EMPLOYMENT TRIBUNALS

Claimant Ms Toni Sullivan

Respondent Everest Roofing (Oxford) Limited

HEARD AT: Reading (by CVP) **ON**: 14 to 16 September 2020 and in Chambers on 2 October 2020

BEFORE: Employment Judge J Lewis
Ms J Smith
Mr R Alldritt

<u>Representation</u>

For the Claimant: Tom Pacey (Counsel)

For the Respondent: David Parry (Solicitor)

JUDGMENT

1. The Claimant was not employed on like work with her comparator and the Claimant's claim of equal pay on the basis of like work therefore fails.

ORDER

1. By 26 October 2020 the Respondent shall:
   1.1 state, in the light of the considerations set out at paragraphs 145 and 146 of the Reasons, whether it wishes to pursue the contention that the Tribunal should not at this stage determine the material factor defence and whether it seeks to call further evidence in relation to that defence; and
   1.2 make any submissions in support of that position and/or as to the matters set out at paragraphs 145 and 146 of the Reasons (including as to whether it applies for the equal value issue to be determined as a preliminary issue in the Stage 1 equal value hearing whether further evidence should be permitted);
   1.3 alternatively state whether the Respondent remains content for the Tribunal to proceed to determine that defence on the basis only of the evidence given at the like work hearing, and for the Tribunal to lift the

stay on the equal value claim so as to determine that issue as a preliminary issue in the equal value claim at this stage on the basis of that evidence, prior to the stage 1 equal value hearing.

2. By 9 November 2020 the Claimant shall make any submissions in response or any further submissions as to the matters arising from paragraphs 145 and 146 of the Reasons or shall notify the Tribunal that no further submissions on this issue are made on behalf of the Claimant.

3. Any submissions in response by the Respondent shall be made by 16 November 2020.

4. The parties may agree to vary the above dates by up to 7 days without the need to apply to the Tribunal.

5. Following consideration of the above submissions the Tribunal will give further consideration to whether it should proceed to determine the material factor defence on the basis only of the evidence it has already heard or whether it should be dealt with in some other way and will give such further directions as appropriate.

REASONS

1. This was the hearing of the Claimant’s equal pay claim, other than her claim based on equal value which was stayed pending the determination of her like work claim. We heard evidence from the Claimant and, on behalf of the Respondent, from its managing director, Simon Townsend. On the final day of the hearing we received written closing submissions from the Respondent, and oral closing submissions on behalf of both parties, which we have carefully considered. Following the hearing we received, and we have considered, a revised schedule of loss submitted on behalf of the Claimant by email of 23 September 2020, and submissions in response to this on behalf of the Respondent by email of 24 September 2020.

The Issues

2. The issues to be determined were clarified in the Case Management Summary (“**CMS**”) following a preliminary hearing on 6 September 2019 and further discussed at the outset of the hearing in the following terms:

   “*Equal pay*
   It is accepted that the claimant's comparator is paid more than the claimant.

   4.1 Are the claimant and the comparator employed in like work within the meaning of 65(1)(a) of the Equality Act 2010?

4.2 (If not, are the claimant and the comparator employed in work of equal value within the meaning of 65(1)(c) of the Equality Act 2010?

4.3 If the answer to 4.1 [or 4.2) is positive, is the difference in pay between the claimant and the comparator because of the material factor of the different, and more senior, duties carried out by the comparator as set out in paragraph 6 of the respondent's grounds of resistance? (At present the claimant does not Identify those matters contained within paragraph 6 of the response as being potentially indirectly discriminatory.)

4.4 If not, what damages are appropriate taking into the pay gap at different points in time?

Failure to provide written statement of particulars

4.5 The respondent admits that there has been a partial breach of the requirement to provide a written statement of particulars of employment pursuant to section 1 of the Employment Rights Act 1998.

4.6 If the claimant's complaint of equal pay succeeds, what award should the tribunal make under section 38 of the Employment Act. 2002?"

3. At the outset of the hearing the parties confirmed that these remained the issues, subject to the following additions or points of clarification:

3.1 In relation to the like work issue, the comparator is Robert Lord, and there are the following sub-issues:

(a) Whether the Claimant and Mr Lord were employed on work that is the same or of a broadly similar nature.

(b) If so, whether there are differences between the tasks that the Claimant and Mr Lord do, and if so whether these are of practical importance in relation to the terms and conditions of service.

3.2 In relation to the material factor defence, it was confirmed that the Claimant does not contend that the material factor relied upon (which is disputed) was tainted by direct or indirect sex discrimination. The issue of objective justification would only arise if the material factor was so tainted.

3.3 There are the following particular sub-issues in relation to quantum arising in the event that the claim succeeds:

(a) In relation to the rate of pay for the comparator (Mr Lord), what were his normal daily hours of work. The Respondent contends that it was 8 hours a day (from 9am to 5pm) and that his hourly rate of pay is to be calculated on this basis.

(b) Whether there is an adjustment to be made in relation to the proportionally greater holidays said to have been taken by the Claimant.

(c) An issue as to whether there can be a claim in relation to pension contributions. (The issue raised in evidence was as to whether this could be claimed given that it was said that the Claimant would have auto-enrolled if her terms were modified by the equality clause, but could have elected to enrol in any event.)

3.4 There was a further issue in relation to quantum as to whether there should be an uplift to any award for non-compliance with the ACAS code in relation to grievances. In closing submissions it was said that the Claimant seeks an uplift of 15% under this head.

4. There is also an equal value claim which has been stayed pending the determination of the like work claim.

5. At the start of the second day of the hearing the Tribunal raised an issue with the parties as to the scope of the pleaded case as to the material factor defence. Paragraph 6 of the Grounds of Resistance pleads that the difference was “the different, and more senior, duties, carried out by Mr Lord.” It was agreed that it is not necessary for the purposes of the material factor to establish that the duties were in fact more senior; it would be sufficient, and available on the pleaded case, if they were in fact regarded (whether or not correctly) as more senior/ of greater value, and that was in fact the reason for the difference in pay. However it is not available to advance a different explanation.

6. At one point in the discussion of this issue, Mr Parry for the Respondent had indicated that he might wish to seek to amend. On the basis of the above confirmation that it was available to rely on the perception of the duties carried out were more senior/ of greater value, he confirmed he did not wish to do so.

7. Also at the start of the second day the Tribunal raised with the parties the question of whether, in the event that it was decided that the Claimant and her comparator were not engaged on like work, it would be necessary to proceed to determine the equal value issue. The parties were agreed that it would be necessary to determine the issue as to the material factor defence irrespective of our decision as to like work. The issue arose even if like work was not established because if the material factor defence was upheld that would also dispose of the equal value claim. We comment further on this at paragraphs 145 to 147 below.

8. The parties were also agreed that if the like work claim and the material factor defence both failed then it would be necessary to list the matter for a stage 1 equal value hearing. In response to the issue being canvassed by the Tribunal, the parties were agreed that this would be the case irrespective of our findings on the issue of whether there were differences of practical importance to the terms of employment as between the Claimant and Mr

Lord. The Respondent's position however was that whilst a stage 1 equal value hearing would be required, it may be that the findings would impact on any submissions as to whether it would be appropriate for the equal value issue to be determined without the need for an expert to be appointed. However that would be an issue to be addressed following consideration of the Tribunal's judgment and reasons and would be a matter for submissions at the stage 1 equal value hearing.

9. The issues identified at the outset of the hearing, and in the preliminary hearing, did not expressly distinguish between different periods of Mr Lord's employment with the Respondent or identify any issue arising if Mr Lord and the Claimant had at any point been employed on like work but if their work had since ceased to be equal work. However in the course of cross-examination of Mr Townsend on the second day of the hearing, Mr Pacey pursued a line of questioning to the effect that the crucial date for determining equal work was at the start of Mr Lord's employment. The Tribunal raised this with the parties at the end of Day 2 (after the evidence had been completed), and noted it was an issue on which the Tribunal would be assisted by submissions from the parties.

10. The point was clarified by the parties on the morning of the third day of the hearing. The context was that the evidence was to the effect that Mr Lord's duties had evolved in the course of his employment. The Claimant's case was that it was sufficient to establish that she and Mr Lord were employed on like work at the start of Mr Lord's employment. At that point the equality clause bit so as to modify the term of the Claimant's contract and the Claimant would continue to have the benefit of that modified term irrespective of whether she ceased to be on like work with Mr Lord.

11. For the Respondent Mr Parry accepted that proposition, subject to an argument he pursued that the modified term applied only "until something else happens" (as it was put in ***Sorbie v Trust House Forte Hotels Ltd*** [1977] ICR 55), and he contended that something else had happened when the Claimant reduced from a two day week to a three day week.

12. However Mr Parry asserted that he had been caught by surprise by this way of putting the case. Until this had been clarified to him after the hearing on the 2nd day, he had understood from the List of Issues that the Claimant's case was that at the time she started proceedings she was employed in like work with Mr Lord, rather than the focus being on the start of Mr Lord's employment (although we note it must also have been understood to be the case at least that they were in like work for the 6 year arrears period in relation to which loss was claimed).

13. The Tribunal noted that the List of Issues was framed only in terms of whether the Claimant and comparator are employed on like work. It did not in terms raise the issue of whether they had been in like work at any stage during Mr Lord's employment, or only at the outset of Mr Lord's employment. The Tribunal was concerned that the Respondent should not be put at a disadvantage to the extent it was taken by surprise. To that end we canvassed with the Respondent whether it wished to seek to have the

opportunity to address this further in the evidence either with the Claimant or Mr Townsend, or to seek a postponement so that further evidence could be called arising in relation to this issue (and subject to hearing submissions in response from the Claimant).

14. At Mr Parry's request we afforded him time to take instructions in relation to this. Having done so Mr Parry confirmed that he did not wish to address the issues further in evidence either with Mr Townsend or the Claimant and nor did he seek a postponement with a view to being able to call other witness evidence. He also confirmed that it was accepted that it was available to the Claimant to pursue this way of putting her case, ie based on the equality clause biting at the outset of employment even if Mr Lord and the Claimant subsequently ceased to be employed on equal work.

15. Mr Parry also clarified that the Respondent did not pursue the suggestion at paragraph 36 of his written submissions that if the Tribunal found that the Claimant was not engaged on like work, the Tribunal might consider that it would be appropriate not to consider the material factor at this stage on the ground that the Tribunal hearing the equal value claim would benefit from hearing from Nigel Townsend and/or Ian Harris (the directors at the time of Mr Lord's recruitment) as to how the comparator's pay was fixed at the level it was. The Tribunal had enquired of Mr Parry as to whether affording an opportunity to call further evidence on this issue would be unfairly giving the Respondent a second bite of the cherry on the basis that the material factor defence was an issue to be addressed for this hearing, and would always have required a focus on the reasons for the difference of pay at the outset.

16. In the light of the clarification as to the case advanced by reference to the position at the outset of Mr Lord's employment, the following further related issues were identified and agreed by the parties:

    16.1 In relation to whether there was like work, there was an issue as to what factors could be taken into account in relation to the assessment of whether there was like work at the outset. Both parties agreed that this was to be assessed on the basis of the tasks in fact carried out. However the Respondent's contention was that it was anticipated from the outset that Mr Lord would be looking at ways in which the Respondent's finances could be improved and taking on further tasks accordingly, and that the tasks in fact taken on were therefore evidentially relevant to the nature of the job being done. The Claimant's contention, aside from disputing that this broader remit was supported by the evidence, was that in any event the focus must be on the tasks in fact being carried on at the outset (albeit not necessarily from day one), and that responsibilities acquired subsequently were not relevant to whether there was like work at the outset.

    16.2 The Claimant, whilst asserting that she was employed on like work throughout, accepted that her best case as to like work was in relation to the start of Mr Lord's employment. It was accepted on behalf of the Claimant that if she was found not to be employed on like work at that stage, that she was also not on like work at any later period in her

employment (given the nature of the additional duties taken on by Mr Lord as his employment progressed).

16.3 If the Claimant was found to be on like work at the start of her employment, there would be the following further issue:

(a) Whether there was a further contractual agreement when the Claimant agreed to reduce her duties such that by no later than April 2008 when the Claimant reduced her days to two per week, "something else" happened with the effect that the equality clause ceased to have effect if the Claimant and the Mr Lord were no longer employed on equal work. Mr Parry confirmed that reliance was not placed on anything other than the agreed reduction in days worked and the preceding reduction in duties. The Respondent did not rely on the subsequent salary changes, as being something else happening in this sense.

(b) If so whether the Claimant and Mr Lord had ceased to be employed on like work by April 2008 (if they had been on like work at the outset of Mr Lord's employment) when the Claimant reduced her days to two per week.

16.4 If, prior to any of the pay rises received by Mr Lord and the Claimant, they had ceased to be on like work, is the Claimant entitled to those pay rises. As to this:

(a) The Respondent's contention was that she was not entitled to any pay increase in those circumstances, noting that the increases given were discretionary and there was not a contractual right to them.

(b) The Claimant's contention was that the percentage pay increases which she received were instead to be applied to her modified rate of pay (commencing with a rate of £15 per hour from November 2007). The claim on this basis was particularised in the revised schedule of loss sent to the Tribunal, after the hearing, on 23 September 2020.

17. It was also accepted by the Respondent, that if the Claimant and Mr Lord were employed on like work from 2007, that (whether or not they subsequently ceased to be on like work) that a subsequent reduction in Mr Lord's rate of pay did not require a reduction in the rate of pay inserted in the Claimant's contract by reason of the equality clause. That was relevant because on the Respondent's case as to the hours worked by Mr Lord, there was a reduction in his hourly rate to £13.13 from 1 July 2010 and that rate has remained less than £15 per hour.

18. There was also a discussion in closing submissions as to whether the Respondent pursued an alternative case in relation to material factor, in the event that its case was not established in relation to the cause of the difference in pay from the outset of Mr Lord's employment, on the basis of the position from June 2018 when it might be said that consideration was given to the issue in the light of the Claimant's grievance. Mr Parry confirmed that no such alternative case was pursued.

Relevant law

(1) Like work

19. So far as concerns the time when Mr Lord started work, the relevant provisions were contained in the Equal Pay Act 1970. However the parties were agreed that, whilst there was some change in terminology (referring to a genuine material factor rather than a material factor) this did not have a substantive effect on the tests to be applied. As it was common ground that there was no difference in substance between the provisions of the two Acts so far as concerned the matters before us, we refer below to the relevant provisions in the Equality Act 2010 ("**EqA**").

20. Section 65(3) EqA provides that in comparing the two roles, and in relation to both elements of the like work test, the Tribunal must have regard to:

    20.1 The frequency with which differences between their work occur in practice; and
    20.2 The nature and extent of the differences.

(a) Same or broadly similar nature

21. In relation to like work, the first question is whether the Claimant and her comparator, Mr Lord, were employed on work that is the same or of a broadly similar nature, as to which the burden is on the Claimant. The focus should be on what they do and, where there are differences in what they do, on the nature and extent of the differences and the frequency with which they occur.

22. The Tribunal is required to make a broad judgment and to avoid attaching too much significance to insubstantial differences. It should not take too pedantic an approach or undertake too minute an examination. As it was put in submissions by Counsel for the Claimant, and we accept, it should be careful to see the wood from the trees. It should consider the matter in broad, general terms and undertake a general consideration of both the work done by the Claimant and her comparator and the knowledge and skill required to do it. As set out in ***Capper Pass Ltd v Lawton*** .[1977] ICR 83 (EAT) per Phillips J (at 87D-G):

    "It is clear from the terms of the subsection that the work need not be of the *same* nature in order to be like work. It is enough if it is of a similar nature. Indeed, it need only be broadly similar. In such cases where the work is of a broadly similar nature (and not of the *same* nature) there will necessarily be differences between the work done by the woman and the work done by the man. It seems clear to us that the definition requires the industrial tribunal to bring to the solution of the question, whether work is of a broadly similar nature, a broad judgment. Because, in such cases, there will be such differences of one sort or another it would be possible in almost every case, by too pedantic an approach, to say that the work was not of a like nature despite the similarity of what was done and the similar kinds of skill and knowledge required to do it. That would be wrong. The intention, we

think, is clearly that the industrial tribunal should not be required to undertake too minute an examination, or be constrained to find that work is not like work merely because of insubstantial differences.

… This question can be answered by a general consideration of the type of work involved, and of the skill and knowledge required to do it. It seems to us to be implicit … that it can be answered without a minute examination of the detail of the differences between the work done by the man and the work done by the woman.**"**

23. It is necessary to consider the respective jobs as a whole; it is not possible to exclude any parts they do not have in common unless they in effect relate to a separate and distinct job: ***Maidment v Cooper & Co (Birmingham) Ltd*** [1978] ICR 1094 (EAT) at 1098H.

(b) Differences of practical importance

24. If the work was of a broadly similar nature, the next question is:

    24.1 whether there are differences between the tasks that the Claimant does and those that her comparator does; and
    24.2 if so, whether such differences are of practical importance in relation to the terms and conditions of service.

25. As to this, in **Capper Pass**, Phillips J comment, at para 87H-88B, that:

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

26. The evidential burden on this second issue is on that Respondent: ***Shields v E Coomes (Holdings) Ltd*** [1978] ICR 1159 (CA).

27. The focus at the second stage is on the differences in the tasks performed by the Claimant and Mr Lord, focussing on differences in the work actually done, how large those differences are, and how often they operate.

28. Paragraph 36 and 37 of the EHRC's Code of Practice on Equal Pay provides that:

    "36. … Differences such as additional duties, level of responsibility, skills, the time at which work is done, qualifications, training and physical effort could be of practical importance.

> A difference in workload does not itself preclude a like work comparison, unless the increased workload represents a difference in responsibility or other difference of practical importance.
> …
>
> 37. A detailed examination of the nature and extent of the differences and how often they arise in practice is required. A contractual obligation on a man to do additional duties is not sufficient, it is what happens in practice that counts."

(2) Material factor

29. If equal work is established, it remains open to the Respondent to show that any difference in terms is because of a material factor which is not tainted by sex (direct or indirect): s.69 EqA.

30. If the matters relied upon as material factors were not tainted by direct or indirect sex discrimination, it is sufficient to show that the factors relied upon caused the disparity of pay, and in that sense were significant and relevant: see ***Glasgow City Council v Marshall*** [2000] ICR 196 (at 202), noting that the scheme of the legislation is that once equal work is established there is a rebuttable presumption of sex discrimination.

31. In order to be material, the difference in pay must be due to the factor relied upon. It must be significant and relevant in that it explains the difference in pay. As explained in ***CalMac Ferries Ltd v Wallace*** [2014] ICR 453 (EAT) at para 16:

> "Where a pay disparity arises for examination, it is not sufficient for an employer to show why one party is paid as one party is. The statute requires an explanation for the difference, which inevitably involves considering why the claimants are paid as they are, on the one hand, and, separately, why the comparator is paid as he is."

32. It is for the Respondent to produce sufficiently cogent and particularised evidence to discharge this burden on the balance of probabilities. That is important given the equal pay risks inherent in lack of transparency as to the reasons for differences in pay.

33. If equal work is established, but the differential pay is only explained in part as being by reason of a material factor, the sex equality clause would operate to the extent that the differential is not explained.

34. The most recent word from the Court of Appeal on the material factor issue was in ***Walker v Co-operative Group Limited and another*** [2020] EWCA Civ 1075. At paragraphs 54 and 55, Males LJ (with whose observations Phillips LJ agreed) said the following:

> "54. The essential starting point for an equal pay claim is proof that the claimant (A) "is employed on work that is equal to the work that a

comparator of the opposite sex (B) does". As section of the 2010 Act makes clear, only then does consideration of the statutory sex equality clause and the possibility of a material factor defence become relevant. The ET did not find that Mrs Walker's work was equal to that of Mr Folland or Mr Asher from the time when she took on her new role in February 2014, but only that it had become equal between then and February 2015, leaving the date at which this had occurred to be determined later. In my judgment that was not a satisfactory approach, either conceptually or practically. Conceptually, it left unresolved the essential starting point for Mrs Walker's claim. Practically, it ran the risk that much of the case would have to be re-litigated as part of the remedy hearing. The ET should either have made a finding as to the date on which Mrs Walker was doing work which was equal to that of a named comparator or should have found that she had failed to prove this at any stage before February 2015.

55. It was, therefore, potentially misleading for the ET to analyse the position in terms of whether a material factor defence applied as at February 2014. The true position, on the ET's findings, was that Mrs Walker's work was not equal to that of Mr Folland or Mr Asher at that time, so that an equal pay claim would not have got off the ground: the statutory equality clause had no application, the issue of material factor could not arise, and there was no need to "justify" the pay differential."

35. We were not referred to the decision by the parties, possibly because it was only handed down on 14 August 2020. At first blush the above dicta as to how a tribunal should approach the material factor defence might point to a degree of caution in determining the material factor issue in the context only of a hearing concerned with like work (and with the equal value claim stayed) in the event that we do not accept that there was like work. That might be thought to be particularly relevant in a case where it was said that the comparator's role had evolved and the equal value case had not yet been addressed. We note however that ultimately the Court in ***Walker*** upheld the decision of the EAT in that case (overturning the ET) finding that a material factor defence had been established, and also that it is well established, and reflected in paragraph 3(3) of Schedule 3 of the ET Rules, that the material factor issue may, on application of the parties (and if the Tribunal considers it appropriate to do so), be determined in advance of deciding the equal value issue. We have however not heard submissions in the light of the above dicta in relation to the approach to the material factor defence. We return to this below in the context of our consideration of the approach to that issue.

(4) Crystallisation of the equality clause

36. An equality clause takes effect if the Claimant and comparator were on like work and the material factor defence is not established. It is not dependent on the Claimant and the comparator continuing to be in like work. Once the equality clause takes effect the modified term is treated as having been part of the Claimant's contract to the same extent as any other term: ***Reading Borough Council v James*** UKEAT/0222/17/JOJ, 7 June 2018.

37. On behalf of the Respondent Mr Parry placed reliance on the dicta in ***Sorbie v Trust House Forte Hotels Ltd*** [1977] ICR 55 (cited in ***Reading BC v James*** at para 16), that once the term is modified, the modified term remains in place:

    "until something else happens, such as a further agreement between the parties, a further collective agreement, or a further statutory modification by reason of a further operation of the equality clause."

38. As further explained in ***Reading BC v James*** (at para 26):

    "once contractual rights crystallise, those rights continue until they are lawfully varied or terminated. The focus is on lawful changes to the women's contracts and not on the fortuitous continued presence or otherwise of the chosen comparator in the same role."

39. Therefore once the equality clause crystallises to modify the term, the modified term will continue to apply in the same way as any other term unless that term is lawfully varied in circumstances where this is not inconsistent with the requirement for the equality clause to operate.

40. A term by term comparison is required. It is not available for the Respondent to assert that less favourable terms in one respect are balanced by more favourable terms in other respects, at least unless that is the basis for a material factor defence. That is subject to a limited exception where what appears to be a separate term is in fact part of the same term, such as might be the case where an allowance is in reality part of basic pay.

(3) Equal pay remedy

41. Under s.132(2) EqA, if the Tribunal finds that there has been a breach of the equality clause, it may:

    41.1 make a declaration as to the rights of the parties in relation to the matters to which the proceedings relate (bearing in mind that the equality clause has the effect of modifying the disputed terms in the contact so that they are no longer less favourable); and

    41.2 order an award by way of arrears of pay or damages in relation to the matters to which the proceedings relate, which under s.132(4) EqA, is subject (in a standard case) to a limit on arrears of six years before the day on which the proceedings were instituted.

(5) Statement of particulars

42. By s.38(1),(3) of the Employment Act 2002 it is provided that if the Tribunal finds in favour of the Claimant in relation to a claim under Schedule 5 of that Act (which includes an equal pay claim), and makes an award in respect of that claim, if when the proceedings were begun the employer was in breach of the duty to provide particulars under s.1 of the Employment Rights Act 1996 ("**ERA**") (or a statement of changes in particulars under s.4 ERA) the Tribunal must increase the award by two weeks' pay, and may if it considers

it just and equitable in all the circumstances increase the award by four weeks' pay. In each case this is subject to s.38(5) of the 2002 Act which provides that this does not apply "if there are exceptional circumstances" which would make an award or increase under these provisions "unjust or inequitable". (In closing submissions the Claimant claimed 2 weeks' pay under this head.)

(6) ACAS uplift

43. Under s..207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**"), read with Schedule A2 of that Act, if the claim to which the proceedings relates concerns a matter to which a relevant Code of Practice applies, and the employer unreasonably failed to comply with the Code, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award made (in relation to the equal pay claim) by up to 25%.

44. Pursuant to s.238(5) TULRCA, any adjustment under s.207A is made before any adjustment under s.38 EA 2002 relating to failure to provide written particulars.

Material facts

(1) The Respondent's business

45. The Respondent operates a roof contractor business. It has an annual turnover of about £1m. At all material times, prior to the recent furloughing of staff, there were four office based employees; Simon Townsend (Managing Director), Alan Stratford (Contracts Manager), the Claimant, and her comparator, Robert Lord. In addition the business typically employed about 10-12 labourers/ roofers and also used a number of sub-contractors from time to time. The business had one site, which is a small office and warehouse, where roofing materials are stored.

46. The company was formed in about 1975 by Nigel Townsend (Simon Townsend's father) who was the Managing Director, and Ian Harris. Simon Townsend joined the company in 2003, and acquired Mr Harris' shareholding in 2011. Unless stated otherwise, references below to Mr Townsend are to Simon Townsend. The Claimant initially worked for the Respondent on a trial fixed term contract from November 2004. At that time the company employed a Management Accountant, Margaret Hill, who was planning to retire. During this period Ms Hill carried out a handover, although as we address below, the Claimant did not take over all of her duties. Ms Hill retired in around December 2004 or January 2005, and on 1 March 2005 the Claimant was employed on a permanent basis.

47. Nigel Townsend had ceased to be involved in the day to day running of the company in June 2006 (though he is still a shareholder and director). Mr Harris remained at director until 2011 but within a year of Nigel Townsend's departure he had started to retreat from the business for health reasons. It was largely left to Simon Townsend and Mr Stratford, who joined in 2006, to

run the business, albeit that Simon Townsend did not become managing director until later.

48. However it was Mr Harris and Nigel Townsend who dealt with the recruitment of Mr Lord, who joined the Respondent company on 1 November 2007. Simon Townsend was not aware at the time as to what Mr Lord was be paid and why. His evidence was that he became aware of this several years later.

49. Neither Nigel Townsend nor Mr Harris provided witness evidence and nor was evidence called by Mr Lord. The Respondent's explanation, as advanced by Mr Parry in closing submissions, was that it took the view that the matters could be adequately addressed in evidence by Simon Townsend. It was not suggested that any of Nigel Townsend, Mr Harris or Mr Lord would have been unavailable to give witness evidence had the Respondent chosen to put them forward as witnesses.

(2) Overview of the chronology leading to the Claimant's claim

50. By an email of 20 June 2018 the Claimant formally requested that her salary be brought into line with that of Mr Lord. She alleged that not only did their roles carry the same title of Accounts Administrator but that they carried out similar duties. Indeed she asserted that her payroll responsibilities commanded a higher level of responsibility. She noted that she had been advised that she was entitled to a written explanation and requested a response within 14 days. She did not expressly refer to this as a grievance, but that is plainly what it was.

51. The Claimant had previously raised this issue informally. She had been aware of the differential in pay as a result of her payroll responsibility and she had raised it subsequently when pay rises were discussed. Mr Townsend disputed that this had previously been discussed. We prefer the Claimant's evidence on this issue. We note that in the email of 20 June 2018 she stated that her previous requests did not appear to be treated seriously. There was no response disputing that this had been discussed.

52. Simon Townsend sent a holding response by email on 5 July 2018, apologising for the delay, saying that he was going over it currently and that he would reply shortly. The Claimant replied on the same day requesting a response by 13 July 2018. Having heard nothing further she wrote again on 22 July 2018 noting that following advice from ACAS she believed she had a valid claim under the Equality Act 2010 and asked to have her salary increased by £1,000 per month, backdated to 1 June 2018, with immediate effect. She volunteered that she acknowledged this would mean she was not entitled to be paid for bank holidays.

53. Mr Townsend provided his substantive response on 24 July 2018. He acknowledged that within a small office there were some administrative tasks that all members in the office carried out, such as taking and forwarding calls and messages, deliveries, petty cash payments, and general administration items such as filing and invoice matching. However he concluded that the

"main bulk of both roles are very different from each other" and were not comparable, and were "very distinct and separate in nature". He also asserted that when factoring in items such as hours worked and pro rata levels of paid holidays, the overall salary packages were not so dissimilar as first appeared.

54. The Claimant responded by email on 29 July 2018 asking to be provided with his comparison of the respective roles and for detail as to how he calculated the respective salaries. She requested a response by 6 August 2018.

55. Mr Townsend replied by email on 8 August 2018. He provided what he said were the specification for the roles carried out by Mr Lord and the Claimant. He asserted again that the different nature of the roles and the tasks carried out made any direct comparison of salary irrelevant. As to salary he emphasised that the Claimant worked a 7 hour day and received additional holiday pay of approximately 2.5 to 3 extra weeks' work depending on the when Christmas fell.

56. The Claimant replied on 13 August 2018 referring expressly to the issue she had raised as having been a grievance. She argued that the two roles were broadly similar and of equal value and stated that she formally requested details of the comparator role and Mr Townsend's full explanation which in Mr Townsend's opinion justified the difference in pay. She offered again to forego the additional bank holiday days if her salary was brought into line.

57. Mr Townsend responded on 1 September 2018 again rejecting the claim. He asserted that the roles were distinct and separate, in the aims and purpose of the roles within the Respondent and in the tasks allocated, the outputs produced by them and in the different skills sets required for each role.

58. A further round of correspondence following between the Claimant's and Respondent's respective solicitors. By a letter dated 14 November 2018 the Respondent's solicitors enclosed a more detailed list of the duties carried out by Mr Lord. It was clarified in evidence that this was drawn up by Mr Lord. It was argued by the Respondent's solicitors that the Claimant's functions were essentially in the nature of data-inputting and record-keeping, whereas Mr Lord's responsibilities had a large element of setting up systems, analysis, involvement with contracts and customers and advice to the Board. It was asserted that the difference in pay was justified by the more senior duties carried out by Mr Lord. A calculation of the hourly rates for each of Mr Lord and the Claimant was also enclosed, calculating Mr Lord's rate on the basis of an 8 hour day and making an adjustment for difference in paid holiday entitlement.

59. An issue was also raised in the correspondence, and in the subsequent Schedule of Loss, of the Claimant having suffered loss by reason of her pay being below the level of auto-enrolment when this was introduced in June 2016, and consequent loss of employer pension contributions. Whilst the Claimant's salary, aside from the operation of the equality clause, was below the level for automatic enrolment it was open to her to elect to join the

pension scheme and it was accepted that had she done so she would have been entitled to pension contributions at the same rate. She did not do so because she felt that on her then salary she could not afford to make pension contributions. Her case was that she would have been able to afford to do so if she had the benefit of the equality clause and that in any event enrolment would have applied automatically.

60. If the Claimant had been enrolled on the NEST pension scheme the Respondent would have been required to make employer contributions of 1% of her pensionable earnings from 1 June 2016 to 5 April 2018, then 2% between 6 April 2018 and 5 April 2019 and 3% from 6 April 2019. The employee contributions in those periods would have been 2%, 3% and 5% respectively.

(3) Furlough and redundancy

61. The Claimant was placed on furlough from 23 March 2020 to 24 April 2020. She returned to work to deal with year-end matters and was then again placed on furlough from 9 June 2020. Whilst on furlough other office staff (not Mr Lord) covered her duties. Mr Lord was also placed on furlough. As at the date of the hearing he had not returned to work as he was shielding.

62. On 21 July 2020 the Claimant was given 12 weeks' notice of redundancy, terminating on 13 October 2020.

(4) The Claimant's role

63. The Claimant's CV at the time of joining the Respondent identified her qualifications as being four O levels, an AAT Foundation and National Payroll Certificates. She has substantial (over 40 years) experience in financial accounting/ administrative work. Prior to joining the Respondent, her previous roles had been working for about 7 years as a purchase ledger/ payroll clerk, and prior to that for 7 years as an accounts clerk.

64. The Claimant was provided with a written statement of particulars of employment dated 1 March 2005. Margaret Hill's contract was copied over to the Claimant but without amendment to accurately reflect the Claimant's position. To that end it stated that the Claimant was employed as a "Management Accountant", which was not and has never been the Claimant's role. She was at all times referred to as an Accounts Administrator. There were also some inaccuracies in the Job Description in its application to the Claimant. She did not deal with corporation tax calculations or directors' tax returns. Nor did she deal with work in progress other than whilst under Ms Hill's supervision. Similarly she was not involved in producing management account type information after Ms Hill's departure.

65. We turn to the functions which the Claimant did carry out.

(a) Payroll related duties

66. This was a major part of the Claimant's duties. Latterly, from around 2016, this included dealing with pension contributions, and took about half of her time. Prior to that it had taken about a quarter of her time. It was referenced in the job description in the particulars under "Wages, salaries, PAYE and CIS Certificates", and in her 15 January 2019 note of her duties under the headings of "Payroll – Sage System", "Pension" and "Sub-contractors", and in par under the heading on "Job specific tasks". The latter referred to setting up, managing and maintaining the Sage Payroll systems for Monthly and Weekly payroll. Setting up the system entailed installing a disk with the pre-loaded relevant payroll systems and then inputting the relevant data.

67. The Claimant's payroll responsibilities fell into three categories; (a) monthly paid (ie the four salaried employees) by PAYE, (b) weekly paid (ie the 10-12 labourers), based on the weekly paid timesheets prepared by Simon Townsend or Mr Stratford and handed to the Claimant, and (c) subcontractors (typically about 5). In each case it was her responsibility to process information about this and to ensure they were paid.

68. Essentially this element of the role entailed inputting and processing the data and printing, checking and distributing payslips each week or month to the staff members and producing P60s at year end for all staff and ensuring deadlines were met. For wages staff, the Claimant used a time sheet system to capture sickness and holiday absences and changes to hours of work. She inputted data onto the Sage Payroll system which generated the necessary report which she submitted to HMRC.

69. The Claimant had also researched the necessary requirements to enable the Respondent to move to real time information (RTI) for PAYE when it was introduced by the Government from April 2013, with the effect that payroll data was submitted to HMRC on a monthly basis rather than by annual payroll PAYE. This was based on the information set out on the HMRC website.

70. The role also involved processing statutory sick pay where necessary, which was calculated automatically by the Sage accounting systems, based on figures updated each year. The Claimant was not involved in setting or negotiating rates of pay.

71. In relation to sub-contractors, it was necessary to verify them by checking their unique tax reference on the system so as to ensure they could work within the CIS Scheme. The Claimant would also produce an invoice capturing their hours of work and jobs on which they worked, and she recorded the statutory deductions on the PAYE spreadsheet for the monthly returns and payments to the HMRC and would submit the monthly CIS report to HMRC. This involved inputting of data from information provided by others, and meeting deadlines to avoid penalties, but did not involve any substantial element of analysis or discretionary judgment.

72. There was some dispute as to whether the Claimant was involved in recommending using NEST when it became necessary to comply with auto-enrolment pension requirements. The decision was made by the Respondent in consultation with the accountant and a separate meeting with the Respondent's bank manager, as to what pension scheme would best meet the needs of the company and the lowest cost option, being promoted by the Government. The Claimant was not involved in those meetings or that decision. She did herself carry out some research on the statutory requirements and she made a suggestion about using NEST, but by then the decision to do so had already been made.

73. As part of her payroll duties the Claimant would enrol new employees on the NEST pension system. She would write to new joiners to inform them as to whether they were eligible to join or would be auto enrolled. There was a standard letter on the NEST website which she was able to adapt for this purpose, and she would check to ensure the new joiners were eligible. She would also inform employees of changes in their contribution rates. She would also upload the pension information and check it all. She would need to check payments in the NEST accounts and was responsible for the payments being made by the deadlines. There was also a Declaration of Compliance that had to be submitted every three years, which the Claimant accepted in evidence was a matter of ticking forms on the NEST website and completing it from the data she had. Essentially the work remained in the nature of inputting and checking data, together with an element of relaying information.

(b) Sales and purchase ledger/ Sage 50 accounting system

74. In around 2007 the Respondent moved from a Pegasus software system to a Sage 50 accounts package. The decision to do so was made by the Respondent's directors. The company's accountants were involved in this process, helping to install the software, transferring across the balances, and showing the Claimant how to use the new system. The Claimant inputted the data (other than the account balances) to copy across the information from the Pegasus to the Sage 50 system. After about three months running the two systems together, the Claimant closed down the Pegasus system.

75. The Claimant inputted the information for the purchase and sales ledger on Sage 50. On the purchase ledger, for each new supplier she set up their account on Sage 50. When cash payments were made to suppliers she posted these into their account. She arranged monthly bank transfers to suppliers and was responsible for ensuring all payments were coded correctly and allocated to the correct job and reconciling all supplier account statements. The Claimant was not involved in ordering the materials or negotiating cost or negotiating with suppliers.

76. Her contact with suppliers arose on a reactive basis in the event that they rang up with queries. For example if they had not received a payment the Claimant would in the first instance need to obtain a copy of the invoices. However the decision as to when and whether to make payment if there was

an issue in relation to this would be made by management, and the Claimant would need to refer the matter to management for a decision.

77. In relation to the sales ledger, the Claimant set up debtor accounts for each customer, posted invoices for work carried out and posted all receipts to the relevant accounts.

78. The Claimant also carried out a manual check of entries on Sage with bank accounts. She also maintained the system for petty cash, so that payments were posted and reconciled.

79. Again these elements of the role largely entailed inputting and checking information, rather than a broader exercise of judgment, discretion or negotiation.

80. The great majority of the Claimant's time was taken up dealing with the payroll and sales and purchase ledger work. There were a number of more minor elements which we address below.

(c) Job Costing system

81. The Claimant also posted labour costs and sales and purchase invoices into the job costing system and checked the purchase invoices were allocated to the correct account. Again this involved inputting data onto the system. It did not involve any analysis of labour costs such as profit margins for jobs.

82. Prior to Mr Lord being employed the Claimant dealt with the stock book. When stock was taken from the yard for a job it would be recorded in the stock book and costed by Simon Townsend, Mr Stratford or (after he joined) Mr Lord. The stock book would then be used to post the materials to the correct job through the job costing system. We address below the nature of Mr Lord's stock responsibilities.

(d) VAT returns

83. The Claimant prepared and submitted VAT returns, extracting the data for purchases and sales for the quarter from Sage 50, taking into account rules relating to EU purchases and bad debts and calculating the VAT due or to be reclaimed, with the Claimant being responsible for arranging payment on time to avoid penalties.

84. The process was changed to accord with Making Tax Digital requirements. A change was made to using the Absolute Accounting software, which was researched by Mr Lord. The Claimant downloaded the information and entered it into the system. The calculations were made automatically, though checked by the Claimant.

(e) Construction Industry Training Board ("CITB")

85. The Claimant also completed the annual CITB training documentation, which involved calculating annual salaries for salaried staff, wages for workers and

payments to CIS contractors. The information was gathered from Sage payroll, or in the case of subcontractors from subcontractor statements, and entered into a spreadsheet which the Claimant set up for this purpose.

(f) P11Ds

86. The Claimant was also responsible for completing form P11Ds for each director, being the form used for reporting benefits in kind ie company cars. This involved gathering details of the Company cars (make, model, price, engine size, CO2 emissions) which were either provided by Mr Stratford or extracted from office files. The Claimant also produced the P11D(b) form which summarised the individual forms and provided details of tax due, and arranged payment. Both forms had to be submitted by deadlines so as to avoid penalties.

(g) Company secretary

87. The Claimant was appointed as Company secretary on 6 November 2006 and in this role signed the company accounts each year once they had been approved by the directors. In 2008 there ceased to be a statutory requirement for there to be a Company secretary, but the Claimant continued in the role. She would attend the meeting with the accountants, although in more recent years Mr Lord had attended that meeting due to the accountants attending on a day which Mr Lord worked rather than the Claimant. It was not suggested that there were other functions associated with the Company secretarial role.

(h) Provision of information to accountants

88. The Claimant would provide the accountants with reports requested by the accountants, such as for profit and loss and balance sheets and debtors and creditors. These could be produced using Sage 50, rather than requiring her to analyse the figures. This was not separately identified in the Claimant's description of her duties provided on 15 January 2019, which we infer indicates that it was not a substantial element of her role or different in nature from other functions involving processing of information from Sage 50.

(i) General office tasks

89. As was the case for other staff (including the directors) when present in the office, the Claimant also carried out general office tasks including covering the office on the two days she worked (Monday and Friday), ensuring visitors or deliveries were attended to, answering the office phone, and taking forwarding messages. She would also carry out sundry administrative tasks such as filing and locating receipts/ invoices and other documents as and when necessary. Taking all this together it was a small part of her role. In evidence she said, and we accept, it took about 1% of her time.

90. Until a few years ago the Claimant monitored and maintained office supplies, tea, coffee, stationery and computer supplies. Since then that has been done by the directors.

(j) Former responsibilities taken over by Mr Lord

91. To a limited extent some of the Claimant's responsibilities came to be taken over by Mr Lord. The principal instance of this related to chasing debts. This was taken over by Mr Lord from the outset of his employment. If debtors did not respond to demand letters she instructed solicitors to chase payment. Whilst this was taken over by Mr Lord, the scope and substance of his role and responsibility in relation to it differed substantially as we address further below. As noted above, Mr Lord also took over responsibility for the stock book, but again as we address below that was part of a wider and substantially different role in relation to stock.

92. For several years the Claimant completed Office for National Statistics forms. This was subsequently taken on by Mr Lord, and has been done by him for more than six years, though not from the outset of his employment. It was a minor part of the Claimant's role.

(5) Mr Lord's role

93. Prior to joining the Respondent, Mr Lord had worked as a senior surveyor. He was known to Nigel Townsend because he had come across him professionally when Mr Lord was working as a surveyor (for Benfield & Loxley).

94. At the time he was recruited there were outstanding invoices of £350,000, which for a business with an annual turnover of around £1m was substantial. Against this context he was initially employed to address the debt collection problem. This was reflected in his written particulars of employment which provided that he was employed in the role of "Accounts Administrator" and, in relation to his job description, simply stated "Reconciliation of Accounts".

95. Mr Townsend's written evidence was that Mr Lord was initially employed to "troubleshoot failings in the debt collection system" and to "look into setting up a new system for recording retentions due and invoices." This was put somewhat more broadly in Mr Townsend's oral evidence where he stated that Mr Lord was tasked with overseeing where he could offer advice and to provide an overview of current structures and as to what structures to put into place. That was in the context that Mr Harris and Nigel Townsend were not there, and that Simon Townsend and Mr Stratford were relatively new to the business. As such it was said by Mr Townsend that the rationale was in part to have someone with Mr Lord's professional background in post who could provide an overview of systems to see what could be improved, and be a sounding board or mentor, albeit with the initial focus on debt collection.

96. We accept that Mr Lord was given a broad responsibility for dealing with debt collection and troubleshooting the debt collection system, and that this would entail looking at processes relating to this. That would include matters such as improving processes relating to retentions and invoices (both of which we note were grouped together with debt collection in Mr Townsend's summary of Mr Lord's responsibilities sent on 8 August 2018). We are not satisfied that it was part of his initial role to carry out a broader review of processes.

As noted above, that was not stated to be the case in Mr Townsend's statement. Nor were we presented with any documentation evidencing any general review of processes having been carried out or recommendations made as to what could be improved. Nor was there any mention in the written particulars of employment as to a wider consultancy role.

97. We accept that Mr Lord's role did evolve. As set out below, he quickly also took on responsibilities in relation to stock and subsequently also took on further duties. Working within a small company and with his professional background, it made sense once he started to get on top of the debt collection issue to look at how else he could best be utilised. We can also see that given the transition in management away from Mr Harris and Nigel Townsend, that it may have been viewed as beneficial to have someone with Mr Lord's background present as a sounding board and that it may well have been seen as a benefit in recruiting him. Whilst we accept that in practice, given his professional background and the close working environment in a small office, Mr Lord would have been involved in discussions with the directors about the business, and been used as a sounding board, we do not however accept that it was any part of his duties as such, as reflected in the fact that there was no mention of it either in the written particulars or in Mr Townsend's witness statement.

98. Prior to joining the Respondent, Mr Lord had been in temporary retirement. Mr Townsend's evidence was that he understood that Mr Lord had been paid a sum which was, as he put it, applicable to the work he was doing, and which he would accept as a minimum to come in to work. He had not been aware of this at the time of Mr Lord's recruitment and had had no discussion with his father at the time about this. He said that he only became aware several years later from discussions over the years. He was not aware of any consideration given to any comparison with what the Claimant was paid. He was not able to provide any detail as to what had been discussed or any evidence of any negotiations as to this.

(a) Credit control/ invoicing/ job costing tasks relating to materials

99. As noted above, Mr Lord's initial focus was on debt collection/ credit control, and we accept, more broadly, related aspects of troubleshooting issues and improving processes related to the debt collection system. This required the exercise of discretion and judgment, operating with a high degree of autonomy, and drawing on his professional experience.

100. As set out in the note of duties complied by Mr Lord on 15 November 2018, one aspect of the debt collection role was setting up systems to monitor valuation dates and cash dates, to monitor/ analyse outstanding cash and to monitor/analyse retention values and to provide reports. He would produce the client invoices and deal with any queries in relation to them and resolve client disputes including by phone, email, formal letters, and face to face meetings. He would chase for payment, dealing directly with the relevant parties including the client and the quantity surveyor ("**QS**"), and dealing with any negotiation over payment including agreeing, at least on larger contracts,

elements to be included as completed or to be omitted from the final bill and the values to be attributed to this.

101. The face to face element of the role was relatively infrequent. We accept Mr Townsend's evidence that Mr Lord would typically have site meetings in relation to the debt collection role two to three times a year and (though relevant to parts of the job as it subsequently evolved) would go to meetings on site a total of four or five times a year, such as where it would help in discussion with the QS to have someone with Mr Lord's surveying background when discussing details.

102. By way of illustration of what the role involved, we were shown a document, referred to by Mr Townsend as a bill of quantities type document with a work schedule [**160**], showing how the total invoice value for the client was reached, as set out in the invoice [**159**]. In this case it related to an old building so the work was not standard. In the first instance Mr Townsend and Mr Stratford would compile the pricing schedule, setting out for each element of work, the rate and the quotation. Mr Lord would subsequently go over the schedule with the QS, working through which jobs had been completed. He would agree which items were to be omitted and any items to be treated as partially completed, which we accept entailed the exercise of commercial skill and judgment. In the schedule at page 160 all "built ups", or individual items, were treated as either omitted or 100% completed other than "welfare", which was given a value of 40%, reflecting the figure agreed between Mr Lord and the QS weighing the contribution by the Respondent. He would not generally make bigger decisions on his own; they would be discussed between Mr Lord and the directors given that they all sat together in the office.

103. In the above example Mr Lord had initially sent the application for payment on 29 October 2019. Following his discussions with the QS, he re-submitted the schedule showing the built ups. He was then contacted by the QS a week later agreeing the application other than one item (worth £200). Mr Lord replied to the QS on the following day, confirming the acceptance of the final account and asking him to email his certificate to him so that it could be attached to the Respondent's invoice to be sent to the client's representative.

104. Retentions were also an aspect of credit control, and finalising contracts and dealing with defect management, where a portion of the fees were held back until certain trigger points were reached. This mainly occurred on larger projects. Dealing with retentions would involve obtaining a list of outstanding issues from the QS and seeing what defects were said to be the cause for non-payment, liaising with the QS and going through the defects, exercising commercial skill and judgment in doing so. The Respondent would then deploy workers to fix the defects, and Mr Lord would negotiate over what had been done. It involved an element of Mr Lord liaising with the QS, where he was able to draw on his experience as a senior surveyor.

105. Whilst the Claimant had previously had a responsibility in relation to debt collection, it was a much more limited role, involving re-sending a copy of the

invoice and if payment was not made, instructing solicitors to pursue this further.

(b) Stock control

106. The job specification provided on 8 August 2018 referred under the heading of "stock control" to "Monitoring of stock levels/ requirements." This was broken down in Mr Lord's own note of duties as covering:
   106.1 monitoring of stock in and out and costing up the value of stock going out; and
   106.2 analysing and providing end of year stock reporting including carrying out a physical stock take in the yard and sheds.

107. Mr Townsend's evidence was that this was part of Mr Lord's responsibility from the start of his employment or at least within the first year. We do not accept that it was within his responsibilities from the outset. In particular we note that it was not mentioned in the job description in the statement of employment particulars [**41**], and that Mr Townsend's evidence was that there was a singular focus on debt collection at the outset. We accept however that it was quickly added to his responsibilities and that this was done within the first year of employment. It was not work that the Claimant had ever carried out other than recording stock taken out of the yard in the stock book.

108. The role involved recording the stock taken from the yard in the stock book and costing it, and posting the materials to the correct job through the job costing system. The stock price could sometimes vary during the year or depend on whether the amount going out was in big or smaller amounts, or the price should otherwise by adjusted to suit the contract. His role would involve valuing the stock, exercising skill judgment in relation to this and the assessment of what stock should be depreciated down and to what extent so as to put a current market value on it. He would monitor the current market value, and also carried out price checks to ensure value for money and to double-check the valuation against the current price [**340-352**]. The valuations would then need to be adjusted by Mr Lord on the computer records. It was of high importance to the Respondent to be able to understand the value of the stock held, and it may also be needed in cases where stock was reclaimed (as we were informed was the case for a lot of stock) where there would then be a negotiation with the buyer.

109. So far as concerns the end of year stock take, it would be necessary to go through what had been paid for the material over the year and make a judgment on the value of what was held.

(c) Contract analysis

110. Mr Lord also had a job costing responsibility, which was closely related to the stock responsibility in so far as it concerned the cost of materials. To this end the job specification of 8 August 2018, identified the elements of "Performance analysis of current, and aged contracts" and "Producing budgets / job costings as required". Mr Lord's own note of duties included:

"Set up system to monitor/analyse cost/valuation reconciliations i.e. profit & loss and provide reports
Analyse contract sums and produce contract budgets
Set up system to monitor/analyse budgets against costs and provide reports"

111. To this end Mr Lord created a spreadsheet listing all job numbers, and setting out the valuation of the job (based on the initial quotation and then variations going forward or omissions or subtractions), the costs broken down by month and with a total, and extrapolating as to the profit and loss for each job [**133-145**]. Mr Townsend contended that this entailed a greater degree of skill than work done by the Claimant because, whilst it entailed inputting figures into a spreadsheet, it involved dragging information from various sources rather than just interrogating the computer. Whilst we accept that this entailed pulling together information from a greater variety of sources, the distinction in this respect is not in our view to be overstated. It was not the case that the Claimant only proceeded by interrogating the computer. She would for example also need to check bank statements and to obtain information for P11Ds from the office files.

112. Mr Townsend explained that Mr Lord would also produce contract budgets, checking the cost against each item in the budget. He would also assist with a cost analysis for pre-contract negotiations. He was in a position to do so from his price checking role and from monitoring invoices from what the company was buying.

(d) Year-end profit and loss analysis and report

113. One of the documents included in the bundle as an illustration of Mr Lord's work was a year-end profit and loss analysis [**90**], to advise the Board so as to enable it to plan for the following year. It was not something which was done from the outset. We accept Mr Townsend's evidence that it started to be done from about two years after Mr Lord started.

114. Mr Lord's list of his responsibilities identified the three key elements for which Mr Lord was responsible by reference to which the adjustment was made to the profit or loss figure shown on the system (together with adding back in dividends and an estimated figure for depreciation). One aspect was the adjustment for the year end stock take. A second element related to insurance. The list of duties included analysing and providing end of year insurance reconciliation reports [**62,91**]. An adjustment to the figure shown in the computer needed to be made to take into account payments for the year that had been made in a different financial year. The third element was work in progress ("**WIP**") and accounts in dispute. This required an assessment of the labour and material costs incurred, and consideration of the value of the work, and how much to allow for the period to the end of the year. Where there was a dispute over the work or payments, it required an assessment to be made as to what should be treated as a bad debt.

(e) Managing insurances

115. Mr Lord was given various responsibilities in relation to insurance, which he took on early in his employment but not from the outset. As set out in his summary of duties, this covered the following in addition to the analysis and provision of end of year insurance reconciliation reports noted above (in the context of the end of year profit and loss analysis for the board):

115.1 "Obtain quotations, analyse & compare and issue instructions for the yearly insurance requirements for the company including combined company insurances and vehicle insurances". To this end he would compare insurance premiums to seek to ensure value for money [**358-360**] and was responsible for taking out the insurance policies and ensuring the premiums were paid on time [**365-375**]. He would also draw up the specification of the insurance required which would be the template used when meeting with the brokers. It was suggested in oral evidence that his surveying experience would be relevant to this in that he would know what would need to be insured. We are not persuaded that was the case to a significant extent. We note that the specification set out at page 359 of the Bundle was stated by reference to broad categories of cover which appear standard other than specifying he level of cover required, identifying one particular issue as to working at height and noting the claims history. We accept though that there was an element of judgment involved in selecting the insurance policy (which Mr Townsend explained did not necessarily involve choosing that with the lowest premium), and of negotiation with the brokers. Mr Townsend's evidence, which we accept, was that the insurance renewal aspect of the role could be quite intensive towards the end of the year, though we note it was a yearly responsibility rather than part of the ongoing responsibilities through the year.

115.2 "Deal with all insurance claims/matters both company and vehicle" Mr Lord was therefore responsible for making any claims under the insurance policies, and dealing with the brokers in relation to this, and he had autonomy in dealing with these matters. [**361-364, 376-380**].

115.3 "Monitor/ obtain subcontractor insurance details". In relation to this he maintained a schedule of insurances held by sub-contractors.

(f) Managing health and safety requirements and compliance

116. Mr Lord also took on a responsibility for health and safety matters. This was not a role he had at the outset. Mr Townsend's best estimate was that Mr Lord had done this for at least 7 or 8, perhaps up to 10 years, and that it would take up on average half a day a week, but working on a health and safety file/construction plan could take up to 2 or 3 weeks.

117. There was both an external element to the health and safety responsibilities, and an internal element with responsibility for health and safety within the company. As noted in Mr Lord's description of his duties, the responsibilities [**62**] included:

117.1 Production of the start of contract constructions plans for submission to the client. This would typically be adapted by Mr Lord

from a template and adding in site specific information. We accept however that these still needed adapting to the appropriate circumstances of each job. It would include detailed information such as the Project Safety Statement (written by Mr Lord but signed by Mr Townsend) and detailed roles of key individuals such as the Project Director, Contracts Manager and Fire Marshal. It would be relevant to draw on his experience as a surveyor, and his knowledge of the sorts of hazards that would be on a construction site and the associated health and safety needs.

117.2 Production of the end of contract health and safety files for submission to the client. Again, this would follow a set template, which he would adapt for the specific site as well as compiling relevant documents for the file received from the suppliers/ contractors.

117.3 Representing the Respondent at various site meetings with the client and client representatives.

117.4 Monitoring/ organising the company health and safety policy. Mr Townsend accepted that the policy was likely to have been written by the Health and Safety consultants retained by the Respondent. However Mr Lord would then go over this in order to finalise it.

117.5 Monitoring/ organising the office safety audits.

117.6 Setting up a system to monitor and organising staff health and safety/ certification and courses.

117.7 Responding to and completing client health and safety questionnaires.

117.8 Providing the submission for, and obtaining, the year SSIP certification, being the safety scheme in procurement.

118. He was also responsible for completing the submission for CHAS (Contractors Health and Safety Assessment Scheme) accreditation which had to be completed every two years and was crucial in order to be able to tender for work in certain sectors and for some organisations. He would write the application and was responsible for ensuring the relevant elements were in place. He was responsible for identifying suitable training and arranging for it to take place, negotiating the price for the training and allocating when the members of staff would attend the training. As part of meeting the requirements, he also became a qualified first aider and fire marshal and obtained an asbestos awareness certification. He also maintained a log of inspections of fire extinguishers, fire bells and the fire action plan and carried out inspections of them.

119. In all we accept that aspects of Mr Lord’s health and safety responsibilities entailed decision making and using professional judgment and working autonomously.

(g) Managing of office utilities contracts (cost analysis/performance/etc)

120. As the role evolved, Mr Lord also took on a responsibility for taking out, managing, and reviewing utilities and office related contracts including analysing their prices to seek to ensure value for money and with an element of discretion as to how to deal with these. One instance involved negotiation

of a new telephone system for the office. Mr Lord's note of his responsibilities including the following in relation to this:

> "Obtain quotations and negotiate office related contracts plus monitor costs/ invoices e.g. bulk diesel, electric, water, telephones, franking, company advertisement, company h&s matters, computer software, vehicle tracking etc"

121. The role therefore had elements akin to being an office manager, looking after the requirements for the building. Mr Townsend's estimate was that this task could take up about a week of Mr Lord's time each year per utility. That did not strike us as being realistic. It appeared to us that this was a much more limited element of Mr Lord's role, which so far as concerned renewal of utility contracts it arose only once a year, although no doubt there may be other aspects of looking after the buildings that would arise on an ad hoc basis during the year.

(h) Website

122. Mr Lord was responsible for monitoring/ updating the Respondent's website. That did not involve producing the website, but entailed a responsibility for providing content ie wording and photographs, with tweaks or updates roughly every six months, which entailed a significant element of discretionary judgment. Again this was not a responsibility he had at the start of his employment with the Respondent as it did not have a website at the time. He took on the responsibility from when the Respondent first had a website, which Mr Townsend estimated was about ten years ago.

(i) Monitoring/ organise vehicle mot/service/tax

123. Mr Lord was also responsible for ensuring that tax and MOTs were maintained on the company vehicles and that they were serviced at the correct time and maintained a record of vehicle drivers. This was fairly routine administrative work that used to be done by the secretary. It was dealt with by Mr Lord as it related to his insurance responsibilities but was a minor element of his role.

(j) Other

124. Other minor elements of the role included straightforward inputting and processing. This included taking over the completion of forms for the Office for National Statistics (which was previously done by the Claimant), and maintaining a schedule of completed jobs, with details of the contractor, site and 1st invoice date.

(k) Overlap

125. There was very limited overlap between the tasks carried out by the Claimant and by Mr Lord. Essentially this was limited to the general elements of covering the office such as ensuring visitors or deliveries were attended to

and answering the phone, and also that they both kept a record of staff holidays. In all this was a very small part of the role.

(6) Hours of work and remuneration of Mr Lord and the Claimant

126. The Claimant initially worked for 3 days a week (Monday, Wednesday and Friday), working a 7 hour day (8.30amto 3.30pm without a lunch break). In or around April 2008, at her request, she stopped working Wednesdays. On reducing the number of hours there was a proportionate reduction in her annual salary. Throughout the period from 1 November 2007 (when Mr Lord's employment commenced) to 31 December 2011, her salary equated to £9.25 an hour, on the basis of dividing the salary by 52 weeks and by the weekly hours – initially 21 hours to 31 March 2008, and then 14 hours. On that basis her salary was £10,101, reducing to £6,734 when her hours reduced.

127. Mr Lord was initially employed for three days a week from 9.30 to 2.30pm ie 5 hours a day on a monthly salary of £975. From 1 January 2009 to 30 January 2010 his hours increased to 6 hours day, and his monthly salary increased to £1,170, equating to £15 per hour. Mr Townsend's evidence was that from July 2010 he worked from 9am to 5pm, being 8 hours a day.

128. No documentation was produced evidencing the alleged change to working 8 hours a day (or indeed the change to 6 hours a day). The Claimant disputed that Mr Lord worked more than a 7 hour day. She was not able to give direct evidence as to this as she did not work on the same days as him. For a period from 15 November 2018 to 6 February 2019 the Claimant kept a record of when Mr Lord left or returned home, as she lived close to him. We regard this as inconclusive. The Claimant accepted in evidence that it took about 15 to 20 minutes for the drive home, rather than 30 minutes as set out in her statement. On that basis, out of 27 days for which there was a record, there were four days on which Mr Lord arrived back at a time consistent with having left on or after 5pm ie arriving on or after 5.15pm. There were 13 days when he arrived back before 5pm (between 4.45pm and 4.56pm) and 10 days when he arrived back between 5pm and 5.14pm. The record also showed that he tended not to leave until or approaching 8.40pm, which was consistent with starting at 9am. In all, this tended to indicate that he generally left before 5pm but did not always do so, and that he was generally at work until at least around 4.30pm. But that could equally be consistent with the Respondent's contention that there was a degree of flexibility in that he might on occasion leave early but that this was made up by additional hours he worked on other occasions. Conversely it would also be consistent with having normal hours of 7 hours a day but in practice regularly working additional time beyond those contractual hours.

129. However in the absence of documentation evidencing the alleged normal hours of 9 to 5pm, other factors call into question whether that was the case. In particular:

129.1 Although the salary increased to £1,365 when his hours increased from 6 hours a day on 1 July 2010, if there was an increase to 8 hours

a day, this equated to a fall in the hourly rate to £13.13. Conversely if there was an increase only to normal hours of 7 hours a day the salary would have been a straightforward pro rata adjustment, involving no change in the hourly rate of pay of £15 per hour.

129.2 In Mr Townsend's oral evidence he sought to explain this on the basis that Mr Lord had been happy to expand his hours on this basis, that they did not talk about payment in terms of hourly rate and that Mr Lord had been happy to increase his salary on this basis. However we consider that it is inherently improbable that Mr Lord would not have identified that there was a drop in the hourly rate, and that the rate would have been reduced without any discussion about this.

129.3 We note the contrast with the previous change in salary when Mr Lord moved from working 5 hours a day to 6 hours a day. There was then a simple pro rata increase in salary at the same hourly rate to reflect the additional hour worked. That in our view makes it all the more improbable that, as Mr Townsend contended, there was simply an agreement to work 8 hours a day without any mention of the reduction in the hourly rate. Rather, the absence of any such discussion calls into question whether there was in fact an increase to normal hours of 9 to 5pm.

129.4 Similarly when the Claimant changed her working hours by only working two rather than 3 days a week, and there was simply a pro rata reduction in her salary based on working 14 hours a week rather than 21 hours a week.

129.5 We were given no explanation as to how the revised salary figure was calculated if it was not based on the previously hourly rate. There was an increase from a monthly salary of £1,170 to £1,365, ie an increase of about 17%, and a decrease in hourly rate on the Respondent's case from £15 to £13.13 but no explanation of how those figures were reached.

130. In those circumstances, if it had been necessary for us to decide the issue, we would not have accepted that there was a change to normal hours entailing an 8 hour day. We would have concluded that it was more probable that the revised salary in 2010 was based on an increase to a 7 hour day, reflecting a pro rata increase at the same rate of pay, albeit that Mr Lord may in practice have tended often to work later than 4pm, as reflected in the Claimant's schedule of the times she saw Mr Lord arriving back home. In the event, as we set out below we have concluded that the Claimant and Mr Lord were not employed on like work. In those circumstances we consider the more appropriate course is to record the factors which seem to us to point against there having been an increase in Mr Lords' normal hours beyond 7 hours a day, but not to make a final determination of that issue which would have the effect of binding the Tribunal if the remedy stage is reached. By then it is possible that there may have been fuller evidence on this issue, and the issue will fall to be determined alongside other remedy issues, including as to the impact of holiday entitlement (see below).

131. If the salary for both Mr Lord and the Claimant was based on a 7 hour day, subject to an issue as to holiday pay which we address below, a comparison between the salary of Mr Lord and the Claimant would require an adjustment to reflect that the Claimant worked two days rather than three. The relevant figures would be as follows:

	C's hourly rate	**C's salary**	**% uplift in C's salary**	**Mr Lord hourly rate**	**Mr Lord's salary**	**% uplift in Mr Lord salary**
1.11.07 - 31.12.10	£9.25	£10,101/ £6,734 (21/14 hrs)		£15	£11,700 £14,040, £16,380	
1.1.11 - 10.1.5	£10.75	£7,826	16%	£15	£16,380	0
11.1.15 – 31.8.17	£11.54	£8,400	7%	£15.82	£17,280	5%
1.9.17 – present	£12.03	£8,760	4%	£16.48	£18,000	4%

132. For both the Claimant and Mr Lord, their terms and conditions provided that they were entitled to 4 weeks' paid annual leave plus bank holidays. The Respondent's contention was that this resulted in the Claimant having proportionally more annual leave due to the incidence of bank holidays and that this was to be taken into account in calculating the rate of pay. They were each entitled to 1.6 weeks leave in addition to the 4 weeks provided for, ie 4.8 days for Mr Lord and 3.2 days for the Claimant.

133. The Claimant's statutory holiday entitlement once she reduced to 2 days a week was to a minimum of 11.2 days. We note that 5 of the 8 bank holidays would fall on a Monday or Friday, and the other three (ie Christmas Day, Boxing Day and New Year's day) would vary. Mr Townsend's evidence was that the Claimant in fact received payment for six bank holidays and time off during the Christmas shut down period and on that basis would receive a total of 16 or 17 days per annum, whereas Mr Lord's entitlement was 18 days. We note that in both cases those figures exceed the amount calculated by adding the bank holidays to the basic four weeks. However the evidence as to the entitlement was not challenged.

Discussion

(1) Like work

134. Standing back, we accept that, broadly, the Claimant's responsibilities entailed inputting, processing and checking information, including submitting returns within deadlines, and was largely focussed around the payroll and purchase and sales ledger responsibilities. At least from the time when Mr Lord was employed it did not involve substantial dealings or negotiation with clients or suppliers (though there was an element of responding to suppliers in relation queries which they raised) or substantial analysis of the figures or scope for discretionary judgment.

135. There was very limited overlap in the tasks carried out by the Claimant and Mr Lord. Essentially this was limited to the general office tasks (which as noted above the Claimant accepted took about 1% of her time) and keeping records for staff holidays. In the event of absences her work was not covered by Mr Lord. However in looking at the frequency with which differences occurred and the nature and extent of differences we have considered not only whether the tasks they carried out were different but the nature, extent and significance of the differences and similarities in relation to what the tasks involved doing.

136. In considering whether Mr Lord and the Claimant were employed on work of a similar nature, we have taken into account that they had the same job title and that there was necessarily a substantial element in Mr Lord's role of inputting and processing information. Nevertheless we accept that from the outset his work was substantially different in nature to that carried out by the Claimant. From the outset Mr Lord's role (in relation to debt collection matters) involved devising systems and analysis of the data and responsibility for troubleshooting issues and improving processes. His work also involved significantly more substantial and complex interaction with clients and relevant parties including professionals such as QSs or the main contractor (although we accept that face to face interaction was relatively infrequent), drawing on his professional experience, and including elements of discussion, negotiation and resolution of disputes and judgment. These were all core elements in Mr Lord's role but not of the Claimant's role.

137. Again, when Mr Lord took on stock control responsibilities, whilst in part this involved inputting data (recording the stock taken in the stock book, adjusting valuations in the computer records and posting materials to the correct job) it also entailed substantial elements of judgment and analysis, and distinct skills, both in relation to the ongoing process of costing up the value of stock going out and the year-end work, which significantly differentiated it from the nature of work done by the Claimant as identified in our findings of fact above.

138. In relation to the job costing/ contract analysis aspects of Mr Lord's role, the element of assisting with cost analysis for pre-contract negotiations and producing contract budgets appears to have involved a degree of analysis and judgment which was different in nature to the Claimant's work. Mr Townsend's contention was that this entailed a high level of skill drawing on his previous experience. However we give less weight to this given the absence of documentation evidencing the nature of the work done by Mr Lord in relation to this. We also take into account that there was a substantial element of inputting and processing data involved in the aspect of monitoring/ analysing budgets against costs (as indicating by the document at pages 133-145 of the bundle).

139. So far as concerned the year end profit and loss analysis for the purposes of advising the directors, and the underlying analysis associated with this in relation to the insurance and WIP position, and the adjustment from the year end stock take, we accept this was different in nature to the running of

reports from Sage for provision to the accountants. Whilst the calculation of the insurance adjustment appears to have been a straightforward process relating to when the premium was paid, we accept that both the element as to the stock position and the assessment of WIP entailed the exercise of judgement and evaluation which was significantly different in nature to the work carried out by the Claimant. We take into account however, in relation to the year-end analysis, that it was something only needing to be done once a year rather than an ongoing task throughout the year.

140. In relation to other duties of Mr Lord, the Respondent argued that a distinction was to be drawn between financial and non-financial responsibilities. We did not find that an easy or necessarily helpful distinction. But again we do consider that there were significant differences in the nature of Mr Lord's responsibilities. The aspect of monitoring or obtaining subcontractor insurance details did entail inputting, processing and checking work that could be regarded as similar in nature to that done by the Claimant. But other elements were such that taken as a whole this aspect of the work was significantly different in nature from the Claimant's work. It included the exercise of judgment in dealing with putting in place the insurance, and a responsibility in relation to making and dealing with claims and dealing with brokers in relation to this which taken together was significantly different in nature to the Claimant's work.

141. Again, we consider that taken as a whole, the responsibility for management of external and internal health and safety requirements was significantly different in nature to the Claimant's work, and included aspects which entailed decision making and using professional judgment, where he was able to drawn on his knowledge and experience, and worked autonomously in doing so. It involved amongst other things producing the start of contract construction plans, representing the Respondent at site meetings with the client and client representatives (though as noted above this was relatively infrequent), monitoring/ organising office safety audits, completing the submission for CHAS accreditation (including becoming a qualified first aider and fire marshal and obtain an asbestos awareness certification), identifying and arranging suitable training for staff, carrying out inspections of fire extinguishers, fire bells and the fire action plan.

142. We also accept that the responsibility for managing office utilities and the website responsibilities entailed an element of discretionary judgment which marked them out as significantly different in nature from the work done by the Claimant.

143. In all we are satisfied that, whether the position is viewed at the outset of the Mr Lord's employment, or looking at the position thereafter, he and the Claimant were not employed on like work. There were some elements of similarity in relation to aspects of the work to the extent that it required careful inputting of and checking and processing information. However, standing back and considering the type of work as whole, and taking into account the significant elements of discretionary judgment/ decision making, negotiation and more complex dealings with clients, and the corresponding additional skills and experience/knowledge involved in or drawn upon for the

work, and considering the nature and extent of the differences and the frequency with which they occurred (having regard to the limited overlap in the tasks and our findings as to those tasks), we do not consider that the work was broadly similar to the Claimant's work. In making that assessment we keep in mind the need to made a broad judgment of the nature of the work, and the skill and knowledge required to do it, and to avoid attaching too much significance to insubstantial differences. If (contrary to our view) the work is to be regarded as broadly similar, the differences between the work were in our view, of practical importance in relation to the terms of their work.

144. We add that we have considered the submission made on behalf of the Claimant that there was insufficient evidence to make a proper assessment of Mr Lord's role, that it was incumbent on the Respondent to provide it and that Mr Lord could have been called as a witness. It would have been preferable to have evidence directly from Mr Lord. However it was available to the Respondent to take the view that Mr Townsend was in a position to give evidence from his knowledge as to Mr Lord's duties. It was also available to the Claimant to call Mr Lord as a witness, seeking a witness summons if necessary. Ultimately, it follows from our findings that the evidence adduced was sufficient to satisfy us on the like work issue, including discharging the evidential burden on the issue as to whether there were differences of practical importance.

(2) Material factor

145. It follows from our finding as to like work that the material factor defence does not arise in respect of that part of the case. As noted above, in paragraph 36 of the Respondent's written closing submissions (provided on the final morning of the hearing) it had originally been submitted that the Tribunal might consider that it would not be appropriate to consider the material factor defence at this stage on the ground that the Tribunal hearing the equal value claim would benefit from hearing from Nigel Townsend and/or Ian Harris as to how the comparator's pay was fixed at the level that it was. In the course of oral submissions, subsequent to the break for Mr Parry to take further instructions, he informed the Tribunal that this submission was not pursued. However having regard to the following matters, the Tribunal considers that it is appropriate to afford the parties an opportunity to make further submissions on the issue of whether the Tribunal should proceed to determine the material factor at this stage on the basis only of the evidence it has heard at the like work hearing, or whether, if the Respondent (or indeed the Claimant) wishes to call further evidence on this issue, there should be an opportunity to do so (and the material factor issue then determined as part of the equal value claim either at the stage 1 equal value hearing or subsequently):

145.1 The Tribunal notes that in the list of issues it was provided that the material factor defence would be determined **<u>if</u>** like work was established. As framed in the list of issues therefore the material factor defence did not fall for determination if, as we have found, like work was not established. It arises only in relation to the equal value claim,

which was stayed pending our determination of the like work claim, either if equal work is established in that claim or if it is taken as a preliminary issue in that claim.

145.2 It may be that is not a determinative factor, given that we have now determined (and rejected) the like work claim and on doing so the next step would be for us to lift the stay on the equal value claim. As noted above both parties specifically agreed on the second morning of the hearing that it would be necessary for the Tribunal to determine the material factor issue irrespective of its decision on the like work issue. However the Tribunal did not hear submissions specifically on the issue of whether the need to lift the stay so as to determine a matter only potentially arising in the equal value claim impacts on whether it would be appropriate for the Respondent to be permitted to call further evidence on the issue of the material factor defence.

145.3 For the purposes of the like work claim it was accepted by the Claimant that her strongest case was based on the position at the outset of employment. It occurs to the Tribunal that this concession might not necessarily apply to the equal value claim. As noted above in ***Walker v Co-operative Group Limited and another*** [2020] EWCA Civ 1075 Males LJ (at paras 54,55) emphasised that the issue of whether there is a material factor is to be determined by reference to the point (if any) at which equal work is established and expressed criticism of the approach of determining the material factor issue but leaving the date at which equal work was established to be determined later. It appeared to the Tribunal that, against the context of evidence that Mr Lord's role evolved over time, this may have some relevance to the question of whether it is appropriate to determine the material factor defence at this stage even in advance of a stage 1 equal value hearing. Again, we bear in mind that this may be answered at least in part on the basis that that the ET Rules (para 3(3), Sch 3), contemplates that the material factor issue can be determined in advances of the equal value question. We are conscious however that we have not heard submissions on the effect, if any, of the Court of Appeal's decision in ***Walker***.

145.4 As noted above, the Tribunal had raised with Mr Parry whether affording an opportunity to call further evidence on this issue would unfairly give the Respondent a second bite of the cherry given that the material factor defence had been identified as an issue to be addressed at this hearing and would always have required a focus on the reasons for the difference in pay at the outset. However given the above points, it appears to the Tribunal that it was not the case that the material factor defence was always a matter to be determined at this hearing. It was only on the second day of the hearing that it was identified and agreed with the parties that he equal value issue arose in any event on this hearing. At that stage it was not identified that this was contrary to the List of Issues, and nor had there been clarification on behalf of the Claimant as to the alternative ways of putting her case at different stages of Mr Lord's employment (though the force of that point would

seem to be reduced by our rejection of the like work case). We keep in mind that it was for the Respondent to provide sufficiently cogent and particularised evidence as to the reason for what Mr Lord was paid and for what the Claimant was paid. But against the context of the way that the issues were framed, it might be said that the concern put to the Respondent as to it being afforded a second bite of the cherry in relation to the evidence it called on this issue might be answered or impacted by the way the List of Issues was framed and also by the fact that the obligation to explain the difference in pay does not strictly arise until equal work is established: see ***Walker***.

145.5 The Tribunal notes that it was only on the final morning of the hearing, and in the revised Schedule of Loss served following the hearing, that the Claimant advanced a case that loss should be assessed on the basis of applying percentage pay increases to her rate of pay, irrespective of the comparator's pay. We address this further below. However it appeared to the Tribunal that this may have some bearing on the question of whether the Respondent should be permitted to consider whether it wished to call further evidence on the material factor defence and whether that issue should therefore be decided at a subsequent stage. That might include evidence bearing on why pay increases were awarded, and whether that was material to explaining the difference in pay. In particular, one issue brought to prominence by the quantification of the Claimant's claim, but not addressed at the hearing, was that the Claimant received a substantial (16%) pay increase from 1 January 2011 at a stage when the comparator did not receive any pay increase. It seemed to the Tribunal that it was appropriate to afford the parties the opportunity to consider whether they wish to make submissions as to the reason for this and whether it impacts on the material factor defence issue and the question of whether it would be appropriate not to decide the material factor issue at this stage only on the basis of the evidence heard, or whether in the light of this either of the parties seek to call further evidence on this issue.

146. Taking these considerations together, we consider that the appropriate course is to afford the parties an opportunity to make further submissions in relation to and arising from the above matters, including as to whether we should proceed to lift the stay and to determine the material factor defence as a preliminary issue in the equal value claim on the basis only of the evidence we heard in the like work hearing. An alternative, if we were persuaded that it was appropriate not to decide the issue at this stage, would be to give directions for any further witness statements on this issue to be served in advance of the Stage 1 Equal Value hearing, with a view to the issue being determined at that hearing if either party makes an application for it to do so (as contemplated by Sch 3 para 3(3) of the ET Rules) and if the Tribunal considers this to be appropriate. We also invite the parties to make further submissions in relation to this.

147. It appears to us that in the first instance, given that the burden of proof is on the Respondent on the material factor issue, it is for the Respondent to say

whether it does wish to call further evidence on that issue in the light of the matters we have set out above, and if so to make submissions as to why it should be permitted to do so, and as to the matters we have set out above. We will therefore make directions for submissions to be provided sequentially, with the Respondent making submissions in the first instance and the Claimant making submissions in response, with provision for a reply by the Respondent. The Tribunal will consider further in the light of those submissions whether to proceed to determine the material factor issue only on the basis of the evidence it has already heard, or whether to give directions relating to this for the Stage 1 equal value hearing or to make some other or further Order.

(3) Remedy issues

148. In the light of our conclusions above it is not necessary for us at this stage to determine the remedy issues. It is however appropriate to make some observations on the disputed approach to the determination of the rate of pay.

149. Our preliminary view is that there may be a flaw in the approach taken by both parties on this issue. Had it been necessary to determine the issue we would have first invited the parties to make further submissions on the points set out below.

150. It is not clear on the evidence that there was any contractual term as to an hourly rate of pay. The only express term was as to the salary. The Equality Act 2010 requires a term by term comparison. In some cases it may be possible to say that it was an implied term that there was an hourly rate of pay. But it is far from clear to us that could be done or be necessarily implied by adding in the number of bank holidays paid – which would vary from year to year. Nor was it obvious that it would include the hours actually worked if, as appears may be the case, Mr Lord would often work more than 7 hours a day but not a full 8 hours.

151. It appears to us that it may be that the difference in hours worked would instead comes in at the stage of considering whether there was a material factor which explained in the difference in pay. Clearly the difference would be explained to the extent that it reflected a difference between working a two day or three day week. To that extent the calculation of an hourly rate would appear to be a reasonable approach which reflects this material factor explaining that part of the difference in pay.

152. Whether any further part of the difference could be explained by a difference in the hours worked per day or by the incidence of bank holidays (justifying a consequent further adjustment in the hourly rate to reflect this) would require evidence as to whether this was in fact the cause of any part of the difference in pay. Whilst the Respondent did not plead this on the basis of a material factor defence, given that it did rely on the difference in hours and difference in holidays, our preliminary view is that the balance of prejudice would be in favour of permitting amendment for the argument to be framed in that way were such an application to be made.

153. We have not heard submissions on the above points. As noted above, had it been necessary to reach a concluded view on them we would have invited further submissions before doing so, both in relation to whether a comparison can be made based on an hourly rate of pay possibly on the basis of an implied term, and as to whether the appropriate analysis is on the basis of a material factor defence and as to how that is to be applied and whether it requires further evidence and/or permission to amend. In the event those are matters that can be considered by the parties and submissions as to how they are to be addressed can be considered at the stage 1 equal value hearing.

154. Equally we do not consider it appropriate to resolve the issue as to whether if an equality clause operated at the outset of employment, the percentage increases in pay the Claimant in fact received should be applied to the modified rate of pay. That issue would appropriately fall to be considered in the light of any findings on the equal value claim, rather than on the hypothetical of equal work being established at the outset of employment. We are conscious also that until the final day of the hearing the Claimant's schedule of loss was instead based on applying the same rate of pay as received by Mr Lord. Indeed it was only after the hearing that we received the Claimant's revised schedule of loss including a calculation on the basis of applying the percentage increases in pay in fact received by the Claimant to pay on the basis of her pay having been modified at the start of Mr Lord's employment. On that basis there was not a close focus in evidence on the particular percentage increases received by the Claimant, including as noted above the substantial pay increase of 16% on 1 January 2011 when it appears Mr Lord received no pay increase. It would not be appropriate to proceed on the basis of the amended case without the Respondent having the opportunity to address in evidence the issue of whether the Claimant would have received the same percentage pay increases and, in the light of the evidence, to hear submissions as to how this may affect any claim for arrears of pay or damages in the event that equal work is established. As noted above, it may be that this also overlaps with the issue we have raised for further submissions in relation to the approach to the material factor defence.

Stage 1 equal value hearing

155. As noted above, both parties were agreed that if the like work claim and material factor defence both failed the equal value claim would proceed and that the next step would be a stage 1 equal value hearing. In the first instance it will be necessary for the Tribunal to consider the position following the further directions we have invited the parties to make relevant to the material factor issue. In the event that either we then decide that it is not appropriate for us to determine the material factor issue at this stage, or if we proceed to determine and then reject the material factor defence, we will give further directions for the stage 1 equal value hearing and the issues to be addressed at that hearing.

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Employment Judge Lewis Watford

JUDGMENT SENT TO THE PARTIES ON 14/10/2020

....

...Jon Marlowe 14/10/2020
FOR THE SECRETARY TO THE TRIBUNALS

<u>Notes</u>

Public access to employment tribunal decisions Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.