.

9) By claim form presented on 9 May 2021, following a period of early conciliation, the claimant brought complaints of sex discrimination and for equal pay, holiday pay and arrears of pay. The claim arises from the imposed reduction in the claimant's pay by 33% during the Covid 19 pandemic.

10) Utopia Leisure Limited is a luxury hotel group trading as Alexander Hotels. It is a large employer with approximately 550 employees. At the time, they owned and operated five hotels. Mr and Mrs Hinchcliffe own Utopia Leisure Limited. They are

experienced, well-known and well-respected business people. Mr Heath is the operations director for Alexander Hotels. The claimant was employed between 15 April 2019 and 8 January 2021 as General Manager of the Great Fosters Hotel.

11) In March 2020 the hospitality industry felt the full brunt of the coronavirus pandemic, subsequent restrictions and lockdowns. Mr Heath and Mr and Mrs Hinchcliffe discussed ways in which to maintain their business and retain their staff. It was decided between the three that a pay cut would be imposed upon staff. The pay cuts were imposed by the respondent with a view to retaining jobs. Although not stated explicitly, the circumstances at the time being a complete cessation in revenue were such that, had the pay cuts not been imposed, it was recognised by all that the only alternative open to the respondent would be job losses. The circumstances created by the pandemic meant that the whole of the hospitality industry was similarly affected. There were no alternative available jobs for employees to move to at that time.

12) There was some chopping and changing by the respondents in relation to the proposed pay cuts. For example the respondents identified that pay cuts should not bring staff below the national minimum wage. Different levels of % pay cuts were imposed on different staff. Mr Heath explained the logic behind the pay cuts was those on lower salaries were potentially disproportionately hit by pay cuts in relation to basic living needs. Those who earned more could better afford the cuts and larger cuts were imposed upon them. Mr Heath told us that a joint decision was made by Mr and Mrs Hinchcliffe and Mr Heath to impose cuts based only on salary levels. The imposed cuts were:
    i. 20% pay cut for those earning under £30,000
    ii. 25% pay cut for those earning 84,999
    iii. 33% pay cut for those earning £85,000 and above.

13) Mr Montagnier was the general manager of Langshott Manor and earned £55,000 per annum. Mr Roullier was the general manager of Barnett Hill and earned £65,000 per annum. The respondent applied the salary cuts with reference to earnings as stated above and both Mr Routier and Mr Montagnier had a 25% cut compared to the claimant's 33% cut.

14) The claimant's annual salary was £90,000. The salary reflected within payslips of Mr Jurca was £90,000 and Mr Perry's was £91,000. The respondent imposed a 25% pay cut (rather than a 33% cut) on both Mr Perry and Mr Jurca. Mr Heath said that the hotels managed by both Mr Perry and Mr Jurca had spas attached to them. These spas were run as separate businesses with their own internal accounts, profit and loss and balance sheet. Both Mr Perry and Mr Jurca were considered to have two roles or dual employment and the pay cut % was applied to earnings within the individual businesses. As their earnings from each role was under £85,000 a 25% cut was imposed upon them. Mr Jurca's total salary of £90,000 was said to be £67,500 for the general manager role and £22,500 for his spa manager role. Mr Perry's total salary of £91,000 was said to be £68,250 for his general manager role and £22,750 for the spa manager role.

15) This was not a scenario whereby the cuts were applied automatically by payroll without management oversight. Mr Heath told us that he, along with Mr and Mrs

Hinchcliffe discussed each individual and identified what they considered to be a fair percentage salary cut to impose by reference to the bands they had set. There was no suggestion from Mr Heath that the level of cuts imposed were determined in any way connected to the duties or breadth/importance of those duties.

16) The Tribunal allowed the respondent the opportunity to provide any further available detail on the reasoning behind the pay cuts as applied to Mr Perry and Mr Jurca and the apparent discrepancy between their treatment and that of the claimant. Mrs Hinchcliff told us that the level of pay cuts were enforced on the basis that those who could afford it, paid more. She addressed the discrepancy between the claimant and Mr Perry and Mr Jurca by saying that they had 'bigger jobs' than the claimant. When asked to clarify how the respondents determined the level of cut imposed, Mrs Hinchcliffe told us she that had nothing more to add.

17) It was noted by the tribunal during the conclusion of submissions on day 3 of the hearing that the spa manager salary as identified by the respondent in both cases would, on the respondent's logic attract a 20% rather than a 25% pay cut as it was under £30,000. We requested confirmation as to the pay cut on all earnings of Mr Perry and Mr Jurca (to allow for rectification of an obvious misunderstanding on our part) and whether there was any evidence before us addressing this point. We allowed both parties the opportunity to make submissions. Mrs Skeaping confirmed that a 25% pay cut was applied by the respondent to the entirety of both Mr Jurca and Mr Perry's earnings. There was no further evidence before the tribunal. Mrs Skeaping sought to adduce further evidence from Mr Heath on this point. However, as we had reached the end of submissions, we considered it inappropriate and not in line with the overriding objective to deal with the matter fairly and justly, to allow further evidence to be introduced at this very late stage. Mrs Skeaping had no further submissions make on this point.

18) The claimant, as general manager of Great Fosters duly implemented the pay cuts within her team as identified by the respondents and notified to her. The claimant was informed of the 33% pay cut imposed upon her by email attachment dated 23 March 2020. There was no consultation with the claimant or any staff in respect of the cuts. These were imposed by the respondent

19) When asked to clarify how the claimant says she objected to the cuts, she repeatedly referred to being petrified and repeated that she had no choice but to continue in her employment. She stated that all employees were essentially in the same position and this corresponds with the respondents' evidence, that they received no pushback at all in respect of the proposed cuts. The claimant has shown that she queried with the respondents when her salary would be reinstated, and was given no definite timeline due to the ongoing pandemic. We find that the claimant at no time objected to the pay cut, nor did she do anything to alert the respondents to the fact that she considered herself to be working under protest. The claimant maintained a good relationship with Mr Heath and the Hinchcliffes. The claimant worked very hard during the covid period. She implemented innovative business ideas such as to fully utilise the impressive gardens of Great Fosters incorporating art exhibitions. For a period in the summer of 2020, the hotel became incredibly busy as we emerged from the first lockdown period, and the claimant worked hard to capitalise and recover hotel revenue to the fullest extent.

The claimant knew that to make her objection to the pay cut known would risk the termination of her employment and she wished to maintain that employment as she searched for an alternative better paid role. We acknowledge that the claimant was in a difficult personal position. She had recently relocated for this job. Her husband was unwell and was not at that time working. The job market within the hospitality industry was for that period, non-existent. The claimant eventually found an alternative role and duly tendered her resignation on 9 December 2020 and her final working day was 8 January 2021. The claimant first mentioned that she considered herself to be working under protest in her resignation letter.

20) We now turn to examine the work carried out by the claimant, Mr Jurca and Mr Perry. All three had contractual documentation in a similar form, a written short contract of employment setting out the basic terms and conditions. There are no job descriptions. The contracts all provided similarly wide description of duties along the lines of as a senior member of the team you will be required to work to fulfil your responsibilities …'. Both Mr Jurca and Mr Perry had only one contract of employment. Their contract refers to their entire earnings and the respondent's evidence about them holding separate roles or dual employment is not reflected anywhere within the documentation. Mr Perry's contract of 2012 offers him the job of 'general manager at RowHill Grange Hotel and Utopia Spa. Mr Jurca' position is stated as 'hotel manager' at Alexander House. He was later promoted to General Manager at Alexander house. There is an organisational chart within the bundle that predates the claimant's employment. This shows general manager positions at various hotels and there is no reference to any 'spa manager' position.

21) The claimant describes her role in some detail. She describes a busy and varied role that included managing a listed Manor house, extensive listed gardens, the estate, a Michelin starred restaurant, the Tythe Barn being a large events space, and extensive wedding and banqueting space, renovation work and estate produced gin and honey. She managed 90 team members. There were references during the evidence to issues relating to an outdoor pool and managing asbestos problems. We heard from both the claimant and Mr Heath that general managers were expected to do what was required to manage their businesses and by their nature their roles were wide-ranging and varied. The claimant disputed that there was any difference between her job and that of Mr Jurca and Mr Perry. She considered their roles to be equivalent and considered the idea of separate roles to be artificial. She told us that a general manager manages the hotel and all of the facilities and services within it. She considered that her managerial role was considerably larger than that of Mr Routier and Mr Montagnier by reference to their respective hotels and all the facilities and services provided and that was reflected in their respective salaries. She considered her role to be equivalent in size to that of Mr Perry and Mr Jurca in respect of overall managerial responsibility. The claimant acknowledged that she did not have a spa, however she had a myriad of other elements within her area that equated to that managed by both Mr Jurca and Mr Perry inclusive of their spas.

22) The claimant told us that she considered it likely that a general manager's salary would be influenced by hotel turnover, but she had no visibility in respect of the other hotels finances. Mr Heath told us that this was not the case and indicated

that number of bedrooms was a better indication. He gave an estimate of turnover and bedrooms for the various hotels as:

General Manager	Hotel	Bedrooms	Est Turnover (£M)
Mr Montagnier	Langshott Manor	22	2 – No Spa
Mr Roullier	Barnett Hill	58	4 – No Spa
Claimant	Great Fosters	45	6 – No Spa
Mr Jurca	Alexander Hall	58	10.5 + 3.5 Spa
Mr Perry	Rowhill Grange Hotel	38	9 & 3 Spa

23) No documentation was disclosed by the respondent in respect of any business turnover. We note that Great Fosters was the most recently acquired hotel. It was in poor financial shape upon acquisition and was being built up by the respondents with the recruitment of the claimant. For example the claimant oversaw the drive to acquire a five-star recommendation and other drives for improvement.

24) The respondent did not produce any detailed evidence in respect of the work carried out by Mr Perry and Mr Jurca. The respondent said it ran each hotel as a separate business, meaning that each hotel had for internal accounting purposes its own budget and profit and loss account. The spas at Alexander house and RowHill Grange, operated for internal accounting purposes as separate businesses with their own budgets and profit and loss accounts. The respondent says that Mr Perry and Mr Jurca had equivalent roles to the claimant to the extent that they were general managers but that they were paid substantially less than the claimant for that role. The respondent said that both Mr Perry and Mr Jurca had additional roles as spa managers running that separate business that the claimant did not hold and were paid additional amounts for this responsibility. The specific differences were said in cross examination were said to include managing the paperwork and accounts from the Spa business, the staff and associated spa related issues such as water quality.

25) Salaries were treated confidentially within the respondent and the claimant was unaware of the salaries paid to the other general managers during her employment. She assumed that pay cuts were implemented as set out by the respondents' in their internal correspondence by reference to salary and was unaware of how the internal accounts outside of her hotel were organized or that Mr Perry and Mr Jurca were said to have the additional role of spa manager. It was common ground that the claimant did not have full visibility of the salaries, percentage pay cuts imposed on other general managers and the respondents reliance upon Mr Perry and Mr Jurca having two roles until the disclosure exercise carried out in Dec 2022.

26) At the outset of the hearing the parties' positions on the holiday pay claim for unpaid accrued holiday entitlement was unclear. The parties were repeatedly requested to clearly identify the areas of dispute for the tribunal and time was provided to both representatives to do so. The end result was that:
   a. The respondent stated that the allowance for bank holidays should be calculated on a pro rata basis rather than by reference to the date of the bank holidays taken; and

b. the claimant claimed that she had accrued five days, time in lieu of holiday, that should be paid on termination. The respondent conceded that one day time in lieu of holiday had been accrued and was unpaid.
c. There was also claim for underpayment of holiday on the same basis as the breach of contract claim (the 33% deduction) or sex discrimination claim (the difference between a 33% and 25% deduction).
d. Both representatives confirmed that there was no other holiday pay claim.

27) The claimant's contract provides, inter alia:
a. your holiday entitlement will be 20 days per annum with a further allocation of the bank holidays that occurred during the same period.
b. the company year runs from 1 April to 31 March.
c. the handbook is incorporated into the contract. While the contract makes reference to a handbook that is being updated at that time the only handbook available to the tribunal was the 'old' handbook that makes no reference to Great Fosters. The holiday provision within this handbook provides: …you are entitled to these eight statutory holidays: New Year's Day, Good Friday [etc]' …You will be paid in lieu of accrued untaken holiday entitlement.

28) The claimant says that she worked long hours during the summer of 2020 and had accrued five days that she was entitled to take in lieu of holiday and these should be paid on termination. She had recorded these as she was obliged to do and they were shown on the respondent's system and there was a screenshot of the same, taken by the claimant on her last day at work, showing five days in lieu accrued within the bundle. The claimant said that there was nowhere on the respondent system to identify the dates to which the days in lieu referred. This information was only in the actual timesheets she had submitted during her employment. They were not before the tribunal.

29) The respondent's evidence was that in principal days in lieu were accrued when extra days were worked but these five days in lieu were not supported by timesheets. Ms Collick gave evidence of various different systems for recording holiday being operated by the respondent that included both handwritten timesheets, her own internal spreadsheets, and the respondents holiday recording program. There had been no disclosure prior to the hearing by the respondent of the relevant timesheets relied upon by the respondent. The respondent disclosed further timesheets during the course of the hearing, however it was noted by the claimant's representative that these omitted timesheets from various parts of the relevant holiday year.

30) For the sake of completeness we note that additional matters, not reflected within our list of issues were included by the claimant within her witness statement. We considered these additional circumstantial matters otiose and there was no nexus between them and the discrimination complained of. They were sensibly abandoned by Mr Gloag and we do not comment on them further. We note that these additional matters were raised by the claimant at a time when she was acting in person and in response to a request from the employment tribunal. We make no adverse credibility finding against the claimant for including these matters.

The law

Sex Discrimination

31) Direct discrimination is defined within section 13 Equality Act 2010. The question for direct discrimination is whether, because of the protected characteristic the respondent has treated the claimant less favourably than it has treated or would treat others. For the purposes of direct discrimination, the employment tribunal needs to consider a comparator in materially similar circumstances to the claimant. The burden of proof provisions in the EqA 2010 are set out *in* section 136(2) and (3*)* and provides effectively a 2 stage approach: Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent. Stage 2: is the respondent's explanation sufficient to show that it did not discriminate?

Equal Pay

32) Neither party provided detailed submissions on the equal pay claim. We note that equal pay law provides that an employee is entitled to contractual terms, including those related to pay, that are as favourable as those of a comparator of the opposite sex in the same employment if they are employed on equal work. In the claimant's case, she claims 'like work' meaning work that is the same or broadly similar to her comparators and any differences that exist are "not of practical importance in relation to the terms of their work", having regard to the frequency or otherwise with which such differences occur in practice, and the nature and extent of the differences" (*section 65(2) and (3), EqA 2010*). We analyse the question in two stages:
    a. a general consideration of the type of work done and the skills and knowledge needed, is the work the same or broadly similar?
    b. a more detailed consideration of the work done, are any differences of practical importance in relation to the terms and conditions of employment?

33) The Equality Act 2010 implies a "sex equality clause" into the contract of employment, which has the effect of importing into the employee's contract the more favourable term(s) of the comparator. However, even if the employee shows that she and the comparator are doing equal work, the employer has a potential defence − known as the "material factor defence". The sex equality clause does not apply if the employer proves that the difference is attributable to a material factor that is not based on sex.

Breach of contract

33 It is well established that if an employer simply announces a unilateral change in contractual terms, this will be a breach of contract. The employee can respond in one of the following ways:
    a. she can acquiesce in the breach by simply carrying on working under the revised terms;
    b. if the breach is a fundamental breach, she can resign and claim to have been constructively dismissed;
    c. she can simply refuse to work under the new terms if, for example, they involve a change in duties or hours;
    d. she can 'stand and sue' — i.e. stay and work in accordance with the new terms 'under protest' and bring an action for breach of contract against the employer

34 If the employee acquiesces in the employer's breach, the employer is effectively let off the hook. An employee can be taken by her conduct to have impliedly agreed to a unilateral variation in the contract of employment. In such circumstances, he or she will lose the opportunity to sue for breach of contract. A distinction can be drawn between cases where an imposed variation has no immediate practical effect and the claimant's circumstances where a substantial percentage reduction to the rate of pay has immediate practical application. There is no absolute rule, in that continuing to work will either always or never be treated as acceptance. The relevant factors include:
   a. if the employee's conduct in continuing to work is reasonably capable of a different explanation, in the circumstances it cannot be treated as an acceptance of the new terms;
   b. whether there was protest or objection at an individual or collective level;
   c. whether there may be an inference of acceptance, 'after a period of time' and if so when is that point reached.

35 We acknowledge and have considered the respondents written submission and both parties oral submissions and they are not repeated herein.

Unauthorised deduction from wages

36 The general prohibition on deductions is set out in S.13(1) ERA, which states that: 'An employer shall not make a deduction from wages of a worker employed by him.' However, it goes on to make it clear that this prohibition does not include deductions authorised by … a relevant provision of the contract, S.13(1)(a). *"Relevant provision"* , in relation to a worker's contract, includes S.13(2)(b), '… terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion…' The key issues involved in determining whether or not there has been a deduction that infringes the provisions are whether the wages are 'properly payable' to the worker; and whether the payment of less than the properly due sum is authorised. The courts have consistently held that the question of what is properly payable to a worker turns on the contract of employment.

Deliberation

37 This tribunal acknowledges the dreadful position in which the parties were placed by the Covid 19 pandemic and the difficult decisions with which they were faced. We consider that in general terms the claimant provided credible evidence. We considered parts of the respondents' evidence to be lacking in credibility and that there were gaps within the respondents evidence in respect of their decision making process as set out below.

Breach of contract

38 It is common ground that the respondent imposed a 33% pay cut on the claimant. We consider the imposition of this pay cut was a fundamental breach of the contract of employment. This pay cut was imposed as an alternative to the respondent making job cuts. The claimant believed that should she object, her employment was likely to be terminated. The claimant felt the imposition of this pay cut immediately. The claimant raised no complaint in respect of the imposition of this

pay cut either individually or collectively. Not only did the claimant fail to notify the respondent of her intention to 'work under protest', the claimant also implemented what she intended to be imposed pay cuts upon her team as requested by her employer. The claimant worked hard and maintained a good relationship with her employer until her resignation on 9 Dec 2020. The claimant actively hid (due to her fear that her employment would be terminated) her intention to work under protest from the respondent. The respondent genuinely had no inclination that the claimant considered herself to be working under protest prior to receipt of her resignation more than 8 months after the cut was imposed.

39 As stated above the tribunal empathises with the parties positions caused by the Covid pandemic and the disruption of the hospitality industry. However, we conclude that the claimant by her actions in failing to raise any complaint with the respondent on the imposition of such a large pay cut results in a situation whereby she has acquiesced to this breach of contract on the respondent's part. The claimant has agreed to this change in her pay and accepted her amended contractual terms. For this reason, the breach of contract claim fails.

Unauthorised deduction from wages

40 We note our findings above that the claimant has by her actions acquiesced to the changes in her terms and conditions. The claimant was informed of these changes in writing. We conclude that the claimant's claim for unauthorised deduction from wages must fail as the amounts claimed were not properly payable this reflects a term of the claimant's contract of employment.

Direct discrimination.

41 It is common ground that the respondent imposed a 33% pay cut upon the claimant from March 2020 to January 2021. We first examine the comparator. A proper comparator must be in circumstances that were not materially different to the claimant. The respondent says that the amount of the pay cut was determined by reference to pay grades. Mr Heath explained the logic behind imposing higher pay cuts upon higher earning employees on the basis of fairness and placing that burden on those with the widest shoulders. Those earning over £85,000 were subject to a 33% pay cut rather than a 25% cut. This part of the respondent's evidence was clear and the tribunal can see the logic the respondent wished to apply.

42 We conclude that a proper comparator would earn at least £85,000. For this reason we conclude that both Mr Montagnier and Mr Routier, who earn less than £85,000 are not proper comparators.

43 We have carefully considered whether Mr Jurca and Mr Perry are proper comparators. Were they on a lower pay grade than the claimant? We have carefully considered the respondent's contention that these two employees held two separate roles or some form of dual employment. The first respondent is a single economic entity. Within its internal accounting process it separates out the business of each of its hotels. It also separates out the business of its two spas. This is how it has chosen to organise its internal accounts and we see nothing unusual within this setup. The respondent could equally have chosen to internally separate out its

restaurant businesses or any of the other services associated with the hotels or upon their estates. Where employees or costs are shared amongst internal divisions of the business it is commonplace to allocate part of those costs to the appropriate internal business. Where one individual works across various internal divisions we do not consider it unusual for their costs to be allocated between such internal businesses. Equally we would not consider it unusual for example had the cost of the HR function been divided and allocated as a cost to each business. Such a scenario may or may not be nothing more than a paper accounting exercise.

44 The list of issues was agreed on the basis that the respondent said that Mr Jurca and Mr Perry were not comparators because they were on a lower pay grade. We note Mrs Skeaping submissions that Mr Jurca and Mr Perry were not comparators as they held an additional role of Spa Manager. We found the respondent's evidence on this point difficult to follow and inconsistent with the stated aims of imposing higher cuts on those who could most afford it and, in light of the respondents size and the individuals being seasoned business people, incredible. We conclude that the tribunal was not provided with transparency in respect of the pay cut decisions making process as it was applied to Mr Jurca, Mr Perry and the claimant.

45 The pay cut was said by Mr Heath to be imposed by reference to earnings only. Mrs Hinchcliffe both agreed with this position and mentioned the comparators having 'bigger jobs' as an potential explanation for the discrepancy. This is at odds with Mr Heath's evidence and not supported elsewhere in the evidence or documentation. Mrs Hinchcliffe's did not comment further on this matter and we do not consider this evidence further.

46 There is no contractual documentation or any documentation, not even an email, recording or mentioning either Mr Jurca or Mr Perry holding two separate roles or any responsibility in addition to their role as general manager of their hotel and all associated with it. Both Mr Perry and Mr Jurca' payslips reflect their total earnings. The tribunal was not provided with any evidence from Mr Perry and/or Mr Jurca to explain the role or roles they held within the business. While Mrs Skepings submissions refer to a separate payroll between the businesses – we were unable to find the evidence to support this submission as the payslips, showed Mr Perry and Mr Jurca holding only one role. There is no suggestion that either Mr Jurca and Mr Perry split their time between general manager duties and spa manager duties. We conclude it more likely than not that both Mr Perry and Mr Jurca were general managers of their respective hotels at all times and their spa management duties formed part of their roles in the same way as management of their restaurants and other facilities offered by their hotels. Their spa management duties form part of their general management duties in the same way as the claimant's restaurant, conferencing, restoration or garden duties form part of her general management duties.

47 It can be seen that the claimant and Mr Jurca and Mr Perry all had overall earnings that were broadly equivalent. On the respondent's case the hotel general manager earnings for both Mr Jurca and Mr Perry were substantially below the claimant's. The respondent produced no evidence or reason why the claimant might have managed to secure a general manager salary so significantly above that of Mr Jurca or Mr Perry. Mr Heath indicated that the number of bedrooms within a hotel may be a potential indicator for general manager salary, however Mr Jurca's hotel has more bedrooms than the claimant's yet there is no explanation for his (on the respondent evidence) general managers salary of £67,500. The claimant has provided credible evidence of her broad managerial role from identifying and exploiting commercial opportunity within the hotel to managing the listed gardens to wedding and conference facilities and renovation work. We conclude it more likely than not that the claimant's salary as a general manager was equal to the salary commanded by Mr Jurca and Mr Perry by reference to all of the services provided by each of the three respective hotels and estates. We conclude that the division of the employment of Mr Perry and Mr Jurca into two separate roles being hotel manager and spa manager was a paper distinction only in place for internal accounting purposes only. Their salaries were divided for internal accounting purposes to two internal divisions. Neither Mr Perry and Mr Jurca had two separate roles within the business in real terms. It is not the case that either Mr Perry or Mr Jurca were on a lower payroll than the claimant.

48 We conclude that Mr Jurca and Mr Perry are proper comparators to the claimant as they both were on a similar pay grade to the claimant and both had earnings in excess of £85,000.

49 This is not a situation whereby the pay reduction was allocated automatically and two high earning employees effectively slip through the net by reference to internal accounting records. The respondents' evidence is that each individual was considered individually. It appears obvious to the tribunal, and we note that the second third and fourth respondents are all experienced business people, that the earnings of both Mr Jurca and Mr Perry from the respondent were in excess of £85,000. We were unable to identify the logic behind the respondents decision to apply a 25% cuts to the two men's salaries. The respondent's decision in the circumstances did not correspond with Mr Heath's explanation of imposing higher pay cuts on those who could more afford it. The respondent's stated position that the pay cut was imposed directly by reference to the two roles is not only lacking in any logic but is not the case. The logic of imposing higher paycuts on higher earners (which we do not criticize) has not been applied equally between the claimant and the comparators. The respondents' treatment and application of a 25% pay cut to the spa manager role (that on the respondent's case should have attracted a 20% cut) is a further indicator that a bespoke arrangement was put in place for both Mr Jurca and Mr Perry for reasons that the respondent was unwilling to share with the tribunal. We conclude on the basis of all the information that we have heard that the respondents considered the individual position of both Mr Perry

and Mr Jurca and for reasons unknown the decided to apply a different percentage pay cut to that applied to the claimant.

50 The claimant has shown that she has been treated less favourably than both Mr Perry and Mr Jurca. Was this because of the claimant's sex? We note the respondent's short defence includes , …' All management salaries were reduced at the start of the pandemic, some by 25% in some by 33 and depending on the pay band the employee was in….. The male general managers within the collection have earned an average of £58,250 per annum during the pandemic with bonuses of £3000. The female general manager earned a salary of £60,000 per annum with a bonus of £4000…' Further, we note that the list of issues agreed by the parties at the preliminary issue records the respondents position that they were not valid comparators because they were on 'a lower pay grade than the claimant'. We consider this, without any reference to the 'two roles or dual employment argument' to be a misleading stance, purposefully not providing transparency into the reasons for the level of pay cut imposed.

51 The claimant has shown that the stated ethos behind the percentage pay cuts being those who earned more carried the heavier burden was not applied equally to her and the comparators. The respondent's repeated assertions that the claimant was on a higher pay grade than Mr Perry or Mr Jurca was obviously not the case and we do not accept the respondent genuinely believed it to be the case. The respondents reliance upon an internal accounting paper distinction that was hidden from the claimant and only disclosed following the case management hearing, was an attempt to obfuscate and disguise a bespoke arrangement applied to comparators. This, in this case provides 'something more' sufficient to allow the claimant to identify a prima facie case of sex discrimination. We conclude that the claimant has met the first step identified within the burden of proof.

52 We now turn to the explanations provided by the respondent. The respondent has failed to provide any credible reason why, when a pay reduction was said to be imposed solely by reference to earnings and justified by reference to fairness in imposing a higher burden on those who earned more, Mr Jurca and Mr Perry were subject to a lower deduction. The individual respondents are experienced business people and it is most unlikely that they would allow such an obvious disparity by reference to an internal paper process only. The percentage pay cut applied to the spa manager's role, even on the respondent's own evidence, does not support that the pay cuts were determined by the salary bands only as the spa roles received a higher pay cut as outlined above. We can see that a bespoke arrangement was put in place for Mr Perry and Mr Jurca for reasons that the respondents were unwilling to share with the tribunal. We are conscious that unlawful discrimination on the grounds of the protected characteristic can taint decisions with or without express intention. We acknowledge that factors such as assumptions as to affordability may be tainted by stereotypical assumptions as to a woman's earnings perhaps assumed to be a second family income or somehow less important than a man's. We find the reasons shared by the respondent to explain the

discrepancy for the reasons stated above to be lacking in credibility. We do not know the logic applied to the deductions made from Mr Perry and Mr Jurca salaries. We do not accept Mrs Skeaping's submission that had the claimant been a man she would have been subject to the same deduction as we do not accept that the pay cuts were determined on the reasons stated by the respondent. We conclude that the respondent is unable to show a nondiscriminatory reason for the claimants treatment. The claimant's claim for direct sex discrimination succeeds.

53 For the sake of completeness, we note that the claimant served a sex discrimination questionnaire. We were told that the respondent provided a 'without prejudice' response to the questionnaire and it was not included within the bundle and it was not made available to the employment tribunal. We invited the parties to make submissions in respect of the relevance or otherwise of this matter. Mr Gloag submitted that as the parties were effectively acting in person and it was common ground that the document existed, no adverse inferences should be drawn against the respondent for failing to respond to a questionnaire and this was the position adopted by the Tribunal and we do not consider this further.

54 The sake of completeness we requested submissions on the potential limitation point in respect of a sex discrimination claim. Both parties submitted that it was common ground that the claimant did not have knowledge of the levels of earnings of the comparators or the detail of the respondents' application of different percentage cuts by reference to internal accounting processes until the disclosure process. Both representatives submitted that this was a case whereby should there be a limitation point, it would be just and equitable to extend the limitation period due to this lack of transparency.

Equal pay

55 The direct sex discrimination claim is brought on the basis of the application of a pay cut. The equal pay claim is brought on a different basis being the work carried out by the claimant. While the claims overlap, we have considered that these are not claims in the alternative but freestanding claims.

56 The respondent says that the two individuals are not comparators as they were not doing 'like work'. They were performing the role of the general manager (similar to the claimant) and the role of a spa manager in addition. We repeat our findings above and note that while the claimant did not have a spa attached to her hotel her work when viewed as overall was in its totality the same or broadly similar to that carried out by Mr Perry and Mr Jurca. The differences between their work, i.e. there spa -related duties carried out by Mr Perry and Mr Jurca and the various strands of the claimant's work such as the gardens, event centres, dealing with renovations, matters relating to her swimming pool, exist by reference to their differing properties and estates and no two hotels are identical. However they are all managing hotels and a range of services attached to those hotels. We do not consider that the differences which exist between

their work to be of practical importance in relation to the terms of their work.

57 We have considered, to the extent possible with the available evidence, the frequency with which differences between their work occurs in practice and conclude that it is likely, due to the differing estates that the managers are often undertaking different tasks from each other, however they are all at that time 'managing' their respective areas and we consider the nature and extent of those differences to be minimal. The fundamental and unifying aspect of all three individuals roles is the managerial aspect that possibly changes from day to day but is in its nature the same or broadly similar work. We conclude that the differences, and in particular the differences by reference to the addition of a spa are not of practical importance in relation to the terms of their work.

58 The respondent runs a material factor defence - that employee salary was different because the comparators were performing the role of the general manager (similar to the claimant) and the role of a spa manager in addition and it is therefore untainted by sex. We have found this position to be lacking in credibility. We refer to our findings above and conclude that the respondent has failed to establish any material factor defence.

Holiday

59 The claimant's contract of employment expressly refers to a contractual entitlement to paid holiday on specified bank holidays. We therefore find that the claimant is entitled to paid holidays where she is employed on those specific days. Where an employee leaves during the year this can result in a situation where they are 'lucky' and paid for bank holidays that fall while they are still employed or potentially 'unlucky' and leave their employment before groups of bank holidays such as Christmas time. In the circumstances the claimant is entitled to be paid for bank holidays where she was employed. We can see no reason why there should be any 'pro rata' bank holidays in the circumstances.

60 It is common ground that on the claimant's final day of employment there was five 'lieu days' recorded on the respondent system. This is recorded by a screenshot taken by the claimant on her final day. These are set by the claimant to be additional days where she worked during a very busy time at the hotel. The respondent operated a system whereby should such days be worked, holiday in lieu would be granted. There was evidence before the tribunal that the claimant worked extremely hard during the coronavirus period. There was evidence that when they restrictions were lifted the hotel was very busy, with cancelled bookings being honoured and every revenue stream explored. The respondent system does not allow the recording of detail giving rise to days in lieu. The documentation in relation to these potential additional days holiday entitlement would only be contained within the physical timesheets. While there was some late disclosure of timesheets during the actual hearing, there were significant gaps within this disclosure. We find it more likely than not that the claimant worked additional days as she has alleged and as recorded within the screenshot taken by her on her final day. The claimant is entitled to be paid

for these accrued but outstanding holidays.

61 We note that in light of our findings under the sex discrimination heading the claimant is entitled to recover the underpayment of her accrued but untaken holiday pay reflecting a 25% pay cut imposed on the comparators rather than a 33% paycut.

Remedy

62 This matter has been set down for a further remedy hearing. The following general comments are intended to assist the parties and potentially to avoid the need for and cost associated with a further hearing if possible:

a. This is a claim where the sex discrimination and equal pay claims have been advanced on different grounds and both been successful. It is not intended that there be double recovery under the discrimination and equal pay heading.
b. In relation to an injury to feeling award under the direct discrimination heading, we note that while the claimant was upset at the imposition of a pay cut upon her, we have found the disparity of the treatment between her and her comparators, not the imposition of a pay cut in itself, to be discriminatory. The injury to feeling element can only reflect the injury to feeling caused by the discriminatory element of the pay cut.
c. It will be open to the parties to make submissions on whether the claimant unreasonably failed to comply with a relevant ACAS Code of Practice, and if so, would it be just and equitable in all the circumstances to decrease any award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A? However we note that such a question will be limited to the discriminatory aspect found, and our findings in respect of the lack of transparency in respect of deductions applied to comparators is likely to be relevant to the reasonableness of otherwise of the claimant's actions.
d. By virtue of Reg 3(2) of the 1996 Regulations, as amended by the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013, the rate of interest in England and Wales is that which is fixed, for the time being, by S.17 of the Judgments Act 1838. The current rate is 8 per cent.
e. Interest on arrears of remuneration begins to accrue from the 'midpoint' date — Reg 6(1)(b) of the 1996 Regulations. This is the date halfway between the date of contravention of the equality clause and in most cases, the date of the remedies judgment — Reg 4. There is a 'serious injustice' provision that allows alternative periods.

63 Finally we note the delay in finalising this Judgment. We apologise to the parties and note that the hearing was held in mid-July just before the holiday season. As explained to the parties when reserving our decision, the first available deliberation day was 31 August 2023 and we have sought to provide Judgment to the parties as soon as possible following this

deliberation day.

Employment Judge Skehan

Date: 4 September 2023

JUDGMENT SENT TO THE PARTIES ON

6 September 2023

…………………………………………………

AND ENTERED IN THE REGISTER

…………………………………………………

FOR THE TRIBUNAL OFFICE