Case Numbers: 2206075/2018
2200922/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR P SECHER**
MS S BOYCE

BETWEEN:

Dr V Tsipouri

Claimant

AND

Imperial College of Science Technology and Medicine

Respondent

ON: **4, 5 and 6 September 2019**
Appearances:
For the Claimant: **In person**
For the Respondent: **Ms K Fudakowski, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The holiday pay claim is dismissed upon withdrawal
2. All other claims fail and are dismissed.

REASONS

1. By claim forms presented on 14 September 2018 and 17 March 2019 the claimant Dr Vasiliki Tsipouri brought claims for equal pay and holiday pay in respect of case number 2206075/2018 and for victimisation and a failure to provide written particulars in respect of the second claim 2200922/2019.

2. On 4 February 2019 the claimant told the tribunal by email that the holiday pay claim had been settled. This was no longer in issue.

3. The claims were consolidated by Regional Employment Judge Potter on 23 April 2019.

The issues

4. The issues were identified at a case management hearing on 23 January 2019 before Regional Employment Judge Potter. The holiday pay claim was identified but the claimant confirmed on 4 February 2019 that this had been settled and it no longer remained in issue.

Equal pay

5. This is an equal pay claim in relation to jobs where it is agreed that they have been rated as equivalent for the period between 3 January 2017 and July 2017. The comparator is Mr PB who, it is accepted, reported to the claimant. The pay differential in issue is £1,270 per annum. For the period in question it amounts to £731 basic pay and £105 pension contribution. These figures are from the claimant's schedule of loss at page 70 of the bundle.

6. There was a time point, the claimant saying that time ran from the ending of employment and the respondent saying that time ran from the end of the period of pay disparity. The issue was whether the claimant has presented her claim at any time before the end of the qualifying period, being six months after the last day on which she was employed. The ET1 on the equal pay claim was issued on 14 September 2018 after Early Conciliation from 16 February to 4 March 2019. In submissions the respondent conceded the time point.

7. The respondent's case was that the pay disparity for the limited period was attributable to one or more of the following material factors. The issue for the tribunal will therefore be whether these amount to a material factor defence under section 69 of the Equality Act 2010 (EqA).

    a. When the claimant commenced employment on 3 January 2017, the comparator Mr PB had already been working with the respondent since 3 May 2011 and had been awarded annual automatic pay increments during his period of service.
    b. The claimant was on a six-month probationary period between 3 January 2017 and 2 July 2017, during which she was required to undertake training and gain leadership experience.
    c. On commencement of employment on 3 January 2017, the claimant had little or no leadership experience.

8. At the case management hearing the claimant referred to 5 failures by the respondent following the end of her employment. She was told by the Judge that if those matters were pursued as claims for sex discrimination or victimisation for raising an equal pay claim, they would need to be set out in a new claim form following ACAS conciliation.

9. The claimant brought her second claim on 17 March 2019. She brought a victimisation claim relying on an allegation that during her 6 month probationary review meeting, Professor Brown criticised her for raising the

equal pay issue and on 10 further detriments, these being:

a. Ms Line or Professor Seckl withholding holiday pay and associated pension and childcare voucher contributions.
b. Ms Line or Professor Seckl causing delay in reporting taxable income to HMRC.
c. Ms Line or Professor Seckl causing delay in reporting income tax.
d. Ms Line or Professor Seckl causing delay in reporting national insurance.
e. Ms Line or Professor Seckl causing delay in submission of leaver details to the NHS Pension Scheme.
f. Delay in issuing the ILMPD certificate – this allegation was withdrawn prior to the start of this hearing.
g. Professor Brown telephoning the claimant on 7 December 2018 – this allegation was withdrawn during the cross-examination of Professor Brown.
h. The person instructing the respondent's solicitors failing to provide a list of documents requested on 18 January and 5 February 2019.
i. The person instructing the respondent's solicitors failing to provide a list of documents to comply with a subject access request dated 15 February 2019.
j. Professor Seckl and Mr PB removing the claimant's name from protocols, grants and publications to which she contributed.

10. The respondent accepted that as a question of fact, on issues (a) to (e), that there were delays but it was not accepted that Ms Line or Professor Seckl were responsible. On issue (j) the respondent accepted that the claimant's name was removed from one protocol, the MicroBiome protocol.

11. In submissions the claimant withdrew the allegations (a) to (e) above against Professor Seckl. They remained against Ms Line.

12. Were these claims presented within time under section 123 of the EqA? If not, was it just and equitable to extend time? Was there a continuing act of victimisation?

13. If the claimant was subjected to any such detriment was it because she had done a protected act. The acts relied upon as protected acts were:

a. The claimant complaining about equal pay throughout her employment.
b. The ET1 presented on 14 September 2018 and sent to the respondent on 9 November 2018 (bundle page 56 the Notice of Claim sent by the tribunal to the respondent).

14. The respondent accepted that the presentation of the second ET1 was a protected act but did not accept that the complaints about pay were protected acts. The respondent's position was that after 1 August 2017 the claimant and her comparator were on equal pay and any complaints

thereafter were about the level of her pay, not about unequal pay.

15. If the claimant was subjected to any of these detriments was it because she had done a protected act?

16. The second claim also included a claim for failure to provide written particulars of employment. The claimant's case was that the referenced Appendix to the Core Terms and Conditions of Service was omitted. The respondent's case was that the claimant was sent an incorrect appendix but she did not alert the respondent to the error until she presented her second claim.

17. Are there any circumstances making an award unjust or inequitable as per section 38(5) Employment Act 2002? The respondent's case was that attaching the wrong appendix was an administrative error, of which they were unaware until the claimant presented her second claim.

18. If the claimant succeeded on the written particulars claim, the tribunal had to consider whether she had been successful in her other claims of equal pay or victimisation, in order for an award to be made.

Witnesses and documents

19. The tribunal heard from the claimant.

20. For the respondent the tribunal heard from four witnesses: (i) Ms Shirley Line, Divisional Manager in the Faculty of Medicine, (ii) Dr Justine Reise, the Director of Operations for the Imperial Clinical Trials Unit – (ICTU), (iii) Professor Robert Brown, a Professor of Translational Oncology and (iv) Professor Michael Seckl, a Professor of Molecular Cancer Medicine – the claimant's line manager.

21. There was a set of documents contained in 2 lever arch files running to over 700 pages. Two further pages were introduced by consent.

22. We had written submissions from both parties to which they spoke. They are not replicated here but were fully considered even if not expressly referred to below. After close of submissions the respondent submitted a second version of its written submission. Although this was only to correct some clerical errors, we did not accept this document as we considered it out of process as submissions had concluded.

Findings of fact

23. The claimant worked for the respondent as a Senior Clinical Trials Manager. Her period of employment with the respondent was from 3 January 2017 to 31 March 2018.

24. It is accepted by the respondent that the claimant and her comparator Mr PB are in jobs that were rated as equivalent (RAE) at level 4. The claimant

resigned on 28 March 2018 giving three days' notice. Her last day in employment was 31 March 2018.

25. The claimant's job title was Senior Clinical Trials Manager and her comparator's job title was Clinical Trials Manager. The comparator, Mr PB, reported to the claimant. It is not in dispute that during the period relied upon by the claimant from 3 January 2017 to 1 August 2017 Mr PB was paid more than her.

The claimant's recruitment

26. On 9 August 2016 the claimant was interviewed for the role of Senior Clinical Trials Manager. She had previously applied for a post with the respondent in April 2016 but was not successful. In July 2016 she applied for the role of CRUK (Cancer Research UK) Senior Clinical Trials Manager and this was the role to which she was appointed.

27. The claimant accepted that she did not have any previous formal line management experience. She received a low score for this at interview. The interviewing managers decided that the claimant needed training on this aspect of the job and this was arranged. The claimant suggested in evidence that she had leadership experience. We find based on the evidence as to her interview and probationary reviews, that the claimant had limited line management and leadership experience. She did not score well on her mid probation review on these elements and she had some leadership management training in 2017 provided by the respondent. We find that the claimant lacked the leadership and managerial experience that the respondent expected and required for the role. For this reason they initially appointed her at the bottom of the pay grade, grade 4, on pay point 37.

28. The claimant replaced Ms Reed. The claimant's comparator Mr PB acted up into the Senior Clinical Trials Manager role for 9 months until the claimant commenced in post. Mr PB chose not to apply for the substantive role. We understood that Mr PB received some acting allowance for acting into that role during the 9 month period.

29. On 8 November 2016 the Divisional Manager in the Faculty of Medicine, Ms Shirley Line, emailed the claimant to offer her the role of Senior Clinical Trials Manager full time for a fixed term of 12 months with a basic starting salary of £44,510 (page 299). This was at the bottom of the spine point in salary band 4 within the respondent's pay scale for Professional Technical and Operational Services. The spine points in band 4 were from point 37 – point 44. Spine point 37 as at August 2016 paid £44,510.

30. Just before she joined the respondent, the claimant was employed in the NHS on Band 7 of their pay scale on £37,400 with an Inner London Allowance of £6,400 making a total of £43,800. The claimant accepted the role with the respondent (page 298).

The pay bands

31. The respondent's pay bands are published on its HR Website. Roles in the Professional, Teaching and Operational Services are determined in bands 1a, 1b, 2a, 2b, 3a, 3b, 4, 5 or 6. Band 6 is the highest and band 1a is the lowest. The pay bands were at pages 280 and 666 of the bundle covering the years from 1 August 2015 to 1 August 2018. Pay band 4, in which the claimant and her comparator were graded, has spine points from 37 – 44 (44 being the highest).

32. Staff make their way incrementally up the spine points within the pay scale or band automatically on 1 October each year until they reach the top of the scale. Discretionary points are available and are awarded on the individual's contribution and performance in role at the discretion of the line manager. These awards can be made at any time and are referred to by the respondent as "non-automatic increments".

33. Staff who commence in employment between 1 October and 30 March in any year (as did the claimant and PB) receive their first increment the following 1 October. Annual increments are given until they reach the top of the band. It is possible, at the line manager's discretion, for an employee who completes their probationary period to be awarded an additional increment. Ms Line's evidence was that this was rare and needed HR approval. It happened in the claimant's case, to which we refer below.

34. In December 2013 the role of Senior Clinical Trials Manager (the role occupied by the claimant) was evaluated at level 4. In October 2014 the role of Clinical Trials Manager (the comparator's role) was created. This was also evaluated at level 4.

Terms and conditions and written particulars

35. In August 2016 the claimant was sent the wrong appendix to the Core Terms and Conditions of Service for the wrong job family. This is not in dispute. The claimant accepts she received the Core Terms and Conditions. The claimant was sent the Clinical Nursing terms (page 219) and should have received Professional Technical and Operational terms (page 664).

36. The claimant opened all the attachments with the email sending her the contractual documentation. She saw (page 219), the terms for Clinical and Nursing Staff. It was put to her that it was obvious that she was not Clinical and Nursing Staff. She agreed. She had previously been on NHS terms and conditions and on Honorary Contracts, so the confusion she had was as to whether potentially she was being given an NHS contract as well as a research contract. She accepted she did not raise it until the end of her employment.

37. The respondent's position is that this was a genuine mistake and the HR

officer simply attached the wrong terms and conditions to the email sending out the contractual paperwork to the claimant.

38. The claimant's position was that there were two particulars that were statutorily required which she was not given and these were in relation to notice and holiday pay. We looked at these separate terms and conditions and in regard to annual leave and notice pay, the provisions appeared to us to be exactly the same with, for example, an annual leave entitlement of 39 days and a notice requirement of three months.

39. Pre-employment discussions took place such that on 4 September 2016 the claimant emailed Ms Line and asked for a starting salary of £50,920 on salary point 42 (pages 325-326).

40. On 19 September 2016 the claimant chased up her formal offer of employment. On 19 September 2016 Ms Line emailed the claimant's then line manager Professor Gabra and the Divisional Head Professor Brown saying (page 323):

> *"Contractual arrangements for Vicky [the claimant] are underway…… I am slightly concerned that the email copied below and which was apparently sent from Vicky 4 September was never received by me.*
> *You will note that Vicky is now requesting an uplift to the salary originally offered and accepted – we started her at the bottom of the scale of level 4 – given her limited line management experience. To uplift the salary at this stage, would inevitably mean having to seek financial approval again. In any event it would be difficult to justify meeting Vicky's salary expectations at sp 42, given her limited experience. Nonetheless, if we are to reconsider the salary offer, I would suggest a maximum of sp 39 (£46,970) – a further increment would be applied in October 2017 and in line with the usual incremental timeframe. In the light of the imminent issue of the contract, I would be grateful if you could let me have your thoughts at the earliest convenience."*

41. On 20 September 2016 the claimant was told that the salary was "*non-negotiable*" (page 325). The claimant was told that the post was on an incremental pay scale and her salary would be reviewed on completion of probation and mandatory training.

42. The claimant replied on 25 September (page 324) saying that the salary did not meet her expectations and the advertised pay range was up to £53,160. Ms Line emailed Professors Brown and Gabra on 26 September 2016 (page 324) saying "*To retain interest, I would suggest incrementing the starting salary by one spine point to £45,700 and that is largely due to the fact that PB is currently in receipt of £44,510 (doesn't seem quite right having the senior on the same salary).*" Ms Line accepted in evidence that she incorrectly quoted PB's salary in her email of 26 September 2016 and confirmed that on that date his salary was £45,700. We accepted and find that there were some typo's in the documentation relating to PB's salary and that when the claimant was appointed in September 2016 his salary was £45,700.

43. Professor Brown replied on 27 September 2016 saying "*Yes, completely agree.*"

44. On 27 September 2016 the claimant was offered a starting salary of £45,700 with a review after six months. This was one spine point above the bottom point, at spine point 38. Ms Line emailed the claimant about this (page 341). The reason given for the increase, as set out in Ms Line's email of 27 September 2016 was given as the claimant's additional travel expenses.

45. The claimant responded (page 340) to say that she was happy to accept the new offer. She said she really appreciated Ms Line's efforts in discussing this with the panel. This meant that as at September 2016 the claimant was made a job offer appointing her at spine point 38 and the comparator was already on spine point 38. As at the date of the claimant's appointment this meant parity of pay.

46. On 1 October all relevant employees go up a spine point. On 1 October 2016 Mr PB went up to spine point 39. This meant that when the claimant started in January 2017 he was on one spine point above her. She was not in employment on the incremental date and did not benefit from the increase.

47. In late 2016 before commencing in the role, the claimant met with Dr Reise at Hammersmith Hospital and told her that she was disappointed with her salary. The claimant did not know at this time what her comparator was earning. It was a general complaint about the level of her pay.

48. We saw the claimant's contract of employment at page 342 stating her starting salary as £45,700. It was signed by the claimant on 4 October 2016. The claimant considered that the starting salary was below her earning potential but nevertheless she agreed to accept the role at that salary and she started on 3 January 2017.

<u>The comparator's job role</u>

49. The claimant's comparator Mr PB commenced employment with the respondent in May 2011. He has received his incremental pay awards throughout his employment. He moved through pay band 3 to pay band 4 and by 1 October 2016 was on pay point 39.

50. When the claimant started on 3 January 2017 she was on spine point 38 at £45,700 and her comparator was on point 39 at £46,970 a pay differential of £1,270 per annum. The period of the pay discrepancy lasted until 31 July 2017. The amount of pay in issue for that period is £731 plus an employer pension contribution of £105 making a total of £836.

51. When the claimant started in post she felt "misled" about the size of her team. She had been told she would be managing 11 people when in fact there were only six.

<u>Other instances of a manager being paid less than a direct report</u>

52. The claimant gave two examples in her witness statement of circumstances of which she was aware of pay inequality between manager and direct report, where the more senior employee was paid less. One example (statement paragraph 36) was Ms Dibble who managed Ms Amoako yet was paid less. They are both female. The claimant said Dr Reise told her that there was a historical reason and it was quite common.

53. At paragraph 51 of her statement the claimant said that Dr Reise informed her that Professor McNeish was appointed as a new Head of Division on a lower salary than some of his peers, where they had longer service. The claimant told Dr Reise that she thought this could open the respondent to claims of age discrimination.

54. Ms Line in her witness statement (paragraph 16) gave a personal example as to when she was made Divisional Manager for Cancer in 2005 and was assigned to line manage the Divisional Finance Manager. They were both on grade 4 but due to the male Divisional Finance Manager's length of service, he was paid more. Ms Line said that this was corrected over time with automatic incremental pay increases and non-automatic increases based upon her performance.

55. At a meeting in January 2017 between the claimant and Ms Maria Martinez, a Clinical Trials Coordinator, she found out for the first time that her comparator was earning more than herself. She did not raise it until six months later, informally in about late May 2017 and by email on 6 June 2017, referred to below.

56. The claimant accepted that she was able to access information about her team members' salaries because it was relevant to costings and grant information. We find that claimant found out about the salary difference from Ms Martinez and not by looking it up on the HR systems.

<u>Mid-probation review meeting</u>

57. On 30 March 2017 the claimant had her mid-probation meeting with Professors Brown and Gabra. The Review Form was at page 389. The claimant did not accept in evidence that there were issues with her performance as a line manager. We saw boxes ticked on that form that indicated that the claimant was not doing well as a line manager in terms of communication and initiative. The comments about her said that she needed ongoing support and needed time to adjust (page 390). The claimant accepted that there was a need for better communication but said it was a new role. The claimant did not raise the matter of her pay during the mid-probation review meeting.

58. The first time the claimant complained formally about the pay differential was on 6 June 2017 to Ms Elizabeth Barnes, the assistant to Ms Line (email page 406). The claimant said she had raised it informally with Dr

Reise between 23 May and 6 June 2017 (her statement paragraph 36).

59. In the email to Ms Barnes on 6 June 2017 the claimant said that that it seemed that PB was paid more than his manager, meaning herself. She asked how this could be explained.

60. Ms Line began her email by saying "*Grateful if you could address such queries to me in the first instance*." (page 406). The claimant saw this as criticism. Ms Line said it was not criticism but that as she had been the person involved in the salary negotiations and knew about the matter, whilst her assistant did not, she was the person to deal with the query. She said she would review the position and get back to the claimant. We find it was a fairly polite and relevant professional request to the claimant and it was not a criticism. Senior managers should be in a position to give more junior members of staff such instructions. We find it was not a criticism.

61. Ms Line replied on 7 June 2017 (page 405) attaching the correspondence from August 2016 regarding the starting salary. She confirmed that the comparator had 6 years' service and had been incremented to his current level of service. Ms Line suggested that the claimant raise it following satisfactory completion of her probation and mandatory training.

62. The claimant understood Ms Line to be suggesting that she raise it during her end of probation review meeting. We find there was a simple misunderstanding between them because Ms Line meant that the claimant should raise it <u>following</u> the review meeting rather than <u>at</u> the review meeting.

<u>End of probation review meeting</u>

63. On or about 29 June 2017 the claimant had her six month end of probationary review with Professors Seckl and Brown. She passed her probationary period and received an increment to point 39 on 1 August 2017. The reason the claimant was given a pay increment was because Professors Brown and Seckl acknowledged that she had successfully completed the training requirements and to ensure retention in post (Professor Brown's statement paragraph 12). This was a non-automatic increment. This marked the end of the pay differential between herself and Mr PB.

64. At the end of the probation meeting the claimant raised the issue of her comparator being paid more than herself and she asked Professor Brown about it as she thought this had been suggested to her by Ms Line in her email of 7 June 2017 (page 405) where she said: *"Your probation ends 2nd July and I suggest you take this as an opportunity to discuss this aspect with Bob [Brown] and Michael [Seckl]"*

65. When she raised it at the end of the probation meeting, Professor Brown told her that it should be discussed separately to the probation meeting.

The claimant considered this as criticism by Professor Brown by using information that was available to her because of her job and she felt upset about this. We have found above that the claimant found out about the pay differential from Ms Martinez. We find that Professor Brown did not criticise her when he said that the pay issue should be discussed separately from the probation meeting. We find that this was proper professional advice and guidance which was relevant and proportionate. We find that it was not criticism.

66. After Professor Seckl left the probationary review meeting, Professor Brown remained and they went on to talk about the pay issue. As we have found above, they made a decision to award the claimant one incremental point, to reflect the fact that she had successfully undergone the training requirements. She moved to spine point 39 on 1 August 2017 being the same pay point as her comparator.

67. The claimant agrees that on 1 October 2017 she moved to point 40 on the incremental date.

68. On 31 July 2017 the claimant was informed by Mr Henry Phillpotts, a Senior HR Administrator, that she had satisfactorily completed her probationary period and her salary would be increased to £46,970, on pay point 39 of level 4 in the Professional Services Job Family. Payment at the new rate commenced from 1 August 2017.

69. On 14 September 2017 the claimant emailed Dr Reise and Professor Brown thanking them for being "*a good boss*" (page 425). The claimant agreed that Dr Reise and Professor Brown were supportive and she said this email was not about the question of her pay.

<u>The ending of the claimant's employment</u>

70. The claimant was initially employed on a fixed term contract which expired on 2 January 2018 (contract page 342). The contract stated that during her probation period the notice period was one month and after successful completion of the probationary period the notice period was as set out in her terms and conditions. It was not in dispute that this was a period of three months. On page 344 under the heading "*Leaving College Employment*" the contract said: "*Notice of the end of your employment is given within this contract. No further contractual notice will be given unless the contract is to terminate prior to the end date specified above."*

71. On 31 March 2017 Mr Phillpotts of HR sent the claimant an email (page 392) stating that he was pleased to confirm that her contract had been extended until 31 March 2018. He said the contract "*will now terminate on that date".* He said all other terms and conditions of employment remained unchanged.

72. It was not until 20 March 2018, 11 days before her contract was due to expire, that the claimant received an email from Mr Philpotts confirming

that her contract had been extended until 31 March 2019. On 26 March 2018 the claimant emailed Professor Seckl saying that she had decided not to agree to the change in her contract extending it to March 2019. She said her employment would therefore end on 31 March 2018.

73. It was put to the claimant that she resigned because she found another job. She agreed that she had found another job but said that she resigned because her issues regarding her pay had not been resolved.

74. Managers at the respondent fully expected the claimant to work a three month notice period. They said that there was a "*general expectation*" that people would give three months' notice. The claimant relied upon the notice provisions in the written terms she had been sent. This told her (page 221) that staff on a fixed term contract receive notice within the contract. No further notice was to be given unless the contract was to terminate early (ie prior to the end of the fixed term). She was on a fixed term contract that was due to end on 31 March 2018. We find that she was not required to give three months' notice, although the respondent incorrectly thought that she was required to give such notice.

75. They also said that there had been general discussions that contracts would be extended. We find that at no time was this confirmed in writing to the claimant and we find it unsurprising that in the absence of any written confirmation the claimant would wish to ensure the continuation of her earnings by seeking other employment.

76. From the respondent's perspective they were left suddenly in a position where the claimant had left with about 3 days' notice. This placed them in a position where they needed to ask PB to act into the role and they said he would be remunerated accordingly.

77. From the claimant's perspective, she considered this unfair because when she joined she had fewer members of her team than she expected and she considered this meant she had to do extra work. We find that this is an argument about her expectations of "fair pay" rather than equal pay.

78. The pay disparity period is from 3 January 2017 to 1 August 2017 and we had to make findings as to the reason for the differential and pay inequality during this period and whether it was by reason of gender. We were not required to make a finding as to whether the claimant should have been paid more because there were fewer members of her team than she expected or whether or not her comparator should have received an acting up allowance before she joined or after she left, for covering the more senior role.

79. The claimant's departure at the end of the week commencing Monday, 26 March 2018 left the department in a difficult position. Mr PB amongst others were left to step up to cover the gap.

<u>Post-employment matters</u>

80. The respondent agrees that there were delays with the claimant's holiday pay, pension and childcare vouchers; tax and national insurance issues and submitting leaver information to the NHS Pension Scheme. The respondent did not accept that Ms Line or Professor Seckl were involved with this or that it had anything to do with any protected act, or alleged protected act, relied upon by the claimant.

81. We heard evidence from Ms Line and Professor Seckl on this. Professor Seckl is a Professor of Molecular Cancer Medicine in the Faculty of Medicine and in the Department of Surgery and Cancer. His evidence was that he does not get involved in matters of payroll, or employees' tax, national insurance or holiday pay. During submissions the claimant withdrew these allegations against Professor Seckl but they remained against Ms Line.

82. The issue surrounded the processing of the claimant's Leaver's form. When she left at the end of March 2018 it was coming up to the Easter weekend and Ms Line was on holiday for about two weeks. The claimant sent her leaver's form to Professor Seckl and Ms Line by email on Wednesday 28 March 2018. The email was on page 598 and the leaver's form was at page 601 – 603.

83. Ms Line's evidence was that the leaver's form got lost and it was subsequently chased by HR on 13 April 2018 (page 642). As Ms Line was on holiday, her assistant Ms Barnes said she would prepare a new leaver's form for the claimant (email page 641). This meant that a new leaver's form was prepared and Ms Barnes omitted from it two matters, namely holiday entitlement and the claimant's business case for having her email account extended beyond the termination of her employment. Ms Barnes then sent the form to payroll.

84. The claimant's case is that Ms Line received her leaver's form and deliberately did nothing about it in order to delay payment of matters such as her holiday pay and tax and national insurance. Ms Line's evidence, at paragraph 47 of her statement, was that there were delays to all staff across the respondent College from February/March 2018 until October 2018 and this was an administrative matter where the administrative assistants had no knowledge of the claimant's concerns about her pay.

85. We find no causal connection between the claimant's second ET1 issued on 17 March 2019 and any issues that she raised about equal pay and the processing of her leaver's form. Our finding of fact is that Ms Line was on holiday when the claimant submitted the form. The form was chased by HR and a replacement was prepared by Ms Barnes. The claimant withdrew her allegations against Professor Seckl in this respect. We found no evidence to suggest that the admin and payroll staff knew about her second ET1 or her complaints about equal pay. Ms Line's evidence was that they did not know about it and we accept that evidence as there was nothing to the contrary.

Protocols

86. The claimant relied upon two protocols where she said that after the termination of her employment her name was removed from the document. They were the DICE protocol and MicroBiome protocol. The respondent accepted that her name was taken off the MicroBiome protocol and the name of the trial coordinator was put in place of her name. The claimant accepted that this happened after her employment had terminated, by mid-April 2019.

87. Professor Brown said that these protocols were evolving documents, from version to version. Some names went on and some names came off as the document evolved. The decision about inclusion of names was for the Chief Investigator, in this case Dr Jonathan Krell. Professor Brown told the tribunal that it was not a decision for the claimant's comparator Mr PB who is considerably junior to Dr Krell, who is a Clinical Senior Lecturer in Medical Oncology. We found Professor Brown's evidence to be convincing and we find that the decision as to inclusion or removal of names was for the Chief Investigator who did not know about the alleged protected acts. There was no evidence to suggest that he knew about these matters.

88. MALIBO was a publication that was rejected by the relevant Journal (referred to at paragraph 18 of Professor Brown's statement). The claimant thought she should have been informed by the co-author about this rejection. She accepted that it was submitted to the journal at around the time she left employment. She also accepted that the co-author may not have had an email address for her when her College email address was deactivated. She also accepted that the co-author, whose initials are IL, was unlikely to have known about her equal pay complaints or her ET1s. She said to her knowledge he would not have known. We find on a balance of probabilities that he did not know about these matters.

89. In submissions the claimant said that Professor Seckl and PB could have influenced the Chief Investigator or the co-author IL. The claimant did not put this to Professor Seckl in cross examination or make this suggestion in her own evidence. This coupled with the fact that we found Professor Brown convincing on the point, leads us to find that those who removed her names had no knowledge of any of the matters she relied upon as protected acts.

90. There was an issue as to whether Professor Brown had made a telephone call to the claimant on 7 December 2018 which she originally considered to be an act of victimisation. This allegation was withdrawn during the cross-examination of Professor Brown. We make no finding upon it.

Acts relied upon involving instructions to the respondent's solicitors

91. The claimant's case was that the person instructing the respondent's

solicitors failed to provide a list of documents that she requested on 18 January and 5 February 2019. In submissions the claimant put this allegation against Ms Line although she did not put it to her in cross-examination or make this allegation directly in her own witness statement.

92. We saw that the respondent's solicitors answered the claimant's request for documents in an 8-page letter dated 19 February 2019 (starting at page 99 of the bundle). This was before the second ET1 was issued on 17 March 2019. We find that the solicitors responded in full and in a timely manner to the request for documents. We could find no detriment to the claimant.

93. The claimant also relied upon the person instructing the respondent's solicitors failing to provide a list of documents to comply with a subject access request dated 15 February 2019.

94. We saw that in the solicitors' letter of 19 February 2019 they suggested that if the claimant wished to see information which went outside the scope of the tribunal proceedings, the correct approach was to make a data subject access request (DSAR) (bundle page 100). The claimant in her evidence (witness statement page 13, no numbered paragraphs) said that she made a DSAR on 16 February 2019. She referred to this as at "exhibit 1 p34-37" but this did not correspond to the page numbering in the trial bundle and we were not taken to it during the hearing.

95. The claimant did not identify any missing documents which had been withheld from her as an act of victimization. Instead said in evidence that she thought there "*ought to have been documents"* such as "*emails*" without any better description. We could find no detriment because we were not told in what way the respondent had failed to comply with the DSAR. The generic expectation that there "*ought to be more documents*" is not enough if the claimant cannot point to a document or documents that she says have been withheld from her as an act of victimisation.

<u>Did the claimant do a protected act?</u>

96. The respondent accepts that the first ET1 issued on 14 September 2018 and served on the respondent on or about 9 November 2018 is a protected act. Any detrimental treatment that precedes 9 November 2018 cannot be because of that act. This is a period of more than 7 months after the termination of employment.

97. We have made findings of fact above that after achieving parity of pay on 1 August 2017 the claimant was no longer complaining to the respondent about unequal pay. Complaints about lack of parity of pay with PB made prior to 1 August 2017 were protected acts. After 1 August 2017 her complaints were about the level of her pay and what she considered to be the fairness or otherwise of her pay. Any complaints about pay after 1 August 2017 were not complaints that the respondent had contravened the EqA because there was no pay differential between the claimant and

her comparator after that date.

The relevant law

98. The relevant provisions of the Equality Act 2010 (EqA) being sections 66 to 70 apply where a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does.

99. A's work is equal to that of B if it is rated as equivalent (section 65).

100. If the terms of A's work do not include a sex equality clause, they are to be treated as including one. A sex equality clause is a provision that has the following effect – section 66 EqA:

> *(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;*
>
> *(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.*

101. An employer has a defence under section 69 if it can show that the reason for the differential in pay is a material factor which is not because of sex or if it falls within section 69(2) set out below, the factor is a proportionate means of achieving a legitimate aim.

102. Section 62(2) provides that a factor falls within that 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.

103. The material factor relied upon need only be material in a "causative sense", rather than a "justificatory sense". In other words, it is sufficient if it has been the cause of the pay disparity. ***Secretary of State for Justice (sued as National Offenders Management Service) v Bowling 2012 IRLR 382 (EAT)***. In that case the female employee was recruited on bottom of scale, the male employee was recruited 2 points higher because of his greater skill set. The Employment Tribunal found that the reason for the differential at the start of employment was that the man had greater experience which was capable of being a material factor. They considered that after a year when the claimant had caught up in experience, the employer could no longer justify the differential. The EAT overturned this finding that the non-discriminatory explanation for the differential applied not just in the first year but in subsequent years because of the operation of the incremental scale.

104. At paragraph 10 of the judgment Underhill P (as he then was) said:

> *"In any event, the operation of an incremental scale of this kind, which is standard in the public service, appears to us too obvious to need to be expressly spelt out……. The question was not what he could, in theory, have done (though at the price of wholly disrupting practices agreed with the representative trade unions) but simply what the explanation for the continuing differential was. If it had nothing to do with*

gender, that is the end of the matter."

105. In the ECJ case of ***Danfoss C-109/88*** the Court took the view that since length of service (seniority) goes hand in hand with experience which generally places the worker in a better position to carry out his duties, an employer need not provide any specific justification for rewarding seniority with higher pay. This was qualified slightly in the case of ***Cadman v HSE 2006 IRLR 969 ECJ*** where it was said that as a general rule a length of service criterion did not need to be objectively justified; unless the worker gives evidence capable of giving rise to serious doubts as to whether recourse to length of service is, in the circumstances, appropriate to attain that objective.

106. The time limit for an equal pay claim is 6 months. There is a table set out with section 129 EqA that sets out the relevant time limit and qualifying periods. In relation to this case

107. On the time limit the respondent's case is that the employment in which the claimant earned less than her comparator ended on 2 July 2017 and the claim should have been presented by 3 January 2018. The claimant's case is that the employment ended on 31 March 2018 and this is the date from which time runs.

108. Section 1 of the Employment Rights Act 1996 gives the right to written particulars of employment. Section 38 of the Employment Act 2002 deals with the remedy in relation to this right. It applies to claims in any of the jurisdictions in Schedule 5 to the 2002 Act. It includes equal pay and victimisation claims. By virtue of section 38(5) there is a defence to the making of an award if there are exceptional circumstances which make an award unjust or inequitable.

109. Section 38 of the Employment Act 2002 does not give a free-standing right to compensation for a failure to provide written particulars. It depends upon a successful claim being made under one of the jurisdictions listed in Schedule 5. Section 11 of the ERA 1996 (reference to a tribunal in relation to written particulars) is not a jurisdiction listed in Schedule 5 of the 2002 Act.

110. Section 27 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the Equality Act.

111. Section 136 provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

112. Section 123 of the Equality Act 2010 provides that:

(1) ……..proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

Conclusions

The equal pay claim

113. On the issue of equal pay we find that the reason for the pay inequality between 3 January 2017 and 1 August 2017 was because of length of service and the effect of the pay bands and incremental pay increases. It was essentially a length of service criterion and one which we find to be a material factor which was not discriminatory. We find this based on the cases of ***Danfoss*** and ***Cadman*** (above).

114. Our findings of fact above are that the reason for the pay differential was entirely due to the placing of the claimant and her comparator on the incremental pay points within band 4. The claimant was initially placed on the bottom pay point 37 and as we have found above, because of the arguments she raised, Ms Line moved her up by one point to spine point 38. When this was done in at the time of her appointment in September 2016 it put her on parity with her comparator PB.

115. PB was in employment on the incremental date of 1 October 2016. The claimant was not and she did not benefit from this service related increase because she was not in service. It had nothing to do with her gender. The same would have applied had she been male. It had the effect of placing her one spine point below her comparator until she successfully completed her probation. By 1 August 2017 and the successful completion of her probation she moved up a pay point to pay point 39 and was on the same pay as her comparator. They both moved up incrementally on 1 October 2917 to pay point 40.

116. This was not unheard of in the respondent. As we have found above, the claimant quoted two examples from her own knowledge of a manager being paid less than a direct report. The claimant knew about an example of this happening between two women. It had also happened to Ms Line personally where she had been in receipt of less pay than the male Divisional Finance Manager who reported to her. This was because of his length of service within the incremental pay point system and it corrected itself over time. It was not directly or indirectly discriminatory.

117. We have found above that the reason for appointing the claimant at the lower end of the pay band was because of her lack of managerial experience. Requiring relevant experience is not directly or indirectly discriminatory. Once she had completed the training to the satisfaction of Professors Seckl and Brown at the end of probation review meeting, she

was given a non-automatic pay increment which resolved any pay differential between herself and her comparator.

118. We find that the respondent has established a material factor justifying the difference in pay. The equal pay claim therefore fails and is dismissed.

The victimisation claim

119. The victimisation claim fails on its facts as set out above. We have found that Professor Brown did not criticise the claimant at the June 2017 probation meeting. He gave proper professional advice and guidance as he was entitled to do as a senior manager.

120. On detriments (a) to (e) above we have found that the delays in question were administrative and went across a large number of members of staff. The issue with the claimant's leaver's form was because it was lost around the Easter holiday time and a new form was created by Ms Line's assistant. This had nothing to do with the ET1 served on the respondent on about 9 November 2018 just over seven months after the termination of her employment.

121. Detriments (f) and (g) above were withdrawn.

122. In relation to detriments (h) and (i) put against Ms Lines when instructing the respondent's solicitors, we found that that the solicitors responded in full and in a timely manner to the request for documents. We found no detriment to the claimant. On the DSAR the claimant could not point to any document she could clearly say had been withheld from her and we could find no detriment on the generic suggestion that there must be something, such as unspecified emails.

123. On the final detriment (j) our finding above is that the protocols were evolving documents were names were added and removed on the decision of the Chief Investigator who had no knowledge of any protected acts and/or the decision of the co-author IL, who also had no knowledge of any protected acts. There was no act of victimisation.

124. As a result of our findings of fact the victimisation claims fail and it was not necessary for us to consider the time point. The victimisation claim fails and is dismissed.

Written particulars

125. We have found that there was no failure to give the claimant written particulars of employment. She accepted that she was issued with particulars and submitted that the failure related to information as to notice periods and annual leave. We found that she was issued with such particulars for Clinical and Nursing staff by mistake, instead of Technical and Professional staff. We could not see a difference in the terms for each of those job groups in the documents to which we were taken, at pages

219 and 664.

126. Even if we are wrong about this and there was a difference, we find that it was no more than a pure mistake on the part of the respondent such as to make any award unjust or inequitable.

127. In any event as none of the other claims succeeded, the claimant is not entitled to a remedy because the right to written particulars is not a relevant jurisdiction under Schedule 5 of the Employment Act 2002.

128. The claimant introduced in submissions an argument that she was disadvantaged by having taken a career break for family reasons and that there had been some change of direction in her career and she considered this indirectly discriminatory. We had no evidence on the statistical impact of career breaks. A career break can be taken by men and women for family or other reasons. This was not an argument of indirect sex discrimination that was supported by any evidence presented during the hearing upon which we could make any findings and we do not do so.

Employment Judge Elliott
Date: 9 September 2019

Sent to the parties: 10/09/2019

For the Tribunal