



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs B Denney  
**Respondent:** Office for National Statistics  
**Heard at:** Southampton  
**On:** 20,21,21 and 23 March 2023  
**Before:** Employment Judge Rayner  
**Members** Ms C Lloyd-Jennings  
Mr R Spry-Shute

## Appearances

**For the Claimant:** Mr Denney, Claimant's Husband  
**For the Respondent:** Mr A Henderson, Counsel

## JUDGMENT

1. The Claimant's claim in respect of equal pay succeeds.
2. The Claimant's work was equal to that of her comparator Mr. M Yates between 30 March 2021 and 2 July 2021 within the meaning of section 65 Equality Act 2010.
3. The Respondent has not proved a material factor defence within the meaning of section 69 Equality Act 2010.
4. The Claimant is therefore entitled to be paid the difference between her pay and the pay of her comparator for the period set out in paragraph 1 above.

## Remedy

5. On agreement between the parties, the Respondent will pay the Claimant the sum of **£2516.60** in respect of pay inequality;
  - 5.1. Interest on the award at the rate of 8% PA, for the period from the mid-point of the period between 30 March 2021 and 23 March 2023, being the date of hearing, of **£199.10**.
  - 5.2. The total amount now payable to the Claimant is **£2715.70**.

**JUDGMENT** having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. By a claim dated 8 December 2021, the Claimant brings a claim in respect of equal pay and sex discrimination .
2. The Claimant worked for the office for National statistics from the 12 August 2019 and at the time she filed her claim she was employed as an Assistant Regional Manager.
3. She the Claimant approached ACAS on 6 December 2021 and her certificate was issued on 8 December 2021.
4. The Respondent resists the claim and the set out the basis of their resistance in grounds dated 10 February 2022.
5. On the 24 August 2022 there was a case management hearing before employment Judge Rayner at which the issues in the case were identified.
6. The issues for the tribunal to determine were identified as follows
  - 6.1. For the question of equal pay, the Claimant relies on like work and the Tribunal has to decide
    - 6.1.1. what was the work done by the Claimant at the relevant time? The Claimant says that between 30 March 2021 and 2 July 2021 that she acted up as an SCO but continued to be paid at the lower pay rate of an HEO
    - 6.1.2. what was the work done by the Claimant's comparator at the relevant time? The Claimant compares herself with Michael Yates who was appointed on a temporary basis to cover a vacant SCO post but was paid at the rate of an SCO and not an HEO.
    - 6.1.3. What the work the Claimant states that she did the same work as a named comparator Michael Yates.
    - 6.1.4. What if any were the differences between the work done by the Claimant and the work done by her named comparator? The Claimant says that there were no differences between work which she did and the work with Michael Yates did. The Respondent says that because of his Regional Manager role, Mr Yates' other day-to-day responsibilities were materially different to the Claimant's.
    - 6.1.5. If there were any differences between the work done by the Claimant and her comparator the tribunal must decide

- 6.1.5.1. what was the nature and the extent of the differences between their work?
- 6.1.5.2. How frequently did those differences occur in practice?
- 6.1.6. Considering the differences, the ET will have to decide whether or not any of the differences were of practical importance in relation to the terms
  - 6.1.6.1. of their work;
  - 6.1.6.2. Between their salary and benefits.
- 6.2. The Respondent relies on the following material factors as each explaining the difference in pay:
  - 6.2.1. The need to meet the operational needs for the North region whereby Mr Yates was the sole candidate who expressed interest;
  - 6.2.2. Mr Yates was promoted to regional manager whereas the Claimant remained an assistant RM;
  - 6.2.3. Mr Yates promotion altered his grade to SCO whereas whilst remaining as assistant RM, the Claimant retained her usual HBO grade. Mr Yates was thus a more senior staff member than the Claimant for the material time;
  - 6.2.4. Mr Hillier remained in a regional manager post which in turn meant he assumed managerial responsibility for CCS London over the Claimant, whereas Mr Yates took on the regional manager post for CCS North without support from another regional manager; and
  - 6.2.5. because of his regional manager role, Mr Yates other day-to-day responsibilities were materially different to the Claimant.
- 6.3. Were those material factors either directly or indirectly discriminatory on the grounds of sex or otherwise tainted by sex?
- 6.4. If the tribunal finds that any of the material factors on which the Respondent relies are considered to be tainted by sex or otherwise amount to a provision criterion or practice that placed the Claimant and other women at a particular disadvantage then the tribunal will need to decide
  - 6.4.1. Were the factors proportionate in achievement of a legitimate aim ?

The Respondent relies on the following

    - 6.4.1.1. the taking of necessary steps on short notice to recruit a regional manager to cover the North region with the legitimate aim of ensuring appropriate management structure to meet the needs of the CCF in the North.

### **The hearing**

7. The case was listed for hearing over four days. The tribunal was presented with a bundle of documents of 380 pages , statements from all those who gave evidence as well as a chronology of key events The Claimant gave evidence on her own behalf and we also heard evidence in support of her claim from Mr Hillier, who had been her regional manager at the material times, and from Joanne Morgan, who had been employed as a CCF area manager on the London region.
8. For the Respondent, we heard evidence from Julia Foggo, who was employed as a security risk manager grade 7, and previously as head of census

operational incidents and risks; Michael Yates the named comparator from James who had been head of field operations to and from Bethany Ferguson who had been head of RMT at the relevant time.

## **The relevant legal principles**

9. To succeed in an equal pay claim, the Claimant must not only prove that her work and the work of her comparator is like work, work rated as equivalent or work of equal value, but must also address any material factor defence raised by the Respondent. Even if a woman is able to prove that her work is, of like the work of her male comparator, an employer can still defend a claim of equal pay if it can satisfy the tribunal that the reason for the difference in pay, despite the like work, is a material factor which is nothing to do with sex.
10. This means that once an employee establishes
  - 10.1. A gender-based comparison which shows that
  - 10.2. she was doing like work, with her male comparator
  - 10.3. and that she was being paid less than they were

The equality clause set out in section 69 Equality Act 2010 takes effect, unless the employer can prove a material factor defence. In other words, a rebuttable presumption of sex discrimination arises.

11. There is no obligation upon the Claimant at this point to prove anything further. The onus shifts to the Respondent once these matters are established, to establish a material factor defence.
12. We have reminded ourselves of the dicta of Lord Nicholls of Birkenhead, in ***Glasgow City Council and others v Marshall and others [2000] ICR 196***, HL at pages 202-203, where he explained the working of section 1(3) Equal Pay Act, (equally applicable to sections 65-69 Equality Act 2010,) in the following terms:

*“The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man’s contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a “material” factor, that is, a significant and relevant factor. Third, that the reason is not “the difference of sex”. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or in a case within section 1(2)(c), may be a “material” difference, that is, a significant and relevant difference between the woman’s case and the man’s case.*

*When section 1 is thus analysed, it is apparent that an employer who satisfies the third of these requirements is under no obligation to prove a “good” reason for the pay disparity. In order to fulfil the third requirement he must prove the absence of sex discrimination, direct or indirect. If there is any evidence of sex discrimination, such as evidence that the difference in pay has a disparately adverse impact on women, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity.”*

13. In this case the Claimant says that her work was like the work of her male comparator Mr. Yates.
14. S 65(2) says that a Claimant's work will be like work if the work of each is broadly similar and any differences between the work are not of practical importance in relation to the terms of their work.
15. S.65(3) Equality Act 2010 provides that when comparing job differences, tribunals should consider:
  1. the frequency with which any such differences occur in practice, and
  2. the nature and extent of the differences.
16. A contractual obligation to do additional different duties is relevant if the employee, as well as being obliged to do them, does them to some significant extent (Phillips J in *Electrolux Ltd v Hutchinson & Others* [1977] ICR 252, EAT at 255).
17. Although contractual provisions may be relevant “the primary matter is what is done in practice” and “it is the work on which, not for which, the two employees are employed.” (Phillips J in *Redland Roof Tiles Ltd v Harper* [1977] ICR 349, EAT at 352).
18. The Equality and Human Rights Commission's ‘Code of Practice on Equal Pay’ notes that differences such as additional duties, levels of responsibility, skills, the time at which the work is done, qualifications, training and physical effort could all be of practical importance. However this remains a question of fact for the employment tribunal.
19. The emphasis at the stage of comparing the work to determine whether the jobs are like work or not, is not so much on the nature of the jobs done by the Claimant and her comparator but on the differences in the tasks and duties that they respectively perform. In *Adamson and Hatchett Ltd v Carlidge* EAT 126/77 the EAT held that tribunals must look closely at the detail to decide if there are any differences in the work actually done, how large those differences are and how often they operate. To help determine the existence or otherwise of such differences, the employer must provide the tribunal with a sufficiently detailed analysis of the jobs in question.
20. A mere contractual obligation on a comparator to do additional duties will be insufficient to constitute a difference of practical importance. It is only if the comparator actually carries out additional duties that a tribunal should consider whether they constitute differences of practical importance between the two jobs. An important factor here is the frequency with which he performs those

additional duties in practice . ( see for example *Electrolux Ltd v Hutchinson and ors 1977 ICR 252, EAT.* )

21. Section 69(1) stipulates that:

Section 69

‘The sex equality clause in A’s terms has no effect in relation to a difference between A’s terms and B’s terms if the [employer] shows that the difference is because of a material factor reliance on which:

(i) does not involve treating A less favourably because of A’s sex than the [employer] treats B, and

(ii) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.’ A factor will fall within S.69(2) if ‘A [the Claimant] shows that, as a result of the factor, A and persons of the same sex doing work equal to A’s are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A’s’.

22. the first limb of S.69(1) — less favourable treatment because of sex — closely corresponds to the definition of direct discrimination contained in S.13 EqA. It is for an employer to show that the material factor does not directly discriminate, and it must do so in every case where a woman has established that she is paid less than a male comparator doing equal work. The second limb of S.69(1) — requiring the employer to show that the material factor is justified — is only triggered if the Claimant has first shown a prima facie case of indirect discrimination, usually by means of statistics showing a disparate impact as between the sexes.

23. We reminded ourselves that when considering the material factor defence, the first stage is for the Respondent to prove that the factors relied upon were both causative of the pay differential, and material.

24. The first stage is a question of the Respondent proving by evidence the factors they relied upon.

25. In *BMC Software Ltd v Shaikh 2017 IRLR 1074, EAT*, the EAT considered that S.69(6) was included to emphasise the point made by Lord Nicholls in *Glasgow City Council and ors v Marshall and ors 2000 ICR 196, HL*, that the difference in pay must be due to the factor relied on.

“The comparison which requires to be made is not between the respective contractual obligations but between the things done and the frequency with which they are done” (Orr LJ in *Shields v E Coomes (Holdings) Ltd [1978] ICR 1159, CA* ).

26. It is important to remember that in order to be ‘material’ (or ‘significant and relevant’, to use Lord Keith’s phrase), the factor relied upon has to explain the difference between the particular woman’s pay and the particular man’s pay. In other words, simply because a factor is potentially capable of constituting a material factor for the purposes of S.69 EqA does not mean that it will always

be sufficient: it must be of actual significance and relevance to the particular case.

27. Tribunals will be expected to scrutinise any factor advanced by the employer in order to satisfy themselves that, even if it is in no way discriminatory, the factor sufficiently explains the variation between the Claimant's and comparator's contracts.
28. As Mr Justice Underhill, then President of the EAT, held in *CalMac Ferries Ltd v Wallace and anor* 2014 ICR 453, EAT: 'Where a pay disparity arises for examination, it is not sufficient for an employer to show why one party is paid as one party is. The statute requires an explanation for the difference, which inevitably involves considering why the Claimants are paid as they are, on the one hand, and separately, why the comparator is paid as he is.'
29. It is well established that 'material' must mean more than simply 'non-discriminatory'. In *BMC Software Ltd v Shaikh* (above) His Honour Judge Hand QC specifically rejected the argument that 'once good faith and a general non-discriminatory attitude [have been] proved then the [equal pay claim] will only succeed if there has been indirect discrimination'. In his view, an employer who proves good faith and the absence of 'obvious direct discrimination' does not necessarily satisfy the condition of materiality. Furthermore, the material factor must actually explain the pay differential in the individual circumstances of the case.

## **Findings of fact**

30. The Claimant worked for the office for National statistics as an assistant regional manager at an HEO grade.
31. Mr Yates a male colleague was employed same grade and was paid at the same rate as her at the start of the chronology in June 2021.
32. In June 2021 was engaged in managing aspects of the 10-year national census. Prior to this, from the autumn of 2020 a series of new posts had been advertised both for regional managers and for assistant regional managers.
33. We were told and we accept that 16 Regional Managers (RMS) were in post to deal with the census and that each of these was assisted by an assistant regional manager (ARM).
34. We have been provided with the job advert which was sent out in respect of both posts. In that advert, the work of the regional manager and the work of the assistant regional manager was not obviously delineated. Instead there is a general description of the work that will be required overall, and a stated expectation that the parties will work as a team. We have not been referred to any other job descriptions or person specifications either for regional managers or for assistant regional managers.
35. We are told and we accept that it was common practice across the ONS for managers and regional managers to work closely together and for there to be a high degree of cooperation, both within each of the regional teams, and also

nationally. We find that this has been a common feature of all the evidence given by everybody who attended the tribunal. We pay tribute to the level and degree of cooperation and collaboration that clearly exists amongst those who work for the ONS and the willingness of individuals take on more responsibility and more senior responsibility than their pay and grade reflect, on a regular basis.

36. We find that there were a number of different elements in the census operation. There were also a number of different stages in the operation. These are described in brief below.
37. First, as well as the household operation, which involved the census being sent to each individual household individually occupied properties, there is a separate part of the project which deals with communal properties. This part of the project focuses on properties such as student halls of residence and residential care homes.
38. The part of the operation with which we have been primarily concerned for the purposes of this hearing is the CSS operation. We have understood that this is the phase of the census that occurs in the second half of the project and was in the nature of a benchmarking process, and was used to ensure that the data being collected was valid and reliable.
39. The process involved focusing on particular areas of the country and as we understand it carrying out sampling of various datasets which had already been produced.
40. We are told and we accept that a decision was made at a senior level in the ONS at some point between October 2020 and March or April 2021 that the CSS operation would be carried out by six of the national regions only and that the responsibility for it would therefore fall under the job role of six of the existing regional managers.
41. In fact we accept that only five of the regions carried out the CSS exercise. The Claimant, who was the assistant regional manager working to Mr Nigel Hillier, one of the regional managers, had been involved in the design and testing of the CSS process prior to the census going live and therefore she had existing expertise and knowledge of the process. She was keen to be involved in this part of the project.
42. We have not been told who made the decision to allocate the work to the five regional managers and nor are we told when the selection process was carried out or how it was decided which regional managers would carry which part of the additional responsibilities which came with this additional part of the project.
43. We do not accept, as asserted by the Respondent, that this additional work had been flagged up within the advertisement for regional managers advertisement when it was sent out, as asserted by the Respondents. The advert we have been provided with does not make any express reference to the CSS operation which would commence during the later stages of the census.



44. From the evidence of Mr Hillier, the Claimant and Bethany Ferguson we conclude that even if it had been the intention and expectation of the ONS, it was not in fact ever made clear to the individuals who were appointed in October 2020, that there was any expectation or intention that this additional piece of work would simply be subsumed into the work of selected regions.
45. Further we find that by March 2021 there was a realisation within the senior staff of the ONS that many of the regional managers would not have the capacity to do the additional work, because of the pressures of the existing workloads and issues arising from staff shortages in a number of areas .
46. We find that what in fact happened was that individuals were approached in their teams and asked whether they would be prepared to take part in the CCS work, and if so, and whether they would be able to take on the additional workload.
47. The CCS London project fell broadly under the South East region and we understand that a meeting took place between the Claimant, Mr. Hillier and Ms. Fergusson in March or April 2021 to discuss how the CCS London work would be dealt with.
48. The Claimant and Mr. Hillier are both adamant that this meeting, which took place virtually over VHS, was a meeting to discuss whether or not Mr. Hillier would take on the additional responsibility. Ms. Fergusson was equally clear in her evidence that purpose of the meeting was to discuss how the work would be done within the section, not whether it would be done. Her evidence to the tribunal was that she had always understood that Mr. Hillier would have responsibility for CSS London as a regional manager and that the meeting was to discuss how the work would be divided up.
49. Nobody took any notes of that meeting and there is no minute, note or letter or e-mail following up from the meeting. We find this extraordinary, but we also find that this is symptomatic of the way that the census teams were being managed at the time. Again, we note that there was a high degree of cooperation and collaboration and teamwork between the people who were doing the work. There was an evident willingness of individuals including Mrs. Denny, to seize opportunities and we have been struck by the genuine passion that the employees of the ONS had for the work that they were doing.
50. Mrs. Fergusson told us and we accept that shortly after this meeting she was unwell and hospitalised and that on her return to work she moved to an alternative position. We accept that she gave her evidence honestly and truthfully to the best of her recollection, but she also very fairly conceded that she had little recollection of actual line management or the detail of matters around that time that occurred on a day-to-day basis. We find that her description of the meeting is more likely to be a description of how she thought the meeting would have gone, having no clear recollection, than a reflection of what was said on the day.
51. This is not any comment on the honesty or integrity of the witness. We accept her evidence that until she was asked to look at the division of the Claimant's work and Mr. Hilliers work many months later, following the Claimant having

raised a grievance, that she had simply not thought about the meeting or the arrangements made at all.

52. We find that Mr. Hillier and the Claimant on the other hand had very good reason to remember the meeting, because it was the starting point by which they determined how their work would be done and who would take responsibility for what.
53. We find that at that meeting Mr. Hillier was asked about his capacity to take on the additional work of CCS London. We find that he made it clear that he did not have capacity to take on the additional work and that the Claimant was asked whether she had capacity to take it on. We find as fact that Mr. Hillier was already completely at capacity. The Claimant, although already busy, was enthusiastic about taking on the management of the project because of her previous experience, and she was ready to take the lead on the area she was familiar with and had helped to design and run in the test phase.
54. Mr. Hillier and the Claimant both left that meeting with the understanding that the Claimant would be stepping up, in her words to manage CCS London. We accept, as both Mr. Hillier and the Claimant do, that there was no formality in the arrangement, in that there was no variation of the Claimant's contract and no expectation of any increase in pay or actual change in grade. However, both understood that the Claimant would, to all intents and purposes, be managing CCS London and that therefore she was standing in the position of regional manager in respect of that project.
55. We find that Mr. Hillier remained as regional manager for the South East region but that in practical terms, that from the point the CCS project started, the Claimant was doing the work required of a regional manager and was carrying out the role of regional manager in respect of the CSS work for the London area.
56. In reaching this conclusion, we have taken into account the evidence of the Claimant in respect of her day-to-day duties both in terms of line management of individuals; the onboarding of staff; the role that she took at the daily briefing meetings and the expectation that she would be the person who could provide information about the project. We have also taken into account the evidence given on her behalf by Joanne Morgan, one of the officers who worked to her. Her experience on a day-to-day basis was that it was the Claimant and not Mr. Hillier who was available to staff for all matters.
57. The Claimants case is that she was doing the same work, or like work, with Mr. Yates. He was temporarily promoted to take on the additional tasks in respect of the CCS, but for North region.
58. The Respondent accepts that the roles done by the Claimant and Mr. Yates on paper were essentially similar. They accept that there was an informal arrangement whereby the Claimant agreed to undertake the additional roles and responsibilities of the role of the regional manager. Everybody agrees that the Claimant worked extremely hard and went above and beyond her own role and in fact carried out many aspects of the work, and the Respondent also appears to agree that the jobs themselves on a day-to-day basis were broadly similar.

59. We have then considered and compared the work done by Mr Yates and the Claimant. In particular we have considered whether or not there were any practical differences between the work that the Claimant was doing and the work of Mr. Yates, and in particular we have considered whether or not the fact that Mr. Hillier continued to be the Claimant's line manager in respect of some of her tasks was a difference of real practical importance.
60. The reason we have considered this is because the Claimant relies on Mr Yates, who was given a temporary promotion to act up as regional manager, in circumstances when the regional manager was no longer available on a day-to-day basis as her comparator,
61. We find that the reason why the manager was no longer available to him was a family issue. We understand that he was an agency worker and therefore could give a shorter period of notice and was not available to do the work.
62. We accept that this is factually different to the situation with the Claimant and Mr. Hillier. Mr. Hillier declined to take on the additional responsibilities involved in a role of regional manager for the CSS work for London but remained employed doing a different job.
63. However the situation of the Claimant was that she had been asked to take on what was effectively a new area of work and that she in fact took it on as the area manager. We accept her evidence that she therefore ceased to be Mr Hillier's assistant manager in respect of the South East region in general. He continued to be the regional manager for the SE but did not take on the Regional management responsibilities CSS London in particular.
64. Mr. Yates was appointed to a post to deal with the CCS project in which the manager was temporarily unavailable, at a time when it was unclear whether or not he, the manager, would be returning to work in the background. The project was already up and running and Mr. Yates was not therefore required to set it up. In all practical ways, his situation was similar to that of the Claimant. Neither of them had a senior person in post who was, on a day-to-day basis, doing the same work that they were doing or was on a day-to-day basis in the position of their area manager.
65. We have also considered the evidence presented to us in respect of two grievance matters which were raised in late April 2021. The Respondent relies on them as indicating a difference in the responsibilities of the Claimant and Mr. Yates.
66. The Respondent asserts that each of these matters were grievances arising with members of the CSS London team and were dealt with by Mr. Hillier.
67. We accept that this appears on the face of the documents that we have seen to be the case.
68. Mr. Hillier and the Claimant have both given evidence about the grievances and the circumstances which may have led to Mr. Hillier dealing with them. The Claimant suggested that one of the reasons why he was dealing with them was because there was an issue which he had been involved with. Mr.

Hillier accepts that he dealt with the grievances and that he was asked to do so, but denies that this was a request arising from him being in the position of the regional manager.

69. The Claimant also suggested that it may have been something to do with duty work or because Mr. Hillier was covering for her when she was in the field.
70. The Emails that we have been referred to were limited in number, and we find that they were produced because the Claimant had raised a grievance and the Respondent was looking for examples of differences between the work she did and the work Mr. Yates did.
71. Ms. Fergusson was therefore asked to look through her emails , and as a result she provided these examples. We are not told whether these are the only emails she provided, nor we told what it was she was asked to provide. We have seen no evidence setting out who asked Mr. Hillier to deal with these matters, or why, but what we do see is that Mr. Hillier dealt them initially and then determined that they needed to be escalated. We have heard evidence that across teams there was cooperation and that if an individual was not available perhaps because they were in the field that it would be natural for another person to cover. This was the suggestion made by the Claimant to explain why Mr. Hillier and not she, was dealing with the matters.
72. The Respondent asserts that these are examples of Mr. Hillier acting as the regional manager in respect of CSS London. The Claimant and Mr. Hillier both reject the suggestion that the only reason that Mr. Hillier dealt with the matters initially was because he remained regional manager and therefore this was part of his duties.
73. On the evidence that we have in front of us, we cannot conclude that the fact that Mr. Hillier dealt with these isolated matters was indicative of anything other than that he was asked to deal with them.
74. The evidence tells us is that on one or two occasions Mr. Hillier was asked to look at a grievance and that he did so. We have no direct evidence from anyone from the Respondents as to the reason why Mr. Hillier was instructed to do so, and Mr. Hillier himself does not accept, that this was an action carried out as regional manager CSS.
75. In any event we observe that the frequency of these particular events is very limited and we have no evidence as to what might have happened in the future. It does not tell us anything about the difference between the Claimant's work and that of Mr. Yates. It is not suggested that Mr. Yates or the Claimant would never have dealt with grievances for example.
76. We have also considered the issue of payment of staff.
77. We find that the Claimant carried out all necessary stages in dealing with staff payments including overtime, up to point of pressing the button to send the requests to the agency Adecco

78. We accept the evidence of the Claimant that she was the person responsible for approving pay claims made and we accept the evidence of Mr. Hillier that he was not involved in the approval or management of pay claims on a day-to-day basis. This was the role and responsibility of the Claimant.
79. We also find that whilst Mr. Hillier did have to take the final action, of sending the pay claims to Adecco, that he did so without any other input. He told us and we accept that the reason why he sent the payment requests on the regular basis was to ensure that staff were paid.
80. We find that the reason for this was not because of any allocation of management responsibilities, but instead it arose from the fact that Adecco, the agency with whom the ONS were working, had to set up the payment structure at an early stage in the project, identifying the 16 regional managers as the individuals who would be given the ability to send Payments , and that it was not possible for changes to be made to add the Claimant onto that system in order to give her the ability to authorise payments.
81. We find that Mr. Yates did not process payments for staff when he was working as an assistant regional manager either, but that he did take responsibility for payments when he was on the temporary promotion. However, we accept his evidence that he also had difficulties with the final stage of the pay claims which involved pressing the button or sending them to Adecco and accept his evidence that this was also because of the way that the system was set up. We find that therefore he also required someone else to carry out the final stages of that process. We conclude that the fact that Mr. Hillier was pressing the button in order to ensure that pay claims were processed was indicative of a failing or shortcoming within a computer system, and was not a difference between the work done by the Claimant and the work done by Mr. Yates. We accept that the Claimant had the responsibility which was equivalent to that of the regional manager and that the process does not detract from that.
82. We have also been referred to the Respondent's assertion that as a matter of structure on the work chart Mr. Hillier retained both the pay and the status of regional manager. We find that this is indicative of a view being taken by the ONS of the structure of work, but does not tell us anything about the work which was being done by the Claimant and Mr. Yates on a day-to-day basis
83. We remind ourselves that the test we must apply is of comparing the work of the Claimant and the work of her comparator and not of comparing her work with that of Mr. Hillier.

### **Conclusions on like work**

84. We find that the Claimant was doing work which was broadly similar in nature to that of Mr Yates. This has effectively been accepted by the Respondent. We also find that the differences, if any, between the work done by the Claimant and Mr. Yates when he was acting up on temporary promotion were of no practical importance, taking into account the frequency of the matters set out. We therefore conclude that the work of the Claimant and the work of Mr. Yates when he was temporarily promoted was like work.

85. We also find as fact that the Claimant was paid less than her comparator. He was paid as a regional manager and she was paid as an assistant regional manager.
86. We have therefore then considered whether or not the Respondent has proved that the reason for the difference in pay was a material factor which is nothing to do with sex.

**Findings of fact in respect of material factor defence**

87. Having reached that conclusion, it is for the Respondent to prove that a material factor which they rely upon caused the difference in pay and has nothing to do with sex.
88. Because of the facts we have found, as set out below, it has not been necessary for us to consider whether or not any proven material factor is free of the taint of sex discrimination, but we do all observe that although not required to make that determination, none of us consider that this is a case where there is any evidence of any conscious or unconscious discriminatory conduct and that the Respondent would probably have been able to demonstrate an absence of direct discrimination, if necessary.
89. We remind ourselves that once the Claimant has satisfied the Tribunal that she was employed on like work and that she was being paid less than her comparator, and that there is a difference in sex, it is for the Respondent to satisfy the Tribunal that there was a material factor which explains the difference in pay and which is nothing to do with sex.
90. This requires the Respondent to satisfy us of three matters. Firstly, the Respondent must identify the material factor which it says explains the difference in pay. This is a matter of pleading and it is for us to determine the case as set out by the Respondents. Secondly, the Respondent must satisfy that the factor relied upon does as a matter of fact explain the difference in pay and thirdly, insofar as it is necessary to do so it is for the Respondent to satisfy us that the reason relied upon is nothing to do with sex.
91. The factors which the Respondent relies upon are set out in the pleaded case and were summarised with the agreement of all parties in the case management order (page 53 of the bundle). The first one is the need for prompt recruitment of a regional manager. The parties are familiar with them.
92. We make the following findings of fact about the process which led to Mr Yates being subjected to temporary promotion.
93. Firstly, there is no disagreement between the parties that there was a vacancy which arose in the north region. We find that Mr Martyn initially spoke to the Claimant and a number of other people including Mr Yates and asked them whether they might be interested in covering the role of regional manager for the north in respect of CCS for a short period of time. At the time that Mr Martyn spoke to them there was no suggestion that this would be on the basis of a temporary promotion or that there would be any pay advantage or that there

would be a promotion to SEO from HEO. When the Claimant had her informal conversation with Mr Martyn about whether or not she might be interested in covering the position, she declined, preferring to remain where she was and carrying out the cover for London.

94. The parties all agree and we find as fact that there was no suggestion at this point that there was any temporary promotion involved. Mr Martyn was simply canvassing views as to whether anybody might be interested in stepping up to assist in covering the role for a short period of time. We note that there was felt to be some urgency, as the need for cover arose from the unexpected absence of a manager due to a personal matter. We also find that at the point of those enquiries Mr Martyn did not know whether or not the existing regional manager would be returning to work, with some adjustments or flexibility, or returning to work but remaining in the background or not returning to work at all.
95. We accept that in a relatively short period of time the regional manager for the north did indicate to the Respondent that he would not be able to return to the role part-time and that since he was an agency worker, it was possible for him to give a relatively short notice of resignation. We accept that he did return to the organisation but did not return in any functional way to the role of regional manager for the north.
96. We find that the only person who expressed any interest at all in covering the post in the north was Mr Yates. Like the Claimant, he had been approached by Mr Martyn and asked whether or not he would be interested in covering the post and acting up and he said he would be. Although Mr Yates was initially interested, he said he would need to speak to his partner and have some conversations. At that stage there is no suggestion before us that there was any discussion between Mr Martyn and Mr Yates about any increase in pay for taking the role on. When asked, Mr Yates told us that he did not recollect and did not believe there had been any discussion about pay at that stage and we find there was not.
97. The role that Mr Yates was being asked the same role that the Claimant was already covering, as we have set out above.
98. During the course of this hearing, we have been referred to the temporary promotion policy. We accept that this was the relevant policy which covered the process for temporary promotions generally.
99. We have also been told that there was an exercise in benchmarking of the additional work that was carried out by a number of staff during the census operation in order to offer some reward and recognition of the extra work done. Whilst there was no formal policy, there was an agreement about how the benchmarking would be carried out and the level of pay that could be made to anybody who had gone above and beyond their own particular role.
100. The Claimant was awarded additional payment in respect of her having acted up and covered the duties of the regional manager, but on benchmarking she was only awarded the lower amount for having covered additional roles and was not awarded the higher amount that might have indicated or reflected that she was acting up as the regional manager.

101. We find that the reason for this was that the Respondent did not accept at any stage and that the Claimant had been formally acting up into the regional manager post, although they accepted that she had put in a huge amount of extra work and despite there having been a large degree of acceptance that she was carrying out many, if not all of the tasks.
102. Going back to the cover of the North post, we find that the reason why there was the need to cover the post in CCS North was the absence of the manager and we are sympathetic to Mr Martyn's desire to ensure that the only person who had expressed an interest in taking up the role on a short-term basis was facilitated to do so. We understand his sense of urgency and we accept that there was a time sensitive post that there was a lot of work to be done.
103. However, since Mr Yates had expressed an interest and there had been no discussion about pay and no discussion about temporary promotion or an increase in grade, we have examined why and at what point it was considered appropriate or necessary for there to be an increase in grade and pay in order to fill the post.
104. We should say, that as a panel, we are not critical in general of a decision to reward somebody for taking over additional roles and responsibilities, but in this case the decision was made to reward Mr Yates, but no similar decision was made to reward the Claimant. The decision led to a pay differential between the Claimant and Mr Yates. It is a critical to the Respondent's material factor defence, for the tribunal therefore to understand and make relevant findings about why and when the decision was made.
105. We have therefore read very carefully the various emails that were exchanged between Mr Martyn and Human Resources and others at the time and we observe that it was only after Mr Martyn had spoken to Mr Yates and others and only after Mr Yates had expressed an interest in the post that the question of temporary promotion appears to have been raised at all.
106. There appeared to have been a Teams discussion on 14 May 2021, including Mr Martyn and somebody called Amy Paynter as well as others about the issues and Mr Martyn had stated that he was hoping to have Mr Yates in post for two months.
107. The previous day it had been noted that the area manager needed to change his working hours and the previous day Mr Martyn had stated "*my solution is to have him in the background, him being the area manager but temporary promotion Mike Yates for two months to cover the region.*" This is the first time we have seen any reference to a temporary promotion from Mr Martyn and from the chronology it looks as if this was on 13 May 2021.
108. When he was asked about this whilst giving his evidence, he was unable to remember when he had first considered the question of temporary promotion or really why he had considered it. The response in the email chain however, from Amy Paynter who was the support officer is that it is her understanding was that "*you cannot TP someone without it being advertised as it would be under three months. You can just do the email out to individual people. He can confirm if he decides to do that for an expression of interest*".



109. Mr Martyn responded that he was not sure what was required by the existing regional manager in terms of flexibility but said that he had tried other R & T members without luck and being midway through the operation only eighteen days left *would be good to keep people that know CCS and the field teams if we can.*
110. This appears to be a reference to the common sense approach of retaining people in the jobs which they were doing rather than moving them around, given the stage that the project was at, but it is also a reference to the fact that Mr Martyn had made telephone calls to other regional management teams including the Claimant, to see whether anyone was interested in providing the cover he required in the north. We all agree that this was a genuine reason for Mr Martyn wanting to TP Mr Yates at that point.
111. On the same day Ms Paynter responded saying that in respect of the regional management in the north, that Mr Martyn should let her know if the manager decided to reduce his hours. We think this is on 14 May. It was not clear at this point therefore whether there was an actual vacancy or whether this was simply the provision of cover whilst the regional manager decided what he was going to do.
112. Ms Paynter also reported back at that stage on the advice she had received about Mr Yates and says *the only way to promote is either use the deputising allowance which is for four weeks maximum and cannot be paid for annual leave days or by running a local advert.* She suggested this should have a short close date of a week and that *you could then appoint via email with no formal applications but the role does need to go through business support first to be financed and HR approved.* She also said *“essentially you could promote Mike for four weeks or send an advert out with a one week turnaround and appoint a successful candidate. Let me know which you decide”.* She refers to the need for a vacant SPO role and suggests there is a number 8387 which is a vacant post until 31 October 2021.
113. We observe at this point that since in the same email it was unclear whether the regional manager was coming back to his post or not, this cannot have been his vacancy, since his post at that stage did not appear to be technically vacant.
114. We understand that in order to be able to promote somebody for four weeks or do a temporary promotion there had to be a vacant post. We do not understand that the regional manager’s post was vacant at that stage.
115. What happened next is that there was a follow up from Ms Paynter stating that she had looked into what could be done regarding Mike and referring to a deputising allowance that could be arranged for about a month. She sets out the difference between the HEO and SEO salary and suggests that he go down the emailing route as the advert could be turned around in a week. She referred to similar adverts sent out by another member of staff.
116. Mr Martyn replied on 17 May again stressing the urgent and specialist nature of the work and saying that he had presented an expression of interest

to all wider RMT members on Tuesday 11 May for the following roles, Regional Manager for north region, Assistant Regional Manager for region.

117. We find that this is not strictly correct. What had happened was that he had a number of informal conversations with people about covering the position.
118. He goes on to say that he received a number of blank refusals and that only Mike and another person stepped up in respect of the other role. He also stated that the manager for the northern region would remain in the background. Essentially he was asking for permission to make an exception to the policy because of the urgency of the situation. At this point Amy Paynter wrote to Fiona Knight who was the HR business party to ask for some advice about approving or allowing a temporary promotion in circumstances where after an expression of interest only went out to the team.
119. We read this as being a request from Amy Paynter as to whether or not it was appropriate or possible to temporarily promote somebody after there had only been a limited exercise on an expression of interest, for a temporary promotion. On the facts that we find and on reading the emails we conclude that there had not been any expression of interest exercise and we are supported in this by the findings of the internal investigation carried out subsequently when the Claimant raised her grievance.
120. Amy Paynter received a response and the understanding was that it needed to go out more widely. However, part of the response was a query asking about how long the temporary promotion was for, and then a response back saying that it was for two months and then further a response back that *because it was a short temporary promotion then it could be restricted to the areas own team if that is what the manager wants*.
121. We all agree that this email exchange contains within it a miscommunication and an error. The advice is based upon a misunderstanding of what had been done and it is clear to us that this is not a granting of permission to abandon any expression of interest exercise for a temporary promotion altogether but is advice about how it might be carried out, had there been an expression of interest exercise already carried out. WE accept that this is not how Mr Martyn read the emails, or how he was advised.
122. We have then referred back at the material factors relied on by the Respondent.
123. We find that at this point there was a need for cover for the absence of the regional manager in the north but the need for a temporary promotion was only raised by Mr Martyn and was only raised by him after Mr Yates had been identified as somebody who was interested. We therefore asked ourselves whether the material factor relied on by the Respondent, that is the need for prompt recruitment of a regional manager to meet the operational needs for the north region whereby Mr Yates was the sole candidate who expressed interest, is the reason why there was then a temporary promotion and we find that it is not.
124. We accept that there was a need for a prompt recruitment to cover a vacancy, but it was not a recruitment for a regional manager at that point and it

was not a need to recruit to a temporary vacancy, technically speaking whereby Mr Yates was a sole candidate who expressed an interest.

125. Mr Yates was the only person who had expressed interest in cover, he was not the only person who had expressed an interest in a temporary promotion. Nobody had expressed any interest in a temporary promotion because there had been no expression of interest exercise carried out. Mr Yates on the evidence we have heard had not been asked whether or not he needed extra money, whether or not he would consider it with or without.
126. Mr Martyn may have considered that he did not want to follow any further recruitment process because of the need to cover quickly and we accept that may have been an entirely valid approach to the problem he faced. He may have thought there was little point as he had already asked, but he must have realised that the pay difference in a change of grade from HEO to SEO, even for a short period of time might change things. We observe that this is presumably the reason why the temporary promotion policy exists.
127. Human Resources had set out in those emails a number of alternative ways of increasing the pay relevant to that role on a short-term basis. None of them were pursued and we have no explanation for Mr Martyn why he did not pursue them. What we find, as a result, is that there was no obvious necessity on the evidence for there to be a temporary promotion at all. Rather, this was a decision made by Mr Martyn once the vacancy had been identified and once Mr Yates had been identified as an individual who might be willing to cover it.
128. We find the Respondent's internal investigation found, when the Claimant raised a grievance, that there was a failure on the part of the Respondent to follow their own internal procedure in respect of temporary promotion. The result of that temporary promotion was that the Claimant was not given the opportunity to consider whether or not she would be interested in applying for the temporary promotion at the higher rate of pay for relatively short period of time.
129. The subsequent pay differential between the job Mr Yates did and the job that the Claimant was doing was caused as a matter of fact by Mr Martyn making a decision that he wanted the role to be paid on a temporary promotion basis and the temporary promotion being agreed as a result of a failure to follow a correct policy and his decision apparently being approved both by direct managers and HR. This may have been a result of a misunderstanding, but the temporary promotion and the associated pay therefore arose not because of the need for prompt recruitment and Mr Yates being the only candidate but it arose as a result of an error made by the Respondent caused by miscommunication.
130. What happened next was that the pay differential remained in place. The reason that it remained in place after Mr Yates was temporarily promoted was because the Respondent did not consider that the Claimant was doing like work with Mr Yates and therefore did not consider that they needed to correct any pay differential.
131. The Respondent looked at the situation that presented to them and despite finding that there had been a failure to follow their own internal policy, they did

not identify that as having been the cause of a pay differential and nor did they identify that the pay differential was based on an error.

132. We also looked at what happened next. The Claimant raised a grievance and the Respondents eventually found that there had been an error, or a mistake made in the application of the policy. However, before that there was a discussion between Mr Martyn and Mr Fido his manager about whether or not some resolution to the Claimant's grievance and the pay differential might be found.
133. We find on the basis of the evidence we have heard and Mr Martyn's reports of what Mr Fido said, that both Mr Martyn and Mr Fido looked to see, in a positive way whether or not they could find a way of paying the Claimant the equivalent rate for the period of time which Mr Yates was doing the same or similar work. We accept that this was not an indication that either of them had made a decision about equal pay or anything else, but that this appeared to be a fairly pragmatic approach to a potential problem.
134. We accept on the evidence that the reason why this did not happen was not that either Mr Fido or Mr Martyn were unwilling to support it, but that there was no support from senior officers within the organisation.
135. Mr Martyn suggested that this was because the Claimant was not at the same level and had not been temporarily promoted. We have not heard any evidence from Mr Fido but we did hear evidence from other senior managers that they would have expected Mr Fido to have been able to make a decision himself. However, we accept that in organisations the reality of that may have been very different and no decision to increase the Claimant's pay to the same level as Mr Yates was made.
136. We do find that this was a positive attempt by Mr Martyn to see whether there could be some resolution.
137. We accept that the message that came back from more senior level was that the Claimant could not be remunerated in the same way as Mr Yates regardless of what the Respondent thought about the equivalence of his duties. This was not a failing on the part of Mr Martyn.
138. Before looking at the remaining material factors we have considered what happened within the grievance and we find that Ms Fogo reviewed the decisions that had been made as part of the Claimant's formal grievance.
139. She took her responsibility seriously and, as with all the Respondent's witnesses we have heard from, we find that she acted with honesty and integrity. However, she did not consider the specific tasks carried out by the Claimant on a day-to-day basis as compared to the specific tasks carried out by Mr Yates on a day-to-day basis.
140. At this point there appeared to have been an organisational view, that the Claimant remained as an assistant regional manager because Mr Hillier had remained in the position as regional manager. Further it appears that because there had been no change to her formal job title or her pay or to anybody's

email title for example, the Respondent thought that they had made as much enquiry as was necessary when considering the question of like work.

141. We also find that there was a consideration of whether or not there was any evidence of sex discrimination and that having concluded that there was not, the Respondents and Ms Fogo in particular considered that that was the end of the matter.
142. We have then considered the second material factors relied on by the Respondent that Mr Yates was promoted to regional manager whereas the Claimant remained an assistant regional manager.
143. We accept that on a purely structural analysis Mr Yates was promoted on a temporary basis and we accept on a purely structural basis that the Claimant was not temporarily promoted in the same way under the policy. However, it must follow from our previous findings that the promotion of Mr Yates and the higher pay he received was a consequence of the decision taken about temporary promotion was not the cause of the pay inequality. The reason for the pay inequality between the Claimant and the Respondent was that a decision had been made to promote Mr Yates which was based as we have said on a flawed understanding and a misapplication of a policy. The Respondent does not rely upon this as a mistake. The cause of difference in grade is that a decision was taken to promote him and not her, the consequence of that decision was the pay differential. The Respondent has had the opportunity to specifically say, this was a mistake or an error, and to correct it. It has not done so, and does not put its material factor defence in those terms.
144. We looked at the promotion altering his grade to SEO. Again, that was a consequence of the decision that was taken and we accept that had the effect that the Respondent relies upon. It is true that as a result Mr Yates was therefore more senior and it is right to say that once the decision had been made that was the reason why he was paid more. That is not the cause of the pay inequality between the Claimant and Mr Yates, it is a consequence of decisions that were taken.
145. Fourthly, the Respondent asserts that Mr Hillier remained as regional manager which in turn meant he assumed managerial responsibilities for CCS London over the Claimant, whereas Mr Yates took on the regional manager post for CCS north without support. Again, we accept as a matter of fact that there was a point in the chronology when Mr Yates took on the regional manager post under a temporary promotion but at the point when the decision was made and on the findings of fact that we have made, the regional manager was still in the background and there was no decision at that point as to whether he would return or not.
146. On our findings of fact, Mr Hillier may have been a regional manager in name but the work which the Claimant was carrying out was the work of the regional manager and Mr Hillier was in effect only in the position of a mentor.
147. We find that the differences between Mr Yates and the Claimant at the point that Mr Yates was temporarily promoted were therefore not caused by the

difference in the regional management structure and we observe that at the times the decisions were made about the temporary promotion, there was no consideration at all on the evidence we have, about the Claimant's position or the regional management structure or any other factor. This is a post facto explanation, which in this case, on these facts, does not assist in explaining the reason for the difference in pay between the Claimant and the Respondent and it is not of itself a material factor.

148. Lastly, we have considered the regional management role and whether there was a difference between the day-to-day responsibilities of Mr Yates and the Claimant. We have already made our findings in respect of like work, and we find that there was no material difference between Mr Yates' role and the Claimant's role and therefore this is a circular argument.

149. We have therefore stood back from the decision that we have made and have reminded ourselves of Section 69(6) of the Equality Act that a factor is not material unless it is a material difference between the cases. We remind ourselves of the guidance from Lord Nichols in *Glasgow City v Marshall* that in order to be material or significant or relevant, the factor relied upon has to explain the difference between the particular woman's pay and the particular man's pay. Simply because a factor is potentially capable of constituting a material factor, it does not mean that it will always be sufficient. It must be of actual significance and relevance to the particular case and the job of the Tribunal is to scrutinise the factors advanced. Even if it is in no way discriminatory, we must be able to satisfy ourselves that the factors sufficiently explain the variation between the Claimant's and the comparator's contracts.

150. In this case having looked at all the material factors relied upon we conclude that they do not sufficiently explain the variation between the Claimant's and the comparator's contracts. We accept that there was a context within which the decision was made by Mr Martyn but the reason for the difference in pay was not the need for prompt recruitment, it was not the fact that only Mr Yates was the sole candidate who expressed an interest and the reason for the difference in pay was not simply that he was promoted and she was not.

151. We find that the material factors which are relied on, pleaded and set out in the case management order are not made out on the facts and evidence that we have heard. We find that the material factors were not causative of the difference in pay between the Claimant and Mr Yates, but that there were other cases which have not been relied on by the Respondent as material factors.

152. As stated earlier, because of our conclusions in respect of the material factors relied upon and because of our findings that the reasons for the pay differentials were otherwise, it is not necessary for us to conclude or draw conclusions about whether any of the reasons for the pay differential itself were discriminatory but we observe that had we been required to do so, it is unlikely that we would have been able to conclude on the facts that we have found that there was any conscious or unconscious direct discrimination.

153. The remedy as agreed between the parties is compensation payable to the Claimant of £2,516.60 and interest payable at the rate of 8% from the mid point of the act of discrimination until today's date which is £199.10. the total payable to the Claimant by the Respondent is therefore £2,715.70.

Employment Judge Rayner  
Date 23 August 2023

Reasons sent to the Parties on 13 August 2023

For the Tribunal Office

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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