THE INDUSTRIAL TRIBUNALS

CASE REF: 6490/17

CLAIMANT: **Teresa Marie McGrath**

RESPONDENTS:
1. **Department of Justice**
2. **Department of Finance**

DECISION

The unanimous decision of the tribunal is that

1. The claimant's claim, pursuant to the Employment Equality (Age) Regulations (Northern Ireland) 2006, is dismissed.

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

3. (i) The claimant has been engaged by the first respondent in like work with her comparators, MK and NMcS from on or about 7 October 2011, pursuant to Section 1(2)(a) and 1(5) of the Equal Pay Act (Northern Ireland) 1970, as amended.

   (ii) The first respondent has not proved 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 under Section 1(3)(a) of the Equal Pay Act (Northern Ireland) 1970, as amended.

   (iii) The claimant's claim against the second respondent, pursuant to the Equal Pay Act (Northern Ireland) 1970 is dismissed.

4. The first respondent is therefore in breach of the Equal Pay Act (Northern Ireland) 1970, as amended, and the claimant is entitled to equal pay. A Remedies Hearing will be arranged to consider any remedy to which the claimant would be entitled on foot of the said decision on liability for breach of the Equal Pay Act (Northern Ireland) 1970, as amended by the first respondent.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Drennan QC**

Members: **Mr D Walls**
Mrs C Stewart

APPEARANCES:

The claimant was represented by Mr P. Lyttle, Queen's Counsel and Ms S. Bradley, Barrister-at-Law, instructed by Worthingtons Solicitors.

The respondents were represented by Ms J. Simpson, Queen's Counsel, and Mr M. McEvoy, instructed by the Departmental Solicitor's Office.

REASONS

1.1 The claimant presented a claim to the tribunal on 5 October 2017, in which she made claims, against the respondents, pursuant to the Equal Pay Act (Northern Ireland) 1970, as amended, the Sex Discrimination (Northern Ireland) Order 1976 as amended, and the Employment Equality (Age) Regulations (Northern Ireland) 2006. The respondents presented a response to the tribunal denying liability of the said claims on 21 November 2017.

1.2 In the course of the tribunal's normal Case Management procedures, the parties agreed a statement of legal and main factual issues (see later). However, at the conclusion of the substantive hearing, it was agreed by the representatives of the parties the claimant's claims to be determined by the tribunal were as follows:-

(a) a claim for equal pay, pursuant to the Equal Pay Act (Northern Ireland) 1970, as amended;

(b) direct discrimination on the grounds of sex, pursuant to the Sex Discrimination (Northern Ireland) 1976, as amended.

The claimant, having not pursued at the hearing her claim of age discrimination, pursuant to the Employment Equality (Age) Regulations (Northern Ireland) 2006, the said claim is therefore dismissed.

It was further confirmed by the representatives of the claimant, during the course of the hearing, that the claimant's claim was a claim of direct sex discrimination, pursuant to the sex discrimination (Northern Ireland) Order 1976, as amended and it was not a claim for indirect sex discrimination under the said Order.

1.3 At the commencement of the substantive hearing, it was agreed, and the tribunal so directed, that the tribunal should firstly consider the liability of the respondents in relation to the said claims of the claimant and, if necessary and appropriate, in light of the tribunal's decision on liability, the matter would be relisted to consider any remedy to which the claimant would be entitled, on foot of the said decision.

1.4 It was not disputed by the representatives of the respondents that the respondents were vicariously liable for the actions of the employees of the respondents, the subject matter of these proceedings.

1.5 The tribunal heard oral evidence, on behalf of the claimant, from the claimant and Ms Brendan Donnelly; and, on behalf of the respondents, Ms Amanda Allaway.

2. **THE RELEVANT LAW**

A **Equal Pay Act (Northern Ireland) 1970, as amended (1970 Act)**

1. Requirement of equal treatment for men and women in same employment.

(1) If the terms of a contract under which a woman is employed at an establishment in Northern Ireland do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) the contract under which a woman is employed ("the woman's contract"), and has the effect that –

(a) where the woman is employed on like work with a man in the same employment –

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term with the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefitting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term.

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment –

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefitting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.

(c) where a woman is employed on work which, not being work in relation to which paragraphs (a) or (b) applies is, in terms of the demands made on her (for instance under such headings as effort, skills and decision), of equal value to that of a man in the same employment –

(i) if, (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable and

(ii) if, (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefitting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term.

(d) where –

(i) any term of the woman's contract regulating maternity-related pay provides for any of her maternity-related pay to be calculated by reference to her pay at a particular time,

(ii) after that time (but before the end of the statutory maternity leave period) her pay is increased or would have increased had she not been on statutory maternity leave, and

(iii) maternity-related pay is neither what her pay would have been had she not been on statutory maternity leave nor the difference between what her pay would have been had she not been on statutory maternity leave and any statutory maternity pay to which she is entitled.

if (apart from the equality clause) the terms of the woman's contract do not provide for the increase to be taken into account for the purpose of calculating the maternity-related pay, the term mentioned in sub-paragraph (i) above shall be treated as so modified as to to provide for the increase to be taken into account for that purpose.

(e) if (apart from the equality clause) the terms of the woman's contract as to –

(i) pay (including pay by way of bonus) in respect of times before she begins to be on statutory maternity leave,

(ii) pay by way of bonus in respect of times when she is absent from work in consequence of the prohibition in Article 104(1) of the Employment Rights (Northern Ireland) 1996 (compulsory maternity leave) or

(iii) pay by way of bonus in respect of times after she returns to work following her having been on statutory maternity leave

do not provide for such pay to be paid when it would be paid but for her having time off on statutory maternity leave, the woman's contract shall be treated as including a term providing for such pay to be paid when ordinarily it would be paid;

(f) if (apart from the equality clause) the terms of the woman's contract regulating her pay after returning to work following her having been on statutory maternity leave provide for any of that pay to be calculated without taking into account any amount by which her pay would have increased had she not been on statutory maternity leave, the woman's contract shall be treated as including a term providing for the increased to be taken into account in calculating that pay.

(3) An equality clause following within sub-section (2)(a), (b) or (c) shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor –

(a) in the case of an equality clause falling within sub-section (2)(a) or (b), must be a material difference between the woman's case and the man's; and

(b) in the case of an equality clause falling within sub-section (2)(c), may be such a material difference.

(4) ….

(5) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the thing she does and things they do are not of practicable importance in relation to terms and conditions of employment; and accordingly and comparing her work with theirs regard shall be had to the frequency or otherwise with which any such

differences occur in practice as well as to the nature and extent of the differences.

(5A) For the purposes of sub-section (2)(d) to (f) –

(a) "maternity-related pay", in relation to a woman, means pay (including pay by way of bonus) to which she is entitled as a result of being pregnant or in respect of times when she is on statutory maternity leave, except that it does not include any statutory maternity pay to which she is entitled.

(b) "Statutory maternity leave period", in relation to a woman means the period during which is on statutory maternity leave

(c) an increase in an amount is taken into account in a calculation if in the calculation the amount as increased is substituted for the unincreased amount.

(5B) For the purposes of sub-section 2(d) to (f) and (5A), "on statutory maternity leave" means absent from work –

(a) in exercise of the right conferred by Article 103(1) or 105 (of the Employment Rights (Northern Ireland) Order 1996 (ordinary or additional maternity leave) or

(b) in consequence of the prohibition in Article 104(1) of that Order (compulsory maternity leave).

(6) A woman is to be regarded as employed and work rated as equivalent with that of any men if, but only, is, her job and their job have been given an equal value, in terms of the demand made on a worker and various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and woman on the same demand under any heading.

…..

(2) Disputes as to, and enforcement of, requirement of equal treatment

(1) Any claim in respect of the contravention of a term modified or included by virtue of an equality clause, including a claim for arrears of remuneration or damages in respect of the contravention, may be presented by way of complaint to an Industrial Tribunal

…..

(4) A determination shall not be made by an Industrial Tribunal in the following proceedings, that is to say –

(a) on a complaint under sub-section (i)

….

Unless the proceedings are instituted on or before the qualifying date (determined in accordance with section 2ZA).

(5) A woman shall not be entitled, in proceedings (including proceedings before an Industrial Tribunal) brought in respect of a contravention of a term modified or included by virtue of an equality clause, to be awarded any payment by way of arrears of remuneration or damages in respect of a time earlier than the arrears date (determined in accordance with section 2ZB).

2ZA "qualifying date" under section 2(4)

(1) This section applies for the purposes of determining the qualifying date, in relation to proceedings in respect of a woman's employment for the purposes of section 2(4).

…..

(3) In a standard case, the qualifying date is, subject to section 2ZAA, the date falling six months after the last day on which the woman was employed in the employment.

….

2ZB "Arrears date" in proceedings under section 2(5)

(1) This section applies for the purpose of determining the arrears date, in relation to an award of any payment by way of arrears or of remuneration of damages in proceedings in respect of a woman's employment, for the purposes of section 2(5).

….

(3) In a standard case, the arrears date is the date falling six years before the day on which the proceedings were instituted.

6B Questioning of employer

….

(3) Where the complainant questions the respondent (whether in accordance with an order under subsection (2) or not), the question and any reply by the respondent (whether in accordance with such an order or not) shall, subject to the following provisions of this section, be admissible as evidence in any proceedings under section 2(1) ….

(4) if in any proceedings under section 2(1) …. it appears to the Industrial Tribunal that the complainant has questioned the respondent (whether in accordance with an order under subsection (2) or not) and that –

(a) the respondent deliberately and without reasonable excuse omitted to reply within such period as the office made by order prescribe, or

(b) the respondent's reply is evasive or equivocal,

it may draw any inference which it considers just and equitable to draw, including an inference that the respondent has contravened the term modified or included by virtue of the complainant's equality clause or corresponding term of service.

….

B. **<u>The Equality Commission for Northern Ireland Code of Practice on Equal Pay</u>**

(Insofar as relevant and material in relation to these proceedings)

1. The Equal Pay Act (Northern Ireland) 1970, as amended, (the Equal Pay Act) gives women (and men) the right to equal pay for equal work. It makes sex discrimination unlawful in relation to contractual pay and benefits. An employer can only pay a man more than women for doing equal work if there is a genuine material reason for doing so which is not related to sex.

….

7. The Code is admissible in evidence in any proceedings under the Equal Pay Act, before the Industrial Tribunal (the tribunal). This means that, while the Code is not binding, the tribunal may take into account an employer's failure to follow its provisions.

8. It is in everyone interest to avoid litigation, and the Code recommends equal pay reviews as the best way to ensure that a pay system delivers equal pay. Employers can avoid equal pay claims by regularly reviewing and monitoring their pay practices, in consultation with their workforce. Consultation is likely to increase understanding and acceptance of any changes required. Involving recognised trade unions or other employer representatives also helps to ensure that pay systems are transparent.

9. The Code includes, as good equal pay practice, a summary of the Commission's guidance on how to carry out an equal pay review. The full guidance is in the Commission's equal pay review kit.

….

11. The principle that a woman is entitled to equal pay for equal work is set out in European Union and Domestic Legislation. The domestic Courts interpret the Equal Pay Act in accordance with European laws and the decisions of the European Court of Justice. A woman bringing an equal pay claim will usually do so under the domestic legislation, but in some circumstances she can claim under European law.

….

14. The Equal Pay Act entitles a woman doing equal work with a man in the same employment to equality and pay in and terms and conditions. The meaning of "same employment" is explained in paragraphs 25 and 26. The Act does so by giving her the right to equality in the terms of her contract of employment (or written statement of employment particulars). The man with whom she is claiming equal pay is known as her comparator.

15. Equal work is work that is the same or broadly similar, work that has been rated as equivalent, or work that is of equal value (see paragraphs 32-42). A woman is not entitled to equal pay for equal work if the reason for the difference in pay is genuinely for a material reason, and which is not the difference of sex (see paragraphs 84-94).

16. Claims for equal pay are usually taken to the Industrial Tribunal. If a woman succeeds in her claim:

    Her pay must be raised of that of her male comparator.

Any beneficial term in the man's contract but not in hers must be inserted into her contract.

Any term in her contract that is less favourable than the same term in the man's contract must be made as good as it is in his.

She may be awarded compensation consisting of arrears of pay.

17. The women can compare any term in her contract with the equivalent term in her comparator's contract. This means that each element to the pay package has to be considered separately and is not sufficient to compare total pay.

    A woman can claim equal pay with a male comparator who earns a higher rate of basic pay than she does, even if other elements for a pay package are more favourable than his.

18. Once a woman is establishes that she and her comparator are doing equal work, it is up to her employer to show that the explanation for the pay differences in genuinely due to a "genuine material factor" that is not tainted by sex discrimination. This defence is known as the "genuine material factor" defence. For example, an employer may argue that the man is paid more because he is better qualified than the woman.

19. The Equal Pay Act applies to **contractual** pay or benefits. The Sex Discrimination (NI) Order 1976, as amended (Sex Discrimination Order) covers **non-contractual** issues such as recruitment, training, promotion, dismissal and the allocation of benefits; for example, flexible working arrangements or access to a workplace nursery.

20. The Sex Discrimination Order compliments the Equal Pay Act by covering **non-contractual** pay matters, such as promotion and discretionary bonuses.

    If a woman wishes to make a claim in respect of **non-contractual** or discretionary payments her claim will be made under the Sex Discrimination Order. If she considers that a term in a collective agreement or an employer's rule is discriminatory and may affect her, it can be challenged under the Equal Pay Act or the Sex Discrimination Order, depending on whether it is contractual or not. If there is any doubt as to which piece of legislation a payment falls under, legal advice should be sought.

….

28. A woman can claim equal pay for equal work with a man, or men, in the same employment. It is for the woman to select the man or men with whom she wishes to be compared. She can claim equal pay with more than one comparator, but to avoid repetition, the Code (and the law) is written as though there is only one comparator.

….

30. The comparator does not have to consent to being named. If the woman's equal pay claim is successful, the result will be that her pay is raised to the same level as his. There will not be any reduction in the comparator's pay and benefits.

….

32. The comparator may be doing the same job as the woman, or he may be doing a different job. She can claim equal pay for equal work with a comparator doing work that is

The same, or broadly similar (known as like work)

Different but which is rated under the same job evaluation scheme as equivalent to hers (known as work rated as equivalent)

….

33. Like work means the woman and her comparator are doing the same or broadly similar work. Job titles could be different yet the work being done could be broadly similar. It is the nature of the work actually being done that needs to be considered.

34. Where differences exist, the tribunal will look at the nature and extent of the differences, how frequently they occur, and whether they are of practical importance to the terms and conditions of the job.

….

35. Work rated as equivalent means that the jobs being done by the woman and her comparator have been assessed under the same analytical job evaluation scheme as being equivalent. This means they have been assessed as having the same number of points, or as falling within the same job evaluation grade.

Job evaluation is a way of systemically assessing the relative value of different jobs.

36. To be valid, job evaluation study must:

Encompass both the woman's job and her comparators;

Be thorough in its analysis and capable of impartial application;

Take into account factors connected only with the requirement of the job rather than the person doing the job (so for example, how well someone is doing the job is not relevant); and

Be analytical in assessing the component parts of particular jobs, rather than their overall content on a "whole job" basis.

37. A woman can compare herself to a man whose job has been rated at a lower value but who receives more pay.

38. Criteria against which jobs may be assessed include for example, effort, skill or decision-making.

….

57. Where an employee has a concern, problem or complaint about her pay, she should raise it with her employer through the organisation's grievance procedure.

58. Guidance on grievance procedures can be found on the Labour Relations Agency's Statutory Code of Practice on Discipline and Grievance Procedures.

Unreasonable failure by either party to follow the Labour Relations Agency's Code can be taken into account by an Employment Tribunal in the course of an equal pay case. The tribunal can financially penalise either party for their failure.

59. A woman is entitled to write to her employer asking for information that will help her to establish whether she has received equal pay and, if not, what the reasons are for the pay difference.

60. There is a standard form which can be used to do this – the equal pay questionnaire. The questionnaire can establish whether the woman is receiving equal pay. She can send the questionnaire to her employer either before she lodges her claim with the tribunal or within 21 days of doing so.

….

61. If a woman takes a case to the tribunal, the employer's replies to the questionnaire should simplify the proceedings because the key facts will have been identified in advance. If the employer fails, without reasonable excuse, to reply within eight weeks or responds with an evasive or equivocal reply, the tribunal may take this into account at the hearing. It may then draw an inference unfavourable to the employer, for example that the employer has no genuine reason for the difference in pay.

C. **<u>The Sex Discrimination (Northern Ireland) Order 1976, as amended (the 1976 Order)</u>**

3. Direct discrimination on the ground of sex

In any circumstances relevant for the purposes of any provision of this Order, a person ("A") discriminates against another ("B") if, on the ground of sex, A treats B less favourably than A treats or would treat another person

8. Applicants and Employees

….

(2) it is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her –

(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, the facilities or services, or by refusing or deliberating omitting to afford her access to them, or

(b) by dismissing her, or subjecting her to any other detriment

(6) Paragraph (2) does not apply to benefits consisting of the payment of money, when the provision of those benefits is regulated by the woman's contract of employment.

11. Equal Pay Act (Northern Ireland) 1970

….

(5) An act does not contravene Article 8(2) if

(a) it contravenes a term modified or included by virtue of an equality clause, or

(b) it would contravene such a term but for the fact that the equality clause is prevented from operating by section 1(3) of the Equal Pay Act …

63A Burden of Proof: Industrial Tribunals

(1) This Article applies to any complaint presented under Article 63 to an Industrial Tribunal

(2) where, on the hearing of the complaint the complainant proves facts from which the tribunal could, apart from the said Article, conclude in the absence of an adequate explanation that the respondent –

(a) has committed an act of discrimination …. against the complainant which is unlawful by virtue of part iii

(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination … against the complainant or

(c) has contravened Article 40 or 41 in relation to an act which is unlawful by virtue of part iii

The tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case maybe, is not to be treated as having committed that act.

D. **The Labour Relations Agency Code on Disciplinary and Grievance Procedures – 3 April 2011 – insofar as relevant and material to these proceedings.**

At page 3 of the Code, it is stated, inter alia,

> *"….*
>
> *A failure to follow any part of this Code does not, in itself, make a person or organisation liable to proceedings. However, industrial tribunals shall take this Code into account when considering relevant cases ….*
>
> *….*
>
> *With reference to grievances, an industrial tribunal can take into account any unreasonable failure to follow the grievance aspects of this Code and may financially penalise the employer or the employee.*

Under Grievance Procedures the Code, states:-

67. Proceedings are concerns problems or complaints that an employee has about some aspect of their work. For example, could be about a work colleague or a manager, decision, policy, the application of a policy or a working relationship.

68. Issues that may cause grievances include:-

    Terms and conditions of employment;

    ….

    Equal opportunities.

69. Grievance procedures are used by employers to deal with employees grievances.

70. Grievance procedures help employers to deal with grievances fairly, consistently, and without unreasonable delay. Employers are required by law to specify, through written statements of employment particulars, any procedure applicable to handling employee grievances. They must specify a person to whom employees can apply for the purpose of seeking redress of any grievance relating to their employment; and cover any further steps which follow from the making of such an application.

….

72. Employees should aim to resolve most grievances informally with their line manager …

However, it is not always possible to resolve grievances informally and circumstances, such as the serious nature of the grievance, may dictate that the formal grievances is the way to proceed.

73. If a grievance cannot be settled informally, the employee should raise it formally with management, using the formal grievance procedure.

74. A failure to follow the grievance procedure in those cases, which a tribunal can hear may mean that the tribunal adjusts any award by a percentage of up to, or down by, 50 per cent to reflect that the provisions of this Code have not been reasonably followed ….

….

84. An employer should hear the appeal without unreasonable delay and at a time and place which should be notified to the employee in advance …..

85. If the employee feels that their grievance has not been satisfactorily resolved then they should have the opportunity to appeal. An appeal should be made without unreasonable delay, advising the employer in writing of their grounds of appeal.

….

95. Where a separate procedure exist for dealing with grievances on particular issues, for example, harassment and bullying, they should be used instead of the normal grievance procedure. All such procedures should comply with the requirements of this Code.

What is a grievance hearing.

101. Employees have the right to be accompanied to a grievance hearing. For the purposes of this right, a grievance hearing is a meeting at which an employer deals with the complaint about a legal duty owed by him/her to a worker, whether the duty arises from statute or common law, for example contractual commitments.

102. For instance, a request for a pay rise is unlikely to fall within the definition, unless a right to an increase is specifically provided for in the contract or the request raises a statutory issue about equal pay.

….

2.2 As set out at pages 39 and 55-56 of the IDS Employment Law Handbook on Equal Pay, 2008 Edition (in relation to the Equal Pay Act 1970, which is in the same terms as the Equal Pay Act (Northern Ireland) Act 1970), stated that the Equal Pay Act 1970:-

"Achieves its objective by implying an "equality clause" into every employee's contract of employment (male and female), enabling a woman (in this case) to bring a tribunal claim where she is treated less favourably than a comparable man in relation to a contractual term ….

….

The effect of this is that were a woman is employed on

- *Like work;*
- *Work that has been rated equivalent under a job evaluation study; or*

With a man in the "same employment" then provided that her employer has no "genuine material factor" defence, she has the right to have her contract modified so that none of her terms is less favourable than his. This may be done by adapting an existing term of her contract so that it corresponds to that and the contract of her male comparator, or by inserting a new term into a contract where such a term is included in a man's contract but not in hers.

…. In order for the equality clause to operate, at least one aspect of the woman's contract must be less favourable than that of a comparable man. This point is neatly illustrated by the case of ***Pointon v University of Sussex [1979] IRLR 119*** *…. even where it can be shown that a claimant is employed on like work, work rated as equivalent …. with her comparator, it is important to recognise that the Equal Pay Act is only concerned to remove inequalities in the contract between the claimant and her comparator if such inequalities are attributable to sex discrimination. If there are non-discriminatory reasons to pay the comparator more, then the equality clause will not operate to modify the claimants contract to bring it into line with his. It is, however, for the employer to explain any apparently discriminatory pay differential by showing under Section 1(3) of the Equal Pay Act, that there is a genuine material factor other than sex which satisfactorily explains why the claimant is paid less or receives unequal treatment in respect of her contractual terms.*

The equality clause operates in respect of each individual term of the contract: it does not treat all the terms relating to pay as generic. This was made clear by the House of Lords in ***Hayward v Cammell Laird Shipbuilders Limited [1988] ICR 464.*** *There, their Lordships rejected the employer's argument that any less favourable terms on the claimant's contract could be counterbalanced by other more favourable terms."*

*(*See further paragraph 17 of the Equality Commission for Northern Ireland Code of Practice on Equal Pay, referred to previously in this decision).

2.3 It is to be noted that, in Great Britain, the Equal Pay Act 1970 was repealed on 1 October 2010 and replaced by the Equality Act 2010, which (in essence, for the purposes of these proceedings) has consolidated the diverse legislative provisions relating to discrimination on variety of grounds into one statute; but the legislative provisions previously contained in the 1970 Act have been, in terms, largely

followed in the Equality Act 2010. Therefore the case law both under the Equal Pay Act 1970, but now also, where relevant, under the Equality Act 2010, are of relevance to claims for equal pay, which are made in Northern Ireland under the Equal Pay Act (Northern Ireland) 1970. Indeed, the development of equal pay law, both in this jurisdiction and also Great Britain has been largely influenced by the influence of European law and the Equal Pay Act (Northern Ireland) 1970 and the Sex Discrimination (Northern Ireland) Order 1976 must be read, insofar as possible, to give effect to Article 157 of the Treaty and the recast Directives as interpreted by the European Court of Justice (see further ***North v Dumfries and Galloway Council [2013] IRLR 737.***

2.4 As confirmed by Mummery LJ in ***Redcar and Cleveland Borough Council v Bainbridge [2008] EWCA Civ 885***, equal pay is not a remedy but a substantive right and the infringement of that right gives rise to remedies in the form of arrears of pay and/or declaratory relief.

In Equal Pay Law and Practice – Daphne Romney QC, reference is made at paragraph 4.13-1.4 to a relevant summary of the relevant principles relating to the said legislative provisions.

> *"[The Act] provides*
>
> T*hree specific <u>gateways</u> into a equal pay claim. A woman must prove one of the following in relation to her chosen comparator:*
>
> - *that she does like work to the man;*
> - *that she does work rated as equivalent to the man; and*
> - *that she does work of equal value to the man.*
>
> *Unless the claimant can satisfy one of these criteria, her claim cannot get off the ground. …"*
>
> *[Tribunal emphasis]*

2.5 In Harvey on Industrial Relations and Employment Law, Division K Equal Pay, paragraph 501-504, further helpful guidance is provided:-

> *"[501] An employer faced with an equality of terms claim may seek to show that the woman and her chosen comparator are not doing like work, or that the compactor chosen is not valid for one reason or another. These defences, if made out, will negate one or more of the elements which have to be established by the claimant. But a third line of defence, which is the subject of this section, assumes the claimant has done enough to show the equality clause is engaged. The clause however does not operate, because of circumstances shown to exist by the employer which explain the differences between the woman's and the man's pay.*
>
> *[502] Once a woman has proved that she is employed on like work, on work rated as equivalent, …., then an equality clause will operate in her favour unless the employer can demonstrate that the variation in*

*contract terms is due to a material factor other than sex (Equality Act 2010 Section 60). In effect therefore proof of like work, equivalently rated work …. requires an explanation of some kind from an employer if he wishes to avoid the operation of the equality clause (**National Vulcan Engineering Insurance Company Limited v Wade [1977] 3 AER 634, [1977] IRLR 109, [1977] ICR 455, EAT: revised [1978] IRLR 225, [1978] ICR 800 CA**). In **Glasgow City Council v Marshall [2000] IRLR 272**, HL Lord Nichols put the matter in the following terms (paragraph 18):*

> *"[A] rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent …. to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be the difference of sex."*

[503] The burden then passes to the respondent to establish its defence under Section 69. Thus, as it has been made clear, the trigger for the employer having to prove his case under the "material factor" defence is not disparate impact as between men and woman, nor the identification of a "provision, criterion or practice" that has such effect. All that is needed is proof of a difference in pay and establishing of equal work between claimant and comparator. When the burden passes, it gives rise to a three stage process; again, per Lord Nicholls:

> *"The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a "material factor", that is a significant and relevant factor. Third, that the reason is not "the difference of sex". This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth the factor relied upon is [….] a "material difference", that is, a significant and relevant difference between the woman's case and the man's case."*

*[504] Underhill P summarised the developed law as it was under Section 1(3) of the Equal Pay Act 1970 in **Newcastle upon Tyne NHS Hospitals Trust v Armstrong and Others UKEAT/0069/09, [2010] ICR 674**, …. at paragraph 19:*

> *"It is necessary for a tribunal first to identify the employers "explanation" for the differential complained of (a preferable phrase to the conventional but clumsy terminology of a "material factor" to which the differential is "due") and then to consider whether that explanation involves sex discrimination, applying the well-known principles which underlie both the*

relevant UK legislation and the juris prudence of the European Court of Justice".

2.6 For work to be like work, (the first gateway) it does not have to be identical in every aspect. First, the work has to be the same or of a broadly similar nature and secondly, whether any differences in the work are practical, as opposed to minimal, importance. Thus, it is necessary for a tribunal to examine what a man and a woman actually do, what differences there are in what they do and whether those differences matter.

In ***Capper Pass Limited v Lawton [1977] ICR 83,*** Phillips J stated:-

> *"…. The test imposed by Section 1(4) requires the Industrial Tribunal to make a comparison between the work done by the woman and the work done by the woman. It is clear from the terms of the sub-section 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 …..*
>
> *The definition requires the … 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 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 … is clearly that … tribunal should not be required to undertake to minute an examination, or be constrained to find that work is not like work merely because of insubstantial differences."*

Further Phillips J, stated at paragraph 12 of his judgment, in relation to the differences themselves – "…. It seems to us, trivial differences, or differences not likely in the real word 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 ….."

If there are differences, the tribunal must decide whether they are of any practical importance in considering this issue, it is necessary to note the concluding words of Section 1(5) of the 1970 Act, as referred to previously when it states regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of those difference. In the IDS guide on Equal Pay (2008), it is stated at page 123/4:-

> *"…. What is significant at this stage in determining whether the claimant is employed on "like work", is not the nature of the jobs done by the claimant and her comparator but the differences (if any) and the tasks and duties that they respectively perform. In* ***Adamson and Hatchett Limited v Cartlidge EAT 126/77****, the EAT held the tribunals must look closely at the detail to decide if there are any differences in the work actually done, how large those*

differences are and how often they operate to help determine the existence or otherwise of such differences, the employer must provide the tribunal with a sufficiently detailed analysis of the jobs in question.

To assist in determining whether differences between the claimants and comparators jobs are of "practical importance", the EAT suggested in ***British Leyland Limited v Powell [1978] IRLR 57*** *that tribunals might ask themselves whether the differences are such as would put the two employments into different categories or grades under a job evaluation study …*

In establishing what the differences are between the claimant's and the comparator's jobs, it is important that the tribunal concentrates mainly on the work that is actually undertaken, rather than how a job description or contract of employment describes the job and the duties entailed in it. "In ***Shields v E Coombs Holdings Limited [1978] ICR 1159*** *Lord Denning MR drew an analogy with what he called a "barman" and a "barmaid" dealing with awkward pub customers. Each might have their own way of handling the situation, but that did not make their work different work and it should not affect the rate for the job."*

2.7 The second "gateway" for a claimant to show is that she has been paid less than a man in the same employment who is employed on work which has been "rated as equivalent" to hers under a job evaluation study. If a woman pursues "the rated as equivalent route she does not need to show that she is employed on "light work". However there is nothing to prevent a claimant from claiming in the alternative, especially if the job evaluation study does not cover the whole period for what the claimant is making a claim of equal pay. Job evaluation is a way of systematically assessing the relative value of different jobs. In essence, jobs, which have been given an equal value under a job evaluation study will be rated as equivalent for the purposes of the relevant legislation. Although, under the legislation, there is no legal obligation to carry out job evaluation, once a job evaluation study has been completed it is binding. A woman, whose work has been rated as equivalent under such a study, is entitled to rely upon the results in order to obtain equal pay. Once a woman has been rated as equivalent to her comparator and has been assigned to grade, it is irrelevant that she and her comparator were at different points during the evaluation process. Rated as equivalent means just that – equivalent.

As seen in ***Springboard Southerland Trust v Robson [1992] ICR 554,*** a job evaluation scheme included the conversion of points and grades to determine an employee's pay; the fixing of grade boundaries was an integral part of the scheme. Had the final boundaries been drawn differently, the claimant and her comparator might well have ended up in different grades, but that was nothing to the point. The fact was that they were rated as equivalent under the scheme and therefore they were deemed to be doing the same work unless the employer could show a material factor defence. Where two employees are assigned to the same grade it cannot be argued, it was held in ***Springboard*** that one is more equal than another, whatever the score that put them there.

The person who is seeking to rely on a job evaluation study in an equal pay claim has the burden of proving that it satisfies the requirements of the Act. (See

Bromley and Others v Haul J Quick Ltd [1988] ICR 623 (in the present proceedings (see later) this was not in issue between the parties).

In ***Redcar and Cleveland Borough Council v Bainsbridge and Others; Surtees and Others v Middlesbrough Borough Council (No 2) 2008 IRLR 776,*** The Court of Appeal confirmed that a claimant may not rely on a comparator doing work rated as equivalent in respect of a period before that rating became effective, confirming that such a job evaluation study does not have a retro-active effect. In the Court's view the argument for retro-active effect overlooked the fact that job evaluation schemes have no force whatsoever before they are agreed and that bands and brackets can and do change from one job evaluation study to another. Furthermore, it held it would mean that such cases would be treated differently from the other gateways - like work and equal value cases - whereby a successful claimant is entitled to backdate compensation by up to six years, as referred to previously, provided she has proved that she was employed on like work or work of equal value or work rated as equivalent, whichever is relevant, during the said six years. However, in the decision of ***Hovell v Ashford and St Peter's Hospital NHS Trust [2009] ICR 1545,*** the Court of Appeal held that, where jobs had been rated as equivalent in a job evaluation study, albeit with different scores, an Employment Tribunal could make a finding of equal value in respect of the period before the job evaluation study was implemented, on the assumption there had been no change in the work done by the claimant and her comparator during the relevant period prior to the job evaluation studies implementation. However, the job evaluation study was not conclusive evidence of equal value before that date.

It would appear to be well established that a job evaluation study must have been completed before it can be relied upon. However the authorities are somewhat unclear as to when a job evaluation study is complete – for example, is it when the study has calculated the overall scores for each job or is being converted into grades or bands. In the case of ***Arnold v Beecham Group Limited [1982] ICR 744*** the Employment Appeal Tribunal took a relatively broad view of what constitutes "acceptance", holding that the union and employer had in fact accepted the validity of the scheme because they had agreed grade boundaries and had sent notification to the employees telling them their interim grading and inviting appeals. Similarly, in ***O'Brien and Others v Sim-Chen Limited [1980] ICR 573*** the job evaluation resulted in an agreed outcome of six clerical grades with pay parameters set for each grade. The employers were informed of their grades and the union and employer renegotiated appropriate salaries for each grade, but the new grades were never implemented due to the then Government's wage policy and so the employer continued to pay the employees at their existing rate. The claimants were successful with the House of Lords agreeing that "the requirements under the relevant legislation were imposed from the moment when the evaluation study and exercise has made available a comparison which can show discrimination" per Lord Russell of Killowen).

2.8 If a respondent fails to establish a defence under Section 1(3) of the 1970 Act (genuine material factor) then the equality clause, which is deemed to be included in her contract of employment, by virtue of Section 1(1) of the 1970 Act, will operate, by virtue of Section 1(2), to modify any contractual term in her contract, which is less favourable than a comparable term in her comparator's contracts and to include a contractual term benefitting her comparators and their contracts of employment which is not included in her contract of employment. The modified or

new contractual term will be incorporated into her contract of employment from the date of the presentation of her claim, and remains in place going forward from that date, without temper of limitation, unless and until there is a further contractual agreement between the claimant and the respondent or until there is a further statutory modification by reason of a subsequent operation of the equality clause. As Elias J stated in ***Sorbie v Trust House Forty Hotels Limited [1977] ICR 55*** and ***Sodexho Limited v Gutridge and Others [2008] IRLR 752*** (as referred to in the IDS Employment Law Handbook on Equal Pay 2008] and again confirmed more recently by Simler P ***in Reading Borough Council v James [2018] IRLR 790,*** a woman cannot continue to compare herself with a male comparator if he ceases to be a comparator but she does not lose such enhanced rights as have already been incorporated into her contract from the date of the presentation of her claim. Those rights have by then become crystallised and the woman remains entitled to enforce them as a term of her contract.

In addition to establishing her future entitlements, a claimant is entitled by virtue of Section 2ZB(3) of the 1970 Act, to arears of pay for up to six years prior to the date of the presentation of the claim, provided that she can establish that she is performing like work with her comparators, or any of them, during that period or work rated as equivalent and that the relevant term for a contract has been less favourable during that period or for a part of it and/or that a term that has benefitted her comparators or any of them during that period has not been included in her contract during that period or for a part of it.

However, if the respondent is able to establish a defence under Section 1(3) of the 1970 Act (genuine material factor giving rise to the variations and which is not the difference of sex) and even if the claimant is performing like work and is paid less, the equality clause that is deemed to be included in her contract of employment by virtue of Section 1(1) of the Equal Pay Act (Northern Ireland) 1970 will not operate to modify any contractual term in her contract of employment which is or has become less favourable than a similar term in the contracts of her male comparators or include a contractual term benefitting her comparators in their contracts of employment but not in hers. Equal pay under the 1970 Act is not concerned with fair pay it is only concerned with sex related pay discrimination, as confirmed in the decision of the House of Lords in ***Strathclyde Regional Council and Others v Wallace and Others [1998] IRLR 146.***

In ***Villalba v Merrill Lynch and Company Ink and Others [2007] ICR 469,*** Elias J set out at paragraphs 114-117 three different circumstances in which pay arrangements may be tainted by sex:-

> *"First there may be a difference in treatment which is specifically on sex grounds. A woman is paid less simply because she is a woman. That is the classic form of direct discrimination.*
>
> *Second there may be a difference in treatment which, whilst not specifically on grounds of sex, results from the adoption of a criterion or practice which adversely impacts on women because they are women. Typically this may be because the social role which women habitually perform makes it more difficult for them to place themselves in the category of the worker attracting higher pay. Treating part-timers less favourably is the classic example.*

Third, where cogent, relevant and sufficiently compelling statistics demonstrate that women suffer a disparate impact compared with men. There is no refutable presumption that sex has indirectly tainted the arrangements, even though it may well be possible to identify how that has occurred and the differential needs to be objectively justified."

In the decision of the Northern Ireland Court of Appeal in **Fearnon and Others v Smurfitt Corrugated Cases Lurgan Limited [2008] NICA 45,** a "red-circling case", Kerr LCJ observed, at paragraphs 12-13:-

> *"12. … to qualify as a contemporaneous genuine material factor encountering the discrepancy in salary, the reasons for it at the time of difference in earnings as challenged must be examined. Otherwise, it will be possible for an unscrupulous employer to allow difference in earnings to persist while knowing that the initial reason for it no longer obtained.*
>
> *13. It is to be remembered that the onus of establishing that there is such a genuine material factor rests on the employer throughout …."*

In the IDS Handbook on Equal Pay [2008] in reference to the defence of genuine material factor it is described at page 202, as follows:-

> *"I know that the work of a woman and the work of her comparator are of equal value in terms of demands, skills, etc but the man was paid more for a particular reason and that reason has nothing to do with the fact that the claimant is a woman or the comparator a man."*

As summarised in Equal Pay and Practice – Daphne Romney QC, at paragraph 7.19 the following helpful summary is provided:-

> *"Once a difference in terms is identified, a rebuttal 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:*
>
> - *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;*
> - *that the reason was causative of the difference between the comparator's term and the term in the claimant's contract;*
> - *that there is a significant and relevant difference between the woman's case and the man's case;*
> - *the difference is not a different of sex."*

In order to be "material" (or "significant and relevant", as referred to in ***Glasgow City Council and Others v Marshall and Others)***, the factor relied upon has to explain the difference between the particular woman's pay and the particular man's pay. It must be of actual significance and relevance to the particular case, it is not sufficient that it is merely potentially capable of constituting the material factor, for the purposes of the said defence.

In ***Calmac Ferries Limited,*** a case under the 2010 Equality Act, it was confirmed that "where a pay disparity arises for examination in a claim of equal pay, it is not sufficient for an employer to show why one party is paid as one party is. Statute requires an explanation for the difference, which inevitably involves consideration why the claimants are paid as they are, on the one hand, and separately, why the comparator is paid as he is.

In ***Bury Metropolitan Council v Hamilton/Council of the City of Sutherland v Brennan [2011] IRLR 358,*** the Employment Appeal Tribunal held that – the explanation, or cause, of a state of affairs is not definitively established simply by showing its historical origin. In the case of direct discrimination, it may be pertinent to consider not only why the differential in question first arose but why it was maintained, particularly if the relevant circumstances may have changed. In the case of indirect discrimination, gender proportions as between the advantaged and disadvantaged groups may have changed, or there may be reasons why a justification which was once good no longer remains so (see also ***Smurfitt Corrugated Cases Lurgan Limited above).***

In ***Skills Development Scotland v Buchanan [2011] EQLR 955***, the Employment Appeal Tribunal held that the mere passage of time does not cause a gender neutral explanation for a difference of pay to lose its "non sex" character, although passage of time could be one, amongst all the relevant factors relied upon by the claimant in any given case, to challenge the genuine nature of the employer's explanation. In ***Outlooks Supplies Ltd v Parry [1978] IRLR 12*** it was held a relevant factor in determining whether the employer has discharged the onus is for the tribunal to see the length of time that has elapsed, since any such 'protection of wages' was introduced, and whether the employer has acted in accordance with the current notion of good industrial practice in their attitude to the continuation of the practice.

2.10.1 In this matter, as confirmed in the course of submissions, both representatives sought to strongly rely on the 'credibility' of the witnesses, called by each of them, and all of whom were the subject of lengthy and detailed cross-examination.

Gillen J in ***Thornton v NIHE [2010] NIQB 4*** stated:-

> *"Credibility of a witness embraces not only the concept of his truthfulness, ie whether the evidence of the witness is to be believed but also the objective reliability of the witness; [that is] his ability to observe or remember facts and events about which the witness is giving evidence.*

In a recent decision in the case of ***ES (a minor) by Rachel Ann Savage, her mother and next friend v Emma Savage and Others [2017] NIQB 56 (a civil case)*** Stephens J in ***Thornton***, namely:-

“(a) the inherent probability or improbability of representation of fact;

(b) the presence of independent evidence tending to corroborate or undermine any given statement of fact;

(c) the presence of contemporaneous records;

(d) the demeanour of witnesses, for example, does he equivocate in cross-examination;

(e) the frailty of the population at large in accurately recollecting and describing events in the distant past;

(f) does the witness take refuge in wild speculation or uncorroborated allegations of fabrication;

(g) does the witness have a motive for misleading the court; and

(h) weighing up one witness against another.”

In ***R v G [1998] Crim LR 483***, the Court of Appeal in England and Wales said that:-

“a person’s credibility is not a seamless robe, any more than is their reliability.”

A tribunal is entitled, if appropriate, to take a different view as to the credibility or the reliability of the evidence of a witness in relation to different issues (see further ***R v H [2016] NICA 41***).

2.10.2 In ***Lynch v Ministry of Defence [1983] NI 216*** Hutton J, as he then was, endorsed the principles which had been stated in ***O’Donnell v Reichard [1875) vR 916 at page 929***

“Where a party without explanation fails to call as a witness a person when he might reasonably be expected to call if that person’s evidence would be favourable to him, then, although the jury might not treat as evidence what they may as a matter of speculation think that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that that person’s evidence would not have helped that person’s case; if the jury drew that inference, then they may properly take it into account against the party in question for the purposes, namely (al) in deciding whether to accept any particular evidence which has in fact been given, either for or against that party and which relates to a matter with respect to which a person not called as a witness could have spoken; and (b) in deciding whether to draw inferences of fact which are open to them upon evidence which has been given, again in relation to matters with respect to which the person not called could have spoken.”

(See further ***Winzniewski v Central Manchester Health Authority [1998] P1QR 324;*** and ***Habinteg Housing Association Ltd v Holleron Ltd [2015] UKEAT80274/14; Breslin v McKevitt and Others [2011] NICA 33).***

2.11 In relation to the burden of proof provisions, the English Court of Appeal in the case of ***Igen v Wong [2005] IRLR 258***, considered similar provisions, relating to sex discrimination, applicable under the legislation applying in Great Britain to article 52g 1997 Order; and, it approved, with minor amendment, the guidelines set out in the earlier decision of ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332***. In a number of decisions, the Northern Ireland Court of Appeal has approved the decision of ***Igen v Wong [2005] IRLR 258*** and the said two-stage process to be used in relation to the burden of proof (see further ***Brigid McDonagh & Others v Samuel Thom t/a The Royal Hotel Dungannon [2007] NICA 1*** and other decisions referred to below) when determining the burden of proof provisions contained in similar anti-discrimination legislation which applied in Northern Ireland. The decision in ***Igen v Wong [2005] IRLR 258*** has been the subject of a number of further decisions in Great Britain, including ***Madarassy v Nomura International PLC [2007] IRLR 246***, a decision of the Court of Appeal in England and Wales, and ***Laing v Manchester City Council [2006] IRLR 748***, both of which decisions were expressly approved by the Northern Ireland Court of Appeal in the case of ***Arthur v Northern Ireland Housing Executive & Another [2007] NICA 25***. (See further the recent Supreme Court decision in the case of ***Hewage v Grampian Health Board [2012] UKSC 37***, in which the Supreme Court approved the guidance in **Igen** and followed in subsequent case law, such as ***Madarassy*** [see below].), and where it did not consider any further guidance was necessary. It also emphasised it was not necessary to make too much of the role of the burden of proof provisions; they required careful attention where there was room for debate as to the facts necessary to establish discrimination but they had nothing to offer where the Tribunal was in a position to make positive findings on the evidence one way or the other.

In ***Madarassy v Nomura International PLC [2007] IRLR 246*** the Court of Appeal held, inter alia, that:-

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more [Tribunal's emphasis], sufficient material from which a Tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination – could conclude in Section 63A(2) must mean that 'a reasonable Tribunal could properly conclude from all the evidence before it. This would include evidence adduced by the claimant in support of the allegation of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject to the statutory absence of an adequate explanation at this stage the Tribunal needs to consider all the evidence relevant to the discrimination complaint, such as evidence to whether the act complained of occurred at all, evidence as to the actual comparators relied upon by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the claimant were of like with like as required by Section 5(3) and available evidence for the reasons for the differential treatment. The correct legal position was made plain by the guidance in* ***Igen v Wong****. Although Section 63A(2) involves a two-stage analysis of the evidence, it does not expressly or impliedly prevent the Tribunal at the first stage, from hearing, accepting or*

drawing inferences from evidence adduced by the respondent disputing or rebutting the claimant's evidence of discrimination … ."

In ***Igen*** the Court of Appeal cautioned Tribunals, at Paragraph 51 of the judgment, 'against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground'.

Even if the Tribunal considers that the conduct of the employer requires some explanation before the burden of proof can shift there must be something to suggest that the treatment was less favourable and by reason of the protected characteristic (eg disability) (see ***B and C v A [2010] IRLR 400*** and ***Curley v Chief Constable of the Police Service of Northern Ireland and Another [2009] NICA 8*** later in this decision).

2.12 In relation to what is to be included by the expression 'something more' – guidance is to be found in the judgment of Elias J in ***The Law Society v Bahl [2003] IRLR 640***, which judgment was approved by the Court of Appeal (see ***[2004] IRLR 799***).

In Paragraph 94 of his judgment, Elias J emphasised that unreasonable treatment is not of itself a reason for drawing an inference of unlawful discrimination when he stated:-

> *"94. It is however a wholly unacceptable leap to conclude that whenever the victim of such conduct is black or a woman that it is legitimate to infer that our unreasonable treatment was because the person was black or a woman. All unlawful discriminatory treatment is unreasonable, but not all unreasonable discriminatory treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. In order to establish unlawful discrimination it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way. The fact that the victim is black or a woman does no more than raise the possibility that the employer could have been influenced by unlawful discriminatory consideration. Absent some independent evidence supporting the conclusion that this was indeed the reason, no finding of discrimination can possibly be made.*
>
> *96. ... Nor in our view can Sedley LJ (in* **Anya v University of Oxford***) be taken to be saying that the employer can only establish a proper explanation if he shows that he in fact behaves equally badly to members of all minority groups. The fact that he does so will be one way of rebutting an inference of unlawful discrimination, even if there are pointers which would otherwise justify that inference. ... No doubt the mere assertion by an employer that he would treat others in the same manifestly unreasonable way, but with no evidence that he had in fact done so, would not carry any weight with a Tribunal which is minded to draw the inference on proper and sufficient grounds that the cause of the treatment has been an act of unlawful discrimination."*

In particular, in *Paragraph 101* of Elias J's judgment explained that unreasonable conduct is not necessarily irrelevant and may provide a basis for rejecting an explanation given by the alleged discriminator but then added these words of caution:-

> *"The significance of the fact that the treatment is unreasonable is that a Tribunal will more readily in practice reject the explanation, given that it would if the treatment were reasonable. In short, it goes to credibility. If the Tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will depend upon why it has rejected the reason he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not discriminated on the proscribed grounds may nonetheless give a false reason for the behaviour. They may rightly consider, for example, that the true reason costs then in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the Tribunal suggest there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support finding of unlawful discrimination itself."*

At *Paragraph 113* of his judgment, he also stated:-

> *"There is an obligation on the tribunal to ensure that it has taken into consideration all potentially relevant non-discriminatory factors which might realistically explain the conduct of the alleged discriminator ... ."*

At *Paragraph 220* he confirmed:-

> *"An inadequate or unjustified explanation does not of itself amount to a discriminatory one."*
>
> *[Tribunal's emphasis]*

In ***S Deman v Commission for Equality and Human Rights and Others [2010] EWCA Civ 1279,*** the issue of "something more" and the shifting burden was referred to by Sedley LJ at paragraph 19 of his judgment, when stated:-

> *"We agree with both counsel that the 'move' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be forwarded by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

In the case of ***The Solicitors Regulation Authority v Mitchell [2014] UKEAT/0497/12***, this guidance was summarised in the following way (*Paragraph 46*):-

> *"(i) In appropriate circumstances the 'something more' can be an explanation proffered by the respondent for the less favourable treatment that is rejected by the Employment Tribunal.*

(ii) *If the respondent puts forward a false reason for the treatment but the Employment Tribunal is able on the facts to find another non-discriminatory reason, it cannot make a finding of discrimination."*

2.13 In the case of ***Curley v Chief Constable of the Police Service of Northern Ireland and Another [2009] NICA 8***, the Northern Ireland Court of Appeal approved the judgement of Elias LJ in ***Laing***, which was also referred to with approval by Campbell LJ in the Arthur case, that it was not obligatory for a Tribunal to go through the steps set out in ***Igen*** in each case; and also referred to the opinion of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] NI 147***, where he observed at paragraph 8 of his opinion, as follows:-

"Sometimes a less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue".

Lord Nicholl's opinion in the ***Shamoon*** case made clear the normal two step approach of Tribunals in considering, firstly, whether the claimant received less favourable treatment than the appropriate comparator, which can include an actual or hypothetical comparator, and then, secondly whether the less favourable treatment was on the proscribed ground, can often be avoided by concentrating on why the claimant was treated as he/she was; and was it for the proscribed reason or for some other reason. If the latter, the application fails. If the former, there would normally be no difficulty in deciding whether the less favourable treatment, afforded to the claimant on the proscribed ground was less favourable than was or would have been afforded to others (see further Paragraph 11 of Lord Nicholls' opinion). Indeed, Lord Nicholls' opinion emphasised that the question whether there had been less favourable treatment and whether the treatment was on the grounds of [sex] are in fact two sides of the same coin.

2.14 In ***Nelson v Newry and Mourne District Council [2009] NICA 24***, Girvan LJ referred approvingly to the decisions in ***Madarassy*** and ***Laing*** and also held that the words 'could conclude' are not to be read as equivalent to 'might possibly conclude'. He said "the facts must lead to the inference of discrimination". He also stated:-

"24. This approach makes clear that the complainant's allegation of unlawful discrimination cannot be used in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the tribunal could probably conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination. In ***Curley v Chief Constable the Police Service of Northern Ireland and Another [2009] NICA 8****, Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."*

2.15 In relation to the statutory questionnaire procedure pursuant to Section 63 of the 1970 Act, it has long been established that the statutory procedure was the way in which the legislature has made provision for a claimant to advance his or her case and thereby to establish key facts in order to decide whether to institute proceedings and/or to present their case in the most effective manner. Interestingly, in Great Britain, statutory questionnaires are now abolished but there is now a system of non-statutory questionnaires. As stated previously, where the tribunal considers that the respondent deliberately and without reasonable excuse, within the prescribed period, has omitted to reply or the respondent's replies are evasive or equivocal, it may draw any inference which it considers just and equitable to draw, including an inference that the respondent has contravened a term modified or included by virtue of the claimant's equality clause or corresponding terms of service. The section is without prejudice to any other enactment or rule of law regulating interlocutory and preliminary matters and proceedings before the tribunal. The fact that the time limits have not been complied with will not automatically mean that an inference will be drawn. As seen in ***Steel v Chief Constable of Thames Valley Police [2003] UKEAT/0793,*** the reply was twenty one months late and some answers were evasive but the tribunal found that the main issue of the comparators was dealt with. However it must be remembered that in equal pay claims, an employer's failure to reply, or an unequivocal or evasive reply, cannot of itself raise a presumption of pay discrimination if the complainant has not also satisfied the requirement of showing the comparator of the opposite sex receives more pay. As recognised in IDS Handbook on Equal Pay [2008], the absence of a timely, non-evasive unequivocal reply to a questionnaire can be of particular relevance when seeking cast doubt on an employer's defence to the equal pay, such as the genuine material factor defence. In ***Dattani v Chief Constable of West Mercia Police [2005] IRLR 327,*** failure to answer the claimant's questions led to an inference being drawn by the tribunal.

In ***D'Silva v NATFHE [2008] IRLR 412,*** Underhill J stated at paragraph 38 of his judgment:-

> *"…. We have observed a tendancy in discrimination cases for respondents' failures in answering a questionnaire, or otherwise and providing information or documents, to be relied on by claimants, and even sometimes by tribunals, as automatically raising a presumption of discrimination. That is not the correct approach. Although failures of this kind are specified at item (7) of the "Barton Guidelines" as endorsed in* ***Igen Limited v Wong …*** *(see at page 957B) as matters from which an inference can be drawn, that is only "in appropriate cases"; and the drawing of inferences from such failures – as indeed from anything – is not a tick box exercise. It is necessary in each case to consider whether in the particular circumstances of that case the failure in question is capable of constituting evidence supporting the inference that the respondent acted discriminatorily in the manner alleged; and if so whether in the light of any explanation supplied it does in fact justify that inference. There will be many cases where it should be clear from the start, or soon becomes evident, that any alleged failure of this kind, however reprehensible, can have no bearing on the reason why the respondents did the act complained off, which in cases of direct discrimination is what the tribunal has to decide. In such cases time and money should not be spent pursuing the point."*

However, it must be remembered that ***Dattini*** and ***D'Silva*** cases were "pure" discrimination cases not equal pay cases. In ***Deer v Walford and University of Oxford [2010] UKEAT/0283*** Underhill P on page 43 of his judgment emphasised that cannot be a mechanistic approach to the drawing of inferences and as confirmed by him in ***Commissioner of the Police of the Metropolis v Virdi [2008] UKEAT/0598,*** inferences are not drawn as a sanction for bad behaviour.

<u>Findings of Fact and Conclusions of the Tribunal on Liability</u>

3. Having considered the said legislative provisions, Codes, and Guidance together with the evidence given to the tribunal by the parties and their witnesses, the documents in the trial bundles, as amended during the course of the hearing and the submissions of the representatives of the parties at the conclusion of the hearing, the tribunal made the findings of fact and reached the tribunal's conclusions on liability, as set out in the following sub-paragraphs, insofar as necessary for the determination of the claims of the claimant.

3.1 The claimant served a statutory questionnaire on the respondents, pursuant to the Equal Pay (Questions and Replies) Order (Northern Ireland) 2004 and Section 6B(2)(a) of the 1970 Act, dated 16 June 2017.

Significantly, in the tribunal's judgment, this questionnaire has not been replied to by the respondents or either of them. The tribunal is satisfied the questionnaire was sent with an accompanying letter by the claimant, which has not been produced by the respondents by way of discovery; but it is assumed the letter was subsequently lost/mislaid by the respondents. However, Ms Allaway, who is presently a staff officer based within the centralised Human Resource function for the Northern Ireland Civil Service and who gave evidence on behalf of the respondents, to which further reference will be made later in this decision, accepted in evidence that Ms Magill, another member of the Dignity at Work team (who were investigating the claimant's grievance – see later) gave it to her in or about July or August 2017. It was suggested that Ms Magill had been off work for a considerable period of time over the summer period and that this probably accounted for the delay in forwarding the questionnaire to Ms Allaway. Despite recognising the importance of the statutory questionnaire and the potential consequences for not providing a reply to it, it seems Ms Allaway gave no instructions to relevant personnel of the respondents and/or the respondents' legal representatives to take steps to have the statutory questionnaire replied to within the relevant eight week period or indeed subsequently. It would appear that Ms Allaway put the questionnaire in the case file, where it "gathered dust" until it was discovered by Ms Allaway in or about November 2017, when preparing the preliminary enquiry meeting report as part of the Dignity at Work process, to which further reference will be made later in this decision.

It has to be noted, at this stage, that the claimant had issued her tribunal proceedings on 5 October 2017, raising, inter alia, the issue of the failure of the reply to the statutory questionnaire. The respondents, in a response to the claimant's claim form in a response 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 by the respondents to reply to the statutory questionnaire. (See later)

Having discovered in or about November 2017 the unanswered statutory questionnaire, Ms Allaway still took no steps to have the questionnaire answered and, at the time of the hearing of the claimant's claim, this remained the position.

The tribunal, in its own experience, is aware of examples of statutory questionnaires which, for various reasons, have not been answered in time. But, frequently, at least before the commencement of the hearing, replies have been given, which assist in the clarification of the issues and the position of the parties before any evidence is given during the course of the hearing. Significantly, no such attempt to do so was made in the present proceedings. The tribunal has little doubt, that if there had been replies to the statutory questionnaire within the relevant time period, some of the issues in the present proceedings may not have arisen or required to be determined by the tribunal; and the claimant's claim might have been more focussed from the outset in relation to the claims the tribunal ultimately has been required to determine and might have avoided the alternative claims in the claimant's claim form which, at the conclusion of the hearing, were not required to be determined by the tribunal.

Ms Allaway, in the judgment of the tribunal, provided no satisfactory or proper explanation for the failure to reply to the statutory questionnaire. She is very experienced in handling tribunal claims and also responding to statutory questionnaires; but yet she took no action to remedy the failure at any time, despite the various opportunities to do so, as outlined above. This tribunal is determining the claims of the claimant; and, in the circumstances, without hearing all the relevant evidence in connection therewith, is not prepared, albeit not without some hesitation, to take into account evidence given at the hearing relating to failures by the respondents to answer other statutory questionnaires, pursuant to equal pay claims, which have been brought by other solicitors/legal staff employed by the respondents and/or each of them and which, in due course, may require to be the subject of determination by a tribunal on foot of their respective claims.

As is normal practice, the statutory questionnaire raised relevant questions in connection with the claimant's claim of equal pay. It is not necessary, for the purposes of this decision, to set them out in detail, save to note that specific questions were raised, and remained unanswered, relating to the important issues of "genuine material factor defence", namely, for example:-

> *"4 ….*
>
> *(ii) If you are relying on a genuine material factor defence for the decision not to substantively upgrade Ms McGrath to a permanent Grade 7 post, please provide the genuine material factor relied upon?*
>
> *(iii) 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 6.09.210?*

(See later).

3.2 The claimant's claim form, dated 5 October 2017, "echo" the contents of the statutory questionnaire, served on 16 June 2017 and stated, in particular, insofar as relevant for the determination of the claimant's claims, as amended during the course of the hearing:-

> *"1. The claimant believes she is being discriminated against on the grounds of her gender in that she is not receiving equal pay to male comparators carrying out like work, …, or work rated as equivalent and the claimant has received less pay and remuneration than her comparators. The claimant therefore claims equal pay under the Equal Pay Act (Northern Ireland) 1970 (as amended) and/or relevant European law, in particular the Equal Treatment Directive.*
>
> *2. The claimant also asserts that the treatment which she has been subjected to may amount to unlawful discrimination on the grounds of her gender contrary to the Sex Discrimination (Northern Ireland) Order 1976 (as amended) and/or relevant European law.*
>
> *3. ....*
>
> *The claimant in her claim form, after setting out in detail her alleged history of the matter, to which the tribunal has made certain findings of fact, as referred to in this decision, insofar as relevant for the determination of her claims then concluded:-*
>
> > *"11. The claimant contends that the respondents have <u>breached the equal pay legislation</u> and unlawfully discriminated against her on grounds of sex …. <u>Accordingly, the claimant seeks modification of her contract by virtue of an equal clause</u> so as she will not be treated less favourably than her comparators. The claimant also seeks substantive regrading as a Grade 7 lawyer from 6 September 2010 and back payment to that date (together with interest, associated pension contributions and bonuses) along with an award for injury of feelings and any other remedy which a tribunal can award under the circumstances.*
> >
> > *[Tribunal emphasis]*
> >
> > *12. The claimant would also ask the tribunal to consider that a statutory questionnaire was served on the respondents of 16 June 2017. To date no response or reply has been received. By virtue of Section 6B of the Equal Pay Act (Northern Ireland) 1970, this questionnaire and any reply are (subject to the provisions of the Section) admissible in proceedings under the Equal Pay Act (Northern Ireland) 1970 and a tribunal may draw any such inference as is just and equitable from a failure without reason or excuse to reply within eight weeks or from an evasive or equivocal reply."*

The respondents, in their response form, denied the claimant's claims, stating with limited detail:-

> *"The claimant's post was reviewed as part of the Northern Ireland Civil Service (NICS) wide Legal Grade Review and designated Grade 711 in November 2016.*

It is understood that the claims are in relation to indirect discrimination. If it transpires that the claims are in relation to direct discrimination the respondents reserve their right to amend this response.

The respondents do not concede that the treatment of the claimant is <u>discriminatory in any way or a matter of equal pay</u>.

[Tribunal emphasis]

Alternatively the Department of Justice (DOJ), Department of Finance (DOF) assigned grades to posts based on their relative value. All Grade 7 posts, wherever they are in DOJ or NICS, are assessed as involving work of equal value. It is not appropriate for the claimant to make claims of discrimination or equal pay without setting out the comparator group. It is not accepted that an appropriate comparator group would demonstrate a disparity. Alternatively if such disparity is accepted by the tribunal, the respondents say that the treatment of the claimant was justified.

The claimant does not identify the provision, criterion or practice said to be discriminatory. In any event the respondents say the treatment of a claimant was justified in all the circumstances described about as being a proportionate means at the time in question of achieving the legitimate aim of filling a person with the appropriate skills.

These matters are subject to an internal complaints procedure and the respondents reserve the right to amend the response in light of any findings."

Despite the detailed nature of the claimant's claim form relating to equal pay, the respondents, in their response form, save for the limited "non-concession" referred to above, did not deal with this claim in any meaningful way.

The respondents did not expressly address the issue of like work and/or work related as equivalent or any defence of 'genuine material factor'. The respondents at no time sought to amend the said response.

3.3.1 In addition to the matters set out in the previous sub-paragraphs, it also necessary to note, certain replies provided by the respondents, dated 2 February 2018, to the claimant's Notice for Additional Information, dated 21 December 2017. The request for information in the said Notice for Additional Information was in similar terms to the questions raised in the questionnaire, as outlined above, and which remained unanswered.

In particular, in relation to the issue of the defence of 'genuine material factor defence', the following was stated:-

"9. If the respondent is relying on a genuine material factor/justification defence with a decision not to substantively upgrade the claimant to a permanent Grade 7 post please provide the genuine material factor/justification relied upon?

10. Provide full details of any genuine material factor defence or other reason relied upon for the decision to limit back pay to 1.06.16 as opposed to 6.09.2010

(Answer)

9. The claimant's substantive post was graded as Deputy Principal (legal officer) level until reviewed as part of the review of legal grades. The difference in pay is due to the difference in grades. The respondents do not accept that the treatment is discriminatory and therefore the question of discrimination does not arise. The legitimate aim of the respondents is to assign grades to post so that staff have the appropriate grade may be placed in posts and paid in accordance with the objective pay and grading system. See also terms of reference for the review of legal grades. The post had been identified by line management as a DP post. It is appropriate for management to review posts from time to time for example by way of the Review of Legal Grades and to take appropriate steps to resolve any anomalies. It does not follow that the previous treatment of the claimant was unlawful and the claimant was treated consistently with all staff similarly affected by outcome of the Review of Legal Grades.

[Tribunal's emphasis]

10. See 3 above.

3.3.2 Some further replies by the respondents to the claimant's said notice are relevant:-

"2. Please confirm the date of the job description which was used for the JEGS evaluation.

(Answer)

Not relevant but see discoverable documentation.

3. Please confirm the rationale for selecting the data of back payment as 1.06.16.

(Answer)

1st June 2016 is the date of the final grading report and was selected as the appropriate date for backdating in respect of temporary promotions in keeping with policy and practice in NICS."

Further in relation to the claimant's comparators, for the purpose of the claimant's said claims, namely N McS, MK and AM (see later), the respondents provided the following information in particular.

Answer

6 & 7

…..

(c) The claimant identified comparators with the exception of AM were regraded to Grade 7 under the operation of the fluid grading arrangements in the former NI Court Service. AM was regraded from legal assistant to the new grade of Principal Legal Officer (Grade 7) following the implementation of the Review of NICS Legal Grades in 2006.

…..”

3.4 At a Case Management Discussion on 10 January 2018, as set out in the record of proceedings, dated 11 January 2018, the parties agreed a statement of issues, which stated, inter alia:-

“Legal Issues

Equal pay s.1(2)(a)(i) Like Work Equal Pay Act (Northern Ireland) 1970

1. <u>It is conceded that at the date of the claim the claimant was performing work rated as equivalent to that of a Grade 7 lawyer</u>.
[Tribunal emphasis]

2. What is the correct date for the backdating of pay:

(a) date of appointment;

(b) beginning of 2014 as the evaluation was based on a job description in in use during 2014.

3. (a) has the claimant from the date of her appointment on 6.09.2010 to the date of the claim performed like [work] …. to the following comparator group;

(i) male Grade 7 lawyers in the DOJ including;

….. NMcS
….
MK
AM

(b) are these appropriate comparators? ….

4. *Is any difference in pay between the claimant and the identified comparators genuinely due to a material factor within S.1(3) of the EPA (NI) 1970 which is not the difference of gender/tainted by sex, between the claimant and the identified comparators.*

   (b) *If so, what is the material factor?*

5. *After JEGS evaluation, was the claimant's contract of employment modified in accordance with S.1(2)(b) of the Equal Pay Act (NI) 1970 by the respondents placing her on temporary promotion to a Grade 7 subject to review?*

…. Factual Issues

1. *What was the date of notification of the JEGS review to the respondents?*

2. *What was the date of the job description on which the evaluation in the JEGS process was based?*

3. *Was the claimant, from the date of her appointment to the date of the claim performing like work … to Grade 7 lawyers in the DOJ to include the following;*

   ….

   NMcS
   ….

   MK
   AM

4. *Was there any material difference in the work performed by the claimant and Grade 7 lawyers in the DOJ to include the following;*

   ….

   NMcS
   ….

   MK
   AM

….

6. *How, if at all, was the claimant's contract modified following the outcome of the JEGS process?*

3.5 The claimant qualified as a solicitor in England and Wales in 2006 and worked in private practice, mainly in the areas of matrimonial and criminal law, in that jurisdiction. In or about 2008, she was admitted on to the role of solicitors in Northern Ireland. In or about 2008, for some three to four months she worked as a legal/housing adviser for the Housing Rights Service in Northern Ireland. She then

worked, as a member of a casual/agency staff, at Deputy Principal level, under a 51 week contract within the Policy and Legislation Division of the then Northern Ireland Court Service (pre devolution), carrying out legal research into various areas of law and subsequently, for approximately five months, in the Tribunal Reform Division of the Northern Ireland Courts Service.

3.6 In 2010, the Northern Ireland Court Service invited applications for the posts of legal officers, namely (i) Legal Officer, analogous to Deputy Principal and (ii) Grade 7, Legal Grade. The claimant decided to apply for the post of Legal Officer (analogous to Deputy Principal) and not the higher grade of post of Grade 7 Legal (see later).

In the Candidate Information Booklet, it was stated:-

> *"The Northern Ireland Court Service is the Lord Chancellor's Department in Northern Ireland. It is a separate Civil Service in its own right. The Court Service provides administrative support to the Courts and some Tribunals in Northern Ireland. On the devolution of responsibility for justice to the NI Assembly, the Court Service is likely to cease to exist as a separate Civil Service and its staff will transfer to the Northern Ireland Civil Service …."*

Further, in the said booklet, under Main Terms and Conditions, it was stated the said post of Legal Officer (analogous to Deputy Principal) would be permanent and the grading and starting salary would be negotiable depending on skills and experience. It also stated:-

> *"….*
>
> *This position is subject to <u>fluid grading</u>; a successful applicant appointed at Legal Officer may be considered for promotion to Grade 7 (Legal) after one years' satisfactory performance (see appointment process)."*

[Tribunal emphasis]

It was the claimant's understanding, which was not disputed by the respondents' representative that, after twelve months and subject to satisfactory performance, such a Legal Officer would be eligible to be upgraded to the Grade 7 (Legal), without the necessity for interview/open competition etc.

Under the appointment process, as referred to above, it was stated in the said Booklet:-

> *"The Court Service is seeking a Legal Officer and/or Grade 7 (Legal) within the Policy and Legislation Division. The successful candidate(s) will be listed in order of merit. This position is subject to <u>fluid grading</u>. Those candidates who wish to be considered for appointment at Grade 7 (Legal) must provide evidence of experience gained in two of the following criteria:*
>
> - *experience in relation to the preparation of primary legislation and drafting of subordinate legislation unsupervised;*

- *experience of providing comprehensive accurate and relevant advice on a range of complex legal issues;*

- *experience of providing policy advice (including advice to Minister) on a range of issues."*

[Tribunal emphasis]

As the claimant, at the time of application, did not consider she satisfied the first and third criteria, for the purpose of application for the post of Grade 7 (Legal), in light of her professional experience to date, as outlined above, she did not therefore apply for the Grade 7 (Legal) post. If she had done so, she would have required to complete an additional form outlining her experience to satisfy the said additional criteria.

3.7.1 In a letter, 14 May 2010, the claimant was informed by Ms Lisa Doyle, the Human Resource Unit (HRU)

"I am pleased to inform you that your name appears on the merit list of applicants deemed suitable for appointment to the post of Legal Officer (DP).

As a consequence of the devolution of police and justice functions, the terms and conditions of this post, as outlined in the Candidate Information Pack, have been aligned with the NI Civil Service. This means that anyone appointed to a Legal Officer (DP) post after 12 April <u>will not be subject to fluid grading and not therefore eligible to be considered for promotion to Grade 7 (Legal) after one year's satisfactory performance</u> …."

[Tribunal emphasis]

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 Durkan, 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 complimenting, 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 complimenting 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 Durkan 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 Durkan 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.

3.7.3 The claimant, following receipt of the said correspondence, confirmed she still wished to be considered for appointment to Legal Officer (DP) grade.

In a further letter, dated 1 July 2010, from HRU, the claimant was informed of her appointment as a Deputy Principal – Legal Officer in the Northern Ireland Courts and Tribunals Service.

[Tribunal's emphasis]

The said letter also stated:-

> *"…. Following the devolution of policing and justice on PJ on 12 April 2010, the Courts Service has now become the Northern Ireland Courts and Tribunals Service, an agency of the Department of Justice, within the wider (Northern Ireland Civil Service (NICS)). The Northern Ireland Civil Service being NICS. As a consequence of the devolution of policing and justice functions, the terms and conditions and pay scale of this post as outlined in the Candidate Information Booklet have been aligned with the NICS …."*

[Tribunal emphasis]

3.8.1 The claimant was subsequently informed by the HRU, the letter of 1 July 2010 comprised her contract of employment, and was therefore employed on NICS terms and conditions of employment.

In light of the foregoing, and the tribunal's decision in this matter, the tribunal has concluded that the relevant respondent for the purposes of the claimant's claim is the Department of Justice, being the claimant's employer at the relevant time, for the purposes of the Equal Pay Act (Northern Ireland) 1970 and/or the Sex Discrimination (Northern Ireland) Order 1976; and not the Department of Finance; albeit the Department of Finance may be the ultimate "paymaster" in relation to employees of the Department of Justice. During the course of the hearing, the representatives of the parties drew no distinction between the said two Departments; but in the circumstances, the tribunal has decided to formally dismiss the claimant's claims against the Department of Finance, as set out previously.

The claimant took up her post on 6 September 2010 and was assigned to the Official Solicitor's Office, which is not within the Policy Legislation Division but is a separate Office. At the time of her appointment, the claimant was not provided with a formal job description for her post in the Official Solicitor's Office (OSU). The Candidate Information Booklet, which related to the application process for appointment to the post of both Legal Officer (DP) and Grade 7 Legal, which was to be based, as set out above, in the said Division, stated generally that a successful candidate could be required to serve in either the Criminal Policy and Civil Policy of that Division and referred to the main activities as

> *"Providing general legal advice to other members of Courts Service staff, scrutinising primary and subordinate legislation and providing policy advice to the Lord Chancellor. The applicant may work unsupervised or directly to other senior managers in the Division as appropriate."*

It was not disputed the respondents' grievance procedure was part of the claimant's said contract of employment.

3.8.2 **The Grievance Procedure and Dignity at Work Procedures**

Insofar as relevant to these proceedings, the Grievance Procedure stated, inter alia:-

"1. Introduction

1.1 This procedure aims to promote good employee relations and deliver fair and equal treatment for all employees. It details the process to be followed by employees who wish to raise a work related grievance and how the Department will take prompt and effective action to resolve the grievance, as far as is reasonably practicable. This policy follows the guidelines laid down in the Labour Relations Agency Code of Practice on disciplinary and grievous procedures which took effect on 3 April 2011. A grievance is a complaint, concern, or problem which a staff member has in relation to an employment-related matter as defined under the scope of the policy in Section 2 below.

2. Scope of the Policy

2.1 Issues that may give rise to grievances include:

…. ● The implementation or application of NICS terms and conditions of employment.

3. Exemptions

3.1 ● It is not appropriate to use this grievance procedure where dedicated complaints or appeal procedures already exist for particular concerns which are found in Appendix 1. This list is not exhaustive.

4. Key Principles

4.1 You and your manager have a responsibility to develop effective working relationships where your individual needs are respected and recognised. You should be able to discuss problems and misunderstandings openly with your manager and should therefore be able to settle most issues informally.

4.2 Departments operate a clear and transparent framework for ensuring their grievances are addressed in every effort is made to reach a reasonable conclusion which supports effective working relationships.

The key elements of this framework are:

Step 1:

Every effort is made to resolve the grievance informally and each step an action of the procedure is taken without delay.

Step 2:

If you remain dissatisfied after information consideration of your grievance or do not want to try informal resolution you may raise a formal grievance.

Step 3:

The decision officer will hold a meeting with you to discuss your grievance and the timing and locations of meetings must be reasonable and agreed as far as possible. The meetings will be considered in such a manner that allow parties to explain their case in full and you will have the right to be accompanied by a trade union representative or work colleague.

Step 4:

The decision officer will review the case and if necessary seek further clarification or initiative further investigation.

Step 5:

Once the decision officer is content there is enough information to make an informed decision, a decision will be made on the appropriate action and you will be informed of the outcome.

Step 6:

You may appeal if you are not satisfied with the outcome and the appeal will normally be heard by an officer at a more senior level than the officer who conducted the first meeting.

4.7 Records must be kept at all stages of the formal procedures and will include –

- *a copy of the written grievance;*
- *management's response;*
- *any action taken with timescales;*

Reasons for any action taken; whether there was any appeal and, if so, the outcome;

Subsequent developments;

Reasons for any delay in the process;

Records of any meetings.

4.11 There may be occasions where the grievance relates to establish policy/procedure and/or organisational decisions where it is not within

the remit of the person handling the grievance to find a resolution, for example if the grievance relates to a NICS wide policy. In those cases, the investigation may be limited to considering if the relevant policy was applied properly but there may be no scope to change the actual policy. As part of the investigation, the investigating officer may write to the management responsible for the policy/decision if required to determine whether the relevant policy has been applied/implemented correctly.

6. Formal Grievance Procedure

6.1 If is not possible to resolve the grievance informally or you do not wish to attempt informal resolution you may invoke the formal grievance procedure, as outlined below. If a manager becomes aware that you wish to invoke the grievance procedure, he/she must refer you to the procedure to ensure that there is no misunderstanding regarding the rules and the process. It is in the interest of all the parties that the grievance is dealt with as quickly as possible. It is essential therefore that anyone dealing with the grievances follow the stipulated time limits, or in exceptional circumstances, agreed to any revised time limit(s).

6.2 Stage One Raising a Grievance

1. You must set out your complaint in writing as soon as is reasonable after the event giving rise to the grievance ….

2. Your witness statement of the grievance should:-

(a) make it clear that it is a complaint under the formal grievance procedure;

(b) set out the reasons for the grievance;

(c) outline what action, if any, has been take to resolve the matter.

3. If your grievance relates to a matter outside of line management's responsibility, it would be directed initially to Departmental HR who will appoint a decision officer to deal with the matter ….

Appendix 1

Name of Policy	*Policy Owner*	*Appeals/Grievance*	*Decision Officer*	*Appeal Officer*
Equal Pay	*PGU*	*Grievance Policy*	*DHR**	*DHR*

** With input from Corporate Human Resources as required to provide policy clarification*

Further, it was not disputed the respondents' Dignity at Work Policy was part of the claimant's contract of employment.

The respondents' Dignity at Work Policy, insofar as relevant to these proceedings, provided, as follows:-

"6.09 Dignity at Work Home Page

This policy is about creating and sustaining a productive working environment for all staff free from any form of inappropriate behaviour. It provides information on what to do should you feel your Dignity at Work has been affected, and also if you have been accused of offensive behaviour …

1. Introduction

…..

What type of behaviour may affect Dignity at Work.

…..

1.4 A variety of terms can be used to describe inappropriate behaviour that may impact on a person's Dignity at Work, including harassment, bullying, discrimination and victimisation. This policy is deliberately broad in scope and addresses:

Any form of unwanted, unreasonable and offensive conduct that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Conduct shall be regarded as having that effect only if, having regard to all the circumstances and in particular the complainant's perception, it should reasonably be considered as having that effect.

1.5 At times the offensive conduct can be unintentional on the perpetrator's part. However it must be emphasised that it is the impact of the conduct on the recipient and not the intention of a perpetrator that is significant ….

2. Unacceptable behaviour

Harassment ……

Bullying

…..

What is not bullying

…..

Discrimination

….

2.4 Discrimination is unlawful when someone is treated less favourably or unfairly compared to others on the grounds of a protected characteristic, in other words their gender ….

….

It can be direct – when people are treated less favourably because of a protected characteristic, or indirect – when a condition or requirement is applying equally to all but which is harder for one group to meet than another of which has a disproportionate or otherwise detrimental effect on them and cannot be justified.

…..

8.2 Anti-discrimination legislation

Unwanted, unreasonable and offensive conduct that is based on social identity or protected characteristics, is covered in the following legislation.

- *Sex Discrimination (NI) Order 1976, as amended (Gender …)*

  [It has to be noted, in the Dignity at Work Policy, there is no legislative reference to complaints/grievances/ appeals relating to issues of equal pay, pursuant to the Equal Pay Act (Northern Ireland) 1970, as amended.]

…..

11.12 Investigating Officer

Investigating Officers are appointed under Stage 2 of the formal procedures to carry out formal investigations. There are trained in investigation techniques and will interview the parties to a complaint and relevant witnesses. Following completion of their enquiries, investigating officers will prepare written reports setting out the facts and their conclusion as to whether or not the complaint should be upheld. Reports are submitted to the Departmental Equal Opportunities Officer.

…..

11.14 Departmental Equal Opportunities Officer

Departmental Equal Opportunities Officers will carry out preliminary enquiry meetings as part of the formal procedures and on receipt of the investigation report, will decide whether or not to uphold the complaint.

….

3.9 Following the claimant's assignment to the Official Solicitor's Office (hereinafter referred to as OSO) on 6 September 2010, the claimant's line manager was Ms Brenda Donnelly, the then Official Solicitor. This is a quasi judicial post, with a salary commensurate to in or about Grade 6/5. The Official Solicitor is appointed by the Lord Chancellor in consultation with the Office of the Lord Chief Justice. At all relevant material times prior to March 2015 (see later), Ms Donnelly, as the Official Solicitor, had line management responsibility for the claimant together with other NICS staff in the OSO. At all relevant material times, aside from Ms Donnelly, as the then Official Solicitor, there were five/six solicitors, apart from the claimant, who all held Grade 7 (legal) posts.

3.10 The claimant completed her probationary period of twelve months without issue. Indeed, all the claimant's performance reviews during her probationary period and afterwards were positive and not the subject of any criticism (see later). Shortly before the end of the claimant's probationary period, Ms Donnelly offered to temporarily promote the claimant to Grade 7 (legal), as soon as the probationary period had elapsed. As fluid grading had ceased, as set out previously, she was not in a position to substantively promote the claimant to Grade 7, as would have been normal under fluid grading (sometimes known as fluid complementing); but the tribunal is satisfied this offer of temporary promotion recognised the claimant, at the end of her probationary period was able to carry out the work of a Grade 7

(legal), following the experience gained in the said probationary period and was therefore able to satisfy by that time the additional criteria for the Grade 7 (legal) post, which at the time of application for her legal officer (DP) post, the claimant had recognised that she was unable to satisfy and resulted in her not applying for the Grade 7 (legal) post (see before).

3.11 The claimant was then temporarily promoted to Grade 7 (legal) by Ms Donnelly from on or about 3 October 2011 (which must be noted was at or about the end of her probationary period) to 30 June 2013 (some 19 months). She then reverted to legal officer (DP) over the summer vacation and on 7 October 2013 to 13 December 2013 (a period of approximately two months) the claimant was again temporarily promoted to Grade 7 (legal), before she commenced her first period of maternity from 13 December 2013 to 8 December 2014 (which period also included a short period of sick leave).

On 10 July 2013, the claimant raised a grievance, to which further reference will be made later, insofar as relevant to this decision, about her said lengthy period of temporary promotion and the failure for her to be substantively promoted to Grade 7 (legal), which was not successful and which decision was not appealed by the claimant.

Following her return from maternity leave in or about December 2014, the claimant resumed her position in the OSO as a legal officer (DP).

During the claimant's said period of temporary promotion to Grade 7 (legal), the claimant was paid salary appropriate to that grade; but she did not receive the same financial package/benefits to which she would have been entitled to if she been substantively and permanently promoted to Grade 7 (legal) and which a person, so promoted at Grade 7, receives and which was received by her said comparators, for the purpose of the claimant's claims. The precise differences, insofar as may be relevant, will require to be considered further, if necessary, as part of any remedy hearing, following the tribunal's decision on liability.

3.12 By 25 March 2015 Ms Donnelly went off work on sick leave and subsequently retired, due to ill health, on or about 30 June 2016. She did not return to work during the intervening period as the Official Solicitor. On or about 8 August 2015, Ms Rosalind Johnston was appointed as acting Official Solicitor. This was advertised as a Grade 6 (internal promotion or transfer). Ms Johnston then became the claimant's line manager in succession to Ms Donnelly.

3.13 On 10 March 2015, the claimant was informed of the "intention to undertake a job evaluation (grading) review of all legal posts in the NICS and Crown Solicitor's Office. Since the devolution of justice in 2010 all legal staff are subject to the same pay and grading arrangements within the NICS and CSO. It is therefore now possible to ensure that the grading of all legal posts is consistent across all Departments".

The exercise had the support of all Heads of Legal Services and included all the different services but, in particular, for the purposes of these proceedings, the legal staff in NICS, such as those in the Official Solicitor's Office but also the Departmental Solicitor's Office, whom, as set out previously, were all employed by

the Department of Justice; albeit the ultimate “paymaster” may have been the Department of Finance.

On 22 June 2015, staff were informed, in relation to this proposed review of all legal posts:-

> *“….*
>
> *2. I am pleased to tell you that the NICS plans to use independent grading analysts, Beaman Management Consultants, in order to start the work as soon as possible. Beaman is the only private sector company in the UK licensed and approved by the Cabinet Office to carry out Job Evaluation and Grading Support (JEGS) grading review and they have extensive experience in the use of JEGS and Job Evaluation for Senior Posts (JESP) on legal posts in a wide range of public sector organisations.*
>
> *….*
>
> *4. Not everyone in a legal post will have their post graded as part of this exercise. NISRA methodology is being used to select a representative sample of posts, which has been increased following consultation with relevant Departments and TUS, to ensure that the sample fully represents the range of NICS/CSO legal posts. Staff in posts selected for a review will be notified in due course once consultation has been concluded.*
>
> *5. CHR will oversee the review through the use of appropriate moderation arrangements to ensure a robust and consistent approach to the grading. The data will be gathered using the JEGS and JESP methodologies. It should be emphasised that the review will be only seeking to gather information about each post and not about the post holder.*
>
> *6. I am aware that a member of staff with specific business areas have been graded before, but, as this is the first time a NICS and CSO wide approach has been possible, I would ask for the co-operation and support from line managers and staff selected in the sample in this important piece of work to ensure consistency across the entire cadre of the NICS.*
>
> *….*
>
> *8 More details on the process for staff in the selected posts and their line manager’s role in signing off job descriptions will be explained in the briefing sessions ….”*

On or about 1 September 2015, the claimant was informed:-

> *“As you are aware a grading review of NICS/CSO legal posts will be conducted by Beaman Management Consultants.*

Legal staff are advised on 22 June that not all legal posts will be graded and that a representative sample, selected by applying NISRA sampling methodology to ensure that posts which undertake different work activities would be included in the exercise."

The claimant's posts was one of the posts selected and, although she commenced her second period of maternity leave during September 2015, she fully participated in the said JEGS review during the course of her said period of maternity leave, which concluded on 12 September 2016, taking part in a JEGS interview on or about 7 December 2015 and completion of job analysis questionnaire, together with Ms Johnston on 1 December 2015 and completion of an agreed job description, dated December 2015. The said job description was based on the claimant's duties and responsibilities between December 2014 and September 2015, when she was working as a legal officer (DP) in the OSO.

3.14 On the basis of the said assessment, the claimant was formally informed in a memo, dated 28 November 2016 that her existing grade of DP had been evaluated and upgraded to Grade 7 with a total point score 632. The Grade 7 range was 601-685.

In a further memo, dated 28 November 2016 informing staff of the result of the JEGS exercise, it was stated:-

"….

5. Since the grading results were received, management has spent a considerable amount of time working through the results and considering how the impact on staff of any potential surplus at a particular grade or a downgrading post could be mitigated. During this process, management has in mind its objective of ensuring that all staff are paid fairly for the grade of work that they do, <u>in line with legislation on equal pay</u>, while endeavouring to minimise any negative impact on staff in post.

[Tribunal's emphasis]

…..

Posts Graded Upwards

13. Where staff are in posts that have been evaluated at a higher grade than the staff member currently occupying them, arrangements had been put in place by Departmental HR to make payments based on <u>temporary</u> promotion terms to the member of staff in that post from an effective date of 1 June 2016 (<u>the effective date of the grading results</u>). Departments will make arrangements to fill the posts formally through temporary promotion arrangements, if required, and will then take steps to fill the post permanently by a person of the same substantive grade on the post.

[Tribunal emphasis}"

As a result, the claimant was temporarily promoted to Grade 7 from 1 June 2016 and received the salary for a Grade 7 (but see before the potential differences other

than pay between a person permanently promoted at Grade 7 and a person on temporary promotion to Grade 7).

In a letter dated 30 January 2017, the claimant was informed by Rory Lavelle, Payroll Services HR Connect, which stated:-

> *"I wish to confirm that you have been temporarily promoted to non Principal Legal Officer (ie Grade 7), which will take effect from 1 June 2016. Your temporary promotion is due to finish on 31 March 2017 but as this is subject to ongoing review, no assurances on duration can be provided."*
>
> *[Tribunal emphasis]*

Indeed, at a meeting, attended by senior Departmental HR representatives, on 19 January 2017, the claimant was told that the upgrading of her post was accepted without challenge, following the JEGS process. As referred to previously in the agreed statement of issues, it was conceded by the respondents that at the date of the claim the claimant was performing work rated as equivalent to that of a Grade 7 lawyer. There was no evidence that the position was any different from the conclusion of the JEGS evaluation, and in particular from 1 June 2016, to the date of the claimant's claim.

The tribunal accepts that the date of 1 June 2016 was applied to any employee affected by the JEGS assessment, irrespective of sex.

The claimant, the date of the hearing of this matter, remained on temporary promotion to Grade 7, which was to be reviewed on 1 July 2017 but with the continuing caveat that no assurances on duration could be provided. Further, no modification of the claimant's contract to that of a permanent Grade 7 had taken place prior to the date of the hearing.

3.15 On 20 January 2017, the claimant lodged a further formal grievance, to which further reference will be made later in this decision, insofar as relevant to the tribunal's decision.

3.16 For the purposes of the claimant's claim of equal pay, the claimant's comparators were MK and NMcS. MK at all material times worked in the Departmental Solicitor's Office, from in or about 2014, having previously worked in the Policy and Legislation Division, where the claimant previously worked; and at all material times, for the purposes of these proceedings, has been employed by the Department of Justice at Grade 7 (legal). NMcS is a legal officer and Registrar to Tribunals, again employed by the Department of Justice and, at all material times for the purposes of these proceedings, has been employed at Grade 7 (legal). On foot of their agreed job descriptions, pursuant to the said JEGs process, referred to previously, MK obtained a score of 626 and NMcS obtained a score of 631. Following the exercise, MK and NMcS were confirmed at Grade 7 (legal). There was no evidence to suggest at any material time, that MK and NMcS had been wrongly graded at Grade 7, prior to the JEGS exercise. Further, no relevant evidence was brought by Ms Allaway, who appeared as a witness on behalf of the respondents, to challenge the claim of "like work" by the claimant with her said comparators at Grade 7 (legal) from the end of her said probationary period, even

when not temporarily promoted to Grade 7 (legal) (see further paragraph 3.18.1 of this decision).

Having considered the job descriptions, used as part of the JEGS exercise of the claimant and her said comparators, which showed in detail the type and nature of the work carried out by each of them, the tribunal was satisfied that their work, as set out therein, was the same or broadly similar, to that of the claimant as confirmed by their respect scores and was so from in or about 2014, the date of the period to which the job descriptions related.

In this context, it is also to be noted, that when the claimant sought discovery, by Notice, dated 21 December 2017 of the job descriptions/personnel specifications of the claimant's comparators NMcS MK, in a reply, dated 2 February 2018, the respondents' representatives replied – "those matters are not relevant given the respondents' acceptance that the substantive post of the claimant is equal to that of her comparators doing Grade 7 Work.

There was therefore, in light of the foregoing, no relevant evidence before the tribunal by the respondents to challenge the claimant's evidence, which the tribunal accepts, that, at all material times, when she was doing Grade 7 work in the OSO that was the same or broadly similar to the Grade 7 work carried out by her comparators MK and NMcS. Indeed the job descriptions, albeit from 2014, confirmed this. Indeed, the tribunal has little doubt, if the same job descriptions had been prepared in 2011-2014, there would have been little or no difference.

3.17 For the purposes of the claimant's case of direct sex discrimination, to which further reference will be made later in this decision, the claimant's comparator was AM who was also employed by the Department of Justice in the Departmental Solicitor's Office at Grade 7 (legal). He was initially employed as a legal assistant (Deputy Principal); but, following a JEGS exercise in or about 2006, he was regraded Principal Legal Officer, to Grade 7, were he remained at the time of these proceedings.

3.18.1 The claimant, whom the tribunal found was a credible and convincing witness (see ***Thorn ton v NIHE)***, accepted, in evidence, that during her said probationary period, she was not doing work to the level of Grade 7 (legal) and could not be included in her claim of like work with her comparators. However, the tribunal considers it is significant that, as soon as the said period was over, Ms Donnelly offered the claimant temporary promotion to Grade 7 (legal), as referred to previously and that the claimant then embarked on her first period of temporary promotion to Grade 7 (legal). This illustrated, in the judgment of the tribunal, she now possessed all the remaining criteria for the Grade 7 post, which she had not possessed at the time of her application. The tribunal is further satisfied Ms Donnelly would not have temporarily promoted the claimant to Grade 7, if she was in any doubt the claimant was not able to do the said work, during the period of temporary promotion from 3 October 2011 to 30 June 2013 and subsequently, after the short break over the summer vacation of 2013, (when work in OSO would have been slower generally), in the period 7 October 2013 to 13 December 2013; and that, during both the said periods, Grade 7 (legal) work was required to be carried out by the claimant.

Further, the tribunal noted that no witnesses were called by the respondents, whom it might reasonably have been expected to call to directly challenge the claimant's

clear evidence that the type of work she was doing throughout the period from the end of her probationary period, even when not temporarily promoted to Grade 7 legal, was Grade 7 legal work which was the same or broadly similar to that of her comparators; and, in particular, none of the permanent Grade 7 colleagues of the claimant in OSO during the relevant period, who would have had direct and intimate knowledge of the work the claimant was doing in the said period, was called by the respondents to challenge the claimant's said evidence. Ms Johnston, who was Ms Donnelly's successor as Official Solicitor from in or about August 2015 was not called to challenge the claimant's evidence, albeit she also clearly would have had such knowledge of the work that the claimant was doing from the date of her said appointment as acting Official Solicitor. The tribunal concluded that the reason such persons were not called by the respondents was because such evidence, if it had been given, would not have supported the respondents' case but rather would have confirmed the claimant's evidence on this issue (see further ***Lynch v Ministry of Defence***).

3.18.2 However, it has to be acknowledged that the respondents' representative did strongly challenge, by way of cross-examination, the evidence given by Ms Brenda Donnelly, the former Official Solicitor, who was called to give evidence by the claimant in light of various performance appraisal documents, which had been completed by the claimant and Ms Donnelly during the period Ms Donnelly was the claimant's line manager. He evidence, as referred to below, had to be given detailed consideration by the tribunal.

The circumstances in which Ms Donnelly was asked to give evidence and/or by whom she was asked to give evidence at any particular time were tactical considerations for the parties and their representatives and not a matter for the tribunal, whose task was to determine issues in these proceedings on the basis of the evidence given, and, in particular the evidence given by Ms Donnelly, when called to do so by the claimant's representatives.

However, it is correct to note that, at the commencement of the proceedings no witness statement by Ms Donnelly had been exchanged by either of the parties, in accordance with the tribunal's Case Management Orders relating to the exchange of such statements. Without leave of the tribunal, Ms Donnelly could not therefore give evidence on behalf of any party to the proceedings. However, during the course of the hearing and, in particular during the course of the claimant's cross-examination by the respondents' counsel, the claimant's representative made an application to call Ms Donnelly as a witness on behalf of the claimant and to call her before the conclusion of the claimant's cross-examination, primarily due to the fact that Ms Donnelly's previously arranged personal family travel commitments outside the jurisdiction meant that she would be otherwise unable to give her evidence until after the period which had been originally allocated to the hearing. Initially, the respondents' representative made an application for the tribunal to recuse itself, which the tribunal refused, as no proper grounds to do so had been established. The tribunal, however, having heard submissions from the representatives of the parties, decided it was appropriate, in the interests of justice, to allow Ms Donnelly to be called as a witness, albeit out of sequence, in the circumstances and further to give leave for Ms Donnelly's recently completed witness statement to be exchanged with the respondents' representatives to give them time to consider its contents before commencing any cross-examination of Ms Donnelly. In allowing the evidence of Ms Donnelly to be taken, as set out

above, the tribunal emphasised it would ultimately be a matter for the tribunal to assess Ms Donnelly's evidence, as appropriate, when determining its decision. It also made clear, when granting the claimant's representative's application, that it would be willing to hear any application by the respondents' representative to recall Ms Donnelly, at a later date, if her cross-examination was unable to be completed fully and properly before she left the jurisdiction and, if necessary, to also seek leave to call any further witnesses for the respondents, other than Ms Allaway, with relevant exchange of any additional witness statements, on foot of any evidence given by Ms Donnelly. In the event, no such application, to call any other witness, was made by the respondents' representatives. The tribunal also acknowledged that, since the claimant's cross-examination had not been completed at the time of Ms Donnelly giving her evidence, if appropriate, the respondents' representative, following the evidence of Ms Donnelly, would be allowed to further cross-examine the claimant, on matters/issues which had been dealt with earlier in the course of the claimant's cross-examination.

3.19 Following exchange of Ms Donnelly's witness statement, Ms Donnelly was called to give evidence. In her witness statement, which she adopted as her evidence in chief, she stated, inter alia:-

> *"….*
>
> *2. I was unaware of this case until around 9.00 pm last night when I was contacted by Laurene MacAlpine for the purpose of informing me of this case and that the Employment Judge had raised the issue of my availability and what my view was on that. My response was that I will be more than happy and in fact keen to give evidence, but, I said, you do know what my view is and always has been that Tess has always done Grade 7.*
>
> *3. When I was Tess' line manager, the reality was that all the work was Grade 7 and complex, I was really scrabbling about to find less complex work for Tess, such as criminal injury, which was the least complex. The reality was all the work was County Court and High Court work – it was all complex and at least Grade 7 standard ….*
>
> *4. Whenever possible I tried to make sure that Tess availed of temporary promotions with the approval of the Supreme Court administrator."*

3.20 In the course of her cross-examination, she further stated, prior to the claimant's application for the post of legal officer (DP) in 2010, she had made it known to the Lord Chief Justice, who was formerly her line manager, and senior personnel in the administration of the Court Service, including Ms McAlpine, that, given the amount of work and complexity of that work, which was not disputed by them, she constantly needed additional legal resource for the OSO.

Prior to devolution, Ms Donnelly was not particularly concerned about the precise grade (whether Grade 7 or DP level) of a person to be appointed but was more concerned with the calibre of the person who most clearly matched what she needed in order to effectively carry out the work of the OSO. In particular, with fluid grading, in force prior to devolution of justice and prior to the claimant's appointment, she knew, after a probationary period of twelve months and

satisfactory performance in that period, a person appointed at the legal officer (DP) level would be able to be substantially promoted to Grade 7 (legal), which was the grade of all the other lawyers in the OSO.

After the devolution of justice, Ms Donnelly accepted she was fully aware fluid grading had been removed and the "automatic" promotion, as referred to above, no longer applied and substantive promotion to a Grade 7 post from DP would be required to be the subject of a recruitment exercise, involving open competition, whenever such an exercise was able to be conducted which was unlikely to happen in the near future. She also acknowledged, following the removal of fluid grading, it was not intended work at Grade 7 level should be given to an employee at legal officer (DP) level; but she stressed, in evidence, that whatever may have been the intention the reality was that the claimant, at all material times, carried out Grade 7 (legal) work, even when employed at legal officer (DP) level, outside the periods of her temporary promotion to Grade 7 (legal).

This evidence, about the type of work the claimant was doing, when not temporarily promoted, was strongly challenged by the respondents' representative in light of the performance review reports completed by Ms Donnelly, which it was suggested by the respondents' counsel stated otherwise.

3.21 Each year, Ms Donnelly, as Official Solicitor, completed a performance review reports in relation to members of her staff, including the claimant. She accepted that in her said role, she was required to complete them accurately and honestly. These were countersigned by Ms McAlpine, who was at that time, a Grade 5 in the Office of the Lord Chief Justice and who at the time, was effectively Ms Donnelly's line manager for these purposes. It will be recalled it was Ms McAlpine, who in May 2010, had raised concerns about equal pay issues (see paragraph 3.7.2 of this decision).

Ms Donnelly, in her evidence, stated, in summary, that OSO, at all material times, was under strain, under resourced and this was known by Ms McAlpine but also the Lord Chief Justice from conversations she had with both of them and, although she was pleased to obtain the services of the claimant at legal officer (DP) level this did not resolve the problem because, in essence, most, if not all the work for practical purposes, in her office was Grade 7 legal work due to its nature and complexity and very little was specifically legal officer (DP) level work. A consequence of this was that the claimant, by the end of her probationary year, if not earlier, was doing Grade 7 legal work almost all of the time. Although Ms Donnelly accepted she knew that she was meant to give the claimant only legal officer (DP) work, she maintained, in reality, this was impossible. In order for her to run the office effectively, her staff including the claimant and the other five/six legal staff, who were all at Grade 7, worked as a team, and as a consequence, the claimant did the same work as the other Grade 7 solicitors in the office and Ms Donnelly was unable to make a distinction between Grade 7 staff and the claimant, when allocating the work. As a result, Ms Donnelly, in her evidence confirmed, in essence, 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 such as Ms McAlpine. As indicated previously, Ms McAlpine was not called to give evidence to refute the above evidence by

Ms Donnelly in relation to her knowledge of the situation on the ground in OSO and/or Ms Donnelly's conversations with her and/or the Lord Chief Justice.

3.22 However, this evidence of Ms Donnelly, summarised as above, had to be very carefully considered by the tribunal as to its accuracy and truthfulness because, in the absence of any other evidence or challenge from Ms McAlpine or any other former or present member of staff in OSO, this effectively confirmed the claimant's evidence that from on or about 3 October 2011, the end of her probationary period, she had been carrying out Grade 7 legal work, which was the same or broadly similar to that of her comparators. In particular, it was necessary for the tribunal to do so because, during the course of Ms Donnelly's cross-examination, it became apparent that there were entries set out in the said performance review records by Ms Donnelly, and conversations with the claimant during the relevant period, which suggested her evidence, summarised above might not be accurate and truthful. In particular, for example, in a record dated 6 June 2011, albeit still within the probationary year, under the comments page, Ms Donnelly had stated:-

> *"I know that Tess is very keen to have training and experience in all aspects of the work of the office. I have explained to Tess as she is a legal officer, I must not impose Grade 7 legal work on her. Within these constraints I will however arrange for Tess to be trained in many areas as possible even if she will not be doing some of the work routinely …."*

Ms Donnelly, in her evidence, by way of explanation, insisted that what was stated in the review was what she was supposed to do in an ideal world but, in reality, there was very little or no DP work in the office, the vast majority of the work being Grade 7 work, which the claimant was doing, whilst at DP level, as part of her training. Ms Donnelly insisted this reality was unavoidable in the circumstances and, although she acknowledged what was stated in the review did not paint an accurate picture, she was, in the formal review document, seeking to "toe the party line". She insisted Ms McAlpine was fully aware of her dilemma as she had to get the work done and that meant, regardless of what was written in the performance review, the claimant for all practical purposes was at all material times doing Grade 7 legal work and this was the reality on the ground.

In a further performance review record for the period April 2012-March 2013, a period of temporary promotion, Ms Donnelly stated, inter alia:-

> *"Since the temporary promotion started Tess has been involved in a diverse range of complex Grade 7 work, all of which she has dealt with to a very high standard …."*
>
> *"….*
>
> *Tess is employed as a legal officer in my office – I hope from my comments above it is clear that I am in no doubt that Tess' performance has been significantly above requirements for her grade. During the period of Tess' temporary promotion to Grade 7* legal she *has carried out her work to a very high standard – her performance fully meets the requirements of Grade 7 …."*

"…. As I have said Tess has been temporarily promoted to Grade 7 legal for quite a proportion of the reporting period and remains temporarily promoted. She has totally taken this in her stride, indicating that she is more than able for promotion to the next grade. The difficulty in the longer term is that the arrangements for promotion within my office have changed and I am unsure if it will be possible for Tess to eventually be promoted within my office or that she will have to apply for posts that are trawled – I hope this will not be the case and that eventually she can compete for a Grade 7 post in that office …"

Ms Donnelly, in her evidence, had to accept that, although what she had stated accurately reflected the position, post devolution, in relation to the removal of fluid grading for someone appointed like the claimant at DP level, it did not set out an accurate and full picture of what she maintained, in the course of her evidence, was happening on the ground in the OSO; namely that the claimant was doing Grade 7 legal work, at all material times, even in the periods outside the periods of temporary promotion.

Ms Donnelly also had to accept, albeit she had some difficulty in recalling the precise conversation, that she had told the claimant, as the claimant herself had confirmed in the course of the grievance investigation with Ms Allaway (see later) that she had disagreed with the claimant, when the claimant had maintained she had been performing Grade 7 legal work at all material periods from 2010 and that the claimant was only performing DP work – referring to "medical declaratory" work as a justification for the distinction between DP and Grade 7 work. When faced with the above, Ms Donnelly accepted that what she had said to the claimant, during the course of these conversations, was not correct and she had basically tried to "fob her off", knowing that what was happening on the ground was very different. She further accepted, in evidence, she had maintained this official line, despite the reality, on more than one occasion. She 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 OSO 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. Ms Donnelly insisted that, if she had only given the claimant DP work of which there was little or none, she could not have operated the OSO and got the work of the office completed.

Ms Donnelly frankly acknowledged she was not proud of what she had written and had said, as referred to above, since it was not accurate or truthful. She accepted that she had been "massaging the truth" or as she put it more bluntly "I was lying to keep myself right"; and, being between "a rock and a hard place", she had tried in official documents to keep herself right to maintain the official position that the claimant was only doing DP work, when not temporarily promoted to Grade 7, knowing the reality was very different and required to be so in order to the get the job done. She further acknowledged that, although she knew the claimant had been doing Grade 7 work all along, she took no formal action to help her. She said she tried to find a solution behind the scenes because of the obvious unfairness to the claimant. However she was repeatedly told by those in higher line management authority that under the policy, following devolution, with no fluid grading, the

claimant would have to wait for a Grade 7 vacancy to be filled open recruitment exercise, which has never occurred.

3.23 The tribunal found this evidence of Ms Donnelly very difficult to assess, in light of what she had stated in the performance review documents and other conversations with the claimant, as outlined above, in contrast to her oral evidence to the tribunal, which told a very different story. The tribunal was only too aware that Ms Donnelly was a senior solicitor, who had held a senior legal position in the judiciary, prior to her sick leave/retirement which in addition to its administrative duties had a quasi-judicial role. The tribunal had no doubt that Ms Donnelly was very aware of the admissions she was now making which, in essence, showed she had been untruthful/lying/massaging the truth but also the significance of her doing so, given her former role and reputation. It appeared Ms Donnelly had only become directly involved in these proceedings at a late stage and was being asked to recall events of some years ago, prior to her illness and her retirement. She clearly had difficulty in recalling the specific conversations with the claimant but she rightly accepted and confirmed that the claimant had been accurate in recalling the conversations, during the course of the grievance hearing before Ms Allaway. She was very firm in her detailed cross-examination, despite her obvious embarrassment about being shown to have told untruths as to the position on the ground in her office and, in particular, that at all relevant times the claimant did Grade 7 work even when employed at DP level. The tribunal was not satisfied that any absence of memory was the issue it had to determine but rather the reliability of her evidence.

In reaching its conclusion, whether to accept Ms Donnelly's evidence about what was, in reality, happening on the ground in OSO, in contrast to what she had said in the performance review documents and/or in conversations with the claimant, the tribunal considered carefully the guidance of Legatt J in ***Gestmin SGPSSA v Credit Suisse (UK) Limited and Another [2013] EWHC 3560*** *at paragraphs 15-22* where he has stressed the importance of contemporaneous documents, the fallibility of human memory and the dangers of accepting oral testimony which conflicts with contemporaneous documents; which guidance has been endorsed and following in many subsequent High Court proceedings of, various types, especially commercial actions (see further ***Barclays Bank v Christie Owen and Davies (t/a Christie and Co) [2016] EWHC 2351*** and ***Noels v Oxford Hospitals NH Trust [2019] EWHC 936).***

However, it has to be noted that, although the guidance endorsed and followed in the above cases are for the most part commercial type cases and very unlike the present proceedings, it has to be recognised it is a general helpful guide to evaluating oral evidence and the accuracy/reliability of memory; but in the final analysis each case depends on its own facts.

Helpfully, HH Judge Eady QC, in an Employment Tribunal case, which related to burden of proof provisions in a sex discrimination complaint, ***Kumar v DHL Services Limited [2017] UKEAT 0117,*** said at paragraph 18:-

> *"More generally, when considering the evidence at trial, it is right that an Employment Tribunal should <u>exercise caution</u> when asked to place reliance upon recollections, particular if given some time after the event and in the context of litigation rather than relevant contemporaneous documents (see* ***Gestmin SGPSSA v Credit Suiisse (UK) Limited*** *at paragraphs 15-22. In*

particular when adjudicating upon direct discrimination claims Employment Tribunals should be aware of the specific difficulties that arise, and astute to the danger of self-serving explanations from employers or witnesses …."

The tribunal, not without some hesitation, has come to the conclusion that what was written is the reviews and said by Ms Donnelly to the claimant was not correct and the reality on the ground in the OSO was, as she was now saying in evidence, 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); and that, as she had said in evidence, she was between a rock and a hard place. She had tried in such documents and conversations to keep herself right to maintain the official position that the claimant was only doing DP work whereas the reality was different and it needed be to get the job done. The tribunal, again in this context, noted that no other relevant evidence was called by the respondents, even after the evidence given by Ms Donnelly, by those in the OSO or elsewhere who might have been in a position to show what Ms Donnelly was now saying was not correct. It has to be said Ms Donnelly's evidence, although accepted by the tribunal, does her no credit as she is only too aware. Indeed, if she had been more truthful from the outset, some of the issues in this matter might have been able to be avoided. The tribunal, in the present proceedings, is satisfied that, in accepting the evidence of Ms Donnelly, it has exercised the necessary caution and has been astute to the dangers of accepting such evidence as referred in the said guidance; but for the reasons set out above, it has concluded that Ms Donnelly's oral evidence to the tribunal should be accepted in the circumstances.

3.24 The claimant's claim of direct sex discrimination related to her claim that she had been treated less favourably than AM, her comparator, for the purposes of this claim who was previously employed as a legal assistant by the Department of Justice in the Departmental Solicitor's Office, prior to 2006 but, following the implementation of a review of NICS legal grades in or about 2006, his work was evaluated as Grade 7 legal work and was, as a consequence, in or about 2006 promoted on a permanent basis to Grade 7 (legal). The claimant, for the purposes of her said claim of direct sex discrimination, simply referred to the circumstances where she has been temporarily promoted to Grade 7 following the JEGS evaluation in contrast to the position of AM following the 2006 exercise; but she gave little or no other evidence about AM's promotion other than to refer specifically to the difference of gender.

The tribunal is satisfied that such a failure to promote could fall within the provision of Section 8(2) of the 1976 Order and was not excluded within the exception in Section 8(6) as the claim relates solely to the issue of failure to promote and not "benefits consisting of payments of money" (see previously paragraph 2C of this decision and paragraph 19 of the Code on Equal Pay relating to non-contractual pay matters, such as promotion); although the tribunal accepts the "dividing line" between an Equal Pay claim and a Sex Discrimination claim can be difficult to discern in relation to non-contractual pay benefits in any particular case.

Undoubtedly there is a difference of gender; but, in the absence of any other detailed evidence by the claimant, for example by AM her comparator or the details of what occurred in or about 2006, the tribunal was not persuaded, without more, the claimant had shown the failure to promote her in or about 2016 could be on the grounds of her sex and the said claim must be dismissed.

(See ***Madarassy v Nomura*** and the case law at paragraph 2.12 of this decision).

3.25 In light of the foregoing and the tribunal's findings as set out in the previous sub-paragraphs the tribunal is satisfied that the claimant has proved, in accordance with Section 1(5) of the 1970 Act that her work and the work of her said comparators, NMcS and MK, was the same or of a broadly similar nature and any differences are not of practical importance in relation to their terms and conditions of employment. The tribunal is therefore satisfied that the claimant was employed on like work with her said comparators from the end of her probationary period, from on or about 6 October 2011 to the date of the presentation of her claim for equal pay on 5 October 2017.

Even if the tribunal is wrong, the tribunal would have been satisfied that the work of the claimant was rated as equivalent from 28 November 2016 to the date of the presentation of her claim for equal pay on 5 October 2017. It was on 28 November 2016 the results of the job evaluation were notified to the staff, including the claimant, and details of appeals etc and the said JEGS process was "complete", (see ***O'Brien and Others v Sim-Chen Ltd [1980] ICR 573, Arnold v Beecham Group Ltd 1982 ICR 744);*** albeit on foot of the said results the claimant was temporarily promoted to Grade 7, backdated with effect from 1 June 2016.

3.26 As stated previously, the claimant made a grievance on 10 July 2014, which was unsuccessful, and not the subject of an appeal, relating to promotion and selection. As set out in the letter of 2 October 2013, giving the claimant the outcome of her grievance, it is noted the main issues highlighted in your complaint were that:

> *"1. You were temporarily promoted for 21 months (October 2011 to June 2013) and in view of the length of time that passed and the terms of the NICS Career Opportunities and Promotion Policy, you felt that the term temporary was no longer applicable and sought confirmation that you were to be included in the cadre of Grade 7 lawyers; and*
>
> *2. you do not consider that it is open to DOJ to downgrade you.".*

The letter concluded, inter alia:-

> *"You have not acquired the right to have your temporary made substantive after the period of temporary promotion. There is no mechanism within the NICS Career Opportunities and Promotion policy to allow this and you would need to sit a formal selection board to be considered for promotion to Grade 7 legal officer. I do not consider there has been any breach of the NICS Career Opportunities and Promotion Policy.*
>
> *In addition, you were not downgraded as you had not been substantively promoted and then demoted but rather you have been temporarily promoted and this arrangement was ended when it was no longer required …."*

In this context, specific reference was made to Section 3.1 of the said policy, and which clearly was central to the outcome of this grievance, which stated:-

"Selection for promotion will be on the basis of merit … and substantive promotion means the transfer under a formal selection procedure to a higher substantive grade that has greater job weight than the individual's existing substantive grade".

The claimant had not participated in a formal selection procedure to fill a Grade 7 legal officer vacancy and it was pointed out in the letter "it would be unfair to others (staff in the same grade and discipline for example) if you were substantively promoted to the Grade 7 legal officer following a period of temporary promotion but without the reach to sit a formal promotion board. Indeed it was accepted there were no such opportunity for the claimant to participate in a formal selection procedure for a Grade 7 legal officer post.

On that basis of the grievance, as outlined above, it was not surprising to the tribunal, the said grievance was not upheld, as it confirmed the application of the promotion policy, following the abolition of fluid grading/complementing. The basis of the grievance was not directed to issues of equal pay and has to be contrasted with the claimant's second grievance, which she lodged on 20 January 2017.

However, it is apparent from the said letter, although the first grievance did not relate to equal pay but rather the application of the promotion policy and use of selection procedures, the claimant did make reference to the following, in the course of her grievance, which are the subject matter of these proceedings and were relevant to the said second grievance:-

"<u>Differentiation between DP legal and Grade 7 legal work undertaken in the Official Solicitor's Office.</u>

At the grievance meeting you (ie the claimant) stated that you had been undertaking Grade 7 legal (legal) work before the temporary promotion had ceased. You explained that due to the type of work carried out in the Official Solicitor's Office that it was difficult to differentiate between the DP legal and Grade 7 legal work as there was no real difference between the cases allocated to each grade.

This point has been raised with the local business area and will be addressed separately. If you have any issues surrounding this issue now that your temporary promotion has ceased, please raise these with your line manager without delay."

The claimant did not appeal in any event the outcome and, as referred to previously, Ms Donnelly again temporarily promoted, within five days of the letter, the claimant from 7 October 2014 to 13 December 2013, when she began her first maternity leave. (See before the tribunal's findings in relation to the evidence of Ms Donnelly). However, the tribunal found it significant the claimant, even at the time of the first grievance, was referring to matters, albeit not expressly stated, relevant to issues of equal pay in relation to her work in OSO.

3.27 On 20 January 2017, the claimant raised her second formal grievance. It may be that other grievances were raised at that time by different legal staff "relating to equal pay and discrimination", as stated by Ms Allaway in evidence. However the tribunal does not have relevant details in relation to the grievances of those other

staff and, in the circumstances, it is only prepared to consider, insofar as relevant, the grievance of the claimant.

The claimant is her said grievance under Grievance Type, ticked the box Pay and Allowances, and then ticked the boxes marked "Equal Pay" and "Pay on Promotion", under grievance subtype. She did not tick the boxes Promotion and Selection – "Eligibility", "not being called for interview".

Under the details of the claimant's complaint, the claimant, in terms, has repeated the history and subject matter of her claim to the tribunal for equal pay, concluding, with reference to paragraph 13 of the memo of 28 November 2016, informing staff of the results of the JEGS Review of Legal Posts (see paragraph 3.14 of this decision) as follows:-

> *"During our meeting I was told by Gillian Ardis and Jacqui McAllister of DHR that is the likely course of action to fill my post. I feel strongly aggrieved by this given that I have held this post (always on a satisfactory basis for performance review purposes since 2010."* (The claimant in the course of her evidence accepted this should now properly read October 2011).

3. On 24 January 2017, the said second grievance was acknowledged and the claimant was told her complaint would be sent to DHR and a decision officer appointed.

For reasons that were not properly or satisfactorily explained by Ms Allaway, although the claimant's grievance related to equal pay and the grievance procedure is the appropriate procedure for such a procedure, it was decided by senior management of the respondents to deal with the grievance, not under the grievance procedures but the Dignity at Work procedures. In Ms Allaway's witness statement, she stated – 'while it was acknowledged that the DAW procedures were not a perfect "fit" in terms of the specific complaints that had been raised, nonetheless it was subsequently decided that those procedures would provide for a more comprehensive assessment of the issues since that was the policy that depals with complaints of discrimination". In the judgment of the tribunal, by deciding to use the Dignity at Work Policy and not the grievance procedure, the respondents failed to properly address the principal issues relating to a complaint of equal pay, namely whether the claimant was doing "like work and/or work rated as equivalent with the work of her comparators"; and if she was, whether the respondents could prove a 'genuine material factor defence'. But, in particular, it wrongly concentrated on issues of sex discrimination, in particular, indirect sex discrimination, which were not relevant, if the claimant established 'like work' and/or 'work rated as equivalent'.

As stated in paragraph 505 of Harvey –

> *"Thus, as has been made clear, the trigger for the employer having to prove his case under the 'material factor' defence is not disparate impact as between men and women, nor the identification of a 'provision criterion or practice' that has such effect. All that is needed is proof of a difference in pay and the establishing of equal work between claimant and comparator."*

Once an employee has established 'like work' or 'work rated as equivalent' to her male comparators, the rebuttable statutory presumption of sex discrimination has

arisen and to defeat that presumption the respondent employer has to establish a genuine material factor defence.

The tribunal found, in the circumstances, much of Ms Allaway's evidence to the tribunal irrelevant, in light of the tribunal's conclusions, in relation to the claimant, in respect of 'like work' and 'work rated as equivalent', as set out previously, with its said concentration on issues of sex discrimination. Further, significantly, the tribunal noted that in her witness statement Ms Allaway, the respondents only witness did not directly and/or expressly address the issue of 'like work' and 'work rated as equivalent'; but in particular she also 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 respondents.

3.29 In the circumstances, for the purposes of this decision, it is not necessary to set out, in detail, the application of the Dignity at Work procedure in relation to the claimant's second grievance or to refer, in detail, to the conflict of evidence between the parties in relation to Ms Allaway's role in carrying out the said procedure.

For completeness, it is noted, Ms Allaway, on 6 December 2017, after carrying out a preliminary investigation, in a letter, dated 6 December 2017, informed the claimant, in summary, she had not found any evidence of discriminatory or disparate impact, either direct or indirect sex discrimination. It was her conclusion that "there is insufficient evidence at this stage to warrant an investigation under the Dignity at Work procedures and the complaint of discrimination is not accepted". This again, in the judgment of the tribunal, illustrated the failure of the respondents to recognise the claimant's grievance was about equal pay not sex discrimination per se.

The claimant was informed she had the right of appeal. The claimant appealed on 13 December 2017. In an email, dated 28 March 2018, the claimant was informed that her appeal had been stayed for a number of reasons including, inter alia:-

> *"Similar equal pay/discrimination claims have also been lodged with the Industrial Tribunal.*
>
> *….*
>
> *Complicated issues of law are involved, not limited to identification of the appropriate provision criterion or practice said to lead to discrimination; the selection of appropriate comparator groups for those advantaged and those disadvantaged by the tribunal in question; and whether the treatment in question is, if discriminatory, justified by the pursuit of a legitimate aim in a proportionate manner.*

In the tribunal's judgment, this again illustrated the error of the respondents in concentrating on issues of sex discrimination and not the issues relevant to a claim/grievance of equal pay, as identified previously, namely, the 'gateways' of like work and/or work rated as equivalent and, if established, the proving of a defence of grievance material factor.

As a consequence, the claimant's second grievance, therefore, has not been concluded by the date of the hearing.

3.30 As stated previously the respondents did not reply to the statutory questionnaire. The response was limited in detail and did not deal specifically with the issues, as identified previously, relevant to a claim of equal pay, pursuant to the 1970 Act. In essence, it was a simple non-concession – "the respondents do not concede the treatment of the claimant in discriminatory in any way or a matter of equal pay".

Ms Allaway's evidence further was not, as stated previously, relevant in proving the said defence.

Significantly, in the response, the respondents did not expressly raise the defence of genuine material factor, nor, as seen above, was the opportunity to do so taken by way of a reply to the statutory questionnaire. It is correct that 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. In the replies (paragraph 9) by the respondents' representatives, dated 2 February 2018, to the claimant's notice for additional information, dated 21 December 2017, reference was made to the respondent's defence of genuine material factor. In the circumstances, the tribunal was satisfied, this was an issue which had required to be determined by the tribunal and, in particular, whether the respondents established, on the evidence, such a defence as set out in paragraph 9 of the said replies (see paragraph 3.3.1).

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.

4. In conclusion, therefore the tribunal has decided:-

   1. The claimant's claim, pursuant to the Employment Equality (Age) Regulations (Northern Ireland) 2006, is dismissed.

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

   3. (i) The claimant has been engaged by the first respondent in like work with her comparators, MK and NMcS from 7 October 2011, pursuant to Section 1(2)(a) and 1(5) of the Equal Pay Act (Northern Ireland) 1970, as amended.

      (ii) The first respondent has not proved 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 under Section 1(3)(a) of the Equal Pay Act (Northern Ireland) 1970, as amended.

      (iii) The claimant's claim against the second respondent, pursuant to the Equal Pay Act (Northern Ireland) 1970 is dismissed.

5. The first respondent is therefore in breach of the Equal Pay Act (Northern Ireland) 1970, as amended, and the claimant is entitled to equal pay. A Remedies Hearing will be arranged to consider any remedy to which the claimant would be entitled on foot of the said decision on liability for breach of the Equal Pay Act (Northern Ireland) 1970, as amended, by the first respondent.

Employment Judge:

Date and place of hearing: **30 April 2018, 1 May 2018, 2 May 2018, 3 May 2018, 4 May 2018, 8 May 2018, 9 May 2018, 10 May 2018, Belfast.**

Date decision recorded in register and issued to parties: