EMPLOYMENT TRIBUNALS

Claimants: **(1) Ms Deborah Hope**
(2) Mrs Fiona Wilshaw

Respondent: **Cumbria Partnership NHS Foundation Trust**

Heard at: **Carlisle** **On:** **11 and 12 September 2017**
13 September 2017 (In Chambers)

Before: **Employment Judge Maidment**

Representation
Claimant: Mr A Crammond, Counsel
Respondent: Mr A Sugarman, Counsel

RESERVED JUDGMENT

1. The Claimants' working on an on call rota did not amount either to a job or work as set out in Section 65 of the Equality Act 2010.

2. It is necessary to carry out a comparison of all of the work undertaken by the Claimants and comparators under their contracts of employment.

REASONS

The Issues

1. The Claimants' primary complaints in these proceedings are of equal pay where they maintain that they were employed on like work or, alternatively, work of equal value to their comparators, two medical

consultants also employed by the Respondent. At a Preliminary Hearing held on 26 April 2017 it was decided that there be a further Preliminary Hearing to determine 2 distinct issues, namely: (1) Does working on an 'on call' rota amount either to a job or work as set out in section 65 of the Equality Act 2010?; and (2) Is it necessary to carry out a comparison of all the work undertaken by the Claimants and comparators under their contracts of employment?

2. That indeed is the entire scope of this hearing.

The Evidence

3. The Tribunal had before it an agreed bundle of documents in two volumes and in excess of 535 pages.

4. Whilst it had been anticipated at the previous Preliminary Hearing that the parties would submit to the Tribunal an agreed statement of facts, that had not, in practice, been possible. Each side submitted instead to the Tribunal their own brief chronology of key events.

5. Having briefly confirmed the relevant issues with the parties, the Tribunal took some time to privately read into the witness statement evidence which had been exchanged between the parties and relevant documents referred to therein.

6. The Tribunal heard evidence firstly from the Claimants, Deborah Hope and Fiona Wilshaw. It then, on behalf of the Respondent, heard from Julie Thompson, Head of Workforce Services and Alison Smith, H R Business Partner. Each witness was able to simply confirm their witness statements and, subject to brief supplementary questions and any necessary clarifications/corrections, was then open to be cross-examined.

7. The Tribunal had cause to and was referred to only a very limited number of documents within the agreed bundle or at times to only a small number of pages within detailed and lengthy contractual documentation. All of the witness evidence referred to details of the remuneration which was provided to the Claimants and comparators in respect of the relevant 'work' and how decisions as to the level of remuneration had been arrived at. The Tribunal made it clear that its findings of fact would be limited to those relevant to the narrow issues before it. It was explained to the Tribunal that an understanding of pay arrangements might be relevant to the Tribunal's consideration in respect of the nature of the relevant 'work'. Indeed, the Tribunal has considered those pay arrangements in that context, whilst appreciating that another Tribunal may well need to make much more detailed findings on aspects of the payment arrangements, for instance, in determining whether the Claimants' and their comparators' remuneration for any relevant work derived from a single source and/or whether the Respondent has a material factor defence to any claim for equal pay.

8. Having considered all of the relevant evidence, the Tribunal makes the findings of fact as follows.

The Facts

9. Ms Hope is a registered nurse and began working for the Respondent in May 2003. At all relevant times for the purpose of these complaints she was employed as Team Manager within the Respondent's Child and Adolescent Mental Health Service ('CAMHS') based in Carlisle. Mrs Wilshaw at all material times carried out a similar role based in a separate location. She is also a registered nurse and had worked for the Respondent since May 2005.

10. From around November 2012, a review was conducted of CAMHS which identified a range of changes thought to be necessary within the organisation of the service. The consultation paper produced, albeit not seen by the Claimants at the time, included a suggested future staffing structure for CAMHS which, as was already the case, included nursing staff at various bands, psychologists, therapists, administrative staff and consultant psychiatrists. One of the recommendations was for the creation of an 'out of hours' provision to extend the availability of CAMHS advice. It was noted that this would be in line with most other CAMHS services – a proposition not accepted by the Claimants. The paper envisaged the participation of all clinical staff with necessary competencies. It was stated that remuneration for participation in the out of hours arrangements would be in accordance with Agenda for Change terms and conditions (which governed how the Claimants were paid) or the appropriate terms and conditions relating to the staff group concerned.

11. In late 2012 two locum consultant psychiatrists, Dr El-Wahab and Dr Tiburtius, were engaged by the Respondent to cover unfilled substantive consultant posts. An agreement was reached with Dr El-Wahab to provide out of hours cover from 5 p.m. on 21 December until 2 p.m. on 1 January for which he was paid at an hourly rate of £96.95 in accordance with the agency rate he was charged out at as a consultant.

12. On 4 January 2013 a death by suicide occurred of a child within the Respondent's area of operation which, it appears, prompted an acceleration of the putting into place of an on-call out of hours service. Dr El-Wahab and Dr Tiburtius subsequently provided out of hours cover until they both left the Respondent on, respectively, 30 January 2013 and March 2014.

13. The Respondent sought to devise a model for out of hours cover within CAMHS and the Tribunal has seen a draft dated 8 January 2013, albeit again this was not a document which was shared with the Claimants at the time. This proposal envisaged a pilot scheme running for a 3 month period prior to its evaluation whereby out of hours cover would be provided from 5 p.m. to 9 a.m. Monday to Friday and from 5 p.m. on Friday through to 9 a.m. on the following Monday morning with one CAMHS practitioner available to provide telephone support and advice to fellow colleagues and professionals on the care, treatment and management of a young person giving cause for concern on a county wide basis. The proposal separately envisaged the undertaking of

assessments of children, including on paediatric wards over weekends, but this further extension of service was never implemented.

14. The proposal anticipated the employees providing on-call cover receiving a pay enhancement. It said that for medical staff this would be in line with their current terms and conditions and for all other staff paid in accordance with section 2 of the national Agenda for Change terms and conditions. This in turn provided for an enhancement as a percentage of basic pay dependent upon the frequency with which out of hours on-call services were provided.

15. The Claimants were initially approached by their manager, Russell Norman, and asked if they would provide out of hours cover. The Claimants describe the arrangement as very ad hoc on the basis that they agreed to join the out of hours cover rota as a favour to begin with supporting the two aforementioned locum consultants. Ms Hope agreed that Mr Norman made an informal request and arrangement with them that they would join the out of hours on-call rota, but without any agreement at that point on the pay they would receive for that work - they simply thought that that would be sorted out in due course. Mr Norman told them that he did not know at this point what they would be paid but the Claimants said that he was keen to get them onto the rota to help the Respondent out. They were subsequently told by Mr Norman that, at least on an interim basis, they would be paid £25 per night and £150 for each weekend of cover provided.

16. The Claimants' historic statement of particulars of employment provided for their normal hours of work (which was 9 a.m. to 5 p.m, Monday to Friday as Team Managers) and that from time to time the Respondent might require them to work reasonable overtime.

17. The Respondent took the view that it had no right to require the Claimants to work on-call out of hours and understood that the Claimants were undertaking this work, which indeed they commenced from some point in February 2013, on a voluntary basis.

18. The Claimants both had detailed job descriptions setting out a job summary and a lengthy list of duties and responsibilities. The first item under the job summary stated as follows: *"To provide a comprehensive mental health assessment, including clinical risk assessment and management. To provide therapeutic interventions utilising a range of evidence-based clinical skills geared to the individual/family needs."*

19. The claimant's duties then included such specialist assessments and treatment of young people together with the management of individual cases as well as a number of duties under the headings 'clinical', 'supervision', 'professional development', 'management', 'governance', 'training' and 'research'.

20. It is noted that at some point in 2015, after the Claimants had been performing the on-call work for some time, there was added to the job description under the 'job summary' heading that: *"The role holder will be*

required to participate in Out of Hours/On Call Arrangements in line with Trust Policy and any local arrangements."

21. It is accepted by the Claimants that an agreement had by then been reached that they would be paid 9.5% of their basic salary for the out of hours on call service, reflecting a frequency of one in three shifts worked, in accordance with section 2 and annex A3 of Agenda for Change. This reflected indeed the anticipation for how out of hours work would be paid at paragaphs 2.2 and 2.54 of the Agenda for Change terms, the later paragraph anticipating that this work might be carried out from home. Such payments are to be consistent with Annex A3 which focusses on interim arrangements in the harmonisation of on call payments. The omission of any reference in the Annex to a service carried out solely from home did not put the payment arrangements with the Claimants outside Agenda for Change terms.

22. Following on from that, the Respondent issued employment change forms to the Claimants which were completed in advance by the Respondent and ready for their signature which was given in both cases on 14 June 2013 confirming that the above *"appointment/change is within the authorised budget and that to the best of my knowledge the details given are correct."* The form had been completed such that the employment change was signified to be by way of an amendment rather than the alternative options of a transfer or additional post. The document reflected the implementation of an on-call pilot scheme from 1 April 2013 to be reviewed on 1 July with the aforementioned 1 in 3 on-call rate applying in terms of the affect on the Claimants' pay.

23. The Tribunal has seen a letter, undated but on its face in final form as at 12 March 2013, from Teresa Waleboer, but which the Claimants have no recollection of receiving. This purports to be the Respondent's response to the proposal for the CAMHS out of hours provision formulated back in December 2012. The document seeks to address a number of specific concerns raised by staff regarding the new service and, it is said, was sent to all of the nursing staff within CAMHS. This included a request for volunteers to participate in the out of hours rota across the range of practitioners within the service. Under the heading of "impact on the daily rota" the response was given that: *"During the interim rota period staff who have undertaken the role have had minimal calls and not required compensatory rest the following day. However this will be monitored closely as part of the evaluation and individual cases dealt with on a case-by-case basis initially by team leaders, however for clarity the management of this will be included as guidance in the staff training for on call."* Reference was made to the Agenda for Change pay scales applying dependent upon the amount of frequency the on-call work was provided by the individual concerned.

24. Two new permanent consultant psychiatrists had been recruited by the Respondent, namely Dr Khanna who started on 18 January 2013 and Dr Williams who started on 1 April 2013. Their employment was governed by the terms and conditions of service (2003) applicable to consultants. Whilst these terms recognised that in principle consultants might work on out of hours on-call rotas, again the Respondent did not consider that

these 'general' terms gave it the ability to require any consultants simply employed upon the standard conditions of the 2003 contract to work on the CAMHS out of hours service. As a result, the Respondent sought and obtained the agreement of both consultants to be part of the pilot out of hours on call service. This was confirmed by letter to both of the newly appointed consultants dated 22 March 2013. Dr Khanna and Dr Williams started to undertake work on the on-call rota from May 2013 alongside, at that time, the remaining locum consultant Dr Tibertius, the two Claimants and another Team Manager colleague.

25. The agreement of Dr Khanna and Dr Williams was reached against a background of some discussion and lobbying by, in particular, Dr Harvey the staff side chair of the local negotiating committee in respect of consultants' pay.

26. The 2003 consultants' contract provided for payments to be made in Schedule 16 of those conditions as a percentage of salary dependent upon the frequency of rota commitment and whether or not a consultant was typically required to return to the workplace when called upon or whether he or she could typically respond by giving telephone advice.

27. Mrs Smith's evidence to the tribunal was that ultimately those national terms were not applied to the out of hours service within CAMHS as it was agreed that in respect of the pilot, where the frequency of demand was not yet known, it would be appropriate to pay the consultants in accordance with the existing local agreement in place for the payment of locums carrying out such duties. This resulted in the consultants receiving payments at a rate of £50 per hour for the time spent on call. This produced a disparity in pay between the Claimant who received £150 per weekend as against £3,200 per weekend for a consultant and £25 per weekday night in contrast to the payment of £800 to the substantive consultants. The Claimants were not immediately aware of this difference in payment.

28. The Claimants' evidence was that the amount of actual work they were called upon to do whilst on the out of hours on-call role rota varied. Some shifts could be very quiet indeed, whilst on others a significant amount of time might be spent in giving advice. It was agreed that the type of work involved when working on-call out of hours was consistently and solely the provision of telephone advice to other NHS professionals, for instance, to doctors employed in Accident and Emergency who might be faced with a young person with mental health needs. Their advice was primarily related to safety aspects of the child in terms of risk to self and others based upon what they were told by the practitioner telephoning them. That essential activity was the same, they said, regardless of the identity of the practitioner on-call at any particular point in time. The Claimants accepted that their job descriptions in their 9 a.m. to 5 p.m. roles covered such advice. During the out of hours service, the key workers they dealt with would be more limited. For instance, they would not be receiving calls from teachers but rather only fellow NHS professionals. The Claimants accepted that they provided this sort of advice as part of their duties during their substantive daytime positions, albeit that this might also involve face-to-face contact with other

practitioners and/or children. They accepted the proposition that the on-call out of hours service constituted an extension of the existing CAHMS. The Claimants clarified, however, that none of the other duties which they performed as part of their Team Manager role were carried out as part of the on-call out of hours service.

29. The Claimants accepted that the consultants involved in the out of hours on-call service also themselves gave that sort of advice when required by practitioners or others during their substantive daytime roles.

30. It is noted that the Claimants and the consultants swapped shifts on the out of hours service at times with each other – something which would not have occurred in the roles they performed within their basic core hours of work.

31. There appears to have been a history of failures to pay the Claimants on time for the on-call out of hours work and/or a confusion as to their entitlements.

32. The Tribunal has seen correspondence between management enquiring as to the possibility of making a one-off payment to the Claimants noting that if the Team Leaders pulled out of the out of hours pilot *"we are snookered!"* Within that correspondence, it was recognised that they were being paid at a rate significantly lower than that which applied to a locum consultant.

33. On the Claimants becoming aware of the nature of the disparity in pay, they raised a grievance in March 2014. There is no evidence of any review of the pilot scheme, as had been envisaged would have taken place in July 2013, such that the three consultants on the rota continued to be paid at the aforementioned rate until they were removed from the rota indeed in March 2014.

34. A grievance investigation report was produced dated May 2015 which contained a statement that: *"It is clear that the work undertaken was the same irrespective of job titles."* There followed a recommendation that the Claimants should receive appropriate financial remuneration for the out of hours on-call work undertaken between April 2013 and June 2014. A background investigative report prepared by a Jennifer Burton referred to a belief that the Claimants' grievances were well-founded and that there was a case to answer as regards equal pay. An email to the Claimants of 16 June 2015 referred to the Respondent originally being advised that there was a case to answer with regards to equal pay of which the Claimants were informed. However, it had then been the advice to the Respondent that there was a *"genuine material factor"* allowing it to defend an equal pay claim as *"in reality we could not get Medics to do the rota without paying them the agreed negotiated rate – they simply would not have worked as that was their market rate."*

35. An outcome letter was sent to the Claimants dated 12 August 2015 which stated that pay was negotiated for all medical staff regardless of their gender. Whilst the original payment made to the Claimants was not in line with Agenda for Change this was subsequently reviewed and changed to

reflect Agenda for Change terms and conditions which was applied, again, to all other managers who carried out on-call duties regardless of gender. The decision therefore was not to uphold the Claimants' grievance.

Applicable Law

36. Within the Equality Act 2010, Section 64 (relevant types of work) provides as follows:

"(1) Sections 66 to 70 apply where—

(a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;

(b) a person (A) holding a personal or public office does work that is equal to the work that a comparator of the opposite sex (B) does.

(2) *The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A."*

37. Section 83 provides:

"(2) "Employment" means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."

38. Section 65 defines equal work as follows:

"(1) For the purposes of this Chapter, A's work is equal to that of B if it is—

(a) like B's work,

(b) rated as equivalent to B's work, or

(c) of equal value to B's work.

(2) A's work is like B's work if—

(a) A's work and B's work are the same or broadly similar, and

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—

(a) the frequency with which differences between their work occur in practice, and

(b) the nature and extent of the differences.

(4) A's work is rated as equivalent to B's work if a job evaluation study—

(a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or

(b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.

(5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.

(6) A's work is of equal value to B's work if it is—

(a) neither like B's work nor rated as equivalent to B's work, but

(b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making."

39. Section 66 (sex equality clause) provides:

"(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.
(2) A sex equality clause is a provision that has the following effect—
(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;
(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.
(3) Subsection (2)(a) applies to a term of A's relating to membership of or rights under an occupational pension scheme only in so far as a sex equality rule would have effect in relation to the term.
(4) In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have)."

40. On behalf of the Respondent the Tribunal has been referred to and considered the cases of **Birds Eye Walls Limited v Roberts [1994] IRLR 29**, **Shields v E Coomes (Holdings) Limited 1978 ICR 1159**, **Dorothy Perkins Limited v Dance [1977] IRLR 226** (and **Dance v Dorothy Perkins Ltd 1978 ICR 760**), **Maidment & Hardacre v Cooper & Co (Birmingham) Limited [1978] IRLR 462** and **Doncaster Education Authority v Gill EAT/568/89**.

41. On behalf of the Claimants the Tribunal has in addition been referred to and considered the cases of **Asda Stores Limited v Ms Brierley and others**, **North v Dumfries and Galloway Council [2013] IRLR 737**, **Strathclyde Regional Council v Wallace and others [1998]IRLR 146**, **Manor Bakeries Limited v Nazir [1996] IRLR 604**, **Davies v Neath Port Talbot County Boorough Council [1999] IRLR 769**, **Arbeiterwohlfahrt der Stadt Berlin v Botel [1992] IRLR 423** and **Kuratorium fur Dialyse und Nieretransplantation v Lewark [1996] IRLR 637**.

42. The Tribunal has had the benefit of written submissions provided by both Counsel upon which they expanded in their respective oral submissions. The Tribunal's conclusions below are informed by and again benefit from those clear and concise submissions.

Conclusions

43. Both parties suggest that a lack of direct authority on the issues before the Tribunal supports their arguments. The Tribunal is told by Mr Sugarman that an acceptance of the Claimants' position would cause a dramatic recasting of the law on equal pay and lead to chaos in the workplace. Many equal pay determinations have no doubt caused dramatic and costly rethinks and the Tribunal should not be influenced by suggested repercussions in its consideration of the correct legal tests to be applied. It is also irrelevant that the Claimants' position was to an extent supported in an internal grievance process or that the Respondent's position has shifted according to prevailing legal advice, if indeed that is an accurate portrayal. The Tribunal must not be influenced

by the apparent unfairness in the way the Claimants have been paid nor any advantage enjoyed by the Claimants' comparators or those representing them in any superior negotiating position and the cost to the Respondent of the arrangement (nor the further cost if the Claimants were now to enjoy the same benefits).

44. The incorporation of a sex equality clause is dependent on there being a relevant type of work which requires the claimant to be employed on work that is equal to the work a comparator of the opposite sex does. Employment pursuant to section 83 of the Equality Act means employment under a contract of employment. This does suggest the requirement of an analysis of work done under a contract of employment with no suggestion of an ability to look at part or some only of the work under that contract of employment. Pursuant to section 65(2) 'like work' exists if the claimant and comparator's work is the same or broadly similar and such differences as arise are not of practical importance. The provision again suggests a need to look at all of the work performed under the contract of employment and then to consider whether or not any differences are of practical importance.

45. An alternative route through to a finding of equal work is to show that an employee's work is rated equivalent to a comparator's work in a job evaluation study (see section 65(4)). Here the reference is clearly to an evaluation of a 'job' which connotes a full analysis of all of the work carried out.

46. The **Dorothy Perkins** case involved female warehouse selectors whose job specification include sorting and checking goods and stock-taking. They claimed equal pay with men in the same warehouse who were known as warehouse operators and whose work included sorting and checking goods but also the loading and unloading of goods. There it was held that the correct procedure for determining whether men and women are employed in like work involves firstly identifying the parties and looking at the nature of the contractual employment; next considering the position in very broad general terms to assess whether the work is broadly similar; and only then going on to investigate any differences in the work which may exist. It was impermissible to hold that, as the men and women were employed on the same work for 3 ½ days a week, that meant that over a five day week, 70% of the work was similar. All the tribunal ought to do was to enquire whether or not the men were doing something significantly different and to see whether that took the woman's case out of the area of broad similarity. The EAT, therefore, did not endorse an approach which might have allowed the claimants to argue that they could compare their selection duties to the selection duties undertaken by their male comparators and seek equal pay for that work rather than all those duties undertaken by them. Following a remission back to the original tribunal the case came before the EAT again and in the course of it reasoning it rejected an argument that the contractual situation regarding the duties performed by the claimants or their comparators could be ignored. In this case the contracts of the men and women were examined, the job specifications indicated a much wider and

different area over which the men were required to work and the tribunal found that in practice the men worked according to the job specification.

47. In **Maidment**, the female claimants sought to hive off from consideration the storekeeping duties which their male comparators undertook on the basis that the remaining work performed by each of them allowed for a comparison for equal pay purposes. The EAT, however, held that it was not permissible in ordinary circumstances to disregard any part of the work actually done in practice. Even though the male comparators were paid a separate and identifiable sum for the storekeeping duties, which were of a different nature to the packing duties which made up the bulk of their work, the tribunal was wrong to hive off such duties from the necessary comparison.

48. The EAT did not rule out the possibility, in unusual or special circumstances, of ignoring some work of a *"quite different kind"* done by the comparators which was in effect a separate and distinct job giving, as an example, male and female cleaners who do identical work apart from the men who also come in on a Saturday to cut the grass. How such possibility might arise was illustrated in the EAT's decision in the **Doncaster Education Authority** case where the male comparator did some separate and discrete work as a housemaster and undertaking vocational training in addition to his role of Head of Business Studies. The EAT did not interfere with the tribunal's decision to factor out additional separate duties on those facts, but made the point that it would only be in an unusual case that the question of severability could be successfully raised on the part of the employee.

49. In this case, it is the submission made on behalf of the Claimants that, on a proper interpretation of the statutory provisions, the work performed on the on-call rota was 'work' and/or a 'job' which the Claimants performed under their contract of employment and that, regardless of whether this work was done as part of one contract of employment (their primary submission) or two separate contracts of employment, it still amounted to 'work' or a 'job' within the statutory provisions. Therefore, it was not necessary to carry out a comparison of all of the work undertaken by the Claimants and their comparators under their contracts of employment. Instead it was permissible for the Tribunal to undertake a comparison of work and/or job, even if the same amounted to part only of the work or job they performed.

50. It was pointed out that the concepts of 'work' and 'job' are not defined within the Equality Act such that, it was said, Parliament must have intended for those words to be given their normal and everyday meaning.

51. This, the Tribunal considers is of less assistance in circumstances where the words have more than one ordinary everyday meaning, are capable of being used in a variety of contexts and indeed at times are interchangeable terms.

52. Mr Crammond recognises that there are three different routes to success in a claim of equal work within section 65 of the Act where 'like work' and 'work of equal value' may be contrasted with the definition of 'work rated as equivalent' which uses the language of 'job' rather than 'work'. He recognises that 'job' is a word more akin to the need to consider the 'whole job' done by the complaint and comparator but says that that is not the meaning which can be attributable to the different language of 'work'. Parliament, he says, must have intended for there to be a difference. It follows therefore, he says, that 'work' is something less or at least capable of being something less than the entirety of a claimant's 'job'.

53. The Tribunal does not agree and does not fundamentally accept that the range of employment duties analysed in a comparative exercise are wider in the case of work rated equivalent under a job evaluation study than 'work' (meaning the component parts of a job or activities which together comprise a whole 'job') necessary in the comparison involved in assessing like work or work of equal value.

54. The Tribunal notes that the existence of a reliable and untainted job evaluation scheme is sufficient to defeat and close off any argument pursued by a complainant that she is doing work of equal value to a comparable male employee (see section 131(6) of the Equality Act). The scope of comparison is not then in an equal value claim intended to be narrower than the whole job comparison within a job evaluation study. The Tribunal rejects an argument which involves the route to a successful comparison being entirely different dependent on the type of equal work pleaded.

55. The Tribunal has no difficulty in accepting that the provision of telephone advice to other healthcare professionals regarding children with mental health issues is 'work' whether carried out in core hours or on an out of hours basis. In effect, it is the Claimants' argument that 'work' in an equal pay context is equivalent to and can be read as an employee's 'duties' and that, therefore, if the Claimants' and their comparators' duties, for which they are of course paid, are sufficiently similar or of equal value then a claim for equal pay can be pursued.

56. The Tribunal considers that such approach and analysis runs counter to the aforementioned authorities and the ordinary 'whole job' approach which, albeit capable of exceptions to it, has traditionally and correctly been taken in the pay equality.

57. That is because, whilst an employee's duties both individually and cumulatively can be said to be her 'work', the Equality Act requires an employee bringing a claim for equal pay to be able to cross a threshold of identifying a comparator employed under a contract of employment on like work etc.

58. If the Claimants' argument succeeded then there is no reason why the Claimants could not pursue an equal pay claim for the time they and the consultants gave telephone advice to NHS professionals in their basic/core hours of work. Mr Crammond does not however accept that they could (and that his definition of work for comparison purposes stretches so far) and says that there would be other factors to examine in terms of the 'quality' of the work and/or, for example, the relative experience and level of expertise brought to bear when carrying out the work. These are factors, however, which surely would come to the fore in the justification of a pay differential rather than in the early stage determination of 'equal work'.

59. Mr Crammond, on behalf of the Claimants, points to European law and quotes commentary from Harvey on Industrial Relations and Employment Law to the effect that the central principle of European law is that men and women should receive equal pay for equal work and that there should be a concentration on the discriminatory outcome or effect rather than on the elements of individual-based comparisons. The Tribunal readily accepts that, of course, domestic law in this area is to be read in such a way as to give effect to European law as interpreted by the European Court of Justice. Again, Mr Crammond refers to commentary in Harvey's to the effect that it is unnecessary to identify work as a separate ingredient in every case since in most situations work will simply be the correlative of pay – in other words work by the employee is that which attracts pay from the employer. The Tribunal is also mindful of the social aims promoted by European equal pay law, albeit the need in domestic legislation to define or prescribe the scope of work for a comparative exercise with that work undertaken by a male employee does not in itself offend against that purpose.

60. Particular reliance is placed on the case of **Davies** which concerned a female part-time employee who was required to attend a trade union training course for full-time hours, but was paid by her employer only for her part-time hours. In that case, with reliance being placed on European decisions, it was said that where there is pay it must be for work and attendance at the training course was work because it was by reason of the existence of an employment relationship. This was with reference to the meaning of pay for equal pay under Article 119 of the Treaty of Rome. Here, therefore, there was no requirement to compare all of the duties of any one individual with all of those of a relevant comparator. Indeed, in Davies the analysis was restricted to only a small element of the employee's duties which were not of course her usual day to day duties at all and yet attracted the right to receive equal pay protection.

61. However, the issue in Davies where the claimant was paid a part-time wage for full-time work and where the primary issue was whether such training could fall within the meaning of work, is far different to the issue here. The Tribunal rejects any suggestion that to give effect to the European law as to equal pay for equal work, 'work' should be defined for equal pay purposes within the Equality Act in line with the definition in Davies and/or that any whole job comparison envisaged within the

Equality Act offends against or diminishes the protection provided at European level.

62. The **Maidment** case does give some support to the proposition that, in the right circumstances, it is possible in a comparative exercise to sever and hive off some of the totality of the work performed by an employee and her comparators. That includes, as was the case in **Maidment**, where there was only one contract of employment covering the work performed by the claimants and their comparators. It is indeed the primary submission on behalf of the Claimants that the work they carried out on the on-call rota was work performed as part of their single contract of employment.

63. The Tribunal agrees that there was in all the circumstances clearly in this case only one contract of employment covering the work the Claimants and the comparators did during their core hours, in the Claimant's cases from 9 a.m to 5 p.m., and the additional on-call out of hours duties. The circumstances in which the Claimants came to perform this out of hours work do not reflect their entering into any new and separate contract of employment. The Claimants themselves describe the arrangement as starting informally with a request to see if they would be prepared to work the on-call hours and with a lack of ascertainment or certainty regarding how and at what level the Claimants would be paid for this on-call work. The on-call arrangements under which the Claimants then worked from February 2013 were formalised by the Claimants confirming by their signature an amendment to their existing contracts of employment backdating the changes (and with now a methodology for payment agreed) to the start of April 2013. Indeed, the work carried out by the Claimants out of hours on call can be said to be an extension of the same type of work they performed under the original contract of employment and during the core 9 a.m. to 5 p.m. hours. Whilst it is accepted that the Claimants, during those core hours, did far more, part of their duties involved giving advice, including by telephone, to other professionals and NHS practitioners and this element of their work was now to be provided also on a rota basis out of hours. The payment received by the Claimants was calculated as a percentage of their basic pay with reference to the frequency of the provision of out of hours services rather than as a payment arrived at and unconnected with their terms and conditions of employment during those core hours.

64. Can therefore in the circumstances it be said that the Claimants' work on-call out of hours constituted a separate job for equal pay comparison purposes. As recognised, **Maidment** might be prayed in support of the proposition. However, the Tribunal does not consider that it can be relied on as authority for that proposition. That case involved a consideration of whether, when two jobs were being compared, elements of work might be separated and hived off and not form part of that comparison. What is effectively now being asked by the Claimants is for the separated or hived off duties to be regarded as forming an entirely separate job which can then itself be compared with the activities of comparators also separated out from their main/core work. **Maidment** talked of part of the work being

seen *"in effect"* as a separate and distinct job. The Claimants circumstances in this case require the Tribunal to be able to conclude that part of the work was in actuality a separate and distinct job for comparison purposes.

65. In the right case with the appropriate set of circumstances, the Tribunal does not rule out that possibility, whether there was employment under one or two contracts of employment. There might be difficult issues to address if an employee was 'dismissed' from or ceased one of two 'jobs' performed under a single contact of employment, but that is not an issue for this Tribunal or a bar to the possibility. However, the Tribunal does not consider such interpretation/construction to be possible in this case. The work carried out when on-call was the same as some of the work carried out during the core hours of work and was an extension of the performance of those duties such that they were provided outside those core hours. The activities were not new or entirely distinct from those already undertaken. That applied also indeed in the case of the consultant comparators who also performed on-call duties as an extension of the duties they already undertook for the Respondent. The Tribunal does not consider that the quality of the work performed when on-call is changed by the fact that there was no existing contractual obligation for the Claimants to work out of hours, that there was a need to agree a new form of payment and a change of contract, the ability of the Claimants and their comparators to swap shifts nor that the Respondent placed clearly significant importance on the new addition to the service being provided. There was in fact no significant structural framework or separate substantive management of the out of hours work but rather little more than an agreed rota according to which the out of hours work was to be provided.

66. If the out of hours on-call work had been performed by the Claimants under a distinct and separate contract of employment entered into by them and indeed in a similar fashion entered into by their consultant comparators, then a comparison under the equal pay provisions of the Equality Act might well have been possible and indeed appropriate. That is without any reliance having to be placed upon the authority of **Maidment**. Of course, the Tribunal's findings are that no such separate contracts of employment were entered into.

67. In conclusion, the tribunal must answer the questions before it as preliminary issues as follows. Working on the on-call rota did not amount either to a job or work for the purposes of section 65 of the Equality Act. It is necessary to carry out a comparison of all the work undertaken by the Claimants and their comparators under their contracts of employment.

68. These complaints will now require listing for a further telephone preliminary hearing to consider how they might be taken forward. The Tribunal raised whether if 'like work' and 'work of equal value' remained unconceded by the Respondent, it might be the quickest route to potential resolution of these complaints for there to be a further preliminary hearing which indeed within the scope of a single hearing could deal with

arguments as to separate establishments, single source of terms and the Respondent's material factor defence which in substantial part was reliant upon the contractual position appertaining to the Claimants and their comparators such that there would be, as had to an extent occurred at this preliminary hearing, an overlap of evidence on these issues. The parties will obviously give further thought to the most appropriate approach prior to this next preliminary hearing.

Employment Judge Maidment

Date 19 September 2017

JUDGMENT SENT TO THE PARTIES ON

2 October 2017

.....
FOR THE TRIBUNAL OFFICE