EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms J Owen	AND	Homes and Communities Agency (trading as Homes England)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY BY VIDEO (CVP) **ON** 18, 19 and 20 September 2023

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mrs R Barrett, Mr I Ley

Representation:
For the Claimant: **In person, assisted by Mr Peacock, Friend**
For the Respondent: **Mr P Oldham of His Majesty's Counsel**

JUDGMENT

The unanimous judgment of the tribunal is that:
1 The claimant succeeds in her claim for equal pay; and
2 The respondent is ordered to pay the claimant the total sum of £24,000.00 (which consists of back pay of £19,000.00, interest of £2,490.30, and ACAS uplift of £2,509.70).

RESERVED REASONS

1. In this case the claimant Ms Jennifer Owen brings a claim for equal pay under the provisions of the Equality Act 2010. The respondent denies the claim.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents to which we were referred are in a bundle of 184 pages. The claimant also adduced some further documents relating to the respondent's application to the Secretary of State for pay reform during 2020 and 2021.

3. We have heard from the claimant. For the respondent we have heard from Mr Steve Trueman, and Mr Richard Fitzjohn.
4. Much of the factual evidence was not in dispute. We have heard the witnesses give their evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The Facts:
6. The respondent is the Homes and Communities Agency which trades as Homes England. It is a non-departmental public body that funds new affordable housing in England. The respondent has a sponsoring department, namely the Department for Levelling up, Housing and Communities.
7. The claimant Ms Jennifer Owen is a Quantity Surveyor. She commenced employment with the respondent on 30 November 2020. Her chosen comparator for the purposes of these proceedings is Mr Thomas Birch (TB). TB is a Building Surveyor who commenced employment with the respondent some five months earlier in June 2020. The respondent has conceded that the claimant and TB were employed on like work.
8. The claimant and TB are referred to as Senior Specialists, and were employed at pay band 16, and the relevant pay range for this grade was from a minimum of £51,258 per annum to a maximum of £71,761 per annum. At the time of TB's appointment, the respondent says that it had a Reward Policy which enabled managers to appoint new recruits anywhere within the relevant pay band. We have not been referred to a copy of that policy. Before his appointment TB's existing salary was £65,000 plus bonuses. He negotiated his salary on appointment, and whereas the respondent was not willing to pay bonuses, it did agree a comparable starting salary of £65,000 with TB.
9. When the claimant was recruited some five months later in November 2020 the policy was said to have changed. She was recruited at the minimum level of the band (at £51,258 per annum). She tried to negotiate a higher salary but was told that she could only be recruited at the minimum level for the band, and could not negotiate. She joined the respondent on that basis and on that salary.
10. Despite the fact that the respondent is a public employer, it apparently did not have any written policy which explains or dictates the change in circumstances between July and November 2020. The rather vague evidence of the respondent on this point was that the change in policy had been decreed verbally by the HR Department and that managers were now encouraged to recruit at the lowest level for the band.
11. The claimant has obtained documents through a Freedom of Information Request which indicate that the respondent was concerned about its pay structures and requested financial resources from the Secretary of State to address these issues. The respondent sent detailed proposals to the Secretary of State on 20 January 2021 headed "Homes England Pay Reform/Flexibility Case". The headline summary was: "Homes England are seeking approval for a pay flexibility business case to pay a targeted average 3.4% pay award for 2020/21 as a cost of £2.88m inclusive of national insurance costs. This will be used to implement a new pay and grading structure that will address significant equal pay risks within the Agency …" In the event the pay award seems to have been subsequently capped at 2.5%.
12. At the time the respondent was also implementing an internal Pay and Grading Review. The claimant was informed in September 2021 that there was an ongoing consultation process but that there would be no change to her pay. In November 2021 the claimant discussed the pay position with TB who indicated that his salary was at £65,000. The claimant was appalled at this differential, and she says that TB could not understand why they were not paid the same salary.
13. The claimant then complained to her line manager Ms Illingworth on 17 November 2021 to the effect that she should be receiving equal pay with TB. Although the claimant did not raise a formal grievance, the respondent chose to treat this letter as a grievance. However, the respondent did not seek to resolve the matter nor to invite the claimant to a grievance hearing, but it did explain that this was because it was carrying out its Pay and Grading

review, and this needed to be concluded before the claimant's grievance could be addressed properly.

14. The claimant continued to chase the matter, and she sought advice from ACAS. On 12 April 2022 the claimant was eventually invited to a grievance hearing which took place on 19 May 2022.
15. Meanwhile, and with effect from 4 April 2022, the claimant became a Regional Programme Lead when she was effectively promoted and seconded to a grade 17 role. She was awarded an Additional Responsibility Allowance of 10% of her salary which was an additional £5,125.80. This meant that her salary was now £56,383.80 per annum. TB now reported to her in this her new senior role, but he remained on £65,000 per annum. The claimant tried to negotiate a higher salary for this reason with the HR Department, but the respondent refused to agree any increase other than the Additional Responsibility Allowance of 10%.
16. The claimant continued to chase the respondent about her grievance. The decision-maker for the respondent was Mr Richard Fitzjohn, from whom we have heard, who at that stage was an HR Consultant and who recently held the interim position of HR Director for the respondent. Mr Fitzjohn rejected the claimant's grievance, and he explained his reasons in a letter to the claimant dated 29 July 2022. He acknowledged that the main point of the claimant's grievance was that she was paid significantly less than her male comparator (TB) and that she should be receiving equal pay. He explained his reasons for rejecting the grievance as follows:
17. "(1) While your pay is clearly different from your specific male comparator, the reason for the differential was the correct application of the approach to salaries on recruitment at the relevant time. Homes England has already updated its Interim Pay Policy to provide greater clarity on what can be offered for external candidates. In addition, we are in the process of seeking Departmental, ELT and NRC support to change our approach to internal promotions. (2) Neither of these recruitment approaches were in themselves discriminatory as is evidenced by the fact that both men and women were recruited on similar salaries under both the May/June approach when your comparator was recruited, and the November approach when you were recruited. (3) In addition, data shows that the average salary for men and women in equivalent roles at L16 is (a) Male £50,874 and (b) Female £52,188. The fact that average female salaries in this grade are broadly similar but with female managers marginally higher suggest that there is no discrimination against women in the application of recruitment policies."
18. The claimant indicated that she wished to appeal against the grievance decision on 4 August 2022, and she continued to press for disclosure of the relevant documents to assist her case. She asserts that these were never forthcoming. In any event the claimant was then invited to an appeal hearing on 6 October 2022.
19. Mr Karl Tupling was the Grievance Investigation Manager, and he rejected the claimant's appeal by letter dated 21 November 2022. The reasons given were effectively that the claimant's recruitment and that of TB were within the relevant policies which applied at the time, and that on the claimant's secondment and promotion the claimant was afforded the maximum uplift for additional responsibilities which applied at the time.
20. Meanwhile by letter dated 4 October 2022 the respondent confirmed that the claimant's secondment had been extended to 30 November 2022, but at the same salary of £51,258 per annum together with the Additional Responsibility Allowance of 10%. Shortly thereafter Ms Illingworth and Mr Trueman confirmed in a joint email dated 13 October 2022 that the claimant's post had been regraded and the claimant was offered a grade 18 role on £62,022.41 per annum with a pay award pending. By email dated 13 October 2022 the claimant accepted this regrade offer but on the basis that her equal pay claim was separate and effectively not compromised.
21. The claimant continued to press the respondent for disclosure of unredacted documents relating to the business case which the respondent had sent to the Secretary of State but these were never forthcoming. The claimant remained dissatisfied. She had already commenced the Early Conciliation process with ACAS on 7 April 2022 (Day A). The Early

Conciliation Certificate was issued on 18 May 2022 (Day B). The claimant presented these proceedings on 28 September 2022.

22. Having determined the above facts, we now apply the law.
23. The Law:
24. This is a claim seeking equal pay under the provisions of the Equality Act 2010 ("the EqA").
25. Section 65 EqA provides: (1) For the purposes of this Chapter, A's work is equal to that of B if it is – (a) like B's work, (b) rated as equivalent to B's work, or (c) of equal value to B's work. (2) A's work is like B's work if – (a) A's work and B's work are the same or broadly similar, and (b) such differences as there are between their work are not of practical importance in relation to the terms of their work. (3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to – (a) the frequency with which differences between their work occur in practice, and (b) the nature and extent of the differences ...
26. Section 66 EqA provides: (1) if the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one. (2) a sex equality clause is a provision that has the following effect – (a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable; (b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term. (3) subsection (2)(a) applies to a term of A's relating to membership of all rights under an occupational pension scheme only insofar as a sex equality rule would have effect in relation to the term ...
27. Section 69 EqA provides: (1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which – (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and (b) if the factor is within subsection (2) is a proportionate means of achieving a legitimate aim. (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's. (3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim ... (6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.
28. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
29. The remedies available to the tribunal are to be found in section 132 of the EqA. The tribunal may order the respondent to pay arrears of remuneration to the complainant. In addition, the tribunal may also award interest on any award pursuant to section 139 of the EqA.
30. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). Under regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. All sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation. Following the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 the rate of interest payable is 8%.
31. We have considered the cases of Enderby v Frenchay Health Authority [1994] 1 CMLR 8; Armstrong v Newcastle-upon-Tyne NHS Trust [2006] IRLR 124 CA; R v Employment Secretary ex parte Seymour-Smith [1999] ICR 447 CJEU; Tydesley v TML Plastics Ltd [1996] ICR 356; Glasgow City Council and Ors v Marshall and Ors [2000] ICR 196 HL; CalMac Ferries Ltd v Wallace and Anor [2014] ICR 453 EAT; and Nelson v Carillion Services Ltd [2003] ICR 1256 CA.

32. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code"). The relevant paragraphs of the ACAS Code relating to the handling of grievances are these: 33 - Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received; 40 … Decisions should be communicated to the employee, in writing, without unreasonable delay; and 42 - Appeals should be heard without unreasonable delay.
33. Equal pay claims can be of different types and reflect the distinction between direct discrimination and indirect discrimination. A woman claimant might be paid less than her male comparator simply because she is a woman, and this would amount to direct discrimination. A claim for indirect discrimination would arise where the woman claimant is paid less than a man because of the effect of some rule or practice by which other women in the same pool as the claimant are also disadvantaged in significant proportions as compared with men (see for example Enderby).
34. With regard to the burden of proof, Article 19 of the recast EU Equal Treatment Directive (No 2006/54) (which covers equal pay) required the burden of proof to shift to an employer once facts are established from which it might be presumed, unless the contrary is proven, that discrimination has occurred. This is what the equal pay provisions of the EqA still reflect and require. Under sections 65 and 66 EqA, if a claimant can establish that she is engaged in like work, work rated as equivalent, or work of equal value with a higher paid mail comparator, then a rebuttable presumption arises that she is entitled to parity. Under section 69 EqA the burden then falls on the employer to rebut this presumption (by way of the Defence of Material Factor) by showing three things: first, that there is a material factor; secondly, that reliance on that material factor does not involve subjecting the claimant to direct sex discrimination; and thirdly, if the factor is tainted by indirect sex discrimination, that reliance on the factor is objectively justified. Lord Nicholls established that this was the case under the previous provisions of the Equal Pay Act 1970 in Glasgow City Council and Ors v Marshall and Ors, and Mr Justice Underhill who was then President of the EAT confirmed that this approach had been carried through to the provisions of the EqA in CalMac Ferries Ltd v Wallace and Anor
35. However, the position is different with regard to an equal pay claim based on indirect discrimination. In Nelson v Carillion Services Ltd the Court of Appeal (following Enderby) confirmed that the burden of proving indirect pay discrimination lies initially on the employee: the employee must establish a prima facie case of indirect discrimination by pointing to statistics which are both significant and valid and suggest that women as a group are being treated less favourably than men.
36. This was confirmed by Arden LJ in Armstrong who confirmed: (32 … (1)) the complainant must produce a gender-based comparison showing that women doing like work, or work rated as equivalent, or work of equal value to that of men, are being paid or treated less favourably than men. If the complainant can produce a gender-based comparison of this kind, a rebuttable presumption of sex discrimination arises. (2) the employer must then show that the variation between the woman's contract and the man's contract is not tainted with sex, that is, that it is genuinely due to a material factor which is not the difference of sex. To do this, the employer must show each of the following matters: (a) that the explanation for the variation is genuine; (b) that the more favourable treatment of the man is due to that reason; and (c) that the reason is not the difference of sex. (3) if, but only if, the employer cannot show that the reason was not due to the difference of sex, he must show objective justification for the disparity between the woman's contract and the man's contract.
37. If a woman has shown that she is engaged on like work, work rated as equivalent, or work of equal value to that of an appropriate mail comparator, then it is presumed that any difference between her salary and that of her comparator is due to the difference of sex. In the absence of a successful defence on the part of the employer the sex equality clause will be deemed to be included by reason of section 66 EqA and this will modify her contractual terms so that they are in line with those of her comparator. The potential

defence is found in section 69 EqA which provides that the sex equality clause will have no effect if the employer can show that the difference in pay is pay is due to a material factor, reliance on which does not involve direct or unjustified indirect discrimination.

38. As confirmed by Lord Nicholls in Glasgow City Council and Ors v Marshall and Ors, the material factor defence will succeed if the employer can show that the factor put forward as the reason for the pay differential at issue is (i) genuine and not a sham or pretence; (ii) a material factor, that is to say it is significant and relevant and caused the variation; (iii) not "difference of sex", that is to say not due to sex discrimination whether direct or indirect; and (iv) it is a material difference, that is to say a significant and relevant difference between the woman's case and the man's case.
39. If an employer can establish a valid material factor which explains the pay differential and this does not involve treating the claimant less favourably because of her sex, then in the absence of any suggestion of indirect sex discrimination this will bring an end to the equal pay claim. The material explanation for the differential will suffice and there will be no need for the employer to justify its actions any further to avoid any equal pay liability. Only where the employer's pay practice is in some way tainted by indirect sex discrimination (for instance where statistics demonstrate that the pay practice had a disparate adverse impact on women when compared with men) the defence will not succeed unless the employer can then also convince the tribunal that its actions were objectively justified as being a proportionate means of achieving a legitimate aim.
40. The Issues in This Case:
41. The claimant presented these proceedings on 28 September 2022. Her claim was limited to one of equal pay by reference to her comparator TB whom she complained was paid more than she was. There was no suggestion that the claimant was intending to bring an equal pay claim based on indirect sex discrimination and the claimant has made no suggestion that there was any group disadvantage to women.
42. The respondent filed its response on 8 November 2022. In the Grounds of Resistance attached to that document the respondent accepted that the claimant and her comparator TB were employed on like work at all material times, and the respondent does not dispute that TB was paid more than the claimant was. In paragraph 4 of its Grounds of Resistance, the respondent asserted that: "the difference in pay was because of a material factor or factors reliance on which did and does not involve treating the claimant less favourably than her comparator because of her sex". This was then explained further in paragraphs 5 to 8 of the response as follows:
43. "(5) When the comparator was recruited in May 2020, the existing application of the Respondent's pay policy was that managers could appoint anywhere within the pay band. This approach applied to recruitment to all pay bands and was applied to the appointment of the comparator who was appointed on £65,000. The respondent refused his request for appointment at a salary of £70,000. In his previous job he had a salary of £65,000 with a bonus scheme. The offer of salary at £65,000 (and no bonus) was the figure at which the respondent believed it would secure his services.
44. (6) Under the respondent's approach applying at the time, other candidates, both male and female, were also recruited to salaries higher than the bottom of the range.
45. (7) By November 2020 when the claimant was appointed, a new approach was adopted in that managers were generally expected to offer new employees a salary at the bottom of the salary range. This approach was used in the claimant's appointment to the band minimum of £51,258.
46. (8) The claimant has put forward no case showing that the reasons for the difference in her and her comparator's pay were tainted by sex discrimination."
47. I subsequently conducted a case management preliminary hearing on 17 May 2023 and prepared a Case Management Order on that day which was mistakenly dated 17 May 2022 instead of 2023, and which was sent to the parties on 23 May 2023 ("the Order"). At paragraph 60 I set out my understanding as follows: "… given that the respondent has conceded that the claimant and TB did "like work", the claimant has already shown that she is doing equal work with her male comparator TB, then the equality clause will take effect unless the respondent can prove that the difference in pay or other contractual terms

is due to a material factor which does not itself discriminate against her either directly or indirectly because of her sex." In paragraph 61 I confirmed: "The sex equality clause will therefore apply pursuant to section 66 EqA and the claimant will be entitled to the same pay as TB, unless under section 69 EqA the Defence of Material Factor Applies. The respondent must identify the factors and prove: (i) it is the real reason for the difference in pay and not a sham or pretence; (ii) it is causative of the difference in pay between the woman and her comparator; (iii) it is material: that is, significant and relevant; and (iv) it does not involve direct or indirect sex discrimination. The burden of proof is on the respondent to establish this."

48. At paragraph 62 I recorded: "The respondent confirmed today that it will set out in full its Amended Response its Defence of Material Factor, but that it is loosely based as follows: first, different policies applied at different times as to the initial pay levels which managers could offer new staff on appointment; and secondly, in any event, the statistics prove that the respondent's appointment processes do not discriminate against women directly or indirectly."
49. In paragraph 8 of the Order under the heading "Amended Response", the respondent was permitted to serve an amended response if so advised, and (in that event) this was required to explain in full any Defence of Material Factor relied upon pursuant to section 69 EqA. The respondent was therefore not specifically ordered to file an Amended Response, but it was clearly envisaged that it would do so because the respondent had agreed to set out any Defence of Material Factor in full in that document. In the event the respondent chose not to serve an Amended Response.
50. The List of Issues to be determined by this Tribunal was set out at the end of the Order and was very succinct. It records: "1.1 – The Respondent concedes that the Claimant and her comparator TB were employed on Like Work for the purposes of section 65(1)(b) EqA; 1.2 - Can the respondent prove that the difference in pay between the claimant and TB is due to a material factor which does not itself discriminate against her either directly or indirectly because of her sex? 1.3 - the Respondent relies on the Defence of Material Factor which it will set out in full in its Amended Response."
51. Paragraph 7 of the Order made it clear that if either party considered that the Order or the List of Issues was incorrect then any objection should be raised within 14 days failing which the List of Issues would be treated as final unless subsequently decided otherwise. The respondent made no objection to the Order, and there was no application for reconsideration or amendment.
52. The issues to be determined in this case are therefore limited to the List of Issues as set out in the Order. The Defence of Material Factor relied upon by the respondent is therefore as set out in its original Grounds of Resistance.
53. Mr Oldham had prepared a skeleton argument on behalf of the respondent which we had read before the commencement of this hearing. It suggested that in both direct and indirect discrimination claims the burden of proof is on the claimant to prove facts from which discrimination may be inferred. He also confirmed that the respondent had declined to file an Amended Response setting out its Defence of Material Factor in full because it was not specifically ordered to do so, and that my paragraph 62 of the Order had correctly recorded the gist of it.
54. At the commencement of this hearing, it was accepted on behalf of the respondent that for the purposes of the direct discrimination element to an equal pay claim this claimant does not have to prove facts from which discrimination may be inferred. We agree. For the reasons set out above in our explanation of the law, we do not agree that the burden of proof is on the claimant with regard to the direct discrimination element of the claimant's equal pay claim. We accept that that is for the claimant to establish a prima facie case of group disadvantage to women if the claim is being pursued as one of indirect discrimination, which we accept was not explained in those terms in the Order, not least because it did not appear to be the nature of the claim which the claimant was pursuing at all. However, we are unanimous that it is not for the claimant to establish a prima facie case of direct discrimination. This is because, (as confirmed in the Order), where it is conceded that the claimant did like work with that of her comparator, who was paid more,

the claimant will succeed in her claim and can rely on the equality clause unless the respondent makes out the Defence of Material Factor.

55. Our Decision:
56. Against this background our decision is as follows.
57. We deal first with the second (potential) element of the claimant's equal pay claim, namely that of indirect discrimination. For the record, we do not consider that any such claim has been brought by the claimant. It is not referred to in her originating application, and it did not form part of the agreed List of Issues as set out in the Order. We feel it appropriate to make the comment that we were surprised that the respondent chose to adduce statistical evidence and make detailed submissions about the relevant law and the burden of proof relating to indirect discrimination when this matter was not before the tribunal. That said, and having heard some evidence on the matter, we are in a position to deal with it succinctly as follows.
58. The claimant has not adduced any evidence to suggest that women generally or any particular pool of women have suffered any group disadvantage as a result of any rules or practice adopted by the respondent with regards to pay. By reference to Nelson, the claimant has not established a prima facie case of indirect discrimination by pointing to statistics which are both significant and valid and suggest that women as a group are being treated less favourably than men. By reference to Armstrong, the claimant has not produced a gender-based comparison showing that women doing like work, or work rated as equivalent, or work of equal value to that of men, are being paid or treated less favourably than men. In the absence of a gender-based comparison of this kind, a rebuttable presumption of sex discrimination cannot be said to have arisen. That is therefore the end of the claim at this stage, and the respondent is not required to show that any difference of treatment is not tainted with sex discrimination.
59. In any event the statistics to which we were referred do not indicate any disparity or disadvantage to women generally. The investigation conducted by Mr Fitzjohn showed that the average salary for men and women in equivalent roles at L16 was £50,874 for men and £52,188 for women. In addition, he adduced statistics with regard to the minimum starting salaries from July 2016 for both senior specialists, and all staff. There was no obvious or significant disparity to suggest that there was any group disadvantage for women.
60. The provisions of section 69(2) are not met, in that we cannot find on the evidence to which we were referred that women have been put to any particular disadvantage. To the extent that this claim of indirect discrimination was ever pursued by the claimant (which we doubt), we have no hesitation in dismissing it.
61. We now turn to the claim which was pursued by the claimant, namely that she is entitled to equal pay with her chosen comparator TB. For the reasons set out at length above, we do not consider the matter to be unduly complicated. The respondent has conceded that at all material times the claimant did like work with her chosen comparator TB. The respondent has also conceded that her chosen comparator TB was paid more than the claimant despite the fact that they were doing like work. In these circumstances the claimant does not have to prove any prima facie case of discrimination, and section 66 EqA imposes a sex equality clause to modify the claimant's contract so that her terms are no less favourable unless section 69 applies. Section 69 provides that the sex equality clause will have no effect if the respondent can show that the difference is because of a material factor which does not involve sex discrimination (the Defence of Material Factor).
62. There is no requirement for the claimant to prove any prima facie case of sex discrimination. If she were able to do so, this would defeat any Defence of Material Factor. But that is different from asserting that if the claimant fails to show a prima facie case of sex discrimination, then the Defence of Material Factor must necessarily succeed, which is not a correct assertion.
63. So, the position put bluntly is this: the claimant will win her claim for equal pay and parity with her chosen comparator TB (who despite doing like work was paid more) unless the respondent succeeds in its Defence of Material Factor.

64. Despite the clear terms of the Order recording that the respondent had agreed to do so, it chose not to serve an Amended Response nor to elaborate on the Defence of Material Factor relied upon. Accordingly, it is as set out in the original Grounds of Resistance, which are set out above. For the reasons now explained, we consider that the respondent's evidence was weak or non-existent in support of this Defence.
65. There were two occasions upon which decisions were made which set the claimant's salary: first, when she was initially appointed in November 2020; and secondly, when she was seconded to the higher level of L17 with effect from April 2022. We deal with each of these two decisions in turn.
66. First, in connection with the claimant's appointment, this followed the recruitment and appointment of her comparator TB from May 2020. He negotiated his salary, and he was appointed at £65,000 which was within the Senior Specialist range of £51,258 to £71,761. The respondent asserts that there was a different policy in place by November 2020 when the claimant was appointed to the effect that managers were advised to appoint at the band minimum of £51,258 and that this policy would apply despite the claimant's attempt to negotiate a higher salary.
67. The Defence of Material Factor relied upon by the respondent to defeat the claimant's equal pay claim in this respect is at paragraph 7 of the original Grounds of Resistance, namely: "(7) By November 2020 when the claimant was appointed, a new approach was adopted in that managers were generally expected to offer new employees a salary at the bottom of the salary range. This approach was used in the claimant's appointment to the band minimum of £51,258." This is consistent with the respondent's confirmation recorded in paragraph 62 of the Order that "different policies applied at different times as to the initial pay levels which managers could offer new staff on appointment".
68. We are unanimously of the view that the evidence provided by the respondent in support of this Defence of Material Factor is weak to say the least. If there was a written policy in place which dictated the scope in terms of TB's appointment and the fact that he was allowed to negotiate, then we have not been referred to it. We are told that there was no written policy in place with regard to the stricter regime which it is claimed applied to the claimant some five months or so later. This was to the effect that she had to be appointed at the lowest salary in the pay range, and without the right to negotiate. The claimant makes the point that it is surprising to say the least that a large public employer cannot produce copies of the written policies which applied at the time, but rather it seeks to rely on some vague change of policy emanating verbally from the HR Department and which has acted to her detriment without any clear rationale. We agree with that observation.
69. We have not been told why there was a change of the recruitment policy which had previously allowed TB to negotiate and agree a starting salary of £65,000, but some five months later only allowed the claimant to be recruited at £51,258 without the right to negotiate, despite the fact that the two of them were doing like work. The respondent has not put forward any reason beyond that it acted in accordance with a verbal change of policy. No suggestion has been made that there were other reasons, for instance problems in recruitment, or market forces requiring certain employees (for example those from the private sector) to have more generous or protected salaries.
70. We cannot find that the respondent's reference to a verbal change of policy is a sufficiently material factor, in the sense that it is significant and relevant, to explain or justify why the claimant was deprived on her appointment of pay parity with her chosen comparator doing like work. We find that the claimant therefore succeeds in her equal pay claim with effect from the initial recruitment decision from November 2020.
71. The second occasion upon which a decision was made with regard to the claimant's salary was against the background of her grievance complaint and her secondment to a L17 role in April 2022. Her salary at that stage was £51,258 per annum, and she was awarded an Additional Responsibility Allowance (10% of salary) equivalent to £5,125.80. In his grievance appeal decision letter dated 29 July 2022, Mr Fitzjohn confirmed that "this is the correct application of the Secondment/ARA approach which allows managers to provide an uplift of up to 10%".

72. This means that the claimant was now earning £56,383.80, whereas her chosen comparator TB was still earning £65,000. This was despite the fact that the claimant was now at a grade 17 role and TB was reporting to her. Be that as it may, it was still "like work" for the purposes of this claim.
73. It is not clear what the respondent's Defence of Material Factor is with regard to this decision. There is no mention of it in the original Grounds of Resistance, which only refers to the initial appointment of the claimant. As such therefore there is no pleaded case as to any potential Defence of Material Factor at this stage. At paragraph 16 of his statement Mr Fitzjohn suggests that "the application of the ARA was in accordance with our policy which was in line with our internal recruitment policy. This allows us to only provide colleagues on promotion with the higher of a 10% increase to the minimum of the pay band. The same rules apply for the application of ARA's where an employee is seconded to cover a higher graded role."
74. In our judgment that comment only addresses what the respondent decided to do at the time of the claimant's secondment. The respondent has simply failed to identify the material factor upon which it relies. That is sufficient in our judgment to determine this second part of the claim in the claimant's favour. In any event, if it is the case (as suggested by Mr Fitzjohn) that the respondent applied its normal provisions on secondment, this does not in our judgment amount to a reason which is material, that is to say significant and relevant, as to why the claimant should continue to be denied pay parity with TB despite the fact that she was still doing like work, and indeed now superior in responsibility to TB. The claimant therefore also succeeds in this second element of her claim.
75. Accordingly, the tribunal upholds the claimant's complaint. The sex equality clause applies, and the claimant is entitled to pay parity with her chosen comparator TB from the date of her appointment in November 2020 until the ongoing pay differential was extinguished (retrospectively) with effect from July 2022.
76. Remedy:
77. Having given a short summary of the above judgment at the end of this hearing, we afforded the parties an opportunity to agree quantum, subject to the respondent's right of appeal relating to liability upon receipt of this written judgment. The parties were able to agree backpay in the sum of £19,000.00, together with interest pursuant to the relevant Regulations in the sum of £2,490.30.
78. The claimant has also applied for an uplift in her compensation under section 207A(2), as a result of what she asserts were the respondent's breaches of the ACAS Code. She complains of unreasonable delay during the grievance process. The relevant paragraphs of the ACAS Code relating to the handling of grievances are these: 33 - Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received; 40 … Decisions should be communicated to the employee, in writing, without unreasonable delay; and 42 - Appeals should be heard without unreasonable delay.
79. The claimant first raised a grievance on 17 November 2021, but the respondent did not arrange a meeting to discuss her grievance until 12 April 2022 with the meeting held on 19 May 2022. The outcome letter was not sent until 29 July 2022, and then following the claimant's appeal there was an appeal meeting on 6 October 2022. The claimant complains that the respondent took the best part of the year to process and determine her grievance and asserts that there was unreasonable delay.
80. In reply the respondent asserts that the respondent treated her initial email of complaint as a formal grievance when it was not expressed to be a grievance, and that it therefore need not have done so. The respondent also makes the point that the claimant accepted during this hearing that the respondent took her grievance seriously and considered the detailed points which she had raised. In addition, it was clear that the respondent was carrying out an investigation into its pay practices generally at that time, and a degree of delay would have been reasonable, indeed sensible, in the hope of resolving the claimant's concerns in the context of a wider resolution of pay issues.
81. Against this background, and given that the claimant is a respected and continuing senior employee, the parties were able to agree an award in respect of a potential ACAS uplift in

the sum of £2,509.70 which brings the total award payable to the claimant to the sum of £24,000.00

82. Accordingly, we order that the respondent pays the claimant the sum of £24,000.00.
83. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 1 and 41 to 54; the findings of fact made in relation to those issues are at paragraphs 6 to 21; a concise identification of the relevant law is at paragraphs 24 to39; how that law has been applied to those findings in order to decide the issues is at paragraphs 56 to 75; and how the amount of the financial award has been calculated is at paragraphs 77 to 82.

Employment Judge N J Roper
Dated 20 September 2023

Judgment sent to Parties on 12 October 2023

For the Employment Tribunal