# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Perkins

**Respondent:** Marston (Holdings) Limited

**Heard at:** Liverpool **On:** 24, 25, 26 and 27 October 2023

**Before:** Employment Judge Horne
**Members:** Mr D Mockford
Mr J Murdie

**Representatives**
For the claimant: in person
For the respondent: Mr P Livingston, counsel

Judgment was sent to the parties on 2 November 2023. The claimant has requested written reasons in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013. The following reasons are therefore provided.

## REASONS

### Introduction and background

1. Preparation of these reasons has taken about three and a half months from the date of the hearing. Our employment judge is sorry about that. The delay was caused by prioritising cases that were listed for hearing during the intervening period, ensuring that the parties to those cases were informed promptly of the outcome, and explaining the reasons orally. One of the consequences was that a lower priority has been given to preparing written reasons. We recognise that the delay will have affected the parties, especially if they are contemplating an appeal.
2. This was a stage 1 equal value hearing ("S1 hearing") under the Employment Tribunals (Equal Value) Rules of Procedure 2013 ("the EV Rules").
3. The background to the hearing can be briefly summarised. The respondent operates an enforcement business. The claimant is a woman. She was employed by Rossendales Limited ("Rossendales"), another enforcement business, from 1 August 2005. She progressed to the role of Head of Enforcement – Local Taxation ("HoELT"). Her employment transferred to the respondent, by whom she remained employed until she was dismissed for redundancy in May 2022.

4. By a claim form presented on 3 November 2022, the claimant complained that the respondent had breached the equality clause in her contract in that the remuneration terms of her work were less favourable than the corresponding terms of the work of three male comparators. The comparators were Mr Kevin Cox, Mr Matthew Hayes and Mr Stuart Symmons. All three men were employed by the respondent in the role of Divisional Enforcement Director ("DED") and, before that, in the role of Regional Enforcement Manager ("REM"). It was the claimant's case that her work was of equal value to theirs.
5. In a separate claim form, given case number 2406708/2022, the claimant also complained of unfair dismissal and indirect sex discrimination. The indirect discrimination complaint specifically concerned a provision, criterion or practice ("PCP"), alleged to be "the requirement to undertake travel including of a significant distance". In her own words, the claimant's case was that "the requirement to undertake travel of significant distances has an impact on women who, because of their childcare responsibilities, are less likely than men to be able to accommodate working patterns this would create".
6. Initially, the two claims were ordered to be heard together. Employment Judge Buzzard considered them both at a preliminary hearing on 16 January 2023. At that hearing, the parties agreed:
   6.1. that the two claims should be heard separately;
   6.2. this claim, that is, the equal pay claim, should proceed to a S1 hearing; and
   6.3. at the S1 hearing, the tribunal should "consider whether … the respondent has a material factor defence to the claimant's claim."
7. Everyone understood the "material factor defence" to be a reference to the issue in section 69 of the Equality Act 2010 ("EqA").

**Issues**

8. Following that hearing, the parties worked jointly to prepare a list of issues. They were not fully agreed. That is to say, the claimant requested that further issues be determined at the S1 hearing beyond those originally drafted by the respondent. Helpfully, the claimant used red font so we could see what those additional issues were.
9. We discussed the issues at the start of the hearing. Significantly:
   9.1. It was agreed that section 69 required us to examine differences in terms over the entire period for which the claimant could potentially be awarded a remedy. The end of the period was in May 2022. The start of that period was the "arrears day" in section 132 of EqA. Our employment judge suggested that that day would be 1 November 2016. The parties asked us to leave open the possibility that the arrears day may have been a few weeks earlier than that. They agreed, however, that nothing happened between August 2016 and November 2016 that would affect our determination of the section 69 defence.
   9.2. At all times relevant to this claim, Rossendales (who initially employed the claimant) remained a distinct legal entity from the respondent. It was agreed that the fact that the entities were separate was irrelevant to the issues that we would have to determine.

9.3. The parties asked us to determine a question of law. The question relates to the material factors on which the employer may rely under section 69 of EqA. Can the employer rely on factors which are "actually matters relating to equal value in relation to factors such as effort, skill and decision-making?". Or do such factors have to be excluded when considering the section 69 defence?

9.4. The respondent confirmed that one of the material factors relied on which the respondent relied was "travel requirements".

9.5. The respondent clarified that, if it was required to discharge the burden in section 69(1)(b) of EqA (justification) in relation to any material factor, it would contend that the factor was a means of achieving the aims of:

(a) Business efficiency and

(b) Recruitment and retention of REMs and DEDs.

9.6. The parties agreed that the tribunal would determine the section 69 issue first, before considering any of the other matters listed in rule 3(1) of the EV Rules. This meant that, if the section 69 defence failed, the tribunal would go on to consider whether to determine "the question", or to require an independent expert ("IE") to prepare a report on the question.

9.7. It was agreed that, in all other respects, the tribunal should determine the list of issues as drafted by the respondent.

9.8. We decided to separate one of the issues to reflect two separate questions that needed to be determined. One was whether the difference in terms was because of an alleged factor. The other was whether that factor was material, in the sense of being relevant to pay-setting, and being a material difference between the circumstances of the claimant and her comparators.

10. We discussed the impact of claim 2406708/2022 on the issues that we would have to determine. By the time of the S1 hearing, there had been a final hearing of that claim, but the parties did not yet know the outcome. The tribunal at the final hearing of claim 2406708/2022 was chaired by Employment Judge Ainscough and we will refer to it as "the Ainscough tribunal". The reserved judgment of the Ainscough tribunal was expected to include their determination of the indirect discrimination complaint. Our employment judge asked the parties whether or not there was any danger that our judgment at the S1 hearing might conflict with the Ainscough tribunal's determination. We were assured that it would not. This was because:

10.1. The claimant's positive case was that the difference between the claimant's terms and the comparators' terms was not because of "travel requirements" at all; and

10.2. The respondent's case was that the "travel requirements" that explained the difference between the claimant's terms and the comparators' terms did not include the "significant distances" that were alleged to be discriminatory in claim 2406708/2022. As an example of the "significant distances" involved in that claim, counsel for the respondent mentioned travel from Manchester to London for meetings. By contrast, the "travel requirements" on which the respondent relied at the S1 hearing were frequent short journeys that the comparators made to locations in their region where enforcement agents did their work.

11. We returned to the issues once all the witnesses had given oral evidence. This was because we wanted to understand better what the claimant's case was about the

disadvantage to her and to women that resulted from the material factors on which the respondent relied.

12. The claimant's main case was that the respondent was required to justify all the factors objectively. This was because, if the respondent could prove that the difference in terms was because of any of the factors on which it relied, those factors must have put the claimant and other women doing work equal to hers at a particular disadvantage. According to the claimant, that disadvantage was evident from the statistics. The REMs and DEDs were predominantly men and the only HoELT was a woman.

13. Alternatively, the claimant's case was that specific factors caused a particular disadvantage to the claimant and to women doing equal work with hers. The main disadvantageous factor was market forces. In particular, it was the need to incentivise the comparators to become REMs and, later, DEDs. It was the respondent's evidence that the reason why an incentive was needed was because the respondent recruited REMs and DEDs from a pool of successful enforcement agents ("EAs"). The claimant said that that factor must have resulted in a disadvantage to women, because the vast majority of EAs were men.

14. Here, then, is the list of issues incorporating the above points:

    14.1. Was the difference in pay between the claimant and the comparators because of one or more of the following factors?

        (a) Competition and expectation

        (b) Certification requirements

        (c) Experience/management/coaching

        (d) Retention of enforcement agents

        (e) Client relationships

        (f) Market forces – including:

            (i) The need to avoid losing the comparators to competitors;

            (ii) The need to incentivise the comparators to become and remain REMs and DEDs

        (g) Travel requirements in the form of frequent short journeys that the comparators made to locations in their region where enforcement agents did their work.

    14.2. If so, was that factor material?

    14.3. Was the factor excluded from section 69 of EqA on the ground that it was also a factor relating to equal value in relation to factors such as effort, skill and decision-making?

    14.4. Did reliance on that material factor involve treating the claimant less favourably than the comparators because of her sex?

    14.5. As a result of that material factor were the claimant and other women doing work equal to hers put at a particular disadvantage when compared with men doing work equal to hers, either:

a. By inference, because of the high proportion of men in the REM/DED role and the fact that the HoELT role was uniquely held by a woman; or

b. As a result of REMs and DEDs being recruited from a pool of successful EAs?

14.6. If so, was reliance on the material factor a means of achieving the aim of:

a. Business efficiency and/or

b. Recruitment and retention of REMs and DEDs?

14.7. Were those aims legitimate?

14.8. Was reliance on the material factor proportionate?

**Evidence**

15. We considered documents in a 742-page bundle. Because of the length of the bundle, we concentrated on those pages to which the parties drew our attention in witness statements, written submissions or orally during the hearing.

16. The respondent called Mr David Burton and Mrs Clare Alessi as witnesses. The claimant gave oral evidence on her own behalf. All three witnesses confirmed the truth of their written statements and then answered questions.

17. The respondent additionally relied on the witness statement of Mr Kevin Avery, who did not give oral evidence. We read his statement, but were unable to place significant weight on it unless it was supported by other more reliable evidence. This is because we had no way of knowing how Mr Avery's evidence would have stood up to questioning.

18. We have mentioned that we returned to a discussion of the issues once each witness had given evidence. Following that discussion, we allowed the claimant to give further oral evidence to explain the disadvantage to women that was caused by reliance on factors underpinned by Mr Burton's requirement that DEDs and REMs should be recruited from a pool of successful EAs. We also allowed Mr Burton and Mrs Alessi to be recalled so that the claimant's clarified case could be put to them.

**Facts**

<u>The respondent</u>

19. The respondent is a multi-operational business. Relevantly for the purposes of this claim, it has contracts for the enforcement of debts, judgments, tax liabilities, penalties and eviction orders.

20. Prior to the respondent's acquisition of Rossendales, the respondent's enforcement business was concerned chiefly with national contracts. The national clients included His Majesty's Courts and Tribunals Service ("HMCTS"), His Majesty's Revenue and Customs ("HMRC") and Highways England. They would collect tax liabilities, fines and penalties. Each national client had a Business Account Manager ("BAM"), who reported to the respondent's Client Director.

21. At the times relevant to this claim, the respondent had a reputation as a market leader in national enforcement activity.

<u>REMs and DEDs</u>

22. Delivery of the national enforcement contracts was the responsibility of the National Enforcement Director, Mr David Burton, assisted by the Deputy National Enforcement Director, Mr Stuart Symmons. Between 2016 and 2018, seven REMs reported to Mr Burton.

23. Following a restructure, on 1 November 2018, three of the REMs became DEDs. So did Mr Symmons, the Deputy National Enforcement Director.

24. Here is a table setting out the dates, roles and salaries of the REMs and DEDs, concentrating on the period from 1 November 2016 onwards.

| **Name** | **Job title** | **From** | **To** | **Salary (£)** |
|---|---|---|---|---|
| **Kevin Cox** | REM South | 1 June 2016 | 31 May 2017 | 61,915 |
| **(comparator)** | REM South | 1 June 2017 | 31 July 2017 | 62,844 |
| | REM South | 1 August 2017 | 31 October 2018 | 72,844 |
| | DED | 1 November 2018 | 15 February 2021 | 72,844 |
| | DED | 16 February 2021 | 30 November 2021 | 90,000 |
| | DED | 1 December 2021 | 31 May 2022 | 91,800 |
| Kevin Avery | REM Midlands | 1 June 2016 | 31 May 2017 | 69,668 |
| | REM Midlands | 1 June 2017 | 31 October 2018 | 70,713 |
| | DED | 1 November 2018 | 30 November 2019 | 70,713 |
| | DED | 1 December 2019 | 30 November 2021 | 90,000 |
| | DED | 1 December 2021 | 30 May 2022 | 91,800 |
| **Matt Hayes** | REM London West | 1 June 2016 | 31 May 2017 | 61,020 |
| **(comparator)** | REM | 1 June 2017 | 31 October 2018 | 61,935 |
| | DED | 1 November 2018 | 30 November 2019 | 70,000 |
| | DED | 1 December 2019 | 30 November 2021 | 90,000 |
| | DED | 1 December 2021 | 30 May 2022 | 91,800 |
| **Stuart Symmons** | Deputy National Enforcement Director | 1 June 2016 | 31 October 2018 | 77,266 |
| **(comparator)** | DED | 1 November 2018 | 30 November 2019 | 77,266 |
| | DED | 1 December 2019 | 30 November 2021 | 90,000 |

| | | | | |
|---|---|---|---|---|
| | DED | 1 December 2021 | 30 May 2022 | 91,800 |
| Linda Eyre | REM South West and Wales | 1 June 2016 | 31 May 2017 | 71,498 |
| | REM | 1 June 2017 | 7 August 2017 | 72,570 |
| | Contract Solutions | 8 August 2017 | 31 October 2018 | 35,000 |
| David Kavanagh | REM North West | 1 June 2016 | 31 May 2017 | 60,822 |
| | REM | 1 June 2017 | 31 October 2018 | 61,734 |
| | Area Enforcement Manager | 1 November 2018 | 28 February 2020 | 30,000 |
| David Munday | REM London North | 1 June 2016 | 31 May 2017 | 59,813 |
| | REM | 1 June 2017 | 31 October 2018 | 60,710 |
| Matt Grimmett | REM South East | 1 June 2016 | 31 May 2017 | 61,709 |
| | REM | 1 June 2017 | 31 October 2018 | 62,635 |

25. REMs and DEDs were responsible for area teams of self-employed Enforcement Agents ("EA"s) in their region. Each area team was led by an Area Enforcement Manager (AEM). There were, on average, 18.5 EAs in each area team. Under the structure in place from November 2018, each DED had responsibility for approximately 100 EAs.

26. Each national contract came with Key Performance Indicators ("KPI"s), agreed with the national client. The DEDs' main responsibility was to ensure that their area teams were, collectively, delivering against those KPIs.

Enforcement Agents

27. Essentially, the role of an EA was to visit a debtor's property, demand payment, and use their powers of persuasion to try and secure payment in full, removing goods if necessary to secure enforcement. They generally collected payment in a single lump sum, but sometimes collected ad-hoc part-payments through multiple visits. The debtor would not always make the payment whilst the EA was at the premises, but if they did not, they would often do so very shortly after the EA had left. Under the national contracts, debts would not be collected by regular instalments. The debtor would not have any payment plan in place. It was not part of the EA's work to enter into, or monitor, such plans.

28. A lesser part of an EA's work was executing eviction warrants. This would involve the occasional forced entry with the aid of a locksmith.

29. EAs chose their own working hours. An EA would visit a debtor's house at a time when they would expect the debtor to be at home. The times when debtors were most likely to be at home were between 6am and 10am. But that did not necessarily mean that this was the best time window for an EA to be at work. An EA would need to balance the risk of a debtor being out of the house against the time it took for the EA to travel between houses. It made more sense not to travel during the morning rush hour, especially in London. This meant that EAs would often work during the middle of the day, even if it meant sometimes knocking on the door of an empty flat.

30. The most effective EAs were not the people with the greatest physical strength, or ability to resist physical violence. Payment was collected through persuasion. No doubt, one of an EA's methods of persuasion was to remind the debtor of the prospect of having their goods lawfully removed. Nevertheless, it was relatively rare that entry would be forced, or an EA would walk away with a debtor's television. We accept Mrs Alessi's evidence that some of the most effective EAs were women, who (in her experience) found ways of de-escalating situations of potential conflict.

31. EAs were paid wholly by commission. Their commission was calculated using an agreed formula that operated across the national contracts arm of the business. Entitlement to commission was triggered by "payment in full" of a debt, or "PIF" for short. Each PIF would attract a flat fee. The amount of the flat fee would vary according to how promptly it had been collected. Outside London, the range was £80 to £120. An EA's PIFs would enter a "ratchet", meaning that the more PIFs an EA obtained within a given timescale, the higher the fee the EA would get for all of them.

32. When recruiting EAs in 2022, the respondent advertised their prospective earnings as being between £35,000 and £75,000. The most successful EAs could earn up to £140,000. That said, the six-figure earners were outliers. In 2019, only 5 out of the 400 or so EAs earned over £100,000.

33. There was a high turnover of EAs within the business. Generally, this was due to EAs moving between rival enforcement businesses. Within this volatile environment, it was a key part of the work of AEMs, REMs and DEDs to establish a personal rapport with the high-performing EAs and keep them loyal to the respondent.

34. All the respondent's REMs and (later) DEDs had been successful EAs before taking up their salaried management position. They all kept their EAs' certification up to date.

<u>Rossendales</u>

35. Rossendales was acquired by the respondent in 2013, but retained its legal identity. Prior to the merger, it already had an established enforcement business. Its contracts were with local authorities. About 90% of Rossendales' local authority work was the collection of unpaid council tax, business rates and child maintenance. Roughly 10% of the business was the enforcement of unpaid motoring penalties on local authorities' behalf.

36. Approximately 70% of the local authority debts referred to Rossendales were collected through payment plans.

<u>The claimant</u>

37. The claimant began her employment with Rossendales on 1 August 2005. We will need to return briefly to the claimant's career history later in these reasons.

38. By 1 June 2016, her role was Operations Performance & Analytical Manager. That role changed to Enforcement Manager from 31 October 2018 and Head of Enforcement, Local Taxation from 1 February 2021 until her employment ended on 6 May 2022. From 2014 until June 2021, she reported to Mrs Clare Alessi, Rossendales' National Enforcement Director. In June 2021, she began reporting to Mr Burton, who, it will be remembered, held the same job title with the respondent. Her work was based at the Rossendales office in Helmshore, Lancashire.

39. Here is how the claimant's role and salary changed over the last 6 years of her employment.

| **Job title** | **From** | **To** | **Salary (£)** |
|---|---|---|---|
| Operations Performance & Analytical Manager | 1 June 2016 | 31 May 2017 | 35,000 |
| OP&AM | 1 June 2017 | 30 June 2018 | 40,000 |
| OP&AM | 1 July 2018 | 30 September 2018 | 42,000 |
| OP&AM | 1 October 2018 | 30 October 2018 | 43,400 |
| Enforcement Manager | 31 October 2018 | 31 May 2019 | 43,400 |
| Enforcement Manager | 1 June 2019 | 31 January 2021 | 44,051 |
| Head of Enforcement (Local Taxation) | 1 February 2021 | 30 November 2021 | 50,000 |
| HoELT | 1 December 2021 | 6 May 2022 | 51,500 |

40. The claimant's role evolved over time. Until 2016, the claimant's role was essentially analytical, with no line-management responsibility. Between 2016 and 2019, the claimant became responsible for an allocations team, which focussed on case management and monitoring case volumes. From October 2018, as Enforcement Manager, the claimant worked alongside a peer, Ms Lisa Ashworth, who was Head of Client – Local Government.

41. From 1 February 2021, the claimant managed the Enforcement Services Team. They managed daily transactions around cases, either in relation to day-to-day operational client questions or day-to-day queries from Enforcement Officers ("EO"s).

42. The back-office team was overseen by the Operational Services Team Leader. Team members would speak to debtors on the telephone. They would enter into payment plans and monitor compliance. If debtors defaulted on their payment plans, the office staff would pro-actively try to make contact and find out what the problem was. Persistent defaulters, or debtors who failed to engage, would be referred for enforcement through control of goods.

43. The claimant never worked as an EO or EA. The possibility of such work never occurred to her. She was never put off the idea by the hours, or the travel, or by any wish to avoid situations of potential conflict.

Enforcement Officers

44. House-to-house enforcement work within Rossendales was done by 3 teams of EOs.

45. Like the respondent's EAs, Rossendales' EOs were self-employed. The remuneration structure for EOs was, however, significantly different from EAs. At Rossendales, EOs were divided into two tiers. Remuneration for Tier One EOs was weighted towards payment per task. There was a small flat fee of £3 for a visit, with a higher flat fee if the EO obtained a signed agreement from the debtor. PIFs were rewarded with commission if achieved within a defined timescale of the first visit. In Tier Two, EOs were more heavily incentivised. A visit, by itself, attracted no remuneration at all. Tier Two EOs were paid a flat fee for a PIF. The fee could be between £80 and £105. (It will be remembered that the upper limit fro an EA was £120.) Like EAs, the PIF would go into a ratchet, meaning that achieving a certain number of PIFs within a defined timescale would result in the flat fee for all of them being increased.

46. Because of the higher earning potential in Tier Two, Rossendales reserved that tier for the better-performing EOs. Underperforming EOs could be relegated to Tier One.

47. The two-tier system recognised that it was often unrealistic, and indeed undesirable, to enforce a prompt PIF from local authority debtors. The local authority clients recognised the importance of collecting debts in affordable instalments. A visit from a Tier One EO would often be all it took to persuade a debtor to re-engage with their payment plan.

48. There were about 120 EOs across the three teams. Each team reported into an Enforcement Lead Officer. There were three Enforcement Lead Officers, each reporting to the claimant. Taking into account part-time working hours, the whole-time equivalent number of Enforcement Lead Officers was 2.6.

49. This structure contrasted with the structure in which the REMs and DEDs operated. Whilst there were, on average, 46 EOs reporting to one of the claimant's Enforcement Lead Officers, the approximate number of EAs reporting to an AEM on the national contracts was 24. From these numbers, we concluded that the EAs were more intensively managed by their area managers than were EOs.

50. In comparison with the volatile market for EAs, the workforce of 120 or so EOs were relatively stable.

"Head of…" roles

51. Mrs Alessi told us, and we accept, that the Head of Decision Support was a man. His pay was, in her words, "comparable" to that of the claimant.

52. The Head of Client was Ms Ashworth.

53. There was also a Head of Data Analytics. We do not know if that person was a man or a woman. We did not rule out the possibility that this person may have been the Head of Decision Support, but with a differently-worded job title.

54. Other than that, we do not know how many of the "Head of…" roles at Rossendales were held by men or by women. We know nothing of their actual salaries.

Pay-setting

55. The respondent had a loose pay grading structure. A manager's grade had little or no bearing on their salary. The significance of the grade was to the incidental benefits such as car allowance. The claimant's role was increased to Grade 3 when she became Enforcement Manager. The DEDs and REMs were in Grade 3 throughout.

56. The claimant's pay structure was set by Mrs Alessi. When reviewing salaries, Mrs Alessi "benchmarked" pay against other equivalent roles in the organisation. For example, when the claimant was HoELT, Mrs Alessi considered the claimant's salary alongside that of the Head of Data Analytics. She took human resources advice and sought final approval from the Chief Operating Officer.

57. The claimant provided evidence to Mrs Alessi to justify her salary. She did not, however, go as far as to suggest any possibility of her leaving to take a better-paid role with a competitor. It did not occur to either the claimant or Mrs Alessi that the claimant might start in business as an EA, or start her own enforcement business, as an alternative to a salaried management role.

58. Mr Burton was responsible for remuneration of the REMs and DEDs. His pay-setting rationale was opaque and generally undocumented. We had to examine what he told us carefully against what we knew about REMs' and DEDs' pay as it changed over time. Within national contracts, Mr Burton harmonised DEDs' pay at £90,000 from 1 December 2019. Up to that point, as we can see from the figures, REMs' and DEDs' pay varied considerably. Pay was reviewed annually, but also increased "ad hoc" during the pay cycle to respond to market pressures.

59. A good example of pay negotiations in action is the process by which DEDs' pay was increased to £90,000. In 2019, Mr Avery approached Mr Burton in a bid to raise his salary. At that time, Mr Avery's salary was £70,713. He told Mr Burton that a competitor had offered him about £50,000 more than that. He added that his current earnings were no more than he could earn as an EA. At the same time, Mr Avery mentioned a similar offer that had reportedly been made to Mr Hayes. Mr Burton was concerned that, if Mr Avery or Mr Hayes left, their teams of EAs would follow. He discussed his concern with the Chief Executive, Mr Gareth Hughes. They agreed that Mr Avery's warning was credible. Mr Burton then increased the pay of the DEDs to £90,000. There was no staff change form recording this pay rise. Mr Burton's recollection was that, if a form was completed at all, it would not have recorded any explanation other than, "exceptional pay increase".

60. The claimant disputes that market forces genuinely explain Mr Burton's pay decisions.

61. We bore in mind that, where an organisation's pay rationale is opaque and undocumented, they cannot generally complain if a tribunal subsequently rejects their explanation for pay differences. We also recognised that there is no evidence

that Mr Burton had to offer any particular starting salary to an REM or DED in order to persuade them to give up self-employed EA work.

62. Nevertheless, we accept Mr Burton's evidence that he was responding to market forces. This is because:

    62.1. From before the start of the comparison period until August 2017, the highest-paid REM was Linda Eyre. This was despite being based outside London. This suggested to us that, looking at the whole of the comparison period, pay-setting was likely to have been influenced by factors other than sex.

    62.2. Organisations generally will choose, if they can, to keep their costs to a minimum. They have a powerful incentive to avoid paying salaries higher than market rates.

    62.3. The respondent was a market leader. The experience of our non-legal members is that market leaders tend to reinforce their dominance by offering higher salaries than their competitors, if they can afford to do so.

    62.4. The sudden jump in DEDs' salaries in 2019 of nearly £20,000 suggests to us that it was a response to an event, rather than a feature of an ongoing pay disparity.

63. Mr Burton set the level of an REM's and DED's pay to make it attractive enough to prevent the role holder from leaving for a competitor, or returning to self-employment as an EA, or setting up an enforcement business of their own.

Legal framework

64. Enforcement activity operates within a strict legal framework. We did not research the relevant legal background in the same way as we would identify the law relevant to our own decision-making. What follows is our broad understanding of the legal position, based on the evidence we heard:

    64.1. Where a debtor fails to pay council tax, rates or child maintenance, the local authority can apply to a magistrates' court for a liability order. Under a liability order (or possibly a further order), an enforcement agent has the legal power to take control of the debtor's goods. Under the Taking Control of Goods Regulations 2013, that power lasts for 12 months. Where the debtor has agreed to pay by instalments during the currency of an order for the control of goods, and subsequently defaults on a payment, the 12-month period restarts on the day of the default.

    64.2. Penalties under the Traffic Management Act 2004 and judgments for unpaid tax can also be enforced by an order for control of goods. The order expires after 12 months. It is unclear to us whether, in theory, that 12-month period can also be reactivated where a debtor fails to pay an instalment. In practice, that situation never arose. Mr Burton's national clients insisted on PIF and were not interested in payment by instalments.

Commercial pressures

65. Clients regularly monitored performance against KPIs. This was so, both under Rossendales' contracts with the local authorities, and also under the respondent's national contracts.

66. The significant KPI for Rossendales' purposes was percentage "payover". This was the amount of money collected as a percentage of the overall volume of debt referred

to Rossendales over a given reference period. The payover KPI was only loosely time-bound. Provided that the percentage payover was on target, the client would tolerate a period of up to 3 years to collect each individual debt.

67. Local authority clients would periodically share information with enforcement businesses on each other's delivery against KPIs. That way, Rossendales could see how it was performing relative to its competitors.

68. Where a local authority was dissatisfied with performance, the concern would be raised through the Head of Client. For example, Southend-on-Sea Borough Council (as it was then), threatened to reduce Rossendales' work allocation because it was underperforming relative to a rival enforcement business. In response, Mrs Alessi and the Head of Client travelled from Helmshore to Essex for a meeting. They agreed to improve and, with the claimant's support, they did. The client was satisfied and the workflow remained the same.

69. National clients also shared information between competitors. This was done in the form of "batch score cards". The KPIs that these score cards were comparing were PIF within 90 days and PIF within a year, measured across a selected "batch" of debt referrals. These metrics placed much greater emphasis on PIF and prescribed a shorter timescale. Relative performance on the score card determined the national client's allocation of debt referrals to the enforcement business going forward. This created a more pressurised commercial environment than existed at Rossendales. We accepted Mr Burton's evidence that this commercial pressure weighed on him when deciding on REMs' and DEDs' pay.

Work location and travel

70. The claimant was office-based. Until the restructure that led to her dismissal, she was rarely required to travel.

71. The work of the REMs and DEDs involved some travelling around the regions where they were based. Some of that work included visiting EAs as they carried out their enforcement activities. Otherwise, there would have been no need for an REM or DED to keep their EA certificate up to date.

72. That said, the REMs and DEDs did spend as much of their time on the street as the respondent would have us believe. Contrary to the respondent's case, we find that the REMs and DEDs were not predominantly "field-based". There are very few contemporaneous travel records. Mr Burton's own estimate was that a DED travelled 4,500 miles in the space of 8 months. That figure breaks down to an average of less than 130 miles per week – significantly less than what we would expect in a field-based role, especially where most of the REMs' regions covered large geographical areas (such as South-west and Wales). It would be inefficient for the respondent to expect its DEDs to travel from house to house to supervise EAs as they enforced payment on the doorstep. The EAs were already intensively managed by their AEMs.

73. The amount of travelling that a REM or DED did in their role was unlikely to be much of an inconvenience to them, financial or otherwise. They had a car allowance. Their travel expenses were paid. Overnight stays were very rare. We are unpersuaded that the travel element of the role was a significant factor in Mr Burton's decision-making about pay.

Recruitment and retention

74. The mileage claims from DEDs that we did see were for travel to hotels. This is consistent with REMs and DEDs being heavily involved in recruitment of EAs. Hotels were used as recruiting and training centres. EAs would need to be selected and enticed into an enforcement career, or away from one of the respondent's competitors, or from the idea of setting up their own enforcement business. This is where the DED's previous EA background came in. Mr Burton expected the DED to trade on their experience and track record as a successful EA, the better to sell the respondent as a business proposition. This was seen by Mr Burton as an important responsibility, because of the high turnover rates of EAs within the industry.

75. Once recruited, the job of maintaining contact with an EA was primarily down to the AEM. That, we find, is why there was a relatively low ratio of EAs to AEMs in the national contracts business, when compared to the high ratio of EOs to Enforcement Lead Officers at Rossendales. Coaching and mentoring was in the job description of the AEMs, but not the REMs or DEDs. There was, however, a role for the REM and DED in maintaining personal relationships with EAs. In Mr Burton's opinion (which we find was genuine), the REM/DED's background as a successful EA helped them to maintain that rapport.

76. Factors motivating Mr Burton to increase DEDs' salaries therefore included their background and its potential to assist in recruiting and (to a lesser extent) retain EAs. Ability to train and mentor EAs was not influential in pay-setting.

77. The claimant, for her part, intervened occasionally in recruitment of EOs, but it was not a significant part of her role. Responsibility for recruiting EOs sat with the Allocations Manager, Mr Bullock. (It was not clear to us when Mr Bullock started reporting to the claimant. It was either 2018, when she became Enforcement Manager, or 2021 when her role became HoELT.) The claimant occasionally participated in interviews when the Allocations Manager was not available.

78. Like DEDs and REMs, the claimant was not responsible for coaching and mentoring of EOs. That was the role of the Enforcement Lead Officers, expressly recognised in their job descriptions.

79. The local taxation enforcement team, of which the claimant was the Head by 2021, was successful in recruiting and retaining a stable workforce of EOs. There may be various explanations for this, one of which may very well have been that the claimant was a better people manager than her counterparts at the respondent. Another significant explanation, however, we find, is that Rossendales was operating in a less competitive sector of the industry. In local taxation, there was less potential for an EO to achieve the high earnings that an EA in national contracts could achieve, but there was also less pressure to secure immediate payment, and less financial risk. A Tier One EO could secure a regular income by visiting debtors and persuading them to make contact with the helpline, or re-commit to their payment plan.

<u>Client contact</u>

80. The claimant's role was not client-facing. Maintaining the client relationship was the responsibility of the Client Account Manager. If client concerns were escalated, it would be Mrs Alessi who would deal with them. The client would sometimes raise a query relating to enforcement of an individual debt. "Low level" queries such as these (in Mrs Alessi's words) would be fielded by the Enforcement Services Team and occasionally escalated to the claimant if they were more complex.

81. Likewise, REMs and DEDs were much more concerned with operational delivery than with client liaison. If asked by the Client Services Manager, an REM or DED would provide information to assist with an operational query from the client, but it was the Client Services Manager who remained the point of contact. DEDs very occasionally attended meetings with clients if, for example, the client wanted to discuss a particular operational issue. The DED's name would not appear on the minutes.

82. Our finding is that Mr Burton was not really thinking about client contact at all when deciding how much to pay the REMs and DEDs.

EA certification

83. EAs were required to be accredited. They had to keep their certificates up to date. We did not have any detailed evidence about what a person has to do to obtain or renew a certificate. In general terms, we accepted the claimant's evidence that it was a relatively straightforward process to become certified as an EA, and well within her capability.

84. We found that current certification was relevant to the role of the REM and DED. If it did not matter at all whether an REM or DED had a current certificate, we would have expected at least one of them to have allowed their certificate to lapse. That said, the existence of an up-to-date certificate was not, in our view, a significant factor in Mr Burton's decision-making about pay. The role specification did not require the job-holder to have a current certificate. The REMs and DEDs, as we found, did not do much direct enforcement work themselves. What was important to Mr Burton was the manager's EA background. It was their contacts and experience, and the risk that they might take those assets with them to a competitor.

Women as EAs

85. Roughly 90% of the agents working the enforcement industry are men.

86. There was no direct evidence about why this is the case.

87. There is no evidence of any historic rule or norm that restricted women's ability to work as an EA.

88. When recalled to give evidence, the claimant speculated that women may be deterred by the risks of physical confrontation. She also mentioned the possibility that, to be successful, an EA may have to work hours that are incompatible with childcare.

89. The lack of direct evidence made it more difficult for us to find what, if any, barriers existed for women wanting to become EAs. We were not able to find that working hours disadvantaged women. It may be said that women are less likely than men to be able to work between 7am and 9am, because, as a population, they are significantly more likely to be responsible for childcare at that time of the day. But we do not have sufficient evidence of the importance of that window of time as an ingredient of success as an EA. There was no requirement to work full-time, or at particular times of day. The evidence was that, actually, EAs often chose to work after 10am, so as to avoid getting stuck in traffic between visits.

90. We also considered the possibility that more women than men might find the work of an EA unattractive, because of their perception that the job involved the risk of physical confrontation. We could conceive of evidence (for example, from surveys) that could demonstrate that this was in fact the case. There was no such evidence

before us. Had our view of the law been different (see below), we might have considered whether it was open to us to make such a finding based on our own general knowledge. As it was, we declined to make such a finding.

**Relevant law**

Material factor defence

91. Section 69 of EqA reads as follows:

> (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.
>
> …
>
> (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.

92. A factor is not material unless it is "significant and relevant". Material factors are not limited to the employee's skills and abilities, but may encompass external factors: *Rainey v. Greater Glasgow Health Board* [1987] AC 224, HL.

93. At the stage of assessing whether a factor was material or not, the tribunal is not concerned with objective justification: *Glasgow City Council v. Marshall* [2000] ICR 196, HL, and *Cooperative Group Ltd v. Walker* [2020] ICR 1450, CA.

94. A factor may be at the same time be relevant to the question of equal value and also a material factor explaining differences in pay under section 69: *Christie v. John E Haith Ltd* [2003] IRLR 670.

95. The material factor must explain the whole of the pay gap. As explained in paragraph 82 of the Equality and Human Rights Commission's Equal Pay Code of Practice, "If the material factor accounts for only part of the variation in pay, the woman is entitled to a pay increase to the extent that the defence is not made out."

Disadvantage

96. Where pay arrangements adversely impact upon women as a group, but there is no obvious feature which causes the differentiation, the employer will nonetheless be required to show that they are objectively justified: *Middlesbrough Borough Council v. Surtees* [2007] IRLR 869 at para 52.

97. The requirement for objective justification will arise where significant statistics show an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men: *Enderby v. Frenchay Health Authority* [1993] IRLR 591, ECJ.

98. The numbers must be statistically significant. The statistical differences between the sexes must be "considerable": *R v. Secretary of State for Employment ex p Seymour-Smith* C-167/97, ECJ. The lower-paid work need necessarily not be done wholly or predominantly by women: * But they must be "cogent, relevant and sufficiently compelling": *Villalba v. Merrill Lynch & Co* [2007] ICR 469. At para 113 of *Villalba,* the EAT added,

> "The statistics must at least show that it is reasonable to infer that the treatment of the disadvantaged group must have resulted from some factor or combination of factors which impinge adversely on women because of their sex, even though no obvious feature causing this disparate treatment can be identified…"

99. Where pay disparity is demonstrated statistically, it is a matter of debate whether an employer can avoid the requirement to show objective justification by showing that the disparity was not due to sex discrimination. See *Armstrong v. Newcastle upon Tyne NHS Hospital Trust* [2005] EWCA Civ 1608. We do not need to resolve this debate, because the respondent does not seek to rely on *Armstrong* in this case.

100. In the absence of statistics, it is still open to an employee to prove that the employer's reliance on the factor that put her, along with women doing equal work, at a disadvantage when compared to men whose work was equal to hers. Here, they must prove the disadvantage itself, rather than have the tribunal infer it from the sex-breakdown of the affected groups.

101. To our minds, the individual claimant must share the particular disadvantage with the group. This is apparent from the words of section 69(2) itself. It requires that "A and persons of the same sex … are put at a particular disadvantage…"

Justification

102. The employer must first show that reliance on the disadvantageous factor was a means of achieving the aim on which it relies.

103. It is then for the employer to show that the aim is legitimate.

104. The employer must then show that reliance on the factor was proportionate.

105. The test is objective. There is no room for the "reasonable range of responses" approach.

106. The assessment of proportionality involves striking a careful balance. On one side, the tribunal must weigh the reasonable needs of the business and the importance of the aim. On the other side of the balance is the discriminatory effect of the condition. Here, the tribunal must take into account not just the effect on the individual claimant, but on the whole of the disadvantaged group.

Burden of proof

107. The responsible person (in this case the employer) must show:

107.1. That the difference in terms was because of the alleged factor or factors;

107.2. That the factor was material;

107.3. That the factor did not involve treating the employee less favourably because of her sex than the employer treated the comparator; and

107.4. (if particular disadvantage is proved within the meaning of subsection (2)) That the factor was a proportionate means of achieving a legitimate aim.

108. Where the claimant is a woman, it is for her to show that, as a result of a factor, she and other women doing work equal to hers were put at a particular disadvantage when compared with men doing work equal to hers. This includes providing statistical evidence. If her case is that the disadvantage can be inferred from the disparate impact of pay arrangements on different groups, it is for her to bring to the tribunal the statistical evidence on which she relies. It is not for the employer to disprove that a system disadvantages women as a group: *Nelson v. Carillion Services Ltd* [2003] EWCA Civ 544.

**Conclusions**

109. The difference in pay between the claimant and her comparators at the start of the comparison period was approximately £26,000 (and £32,000 in the case of Mr Symonds). By the end of the period, the gap was approximately £40,000.

110. We have examined the factors on which the respondent relies and assessed the extent to which they explain those differences.

111. We have not excluded factors that would also be relevant to the equal value question. Paragraphs 9.3 and 14.3 above identify the question of law that we had to decide and paragraph 94 provides the short answer to it.

Factor (a) - Competition and expectation

112. We found that the difference between the claimant's pay and the REMs'/DEDs' pay was partly because of the commercial pressures that existed under the national contracts.

113. There was a material difference here between the claimant's circumstances and those of her comparators. In some respects, the commercial environments were the same: the HoELT and REM/DED were all responsible for ensuring delivery against KPIs, which were monitored and performance data shared with competitors, with the potential to affect work allocation. But the KPIs for the REMs/DEDs were more pressing. A target of achieving a defined number of PIFs within 90 days or 12 months is different in nature to a target of maintaining an average payover, with collection periods of up to 3 years being tolerated.

114. This factor was relevant to pay. As Mr Lynch later found in the grievance appeal outcome, the added pressure under the national contracts demanded an increased level of skill, effort and decision-making.

115. Relying on this factor did not involve treating the claimant less favourably than the comparators because she is a woman.

116. Had this been the only factor, the claimant's case would have succeeded in part, because the difference in pay was not wholly because of this factor.

Factor (b) – Certification requirements

117. We did not find that the difference in terms was because of certification requirements to any significant extent. An REM's/DED's *background* as an EA was certainly relevant to their pay, but that is not the same as current certification. It was a relatively straightforward process to obtain and renew a certificate. An REM or DED who had only recently acquired such a certificate would have been no use to Mr Burton, as he saw it, because they would not have the experience or contacts that he prized. Likewise, REMs or DEDs with a successful EA career behind them would still be seen by Mr Burton as a significant asset, even if their certificate had

recently lapsed. They would still be a target for poaching by a competitor. They could return to EA work by getting a new certificate.

Factor (c) – Experience/management/coaching

118. The label for this factor in the list of issues is rather obscure. During the evidence, it appeared to be clearly in the minds of the parties that "experience" encompassed the role-holder's experience of working as an EA, as an advantage in recruiting new EAs, as distinct from retaining them as described in factor (d).

119. To that extent, the difference in pay was partly because of experience as an EA. We found that REMs and DEDs were heavily involved in recruitment and were expected to trade on their EA experience in order to do so. We also found that Mr Burton took this into account when setting their pay.

120. So far as recruitment of EAs was concerned, there was a material difference of circumstances between the claimant and her comparators. The claimant had only occasional involvement in interviews, when the Allocations Manager was unavailable.

121. Taking into account EA experience as an aid to recruitment of new EAs did not involve treating the claimant less favourably than the REMs or DEDs because she is a woman.

122. We will return to whether reliance on this factor put women at a disadvantage.

123. "Management" and "coaching" are also subsets of factor (c). But we found that coaching and day-to-day management of EAs were not significant factors in Mr Burton's pay decisions. In any case, when it came to management and coaching, there was no material difference between the claimant's circumstances and those of her comparators. The claimant had little responsibility for managing and coaching EOs, but the REMs/DEDs did not have significantly more responsibility managing and coaching EAs. Both the claimant and the REMs/DEDs had a layer of middle management to do that work for them. This was evidence, as we found, by the lower ratio of EAs to AEMs in national contracts than the equivalent in Rossendales' local authority work.

Factor (d) – Retention of EAs

124. We found that the difference in pay was partly because of the ability of an REM and DED to maintain relationships with EAs. Mr Burton believed that this ability was acquired through the REMs/DEDs having themselves gained experience of front-line EA work. By itself, this factor could only explain part of the difference. We have in mind here the greater responsibility of AEMs for maintaining personal contact with the EAs.

125. There was a material difference in circumstances between the claimant and her comparators. The labour market for EAs was more competitive than the labour market for EOs doing local authority work. Turnover was higher amongst EAs. This meant that Mr Burton gave greater recognition to the ability to retain agents than Mrs Alessi did.

126. The difference was relevant to pay. In an environment of high agent turnover, the ability to retain EAs had an obvious economic value.

127. Reliance on experience as an asset in retaining EAs did not involve treating the claimant less favourably than the REMs/DEDs because she is a woman.

128. We will return to the question of whether it put women at a disadvantage.

Factor (e) – Client relationships

129. Our finding was that the difference in pay was not because of client relationships. There was in any case no material difference in circumstances between the claimant and her comparators. The degree of responsibility for client relationships was, in fact, strikingly similar. Neither the claimant nor the REMs /DEDs were the point of contact for the client. Both Rossendales and the respondent had designated client account managers. The claimant, REMs and DEDs all sometimes provided specific information in response to some operational queries as and when requested by the account manager.

Factor (f) – Market forces

130. The difference in pay was because of market forces. This was the single most influential factor. It fully explained the difference, to the extent that it was not already explained by the other factors. Mr Burton was genuinely concerned that, if he did not pay his REMs and DEDs highly enough, he might lose them to a competitor. It also weighed on his mind that a DED compared his salary to what he could be earning as an EA.

131. By comparison with Mr Burton, Mrs Alessi was not as concerned that the claimant would leave to work for a competitor. Her main consideration was to "benchmark" the claimant's salary with the other "Head of…" roles. This made the claimant's circumstances materially different from those of her comparators.

132. The difference was relevant to pay. Salaries are one of the main levers that an employer can pull in order to retain their staff in a competitive job market.

133. Allowing salaries to be dictated by the market did not, in itself, involve treating the claimant less favourably than the respondent treated the REMs and DEDs because she is a woman.

Factor (g) – Travel

134. The requirement for frequent short journeys did not explain the pay differential to any significant extent. It was a modest amount of travel per week. The structure was designed to allow AEMs time for regular day-to-day visits to EAs in the field.

Can discrimination be inferred from statistics?

135. The difference in terms was therefore because of material factors that were not directly discriminatory. We must now decide whether the respondent is required to justify its reliance on those factors objectively.

136. First, we considered whether there was statistical evidence from which we could infer that the disparate pay arrangements must have resulted from some kind of sex discrimination.

137. The claimant has not, in our view, proved that the disparity by itself supports that inference. This is for three reasons:

137.1. The claimant has not proved how many men and how many women occupied "Head of…" roles at Rossendales, or did work equal to hers. All we know is that there was at least one man (Head of Decision Support) and two women (the claimant and Head of Client) occupying those roles at Rossendales. We cannot find, on the evidence before us, that the sex balance of people was

"considerably" different, in the meaning of *Seymour-Smith,* to that within Mr Burton's team during the relevant period.

137.2. The sample size is very small, meaning that the numbers are less likely to be statistically significant. Although the DEDs were all men, there were only four of them. There was only one person in the claimant's role (and we do not know how many other people did work equal to hers).

137.3. When looking at the sex breakdown amongst the comparator group, it is artificial to concentrate on the DEDs and ignore the earlier REMs. With the exception of Mr Hayes, the change in role title from REM to DED did not have any effect at all on their pay. Once the REMs were included, the men still outnumbered the sole woman, but, significantly, she was the highest-paid of all of all the REMs.

Particular disadvantage

138. Before determining the remaining issues, it is worth taking stock. The effect of our findings so far is that the difference in pay between the claimant and her comparators was entirely because of the combination of the following factors, none of which were directly discriminatory:

138.1. Competition and expectation (a partial factor)

138.2. Market forces (the most influential factor)

138.3. Recruitment and (to a lesser extent) retention of EAs

139. Competition and expectation, it will be remembered, are shorthand for the differing levels of pressure caused by the different KPIs which the claimant and her comparators were respectively responsible for achieving. It was not suggested by the claimant that reliance on this factor put women at a particular disadvantage. In any case, there was no evidence from which we could find that such a disadvantage existed.

140. That is not a complete answer to the claim. As we found, competition and expectation did not fully explain the difference in terms. We therefore need to consider any disadvantage caused by the remaining factors.

141. The two basic market forces are supply and demand. Supply of potential REMs and DEDs was limited because the respondent selected them exclusively from a pool of successful EAs. Demand across the industry for the respondent's REMs and DEDs was increased, partly because of the perceived potential of people with their experience and contacts to recruit and retain EAs. This made them targets for poaching by competitors.

142. Underlying both these market forces was the fact that REMs and DEDs all had a background of being successful EAs. If the effect of an EA background on the labour market put women (including the claimant) at a disadvantage, the respondent would be required to justify its reliance on that factor.

143. The claimant says that reliance on these market forces put her, and other women doing work equal to hers, at a particular disadvantage. Her argument is based on the demographic of EAs in the industry. EAs are 90% men.

144. We assumed, for the purposes of this argument, that the EA labour market is male-dominated because of a widely-held belief that the work carries the risk of

physical confrontation. We also assumed (without making a finding) that this constituted a particular disadvantage to women.

145. In our view, this is not enough to require the respondent to justify its reliance on the factor objectively. This is because the claimant did not share the disadvantage with the group. Whilst the claimant was statistically less likely than a man to have been an EA, she (unlike the disadvantaged group) had not been deterred from being an EA for any reason. If there was a group of female would-be REMs and DEDs who missed out on eligibility because they had been put off being an enforcement agent, the claimant was not one of them. Her route to being a senior operational enforcement manager was not shaped by any real or perceived barrier to working as an EA. Her management career at Rossendales naturally evolved from a desk-based, analytical role.

146. The respondent is not, therefore, required to show that reliance on market forces, or ability to recruit and retain EAs, was a proportionate means of achieving a legitimate aim.

147. This means that the material factor defence succeeds. The equality clause in the claimant's contract had no effect on the difference between her pay and that of her comparators.

148. The complaint of breach of the equality clause therefore fails.

Justification

149. We thought it worthwhile to determine the remaining issues in case our conclusion on particular disadvantage is held to be wrong.

*Recruitment and retention of REMs and DEDs*

150. The thing that has to be justified is the reliance on the factor as a reason for a difference in terms.

151. The respondent relies on "recruitment and retention of REMs and DEDs".

152. Recruiting REMs and DEDs was plainly a legitimate thing for an enforcement business to aim to do.

153. Reliance on market forces was a means of achieving that aim. This must, however, be understood in its context. The specific market forces that influenced Mr Burton to increase REMs' and DEDs' pay were the restricted supply of, and high demand for, people with a successful EA background. These market forces were only relevant to pay because Mr Burton had decided that he wanted his REMs and DEDs to be former EAs. Otherwise, there would be no need for him to rely on those market forces as a factor in pay-setting. If Mr Burton had opted to widen the pool of candidates to people from other backgrounds, he would not have had to pay the premium that he believed a former EA could command.

154. Likewise, retention of REMs and DEDs was also legitimate. As with recruitment, reliance on the relevant market forces was a means of achieving that aim, but only if the aim was to retain an REM or DED *with an EA background.*

*Business efficiency*

155. Business efficiency is a legitimate aim.

156. It helped to achieve the aim of business efficiency to rely on market forces (supply of and demand for former successful EAs) as a reason for setting REMs' and DEDs'

pay higher than the claimant's pay. Once it was decided that REMs and DEDs should all be former EAs, it was economically more efficient to pay those managers enough to attract former EAs, and to pay a lower salary to the HoELT at Rossendales, who had not been an EA. Reducing the REMs' and DEDs' pay risked losing them to competitors; increasing the claimant's pay would mean paying more than they needed to pay her to retain her in the role.

*Proportionality*

157. We must therefore decide whether reliance on market forces was proportionate. We must balance the group disadvantage against the respondent's needs and the importance of the aim.

158. On one side of the scales is the group disadvantage caused by reliance, as a determinant of pay, on the supply of and demand for people with a successful EA background. The scale of the group disadvantage is hard to assess. We put aside, for a moment, the need for the disadvantage to be shared by the claimant with the group. We would, at least, need to assess the degree to which reliance on these market forces adversely affected women doing work equal to the claimant's work. One of the difficulties in this case is that we know very little about how many women were adversely affected in this way. This is because we do not know the breakdown of people who held "Head of" roles, or did any other work that was equal to that of the claimant.

159. Nevertheless, we have concluded that the respondent has failed to prove that reliance on market forces was proportionate. It could have achieved the aims of recruitment, retention and business efficiency relatively easily without the need for such a large gap in pay between the claimant and the REMs and DEDs. All Mr Burton needed to do was to recruit REMs and DEDs from a wider pool. The facts did not demonstrate to us, objectively, that it was reasonably necessary for an REM or DED to have been an EA at all. From our outsider's perspective, what we think Mr Burton needed was somebody, from whatever background, who could learn and understand the legal and commercial environment in which EAs worked, command the confidence of EAs, sell the organisation to new recruits, build a rapport with them, line-manage the AEMs, supervise EAs occasionally on house visits, and provide operational information to the Client Account Managers as and when necessary. The claimant demonstrated that she had those skills, despite not having been an EA herself.

160. It therefore follows that, had the respondent been required to satisfy section 69(1)(b) of EqA, the respondent would have failed to discharge that burden.

**Disposal**

161. For the reasons we have given, however, we dismiss the claim.

Employment Judge Horne

13 February 2024

SENT TO THE PARTIES ON

14 February 2024

FOR THE TRIBUNAL OFFICE