EMPLOYMENT TRIBUNALS

Claimant: Mrs N Khan

Respondent: Eden Insurance Services Limited

Heard at: Manchester (in person and by CVP) On: 26, 27 and 28 September 2023

Before: Employment Judge Leach

REPRESENTATION:

Claimant: Mr Forrest (Solicitor)

Respondent: Mr Lassey (Counsel)

JUDGMENT having been sent to the parties on 6 October 2023 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

Introduction

1. The claimant was employed by the respondent as an Insurance Account Handler from 2005 until July 2021. The respondent is a firm of insurance brokers based in Clitheroe. At relevant times it employed 4-5 employees.

2. The claimant says that she received unequal pay to her comparator. The comparator started employment in December 2017 and therefore her claim for equal pay only dates back to then. The claimant says that she was engaged on like work to the work of her comparator.

3. The claimant also brings a complaint of constructive dismissal.

The Issues

4. A draft List of Issues was available at case management stage but had not been finalised even though the parties had been ordered to do this We worked with the parties at the beginning of the hearing to finalise that List of Issues. The final, agreed list is set out below.

Constructive Unfair Dismissal

1. *Did the respondent fundamentally beach the claimant's contract of employment entitling her to resign? The claimant relies on the following breach.*
   a. *Mr Robert Finlayson (RF) carrying out the same job as the claimant but receiving a higher salary (significant discrepancy) than the claimant.*
   b. *The way that the matter was handled – particularly the alleged unwillingness or inability to address the claimant's concerns about unequal pay.*

2. *Did the claimant resign in response to that breach?*

3. *Did the claimant resign without delay so as not to constitute affirmation or acceptance of the breach of contract?*

5. We note here discussions on this issue, referring also to the comments on this point made by Judge Doyle in his Case Management Orders. Mr Forrest on behalf of the claimant confirmed the claimant's position that effectively the constrictive dismissal complaint was won or lost on the basis of the success or not of the equal pay claim. Whilst her complaint included a complaint that the respondent was unwilling to address her equal pay; if she does not have a valid equal pay claim then any unwillingness would be justified.

Equal Pay

4. *Who is the comparator for the purposes of the Claimant's claim for Equal Pay? The claimant's comparator is RF.*

5. *Is the comparator engaged on the same or similar work in comparison with the claimant?*

6. *If so did the claimant receive equal pay as the comparator?*

If not, was there a material factor explaining the difference in pay.

6. We note here our discussions with Mr Lassey when he confirmed that the material factors relied on by the respondent were set out at paragraphs 16.1 to 16.6 of the amended grounds of resistance document. Those 6 factors are the same

reasons provided by the respondent as to why the claimant was not engaged on like work as the respondent. They are as follows:

> *16.1 The Comparator generated new business, which the Claimant did not do, as she focused on clients provided by the Respondent;*
>
> *16.2 The Comparator managed higher value clients than the Claimant;*
>
> *16.3 The Comparator was required to be Cert CII qualified, whereas the Claimant was not;*
>
> *16.4 The Comparator's role required him to travel a significant amount in order to generate new business leads, whereas the Claimant's role was office based;*
>
> *16.5 The Comparator was required to be available outside office hours, provide his personal contact details to clients, fund a personal mobile phone for business use and use his own car for business purposes (including commensurate increase in car insurance),*
>
> *none of which applied to the Claimant; and*
>
> *16.6 The Comparator had a duty specific to him, to transition the portfolio of Michael Hall Associates' clients to the Respondent (a role for which he was considered critical), which did not apply to any other employee of the Respondent, including the Claimant.*

The Hearing

7. The hearing was listed as an in-person hearing. We were delayed on day one as, although the claimant's solicitors had been ordered to attend with requisite copies of the bundle, they had not done so and it was not until the afternoon of day one that bundles were provided. References to page numbers are to this bundle of documents.

8. Mr Lassey asked that the hearing only deal with liability issues. Whilst we noted that the hearing had been listed to deal with both liability and remedy, it soon became apparent that, realistically we would only be able to consider and reach decisions on liability. Accordingly no evidence was heard in relation to remedy.

9. The claimant gave evidence. We had also been provided with a statement from the claimant's husband but Mr Forrest told us that it had been decided that his evidence did not need to be given on the liability issues. We have therefore not considered Mr Khan's statement.

10. Mr Palmer (director and shareholder of the respondent) provided evidence for the respondent.

Findings of Fact

11. The respondent is a small insurance broker business, based in Clitheroe, Lancashire. At all material times it was owned and operated by Mr and Mrs Palmer. The business employed an additional two or three employees.

12. The respondent provides general insurance brokerage services to a range of individual and commercial clients.

The claimant's employment with the respondent including our findings about the role and her pay.

13. The claimant started work for the respondent in 2005. The claimant had previous insurance experience. According to the terms of the employment contract at page 36, the claimant was employed with a job title of an Insurance Adviser. The claimant's starting salary in 2005 was £18,000 or thereabouts. The claimant worked full time hours although as we note below, this changed during her employment with the respondent.

14. There are two documents headed "Job Description" dated 25 April 2006 (pages 42 and 44). We have considered these but also (and particularly) the evidence provided in this hearing and made the following findings:-

a. that the claimant's role included managing client relationships and developing new business.

b. The claimant worked with and assisted all clients of the respondent and also had her own portfolio of clients.

c. In response to a question Mr Palmer estimated the size of this portfolio in terms of commissions as at the time of the claimant's departure to be a bit more than £45,000.

d. For most of her employment the claimant was based in the office, although (as has been quite common within many businesses in more recent years) towards the end of her employment, the claimant spent increasing amounts of her working time from home.

e. The claimant did not tend to travel away from the office or her home, either to meet with clients or generate new leads: she worked from the office building relationships with existing clients and potential new clients.

f. Potential new clients were ones who had contacted the respondent firm. The claimant then responded to that contact on behalf of the respondent firm. We have no evidence of any example of the claimant generating new leads from nowhere, although that is within the written job description at page 42 which refers to *"self-generated*" new business.

g. The claimant did not have a sales target.

h. The claimant worked during normal office hours; she was not required to be contactable outside of these office hours;

i. The claimant was not provided with a mobile phone or business cards.

15. As for the accounts on which the claimant worked, she worked on a range of domestic and commercial insurance accounts, and within these two broad categories on a range of different insurances. No evidence was provided about any type of general insurance that the claimant did not work with. She has provided examples of renewals for which she was responsible and, in monetary terms, the largest of the examples provided was £5,091.82 including insurance premium tax (page 98). We have also been provided with a spreadsheet from 2018 and this includes examples of renewals completed by the claimant, including on with a premium of £9,845.70 which is noted at page 86 line 47 for commercial combined insurance.

16. The claimant was required to maintain and improve her insurance industry knowledge through participation in a CPD scheme. The respondent had signed up to such a scheme with one of the insurers with whom it worked.

17. The claimant worked effectively. She maintained her client base and built relationships with existing and new clients. She worked well within the small team at the respondent, and she was good at her job.

18. We have learned of two significant life events that the claimant went through during her employment with the respondent. In or around 2010 the claimant underwent IVF treatment which was very stressful for her. She was obliged to take some time away from work. She returned to work having agreed reduced hours with the respondent and became employed for four days a week. The respondent did not pay the claimant during her absence beyond her SSP entitlement. The respondent did fund two counselling sessions for the claimant totalling about £200.

19. In 2013 the claimant became pregnant and was then absent on maternity leave. On her return from maternity leave it was agreed that the claimant's hours would reduce to three days a week, and those are the hours which she worked until the termination of her employment. The days were fixed and the claimant was not required to be contactable on her non-working days.

20. The claimant's salary did not increase by much during her 16 years of employment with the respondent, and in real terms it dropped significantly. The figures that we note next are full-time equivalent figures – the claimant was paid at appropriate pro rata rates when reducing her hours to four and then three days a week. We also note some confusion here between the claimant's evidence, the respondent's evidence and the evidence in the bundle and we have done our best, having looked at the evidence and particularly the payslips and the information provided on these, to identify the pay that was provided. There are no significant discrepancies but there are some.

21. By November 2010, the claimant was receiving a full-time equivalent pay of £18,637 and that is noted on the new contract that the claimant was given during that year. It was "pro rata'd" to £14,910 for a four-day week.

22. By December 2017 (i.e. the date that the comparator started employment) the claimant was being paid a full-time equivalent pay of £19,262. We have obtained that detail from the payslips provided. The actual pay was £11,557.44 for a three-day week.

23. BY the date of termination, the claimant's full-time equivalent salary was £20,096 (again with reference to the payslips). The proportionate amount was £12,057.06 for a three-day week.

24. The following pay rises were provided during the claimant's employment.

a. An increase of £500 in 2010 reflected in a typed file note and an updated contract (which is at pages 47-50, although this also reflects a reduction in hours from 37.5 to 30 per week – 5 days to 4)

b. An increase of £500 in 2009. We find that this increase occurred because we have seen the terms of a handwritten memo confirming it.

c. An increase in 2019 – although this was not mentioned in Mr Palmer's evidence we find that a discussion did take place in 2019 as explained by the claimant. This was a discussion when the claimant raised with Mr Palmer the issue of her pay, particularly in comparison with the comparator. This is when the claimant's pay was increased to the salary rate which remained in place up to the termination date, being a full-time equivalent of £20,096. It was increased by £500 from what it had been just before then.

25. By 2021 the claimant's salary had fallen well below the market rate for an insurance adviser. Mr Palmer accepts the market rate was £25,000-£30,000, and we agree. It is reflected in the salary that the claimant now earns in her new employment – she started on a salary of £29,000 which is within the bracket provided by Mr Palmer.

<u>The comparator's employment by the respondent,</u>

26. The comparator named by the claimant is Robert Finlayson ("RF").

27. RF started work for the respondent on 1 December 2017. It was designed so that the start of his employment would coincide with the completion date on a commercial transaction between the respondent and another broker firm called Michael Hall Associates Limited ("MHA").

28. In summary, the agreement between the respondent and MHA was as follows.

a. The respondent was provided with an opportunity to take over those MHA clients that were serviced from MHA's office in Haslingden, Lancashire.

b. MHA had other offices in Scotland and had decide to close the Haslingden office. The Haslingden office was small, a similar size to the respondent's office in Clitheroe.

c. RF headed up the Haslingden office and had in fact been the owner of the Haslingden business some time previously, although more recently that

business had been acquired by MHA and RF had become an employee of MHA.

d. AS far as the transaction between the respondent and MHA was concerned, there appeared to be no recognition of the TUPE Regulations, or (if there was) a decision had been made that the TUPE Regulations did not apply. Consequently RF was made redundant from MHA, the cause of the redundancy being the closure of the Haslingden office.

e. The respondent paid MHA a sum on completion. This sum was for the book of clients that had been serviced from MHA's Haslingden office. However the payment on completion was relatively small. Most completion monies were paid if and when those clients renewed –when they were taken on to the respondent's books on renewal of their insurance over the following 12 months. It was important therefore (for both parties) that the respondent succeeded in persuading those clients to renew with them.

29. The respondent offered RF employment. The respondent decided that it was key to do so to ensure that the commercial agreement worked, otherwise RF could have obtained employment elsewhere and the clients could have gone either with RF or to "the four winds."

30. The respondent and RF negotiated a salary. RF had previously been paid a salary of around £48,000 but this was a salary that was being paid to him to operate a business that appeared not to be profitable. Also, RF would not be managing employees and other tasks involved in heading up an office. The respondent would not pay him that amount. The outcome of the negotiation was an agreement to pay him £32,500 a year.

31. RF was provided with a contract of employment, a copy of which is at page 52 and is on near identical terms to the claimant's contract except that RF was given a job title of Account Executive; and the contract did not include a job description – we have been provided with no job description as far as the comparator is concerned. The contractual hours were 37.5 per week. We also note a difference in holiday entitlement and stated normal retirement ages.

32. We find the main reason the respondent decided to employ RF was to take steps to persuade those clients listed in the commercial agreement to become clients of the respondent. Also, unless the commercial agreement went very badly, there would be many more clients for the respondent. Someone would need to provide those clients with the insurance services they required.

33. According to the terms of the commercial agreement, the portfolio of clients was worth, in commission terms, about £81,000 although it soon became apparent that some of the clients would not agree to transfer to the respondent and the value of the portfolio was around £60,000 by early 2019, following the first full round of renewal dates. The value dropped further, to around £45000, by 2021.

34. At all material times RF operated in something of a separate space to the remainder of the respondent business. His focus was and continued to be the clients that transferred – we refer to those the MHA clients.

RF's role with the respondent

35. There was no initial expectation for RF to generate new business; his focus was to persuade MHA clients to renew with the respondent . We have no evidence from the respondent that RF took active steps to generate new business at any stage – we have evidence of a declining portfolio but without an increase in value at any time. The claimant provided evidence of some new business generated by RF, in a document that the claimant provided comparing her performance to RF's performance. That is the only evidence we have and has not been challenged. We have evidence that RF submitted travel expenses but no evidence that expenses were incurred when self-generating new business. From the evidence provided, we find these expenses were incurred when RF visiting existing contacts or clients or a combination of both.

36. Mr Palmer provided evidence that he and his wife spoke to RF in 2019 and noted the decline in value of the portfolio and that he was told he would need to find other instructions to justify his pay. We accept that discussion occurred. As already noted above, we find that the claimant had (at about the same time) raised the issue of her pay with Mr Palmer and the discrepancy between her pay and RF. Just as happened in 2021 (which we detail below), we find that that was the catalyst for the discussion between Mr and Mrs Palmer and RF.

37. These are our findings about RF's role and similarities between his role and the claimants. .

a. He had a portfolio of insurance clients.

b. He dealt with queries from those clients and he effected renewals. He did so not just by maintaining contact remotely (by telephone, email and so on) but also by visiting those clients. The purpose of the visits was to maintain relationships and effect renewals. Personal visits were probably important on the initial renewal date from MHA – in other words between December 2017 and December 2018 - or if not important were perceived to be important by RF and by the respondent.

c. Theoretically, RF was available outside of normal working hours, however we have no evidence of him carrying out work outside of normal business hours and we note that the contractual clause regarding hours is the same for RF and for the claimant.

d. RF was often not based in the office, although the evidence is that this in itself became an issue that needed addressing in 2021 when he was told that he had to be in the office.

e. By 2021 RF was required to generate new business but not in any targeted sense. By this we mean that there was for example no strategy that he was to execute, no reporting requirements on business development, no

minimum targets for new business. We are quite sure that where the potential for new business came the way of RF then he would seek to secure that business (but that was the same with the claimant).

f. RF dealt with the full range of insurances and clients in the transferred portfolio. This was the same wide range of insurances that the claimant was dealing with. There were some accounts that were more valuable than accounts that the claimant was handling, but by and large we find that the work and accounts were comparable. The types of insurance were the same, variety of clients were the same, value of portfolios (in terms of commissions) the same and arguably higher with the claimant on a pro rata basis.

Differences

38. We have considered the differences between the work of the claimant and the comparator, particularly noting the areas of difference identified by the respondent. We set out our findings under the headings below.

Potential difference 1. Travel for business purposes

39. We accept that RF did travel for business purposes. From the evidence we had, he did so several times a month.

Potential difference 2. Contactable outside of working hours.

40. We have no evidence that this occurred in practice.

Potential difference 3. Complexity and value of clients,

41. As noted above we do not find any significant difference there. There are a few clients amongst the MHA clients that have greater value in terms of renewal premiums, but the range of insurances was broadly the same. We have no evidence, for example, that the claimant did not deal with certain insurances or certain sectors and the comparator did. We find that they handled the same type of instructions.

Potential Difference 4. The provision of business cards

42. These are of some relevance to an employee engaging in face-to-face client visits, particularly on introduction, and we note here the introduction of the respondent's business to the MHA clients in the 12 months following the completion of the commercial agreement. We can understand the good sense in RF attending those meetings with a business card bearing not just his name but also the name of the respondent.

Potential Difference 5. Uniform for the claimant

43. The evidence of the claimant, which we accept and was not challenged, was that at some stage the claimant was provided with a cardigan with the respondent's label on it. She sometimes wore it and sometimes did not. We have no evidence about

other employees who did or did not wear a similar cardigan other than we know that the comparator did not wear a cardigan with the respondent's logo on it. This is a minimal difference, and we attach no importance to it. It is irrelevant (we find) to the issues in this case.

Potential Difference 6. RF's ACII qualification

44. RF is an Associate of the Chartered Insurance Institute (ACII).

45. We have considered this and decided to attach little importance to it in considering differences between the roles. It did not bring about any differences in the work done. We note the terms of the grounds of resistance - that it is pleaded that RF was required to be CII qualified. We have not been provided with any evidence it was a requirement for him to work for the respondent to hold and maintain that qualification. There is no evidence either that the qualification had the potential to provide opportunities for other types of work to be done that was not being done at the time.

46. Mr Palmer's evidence is that it was not a requirement but a qualification that it was good to have, for clients to see a member of staff who had this qualification. However, no evidence was provided of any actual benefit that the qualification brought.

Potential Difference 7. The particular responsibility that RF had for transferring the MHA clients.

47. We have considered whether this was a difference in the role. We have decided it was not. The claimant was also charged with maintaining relationships and effecting renewals. As far as the particular MHA portfolio was concerned, RF was seen as being uniquely placed to persuade those clients over, but the work was the maintaining of relationships, effecting renewals and dealing with insurance queries as they came through from clients. We accept that strategically RF's involvement was (and was seen to be) important to the respondent who had entered into the commercial agreement, but the work was effectively the same as that already being carried out by the claimant with the respondent's existing clients.

48. To further support this and the fact that the claimant also carried out client relationships and that her relationships were regarded as strategic, we note the existence of post termination restrictions in the claimant's employment contract (these are at page 48). Clearly she had relationships with clients that the business saw as vulnerable in the event that she left and so needed to protect those relationships in the same way. The claimant and RF were bound by the same post termination restrictions.

Potential Difference 8. Different job titles.

49. It is relevant to explain our findings about the job titles of Insurance Adviser (the job title provided to the claimant) and Account Executive (RF's job title) as understood more widely in the insurance industry. There is emphasis by the respondent on the importance of the difference in these job titles.

50. We have already noted that (unlike RF) the claimant has been provided with job descriptions during her employment; one of these refers to the claimant as an

Account Handler and another as an Insurance Adviser. Some of the stated responsibilities in the job titles are by way of assisting Account Executives. We have no evidence of the claimant assisting any Account Executives. We are very clear that the claimant did not assist RF in his supposed capacity as an Account Executive.

51. We accept that Insurance Advisers will work with and under Account Executives in larger brokers, but the structure at the respondent was at the relevant time a flat one – it was a very small business. Mr Palmer helped us by explaining what the role of an Account Executive was. An Account Executive would tend to have responsibility for a large portfolio of clients with commissions of around a quarter of a million pounds. They would be assisted by Insurance Advisers as well as administrative staff in managing those clients. They would work as a team with a structure. They would also have business development opportunities (although we accept Mr Palmer's evidence that business development and the way that is now structured and remunerated is different in the insurance industry to how it used to be). An Account Executive would typically be paid between £40,000 and £50,000.

52. This is a different business structure to the one that existed at the respondent. Whilst the different job titles would point to different roles in larger brokers, the different job titles within the framework of this respondent business did not in themselves point to any practical differences between the claimant's role and her comparator.

The frequency and importance of the differences

53. The sections above already provide comment (and our findings) on the frequency (where appropriate) and importance of differences.

54. In summary, we do not attach any significant practical importance to those differences. The important element of the role of the claimant and the comparator was to service clients' needs, ensure relationships were maintained with those clients from one year to the next, secure renewals and follow new business opportunities.

55. RF sometimes adopted what might be seen as a more traditional approach of personal visits. We accept the evidence of the claimant that she could have also carried out personal visits to clients but decided that she did not need to. These were different approaches, borne of a difference of views but achieving the same ends.

56. To further support our finding that the travel was not a significant difference, one of the points that the respondent made when addressing issues of pay with RF in May 2021 was that if he were to continuing working a five-day week he would have to be in the office. We find that the respondent itself attached little practical importance to RF's time spent travelling and out of the office. By 2021 if anything it was quite the reverse – that it was seen to be an impediment not a benefit.

Events of 2021

57. As noted above, the claimant had queried her pay in 2019 – she had not had a pay rise since 2010, and that query included a comparison to RF. She was then provided with a pay increase of £500.

58. The claimant was not satisfied with the outcome in 2019. We accept her evidence that she looked further into the issue. We note here that it often takes courage to raise grievances with an employer, particularly where they are such a small and personal employer. The claimant liked her work. Raising these matters was not easy for her.

59. The claimant carried out some research into equal pay legislation. She also continued to muse over the issues, noting (no doubt with increasing dissatisfaction) what she genuinely believed to be the greater value that she was giving to the respondent business than RF. She recorded some information about renewals and new business carried out by her and by RF (the information is at pages 77-79, and has not been challenged).

60. There is no indication from the information at 77-79 of value or complexity of each renewal or new instruction. We have also reminded ourselves that it is not for us, when considering whether the claimant and comparator were engaged in like work, to focus on the performance of the claimant and comparator in their roles. However, it is relevant that we note the claimant's work in compiling and providing these comparisons in order to understand the relevant events and how the parties reached the position they did in 2021. The figures also add weight to the claimant's belief through the period from 2019 to 2021, that she was doing the same work as her comparator, more effectively but for less pay.

61. The claimant provided the respondent with this document when she raised the issue of her pay and equal pay in May 2021.

62. The claimant initially raised the pay disparity issue with Rachel Palmer on 12 May 2021. We accept the claimant's evidence that the response from Rachel Palmer (particularly when hearing that she had learned of the pay disparity between claimant and RF, from Richard Palmer) was to roll her eyes. However noting further was taken forward in that discussion. It was decided between Rachel and Richard Palmer that Richard Palmer should next meet with the claimant, and he did so by going to see her at her home on 17 May 2021. During this meeting, Mr Palmer acknowledged that the claimant was not paid enough and offered her a £2,000 pay increase. We accept the claimant's evidence that Mr Palmer sought to justify the difference in pay between her and RF because RF was CII qualified and was carrying out the role of an Account Executive. We also accept that the claimant did not agree with Mr Palmer about this difference. She made clear that she considered the two were carrying out the same job and she declined the offer of the £2,000 pay increase.

63. A few days later, Mr Palmer called the claimant and told her that RF's salary had been lowered to bring it in line with hers. As we explain next, we do not accept that this was the case, but first we comment on Mr Palmer's position in this call.

64. By the time of this call, Mr Palmer and RF had discussed RF's salary (that discussion took place on 20 May 2021). Mr Palmer told RF that the value of the portfolio was declining and that his salary was not sustainable. They also discussed the comparison that the claimant was making between her pay and RFs.

65. Mr Palmer provided RF with 2 options (1) for his working days to reduce to 3 a week for which he would receive a reduced salary of £21,000. (2) for his salary to remain at £32,500 but for his working arrangements to change; particularly he would have to be prepared to work with the respondent's clients as a whole (not just the MHA clients) and to be in the office 5 days a week.

66. It is apparent from an email sent by RF on 24 May 2021, that discussion did not result in agreement. However, assuming Mr Palmer genuinely believed that an agreement had been reached between respondent and RF for RF's salary to be reduced to £21,000, he omitted to explain in his telephone call to the claimant, the vital piece of information that the £21,000 was to be paid for RF to work a three-day week. There was no comparison of pay at all. They were (or would have been) still a long way apart.

67. As it was the claimant called RF and he told the claimant that he had not agreed to be paid at the same level as the claimant. RF and the respondent did agree an outcome soon afterwards which was that RF would receive pay of £23,000 (RF had proposed £25,000 and they had settled at £23,000) but it was not for full-time hours. RF wanted to be generally available over the five working days, but he was not agreeing to work a full-time 37½ hour week, and that was not the agreement that was reached. That is apparent from the communication between the respondent and RF and particularly RF's letter at page 62. Crucially, Mr Palmer also accepted in his evidence that RF does not work full days.

Grievance Outcome

68. The claimant's formal grievance was considered, and Mr Palmer provided his grievance outcome by a letter dated 16 June 2021. We note here the reasons given as to why the claimant was not engaged in like work; being.

a. That the claimant was an account handler and the RF an account executive. In relation to this, the outcome letter states as follows: *"These are each distinct roles which are recognised and replicated throughout the insurance industry."*

b. "*An Account Executive is required to generate new business which involves a considerable amount of travel, generation of new leads and securing new accounts for the business. The role is not office based. There is a requirement to be available outside office hours to deal with client queries, meetings and the like. There is usually a sales target, although in this case, The target applied to your comparator was to ensure the transition of a portfolio of clients to our books.*

c. In contrast, the account handler role which you occupy is office based. You are not required to generate new business or leads and you do not have targets to meet. The principal function is to support and process the accounts brought in by the account executive, develop client relationships and handle renewals year on year. There is no requirement on you as an account handler to be available outside office hours or to go out on the road visiting clients."

69. As we have already made clear in this judgment , whilst these differences in roles might usually apply in the Insurance Industry, we find they did not apply as between the claimant and her comparator.

Grievance Appeal

70. The grievance appeal meeting took place on 12 July 2021. A transcript is at pages 69-71. It is an agreed transcript; the meeting was recorded. We read the transcript and we decided it was not necessary for us to hear the audio recording of the meeting. We make the following observations about the appeal meeting.

71. In her appeal, the claimant was asking for equal pay. There was also some reference to home working which the claimant had been carrying out to some extent anyway. However, the primary issue on this appeal was equal pay.

72. The respondent's main focus in that meeting was its explanation to the claimant that the comparator and the claimant were going to be paid the same. The respondent did not in the appeal meeting continue to put forward a case that the claimant and comparator were not involved in the same work. We find that the respondent had effectively given that argument up, particularly following sight of the claimant's grievance and appeal and documentation and that they had decided to focus on resolving matters by lowering the pay of RF. They were also aware by that stage that the claimant had engaged in ACAS early conciliation.

73. The claimant made clear that she did not consider that Mr Palmer had been truthful to her in telephone discussions about her comparator and the salary comparisons. It is apparent from our findings noted earlier that we also find that Mr Palmer had not been truthful with the claimant on this point. The position with RF's salary had by then moved somewhat in negotiations. The final position was that he was to be paid £23,000 a year for less than full-time hours and she was being offered £20,096 plus a pay rise of £2,000 taking her pay up to £22,000, but then pro rata'd to a three day week Even if we were comparing full-time pay of £23,000 with the claimant's increased pay of £22,096 there was still a discrepancy of £1,000 or so, but we find that the discrepancy was much greater than that because RF was not required to work full-time hours. The claimant was being offered 3/5 of £22,000 for her 3-day week; a salary of £13,200.

74. Mr Palmer reacted badly to being accused of not telling the truth. Mrs Palmer also reacted by ending the meeting and telling the claimant that she would need to take them to court and expecting her back in the office. The meeting ended abruptly as a result. We find that that reaction by the Palmers significantly impacted the claimant and made final her decision to resign.

75. The claimant did not return to work following the appeal hearing. Her resignation email is dated 12 July 2021. The terms of the written resignation are brief.

> *"it is with a heavy heart that after 16 years, I have decided to hand my notice in to Eden Insurances Limited.*
>
> *As per the terms of my contract I will continue to work for the next 4 weeks."*

Reasons for the claimant's resignation

76. The respondent's position is that the client resigned because she had received an offer of employment for more pay.

77. We find that the claimant entered into the grievance process genuinely in the hope of resolving the issue and continuing her employment with the respondent. We note particularly the terms of the claimant's grievance letter to the respondent dated 21 May 2021 (page 61)

> *" Hi Richard,*
>
> *Following our conversations this week regarding the equal pay issue between myself and Robert Finlayson. I would first like to point out that I am wanting to try and resolve this situation amicably. I have worked with yourself and Rachael for 16 years and we have always had a good relationship and would like that to continue. This situation has been bothering me for some time and it has come to the point in which I had to raise the issue with you. I do not want any hostility between us as it is not my fault that I am now in this position.*

78. The sentiments expressed by the claimant in this letter were genuine. The claimant wanted the equal pay issue to be addressed fairly and for her employment to then continue.

79. At around the same time as she raised this grievance, the claimant decided to start actively looking for other employment. If she was not in possession of an offer when she attended the appeal hearing, then she was certainly at the stage where she was about to be made an offer (and will have been aware therefore that her application for other employment was at an advanced stage. We know that following the appeal hearing - but on the same day as the hearing - a reference request came through to the respondent.

80. The offer undoubtedly played a significant part in her decision to resign. At the point of resigning the claimant knew that she had the protection of other employment to go to and therefore maintaining (and in this case, increasing) her income, but we accept the claimant's evidence that she only looked for other work because of her dissatisfaction about her pay and continued to hope (even at the appeal stage) that matters would be resolved in a way that the claimant considered to be fair. Her employment with the respondent would then have continued as indicated by the terms of the claimant's grievance letter.

81. The claimant resigned because the respondent failed to resolve her grievance (the equal pay issue) to her satisfaction and because the claimant believed that Mr Palmer had not been truthful with her when he told her that she was being offered the same salary as RF.

Submissions

82. Both parties provided oral submissions and we have taken account of these. Before those submissions were made, we indicated to both representatives that we were likely to find the guidance provided in the recent decision in **CSC Computer Science Limited v. Hampson [2023] EAT 88** would be particularly helpful to our decision making.

83. During his submissions, Mr Forrest told us (for the first time) that it was accepted that the fact that RFs employment was linked to the commercial agreement with MHA, was a material factor. However, said Mr Forrest, certainly by the time that the claim form was presented in 2021, it no longer explained the difference; that it had fallen away as a material factor.

84. We recognised this as an argument about a disappearing material factor. We noted case law on the issue, particularly the (relevantly) recent authority of **Samantha Walker v. Cooperative Group Limited [2020] EWCA Civ 1075** ("Walker")**.** Both parties were provided with an opportunity to make submissions specifically on this issue on the morning of day 3 which we duly considered.

The Law

Equal Pay

85. The relevant parts of the EqA provide as follows:-

"65 (1) For the purposes of this Chapter, A's work is equal to that of B if it is -

(a) Like 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

(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."

……

66 (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 which 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."

……..

69 (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 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.

……

(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."

Equal Pay (1) Like Work

86. The EAT in **Baker v Rochdale Health Authority UKEAT/0295/91** confirmed the 2 questions that Tribunals are required to consider and decide upon in "Like Work" cases:

"The first question is - Were the [Claimants and their comparator] *employed on work which was the same or of a broadly similar nature? ….. Secondly, where there was a difference between the things which the* [Claimants and their comparator] *actually did, and was it a difference of practical importance in relations to the terms and conditions of service?"*

In answering that question the industrial tribunal will be guided by the concluding words of the subsection. But again, it seems to us, trivial differences, or differences not likely in the real world to be reflected in the terms and conditions of employment, ought to be disregarded. In other words, once it is determined that work is of a broadly similar nature it should be regarded as being like work unless the differences are plainly of a kind which the industrial tribunal in its experience would expect to find reflected in the terms and conditions of employment."

87. The judgment in **Maidment and Hardacre v Cooper and Co [1978] IRLR 462**. The judgment in that case made clear that we should not disregard any part of the work actually done. In that case the claimant's comparator did undertake the same role as the claimant, both were employed as packers. However the comparator also undertook storeroom tasks. Those tasks could not be ignored when deciding whether claimant and comparator were employed to carry out Like Work.

88. In the case of **E Coomes (Holdings) Limited v Shields [1978] IRLR 263** ("Coomes v Shields") , the Court of Appeal set out the approach to be followed in deciding whether a claimant was employed to carry out like work to her comparator. The reference to s1(4) below is to the Equal Pay Act 1970, which applied before the Equality Act 2010.

> *28. When a woman claims equal pay with a man in the same employment, she has first to show that she is employed on 'like work' with him. This is defined in s.1(4), which proceeds in this fashion:*
>
> *29. First, her work and that of the men must be 'of the same or a broadly similar nature'. Instances of the 'same nature' are men and women bank cashiers at the same counter; or men and women serving meals in the same restaurant. Instances of a 'broadly similar nature' are men and women shop assistants in different sections of the same department store; or a woman cook who prepares lunches for the directors and the men chefs who cook breakfast, lunch and teas for the employees in the canteen — see Capper Pass Ltd v Lawton [1976] IRLR 366.*
>
> *30. Second, there must be an inquiry into (i) the 'differences between the things that the woman does and the things that the men do'; and (ii) a comparison of them so as to see 'the nature and extent of the differences' and the 'frequency or otherwise with which such differences occur in practice': and (iii) a decision as to whether those differences are, or are not 'of practical importance in regard to terms and conditions of employment'.*
>
> *31. This involves a comparison of the two jobs — the woman's job and the man's job — and making an evaluation of each job as a job irrespective of the sex of the worker and of any special personal skill or merit that he or she may have. This evaluation should be made in terms of the 'rate for the job' usually a payment of so much per hour. The rate should represent the value of each job in terms of the demand made on a worker under such headings as effort, skill, responsibility, or decision. If the value of the man's job is worth more than the value of the woman's job, it is legitimate that the man should receive a higher 'rate for the job' than the woman. For instance, a man who is dealing with production schedules may deal with far more important items than the woman — entailing far more serious consequences from a wrong decision. So his job should be rated higher than hers, see Eaton v*

Nuttall [1977] IRLR 71. But, if the value of the woman's job is equal to the man's job, each should receive the same rate for the job. This principle of 'equal value' is so important that you should ignore differences between the two jobs which are 'not of practical importance'. The employer should not be able to avoid the principle by introducing comparatively small differences in 'job content' between men and women: nor by giving the work a different 'job description'. Thus where a woman driver in a catering department drives vans within the factory premises to and from the kitchens and a man driver in a transport section drives vans on the public highway, it could properly be held that the differences were 'not of practical importance' and she should receive the same 'rate for the job' an hour rate as he, see British Leyland v Powell [1978] IRLR 57. Again in a hospital, the attendance on patients may be done by women called 'nurses' and men called 'orderlies': and there may be differences in 'job content' in that, while both do many similar things, the men 'orderlies' deal with the special needs of men patients, but these differences are not such as to warrant a 'wage differential' between the nurses and the orderlies — see Brennan v Prince William Hospital (1974) 503 Fed Rep 2nd, page 282.

89. Last (but certainly not least) on the issue of Like Work we have found as very helpful, the guidance provided in the recent EAT decision in **CSC Computer Science Limited v. Hampson [2023] EAT 88**. ("Hampson") particularly paragraphs 5-16.

90. Paragraph 8 of the judgment lists the following questions to be asked.

(i) what work did the claimant do during the relevant period or periods?
(ii) what work did her comparators do during periods relevant to the comparison?
(iii) were there any differences between the work that they did?
(iv) what was the frequency of the differences in practice?
(v) what was the nature and extent of the differences?

91. The EAT explained that the answers to these questions were then to be analysed in considering and answering the 2 questions noted in the earlier authorities that we have referred to above; being:

a. is the work of the comparator employee the same or broadly similar? (stage one)
b. are any differences between their work of practical importance in relation to the terms of their work? (stage two)

92. We also note the following from the EAT's judgment:

"11. At Stage 1 there is a broad assessment of the kind and nature of the work that is done, which can potentially include consideration of levels of

responsibility and seniority. It is a broad assessment of the work actually done.
12. Stage 2 involves a consideration of any differences in the work between the employee and her comparator. It requires a more detailed and granular analysis of whether such differences as exist are of practical importance, as would generally be reflected in terms of employment.
13. The focus is on what the employees do in practice, rather than what they might be required to do under their contracts or job descriptions, although such documents may provide evidence of the work that is actually done

Equal Pay (2) Material Factor

93. The House of Lords in Glasgow City Council v Marshall [2000] IRLR 272 ("Marshall") provided guidance on the consideration of material factor defences.

> *"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 s.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.*

94. As noted above, it was accepted by Mr Forrest that the commercial transaction between the respondent and MHA initially amounted to a material factor but certainly by the time of the claimant's resignation, it was no longer a material factor. We focussed on the notion of an "evaporating" or "disappearing" material factor.

95. We considered the Walker case. We note particularly paragraph 42 of the judgment of Bean LJ and the critical question, whether the material factors as identified in that case had ceased to operate as an explanation for the difference. This is not simply a question of a material factor such as market forces "falling away;" becoming less important. In a market forces example, a comparators role may, over time, become less valuable when compared with a claimant's role. The market may change. Even then, the material factor that existed at the point when the different pay rates were set, might still explain the difference in pay between a claimant and comparator.

It is essential therefore for us to consider whether at any time during the claimant's employment, any material factor(s) that we identify, cease to explain the difference in pay. That is what we have done.

Constructive and unfair dismissal.

96. Dismissal for the purposes of the ERA includes the circumstances stated at s95(1)(c). *"…..an employee is dismissed by his employer if…….the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."* This is commonly referred to as a constructive dismissal.

97. In considering the issue of constructive dismissal, an Employment Tribunal is required to consider the terms of the contractual relationship, whether any contractual term has been breached and, if so, whether the breach amounts to a fundamental breach of the contract (**Western Excavating (ECC) Limited v. Sharp [1978] QC 761**).

98. It is an implied term of every employment contract that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see for example **Malik v. BCCI [1997] IRLR 462** at paras 53 and 54). We refer to this term as "the Implied Term."

99. In considering the Implied Term, Browne-Wilkinson J in **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666** ("Woods"), said that the tribunal must *"look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."*

100. Once repudiatory breach of contract has been established, it is necessary to consider the part it played in the claimant's decision to resign. The following passage from the judgment of the Court of Appeal in **Nottinghamshire County Council v. Meikle [2004] IRLR 703 ("Meikle")** is helpful:

> "33. *It has been held by the EAT in Jones v Sirl and Son (Furnishers) Ltd [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the*

> *attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the Western Excavating case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation."*

101. We also note the Judgment in **Abbycars (West Horndon) Ltd v Ford EAT 0472/07** (Abbycars) at paragraph 34; " *the crucial question is whether the repudiatory breach played a part in the dismissal. There must be a causal connection between the repudiation and the resignation; if they are unconnected acts then the employee is not accepting the repudiatory breach."*

Conclusions

102. We set out first our conclusions on the Equal pay complaint.

Is the comparator engaged on the same or similar work?

103. The claimant was engaged on the same or broadly similar work as her comparator.

104. We have considered the differences that, according to the respondents, there were between the claimant's role and the role carried out by her comparator. We find that See our findings of fact particularly 37-56 above. whilst we have identified some differences between the claimant's work and RFs work we do not regard these to be of any practical importance. Referring specifically to paragraphs 16.1 to 16.6 of the Grounds of resistance

> *16.1 The Comparator generated new business, which the Claimant did not do, as she focused on clients provided by the Respondent;*

105. We find:

a. that the claimant did generate new business and

b. that the comparator was not required to be any more focussed on new business generation than the claimant.

> *16.2 The Comparator managed higher value clients than the Claimant;*

106. There is some evidence of a few renewals being of a higher value. However the vast majority were not. Furthermore (1) there is no evidence of any insurance in which RF was involved that the claimant was not (2) there is no evidence of the claimant not being allowed or able to look after clients at a particular value (3) the value of the portfolios managed by the claimant and RF were comparable. If anything (having regard to a 3-day week) the claimant's was of a higher value.

16.3 The Comparator was required to be Cert CII qualified, whereas the Claimant was not;

107. See our findings of fact at 44-46. Our findings are (1) the comparator was not required to be CII qualified ad (2) the fact that he was, was of no practical importance.

16.4 The Comparator's role required him to travel a significant amount in order to generate new business leads, whereas the Claimant's role was office based;

108. See our findings above, particularly at paras 14.d and e; 37 b; 55 and 56. We attach no practical importance to the fact that RF frequently travelled to meet clients whereas the claimant maintained contact and relationships whilst based at the office. Our findings at paragraph 56 indicate that the respondent attached no practical importance to it either.

16.5 The Comparator was required to be available outside office hours, provide his personal contact details to clients, fund a personal mobile phone for business use and use his own car for business purposes (including commensurate increase in car insurance),

none of which applied to the Claimant; and

109. Breaking this down:-

a. Use of car. This simply means that RF claimed travel expenses to undertake travel that was of no practical importance. The claimant could also have visited clients but chose not to (see 55 above).

b. Use of mobile phone and provision of contact details. We accept that the claimant provided clients with a mobile phone number. We also accept that, particularly during the first 12 months of his employment, which might have been useful; that it helped to ensure that clients saw a continuation of an existing service as far as possible. However, RF was frequently not in the office because he was undertaking travel. A mobile number was needed for contact purposes. The claimant on the other hand was available on her office number and email. Both ensured they were contactable by clients and potential claimant. The methods of ensuring contact were different but this was of no practical importance.

16.6 The Comparator had a duty specific to him, to transition the portfolio of Michael Hall Associates' clients to the Respondent (a role for which he was

considered critical), which did not apply to any other employee of the Respondent, including the Claimant.

110. We accept that the comparator had this specific duty. It did not mean that the work involved was different to the claimants; she also had a portfolio to maintain, clients to look after, renewals to complete. However, it does explain why RF was recruited and why he was paid £32500 when recruited in December 2017. him.

If so, did the claimant receive equal pay as the comparator?

111. No, she did not.

Was there a material factor explaining the difference in pay?

112. We have been through matters 16.1-16.6 of the amended grounds of resistance which is the material factor defence that the respondent puts forward, and we find that there was a material factor until May 2021. The material factor was the reason for RF's recruitment by the respondent. He was regarded as the most appropriate person to effect renewals and continue relations with the book of insurance that was transferred over. The respondent considered RF's recruitment to be vital to their agreement with MHA being successful. The respondent decided that it needed to secure his employment and entered into a negotiation which resulted in an agreed salary of £32,500. That was the reason the respondent was paid what he was, and it remained the explanation until May 2021.

113. It became uneconomic to continue that salary. Whilst the respondent may not have welcomed the claimant's grievance it effectively ensured that the respondent addressed RF's salary when it did, but that was the watershed. As from May 2021 the reason for RF's recruitment was no longer the explanation for the difference in pay between the claimant and comparator. The respondent's own actions confirm this; particularly the substantial renegotiation with RF; the assurances (albeit false ones) provided to the claimant that she and RF were to receive the same pay.

114. By May 2021, RF had brought those MHA clients that he could persuade over to the respondent. By that date they had been through at least 3 renewal cycles with the respondent. They were established clients of the respondent.

115. Like the claimant, RF also had restrictive covenants in his contract. The respondent could have ensured equality of pay then (and pretended to the claimant that it had). From that date (and we take that to be the date of the formal grievance, 21 May 2021, which was also the day after Mr Palmer's discussion with RF discussing RF's pay) there was no material factor defence explaining the difference in pay between the claimant and her comparator.

<u>Constructive unfair Dismissal</u>

7. *Did the respondent fundamentally beach the claimant's contract of employment entitling her to resign? The claimant relies on the following breach.*

c. Mr Robert Finlayson (RF) carrying out the same job as the claimant but receiving a higher salary (significant discrepancy) than the claimant.

d. The way that the matter was handled – particularly the alleged unwillingness or inability to address the claimant's concerns about unequal pay.

116. We find that the two breaches alleged at (a) and (b) of the List of Issues did occur.

117. As far as the first breach (carrying out the same job but receiving a higher salary), the contractual breach only occurs from 21 May 2021 when the material factor defence no longer applied. The claimant and RF could and should have been put on the same pay.

118. We also find the way that the matter was handled by the respondent amounted to a breach of contract. There was an unwillingness to address properly the claimant's concerns about equal pay. Significantly, in the course of discussing pay with the claimant, Mr Palmer was untruthful – in the phone call referred to at paragraph 67 above (which was around 21/22 May 2021) and in the course of the grievance process including at the grievance appeal.

Did the claimant resign in response to that breach?

119. Yes. It was a reason for the claimant's resignation. It played an important part in the claimant's decision to resign. We would go further though and say it was not just a reason for her resignation. We find that it was the principal reason for the claimant's resignation. Quite simply, had the respondent addressed candidly and fairly the issue of the claimant's pay, we find it likely that the claimant would have continued in her employment with the respondent. We note particularly:-

a. The claimant's concerns from 2019 about equality in pay and her slowness and reluctance to complain further.

b. The claimant's evidence that she liked her job.

c. The terms of the claimant's grievance – noted at para 77 above.

d. That the claimant was willing to engage in the internal grievance process and waited until the outcome of her grievance appeal before finally deciding whether to resign.

Did the claimant resign without delay?

120. There is no dispute about that.

Employment Judge Leach
Date: 30 October 2023

REASONS SENT TO THE PARTIES ON
6 November 2023

FOR THE TRIBUNAL OFFICE

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