

Neutral Citation No: [2021] NICA 44

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Ref: TRE11322

ICOS No: 19/084223

Delivered: 02/07/2021

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPEAL FROM THE DECISION OF  
AN INDUSTRIAL TRIBUNAL

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DEPARTMENT OF JUSTICE

and

TERESA MARIE McGRATH

Appellant/Respondent

Respondent/Claimant

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Before: Treacy LJ, McCloskey LJ and O'Hara J

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Dr T McGleenan QC, Ms J Simpson QC with Mr Sands (instructed by the Departmental  
Solicitors Office) for the Appellant

Mr P Lyttle QC with Ms S Bradley BL (instructed by Worthingtons Solicitors) for the  
Respondent

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**TREACY LJ (Delivering the Judgment of the Court)**

**Introduction**

[1] This case is an appeal by the Department of Justice ("DOJ") from the decision of the Industrial Tribunal dated 25 July 2019 holding that it was in breach of the Equal Pay Act (NI) 1970 as amended ("the 1970 Act") and that Ms McGrath ("the claimant") was entitled to equal pay. At the conclusion of the hearing we announced our unanimous decision dismissing the appeal and that we would issue our written reasons later.

## **Factual Background**

[2] The factual background to the case and the claimant's employment history are set out in detail in the appellant's skeleton argument. We have largely adopted this helpful summary.

## **Pre-Employment History**

[3] Prior to March 2010 the claimant worked for the NI Court Service ("NICtS") as an "agency" employee having previously worked in private practice.

[4] On or about January 2020 an NICtS advertisement sought applications for the permanent positions in either (i) Legal Officer or (ii) Grade 7 posts.

[5] The claimant applied for and received a 'Candidate Information Booklet.' This provided additional information, indicating that:

- (i) The NICtS was "*the Lord Chancellor's Department in Northern Ireland*" and thus a "*separate Civil Service in its own right*";
- (ii) However, after devolution, the NICtS was "*... likely to cease to exist...*";
- (iii) At that point in time, the posts of Legal Officer and Grade 7 employees "*would transfer to the NI Civil Service*" ("NICS");
- (iv) The post of Legal Officer was (then) currently "*analogous to [the post of] Deputy Principal*" ("DP") in the NICS;
- (v) Salary scales (for both posts) would be negotiable "*depending on skills and experience*";
- (vi) If appointed, any successful candidate would be under 12 month's "*probation*";
- (vii) DP legal officer posts were (then) subject to "*fluid grading*" which could mean that a successful candidate "*... may be considered for promotion to Grade 7 (Legal) after one year's satisfactory performance.*"

[6] The Candidate Information Booklet highlighted the skills and abilities which candidates would need to demonstrate, in order to know whether they should apply for a DP or Grade 7 post.

[7] The claimant accepted she did not have the experience to apply for a Grade 7 post and she applied for a post as Legal Officer.

[8] Whilst this process was ongoing, on 12 April 2010, policing and justice functions were formally devolved to the Department of Justice (“DoJ”) under devolution. As a consequence:

- (i) The former functions of the NICTS were now transferred to the DoJ;
- (ii) NICTS employees currently employed by NICTS (and their contracts of employment) now had to be “assimilated” (transferred) into the DoJ;
- (iii) NICTS employees would now become subject to NICS terms and conditions and with the benefit of any existing contract rights including an entitlement to fluid grading (i.e. acquired by virtue of TUPE);
- (iv) However, candidates seeking employment within NICTS, but who had not yet obtained employment, could not be offered fluid grading. They would only be offered employment on NICS terms and conditions. This was the respondent’s position.

[9] On 14 May 2010 the claimant was informed she been included on “*the merit list of applicants deemed suitable for appointment to the post of Legal Officer (DP).*”

This letter, from the Human Resource Unit of the Court Service, was sent to all potential candidates including the claimant. The letter indicated that the previous terms of the offer of employment now had to be amended “*as a consequence of the devolution of policing and justice functions*” i.e. as had been indicated in the Candidate Information Booklet.

[10] The letter “re-offered” employment but on amended terms, namely that:

- (i) The terms and conditions of the post of DP “*have [now] been aligned with the NICS*”;
- (ii) “*This means that anyone appointed to a Legal Officer (DP) post after 12 April will not be subject to fluid grading and not therefore eligible to be considered for promotion to Grade 7...*”

[11] The letter required the claimant to confirm whether she “*... would still like to be considered for appointment to Legal Officer (DP) grade...*” (i.e. under the *new* terms and conditions) *before she could be considered as a candidate*. The claimant confirmed she would be subject to the “new” NICS contract terms and conditions and wished her application to be considered; i.e. she was aware that ‘fluid grading’ would not apply and any promotion would be subject to NICS terms and conditions.

[12] On 1 July 2010 a formal offer of employment was made. The respondent accepted the offer of employment at the grade of DP.

[13] The respondent was now employed on NICS terms and conditions of employment and like all other NICS employees in order to obtain a promotion, the respondent would have to 'openly compete' with others for any available Grade 7 posts under the 'merit principle' enshrined in the NICS terms and conditions.

### **Appointment to a post**

[14] The claimant had not applied for an identified post, only to an unidentified DP post within the NICTS.

[15] On 6 September 2010 the claimant was assigned to work as a DP in the Office of the Official Solicitor ("the OS's office").

[16] At that time the OS's office was entirely staffed by female employees. There were approx. 5-6 female employees, headed by the (then) Official Solicitor, Ms Brenda Donnelly ("Ms Donnelly"). Aside from Ms Donnelly all the staff held Grade 7 posts; consequently, the claimant was the only DP.

### **Working history**

[17] Following her appointment, the claimant's working history was as follows:

- (i) From 6 September 2010 - 3 October 2011 she worked as DP in the OS's office (approx. 1 year, 1 month) and received the salary of a DP. Her probationary period was largely coterminous, running from 6 September 2010 to 5 September 2011;
- (ii) From 3 October 2011 - 30 June 2013 she worked on a "temporary promotion" in a Grade 7 post in the OS's office i.e. covering for absent employee(s). She received an appropriate pay increase whilst working in that "temporary grade" i.e. Grade 7 remuneration, for the period of 1 year 9 months she performed this role;
- (iii) From 30 June 2013 - 7 October 2013 (i.e. approx. 3 months) the claimant resumed her post as a DP, reverting back to remuneration on the DP scale;
- (iv) On 10 July 2013 the respondent issued a 'Grievance' ("the first Grievance") claiming she had been "downgraded" and sought confirmation that she should now be "*included in the cadre of Grade 7 lawyers*";
- (v) The first Grievance was determined on the 2<sup>nd</sup> October 2013. The decision confirmed (a) that the "temporary promotion" "... *had been used to cover the longer term absences of two staff members...*" and (b) that

the respondent "... accepted that there was no policy in place which allowed for a temporary post to be made substantive (i.e. for a temporary promotion to become a permanent arrangement)". The claimant did not appeal the decision;

- (vi) From 7 October 2013 - 13 December 2013 the claimant was placed on another "temporary promotion" again covering for the absence of a Grade 7 colleague (approx. 2.5 months). She received commensurate "Grade 7" pay during this period;
- (vii) From 13 December 2013 - December 2014, the claimant was on maternity leave with her first child. During this period she received DP remuneration;
- (viii) She returned to work during December 2014 continuing to work in the OS's office in her DP post;
- (ix) On 10 March 2015 the claimant (and all employees) were informed of a "... job evaluation (grading) review of all legal posts in the NICS and CSO..." ("JEGS");
- (x) On or about 25 March 2015, Ms Donnelly left the OS's office. Ms Rosalind Johnston was not appointed into Ms Donnelly's post until 8 August 2015. In the intervening period, the claimant outlined that the staff in the OS's office performed whatever work had to be done "*without distinction*" (in grades);
- (xi) During September 2015 the claimant went off on a second period of maternity leave. She continued to be paid as a DP;
- (xii) The claimant completed her JEGS assessment form which was "co-signed" by Ms Johnson. She was also interviewed, as part of the JEGS evaluation process, during December 2015;
- (xiii) The claimant did not return to work until 12 September 2016. She resumed work as a DP.

[18] On the basis of the JEGS assessment, the claimant's post in the OS's office was regraded upwards from a DP to a "Grade 7" post. Of the 102 DP posts assessed, only 1 other was re-graded 'upwards'; some posts were downgraded.

[19] Any employee deemed to have been working in a post which was 'upgraded' was informed of their entitlement to receive a salary commensurate with the new JEGS assessment: however, the 'back-pay' was only to commence from 1 June 2016, in accordance with the terms of the JEGS review. This date applied irrespective of sex, gender, age, etc.

[20] The claimant took issue with the date of 1 June 2016 on the basis that she had *“been in this post since 6.9.2010.”* E-mails were exchanged between the claimant and Human Resources (Ms Ardis and Ms McAllister). The claimant lodged a second Grievance (*“the second Grievance”*).

[21] As part of the second Grievance, and part of her claim to the Tribunal, the respondent asserted that:

- (i) She had always been performing Grade 7 work - including those periods of time when she had been placed on ‘temporary promotions’; and
- (ii) Following the JEGS review - although she was receiving the same pay as a Grade 7 - she could be ‘demoted’ to a DP at any time. Therefore, her contract of employment *“had not been modified to place me in the same position as my Grade 7 comparators”* and she sought *“promotion.”*

### **History of Proceedings**

[22] The claimant served a statutory questionnaire on the Department of Justice and the Department of Finance (*“DoF”*), pursuant to the Equal Pay (Questions and Replies) Order (NI) 2004 and Section 6B(2)(a) of the 1970 Act, dated 16 June 2017. The claimant did not receive a reply to the questionnaire from either of the Departments.

[23] The claimant issued tribunal proceedings on 5 October 2017. The respondents issued a response to the claimant’s claim form on 21 November 2017.

[24] The eight day hearing took place between 30 April and 10 May 2018. The tribunal heard oral evidence on behalf of the claimant from the claimant and Ms Brenda Donnelly, the claimant’s former line manager during the period September 2010 to March 2015. On behalf of the respondents, the tribunal heard oral evidence from Ms Amanda Allaway, a staff officer based within the Human Resources department of the Northern Ireland Civil Service.

[25] The tribunal issued its unanimous decision on 25 July 2019.

### **Tribunal decision**

[26] The claimant was not directly discriminated against on the grounds of sex, pursuant to the Sex Discrimination (Northern Ireland) Order 1976 and the claim was dismissed.

[27] The tribunal found that the claimant had been engaged by the DOJ in like work with her comparators from 7 October 2011, pursuant to section 1(2)(a) and 1(5) of the 1970 Act.

[28] The DOJ had not proved that the variation between the claimant's contract and those of her comparators was genuinely due to a material factor which was not the difference of sex under section 1(3)(a) of the 1970 Act.

[29] The DOJ was, therefore, in breach of the 1970 Act and the claimant was entitled to equal pay.

### **The tribunal's key findings**

[30] Having accurately set out in detail the relevant legislation, case-law and applicable principles, the tribunal made a series of findings of fact and conclusions, which we have summarised below with references to the relevant paragraph numbers in the tribunal's decision.

[31] The claimant did not receive a reply to the statutory questionnaire, dated 16 June 2017, from either the DOJ or the DoF [3.1].

[32] The response form from the respondents, dated 21 November 2017, was in essence a denial with limited detail, which did not address the issue of the failure of the respondents to reply to the statutory questionnaire [3.1].

[33] The statutory questionnaire raised specific relevant questions in relation to the claimant's claim of equal pay, which remained unanswered by the respondents [3.1].

[34] The claimant's claim form, dated 5 October 2017, echoed the contents of the statutory questionnaire. Despite the detailed nature of the claimant's claim form relating to equal pay, the respondents did not deal with this claim in any meaningful way [3.2].

[35] The respondents did not expressly address the issue of like work and/or work rated as equivalent or any defence of "genuine material factor" [3.2].

[36] It was apparent from relevant email correspondence dated 10-14 May 2010 that there were discussions amongst the senior management of the NICtS about the removal of "fluid grading" following the devolution of justice and the implications of this factor on the legal officer and Grade 7 legal recruitment exercise, which had begun before devolution [3.7.2].

[37] The tribunal was satisfied that at the time of the claimant's appointment as legal officer (DP level) in May 2010, senior management recognised that there were clear risks of equal pay claims following the removal of fluid grading [3.7.2].

[38] The tribunal was also satisfied that senior management realised that to avoid such risks it would be necessary to manage the line management of DPs and the distribution of work for such persons [3.7.2].

[39] The tribunal concluded that the fact that the authors of the emails - Ms Durkin, Ms McAlpine and Ms Fee - were not called as witnesses by the DOJ was because their evidence would not have helped it [3.7.2].

[40] The relevant respondent for the purpose of the claimant's claim was the Department of Justice, being the claimant's employer at the relevant time for the purposes of the 1970 Act and/or the Sex Discrimination (Northern Ireland) Order 1976 [3.8.1].

[41] The tribunal was satisfied that the offer of temporary promotion to the claimant at the end of her probationary period in October 2011 recognised that the claimant was able to carry out the work of a Grade 7 legal officer [3.10].

[42] Following a Job Evaluation and Grading Support [JEGS] review, the claimant was informed on 28 November 2016 that her existing grade of DP had been evaluated and upgraded to Grade 7, with a total point score of 632. As a result, the claimant was temporarily promoted to Grade 7 from 1 June 2016 (the effective date of the grading results) and received the salary for a Grade 7. The tribunal accepts that the date of 1 June 2016 was applied to any employee affected by the JEGS assessment, irrespective of sex [3.14].

[43] For the purposes of the claimant's claim of equal pay, the claimant's male comparators were MK and NMCS. In the JEGS review, MK obtained a score of 626 and NMCS obtained a score of 631. The tribunal was satisfied that their work was the same or broadly similar to that of the claimant and was so from in or about 2014, the date of the period to which the job descriptions related. There was no relevant evidence before the tribunal to challenge the claimant's evidence that when she was doing Grade 7 work in the Office of the Official Solicitor that it was the same or broadly similar to the work carried out by her comparators [3.16].

[44] The tribunal noted that no witnesses were called by the DOJ to challenge the claimant's evidence that the type of work she was doing from the end of her probationary period in October 2011, even when not temporarily promoted, was Grade 7 work, which was the same or broadly similar to that of her comparators. The tribunal concluded that the reason why neither the claimant's Grade 7 colleagues nor her new line manager were called by the DOJ was because their evidence would not have supported it's case. Such evidence, however, would have confirmed the claimant's case on this issue [3.18.1].

[45] Brenda Donnelly, the former Official Solicitor, was called to give evidence by the claimant about performance appraisal documents, which had been completed by



the claimant and Ms Donnelly during the period Ms Donnelly was the claimant's line manager. The tribunal emphasised it would be a matter for the tribunal to assess Ms Donnelly's evidence when determining its decision [3.18.2]

[46] In summary, Ms Donnelly's evidence was that while it was not intended that work at Grade 7 level should be given to an employee at DP level, the reality was that the claimant carried out Grade 7 legal work at all material times, even when employed at DP level outside the periods of temporary promotion to Grade 7 legal. This situation was known to senior management including Ms McAlpine, a Grade 5 in the Office of the Lord Chief Justice and, effectively, Ms Donnelly's line manager. Ms McAlpine, in May 2010, had raised concerns about equal pay issues [3.21].

[47] Ms Donnelly's evidence had to be very carefully considered by the tribunal. This was because entries in the claimant's performance reviews completed by Ms Donnelly and conversations Ms Donnelly had with the claimant suggested that her evidence might not be accurate and truthful. Ms Donnelly acknowledged that what was written in the performance reviews and what she had said in conversations with the claimant were inaccurate. However, she explained the discrepancies by insisting that she was maintaining the official line (i.e. that the claimant was only doing DP level work) and was "lying to keep myself right", despite the reality on the ground that the claimant was doing Grade 7 legal work, even though she was at the lower DP level. Ms Donnelly insisted that Ms McAlpine, her line manager, was fully aware of the situation [3.22]. The DOJ called no oral evidence to rebut that of Ms Donnelly.

[48] Having carefully considered Ms Donnelly's evidence and the relevant case-law, the tribunal concluded that Ms Donnelly's oral evidence to the tribunal should be accepted. The tribunal concluded that the claimant was doing Grade 7 legal work, even when employed at DP level and not just when temporarily promoted to Grade 7 legal [3.23].

[49] The tribunal was not persuaded that the claimant had shown that the failure to promote her in or about 2016 was on the grounds of her sex and the claim for direct sex discrimination was dismissed (this claim involved a male comparator, AM, who was permanently promoted to Grade 7 legal in 2006) [3.24].

[50] The tribunal was satisfied, in light of the foregoing, that the claimant had proved in accordance with section 1(5) of the 1970 Act that her work and the work of her comparators was the same or broadly of a similar nature from the end of her probationary period, around 6 October 2011, to the date of her claim, 5 October 2017 [3.25].

[51] The claimant made a grievance on 10 July 2014 relating to promotion and selection, which was unsuccessful and not the subject of an appeal. The basis of the grievance was not the issue of equal pay. However, the tribunal found it significant

that the claimant, at the time of the first grievance, was referring to matters relevant to issues of equal pay in relation to her work in the Official Solicitor's Office [3.26].

[52] The claimant raised her second grievance on 20 January 2017. The basis of the grievance was equal pay and pay on promotion. For reasons that were not properly or satisfactorily explained by Ms Allaway, it was decided by senior management to deal with the grievance under the "Dignity at Work" policy rather than under the grievance procedure. The tribunal found that by using the Dignity at Work policy and not the grievance procedure, the DOJ failed to properly address the principal issues relating to a complaint of equal pay. Further, it wrongly concentrated on issues of sex discrimination, which were not relevant. At the time of the tribunal's decision, the second grievance had not been resolved [3.27-3.28].

[53] The tribunal found much of Ms Allaway's evidence irrelevant in relation to the claimant in respect of "like work" and "work rated as equivalent." Further, the tribunal noted that in her witness statement, Ms Allaway, the DOJ's only witness, did not address the issue of "like work" and "work rated as equivalent" nor did she address the defence of "genuine material factor" [3.28].

[54] The tribunal found that the DOJ's reliance on the promotion/selection policy/procedure for a promotion to Grade 7 legal did not provide a defence of genuine material factor in the circumstances of the claimant, who established that she had been doing like work with the work of her comparators and was not receiving the same pay or benefits. The reliance upon what would happen in the event of a hypothetical substantive vacancy at Grade 7 legal did not establish the defence of genuine material factor. The tribunal was not satisfied that the DOJ had proved that the variation between the claimant's contract and those of her comparators was genuinely due to a material factor which was not the difference of sex [3.31].

### **Grounds of Appeal**

[55] The DOJ's grounds of appeal are, in summary:

- (i) The tribunal erred in law in failing to distinguish between the claimant's circumstances during four separate time periods.
- (ii) By failing to distinguish between these different time periods, the tribunal erred in law in deciding that the claimant had been doing like work to the work of her comparators.
- (iii) The tribunal erred in law in failing to distinguish between the NICS policy on temporary promotion (for temporary posts) and the NICS policy on open recruitment and selection (for permanent posts).

- (iv) The tribunal erred in law in failing to recognise that the NICS policy on temporary promotion constituted a genuine material factor, which was not related to sex, and which explained the variation in contracts between the claimant and the comparators.
- (v) The tribunal erred in law by finding that the claimant had been doing like work from around 7 October 2011.
- (vi) The tribunal erred in law in failing to recognise that the evidence of the claimant's line manager constituted a genuine material factor, not related to sex, which explained the variation between the claimant's contract and those of her comparators.
- (vii) The tribunal erred in law in finding that there was no substantive vacancy to which the NICS policy on open recruitment and selection applied.
- (viii) The tribunal erred in law by finding that there was "no such relevant recruitment selection exercise" and that the policy related to a "hypothetical exercise for promotion to a substantive Grade 7 legal post."
- (ix) The tribunal erred in law by misconstruing the NICS policy as having "no application or relevance to the claimant's circumstances and her claim for equal pay" when the policy provided for a recruitment exercise to fill the post occupied by the claimant.

[56] Notwithstanding the terms of the Notice of Appeal the appellant expressly disavowed in its skeleton argument any challenge to the findings of fact made by the tribunal. Rather, it submitted that the conclusions based on those facts amounted to an error of law in the application of the provisions of the Equal Pay Act.

### **The appellant's arguments**

[57] The appellant summarised its main points as follows:

- (i) Firstly, if the claimant was allocated 'Grade 7' work this only occurred as a result of the actions of Ms Donnelly. The findings of fact demonstrate that Ms Donnelly did so for 'reasons of her own', whilst deliberately misrepresenting the situation to Line Management.
- (ii) However, Ms Donnelly's evidence clearly indicated that the reason for the allocation of work at the higher grade to the claimant was not due to her sex. Ms Donnelly was a female allocating work to a female. At no time was it suggested that in so doing she was discriminating against the claimant on the ground that she was a woman. As sex

discrimination is a critical ingredient in any equal pay claim, if there was no evidence of sex discrimination the claim ought to have failed.

- (iii) Having made the findings as to why Ms Donnelly acted as she did, the tribunal ought to have considered whether Ms Donnelly's actions were a 'genuine material factor' explaining the difference in pay and amounting to a complete defence to the Equal Pay claim.
- (iv) Secondly, whilst the claimant was on 'temporary promotion' there is no doubt that she was performing Grade 7 work: however, this is because she was 'doing the work' of her absent colleagues – who were all Grade 7. During these periods she was paid as a grade 7 and there was no pay disparity. Therefore, the tribunal should have discounted and distinguished between those periods of time in its judgment.
- (v) Thirdly, following the JEGS assessment, the claimant continued to work in the OS's office on 'temporary promotion'. In due course, the claimant would be able to apply for that post or any other Grade 7 post in the NICS in competition with other employees within the NICS. The success of her application for promotion would stand or fall on its own merits. This is what occurred; the claimant applied for the post and was successful and remains in that post.
- (vi) The policy on 'open competition' for promotions is a common term and condition applicable to all NICS employees irrespective of sex, religion etc. Therefore, the judgment of the tribunal – by effectively giving the claimant promotion 'in post' – has given her better NICS terms and conditions than those of her colleagues – not equal terms.

### *The evidence of sex discrimination*

[58] The appellant submits that the conclusions reached by the tribunal on the basis of its findings of fact amounted to an error of law in the application of the provisions of the Equal Pay Act (Northern Ireland) 1970. The main thrust of the appellant's argument is that having identified the explanation for the pay disparity which was non-discriminatory on the ground of sex (i.e. the claimant's manager was allocating the claimant work above her pay-level), the tribunal wrongly concluded that a "genuine material factor" defence had not been established and accordingly that the claim under the 1970 Act should succeed. In short, having established that there was a genuine non-discriminatory reason for the disparity in pay, regardless of whether it was fair or unfair, the tribunal as a matter of law ought to have dismissed the equal pay claim.

[59] Relying on the cases of *Strathclyde RC v Wallace* [1998] 1 WLR 259 and *Glasgow City Council v Marshall* [2000] 1 WLR 333, the appellant submits that the fundamental requirement in any equal pay claim is to find a disparity in pay which is

gender-related. In the present case, the appellant submits that having accepted Ms Donnelly's evidence, the tribunal should have then considered whether or not her explanation for the disparity in pay gave rise to any "suggestion of sex discrimination." This, the appellant argues, is a critical element of the statutory framework and the tribunal fell into legal error in failing to consider this issue.

[60] The appellant argues that the tribunal compounded this legal error by failing to give any, or any proper, consideration to the "genuine material factor" defence. Having concluded that Ms Donnelly's oral evidence was the correct version of events, the tribunal had a duty to consider whether that "new" evidence gave rise to a "genuine material factor" defence. The tribunal, the appellant claims, failed to consider the genuine material factor defence despite the fact that it had acknowledged that the genuine material factor defence was pleaded and was part of the overall defence to the claim. This, the appellant submits, is an error of law.

### *Distinguishing between the periods of employment*

[61] The appellant also contends that the tribunal should have distinguished between the periods when the claimant was on temporary promotion to Grade 7 and the periods when she was not. The appellant asserts that during her periods of temporary promotion, the claimant was "rewarded commensurately."

[62] The court observes in passing that contrary to the appellant's express disavowal of challenging the tribunal's findings of fact this line of argument appears to be an appeal against the tribunal's findings of fact rather than an appeal against an error of law. Furthermore, it fails to acknowledge that (i) the tribunal found that even when the claimant was not temporarily promoted she was actually doing Grade 7 work and (ii) while on temporary promotion, the claimant did not receive the same benefits as those who held permanent Grade 7 positions (tribunal decision [3.23] and [3.11]).

### *The backdating of 'JEGS' and the further period of temporary promotion*

[63] The appellant argues that the judgment of the tribunal effectively gave the claimant a promotion "in post" rather than the claimant having to apply for a permanent position through an open competition. The appellant submits that there was no justification for "promoting" the claimant into the Grade 7 post in the Official Solicitor's Office from the date of the JEGS review or thereafter. In doing so, the appellant asserts, the tribunal gave the claimant *better* NICS terms and conditions than those of her colleagues, not *equal* terms, because the tribunal's decision by-passed the open competition process.

[64] The appellant also submitted that decisions relating to the claimant's post should have taken place at a remedies hearing, where the tribunal could have examined the standard terms and conditions of employment in the NICS Handbook, including those relating to temporary promotion.

[65] Whilst the appellant emphasises that it is **not** disputing the findings of fact made by the tribunal it asserts that the tribunal's findings provide sufficient evidence to explain the difference in pay between the claimant and her male comparators. The tribunal concluded that there was no evidence of direct sex discrimination in the case. The appellant submits that in such circumstances, where the material factor explaining the difference in pay between a claimant and her comparators bore no taint of sex discrimination, there were no grounds for modifying the claimant's contract and it was not open to the tribunal to uphold the equal pay claim.

### **Claimant's Arguments**

[66] The three central arguments of the claimant are:

- (i) the appellant has erred in conflating the equal pay claim and the sex discrimination claim;
- (ii) the appellant repeatedly failed to raise a genuine material factor defence; and
- (iii) the appellant's suggestion that the tribunal ought to have considered whether or not Ms Donnelly's actions were a genuine material factor defence when this was not raised by the appellant is unsustainable.

#### *The claim of direct sex discrimination*

[67] The claimant emphasises that the direct sex discrimination case was a "stand alone", separate and secondary claim and that the tribunal's decision to dismiss it had no bearing on the equal pay claim, which is governed by the 1970 Act. The claimant argues that the appellant erroneously conflated the claims of sex discrimination and equal pay, an error which is "starkly set out in the appellant's conclusion at paragraph 81"

#### *The genuine material factor defence*

[68] The claimant argues that the tribunal's finding that the claimant was performing Grade 7 work from October 2011 raised the rebuttable presumption of sex discrimination. The claimant asserts that the appellant had every opportunity to rebut this presumption by raising a genuine material factor defence before the tribunal, however, it repeatedly failed to do so. The claimant argues that the appellant's suggestion that the tribunal "ought to have considered whether Ms Donnelly's actions were a genuine material factor" when this was not raised as a genuine material factor by the appellant is unsustainable.

[69] The claimant states that the onus is on the appellant to raise the defence of a genuine material factor untainted by sex. The claimant argues, however, that while the appellant maintains that it did raise and establish a genuine material factor, the findings of the tribunal at [3.1]-[3.3.1], [3.28] & [3.30] contradict this assertion.

[70] The claimant argues that the appellant has repeatedly sought to put the onus on the tribunal to raise and consider the genuine material factor defence. However, the claimant submits that the tribunal considered the issue of the genuine material factor defence in detail and concluded that it was neither raised in the pleadings nor in the evidence of the appellant's only witness, Ms Allaway.

[71] In reliance upon extracts from Harvey on Employment Law and relevant case-law including *Fearnon and Others v Smurfitt Corrugated Cases Lurgan Limited* [2008] NICA 45, the claimant reiterates the point that the onus of establishing a genuine material factor defence rests on the employer. The claimant argues that the appellant simply did not raise a genuine material factor defence in the pleadings or in evidence, a fact which was reflected in the findings of the tribunal at [3.1], [3.2], [3.3.1] and [3.30]. The claimant argues that it is unsustainable for the appellant to suggest that it did in fact raise the genuine material factor defence or that the tribunal should have considered such a defence when the appellant did not raise or adduce evidence of a genuine material factor defence at the tribunal.

#### *Distinguishing between the periods of employment*

[72] The claimant submits that the point raised by the appellant, that the tribunal should have distinguished between different periods of the claimant's employment, is a matter for argument at a remedies hearing. The claimant also notes that the evidence adduced that she was doing Grade 7 work once her probation period ended was unchallenged by the appellant.

#### *The 'JEGS' outcome and the further period of temporary promotion*

[73] The claimant submits that the appellant's argument, that the tribunal should not have "promoted" the claimant "in post", demonstrate a fundamental misunderstanding of the JEGS exercise in the context of an equal pay claim. Within such a context, the JEGS review serves as a tool to establish the grade of work being undertaken by the employee. In the present case, the claimant used the JEGS outcome to support her evidence that she was doing "like work" since October 2011. This evidence was not contested by any witnesses called by the appellant. Accordingly, the claimant was entitled to an equality clause giving her the same pay and benefits as her male comparators.

[74] The main thrust of the claimant's argument is that the appellant repeatedly failed to raise a genuine material factor defence and the suggestion that the tribunal ought to have considered whether Ms Donnelly's actions were a genuine material factor defence, when this was not raised by the appellant, is unsustainable. In

accordance with the 1970 Act, the claimant established that she was doing like work with her male comparators. This raised the rebuttable presumption of sex discrimination and the entitlement to an equality clause in the claimant's contract, subject to a genuine material factor defence. The appellant failed to raise or adduce evidence of a genuine material factor defence. It was open to the appellant to call evidence from senior civil servants to address the issues of equal pay and genuine material factor. The appellant did not do so. In conclusion, the claimant submits that the tribunal dealt with all the relevant factual and legal issues properly and comprehensively and its decision should be affirmed.

## **Discussion**

### *The role of the Court of Appeal*

[75] The role of the Court of Appeal as the appellate tribunal for the Employment Tribunal has been the subject of detailed judicial consideration. The role was summarised by Coghlin LJ in the case of *Miskelly v The Restaurant Group* [2013] NICA 15 as follows:

"[24] The tribunal constituted the appropriate industrial court instituted for the purpose of resolving relevant employment issues and this court is confined to considering questions of law arising from the tribunal decision. The tribunal has the advantage of seeing and hearing the witnesses at first instance and it is fundamental to understanding the function of this court to appreciate that it does not conduct a general rehearing. Article 22 of the 1996 Order provides that a party to proceedings before an industrial tribunal who is dissatisfied in point of law (our emphasis) with a decision may appeal to this court. We remind ourselves of the observations of Girvan LJ in Carlson Wagonlit Travel Ltd v Robert Connor [2007] NICA 55 when he said at paragraph [25]:

"In this case the decision of the Tribunal must stand unless the Tribunal made an error of law in reaching its conclusions; based its conclusions on material findings of fact which were unsupported by the evidence or contrary to the evidence; or the decision was perverse in the sense that no reasonable Tribunal properly directing itself could have reached such a decision."



[76] The present appeal gives rise to a number of related issues. First, is it open to the appellant to raise a defence of genuine material factor (i.e. the claimant's manager was allocating work above her pay-level) which did not form part of its pleaded case. Secondly, if it is, can the actions of Ms Donnelly be regarded as a genuine material factor defence.

### *Raising new points on appeal*

[77] In *Notting Hill Finance Ltd v Nadeem Sheikh* EWCA Civ [2019] 1377 the Court of Appeal stated that an appellate court has a general discretion whether or not to allow new points to be taken on appeal. Having reviewed the key authorities, the court said at [25]-[26]:

"25. The principles were also recently restated by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [15]-[18]:

'15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.

16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).

18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24 at [29]).'

26. These authorities show that there is no general rule that a case needs to be “exceptional” before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.”

[78] Ms Donnelly’s actions were never pleaded as a genuine material factor defence and there was no attempt to make an application for permission to amend the pleadings before the tribunal. Moreover, during the tribunal hearing, the appellant’s representative “strongly challenged by way of cross-examination the evidence given by Ms Donnelly” (Tribunal decision 3.18.2).

[79] Notwithstanding the strong challenge by the appellant to her evidence in cross-examination the appellant now, audaciously, seeks to rely on this evidence to establish a genuine material factor defence on which to dismiss the claimant’s equal pay claim, which had never been pleaded in the first case. Ms Donnelly’s evidence was adduced by the claimant primarily to prove that she was doing “like work” with her comparators. Critically, the appellant now wishes to use this evidence as a basis for a genuine material factor defence. However, Ms Donnelly’s evidence was not adduced, tested or considered before the tribunal *as a genuine material factor defence*.

[80] There is force in the contention that the nature of the tribunal proceedings, the nature of the point, and the difficulties that would arise in permitting it to be raised point towards it being an unfair and unsatisfactory manner of proceeding in this case.

[81] In the statement of issues it was agreed an issue to be determined by the tribunal related to the defence of a ‘genuine material factor’ and in replies by the appellant to the claimant’s notice of additional information reference was made to appellant’s defence of genuine material factor. In the circumstances the tribunal was satisfied that this was an issue to be determined by the tribunal “and, in particular, whether the [appellant] established, on the evidence, such a defence as is set out in the paragraph 9 of the said replies” that is that “the difference in pay is due to a difference in grades.” The genuine material factor that is now relied on is that the claimant’s manager, unknown to senior management, was allocating the claimant work above her pay level.

[82] Having carefully examined her evidence the tribunal concluded that her evidence to the tribunal should be accepted. Ms Donnelly confirmed the claimant's evidence that at all material times she was performing Grade 7 work, following the conclusion of her probationary period, whether she was working formally as a legal officer (DP) or on temporary promotion to Grade 7 "and this was known to senior management..." who were not called to refute her evidence. Ms Donnelly "insisted that she was between 'a rock and a hard place', since she was officially required not to give the claimant Grade 7 work but she had the OS Office to run, most if not all of which work, for practical purposes, was Grade 7 work; and, as a consequence, she was being squeezed in all directions. She insisted that "the dogs in the street" knew the position on the ground but those, in relevant line management, were prepared to maintain officially, what was known to be a fiction, that the claimant was only doing DP work when not temporarily promoted...."

[83] The appellant's suggestion that the tribunal "ought to have considered whether Ms Donnelly's actions were a genuine material factor" when this was not pleaded by the appellant and there was no application to the tribunal for leave to so amend the pleadings is unattractive.

[84] Having regard to the applicable principles earlier set out we do not consider that it would be just to permit the new point in the circumstances of this case, including the failure of the appellant to plead any genuine material factor in the IT3, to reply to the statutory questionnaire, amend its pleadings or call any evidence in respect of such any genuine material factor defence. In any event, for the reasons that follow, we consider that the conclusion of the tribunal that no genuine material factor had been established is unassailable.

### **Genuine Material Factor Defence**

[85] The tribunal adopted the following formulation of the criteria for a genuine material factor defence which we are content to accept as an accurate statement of the applicable principles, in light of the constant jurisprudence to similar effect:

"Once a difference in terms is identified, a rebuttable presumption passes to the employer who must then explain the reason (the material factor) for the difference between the claimant and her comparator. It does not matter whether the explanation is a good one or whether the Employment Tribunal agrees with it. What does matter is that it is a non-discriminatory reason for the difference; in other words that it is nothing to do, directly or indirectly, with sex. In addition, the employer must show:

- (i) that this was the real reason for the difference and is not a sham or pretence, ... the reason still has to

be a genuine one;

- (ii) that the reason was causative of the difference between the comparator's term and the term in the claimant's contract;
- (iii) that there is a significant and relevant difference between the woman's case and the man's case;
- (iv) the difference is not a difference of sex."

[86] Bearing in mind that the appellant does not challenge the factual findings of the tribunal including its finding that the applicant was doing 'like work' with the work of her comparators the rebuttable presumption of sex discrimination arises and the onus is on the appellant to plead and establish a genuine material factor. The appellants assertion that it did raise and establish a genuine material factor is contradicted by the findings of the tribunal at [3.1]-[3.3.1], [3.28] & [3.30]. It is clear that the tribunal did consider whether a genuine material factor defence had been raised and explicitly reviewed in detail whether the appellant had raised a genuine material factor defence in the pleadings and in the evidence of Ms Allaway. The tribunal concluded that it was not raised in the pleadings nor in the evidence of their only witness. A genuine material factor defence was identified as an issue in the agreed statement of legal issues. Notwithstanding this the appellant did not raise a genuine material factor in the pleadings nor in the evidence presented to the tribunal. The DOJ did not reply to the statutory questionnaire and the specific questions as to whether the appellant was relying on such a defence and if so to provide full details. There was no satisfactory or proper explanation from the appellant for this failure. The appellant did not plead a genuine material factor in para 6.2 of its IT3 and at no time sought to amend its response. Excerpts from the appellant's response to the claimants notice for additional information are set out at para 3.3.1 of the tribunal's decision relating to the existence of a genuine material factor. In the only witness statement provided by the appellant, Ms Allaway, a genuine material factor defence is *not* raised and the tribunal found that her evidence was not relevant in proving the genuine material factor defence. The first three points in the appellant's summary noted at para [57] above focus on the reasons given by the former Official Solicitor, Ms Donnelly, that the claimant was doing Grade 7 work from 2011. However, as Mr Lyttle pointed out the material finding of the tribunal is that the claimant was doing Grade 7 work from October 2011 which raised the rebuttable presumption of sex discrimination. The appellant had every opportunity to plead a genuine material factor defence, file witness statements in support of such a defence and call evidence for consideration of the tribunal. It conspicuously failed to do so and there is simply no explanation for this failure or refusal.

[87] Since the claimant, satisfied the tribunal that she is employed on like work the equality clause will operate in her favour unless the employer can demonstrate the

variation in contract terms is due to a genuine material factor other than sex. The tribunal was satisfied that the rebuttable presumption of sex discrimination had arisen as the claimant had established the gender-based comparison showing she was doing like work to that of her male comparators NMcS and MK, and was being paid or treated, less favourably than those comparators. The variation between her contract and the males' contract was therefore presumed to be the difference of sex.

[88] The tribunal's finding that the claimant was performing Grade 7 work from October 2011 raised the rebuttable presumption of sex discrimination and the onus of establishing a genuine material factor defence rests on the employer - see *Fearnon & Ors v Smurfitt Corrugated Cases Lurgan Limited* [2008] NICA 45. In accordance with the 1970 Act, the claimant established that she was doing like work with her male comparators. This raised the rebuttable presumption of sex discrimination and the entitlement to an equality clause in the claimant's contract, subject to a genuine material factor defence. The DOJ failed to address properly or at all the issue of genuine material factor and adduced no evidence of a genuine material factor defence. It was open to it to call evidence from senior civil servants to address the issues of equal pay and genuine material factor but they chose not to do so.

[89] In the section of its decision entitled "findings of fact and conclusions of the Tribunal on Liability" the tribunal noted that the claimant had served a statutory questionnaire on the appellant dated 16 June 2017. The tribunal stated that "*significantly, in the tribunal's judgment, this questionnaire has not been replied to by [the appellant].*" The claimant issued her tribunal proceedings on 5 October 2017 raising, inter alia, the failure to reply to the questionnaire. The tribunal noted that the appellant in its response to the claim form, dated 21 November 2017, "which was, in essence, a denial but with limited detail, did not address, surprisingly in this context, the issue of the failure to reply to the statutory questionnaire." Despite the recognition of the importance of the questionnaire and the potential consequences of not responding to it, the tribunal concluded that the appellant had provided "...no satisfactory or proper explanation for the failure to reply...." As the tribunal noted at para 3.1 of its decision the questionnaire raised relevant questions in connection with the claimant's claim for equal pay. The tribunal noted that "*specific questions were raised, and remained unanswered, relating to the important issues of 'genuine material defence.'*" These included the questions:

*"if you are relying on a genuine material defence for the decision not to substantively upgrade [the claimant] to a permanent Grade 7 post, please provide the genuine material factor relied upon?" and "provide full details of any genuine material factor defence or other reason relied upon for the decision to limit back pay to 1.6.16 as opposed to 6.09.10 (sic)."*

[90] The claimant's claim form, dated 5 October 2017, echoed the contents of the statutory questionnaire and specifically referenced the failure to reply and the power of the tribunal under Section 6B of the EPA (NI) 1970 to draw any such inference as

is just and proper from a failure without reason or excuse to reply or from an evasive or equivocal reply. The tribunal found that despite the detailed nature of the claimant's claim form relating to equal pay, the appellant in their response form did not deal with this claim in any meaningful way. The tribunal also found that the appellant did not expressly address the issue of like work and/or work rated as equivalent or any defence of 'genuine material factor.' Nor did the appellant at any time seek to amend its response. The tribunal further noted that at a Case Management Hearing on 10 January the DOJ conceded that at the date of the claim the claimant was performing work rated as equivalent to that of a Grade 7 lawyer.

[91] This failure to address properly or at all specific questions relating to the issue of genuine material factor is striking and has to be seen in the context of the email correspondence dated 10-14 May 2010 from which it was apparent that there were discussions amongst the senior management of the NICTS about the removal of "fluid grading" following the devolution of justice and the implications of this factor on the legal officer and Grade 7 legal recruitment exercise, which had begun before devolution [3.7.2].

[92] The tribunal set out the emails:

*"3.7.2 It was apparent from relevant various emails correspondence provided to the tribunal, that there were discussions, amongst senior management of the Northern Ireland Courts and Tribunal Service about the removal of fluid grading on the devolution of justice and the implications for the said legal officer (DP), Grade 7 legal grade recruitment exercise which had begun, before devolution.*

*In an email, dated 10 May 2010, Ms Jacqui Durkin, Head of Business Development and Services NI Courts and Tribunal Service and copied to Ms Laurene McAlpine and Ms Geraldine Fee, she stated:*

*".... An option might be to write to the 4 appointable candidates who hadn't indicated an interest in appointment at Grade 7 to explain the situation as fluid complementing, ask if they still wanted to be considered for appointment at DP. We would also have to write to the 4 who have indicated an interest in being appointed at Grade 7 advising them that fluid complementing no longer applied and asking if they were appointable at DP are they still interested. I know the point you have made about Grade 7 being the entry grade for legal officers in the NICS and given this scheme was agreed as a DP and/or Grade 7 scheme in February then I think it is for the individuals to decide if they*

*are prepared to accept appointment at DP in the knowledge fluid complementing no longer applies.”*  
*[See the correspondence sent to the claimant as referred to previously in paragraph 3.7.1 and 3.7.2].*

*In an email, dated 11 May 2010, from Ms McAlpine, in reply, and copied to Ms Durkin and Ms Fee she stated:*

*“.... Think there is still a risk of an equal pay claim once they are in post and realise after a year or two that other people are doing the same work at a higher grade – which of course they will say they did not know when they accepted the post at DP with no fluid complementing.*

*There will be no way to manage the distribution of legal work so that DP lawyers deal with less complex issues (half time you don't know how complex an issue is until you are halfway thru it). You should make sure Corporate HR are aware of the risk and they take ownership of it ....”*

*Ms Durkin in a further email, in reply to Ms McAlpine and Ms Fee, dated 11 May 2010 stated:*

*“I don't think they would accept that and would say we identified the business need for DP and Grade 7 lawyers so it would be up to us to manage the line management of DPs and distributing work (this must happen now before fluid complementing) so equal pay issues didn't arise. It may be the best option is only to appoint at Grade 7, as we said the appointable DPs may not take it, if there is no fluid complementing ....”*

*In a further email, dated 11 May 2010, by Ms Fee, to Ms Durkin and Ms McAlpine, she stated:*

*“There may be difficulties with appointing at Grade 7 though, when we have at least two legal officers who will not be promoted until they reach the standard but who will be doing broadly comparable work to the new entrants. Also if we appoint at DP without fluid complementing how would such a DP ever get promoted as there would be no legal promotion board to Grade 7 – only direct entry at that level and its unlikely that there would ever be*

*public recruitment for several years ..."*

*Ms Durkin, Ms McAlpine and Ms Fee were not called as witnesses by the respondents and the tribunal, following the guidance in Lynch v Ministry of Defence [1983] NI 216, (see before), have concluded that their evidence would not have helped the respondents. In particular, the tribunal is satisfied that, at the time of the claimant's appointment as legal officer (DP), with the removal of fluid grading it was recognised, by senior management, there were clear risks of equal pay claims, following such an appointment and that issues, similar to those that are the subject matter of these proceedings might arise; but also senior management realised to avoid such risks it would be necessary to manage the line management of DPs and distribution of work for such persons."*

[93] We agree with the claimant that it is surprising that throughout the course of the hearing before the tribunal the appellant did not address these issues or adduce any evidence from witnesses of sufficient seniority to address them.

[94] The tribunal at para 3.28 held that the appellant's "...only witness ...in particular...did not directly and/or expressly address the defence of genuine material factor, the onus of proving such a defence at all times remaining with the [appellant] respondent." Her evidence the tribunal found was not relevant in proving the defence, the appellant did not reply to the statutory questionnaire and the tribunal found " significantly, in the response, the [appellant] did not expressly raise the defence of genuine material factor, nor,.....was the opportunity to do so taken by way of a reply to the statutory questionnaire." In the statement of issues it was agreed an issue to be determined by the tribunal related to the defence of a 'genuine material factor' and in replies by the appellant to the claimant's notice of additional information reference was made to appellant's defence of genuine material factor. In the circumstances the tribunal was satisfied that this was an issue to be determined by the tribunal "and, in particular, whether the [appellant] established, on the evidence, such a defence as is set out in paragraph 9 of the said replies" that is that "the difference in pay is due to a difference in grades."

### **Overall conclusion on Genuine Material Factor**

[95] On this issue the tribunal found as follows at para 3.31

"The tribunal has no doubt that, following the abolition of fluid grading/fluid complementing, if a vacancy occurred in DSO/OSO, or elsewhere in the Department of Justice, for a substantive permanent Grade 7 (legal) that the NICS policy would require any DP or other member of staff applying to take part in an open recruitment/selection



procedure. Indeed, such a policy, on the evidence, would not seem to be discriminatory. But, in the judgment of the tribunal, reliance on this promotion/selection policy/procedure for such a promotion by the respondents was in error as it does not provide a defence of genuine material factor in the circumstances of the claimant, who has established, pursuant to the 1970 Act, on the facts of this case, that she has been doing 'like work' with the work of her said comparators and is not receiving the same pay or benefits. The reliance upon what would happen in the event, if it occurred, of a substantive vacancy at Grade 7 (legal), therefore does not establish, in the tribunal's judgment, the defence of genuine material factor. It was not the cause of the disparity in this particular case. There was no such relevant recruitment selection exercise. There was a failure by the respondents to properly consider the individual particular circumstances of the claimant, who had established like work with her said comparators and therefore to ensure she received equal pay with her comparators. To temporarily promote the claimant, who has shown she was doing like work with her comparators did not establish, in the circumstances, the defence of genuine material factor. To be able to rely on such a recruitment/selection policy, relating to a hypothetical exercise for promotion to a substantive Grade 7 (legal) post, which had no application or relevance to the claimant's actual circumstances and her claim for equal pay, would allow the respondents to drive a "coach and horse", in the tribunal's judgment, to her said claim of equal pay and the protections given to her under the 1970 Act. Clearly, if the claimant's work had been restricted to DP work, so that no like work could be established, then no issue of equal pay would have arisen and would have avoided the very risks relating to equal pay, envisaged by senior management at the time when fluid grading was abolished (see the series of emails in May 2010).

In light of the foregoing, the tribunal is not satisfied the first respondent has proved, as it was required to do, that the variation between the claimant's contract and those of her said comparators is genuinely due to a material factor which is not the difference of sex"

[96] These were conclusions to which, on the evidence, the tribunal were entitled to come. We are satisfied that the tribunal dealt with all the relevant factual and legal issues properly and comprehensively and its decision should be affirmed.

[97] We agree with the claimant that the point raised by the appellant, that the tribunal should have distinguished between different periods of the claimant's employment, is a matter for argument at a remedies hearing.

[98] Accordingly, for these reasons we dismissed the appeal.