EMPLOYMENT TRIBUNALS

Claimant: Ms S Thaker

Respondent: Prologik Limited

Heard at: Watford Employment Tribunal (In Public; In Person)
On: **14 to 17 April 2026**

Before: Employment Judge Quill; Ms G Bhatt MBE; Ms A Telfer

Appearances
For the Claimant: Mr C Sekar, counsel
For the respondent: Mr J Heard, counsel

*On 17 April 2026, judgment and summary reasons were given orally. Written reasons have been requested. The reasons below are the written **full** reasons.*

WRITTEN FULL REASONS

Introduction

1. This hearing was scheduled, and the preliminary issues defined, at a preliminary hearing in private for case management on 10 October 2025 conducted by EJ Quill sitting alone.

2. There had previously been a final hearing of certain issues before the full panel. At this hearing, we have taken into account the findings of fact made previously, as set out in the reasons sent to parties on 7 August 2024. Other than what is set out in paragraphs 37 and 38 of those reasons (which we discuss in more detail below), those findings are part of what we rely on for our decisions on these preliminary issues.

3. In the interests of brevity and proportionality, we have sought to avoid extensive replication of the wording of earlier tribunal decisions, orders and reasons,. However, we have taken full account of those.

4. The decisions for this hearing were:

5. It will make decisions for the following issues. If the Tribunal decides that the issue was already determined at the final hearing in April 2024 (or otherwise), then it will make a declaration to that effect. Otherwise, the issues listed below will be determined as preliminary issues.

5.1. Was Mr Azim Karimjee an employee of the Respondent and, if so, when did that contract end.

5.2. If he was an employee, then, for the last 12 months of his contract, what were the terms of his contract for:

5.2.1. Salary

5.2.2. Performance Related Pay

5.2.3. Pension

5.3. If he was an employee, then was it a term of his employment contract that he would receive any employment income that would be disguised as being dividend payments to a shareholder. If so, what were the details of that term?

5.4. For the period from February 2019 to March 2021, what were the terms of Asela Rodrigo's contract of employment for:

5.4.1. Salary

5.4.2. Performance Related Pay

5.4.3. Pension

5.5. If he was an employee, then was it a term of his employment contract that he would receive any employment income that would be disguised as being dividend payments to a shareholder. If so, what were the details of that term?

5.6. For the period from February 2019 to March 2021, what were the terms of Mark Vincent's contract of employment for:

5.6.1. Salary

5.6.2. Performance Related Pay

5.6.3. Pension

5.7. If he was an employee, then was it a term of his employment contract that he would receive any employment income that would be disguised as being dividend payments to a shareholder. If so, what were the details of that term?

5.8. For the period from February 2019 to March 2021, what were the terms of the Claimant's contract of employment for:

5.8.1. Salary

5.8.2. Performance Related Pay

5.8.3. Pension

5.9. For each of Asela Rodrigo, Mark Vincent and (if he was an employee) Azim Karimjee, does the defence in section 69 EQA succeed? Has the Respondent shown that the sex equality clause in the Claimant's contract has no effect in relation to a difference between her terms and the comparator's terms.

That is, in relation to each of

5.9.1. Salary

5.9.2. Performance Related Pay

5.9.3. Pension and

5.9.4. (if found to exist) the term that the comparator would receive employment income disguised as being dividend payments to a shareholder

has the Respondent shown that the difference between the comparator's term and the Claimant's term was because of a material factor reliance on which:

- does not involve treating the Claimant less favourably because of the Claimant's sex than the Respondent treated the comparator, and
- if the factor is within subsection 69(2) EQA, is a proportionate means of achieving a legitimate aim.

Hearing and Evidence

5. We still had access to the documents from the April 2024 final hearing where necessary. However, the parties had prepared documents specifically for this hearing.

6. We had a main bundle which was initially 1128 pages, with some additional documents added, including a spreadsheet that was easier to follow in electronic format.

7. We had a written statement from the Claimant and a supplemental statement from her. We had a written statement from Asela Rodrigo.

8. Each of the witnesses gave evidence on oath and answered questions from the other side and from the panel.

9. We had written and oral submissions from the parties.

Law

10. Section 69 the Equality Act 2010 ("EQA") is headed "Defence of material factor" and both parties are familiar with it and have addressed it in their written submissions.

11. The relevant parts are:

> (1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—
>
> (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
>
> (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.
>
> (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.
>
> (3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.
>
> …
>
> (6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.

12. At this hearing, when we are deciding if the employer can prove a material factor defence, there is no obligation upon the claimant to prove any particular facts to contradict the proposed defence. The onus is on the respondent to establish a material factor defence.

13. The Respondent must be able to do the following

    13.1 Identify the factor that they say caused the difference in pay.

    13.2 Show that the factor was material. This means they must be able to prove that I the factor relied upon did in fact cause the difference in pay.

    13.3 Show that the factor is one which is not directly discriminatory.

    13.4 If the material factor is indirectly discriminatory (because it has a particular impact on women) then the Respondent must objectively justify the use of the factor to determine pay, by showing that it is a proportionate means of achieving a legitimate aim.

14. The Respondent has to prove, by sufficiently cogent and particularised evidence, that the factor relied on explains the differences in pay complained of: <u>BMC Software Ltd v Shaikh</u> [2019] IRLR 653.

15. In CSC Computer Science Ltd v Hampson [2023] EAT 88, the EAT summarised the principles of the material factor defence and commented on the burden of proof.

16. It is for the Respondent to prove the whole of the defence under section 69, including that the factor does not involve treating A (the Claimant) less favourably because of A's sex than the responsible person treats B (the comparator).

17. However, where either side makes any specific factual assertions then the Tribunal will need to consider whether there is an evidential basis for that assertion, as part of its overall analysis of whether the Respondent has proved the defence.

18. For this hearing, we proceed on the assumption that the Claimant and each comparator were, in fact, doing equal work.

19. The equal pay provisions provide that it is for the Respondent to explain why there is a difference in the pay of two individuals who were doing equal work . The equal pay provisions are concerned with equal pay not with “fair” pay.

20. In Strathclyde Regional Council and Others v Wallace and Others [1998] ICR 205, Lord Browne-Wilkinson said in respect of equal versus fair pay,

> The purpose of section 1 of the Equal Pay Act 1970 is to eliminate sex discrimination in pay not to achieve fair wages. Therefore, if a difference in pay is explained by genuine factors not tainted by discrimination that is sufficient to raise a valid defence under subsection (3): in such a case there is no further burden on the employer to ‘justify’ anything.

21. In other words, so long as the Respondent proves that the reason does not fall within section 69(1)(a) or 69(1)(b), no further justification is necessary. Reasonableness and fairness are not part of what the Tribunal has to consider under section 69.

22. Obviously, where a purported explanation is far-fetched, then that is highly relevant to whether the Respondent can prove that it is the truthful and accurate explanation for the difference in pay.

23. Where the purported explanation appears to show that the Respondent treated one or more employees very unreasonably, then that will be relevant to how far-fetched the reason appears to be. However, if the reason is, in fact, true, and not within section 69(1) (a) or (b), then that is sufficient.

24. It is not sufficient for the Respondent to show that a particular factual assertion is true. For example, it is not sufficient to prove that it is true that the comparator had more experience, or additional qualifications, etc. The Respondent has to prove that the factual assertion is, as a matter of fact, the actual reason for the

difference in pay. Put another way, it is not sufficient for the Respondent to argue that a particular fact could have justified the pay difference; it has to prove that that particular fact was relied on at the time when (as the case may be) the claimant's pay was set or the comparator's pay was set.

25. In particular,

    25.1 where the comparator had a particular term in the contract, and the claimant did not, the Respondent has to prove that the particular factor relied in is the reason for both (i) the comparator having the term and (ii) the claimant not having it.

    25.2 Whereas, where the comparator and the Claimant both had a particular term in the contract, but it was less advantageous to the Claimant the Respondent has to prove that the particular factor relied in is the reason for the difference.

26. The defence will only succeed in full if the entirety of the difference is proved, and for the entirety of the relevant period. However, the Respondent can rely on more than one different proposed material factor. Provided each reason satisfies the criteria of being truthful and non-discriminatory, then the defence could potentially succeed in full if, in combination, the material factors prove the entirety of the difference and for the whole period, even though none of the factors by themselves would have been sufficient.

27. The material factor defence is considered term by term. Regardless of whether the defence succeeds or fails when considering whether the sex equality clause operates on one particular term of the comparator's contract, the defence has to be separately considered for each other term which is the subject of the complaint.

28. Just as there is no limit to what the Respondent might put forward as the alleged material factor, there is no limit to what has to be considered when addressing whether the factor (even if the genuine reason for the difference) is non-discriminatory.

29. The issues likely to arise in terms of whether the pay difference is less favourable treatment because of sex, and/or puts women at a particular disadvantage will vary depending on (i) firstly on the contract term in question and (ii) secondly on the proposed material factor.

30. Where, for example, the material factor is said to be based on duration of continuous employment, consideration might have to be given to whether women are more likely to have more breaks in employment.

31. Where, for example, it is based on which shifts are worked, consideration might have to be given to the childcare disparity and to whether, on a statistical basis, it was more difficult for women to do the shifts that attracted the higher rates (and, if so, whether the Claimant was at that disadvantage)

32. In terms of productivity bonuses, as the local authority cases make clear, it is important to analyse whether – statistically – the jobs which had such performance related additional pay were predominantly done by men, and the jobs without bonuses were predominantly done by women. If so, then the material factor defence will fail in the absence of proof that the performance related additional pay was a proportionate means of achieving a legitimate aim.[1]

33. An argument sometimes relied on is that "market forces" were different for the claimant and the comparator. The classic market forces argument is where a comparator, or group of comparators, is paid more than the claimant, either to recruit the comparators in the first place or to retain them in the respondent's employment.

    33.1 Sometimes the enhanced payment is made as a designated recruitment and retention payment, which could be one off or ongoing

    33.2 Sometimes the employer increases the basic rate for the comparator.

34. If it is true that the Respondent had decided that "market forces" required it to pay the comparators more, the need for justification arises only where particular disadvantage can be shown. See for example <u>Bradley v Royal Holloway & Bedford New College, University of London</u> EAT/0459/13.

35. A leading authority is <u>Rainey v Greater Glasgow Health Board</u> [1987] ICR 129. In <u>Rainey</u>, the NHS employers recruited the comparator, and other qualified persons from the private sector in order to establish a particular service. To do so it was necessary to give the comparator and the other recruits the option of remaining on their existing pay and conditions of service. The claimant was recruited a few months later on the appropriate standard NHS scale, which gave her a salary which was less than three quarters of that of the comparator.

36. The defence succeeded. The court said

> "the new prosthetic service could never have been established within a reasonable time if [comparator] and others like him had not been offered a scale of remuneration no less favourable than that which they were then enjoying. That was undoubtedly a good and objectively justified ground for offering him that scale of remuneration".

[1] As already stated, the defence would also fail if the reason relied on was to improve productivity and the Tribunal decided that achieving improved productivity was not the true reason for the bonus at the time in question

37. In addressing whether there was a good and objectively justified reason for paying the claimant less, when she and others were subsequently directly recruited, the court said.

> "It was not a question of the appellant being paid less than the norm but of [comparator] being paid more. He was paid more because of the necessity to attract him and other privately employed prosthetists into forming the nucleus of the new service".

38. A market forces payment was also one of the issues in in Enderby v Frenchay Health Authority [1994] ICR 112, [1993] IRLR 591 The ECJ, having reviewed various authorities, said at paragraphs 26 and 27:

> The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground within the meaning of the case law cited above. How it is to be applied in the circumstances of each case depends on the facts and so falls within the jurisdiction of the national court.
>
> If, but only if, a disparate impact/particular disadvantage is shown, it will always be necessary for the Tribunal to consider whether the market forces payment is a proportionate means of achieving a legitimate aim.
>
> That legitimate aim will be the need to recruit and retain suitably qualified employees. The matters to be considered, in order to decide whether the respondent has shown the means adopted to be proportionate, will include whether other ways of achieving the legitimate aim have been considered, whether the market has been properly tested and whether the additional payment is higher than it needs to be.

39. The Respondent has to do more than simply assert market forces. In Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, the employer asserted that fear of the comparator being head hunted explained the pay differential. On appeal, the EAT ruled that, in assessing whether the employer had a material factor defence, the tribunal had failed to take into account the lack of transparency in its pay system and its serious failure adequately to respond to an equal pay questionnaire.

40. The EAT commented that

> 'no tribunal should be seen to condone a City bonus culture involving secrecy and/or a lack of transparency because of the potentially large amounts involved, as a reason for avoiding equal pay obligations'

41. The expression "market forces" is simply a short hand for certain arguments that might be made. It does not connote, in itself, whether the defence in section 69 will, or will not, succeed. The more common arguments are based on the hypothesis that the claimant's pay is what the employer regards as appropriate for the job, but that there was a need to pay the comparator more. Less commonly, it might be that the comparator's pay is what the employer regards

as appropriate for the job, but that there were particular circumstances which – the employer argues – meant that they paid the claimant less than that.

42. in Benveniste v. University of Southampton [1989] ICR 617. the claimant was appointed as a lecturer.

    42.1 On employer's case, because of financial constraints she was offered a salary which was significantly lower than that of her male comparators. The decision was that the employer had a successful material factor defence so long as it remained subject to the financial constraints, but not once it could afford to pay the claimant the same as her comparators: "*the material difference between the applicant's case and the case of the comparators evaporated when the financial constraints were removed*."

    42.2 Put another way, the defence would have failed outright had it been shown that the respondent offering the claimant the lower rate was because of sex. It would also have failed if the policy was more likely to disadvantage women than men, and could not be justified.

43. However, Benveniste was not a disparate impact case, but one where the original explanation for the difference in pay had simply ceased to operate.

44. The principle that a material factor defence might have a shelf life is always something that has to be considered. For example, there are cases which rely on TUPE as the explanation for the difference in pay. The fact that comparator transferred in on a higher (or claimant transferred in on a lower, as the case may be) rate of pay might well explain the difference in pay not long after the transfer. However, findings of fact would have to be made to decide whether that was still the actual reason for the pay difference if the TUPE transfer had been several years earlier.

45. However, it does not follow that every material factor defence always expires because of the passage of time.

    45.1 In Secretary of State for Justice v Bowling [2012] IRLR 382, the Tribunal upheld an equal pay claim where the claimant had been appointed on a lower incremental scale than that to which her comparator was appointed. It was accepted that this particular decision was because of the comparator's greater experience, but in, the tribunal's view, that factor ceased to justify the difference in pay a couple of years later, because by then they were doing identical jobs and had achieved the same performance ratings.

    45.2 The decision was reversed on appeal to the EAT. The original decision to place the two employees on different points on the scale would continue to explain the difference in pay during the whole six year period it would take the claimant to reach the top of the scale.

45.3 The catching up referred to by the tribunal might, "*have undermined the justification for the differential but it did not undermine its causative effect*."

45.4 The fact that the original justification (difference in experience) no longer applied was immaterial, because this was not a case where disparate impact had been shown. The explanation given by the employer was not tainted by sex discrimination. The sex of the two employees had nothing to do with their different points on the scale at the outset of their employment. On the particular facts, the difference in their starting salaries continued to explain the difference in pay for some years.

45.5 Naturally, in another case, without a formal incremental pay scale, the factual assessment of the defence would have been different.

46. In accordance with normal principles, if the Tribunal decides that either party (the Claimant or the Respondent) had documents in their possession that they have failed to disclose in breach of an order, then that party runs the risk of the Tribunal deciding that they did so deliberately, and that they did so because the documents undermined their case.

47. However, in accordance with normal principles, not every failure to disclose will lead to that result, and the Tribunal might decide to accept the party's explanation for the failure, and/or accept that the missing documents did not assist the opposing party.

48. In terms of not calling a particular witness, in principle, the failure could lead to adverse inferences being drawn. However, adverse inferences are drawn only if that is appropriate in all the circumstances, which include the fact that hearings are scheduled for a finite amount of time and parties are expected to be proportionate. So, if the parties other witnesses cover the topics appropriately that is relevant to the decision about whether to draw an adverse inference from the non-appearance of one particular person who (according to the other side) had first hand knowledge of a particular matter. If an opposing party wants an adverse inference to be drawn, the onus is on them to raise the issue at an appropriate stage, and give the other party the chance to explain or even the chance to call the witness in question. The test is whether, in all the circumstances, including the explanation given, the timing of the other side's comments, etc the failure to call the witness seems to be suspicious.

Discussion and conclusions on the preliminary issues

49. We make some additional findings of fact which we set out below as part of our analysis.

50. When making decisions about what the comparators were paid, we make our decisions on the balance of probabilities, based on all the evidence presented, and that includes drawing appropriate inferences.

51. One comparator, Mr Vincent, had a written contract, and the other two did not. However, there was a significant change in the pay arrangements for all 3 comparators in 2017, as set out in paragraphs 33 to 38 of the earlier reasons. The change to Mr Vincent's contract of employment was not in writing (or, at least, not fully in writing).

52. Paragraph 5.1 of the list of preliminary issues is admitted by the Respondent. Mr Karimjee was an employee of the Respondent.

53. Paragraphs 42 to 47 of the earlier reasons discuss Mr Karimjee's departure and the Claimant's arrival

54. Our finding, based on the totality of the evidence as a whole, including the spreadsheets and the payslips, is that Mr Karimjee's employment ceased on 30 June 2018.

55. There was around a month or so when the Claimant and Mr Karimjee both had contracts of employment with the Respondent.

56. We accept that the Claimant's recollection is probably accurate, and that Mr Karimjee was only actually at the work site for a small number of days that month. There was some handover from Mr Karimjee to the Claimant, but not much.

57. In terms of start date of Mr Karimjee's employment, we accept the Respondent's account that there was no written contract of employment at any point in time.

58. We do not accept that there was no discussion at board meetings - or other meetings, including meetings discussing the company's accounts – about the fact that Mr Karimjee was now being treated as an employee for various purposes, including PAYE purposes and/or about issues such as pension contributions made by the company.

59. On the balance of probabilities, Mr Karimjee became an employee no later than 2010. There is a lack of contemporaneous written evidence. However, that is when the PAYE arrangements commenced.

60. We do not rule out that he was an employee earlier than 2010. However, and in any event, we are entirely satisfied that Mr Karimjee had become an employee

by no later than 2014 when the role and responsibility documents (discussed at paragraphs 39 to 41 of the earlier reasons) were created.

5.2. If he was an employee, then, for the last 12 months of his contract, what were the terms of his contract for:

5.2.1. Salary

5.2.2. Performance Related Pay

5.2.3. Pension

5.3. If he was an employee, then was it a term of his employment contract that he would receive any employment income that would be disguised as being dividend payments to a shareholder. If so, what were the details of that term?

61. For ease of exposition we specify here that in terms of the issue at 5.3 for Mr Karimjee, and also for the corresponding paragraphs (5.5 and 5.7) for the other comparators, it is our decision that in each case there was a term of the respective employment contract that specified that some of the income that the employee (Mr Karimjee, Mr Rodrigo, Mr Vincent) was entitled to receive as a term of the contract of employment would be represented to external bodies as dividend payments

62. We have not formed any opinion - and do not see it as our role to decide - whether any statutory or regulatory requirements have been breached by the arrangement. Our role, in this preliminary hearing, is simply to decide if there was a contractual term or not, and we have decided that there was.

63. The mere fact alone that a particular payment is made by an employer to an employee does not prove that the there was a term of the employment contract that required the payment, still less that the payment was a payment of what might loosely be called “salary” or “wages”. (For example, there might be terms of an employment contract that entitle the employee to be reimbursed for expenses properly incurred, evidenced and claimed for, but the payment would not be deemed “wages”).

64. Payments which were not because of a term of an employment contract might include repayment of a loan that the employee had made to the company, or rent for use of the employee's premises, or any other type of payment under a contract that is separate from and distinct from the contract of employment.

65. Similarly, where a company genuinely declares dividends and pays them to its shareholders, the shareholders are receiving those payments in their capacity as shareholders, and not because of an employment contract. The fact that a shareholder might also be an employee does not convert a properly declared / paid dividend into a payment that was made because of a term in their employment contract.

66. In this case, our decision is that the actual arrangement was a contractual arrangement between the company as employer and the individuals as employees.

67. The parties are not fully in agreement about the details of the arrangement and we have taken into account all of the evidence and submissions when reaching our conclusions about the details.

68. However the position of each witness was that - as far as they were concerned at the relevant times - there was nothing unlawful about the arrangement. Neither witness believes that there was a failure to disclose any information to HMRC or any other relevant external body that they had been obliged to disclose.

69. What we might usually expect to see by way of a dividend declaration would be some evidence that - in accordance with the particular company's particular constitution - specific relevant decisions had been made at an appropriate time, by the appropriate people, each time a dividend was declared.

70. A properly taken decision by the company to declare a dividend on a particular class of shares would result in payments being made (or at least an entitlement to receive payments being created) to particular shareholders.

71. However, in this case, we are satisfied that that is not what happened

72. Rather an agreement between each employee (Mr Karimjee, Mr Rodrigo, Mr Vincent) and the company was reached that the contractual entitlement to payments that they had been receiving already under their contracts of employment would continue, but on the basis that the company would arrange matters so that their payment in a particular month would reflect a certain amount to be declared as salary for PAYE purposes, whereas the remaining part of the entitlement to contractual pay would be treated as a dividend payment for that month (and so taxed differently).

73. Our finding – based on the evidence as a whole including the spreadsheet starting at [Bundle 446] and the claimant's e-mail at 18 November 2020 and the claimant's witness evidence – that when the change in payment method was agreed, the relevant employees (Mr Karimjee, Mr Rodrigo, Mr Vincent) did not agree to completely forego their previous entitlements under their respective contracts of employment. They did not, for example, agree to take the risk of low dividends being declared by the company. Rather, they agreed to keep their same entitlements under the contract of employment, and to change only the manner in which those contractual payments were described to the outside world.

74. Particular contractual payments were to be described as dividends. The methodology was to work out what the employee was entitled to receive for a

particular (using the contractual method that existed for that employee prior to the 2017 change) shortly after month end. After that particular month's contractual entitlement had been calculated, documents were created which purported to show that - in the previous month - the company had declared that amount as a dividend for the relevant class of share. (Although, for the avoidance of doubt, no such actual decision had been taken by the company.)

75. We accept Mr Rodrigo's oral evidence that if there had ever come a time when the business's retained profits were such that payment of a dividend could not be justified in accordance with company law requirements then the so-called "dividend" payment would not have been made.

76. However, our finding is that each of Mr Karimjee, Mr Vincent and Mr Rodrigo believed that they had the particular contractual entitlement that we have described. In the absence of a shortage of retained profits, they had a contractual entitlement to the particular sums being paid to them which the company (and each of them, as far as we know) would treat as a dividend for tax purposes. The arrangement commenced before the Claimant became Finance Director and continued while she was Finance Director.

77. It makes no difference to our assessments that while Mr Karimjee was the finance director he produced dividend vouchers and that while the claimant held that role she did not do so.

78. Mr Rodrigo's own evidence was that this did not actually prevent him and - as far as he was aware - Mr Vincent being able to have the payments treated as dividends for tax purposes.

79. We also accept the Claimant's evidence that she was not asked to create the dividend vouchers and that she believed that this scheme was fully lawful for tax purposes as well as generally.

80. No written document was produced to expressly record an agreement between the company and any of Mr Karimjee or Mr Vincent or Mr Rodrigo to include the term we have mentioned.

81. We accept the respondent's evidence that a proper search has been done and no such documents have been uncovered. Furthermore, the claimant was director of finance for a significant period of time and had such documents existed and been within the company's financial records she would have been likely to have seen them.

82. However, the fact that the agreement was not recorded in writing does not prevent us from deciding that there was an express agreement on the terms that we have identified.

83. We are confident that if Mr Vincent or either of the other comparators had been told in any particular month that they were not going to receive the agreed dividend payment (that is, calculated based on the contractual employment entitlements they had had prior to the 2017 scheme being introduced) then they would have believed that that was a breach of their employment contract by the company. This is subject to the proviso mentioned above, that we accept Mr Rodrigo's evidence on oath that the payments would not have been made if payment of a dividend could not be justified in accordance with company law requirements (though, as per the earlier reasons, when the company's finances were hit by Covid, the directors did not actually forego the payments completely, but rather deferred them.)

84. We are satisfied that there was offer and acceptance and intention to create legal relations in relation to the variation of the employment contracts that we have discussed above.

85. The variation that was agreed is exemplified by the claimant's 18 November 2020 email as well as the other evidence.

    85.1 The pre-2017 salary to which the employee had been entitled was added to any entitlement to (for example) Commission to produce an overall figure.

    85.2 From that overall figure the gross amount paid through the PAYE pay slip was deducted.

    85.3 To that resultant figure a multiplication factor of 0.9104 was applied and that was treated as the amount of the employee's contractual entitlement to be paid in a manner that was described as a dividend payment

86. In our original reasons at paragraph 38 we stated that the "payments of dividends were made by 12 (equal) monthly instalments each year".

87. The word in brackets does not accurately represent the factual situation. It is clear from the evidence that we have at this hearing that, in fact, the payments made for each comparator were not the same month on month for that comparator throughout the year

88. None of our decisions at the April 2024 final hearing relied on our opinion that the instalments for a given comparator were the same each month.

89. In paragraph 37 of our reasons, the last 7 words said that we had accepted that the dividends had been properly authorised by the company based on the previous year's profits. For the reasons stated above, that finding of fact was not correct and we disregard that finding, and we replace it with the findings of fact described above.

90. The remainder of paragraph 37 of our earlier reasons remains accurate in the sense that the claimant still suggests that HMRC has not been misinformed as far as she is concerned. None of the documents which she, as finance director, prepared for the company or for HMRC were untruthful or misleading in her opinion. More specifically, she says that she was told at the time by the company's accountants that the scheme was lawful (and it is also Mr Rodrigo's assertion that he and the other comparators, and the company, were told the scheme was lawful by experts which they relied on.)

91. The claimant did not see it as part of her role as Director of Finance to make decisions about whether the payments being described as "dividends" were being treated properly in the company accounts and other documents.

92. We find that the contractual term that each of the comparators had that we have described above is a contractual term that the claimant believed that they had at the time as demonstrated by for example her email at [Bundle 449]

93. Thus the second sentence of our findings at paragraph 37 in the earlier reasons has to be seen in that light. In other words it is the claimant's position that these payments that were described as dividend income to external bodies were appropriately described to those bodies as dividend income but which were in fact in reality payments made pursuant to contractual entitlements which the employees had

94. In any event, regardless of what either the claimant herself or any of the comparators believed about the honesty of the information given to HMRC, our decision is as mentioned above that each of the comparators had reached an agreement with the company that their employment contract gave them the contractual right to the payments we have described, subject only to the condition that the company had to have sufficient retained profits.

95. For Mr Karimjee in particular (paragraph 5.2 of list of issues), the final two payslips on [Bundle 316 and 317] show that for each of the two months, May and June 2018, he was paid the sum of £10,501.25 via PAYE.

96. For those two particular months nothing was paid to him by way of any sum described as "dividend".

97. We note that Mr Rodrigo says in his witness statement and that he cannot recall any agreements been reached between the company and Mr Karimjee which were an agreement for Mr Karimjee to become an employee. He does not recall the company reaching any agreement on any terms of employment, including agreement about any rate of salary, let alone on the rate of salary demonstrated by the payslips for May and June 2018.

98. However, Mr Rodrigo does not allege (and we do not find) that Mr Karimjee was making some secret payments to himself. We are satisfied, on the balance of probabilities, that Mr Rodrigo and Mr Vincent knew at the time that Mr Karimjee was drawing a salary from the company.

99. We also take into account that - starting from April 2017 – Mr Karimjee received exactly £5710 gross per month until December 2017. Then in January, February, March and April 2018 he received less than that.

100. We accept that Mr Karimjee apparently made various changes to his pay arrangements with the respondent. Mr Rodrigo says he did not know about any of this. As mentioned, Mr Rodrigo claims that he did not know there was any agreement at all between the company and Mr Karimjee for salary payments, let alone the specific details. Assuming that Mr Rodrigo is telling the truth, either he was not consulted by Mr Karimjee each month before Mr Karimjee increased his salary up or down, or he was consulted, but he has now forgotten. Either way, Mr Rodrigo does not allege that Mr Karimjee was making changes that were not properly authorised by the company.

101. The absence of specific documentation to explain these fluctuations in the amount shown in the payslip as "salary", and the fact that Mr Rodrigo says he does not know about these particular changes, means that we have to make inferences based on the documents that we do have

102. Row 9 of the spreadsheet shows the amount of money that Mr Karimjee was treating himself as entitled to receive from the company

103. Whenever there was a payment made to him via PAYE, as shown on each payslip, from 2017 onwards, Mr Karimjee took the difference between the amount shown as pay on the pay slip and the figure in row 9 as being "salary foregone" for that month. He then used the "salary foregone" figure to calculate the sum which would be described as a dividend payment on his class of shares for that particular month.

104. Once the dividend payment was calculated, the actual payments made were that 35% of the total was paid to him and 65% of the total was paid to his wife. The 35:65 split in the dividend payment matched the 35:65 split in the ownership of that class of shares.

105. As we set out in the reasons from the April 2024 hearing (paragraphs 29 to 34), the company had different classes of shares.

106. In 2017, 100 of

106.1 Mr Rodrigo's A class shares became Class C. No-one else had any Class C.

106.2 Mr Vincent's A class shares became Class E. No-one else had any Class E.

106.3 Mr Karimjee's A class shares became Class D. At some point in time, he transferred 65 to his wife and he retained 35 for himself. No-one else had any Class D.

107. So a dividend at a certain rate, declared on Class D, would indeed result in payments being made to Mr Karimjee and his wife in the ratio 35:65.

108. However, we are satisfied that, rather than making particular decisions to declare particular dividends, at appropriate times, and in accordance with its constitution, the reason that the company made these payments is that it was a term of Mr Karimjee's employment contract that it would do so. There was a contractual arrangement between Mr Karimjee and the company that he would be entitled to receive a particular level of remuneration, and that he, Mr Karimjee, had the flexibility to decide how that remuneration would be paid in any given month. In particular, he could decide that part of his remuneration would be described as a dividend on Class D shares, and that particular sum would then be paid partly to him and partly to his wife.

109. There is no written explanation set out in the documents for why, in Row 9 of the spreadsheet, Mr Karimjee included the full figure of £10,501.25 for various months but lower amounts in, for example, the period August 2017 through to December 2017

110. However taking account of amongst other things the full pay slip figures for May and June 2018 as well as the way in which Mr Karimjee's payments were calculated for "dividend" and for holiday pay purposes, we are satisfied on the evidence that the agreement between him and the company for all of January 2018 until the end of his employment was that he would be entitled to receive £10,501.25 per month (which is equivalent to £126,015 per year) as the payments for his work as an employee. As set out above, some of that was described as a "dividend" for tax purposes, and some of that "dividend" amount was paid by the company to Mr Karimjee's wife.

111. The fact that this is the correct decision on the balance of probabilities is supported by, amongst other things about the fact that the tribunal asked Mr Rodrigo whether the company had made any attempts to contact Mr Karimjee either to ask for an explanation of these payments or to ask for anything to be repaid and his answer was

111.1 Firstly, "no", they have not done either of those things and

111.2 secondly, that the reason for not seeking any explanation or clarification from Mr Karimjee was that, regardless of how the payments made by the company were categorised he, Mr Rodrigo, accepted that Mr Karimjee was paid the aggregate amount which had been agreed between the company and Mr Karimjee.

112. The Respondent has had every opportunity over the years since this litigation commenced to examine all of its records carefully, including board minutes, emails and any other financial information as to decide whether Mr Karimjee had paid to himself more than he was properly entitled to under his contract of employment.

113. The Respondent has only very recently conceded that Mr Karimjee was actually an employee, having denied this consistently previously.

114. Our finding is that the pay slips are "genuine" in the sense that they were actually created contemporaneously and are not a recent fabrication. However, they do not accurately show all of the amounts that each respective comparator was receiving as contractual remuneration.

<u>Issue 5.2.2</u>

115. None of Mr Karimjee's contractual entitlement was performance related pay

<u>Issue 5.2.3</u>

116. For pension, the employer's pension contribution was comparatively modest.

117. Mr Karimjee's payslips for January and February 2016 shows employer pension contributions of £30.46 [253-254].

118. March 2016 at [Bundle 255] shows no payment that month. That one says employer pension for the year to date (so April 2016 to March 2016) was £60.92, so the only contributions were those in January and February.

119. The next payslip that references any employer pension contribution is April 2016 in the sum of £3,444.97 [Bundle 256].

120. We accepts Mr Rodrigo's oral evidence was that it was Sephtons who added the formula that is written on the page at the top of the payslip, and that it was included contemporaneously on the original, rather than added during the litigation.

121. The respondent has demonstrated that Mr Karimjee's "employer" contribution was actually made up of three components

121.1 Mr Karimjee's own amount of money as sacrificed by him to the pension fund

121.2 plus the saving which the employer made by way of less national insurance

121.3 plus a further 1% actually from the company

Preliminary issues 5.2.1 and 5.3

122. The aggregate of £10,501.25 per month (which is equivalent to £126,015 per year) was paid, and the company / Mr Karimjee allocated that overall aggregate between components described as “salary” or “dividend” in different proportions in different months.

5.4. For the period from February 2019 to March 2021, what were the terms of Asela Rodrigo’s contract of employment for:

5.4.1. Salary

5.4.2. Performance Related Pay

5.4.3. Pension

5.5. If he was an employee, then was it a term of his employment contract that he would receive any employment income that would be disguised as being dividend payments to a shareholder. If so, what were the details of that term?

123. We have already said that our decision on paragraph 5.5 is that there was such a term.

5.4.1

124. Prior to 2017, his monthly entitlement (subject to what we say in paragraphs 85 to 88 of the earlier reasons) was £10,501.25 per month. In other words, it was £126,015 per year.

125. As stated in paragraph 33 of the earlier reasons, there was a change in 2017.

126. After that, as declared for PAYE purposes, he received a “salary” of £680 per month, which later increased to £700 per month then to £719.

5.4.2

127. Mr Rodrigo also received commission. As stated in the earlier findings of fact, the Claimant knew what Mr Rodrigo’s commission rate was, and was able to calculate it. See the reasons from the April 2024 final hearing, and the email in the public preliminary hearing bundle on [Bundle 449].

128. Our finding is that the figures shown for commission in [Bundle 446] etc are accurate

<u>5.4.3</u>

129. Mr Rodrigo's pension entitlement was zero until 2021.

130. In particular, as per the previous findings of fact, it was when the Claimant raised pension entitlement in March 2019 that the proposal was made that all 3 of them would get the same from then on (£9000 contribution per month). That was adopted in due course; until then, Mr Rodrigo had a worse arrangement than the Claimant, she had been on auto enrolment and he had been on nothing. (They both got less than Mr Vincent).

<u>5.4.1 and 5.5</u>

131. Unlike with Mr Karimjee, the amount set out in Mr Rodrigo's payslip did not fluctuate. He received the same amount of as "salary" each month.

132. However, like with Mr Karimjee, the agreement with the employer was that his aggregate payments as an employee would be made up of the aggregate of £10,501.25 per month plus the commission entitlement. However, it would not all be paid by PAYE. The agreement with the employer was that the company would perform a calculation and make a contractual payment to him outside of the PAYE scheme which was labelled as dividend.

5.6. For the period from February 2019 to March 2021, what were the terms of Mark Vincent's contract of employment for:

5.6.1. Salary

5.6.2. Performance Related Pay

5.6.3. Pension

5.7. If he was an employee, then was it a term of his employment contract that he would receive any employment income that would be disguised as being dividend payments to a shareholder. If so, what were the details of that term?

133. We have already said that, for paragraph 5.7, the answer to the first part is "yes". He did have a term in his contract of employment that he would receive employment income which he and the company would treat as a dividend payment.

<u>5.6.1</u>

134. Mr Vincent's initial salary and other terms were set out in the earlier reasons at paragraphs 25 to 28, with later developments discussed at paragraphs 29 to 38.

135. Following the 2017 changes, Mr Vincent took the same payments via PAYE as Mr Rodrigo.

<u>5.6.2</u>

136. Mr Vincent also received commission. As the March 2019 exchange of emails shows, that was a sales commission of 3% on his own sales and 1% on other people's sales. As stated in the earlier findings of fact, the Claimant knew what the commission rate was, and was able to calculate it.

137. The terms of his contract at 3.5, 3.6 and 3.7 in relation to share options are those that we set out in our reasons from the April 2024 final hearing.

<u>5.6.3</u>

138. Mr Vincent had a pension entitlement as set out in the reasons from the April 2024 final hearing. This was to £9000 per year as employer's pension contribution. See paragraph 28 of the April 2024 reasons.

<u>5.6.1 and 5.</u>

139. Mr Vincent had the same term in his employment contract as Mr Rodrigo. His overall contractual entitlement (£10181.75 per month, so £122,181 per annum, subject to the special Covid arrangements) plus his commission entitlement was aggregated together and, after adjustments to account for sums paid via payroll, and a multiplier of 0.9104, the balance of his contractual entitlement was paid to him in a manner which was labelled as being a dividend payment.

140. For Mr Vincent, we accept that the spreadsheet accurately shows how his dividend payment and commission were calculated.

<u>Share Options</u>

141. Only Mr Vincent had contractual terms about share options. Mr Rodrigo and Mr Karimjee had no similar terms in their contracts in relation to share options

142. The way by which Mr Rodrigo and Mr Karimjee acquired their share ownership and the way in which Mr Rodrigo and Mr Karimjee and Mr Vincent acquired the and C, D, E shares and is set out in the reasons from the earlier hearing.

5.8. For the period from February 2019 to March 2021, what were the terms of the Claimant's contract of employment for:

5.8.1. Salary

5.8.2. Performance Related Pay

5.8.3. Pension

143. In each case, the Claimant contractual entitlements are as set out in the earlier reasons.

144. There was no formal “entitlement” to PRP, though a bonus was awarded. We take into account, as per the earlier reasons, what sums were deferred, and the timings of all the payments.

<u>5.9 of list of preliminary issues</u>

145. It is convenient to comment first of all on item 5.9.4 of the list of issues.

146. The Respondent denied the existence of this term and we found it to exist.

147. As set out in the earlier findings of fact from the previous hearing, the claimant did not enter into an agreement such that she would have (for example) class F shares.

148. In order for there to have been a term of the Claimant’s employment contract that she would receive particular sums of money which would be treated for tax purposes as dividend payments, but which was actually contractual pay, then the Claimant would have also had to reach an agreement with the employer that the amount she would be paid via PAYE would be reduced. [At least, that is what the comparators each did. If the argument were to be that the Claimant should have been able keep the same amount of salary that she had always had, paid via PAYE, but also have some additional amount on top, as contractual payments that she could tell HMRC were dividend payments, then she is suggesting that the employer should have entered into a fundamentally different agreement with her (in around February 2019, or later) than it did with the comparators (in 2017).]

149. As stated above, Mr Vincent and Mr Rodrigo had effectively the same agreement as each other in terms of the sums paid to them each month by the Respondent as “salary” in the payslips. Ie as the sums which were subjected to PAYE. There was a specific (small) sum paid each month. A significant reason for the difference in the Claimant’s pay arrangements and those of Mr Vincent and Mr Rodrigo is that the Claimant did not agree with the company that she would receive less than £10,000 as the declared “salary” for PAYE purposes. This reason had nothing to do with sex.

150. As also stated above, the employer and Mr Karimjee adopted a far more flexible approach. It had been decided (and this was apparently agreed with the company, as stated above) that he would receive a larger amount than Mr Vincent and Mr Rodrigo via PAYE, and he then had a “salary sacrifice” identified in the payslips, which was then used to fund the employer’s pension contribution.

151. The reasons that the Claimant did not have a term of her employment contract that stated that some of her agreed contractual income would be disguised as a dividend payment included that she did not own shares

152. As per the reasons from the April 2024 hearing, (i) discussions about possible share ownership took place between the Claimant and the other directors and (ii) ultimately the claimant decided she did not want to proceed

153. At the previous hearing the claimant stated that her decision not to proceed was because of what she had been told about the company's financial situation (and implied that she might have been given false information about the company's financial situation to discourage her from acquiring shares). See paragraphs 78 to 80 of those reasons.

154. In this hearing, the claimant said that Mr Vincent had told her that it would cost up to £70,000 for her to invest. Regardless of whether he said that or not, as discussed in the previous reasons, the Claimant knew that for her to acquire shares then there would have been negotiations about how many shares she would acquire and that the Respondent would have had the price per share evaluated by Sephtons. As per paragraphs 81 and 82 of the earlier reasons, the Claimant informed the others that she no longer wished to proceed and, for that reason, the share evaluation was not done. The employer did not say “no” to her acquiring shares, and nor did the other directors.

155. We are satisfied that the fact that the claimant did not have an arrangement with the respondents such that she received a lower amount as declared PAYE salary and a further additional contractual entitlement paid to her, but described as dividend payments, was because she was not a shareholder.

156. In order to become a class F shareholder she would have had to become a Class A shareholder (either prior to, or at the same time as, being allocated any Class F).

157. We are satisfied that the reasons the Claimant did not become a shareholder did not amount to less favourable treatment because of sex and was not because of a factor that put women at disadvantage in comparison to men.

158. As set out in the earlier reasons Mr Rodrigo and Mr Karimjee became shareholders as a result of their long standing relationship with the company and the buyout of other investors. They did not acquire their shares because of any terms of their contract of employment

159. We also accept that in 2011 two other employees were offered the opportunity to invest in the company. That was one man and one woman. Those other two employees declined. Mr Karimjee’s and Mr Rodrigo’s acquisition of their shares was not because of sex.

160. So the material factor defence succeeds in relation to paragraph 5.9.4 of list of issues (“the term that the comparator would receive employment income disguised as being dividend payments to a shareholder”) for each of the three

comparators. as a freestanding term of the contract between the claimant and the employer, the equality clause does not operate so as to incorporate into the claimant's contract of employment a term by which one particular sum would be paid to her and declared for PAYE purposes and a further sum would additionally be paid and treated as if it was a dividend payment.

161. We turn now to the other three terms.

5.9.1. Salary

5.9.2. Performance Related Pay

5.9.3. Pension and

162. When assessing the material factor defence for each other terms of the contracts for each comparator, we do take into account the existence of the contractual pay as we have found it for each of the comparators namely that the amounts described as dividends were actually contractual pay (as well as what is in the payslips). We take into account that the Respondent denied the existence of this clause. We also take into account that it denied that Mr Karimjee was an employee and, earlier in the litigation, falsely denied that the Claimant was an actual company director (as opposed to simply being an employee with the word "director" in the job title).

163. In terms of PAYE payments, the claimant always received higher amounts than Mr Rodrigo and Mr Vincent. Mr Karimjee's PAYE payment fluctuated as discussed in detail above.

164. In terms of pension payments, the claimant received higher than Mr Karimjee in terms of payments from the company because, as stated above, he was only receiving 1% from the company. The remainder of payments made by the company were actually sums from his salary entitlement which were part of a "salary sacrifice" and then shown as employer's contributions..

165. For pension, the claimant did not receive less than Mr Rodrigo for any period

166. We addressed the situation with Mr Vincent's pension contributions above. He got £9000 per month throughout the Claimant's employment, but she only got that from June 2019 (though deferred and paid in lump sum in March 2021, as set out in the earlier reasons at paragraph 83).

167. In terms of performance related pay (including commission payments / bonuses / etc), the claimant did not receive less than Mr Karimjee. Effectively they both had a contractual entitlement to zero. The Claimant did have a bonus as a one off discretionary payment as described in the earlier findings of fact

168. Mr Rodrigo also had no performance related pay although he did have sales Commission. We discuss the situation in relation to Mr Vincent's share options which were performance related below.

<u>Material Factor: basic pay for Mr Rodrigo and Mr Vincent</u>

169. There is nothing to justify, or to explain by a material factor. For the entirety of the Claimant's employment, her basic pay (as shown on the payslip) was a lot higher than the sums paid to Mr Vincent and Mr Rodrigo (as shown on their payslips).

<u>Material Factor: basic pay for Mr Karimjee</u>

170. See below.

<u>Material Factor: pension contribution for Mr Rodrigo and Mr Karimjee</u>

171. There is nothing to justify, or to explain by a material factor. For the entirety of the Claimant's employment, the employer's pension contributions were not less for the Claimant than for these comparators. (She received something while Mr Rodrigo received zero until they both had increases to bring them in line with Mr Vincent. She received auto-enrolment, and later £9000 per month, whereas Mr Karimjee received only 1%).

<u>Material Factor: pension contribution for Mr Vincent</u>

172. See below.

<u>Material Factor: performance related pay Mr Karimjee</u>

173. There is nothing to justify, or to explain by a material factor. He did not have a term that was better than the Claimant's terms.

<u>Material Factor: performance related pay Mr Vincent and Mr Rodrigo</u>

174. For each of Mr Rodrigo and Mr Vincent they received sales commission. The respondent has proven the material factor defence in each case.

175. The claimant's particular argument is that she says she was not necessarily seeking sales commission as such, but rather that some other term should have been created for her such that she had the opportunity to earn more than her "normal" amounts if she hit particular performance targets (such targets, she says, should have been negotiated and set out clearly, and needed to be achievable).

176. The claimant accepts, and it is our finding in any event, that Mr Rodrigo and Mr Vincent were genuinely paid the commission because of sales and genuinely paid it because the respondent place a value on the benefits of sales.

177. We do not ignore the Claimant's point that in order to actually receive payment from customers, the Respondent needed to do more than simply agree a contract with a particular customer. It also had to then deliver on that contract. However, that does not mean that the Respondent did not place a value on the work done by those who did actually obtain the sales contract.

178. The Respondent's decision to pay commission to sales staff (and to Mr Rodrigo) was not for any reason connected to sex. The Respondent's decision not to pay commission to staff other than those who got sales was also not for any reason connected to sex.

179. We note the claimants argument that if it is assumed or proven that a particular industry is male dominated then it follows that particular contractual terms such as commission terms would tend to benefit more men than women.

180. Our assessment is that the correct comparison is <u>not</u> between the group of people working in this industry as compared to the group of people working outside the industry (or to the population as a whole).

181. By analogy with the local authority cases, if it were true that there was a significant disparity between sales staff generally and finance staff generally - so sales staff being male-dominated and/or finance staff being female dominated - then it could be argued that a decision to pay commission (or other performance related pay) to sales staff, and to have no productivity bonus for finance staff was potentially discriminatory. That is, it might have to be justified as a proportionate means of pursuing a legitimate aim.

182. However the claimant has not demonstrated that there is such a disparity.

183. The claimant's argument that the Respondent could have created a particular bonus clause for her - which was based on profit that she generated by cost savings and/or by product delivery and/or by any other method - does not address the material factor arguments. It does not show that the sales commission was for any reason other than that stated by the Respondent (to generate sales by incentivising the sales staff) and nor does it show that it was because of sex or that it disproportionately advantaged men or disadvantaged women.

184. Arguing that something else might have been "fairer" does not tackle the material factor defence relied on by the Respondent.

185. The fact that the comparators had terms in their contracts providing for "commission" and that the claimant did not have such a term in her contract has been satisfactorily explained and the section 69 defence succeeds.

Material Factor: General

186. The Respondent asserts the following material factors. An application to add what would have been a new paragraph (e) between the existing paragraphs (d) and (e) below was not pursued.

Salary

a. Market forces – Mr Rodrigo, Mr Vincent and the Claimant were paid salaries in accordance with what the Respondent understood to be a reasonable market rate.

b. Recruitment advice – The Respondent sought and took into account advice from its recruiter in respect of the Finance and Operations Director pay terms.

c. Experience in the sector – Mr Rodrigo and Mr Vincent had experience in the industry sector which the Claimant did not.

d. Responsibility – The levels of responsibility for Mr Rodrigo and Mr Vincent were greater than the Claimant's.

Share options

e. Negotiated positions – Mr Vincent negotiated for share options whereas the Claimant did not.

Performance related pay/commission

f. Sales generation – Mr Rodrigo and Mr Vincent's work generated sales, whereas the Claimant's work did not. The Respondent sought to incentivise sales-generation.

Pension contributions

g. Market forces – Pension contributions for Mr Vincent's role were considered to be in accordance with his role in the employment marketplace in the Respondent's industry sector.

h. Negotiated positions – Mr Vincent negotiated for pension contributions whereas the Claimant did not.

i. Mr Karimjee – It was Mr Karimjee's choice to pay an amount from his income towards his pension.

Material Factor: basic pay for Mr Karimjee;

187. Based on his last two months of employment even ignoring dividend payments his salary was higher than the Claimant (being slightly more than £126,000, as discussed in findings of fact).

188. The relevant parts of the material factor defence are a and b and c (applied to Mr Karimjee).

189. We set out in our earlier findings of fact the circumstances in which the respondent came to a decision that Mr Karimjee should leave and a replacement should be recruited.

190. Having made decisions about the duties that the replacement would have they advertised at what they believed was the appropriate market rate for the job.

191. The Respondent has proven that the respondent did not wish to pay the replacement more than was necessary.

192. Mr Karimjee had experience in the sector and had been with the company a long period of time

193. Mr Karimjee was an investor in the company.

194. The recruiters provided advice on an appropriate rate of pay at which to advertise the job and that is what the respondent did.

195. This was nothing to do with sex as the respondent did not know what the sex any of the applicants would be let alone the sex of the successful candidate. Further, as set out in the earlier reasons, once the Claimant was identified as the preferred candidate, the Respondent was willing to agree to her request to pay more than the advertised rate. It did so knowing that she was a woman.

196. As we mentioned in paragraph 44 the earlier reasons four people were shortlisted and interviewed: two men and two women.

197. The respondent's opinion - based on the recruitment advice it received - that it was offering a sufficient salary for the job to attract candidates was borne out on the facts. A reasonable number of applicants, of a sufficient quality to be shortlisted, were attracted. At least one candidate of a sufficient quality to be appointed (the Claimant) was attracted.

198. If, hypothetically, it were to be the claimant's argument that the going rate for the job which was advertised had been £126,015 a year then it is surprising that there were so many candidates at two thirds of that rate. It is also surprising that the Claimant was willing to apply for the job at two thirds of the appropriate market rate (and to take it, albeit with a negotiated increase).

199. We accept, on the facts, that the reason that the job was advertised at this rate was that the Respondent genuinely believed that the market did not require it to pay more. In particular, the specific circumstances that led it to pay Mr Karimjee the (flexible) amounts described in the findings of fact were not circumstances which applied to the incoming director of finance.

200. Our assessment is that this particular reason for paying the Claimant less than Mr Karimjee did not expire during over the period of time that the claimant worked there.

200.1 On the claimants case even if a lower rate of pay than Mr Karimjee was justifiable at the outset then she should have matched his pay from no later than around (i) February 2019 when she became a statutory director or (ii) around March / April 2019 as a result of the pay discussions which we referred to in our earlier reasons (and about which there was some further cross examination at this hearing).

200.2 However the pay review clause - as we set out in the earlier reasons - was that the Claimant's pay would be reviewed after a year. That was done. There was an increase.

200.3 The following year the company had some financial difficulties including COVID. As set out in the earlier reasons, there were redundancies for other staff in 2020, after the Covid pandemic started. Later in the year, the proposal for the claimant herself to be made redundant was made.

201. The factors which led to the Claimant being given a lower rate of pay than Mr Karimjee when she started in June 2018 had not ceased to explain the fact that the Claimant had not reached £126,000 per annum by the end of her employment (in March 2021).

202. The material factor defence succeeds.

<u>Material Factor: pension contribution for Mr Vincent;</u>

203. For the period February 2019 to June 2019, Mr Vincent had £9000 per year by way of employers pension contributions and the claimant had much lower amount being auto enrolment contribution only. See below.

<u>Material Factor: Mr Vincent's performance related share options;</u>

204. Mr Vincent had performance related share options and the claimant did not. See below.

<u>Material Factor: Overall aggregate for each comparator</u>

205. Taking into account the sums received by way of payments described as "dividends" the claimant's salary was lower than Mr Karimjee's.

206. Taking into account the sums received by way of payments described as "dividends" the claimant's salary was lower than the aggregate payments received by Mr Rodrigo even ignoring commission

207. Taking into account the sums received by way of payments described as "dividends" the claimant's salary was lower than the aggregate payments received by Mr Vincent even ignoring commission

208. For the first comparison, between the Claimant and Mr Karimjee, what we say above regarding basic pay applies to this point too. That is, for the whole of the Claimant's employment, there was a material factor which explained why she was not paid, as salary (or salary plus "dividends") a sum equivalent to £126,015 per year.

209. The second comparison that between the claimant and Mr Rodrigo.

210. For similar reasons to those discussed for Mr Karimjee, the Respondent's alleged material factors a, b, and c are relevant. They explain why Mr Rodrigo was paid around £126,000 per year, ignoring commission, once his PAYE payments were added to his "dividend" payments, but the Claimant was paid less. They explain the difference between the Claimant's starting salary and Mr Rodrigo's aggregate, and they continue to explain the difference between his aggregate pay (ignoring commission) and the Claimant's for the entirety of her employment.

211. In Mr Rodrigo's case, item d also applied. The claimant had significantly less overall responsibility for the success of the business as a whole than Mr Rodrigo had. As well as being the managing director he had significant input into the technical side and was the effectively founder of the business and an extremely important decision maker on all aspects of the business which the company operated. The Claimant did have some responsibilities that were went beyond those that a Director of Finance would typically have, but there were several aspects of the business that she was not directly involved with (whereas Mr Rodrigo was). This is also a genuine reason that the Claimant was paid less than Mr Rodrigo (taking account of his "dividend" payments, but ignoring commission.)

212. The third comparison is with Mr Vincent. There is the fact that is overall pay (ignoring commission) was higher than the Claimant's if his "dividend payments" were taken into account, the fact that he had a better pension contribution, and the fact that he had contractual share options.

213. The material factor arguments overlap. From the Respondent's list, we find that a, b, c, e, g, h, are made out (as well as f which we addressed separately already regarding commission).

214. We do not find material factor (d) to succeed for Mr Vincent. However, those that do succeed sufficiently explain the entirety of all of the differences between his contractual terms and those of the Claimant.

215. To the extent that the Claimant argues that the “negotiated positions” arguments (e and h) are tainted by sex discrimination, there are no facts from which we could reasonably conclude that that is the case.

216. It is not true that the respondent was unwilling to negotiate with the claimant because she was a woman. On the contrary as set out in the earlier findings of fact after the respondent had decided that she was the preferred candidate they agreed with her to offer her a higher rate of pay than had been advertised, following negotiations which she initiated.

217. We find that the respondent genuinely wanted to attract Mr Vincent in particular to its business and it negotiated a package accordingly that took into account what they needed to offer to him in order to employ him, specifically.

218. In particular, the respondent believed that Mr Vincent had contacts in the industry that would generate sales and assist the Respondent’s business.

219. This is in contrast to the situation when it was intending to recruit a replacement for Mr Karimjee. The respondent had no particular person in mind. They advertised with the intention of appointing the best applicant.

220. When the claimant applied, she did not have any particular industry experience. We do accept the claimants argument that the respondent did not make industry experience a requirement for the job for which she applied. However, that is missing the point. The Respondent did not need the new director of finance, who was to replace Mr Karimjee, to have industry experience. Mr Karimjee had had it (and it was reflected in his remuneration), but the Respondent did not need his replacement to have it (and hence the Claimant was found to be the best candidate, even though she did not have experience in the particular industry).

221. That contrasted massively to the situation when the Respondent was seeking to recruit Mr Vincent. One of the main points which attracted the Respondent to seek to appoint Mr Vincent to the position to which it appointed him (a different position to either Mr Karimjee’s or the Claimant’s) was that, for the role that he would be doing, his industry experience was something that the Respondent wanted to acquire.

222. When offering Mr Vincent an overall package that included various elements - some of which were more preferential than Mr Rodrigo’s own terms as well as being more preferential than Mr Karimjee’s or the claimant’s - Mr Vincent's particular knowledge and experience in the exact marketplace was something specific that the respondent placed value on and was willing to pay for.

223. The respondent genuinely believed that it could attract a director of finance to replace Mr Karimjee without needing to offer the same particular benefits as it offered to Mr Vincent.

224. Furthermore we accept Mr Rodrigo's evidence that (just like the company negotiated with the claimant and went some way towards matching what she had asked for) Mr Vincent asked for particular terms which included the pension contributions and the share options. The Claimant did not ask for such terms to be made a condition of her joining the Respondent. To the extent that she asked to match Mr Vincent's terms after she had already joined, the negotiating positions were different.

225. Our view that there was no less favourable treatment because of sex in the terms offered to Mr Vincent is reinforced by the fact that Mr Karimjee did not have all of these terms and nor did Mr Rodrigo. In any event, our decision is that none of the material factors a, b, c, e, g, h, involved the Respondent treating the Claimant less favourably than Mr Vincent because the Claimant was a woman or because Mr Vincent was a man, and nor did rely on a factor which put women at a particular disadvantage compared to men.

Approved by:

Employment Judge Quill

on Date: 14 July 2026

WRITTEN FULL REASONS SENT TO THE PARTIES ON

15 July 2026

FOR EMPLOYMENT TRIBUNALS