EMPLOYMENT TRIBUNALS

Claimant: Damilare Ajao[1]

Respondent: Commerzbank AG

Heard at: London Central Employment Tribunal

On: 18-20 September and 31 October 2023

In chambers: 22 November 2023

Before: Employment Judge Khan
Ms J Cameron
Dr V Weerasinghe

Representation
Claimant: In person
Respondent: Ms C McCann, counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

(1) The claim was brought out of time and is dismissed.
(2) The difference in pay between the claimant and his comparators was because of material factors which did not involve treating the claimant less favourably because of his sex.

REASONS

1. By a claim form presented on 9 June 2020 the claimant brought complaints of a breach of the equality clause and direct sex discrimination. At a preliminary hearing on 24 and 25 January 2023 the complaint of sex discrimination was struck out and the claimant was given leave to amend the equal pay complaint to add a second comparator.

[1] This judgment has been amended, on 29 April 2024, to identify the claimant by name (which in the previous version was anonymised as 'Z') pursuant to the decision of the EAT in *Ajao v Commerzbank AG & Ors* [2024] EAT 11.

2. This is the third of four claims brought by the claimant against the same respondent. The first and second claims were dismissed by a reserved judgment which was sent to the parties on 14 February 2022. The fourth claim no longer proceeds because part of that claim was struck out at the preliminary hearing in January 2023 and the remainder of that claim was dismissed as a result of the claimant's failure to pay a deposit.

3. Although both parties referred to this litigation history during this hearing, and to the claimant's outstanding appeal in respect of the first and second claims, which we were told was due to be heard by the EAT in January 2024, we were astute to focus on the claim before us and the issues that we were required to determine, as set out below.[2]

The issues

Breach of the sex equality clause

(1) The claimant has brought a claim for breach of the sex equality clause implied into his employment contract: section 66 of the Equality Act 2010 ("EA 2010").

(2) It was a term of the claimant's contract that his contract terms would be no less favourable than those of any female comparator and that he would have the benefit of any terms enjoyed by any female comparator (as per s66(2) EA 2010).

(3) For the purposes of this claim the claimant relies on (i) Lola Aminat Busari and (ii) Shirley Ofili as his comparators.

(4) It is accepted that, since joining the respondent on 1 May 2019, the claimant did "like work" within the meaning of s65(1)(a) read with 65(2) EA 2010 to the work done by Ms Busari and Ms Ofili until his dismissal on 21 November 2019.

(5) The claimant's annual salary was £50,000; Ms Busari's annual salary was £53,000, and Ms Ofili's salary was £58,000. The claimant alleges that this difference in salary was because of his sex.

(6) Was the difference in salary because of a material factor, reliance on which does not involve treating the claimant less favourably than Ms Busari or Ms Ofili because of his sex (see s69(1)(a) EA 2010)? The respondent relies on the following factors: (i) the McLagan benchmarking pay range; (ii) stated salary expectations and, where known, previous salary; and (iii) years of experience of Know Your Client / client onboarding in banks.

[2] On the first day of the hearing, I noted that the tribunal was cognisant of the adverse findings which had been made about the reliability of the claimant's evidence and his conduct in relation to the first and second claims, and emphasised that this would only become potentially relevant if we concluded that there had been a repetition of the same conduct. A further issue arose once we had read the claimant's witness statement in that it became apparent that the claimant was seeking to adduce evidence / make submissions about findings which the tribunal had already made in relation to these other claims (as noted below: see paragraph 25); additionally, there were substantial parts of the claimant's closing submissions which sought to do the same which we disregarded.

(7) Pursuant to the time limits set out at section 129 EA 2010, does the tribunal have jurisdiction to consider the complaint? The claimant's employment ended on 21 November 2019, he notified ACAS on 3 March 2020 and obtained an early conciliation certificate on the same date, and he presented his claim on 9 June 2020. The respondent says this is a standard case (and brought out of time), whereas the claimant says this is a concealment case (and brought in time).

(8) If the claim succeeds, to what compensation is the claimant entitled?

The evidence and procedure

4. The hearing was a remote public hearing, conducted using the Cloud Video Platform (CVP) under rule 46. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.

5. The claimant gave evidence himself. By consent, we also permitted the claimant to rely on the evidence of Yinka Taiwo, formerly a KYC Analyst at Assistant Vice President level which consisted of one of the two statements prepared for the preliminary hearing in January 2023. Owing to a lack of time, Mr Taiwo did not give evidence under oath, as he was willing to do, the respondent being content not to cross-examine him with the caveat that it did not accept one aspect of his evidence (which is dealt with below) and invited the tribunal to place greater weight on the contemporaneous documents.

6. For the respondent, we heard from George Brooke-Wilson, Senior HR Business Partner.

7. We also read the witness statements of the claimant and Mr Brooke-Wilson which the parties relied on at preliminary hearing in January 2023 when no oral evidence was given (other than from the claimant as to his means).

8. There was a (primary) hearing bundle of 946 pages. There was an additional bundle which was relied on by the claimant of 80 pages. Several other documents were added, by agreement, including much of the contents of a second bundle produced by the claimant after the end of the evidence on day three and before we heard closing submissions, on day four. Other documents were added in consequence of orders that we made. We read the pages to which we were referred.

9. We also considered written and oral closing submissions.

10. References below to [ ] and [X/] are to the primary hearing bundle and witness statements, respectively.

11. On the first day of the hearing, the claimant applied to amend the claim to assert that the material factors relied by the respondent were tainted by indirect sex discrimination. We were satisfied that an amendment application was required. Although where a claimant, such as in this case,

can point to a higher paid female comparator who is employed on like work, which creates a rebuttable presumption that the difference in pay is because of sex, it is relevant that the burden is on that claimant to show that any material factor which is relied on by the respondent to rebut this presumption is tainted by indirect sex discrimination. The claim form made no reference to indirect discrimination. Nor did the list of issues – which in all cases does not replace the pleadings but serves a crucial function of distilling the issues which are disputed and in guiding the parties on how they should marshal their evidence and present their cases at the final hearing – refer to indirect discrimination, referring only to direct discrimination. The list of issues had been prepared by the parties in advance of the preliminary hearing on 15 September 2022, at which the claimant was represented by counsel, and was recorded by the tribunal as being agreed by them (see paragraph 6.5, Case Management Order dated 15 September 2022 [49]). The issues, insofar as they related to the equal pay complaint, remained unchanged in the final iteration of the list of issues (dated 14 April 2023) which had been amended to remove the complaints that had been struck out. In between those two dates, at the preliminary hearing on 24 and 25 January 2023, the claimant had been put on notice of the four material factors on which the respondent intended to rely, as set out the witness statement of Mr Brooke-Wilson, which was adduced by the respondent at that hearing; three of which continue to be advanced by the respondent. We refused this application for the reasons we gave. This was not a minor or trivial amendment which was being made on the first day of the final hearing and would, if granted, require additional evidence to be adduced and time at this hearing. Whilst we acknowledged that two directly contradictory positions could be pursued in the alternative, the claimant was so adamant that the material factors at issue were a sham to the extent that the contrary position appeared to be unsustainable, on the claimant's case. The claimant failed therefore to establish that granting the amendment was of practical importance to the prosecution of the claim and that a refusal would cause hardship or injustice. Whereas the respondent had prepared its defence on the basis of what it understood to be the claimant's case i.e. that the material factors it relied on were a sham or were directly discriminatory because of sex, and would require additional time to respond to the assertion that the material factors were tainted by indirect sex discrimination. We were also mindful that, the first day having been spent on case management, there were only two days remaining in which to hear the evidence and closing submissions, excluding time for the tribunal to deliberate. We therefore concluded that the balance of hardship and/or injustice of granting or refusing the application weighed against permitting the amendment.

12. We also considered the claimant's application for the respondent to be sanctioned on the grounds that it had failed to comply with its duty of disclosure, had varied the tribunal's orders without obtaining prior approval and had appended new evidence to Mr Brooke-Wilson's witness statement, in the form of an anonymised table of data. We were not satisfied that the claimant had established that the respondent had breached any of the tribunal's orders, and importantly, following discussion with the claimant, he agreed that a fair trial remained possible. In respect of the appended evidence, this had been produced by Mr Brooke-Wilson and formed part of his evidence-in-chief; the claimant was given leave to address it when giving evidence, was able to put questions to Mr Brooke-Wilson in cross-

examination and make submissions on it at the end of the evidence. We subsequently ordered the respondent to disclose the names of the employees in this table, for the reasons we gave.

13. When we reconvened to hear closing submissions we considered the claimant's application to rely on additional evidence in relation to four new documents, which we refused for the reasons we gave: we were satisfied that none of these documents were either relevant, or of such relevance, that it would be proportionate and necessary to admit them into evidence to fairly dispose of the issues we were required to determine.

The facts

14. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

15. The respondent is a company incorporated under the laws of Germany and engaged in the business, amongst other things, of investment banking.

16. The claimant was employed as a Know Your Client ("KYC") Analyst in the Client Lifecycle Management ("CLM") team at Assistant Vice President ("AVP") level (IB02 on the internal grading scale) from 1 May to 21 November 2019.

17. He was recruited as part of a large-scale exercise resulting from a review by the Financial Conduct Authority. This recruitment exercise was coordinated by Pratab Tyagi, Business Manager, who was assisted by Paul Lewis, an HR Business Partner. Andrew Charles, CLM Operations Manager, was the hiring manager. (Mr Lewis and Mr Charles are no longer employed by the respondent.)

18. Mr Brooke-Wilson gave evidence about this exercise and the salary-setting process. We accepted his evidence that he was not involved in any discussions concerning the salary offered to any individual candidate. We find that the recruitment process was as follows.

19. Firstly, a job description was prepared [101-102]. This was a generic job description for the KYC Analyst role which applied to both AVP and Associate grades. The Associate grade was more junior and dealt with less complex cases than the AVP grade.

20. Secondly, based on this job description, a pay range was set according to the McLagan external benchmarking data. As the latest available McLagan data was from April 2017, this data was uprated, or "aged", to reflect this time lag [144]. This produced, a salary range for the AVP grade KYC Analyst role of between £48,925 (McLagan lower quartile) and £55,929 (McLagan median). This exercise was conducted by a subject matter expert in the HR team.

21. Thirdly, candidates were then identified through external recruitment agencies or from the cohort of contractors currently engaged by the business or by word of mouth. We accept Mr Brooke-Wilson's evidence that he was told by Mr Tyagi that the McLagan benchmarked pay range was

discussed with agencies at a conference call attended by Mr Tyagi and Mr Lewis. This is because we find it is likely, as a matter of common sense and practical reality, that this information was disclosed to the agencies in order that it would inform the discussions they had with potential candidates in relation to their salary expectations and because the evidence we were taken to showed, for the most part, that the salary expectations which the agencies put forward on behalf of their clients corresponded with the McLagan range, and we do not find this correlation to be a mere coincidence. Accordingly, once a potential candidate had been identified by an agency and had expressed an interest in being put forward for the role, the agency would forward a CV on the candidate's behalf that included their expected salary which in most cases was within the McLagan range. The JCW recruitment agency ("JCW") acted on behalf of the claimant as well as his comparators, Ms Busari and Ms Ofili, and forwarded their CVs which stated that their expected salaries were £50,000, £53,000 and £60,000, respectively [127-130, 112-117 & 131-134]. In fact, all of the candidates which JCW put forward for the same role were within the same range of £50,000 to £60,000 as regards their salary expectations. We accept Mr Brooke-Wilson's evidence that owing to the scale of the recruitment exercise, the respondent placed a lot of trust on the information which the agencies put forward on behalf of each candidate.

22. Fourthly, the respondent produced a shortlist of candidates who were invited to an assessment centre that included a competency-based interview with the hiring manager, a written test and an interview with HR. We accept Mr Brooke-Wilson's evidence that a candidate's performance at the assessment centre was not a factor which was relevant to the level of salary offered to a successful candidate, notwithstanding his earlier evidence to the contrary (which as we have noted was adduced for the purposes of the preliminary hearing, but not tested under oath) because there was no other evidence to suggest that this was a factor; and we find that the assessment centre functioned primarily as a means of identifying the candidates who were suitable for appointment. We also accept his evidence that when he conducted HR interviews at other assessment centres, as part of the wider CLM recruitment exercise, Mr Brooke-Wilson discussed salary expectations with the candidates and in doing so he was following standard practice. The claimant was one of five successful candidates for the AVP grade KYC Analyst role, including his two comparators, who attended an assessment centre on 13 March 2019, all of whom were put forward by JCW.

23. Fifthly, once a final decision had been made on whom to hire and on what salary, and this had been approved, an offer was made verbally to the successful candidates via their agency, if relevant, and this offer was confirmed in writing if the candidate confirmed that they were interested in proceeding. On 18 March 2019, Mr Tyagi emailed Mr Lewis [139] to confirm that offers for five KYC analysts, which included the claimant and his comparators, had been approved, and two KYC reviewers, and instructed him to make these offers. This email referred to an attached Excel spreadsheet entitled 'CLM Hiring Overview' which Mr Tyagi had updated [107-111] ("the approval spreadsheet"). The claimant's offer was conveyed by his agency on 21 March 2019 by telephone which was followed up by an email on the same date confirming that he had been offered the AVP level

role on a salary of £50,000 [147]. A formal offer letter, enumerating the terms and conditions of employment, was sent to the claimant on 25 March 2019 which he signed and dated the next day [170-177]. By this date, Mr Brooke-Wilson was providing cover in Mr Lewis' absence which involved acting as the conduit between the respondent and the agencies, and obtaining and collating data to be used to populate the new employment contracts.

24. The approval spreadsheet was disclosed to the claimant in error by the respondent in February 2020, when it responded to a data subject access request (DSAR) which the claimant had made. The version of this spreadsheet in the hearing bundle [107-110] was illegible in large part. Having ordered the respondent to disclose all relevant information contained in the spreadsheet in a legible format, the authenticity of which the claimant did not dispute, we agreed with the respondent that the data reproduced in the tables at pages 135-137 of the bundle was identical to the corresponding data in the spreadsheet. Materially, the spreadsheet included the following data in respect of the claimant and his two comparators:

	Proposed Salary in GBP	Salary in scope of HR approved bands	McLagan LQ in GBP	McLagan Median in GBP	Current/ last salary in GBP	Years of relevant experience
Z	50,000	Yes	48,925	55, 929	TBC	5+
Ms Busari	53,000	Yes	48,925	55, 929	TBC	6+
Ms Ofili	58,000	No, but under HR approval limit of 5% above McLagan Median	48,925	55, 929	TBC	8+

<u>Stated salary expectations and previous salary</u>

25. We find that the claimant's evidence in relation to his stated salary expectations was inherently inconsistent as well as being inconsistent with the contemporaneous documents, and was therefore unreliable. In cross-examination, the claimant stated that he was told by his agency that all AVP grade analysts would be paid at £50,000 (this was not in his witness statement); he also stated that when he was interviewed by Mr Lewis and Yogita Mehta, on 13 March 2019, he was asked about his salary expectations which he told them were between £55,000 and £60,000 to which Mr Lewis said there was a baseline and everyone had to be paid the same (this was alluded to in the claimant's witness statement, although in less detail [C/14]); the claimant also stated that when he was offered the salary of £50,000, he accepted this offer because JCW had told him there was a base salary and he understood from the equal opportunities statement in the respondent's Employee Handbook that everyone would be paid the same (this was not in his witness statement). We do not accept the

claimant's evidence that he was told by his agency that everyone on the AVP grade would be paid the same salary of £50,000 because we find that this is neither credible nor consistent with our finding that JCW had been made aware of the salary range and had put forward candidates with a range of salary expectations. Another relevant factor is that JCW stood to benefit from a (22%) commission if the claimant secured a role, and had an incentive to maximise his salary, within realistic bounds, and at the very least, to ensure that any salary that was offered to him was at a level which he was likely to accept. We also take into account that at the preliminary hearing in January 2023, the claimant relied on Mr Taiwo's evidence that he asked for a higher salary than he was offered and not only omitted any reference, in his own statement (for that hearing), that he did the same thing as Mr Taiwo, but submitted via his counsel that his evidence would be that he was not asked to put forward salary expectations (the veracity of the record of which [71] the claimant does not dispute). We also give less weight to the claimant's evidence because we find that he adduced evidence or made submissions in his witness statement (i.e. the one prepared for this hearing), which are unsustainable in the face of incontrovertible documents and/or patently untrue:

a. The claimant's statement [C/16] that: *"EJ Joffe had found that the respondent's system for salary setting was at odds with equal opportunities and discriminated. As stated in EJ Joffe judgement of February 2023, not only does the system for setting employee's salary discriminates, but it is also at odds with its own Equal opportunity statement"* is erroneous and misleading which we do not accept to be borne of genuine misinterpretation.
b. The claimant's statement [C/1] that *"my employment was abruptly terminated after the Respondent(s) found out that I had done a protected act"* is patently unsustainable because that victimisation complaint as well as the claimant's assertion that he had done a protected act, or that the respondent believed he had done or might do a protected act, had been unequivocally rejected by the tribunal (see paragraphs 112-114, liability judgment [286-287]).
c. The claimant's statement [C/4] that *"On 27 March 2020, I lodged claim 3 at the tribunal"* is also patently unsustainable: although the claimant had emailed the tribunal on that date when he had attached an ACAS early conciliation certificate and particulars of claim (but not an ET1, despite the content of that email to the contrary), as EJ Joffe had noted in her judgment, the third claim and been presented on 9 June 2020 [71] which was relevant to her decision to strike out the complaint of sex discrimination.
d. The claimant's statement [C/3] that *"Part of my reasonable communication to resolve the issues (pay difference) with Respondent, notably includes an email sent to Respondent on 6 March 2020 – please see ' FHB' [386] seeking for clarities for pay the disparities"* [C/3] is misleading and the claimant agreed under cross-examination that he made no reference to disparities in that email (although he had asked for information about salary-setting and made reference to the Equal Pay Act).

For these reasons, we find that it is more likely that the claimant understood and agreed to JCW putting forward a £50,000 salary expectation, on his

behalf, and his agency did not mislead him into agreeing to this figure. In respect of the assessment centre, whilst we do not discount the likelihood that salary expectations were discussed between the claimant and the recruiters and/or with the HR representative (in accordance with Mr Brooke-Wilson's evidence), we do not accept the claimant's evidence that he referred to a salary of between £55,000 and £60,000 because we do not find his evidence on this issue is reliable, for the reasons given above; nor do we find that the claimant's evidence on this point is credible given our finding that he agreed to JCW conveying an expected salary at the significantly lower figure of £50,000. We therefore find that the claimant was offered and accepted a salary in the amount which was put forward by his agency, on his behalf, with his consent.

26. Ms Busari was also offered and accepted a salary of £53,000 which was the same as her stated expected salary.

27. Ms Ofili was not offered her expected salary of £60,000 but a lower salary of £58,000 which exceeded the McLagan range but was within a tolerance limit of 5% of the McLagan median, which required approval by HR. This was explained in an email sent by Mr Tyabi on 15 March 2019 [138]:

> "One KYC analyst [Ms Ofili] salary expectation is £60,000 but I have checked with agency and she has agreed to accept minimum £58,000 which slightly above McLagan £55,929 but under 5% above McLagan median HR approval limit."

28. There is no contemporaneous evidence that the hiring manager was cognisant of the current salary / day rate of the claimant or his comparators when the offers were made. This data was missing from the approval spreadsheet, although it was in the data which Mr Brooke-Wilson obtained after the offers had been made (in respect of which, it is agreed that the claimant had been on a day rate of £250). As we find below, in respect of the wider cohort of successful candidates, and specifically those who had been previously paid a day rate as contractors, there was a demonstrable correlation between staring salary and previous day rate. We would add, that even had the hiring manager known that the claimant's previous day rate was £250, the starting salary he was offered was entirely consistent with the other successful candidates in the wider cohort with the same day rate (see paragraph 34(3)).

<u>Years of relevant experience</u>

29. Mr Brooke-Wilson produced a table for these proceedings which was appended to his witness statement. We accept his evidence that he populated this table with data he gleaned from candidate profiles / CVs, the HR online information system (SAP) and the recruitment portal, in addition to the approval spreadsheet. This table enumerated 34 KYC analysts at AVP level who commenced employment between December 2018 and November 2019; 12 women and 22 men. 11 of the employees in this table also featured in the contemporaneous approval spreadsheet, including the claimant and his comparators. Comparing the data relating to these 11 employees, there was a single variance in Mr Brooke-Wilson's table which related to the claimant's relevant experience: Mr Brooke-Wilson accounted for "4+" years whereas the spreadsheet accounted for "5+" years. We agree

that on a closer analysis of the claimant's CV, he had accrued between four and five years of relevant experience (as of March 2019).

30. As the figure in the approval spreadsheet tallied with the headline figure in the claimant's CV, we infer that in compiling this spreadsheet the respondent relied on the headline figure. The same cursory approach to recording the years of relevant experience, measured quantitatively, was taken with Ms Busari: the figure in the spreadsheet of "6+" years was the same as the headline figure in her CV, however, looking at the details of her employment history, we find that she had accrued only 69 months of relevant experience. In respect of Ms Ofili, there was no headline figure in her CV so that the respondent was required to quantify her relevant experience. Based on her CV, we find that Ms Ofili had in fact accrued more than nine years experience which exceeded the "8+" set out in the approval spreadsheet. We also infer from the inclusion of this data in the approval spreadsheet that this was a potentially relevant factor in salary-setting for the claimant and his comparators, and we find that it was one which was likely to have had greater significance in Ms Ofili's case because she was seeking a salary which exceeded the McLagan pay range.

31. Mr Brooke-Wilson's table tallied with the figures in the approval spreadsheet. When giving evidence, he conceded that he had miscounted Ms Busari's relevant experience which, having had an opportunity to review her CV, he counted as being 70 months. Given that Mr Brooke-Wilson's quantitative analysis of the claimant's relevant experience was correct, he overcounted Ms Busari's experience and undercounted Ms Ofili's experience, we do not find that he deliberately manipulated these figures for the claimant and his comparators in order to mislead the tribunal, as the claimant contends.

<u>Other candidates who were recruited as part of the same recruitment exercise</u>

32. The two other successful candidates (both male) who went through the same assessment centre as the claimant and his comparators, and who had also been put forward by JCW were offered and accepted a salary that corresponded with the expected salary set out in their CVs (of £50,000 and £54,000). These salaries did not correlate with the relevant experience of each candidate, which Mr Tyabi had accounted for (and with which Mr Brooke-Wilson's table tallied) as being "4+" and "3+" years, respectively, and whilst we find Mr Brooke-Wilson's evidence that the reason for this was that the candidate who was offered the higher starting salary with less experience had declined a previous offer of employment by the respondent to be plausible, we find that because they (like the claimant and Ms Busari) had sought salaries within the McLagan range, the number of years of relevant experience was unlikely to be a significant factor.

33. In respect of Yinka Taiwo, who was recruited as a KYC Analyst at AVP level as part of the same overall recruitment exercise but from a different assessment centre than the one which the claimant and his comparators attended, he was offered and accepted a salary of £55,000. Mr Taiwo had over eight years of relevant experience. The one part of Mr Taiwo's evidence (none of which was given under oath for reasons of time) which is

disputed by the respondent is that he *"asked the Bank* [the respondent] *for a salary of between £60,000 - £65,000 per annum, but I was told that the Bank would only pay £55,000 for the position"* [YT/6] [227]. Although the circumstances in which Mr Taiwo says he made that request are unclear, it is notable that his candidate profile stated that his preferred minimum salary was £60,000, from which we infer that Mr Taiwo's evidence is that he asked for a higher salary range at the assessment centre. Regardless of whether this was in fact what took place, we find it is likely that the respondent gave greater weight to the level of his current salary, which was £55,000 according to his candidate profile, or was alternatively, a day rate of £350, according to Mr Brooke-Wilson's table; and as we find, the data demonstrates a strong correlation between day rates and starting salaries.

34. In respect of the data relating to the wider cohort of the 34 employees enumerated in Mr Brooke-Wilson's table, we make the following findings:

    (1) Of the 10 employees, including the claimant and Ms Busari, whose recorded salary expectations were within the McLagan pay range, there was a direct correlation between this factor and starting salary: eight employees (seven of whom were men) were recruited on a salary which matched their expectations; of the two employees in this group, one (a woman) was recruited on a marginally higher salary (i.e. £50,000 instead of £49,000) and had the second highest relevant experience (of more than nine years) and the remaining employee (a man) was recruited on a marginally lower salary (i.e. £54,300 instead of £55,000).
    (2) Of the eight employees, including Ms Ofili, whose recorded salary expectations exceeded the McLagan range, this group accounted for five (two men and three women) out of the top seven earners within the wider cohort; as we find below, for the three lowest three earners in this group (all male) there was a clear correlation between their starting salary and the day rate at which they had been paid in their previous role.
    (3) Of the 13 employees who had been working as contractors paid on day rates, there was a clear correlation between this factor and starting salary: the highest paid employee (£56,000), a woman, had been paid a day rate of £400; five of the next seven highest paid employees in this group, two women and three men (including Mr Taiwo) were recruited on a salary of £55,000 and had been paid day rates of between £315 and £375; there were five employees, three women and two men, who were recruited on a starting salary of £50,000 who had been paid day rates of £250 or £300 (although this group of employees excluded the claimant, his salary correlated to his day rate in exactly the same way); the lowest paid employee in this group (£49,000), a man, had been previously paid on the lowest day rate of £200. For the six (male) employees in this group, for whom there was also a recorded salary expectation, that factor was superseded by the day rate factor, with three out of six of this sub-group (including Mr Taiwo) having sought salaries which exceeded the McLagan range.
    (4) Of the five employees (all male) for whom there was a recorded previous salary (not a day rate): four were offered a higher salary; one was offered the same salary.

Relevant legal principles

Equal pay (like work)

35. If it is established that the claimant is doing like work with that of an appropriate comparator then it is presumed that any difference in pay is because of a difference in sex. This presumption will not apply if the employer is able to show that the difference in pay is due to a 'material factor' which does not involve treating the claimant less favourably because of his sex or is one which although tainted by indirect sex discrimination can be objectively justified (section 69(1) and (2) EA).

36. When the burden passes, it gives rise to the following process (per Lord Nicholls in *Glasgow City Council v Marshall* [2000] IRLR 272, HL):

> "The burden passes to the employer to show that the explanation 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, 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, the factor relied upon is…a "material difference", that is a significant and relevant difference between the woman's case and the man's case."

The material factor relied on need only be material in a "causative sense" rather than a "justificatory" one i.e. it will be sufficient if it has been the cause of the pay disparity.

37. Where there is a complaint of direct discrimination there has to be more than an assertion of this by the claimant, there must be some evidential basis for it (see *CSC Computer Science Ltd v Hampson* [2023] EAT 88). As for indirect discrimination, the burden is on the claimant to show that a material factor relied on by the respondent is indirectly discriminatory in which case the respondent is required to justify this disparate treatment.

Time limits

38. Section 129 EA 2010 sets out the time limits for bringing a complaint relating to an equality clause which are, materially, in a 'standard case':

> The period of 6 months beginning with the last day of employment or appointment;

and in a 'concealment case':

> The period 6 months beginning with the day on which the worker discovered (or could with reasonable diligence have discovered) the qualifying fact.

There is no provision for the standard time limit to be extended in equal pay claims.

39. Section 130(4) provides that:

> A concealment case in proceedings relating to an equality clause is a case where—
> a. the responsible person deliberately concealed a qualifying fact from the worker, and
> b. the worker did not discover (or could not with reasonable diligence have discovered) the qualifying fact until after the relevant day.

The 'relevant day' being the last day of employment or appointment.

Conclusions

40. We have found that the McLagan benchmarking pay range was used to set the salary range for the KYC Analyst role at AVP level. It was applied to the claimant and his two comparators, and the two male candidates in the same cohort of five (as well as the other successful candidates in the wider cohort). Although Ms Ofili was offered a salary that exceeded this pay range, the McLagan benchmarking data remained relevant as that salary was based on the 5% tolerance above the McLagan median (as were the salaries offered to the other three employees set out in Mr Brooke-Wilson's table which exceeded the McLagan range).

41. We have also found that where the expected salary for a candidate was within the McLagan range there was a direct correlation with the starting salary they were offered. Thus, in the claimant's case and that of Ms Busari (and the other two male candidates in the same cohort) they were offered their expected salary; and in Ms Ofili's case although she was not offered her expected salary because it exceeded the McLagan range, she was offered the highest salary which corresponded with having asked for the highest salary within the cohort of five (and also the wider cohort). In respect of the wider cohort, we have found that where the expected salary exceeded the McLagan range, this factor was less significant than the previous day rate paid to a successful candidate, where applicable, which was given greater weight in salary-setting.

42. There is contemporaneous evidence, in the form of the approval spreadsheet, that the relevant experience of each candidate was a factor which was considered, in quantitative terms, at the material time, although it was not likely to be a significant one in most cases. As Mr Brooke-Wilson conceded when giving evidence, there was no clear correlation between experience and the salary offered (even allowing for the fact that no one factor was applied in isolation). However, we have found in Ms Ofili's case, it is likely that the length of her relevant experience was given greater weight by the respondent when it agreed to offer her a salary of £58,000 so that it was a significant and relevant factor.

43. Each of these factors was genuine. None was used in isolation. We therefore reject the claimant's contention that these factors were a sham. We find that these factors explain the difference in pay between the claimant

and his comparators. We do not find that they involved treating the claimant less favourably because of his sex.

Time limits

44. The claimant's employment with the respondent terminated on 21 November 2019. The claimant notified ACAS and obtained an early conciliation certificate on 3 March 2020. The claim was presented to the tribunal on 9 June 2020. If a standard case, the claim was 20 days out of time and as there is no discretion to extend time, the tribunal would have no jurisdiction to consider the claim.

45. The claimant contends that this is a concealment case based on the discovery of a qualifying fact on 20 February 2020 which, if correct, would mean that his claim was presented in time. It is not in dispute that the claimant was alerted to a potential equal pay complaint when the respondent inadvertently disclosed the approval spreadsheet with its response to the claimant's DSAR on 20 February 2020. However, we have rejected the claimant's allegations that he was misled by his agency and / or the respondent that all successful candidates would be offered the same baseline salary of £50,000 and nor do we find that the equal opportunities statement in the Employee Handbook amounts to a deliberate concealment by the respondent of the fact that some women were being paid more to do the same work as him.

46. We therefore find that this is a standard, not a concealment case, and accordingly, that the claim was brought out of time and is dismissed for want of jurisdiction.

47. Finally, I apologise for the delay in promulgating this judgment.

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Employment Judge Khan

03.04.2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

1 May 2024

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FOR EMPLOYMENT TRIBUNALS