



EMPLOYMENT TRIBUNALS

Claimant: Samira Ahmed

Respondent: BBC

Heard at: London Central

On: 28 – 31 Oct, 1, 4 – 7
Nov 2019
1 – 2 Dec (in chambers)

Before: Employment Judge H Grewal
Mr S Godecharle and Mr P Secher

Representation

Claimant: Ms C Darwin, Counsel

Respondent: Ms R Crasnow QC and Mr J Milford, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that by virtue of the sex equality clause the terms relating to pay in the Claimant's contracts for presenting "Newswatch" from 1 October 2012 to 30 September 2018 are modified so as not to be less favourable than the terms relating to pay in Jeremy Vine's contracts for presenting "Points of View" from 2008 to July 2018 because:

- (i) Her work on "Newswatch" was like Jeremy Vine's work on "Points of View" under section 65(1) of the Equality Act 2010; and
- (ii) The Respondent has not shown that the difference in pay was because of a material factor which did not involve subjecting the Claimant to sex discrimination (section 69(1) of Equality Act 2010).

REASONS

1 In a claim form presented on 29 November 2018 the Claimant claimed that from October 2012 to date her work as presenter of Newswatch was equal to the work of Jeremy Vine as presenter of Points of View from 2008 to 2018 and that the sex equality clause should apply so as to modify any terms of her contracts that were less favourable than the terms of his contracts.

The Issues

2 It was not in dispute that the terms as to pay in the Claimant's contracts to present Newswatch were less favourable than those in the contracts engaging Jeremy Vine to present Points of View. The issues that we had to determine were as follows.

3 Whether the Claimant's work on Newswatch from October 2012 onwards was like Jeremy Vine's work on Points of View between April 2008 and July 2018;

4 If not, whether the Claimant's work on Newswatch was of equal value to the work of Jeremy Vine on Points of View.

5 If the Claimant's work on Newswatch was equal to that of Jeremy Vine on Points of View, whether the Respondent had shown that one or more of the factors on which it relied was:

- (a) The real reason for the difference in pay;
- (b) The cause of the difference in pay;
- (c) Material, that is, a significant and relevant difference between the Claimant's case and Mr Vine's case; and
- (d) Did not involve any sex discrimination.

6 In relation to 5(d) (above) whether the Respondent had shown:

- (a) That the factor did not involve treating the Claimant less favourably because of her sex than it treated Jeremy Vine; and
- (b) If the Claimant had shown that, as a result of the factor, she and women doing work equal to her work were put at a particular disadvantage when compared with men doing work equal to her work, that the factor was a proportionate means of achieving a legitimate aim.

7 The factors relied upon by the Respondent were:

- (a) Differences between the profile of Newswatch and the profile of Points of View as set out in paragraph 4 of its Grounds of Resistance;

- (b) Differences between the public profile/level of audience recognition of the Claimant and that of Mr Vine;
- (c) Differences between the broadcasting experience and range of the Claimant and that of Mr Vine;
- (d) Differences between the market rate payable for the Claimant and that payable for Mr Vine, in circumstances, where retaining high profile presenters was important to the Respondent's strategic objectives;
- (e) Specific market pressures at the time when Mr Vine negotiated his terms in 2008, when Mr Vine's pay was set in a context where a rival broadcaster had made an offer for his services;
- (f) In part, the fact that the Claimant was engaged on an OATs contract and/or a standard employment contract, and Mr Vine was engaged on a freelance basis through a personal service company.

8 In relation to each or any of the factors set out above at paragraph 7:

- (a) At what particular time did the material factor(s) apply, and whether it subsequently ceased to apply?
- (b) Whether the material factor(s) accounted for all the difference in pay? If not, for what proportion of the difference in pay did it account?

The Law

9 Section 65 of the Equality Act 2010 ("EA 2010") provides,

"(1) ... 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.*

...

(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."*

10 In considering whether a woman's work is like a man's work the focus should be on what each of them does and, if there are any differences between what they do, the nature and extent of the differences and the frequency with which they occur. The things done by an employee may include the exercise of responsibility (**Eaton Ltd v Nuttall [1977] 3 All ER 1131**).

11 In **Brunhoffer v Bank Der Osterreichischen Postsparkasse [2001] IRLR 571** the European Court of Justice held that in order to determine whether employees perform the same work or work of equal value it is necessary to ascertain whether, when a number of factors are taken into account, such as the nature of the activities actually entrusted to each of the employees in question, the training requirements for carrying them out and the working conditions in which the activities are actually carried out, those persons are in fact performing the same work or comparable work.

12 Section 66 EA 2010 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 to be not 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."*

13 Section 69 EA 2010 provides,

- "(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which –*
 - (c) does not involve treating A less favourably because of A's sex than the responsible person treats B, and*
 - (d) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.*
- (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.*
- ...
- (6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's case."*

14 In **Glasgow City Council v Marshall [2000] ICR 196** Lord Nicholls of Birkenhead, with whom all the other Law Lords agreed, set out what was required to establish the material factor defence under section 1(3) of the Equal Pay Act 1970 (which was to the same effect as section 69 EA 2010). He said, at page 202,

- "The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like*

work or work rated as equivalent or work of equal value 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 due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge the 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 or, in a case falling within section [65(1)(c) EA 2010] may be, a "material" difference, that is, a significant and relevant difference, between the woman's case and the man's case.

When section 1 is thus analysed, it is apparent that an employer who satisfies the third of these requirements is under no obligation to prove a "good" reason for the pay disparity. In order to fulfil the third requirement he must prove the absence of sex discrimination, direct or indirect. If there is any evidence of sex discrimination, such as evidence that the difference in pay has a disparately adverse impact on women, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity."

15 In **Calmac Ferries Ltd v Wallace [2014] ICR 453** Langstaff J stated,

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

16 In **BMC Software Ltd v Shaikh [2019] ICR** Underhill LJ said,

"It is important not to overlook, as Judge Hand arguably comes close to doing, that the burden is on the employer to prove (by sufficiently cogent and particularised evidence) that the factor relied on explains the difference in pay complained of... If an employer is going to seek to justify a pay disparity based on a factor such as the comparator's promotion or superior "merit" or "market forces" it needs to be able to explain with particularity what those factors mean and how they were assessed and how they apply in the circumstances of the case. It is evident from the tribunal's findings that BMC was simply unable to do that because of its chaotic and wholly non-transparent "employment systems". The equal pay risks in having non-transparent systems is a commonplace of equal pay law."

17 In **Danfoss (Case 109/88) [1991] ICR 74** the ECJ held that the Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker

establishes, in relation to a relatively large number of employees engaged in work of the same nature or value, that the average pay for women is less than that for men.

18 Tribunals considering an equal pay claim are obliged to take into account any part of the EHRC Code of Practice on Equal Pay that appears relevant to the proceedings. Paragraph 102 of the Code provides,

“Transparency means that pay and benefit systems should be capable of being understood by everyone (employers, workers and their trade unions). It should be clear to individuals how each element of their pay contributes to their total earnings in a pay period.

Where the pay structure is not transparent and a woman is able to show some indication of sex discrimination in her pay, the employer carries the burden of proving that the pay system does not discriminate.”

19 In **Enderby v Frenchay Health Authority [1994] ICR 112** the ECJ held that where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, article 119 of the Treaty requires the employer to show that the difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.

20 In **Newcastle upon Tyne Hospitals NHS Foundation Trust v Armstrong [2010] ICR 674** Underhill J in the EAT said,

“As for indirect discrimination, it is now recognised that that this label in fact covers two distinct phenomena... The first kind of indirect discrimination occurs where the employer “applies” a “provision, criterion or practice” (or “PCP” in the jargon) which puts or would put women at a particular disadvantage when compared with men – or, as it is more commonly put, has a “disparate adverse impact”: that is the formulation adopted in the relevant European Union legislation, and now incorporated also in the United Kingdom statutes. The second kind of indirect discrimination was first recognised in the decision of the European Court of Justice in Enderby v Frenchay Health Authority ... In cases of the Enderby type indirect discrimination is found where two groups of employees doing work of equal value receive different pay and there is a sufficient disparity in the gender breakdown of the two groups.”

21 The burden of establishing the particular disadvantage or disparate impact necessary to raise a prima facie case of indirect discrimination is on a claimant (per Simler J in **McNeil v Revenue and Customs Commissioners [2018] ICR 1529**)

22 In **Armstrong v Newcastle Upon Tyne NHS Hospital Trust [2006] IRLR 124** the Court of Appeal held that once disparate adverse impact had been established, the burden passes to the employer in respect of two issues. First, that the difference between the man’s and woman’s contract is not discriminatory, in the sense of being attributable to a difference of gender. Second, if the employer cannot show that the difference in treatment was not attributable to a difference of gender he must then demonstrate that there was nonetheless an objective justification for the difference

between the woman's and the man's contract. That reasoning was followed in a number of cases thereafter.

23 In **McNeil v Revenue and Customs Commissioners [2018] ICR 1529** Simler J in the EAT considered whether the Armstrong lines of cases survived the Supreme Court decision in Essop v Home Office; Naeem v Secretary of State for Justice [2017] ICR 640. She concluded,

“71 ... to the extent that the line of authority based Armstrong v Newcastle Upon Tyne NHS Hospital Trust [2006] IRLR 124 has been understood as holding that it is open to a respondent to rebut a finding made of particular disadvantage by showing that the underlying reason for the particular disadvantage was not itself related to the protected characteristic in issue, it is inconsistent with the ratio of Essop/Naeem and can no longer be regarded as good law.

72 In my judgment however, as the parties agree, it remains open to a respondent to dispute a case of disparate disadvantage based on statistics by advancing an explanation or evidence to demonstrate that the statistics are not significant or that the result indicated by them is not significant. What a respondent cannot do once the statistics are shown to be sufficiently significant to prove particular disadvantage, is to seek to undermine that by requiring a claimant to prove the reason why that is so.”

24 In **Enderby** the ECJ was also asked to what extent – wholly, in part or not at all – the fact that part of the difference in pay is attributable to a shortage of candidates for one job and to the need to attract them by higher salaries can objectively justify that pay differential. The Court answered,

“25 ... it is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by the employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds...

26 The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground...

27 If, as the question referred seems to suggest, the national court has been able to determine precisely what proportion of the increase in pay is attributable to market forces, it must necessarily accept that the pay differential is objectively justified to the extent of that proportion. When national authorities have to apply Community law, they must apply the principle of proportionality.

28 If that is not the case, it is for the national court to assess whether the role of market forces in determining the rate of pay was sufficiently significant to provide objective justification for part or all of the difference.”

Paragraph 79 of the EHRC Code of Practice provides,

“If the material factor accounts for only part of the variation in pay, the woman is entitled to a pay increase to the extent that the defence is not made out.”

25 Section 149(1) EA 2010 provides,

“A public authority must, in the exercise of its functions, have due regard to the need to –

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
- (b) advance equality of opportunity between person who share a relevant protected characteristic and persons who do not share it;*
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.”*

The BBC is a “public authority” to which section 149 applies (schedule 19 EA 2010).

26 The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, which came into effect on 31 March 2017) required certain public authorities, including the BBC, to publish certain gender pay gap information relating to employees. A public authority was not required to include data relating to a relevant employee if the employee was employed under a contract personally to do work and the public authority did not have and it was not reasonably practical for it to obtain the data.

The Evidence

27 The Claimant and Michelle Stanistreet (General Secretary of the NUJ) gave evidence in support of the claim. The following witnesses gave evidence on behalf of the Respondent – Gautam Rangarajan (Director of Strategy since 2013), Roger Leatham (Head of Operations and Business Affairs for Entertainment for BBC Vision 2007-2017 and now Director of Business Affairs for BBC Studios Production), James Mallett (Series Producer, Newswatch since 2008), Simon Miller (Series Producer, Points of View since 2016) and Lisa Tsavalos (Senior HR Business Partner). We had five lever-arch files of documents, and we watched extracts of recordings of Newswatch and Points of View. Having considered all the evidence before us, the Tribunal makes the following findings of fact.

Findings of fact

28 This section is divided into four parts:

- (a) The BBC;
- (b) The two programmes – Points of View and Newswatch;
- (c) Jeremy Vine (the comparator);
- (d) Samira Ahmed (the Claimant).

The BBC

29 The BBC is governed by Royal Charter, which sets out its public service obligations, and a framework agreement with the government which deals with a number of matters including funding. It is principally funded by an annual licence fee paid by members of the public. It is subject to a public sector equality duty which requires it to have due regard to the need to eliminate unlawful discrimination.

30 The 2006 Royal Charter for the continuance of the BBC, which remained in force until 31 December 2016, stated that the BBC existed “*to serve the public interest*” and that its main object was the “*promotion of its Public Purposes.*” Its Public Purposes were set out at paragraph 4 as being the following,

- “(a) *Sustaining citizenship and civil society;*
- “(b) *Promoting education and learning;*
- “(c) *Stimulating creativity and cultural excellence;*
- “(d) *Representing the UK, its nations, regions and communities.*”

31 The BBC was obliged under the Framework Agreement of 2006 to ensure that a certain percentage of its programmes were produced as independent productions. Programmes which existed wholly or mainly of news were excluded from this obligation.

32 In or around 2008 the BBC Trust commissioned external consultants, Oliver & Ohlbaum Associates (“O&O”), to examine the interaction of the BBC with the market for on-screen and on-air talent (the people who appeared on television and radio). In particular, it wanted to know how the size and structure of its reward packages for talent compared with the rest of the market (“value for money”) and to what extent its policy and processes in relation to investment in, and reward of, talent supported value for money (“value for money processes”).

33 The O&O report was produced on 22 April 2008. It focused on the BBC’s payments to the top 200 talent names for two reasons. Firstly, there was a specific policy concern (within the BBC and outside it) as to the BBC’s strategy and payments to top level talent – whether the absolute payment levels were appropriate, and whether the differentials between the top, middle and lower level talent were appropriate for a public service organisation. The second reason was that a focused analysis was easier when covering the top 200 talent names rather than the 200,000 or more individual talent contract payments made by the BBC every year.

34 On the issue of value for money the report concluded that in programme areas where the BBC was competing most directly with rivals there was no evidence that it was paying more than the “market price” for such leading TV talent and in some cases might well be paying less than the market price for that talent. However, value for money was more difficult to judge in programme areas where the BBC either competed less directly with the market place or on a scale that was not replicated by the market. The report also said that a large number of interviewees had suggested that the BBC did not always realise its own bargaining position in terms of the talent’s real alternatives and the extra benefits that the talent could derive from exposure to the BBC. The report stated that that was likely to be more of an issue in less contested programming and talent areas than more contested ones. It recommended that in some genre areas where payments reached high levels, the BBC should

engage in systematic and continuous consumer value research to support its succession planning programme so as to identify unique pulling power, commercial value and potential replacements.

35 On the issue of value for money processes, the report concluded that the BBC had in place certain systems and processes to ensure that it achieved value for money. Business affairs staff worked closely with programme makers and commissioners in setting fees and leading negotiations. Most of the largest deals ended up being considered at divisional or board level, and all existing deals that involved more than 3 per cent inflation had to go through a specific divisional approvals process. There were, however, a number of areas where the BBC needed to consider improving its processes. It highlighted a number, which included the following. It said that the approvals process might benefit from more internal challenge, especially in relation to the largest deals, and ones that involved an assessment of the BBC's alternatives and the talent's own alternatives and motivation. While the support information for each case was interrogated (often by senior finance staff), those doing the interrogation tended to have to rely only on the facts and benchmarks gathered by those proposing the case. It also said that for larger deals the BBC should consider doing more systematic research designed to isolate the named talent's contribution to audience levels, audience demographics and audience value, and the relative contribution of potential replacements (programme AIs [Audience figures] being only a very general and imperfect proxy for this). The BBC should consider doing this on a regular basis across genre, rather than only when a major negotiation is coming up.

36 In a section dealing with how the talent market worked, the report pointed out how talent agents could impact the market. It stated that it was in their interest to create a biased view of payment levels in the market to confuse any attempts by broadcasters to obtain proper payment benchmarks. It continued,

“they replace the insecurity of the individual artist with a more detached, independent and often amoral stance allowing for tougher negotiation and a certain amount of half truths about the artist's objectives and alternatives.”

38 Following the O&O report of 2008, the BBC committed to reduce spending on top tier talent (those earning more than £100,000 per year) and to hold overall talent spending flat, in nominal terms, on a like for like basis.

39 In February 2015 Oliver & Ohlbaum Associates Ltd produced a report of its review of the BBC's arrangements for managing on-screen and on-air talent. They noted that the BBC's dealings with talent were on a large scale; in 2013-2014 the BBC had used more than 48,000 talent in various capacities, including around 47,000 freelancers and 1,300 talent on staff. The key findings of the 2015 review were that the BBC had reduced talent spending by 15% since 2008-09; the BBC's processes around talent management represented a vast improvement since 2008, although there was scope to further improve the quality and consistency of processes; the BBC took a largely informal approach to talent development and, although that had been effective in the past, a more structured approach to talent development and succession planning would ensure that the BBC got the most out of its talent pool; and after five years of rigorously controlling talent costs, the BBC was likely to come under pressure from a strong competitive market for talent. The BBC's new strategy

would provide some flexibility to address the likely fee inflation, but the importance of development and succession planning should not be overlooked.

40 Paragraph 37 of the December 2016 Royal Charter required the BBC to publish an annual report for each financial year. The annual report had to include, among other things, a report from the Remuneration Committee on the names of all those doing work for the BBC who had been paid more than £150,000 from licence fee revenue in that financial year set out in pay bands.

41 In July 2017, in line with its 2016 Royal Charter commitments, the BBC published for the first time the names of its on-air talent paid over £150,000 p.a. There were 96 names on the list – 65 men and 31 women. There were 7 individuals who earned more than £500,000 each. They were all men. They included radio and TV presenters in sport, news and entertainment. One of them was Jeremy Vine who was in the £700,000-749,999 band. 7 individuals (6 men, 1 woman) received between £400,000 and £500,000. 10 individuals (5 men, 5 women) received between £300,000 and £400,000. 33 individuals (24 men, 9 women) received between £200,000 and £300,000. 39 individuals (23 men, 16 women) received between £150,000 and £200,000.

42 Following the publication of the high earners' list the BBC's approach to pay of on-air talent was the subject of much criticism. There were criticisms about the level of payments being made by a public sector broadcaster funded by the public. There were also criticisms about the fact that the highest earners were men and that the number of men on the list was more than double the number of women.

43 In October 2017 the BBC published a Gender Pay report (in accordance with its obligations under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017). The report included data for people who worked on graded staff contracts. It included on-air presenters who had BBC staff contracts but not presenters on freelance contracts. A large number of on-air presenters (including the Claimant and Jeremy Vine) did not have graded staff contracts and were excluded from the report. The BBC said at the time that it would review its approach to on-air presenters, editors and correspondents. At the same time Eversheds Sutherland published an Equal Pay Audit Report. This also covered people on staff contracts and did not cover those who were on freelance contracts.

44 On 9 November 2017 the BBC announced that it would carry out a review of on-air roles within the following areas – Network News, Radio Continuous Programmes, Nations, English Regions, World Service and Sport. It said that it would be supported in that work by PricewaterhouseCoopers, who would assist it in reviewing the roles and coming up with fair and objective frameworks for contracting and reward.

45 On 15 December 2017 the NUJ wrote to the BBC to raise formal grievances on behalf of 121 women. One of them was the Claimant. They said that the complainants believed that they had received less pay and other less favourable terms in their contracts when compared with men doing the same or equivalent work at the BBC between December 2011 and the date of the letter. It sought pay information in relation to a number of named male comparators. One of them was Jeremy Vine. (The grievance is dealt with in more detail in the section dealing with the Claimant).

46 The PricewaterhouseCoopers (“PWC”) report was published on 30 January 2018. The review looked at 824 individuals, consisting of presenters, on-air editors and correspondents working within the areas that had been outlined in the BBC’s announcement of 9 November 2017. They were predominantly people working in news and news-related areas. It did not include presenters who worked in other areas and did not include Jeremy Vine. PWC found that the BBC had a set of pay arrangements for that group which lacked a consistent evaluation and a governance framework. As a result of the lack of consistent framework, the BBC’s approach to pay for that group had historically lacked rigour and that had resulted in anomalies for both men and women. Its analysis showed that where pay differences had been identified amongst employees in similar roles, these were typically driven by material and justifiable factors unrelated to gender. In some cases men and women in comparable roles were paid differently, but they had not seen anything which led them to believe that that was as a result of gender bias in the setting of pay.

47 PWC considered whether the Career Path Framework (“CPF”) could be suitable for the on-air group that it had considered. CPF was an evaluation-based system which had been introduced by the BBC in 2017. It provided individuals with a job within a broad career level band and set out a market-based pay range for each job. There were five career level bands (A to E). The BBC had in November 2017 mapped some of the people in that on-air group on to career bands C to E. Working with the BBC, PWC identified a number of other roles that could be brought within the CPF structure. There were, however, 168 roles that did not fit into CPF Career Levels C to E. PWC recommended a bespoke approach for them which sat above level A to E. It was described as Career Level F.

48 On 23 October 2018 the House of Commons Digital, Culture, Media and Sport (“DCMS”) Committee reported on the BBC. It heard evidence from a number of individuals on the issue of equal pay. In its report, the committee said that it had been highly concerned to hear allegations of equal pay discrimination at the BBC. The report continued,

“As a public sector broadcaster, the institution should be setting an example for other organisations, but its approach to pay has been extremely poor. The corporation was unable to give us a good reason why or how pay discrimination has been left unchallenged for so long...”

The BBC pay structure lacks central oversight and allows too much managerial discretion over salaries. Pay decisions for senior positions appear to be made on an ad hoc basis: someone in the executive team agrees a pay settlement, without consideration of what the decision means for others that sit within the same band... This culture of invidious, opaque decision-making must end. In order to prevent misuses of managerial discretion, the BBC must look at the system by which it makes pay decisions. It must ensure that sufficient oversight takes place, and that decisions are based on transparent, objective criteria rather than on the basis of individual personalities, and that managers making the decisions understand the equal pay legal framework within which they must operate.”

49 The BBC’s HR Pay Equality Unit report dated 11 January 2019 recorded that it had received a total of 1228 queries about pay to that date. 1,022 of these had been resolved – of those resolved, 68% had been raised by women and 32% by men. A

total of 615 individuals (413 women and 202 men) had received a pay increase. The BBC categorised 27 of these as being equal pay cases and the rest as “fair pay” cases. Out of the 27, 26 were raised by women and one by a man. **1/38**

50 By October 2019 the number of complaints had increased to 1308. 1235 had been resolved – 68% from women and 32% from men. 758 individuals had received pay increases (498 women and 260 men). 36 were categorised by the BBC as equal pay cases (34 of these were from women and 2 from men).

51 On 12 March 2019 the Equalities and Human Rights Commission (“EHRC”) announced that it would conduct an investigation into whether there had been unlawful pay discrimination at the BBC from 1 January 2016 to the date when any changes were made. The EHRC is expected to report in March 2020.

The two programmes and the work of the presenters

Points of View

52 Points of View has been broadcast since 1961. It is a fifteen-minute programme which airs the views of the BBC’s audience on all BBC programmes, including news. There is no comparable programme on other TV networks. There are 20 episodes a year in two series of ten episodes each. It is commissioned for BBC 1. It is licence-fee funded. It falls within the Factual genre. It is classified as having a magazine format and is presenter-led. It is pre-recorded.

53 Jeremy Vine presented Points of View between April 2008 and July 2018 (The circumstances in which he was appointed and his rate of pay are dealt with below in the section headed “Jeremy Vine”).

54 Since 2008 Points of View has been broadcast on BBC 1 on Sunday afternoons, normally starting after 4 p.m. although it has sometimes started earlier in the afternoon. According to audience figures provided by BARB (Broadcasters’ Audience Research Board), in 2008 Points of View had an average audience (of adults aged over 16) of 1,820,000. In 2009 the average audience figure for the same age group was 1,450,000. The BARB panel comprises 5,100 homes. Each home in the panel is provided with a box which records the programmes watched in each home and the age and number of individuals watching them. In 2010 a new BARB panel was introduced. Hence, it is suggested that data comparisons pre and post 2010 should be considered with caution. In 2011 the adults 16+ audience figure for Points of View was 1,668,000. Thereafter, it declined considerably and from 2013 to 2018 has been around the 1 million mark (plus or minus up to 120,000).

55 In the middle of the hearing the Respondent was asked to disclose the minute by minute audience figures for Points of View for 2016-2018. It had previously produced graphs based on similar data for Newswatch. The data produced showed that in general there was no increase in audience figures when Points of View came on and, more often than not, the audience figures decreased.

56 Simon Miller was Series Producer for Points of View from March 2016 onwards. He led a small team. Mr Miller was responsible for deciding the content of the programme, writing the script and signing off the final edit.

57 The production process for the programme was as follows. On Monday morning the team reviewed their sources for viewer feedback and discussed the programmes featured in the feedback. Mr Miller then prepared a draft running order setting out the programmes that they were considering featuring on the show and sent that to Jeremy Vine on Monday afternoon. There would usually be around six or seven programmes on it. Mr Vine did not have to view all the programmes in advance; he might well have viewed some of them.

58 On Monday and Tuesday other members of the team prepared briefings for Mr Miller on each of the programmes. They also filmed any film or films that were to be used in that week's programme. That could include the viewer expressing his views or a response from someone at the BBC. On Tuesday afternoon and Wednesday Mr Miller wrote the script and then sent the draft script to the executive producer who normally reviewed it quickly. On Wednesday evening Mr Miller sent the script to Jeremy Vine. The script was about ten single A4 typed sheets. Mr Miller tried to write the script in Mr Vine's voice and style. Mr Vine's role was to introduce the programme as a whole, the programmes which were being discussed that week, the viewer clips and the BBC response.

59 On Thursday morning Mr Miller proof read and fact checked the script and sent it to the producer/director in London by lunch time. Filming was booked to take place at New Broadcasting House in London between 2.30 and 6.30 pm. The filming did not take place in a studio but in an open area which was used by people to access the kitchen. Mr Vine usually arrived at about 2.15. During filming Mr Vine read the script from autocue. Mr Vine sometimes tweaked the script and made stylistic changes to it. If he wanted to make a change that might alter the intended meaning of the script that could only be done if Mr Miller approved it. The viewers' comments were read by someone else. Mr Vine's role was to be on the side of the viewers and to take their opinions seriously. His role also involved holding the BBC to account but not being dismissive towards it. The programme put points raised by the viewers to the programme makers and editors. Their responses were either read out by someone or the individual attended the programme. Interviews were rare; in the 80 shows that Mr Miller produced there were about 5 or 6 interviews. The tone adopted depended on the issue being discussed, but it was generally quite light-hearted and occasionally tried to be humorous. Mr Miller's evidence was that he aimed for "*a couple of chuckles in each show*". On two occasions Mr Vine used visual gags that had been written into the script and on occasions he rolled his eyes because that was in the script.

60 Mr Vine was free to leave once the filming was concluded. He would get away at the latest by 5.30. The recordings were then sent to Mr Miller's team who edited the programme on Thursday evening and Friday. Mr Vine was not involved in the editing.

Newswatch

61 Newswatch was established in 2004 as part of an initiative to make BBC News output more accountable following criticisms of the BBC in the Hutton Report. It is a fifteen-minute programme which is a forum for discussion and debate of viewers' opinions on BBC News. There is no comparable programme on other TV networks. It is broadcast for 44 weeks of the year. It is commissioned for the BBC News Channel (previously known as BBC News 24). It is licence-fee funded. It falls within the News genre. It is classified as having a magazine format and is presenter-led. It is pre-recorded.

62 The Claimant has presented it since 1 September 2012. (The circumstances in which she was appointed and her rate of pay are dealt with below in the section headed "Samira Ahmed".)

63 Newswatch is first broadcast on Friday evenings on the News Channel. It used to be broadcast at 9.30 pm but that changed in 2018 to around 7.45 pm. It is broadcast again on the News Channel at 3.45 am and as part of Breakfast on BBC 1 on Saturday mornings at 7.45 am. Breakfast is broadcast on Saturday from 6 am to 10 am. According to BARB the average audience figures for adults 16+ for Newswatch solely on the News Channel have fluctuated between 106,000 and 142,000 for the period 2012-2018. The total audience figures for Newswatch (including on BBC Breakfast) have steadily been in the region of 1.5 million for that period. The graphs produced by the Respondent based on the minute by minute data showed that there was a slight dip in Breakfast audience figures when Newswatch first came on but that thereafter the audience figures continued to rise during the programme and after it ended. That was consistent with the audience figures on other days.

64 James Mallet was the Series Producer for Newswatch from 2008 onwards. Mr Mallet identified the content of the programme, decided who they might want to interview, arranged the interviews, drafted the script and wrote the interview questions, attended the filming and edited the filmed material.

65 The process of preparing an episode of Newswatch starts on Monday. Mr Mallet reviews the feedback received from viewers about the BBC's coverage of the news. On Wednesday Mr Mallet emails John Neal, Newswatch's Editor, his proposal for the programme's main topic or, if there is not a leading story that week, two or three options for him to consider. Once the topics are finalised, he takes steps for the appropriate people to be interviewed on the programme. The interviews could be with one of the makers of the programme being reported on, a senior member of BBC management, an editor or a journalist or with one or two viewers. Interviews feature on three-quarters of episodes of Newswatch.

66 On Wednesday Mr Mallet also gets in touch with the Claimant to tell her what topics and/or programmes are being covered that week. The Claimant is expected to view those programmes. The Claimant sometimes suggests topics to be covered and some of her suggestions make it into the programme.

67 By Thursday Mr Mallet normally knows who will be available for interviews, and he starts writing the script. The script sets out everything that the Claimant is to say in the programme. The Claimant's role is to introduce the programme as a whole, the

clip of the news programme being reported on, read out the viewer comments and conduct the interview. Mr Mallet writes it in a way that fits with the Claimant's style.

68 At around 11 am on Friday Mr Mallet sends the script to John Neal who normally approves it without making any changes. The Claimant usually arrives in the Newswatch office in New Broadcasting House at about 11-11.30 am. She is given the script at that time. Between 12 noon and 12.45 she is in makeup. Between 12.45 and 1.45 the Claimant and Mr Mallet work through the script. The Claimant makes stylistic tweaks to the script to adjust certain words and phrases to her way of speaking and usually focuses her changes on the interview section. She sometimes suggests one or two additional questions or angles to the interviews. She then types up the questions.

69 The programme is filmed between 1.45 and 2.45 in a studio. The studio is booked for that one hour and the recording has to be concluded during that time. It is, therefore, important to have a presenter who can work efficiently and not require multiple attempts at recording parts of the programme. The script is on autocue and the Claimant reads from it. She has to inject meaning into what she reads. The Claimant needs to make the viewers feel she is on their side and to be able to hold the BBC to account. The vast majority of items covered are serious but not all of them. For instance, the show has covered viewers' comments about news coverage of "Strictly Come Dancing" or about news presenters acting as news presenters in the television drama "Bodyguard". If the Claimant is covering a lighter subject, she adopts a lighter tone. Generally, the tone of the programme is serious.

70 At the end of filming interviews the Claimant quite often makes suggestions about editing. All decisions about editing are ultimately made by Mr Mallet. The Claimant leaves between 3 and 3.30 pm. The editing is done between 3.30 and 7 pm on Friday after the Claimant leaves. She plays no part in the editing. Once Mr Mallet and his team have completed the edit of the programme, John Neal watches it and he might make small changes or sign off the programme.

71 In her role the Claimant has questioned BBC bosses about matters that have been of interest to and reported in the national press. Examples of this are interviews with David Jordan, the head of editorial policy, about the BBC's decision to drop a Newsnight investigation into the Jimmy Saville sexual abuse allegations, Cliff Richard's successful lawsuit against the BBC for infringement of privacy over a police raid and recently whether the viewer who had complained about Naga Munchetty had also complained about her co-presenter, Dan Walker.

Jeremy Vine

72 In late September 2007 Roger Leatham, Head of Operations and Business Affairs for Entertainment for BBC Vision, was asked to lead negotiations with Jeremy Vine's agent for the renewal of his contract which was due to expire at the end of that year. Mr Leatham had worked at the BBC between 1994 and 2004. He was head of BBC News, Radio and Factual when he left. He had worked for ITV and Channel 4 for a little over three years before returning to the BBC in July 2007.

73 At the time Mr Leatham was aware that Jeremy Vine had built up his reputation by presenting "The Jeremy Vine show" on Radio 2 which had a strong regular audience. He was also broadly aware that Mr Vine had done work as a correspondent and

presenter on television for the BBC, although he did not have any detailed knowledge of that.

74 No witness before the Tribunal gave or produced any evidence about Mr Vine's experience prior to 2007. There was an entry from Wikipedia dated 25 October 2019 attached to, and reproduced in, Mr Leatham's witness statement and, in the files of documents, an undated table which was not introduced into evidence by any of the Respondent's witnesses. We do not know who compiled the table or the source of the information contained in it. We did not regard either of those two documents as being wholly accurate or reliable. They were useful in providing a broad outline of Jeremy Vine's career but we could not rely with any confidence on the details given in them. On the basis of the evidence before us we found that Mr Vine's career with the BBC began towards the end of the 1980s. From the mid-1990s he did some work for BBC television as a news correspondent, in the 2000s he presented a handful of episodes of Newsnight and the Politics Show and some other shows, he presented the local elections programme in 2006 and Panorama in 2007. At the end of 2003 Mr Vine was appointed to take over the show that had been hosted by Jimmy Young. It is a two-hour show broadcast on Radio 2 from 12 noon to 2 p.m. during the week. The show is a mixture of news-based discussions with listeners phoning in, popular music and magazine slots for health, religion and gardening. He has presented it since then and it is known as "the Jeremy Vine show". It has audience figures of between 1.8 and 2 million.

75 The new deal that Mr Leatham was asked to negotiate was a three-year deal to cover Panorama, the Radio 2 show, elections and the possibility of other work (the negotiation was outside Mr Armitage's remit as the programmes in question were not Entertainment programmes). Following negotiations between Mr Leatham and Alex Armitage, Jeremy Vine's agent, (in which Mr Armitage sought a 63% increase in fees for Jeremy Vine's existing work and claimed that he had had offers in excess of that from rival channels) the following deal was agreed in principle on 12 December 2007. It was a three-year deal from 1 January 2008 to 31 December 2010, during which time Mr Vine was to provide his services exclusively to the BBC in all UK audio-visual media. The terms of the deal were that:

- Jeremy Vine would present 230 programmes per year of the Radio 2 show. The fee would be increased by 3% in year 1 and 5% each in years 2 and 3;
- he would present a number of episodes of Panorama and would do some additional work on episodes where he was not the main presenter. There would be a 5% fee increase each year;
- he would contribute to three News specials a year and receive a fee for that;
- he would provide election coverage and contribute to coverage of a General Election, if there was one. A separate fee was payable for that.
- he would present 80 episodes of "Eggheads" – a daytime quiz show for the first two years of the deal. He would be paid a fee per episode.
- there would be a review at the end of year 2 when it was planned that additional work could be found for Mr Vine. Even if no additional work was found he would be guaranteed a payment of £100,000.

76 The deal was signed on 4 February 2008.

77 In March 2008 the Points of View production team decided to approach Jeremy Vine to present Points of View from April 2008. The negotiations were handled by Jill Ridley of the Talent Rights team in BBC Birmingham. We did not hear evidence from anyone, in either the production team or the Talent Rights team, who was involved in the appointment of Jeremy Vine or the setting of his fee. Roger Leatham was not involved in the negotiations, he did not know what factors were taken into account and he was not aware of the fee that had been agreed. He could only speculate on the matter. The only contemporaneous documentary evidence before us consisted of two emails from Jill Ridley to Roger Leatham. In the first dated 13 March 2008 she said that they were looking at the possibility of using Jeremy Vine to present the new series of Points of View. She said that she was aware that he had a long-term contract (“LTC”) with the Respondent and she wanted to check whether her making him an offer would have any implication for the LTC. The second one on 27 March was to update him on the negotiations. She said that their offer of £2,750 had been rejected by Mr Vine’s agent and that the maximum that production was prepared to pay was £3,250.

78 It was eventually agreed that Mr Vine would be paid £3,000 per programme, and he began to present it on 17 April 2008. On 18 April the BBC entered into an agreement with Mr Vine for him to present 20 episodes of Points of View on specified dates for which he would be paid £3,000 for each episode. Similar annual agreements were signed in April 2009 and March 2010.

79 Alex Armitage did not give any evidence before us about the negotiations for Points of View. The Respondent sought to rely on an email from him dated 15 October 2019 to the Claimant’s solicitor. We admitted that email in evidence but said that we would attach to it such weight as we thought appropriate. In the email he said that he had no documentary evidence of the negotiations other than one email. He also said that he recalled “*reluctantly*” accepting £3,000 because the figure was less than what he could achieve “*elsewhere*” given his client’s “*market value as a major star*”. We attached no weight to that evidence. The Respondent could have called Mr Armitage as a witness but had chosen not to do so. His evidence had not been tested in cross-examination. It was not clear what Mr Vine could have achieved elsewhere in circumstances where he was tied to working for the BBC for the next three years. It is clearly in Mr Armitage’s interest and that of his clients to say what he did. He is hardly likely to say that his client would have been prepared to accept a lower sum but that he pushed for as much as he could.

80 It was not in dispute that prior to Jeremy Vine taking over, Points of View had been presented for almost ten years by Terry Wogan. Roger Leatham’s evidence to the Tribunal was that Terry Wogan was “*extremely experienced*” and the “*most iconic of people that the BBC engaged.*” Mr Leatham said that in 2007-2008 he was an “*extremely high-profile presenter*” and “*one of the best-known presenters on radio and TV.*” Mr Leatham’s evidence was that in comparison in 2007-2008 Jeremy Vine was “*up and coming*” and that he did not have the “*same status as Terry Wogan.*” It was also not in dispute that in the past Points of View had been presented by Anne Robinson, Carol Vorderman and Des Lynam.

81 The Respondent in its closing submissions made many references to “the evidence” before the Tribunal of what the previous presenters of Points of View, including Terry Wogan, had been paid. The “evidence” relied upon by the Respondent was an undated document headed “Summary of Contracts: Presenter Pay on Newswatch & PoV”. It contained the names of various presenters, the dates on which it claims they presented Points of View and what it claims that they were paid. There was no evidence before us of who had created that document, what the source of the information on the document was or when and for what purpose it had been created. It appeared in the bundle of documents in the section where we had the papers relating to the Claimant’s grievance appeal. In the index it was referred to as “Appeal Panel copy” Mr Leatham’s evidence was that he did not know whether it had been prepared for the grievance appeal panel.

82 We had concerns about whether the document had in fact been prepared for the appeal panel. There was nothing in the appeal documents to show that the appeal panel had sought that information or that someone had sent the panel that information. There is, however, a document that indicates the contrary. In a document headed “Appeal Summary Investigation Table” someone has set out the various matters that the panel was looking at. In respect of the Claimant’s complaint about being paid less than Jeremy Vine for doing similar work, it was noted that in the original grievance it had been shown that there was a justifiable reason for Mr Vine being paid more, and it referred to an email from Emma Trevelyan to Paula Greenwood dated 26 November 2018. The note then continued “*Agreed with appeal panel on 25.04.19 no further investigations required on this (apart from speaking to John)*”. That is a reference to John Neal and the panel did speak to him but that related to the Claimant’s work on Newswatch. That indicates that the grievance appeal panel did not intend to conduct any further investigation of the equal pay issue. In the grievance appeal outcome the panel set out the evidence that it had reviewed. It said that it had reviewed the evidence considered at the original grievance and the further evidence that the Claimant supplied at the appeal. There was no reference to the undated document with the pay details of presenters. The panel did say in its outcome letter,

“We noted that there were various female presenters on ‘PoV’, who received payments which were similar to, or more than, male PoV presenters, and that all of the payments made to PoV presenters were consistently higher than the payments paid in relation to ‘Newswatch’ to either you or Ray Snoddy.”

83 That sentence in the outcome letter could be a reference to the undated document but, in light of what is said in the appeal panel documents, it is more likely to be a reference to Emma Trevelyan’s email of 26 November 2018 to Paula Greenwood. In that email Ms Trevalyan said,

“I have looked at some older PoV fees, for context – as you’ll see below there has been a range.

*Anne Robinson 1996 - £1250
Carol Vorderman 1998 - £1400
Des Lynam 1999 - £1250
Terry Wogan 2001 – 2007 – £2000”*

What is said in the outcome letter about the pay levels of Points of View male and female presenters is entirely consistent with that email.

84 That email also raised other concerns about the accuracy of the undated document. The undated document records Terry Wogan's pay in 2001 as being £1500 and then going up to £2,000. There are then further increases to £2,500, £3,000 and in 2007 it is shown as being £3,500. Both the email and the undated document cannot be correct and the discrepancy between them highlighted to us the danger of considering either of those documents to be evidence of the facts contained in them.

85 For the reasons given above, we concluded that we could not find as fact that the presenters of Points of View had been paid what the Respondent claimed they had been paid on the basis of an undated document created by an unknown person with no evidence before us of how, when, why and by whom it had been created, especially when that document was inconsistent with another document disclosed by the Respondent. The Respondent had not at any stage asked the Claimant to admit the facts stated in that document. If the Respondent considered that evidence was important, it should have called evidence about it in the normal way. A witness should have given evidence about what records he or she had accessed and what they had shown, and the relevant documents should have been disclosed to the Claimant in the normal way. An A4 sheet asserting facts is not on its own, without any further information, evidence of the facts stated on it.

86 An O and O report for BBC Audio and Music on 17 September 2010 found that Jeremy Vine was one of the three most popular magazine presenters on radio. There was no evidence before us about who the recipients of that report were.

87 In January 2011 the BBC entered into a two-year agreement with Jeremy Vine for him to present the Radio 2 programme, eighty editions of "Eggheads", election coverage and such additional programmes as the parties might agree. The additional programmes included Panorama which it was agreed would be separately contracted on an ad hoc basis. That agreement did not cover Points of View.

88 As far as Points of View was concerned Jeremy Vine and the BBC continued to sign annual agreements in the same way as before. There was no evidence that the fee was reviewed every time a new contract was signed. For any deals that involved a payment in excess of £100,000 or an increase in the fee, the Talent Rights team had to submit a Talent Deal Referral to the Talent Rights Negotiation Group. The Points of View contract did not fall into either of those categories, but as Jeremy Vine had a long-term contract for other work for which he was paid in excess of £100,000 Jill Riddle submitted a Talent Deal referral on 27 January 2012 and Andrea Coles submitted one on 13 March 2012. In their referrals they justified continuing to pay him £3,000 per programme. In 2011 Ms Riddle said that it was important to retain Jeremy Vine as the series had been commissioned with him as presenter and at that time production was not willing to find an alternative. There had been a few alternative presenter suggestions but they had not been approved by the commissioning editor and they had not done any research into their availability or likely fee. When asked why she was recommending the fee, she said she believed it to be very good fee for the nature of the contribution. The 2011 referral was approved on the grounds that keeping the fee at the same level as the previous year was in line with the then talent strategy for the Factual Genre.

89 Approving it in March 2012 the Head of Production said,

“Retention of this rate for a further financial year will enable us to ensure the budget spent on talent is reduced c/f remainder of the budget. However, I do believe this is a rate at the top end for a show of this type and more up and coming journalist presenters should be investigated by production to ensure that there are alternative succession plans.”

90 In July 2013 the BBC entered into a 2.5-year contract (1 July 2013 to 31 December 2015) with Jeremy Vine. It covered the Radio 2 show, election coverage, Eggheads and also Points of View. By this time the audience figures for Points of View had dropped considerably. Notwithstanding that, the terms remained unchanged for Points of View except that it was agreed if the Respondent did not require him to present Points of View *“alternative programming to be considered and agreed by the Company [BBC] and the Contributor [Vine] in good faith up to a further minimum guarantee of the same £60,000.”*

91 In September 2015 Paul Luke (Head of Business Affairs) sent an email to a number of people, including Roger Leatham, about the expiry of Mr Vine’s contract in December 2015. He said that he had had discussions about renewing the deal and that they felt that it was no longer appropriate to have any guarantee for TV output. As far as Eggheads was concerned, he suggested that they move forward on a commission by commission basis and said that daytime would be willing to consider recasting as an option if a deal could not be achieved. He noted that Mr Vine was expensive compared to comparators. In respect of Points of View he said,

“As you know there is some uncertainty around the future of POV and whether it should be moved to on-line. In any event Jeremy’s fee represents a substantial part of the budget for the programme and we feel that given the uncertainty we should move to a commission by commission basis and potentially also consider the option of recasting.”

92 On 1 January 2016 Mr Vine’s existing contract was extended for a further six months to 30 June 2016 while Television considered his future use and the possibility of him presenting Crimewatch. The contract was dealt with by Emma Trevelyan for the BBC.

93 In April 2016 Paul Luke circulated to his colleagues a draft of the offer that he intended to send to Jeremy Vine’s agent. It included an offer to present Crimewatch. In respect of the fee for that he said,

“On the face of it, when compared to Points of View, this may not seem very high but the POV rates really have no comparison and were it not for historical precedent would be unaffordable.”

94 In July 2016 the BBC signed a contract with Jeremy Vine for the provision of his services from 1 July 2016 to 31 December 2017. His work on the Radio 2 show and Eggheads was to continue until the end of 2017. In addition, he was to present four programmes of Crimewatch in 2017. As far as Points of View was concerned, it was agreed that he would do ten programmes at £3,000 per programme until the end of 2016.

95 Prior to that agreement, a Talent Deal Proposal form was submitted for the television work that Mr Vine was to do under the contract. The fees for which approval was sought consisted almost entirely of the fees for Eggheads. The fee for Points of View was £30,000 and the fee for four episodes of Crimewatch was likely to have been lower than that. Commercial valuation was required if the total deal cost in excess of £500,000. The bulk of the commercial valuation (the advertisement revenue that would be generated by Mr Vine presenting a similar programme on a commercial channel) related to Eggheads.

96 Jeremy Vine presented a further nine episodes of Points of View between April and June 2017 on the same terms as before. A contract was signed in June 2017 to cover those episodes. It was signed by Lyn Davis on behalf of the Respondent.

97 At about the same time, as a result of the guidance given by HMRC to the BBC on assessing employment status, it assessed Mr Vine as being employed for tax purposes when presenting Points of View. The effect of that was that it would pay him net of tax and NI contributions. There was a dispute between the Respondent and Mr Vine's agent about that. In the meantime, the second series of Points of View was filmed in the last quarter of 2017. In the end it was agreed that the Respondent would pay him net but if he was successful in challenging that status with HMRC they would reimburse him the tax and NI or he could claim it on his self-assessment return.

98 There was a discussion about Points of View and, in particular, Jeremy Vine at a commissioning meeting on 19 October 2017. The minutes noted,

"Points of View (JV discussion) ... Think about what a reasonable price for this series would be."

That meeting took place three days after the Claimant made a complaint in writing about equal pay and used Jeremy Vine as a comparator (see paragraph 121 below). At the commissioning meeting on 12 December 2017 it was agreed that they would commission 20 more episodes of Points of View. The minutes recorded,

"Do some negotiating on JV fee."

99 On 3 January 2018 David Brindley (Head of Popular Factual and Factual Entertainment) sent an email to Lisa Opie (Head of Factual at BBC Studios which produced Points of View at that time). He said that they were going to commission two more series of POV (of ten episodes each) at "*a slightly lower tariff*" which would mean Jeremy Vine taking a pay cut. He said that he had had a discussion with him about that.

100 On 5 January Matthew Hickling obtained details from Simon Miller as to what Jeremy Vine's work involved and forwarded those to Stuart Krelle (Business Affairs Manager in Factual) with the comment "*3k – for half a day.*" On the same day Mr Krelle sent an email to Roger Leatham and Lisa Opie that in light of the funding cuts which had been notified to Mr Vine his fee would be reduced to £1500 and he would be contracted on an employed basis. After the deductions for tax his fee would come out at less than £1500. On 13 January Jon Swain said that they could make the show

at the new price that Mr Brindley wanted to pay if they could get Mr Vine to agree to accept £1,300 per episode. He continued,

“Jeremy has been pretty understanding and indicated to David that he’d want £1500 (think that’s half his current rate) but hinted that he would probably settle at £1300. I believe stand-in presenters have been paid £1k and been very happy (it’s easy money as it’s so little work).”

101 On 17 January Roger Leatham emailed the offer to Mr Vine. They offered to pay him £1,300 per episode for 20 episodes and said that he would be employed for tax purposes. The two of them met to discuss the matter and Mr Vine indicated that he was keen to accept but asked whether it could be for longer than a year given the significant reduction to his fee. That indicates that Mr Vine was prepared to continue presenting the programme at the reduced rate. David Brindley was clear that at that stage they could not commit to more than one year. On 24 January 2018 Jeremy Vine accepted the offer.

102 In the course of 2017-2018 Jeremy Vine also agreed to take a pay cut on the other shows that he presented (the Radio 2 show and Eggheads). In the July 2018 high earners’ list he was shown as having received in the £440,000 – £449,999 range.

103 At the commissioning meeting on 19 June 2018 it was decided that the autumn run of Points of View would not have an on-air presenter and the links would be recorded by a voiceover. It was anticipated that that would bring the costs down.

104 At that stage Jeremy Vine decided to stop presenting Points of View.

105 In August 2018 the production team started to look for someone to do the voiceover. Their budget for the voiceover was £500. Ultimately Tina Daheley was appointed to do the voiceover. She was paid £400 per episode.

106 There were in the bundle of documents reports of talent surveys conducted by the Respondent in respect of Jeremy Vine in November 2014, December 2015 and June 2017. In each year his recognition rates were higher than the all talent averages of 54-55%. In 2014 he was recognised by 63% of the respondents, in 2015 by 75% of the respondents and in 2017 by 79% of the respondents. In 2015 Jeremy Vine appeared on Strictly Come Dancing. In each year he was most strongly associated with news/current affairs programmes (63% in 2014, 59% in 2015 and 54% in 2017).

107 In an On-Air Survey conducted by Populus in the first week of December 2017 72% of about 1500 respondents correctly recognised Jeremy Vine and 29% correctly recognised the Claimant.

Samira Ahmed (The Claimant)

108 The Claimant joined the BBC in 1990 as a graduate on its fast track News Trainee scheme. At the conclusion of the training period in 1992 she got her first BBC contract as a network radio news reporter. Between 1993 and 1997 the Claimant worked for the BBC in a variety of roles. Between 1993 and 1995 she

worked as a news presenter on BBC World Service TV and as a reporter on Newsnight and the Today programme. In 1994 she was taken on as a News Correspondent and became staff in that role in 1995. In 1996-1997 she was the BBC's Los Angeles correspondent and in that role she appeared across national TV and radio networks.

109 In 1997 the Claimant left the BBC and worked for a year in Berlin as news presenter for Deutsche Welle TV – Germany's equivalent of the BBC World Service. In 1998 she returned to the UK and worked on a freelance basis as news presenter on the new BBC News 24 channel (now known as BBC News).

110 In April 2000 the Claimant joined Channel 4 news as a reporter and from 2002 to 2011 she was co-presenter of Channel 4 news with Jon Snow. She co-presented on weeknights and was the main presenter on many Friday and weekend editions of the show. She was also one of the regular presenters on the half-hour Channel 4 news at noon. We only had audience figures for the period 2007 to 2011. The figures for individuals aged 4+ for the evening news bulletins went down from 930,000 in 2007 to 789,000 in 2011.

111 In 2010 the Claimant appeared on Celebrity Mastermind and in 2011 on Have I Got News for You (two popular entertainment shows on BBC One).

112 In 2011 the Claimant secured contracts to present several shows for the BBC. These included the proms on BBC 4, a contract with BBC news to present a certain number of editions of The World Tonight (on Radio 4) and PM (the Radio 4 News Hour at 5pm) and Night Waves (an arts and ideas discussion programme on Radio 3).

113 Ray Snoddy had been appointed to present Newswatch when it first started in 2004. Mr Snoddy was an experienced newspaper journalist and had been Media Editor of the Financial Times and The Times but he had no experience of presenting radio or television shows. He had initially been paid £400 per programme and by 2012 it had gone up to £440 per programme.

114 In early 2012 a decision was made to move the filming of Newswatch from Television Centre in West London to New Broadcasting House. That prompted a rebrand of the programme with a new set and new graphics. It also became a more studio-based programme with fewer video inserts. The idea was to record it more "as live" with less editing required. Barney Jones, who was the editor of the programme at that time, decided not to renew Mr Snoddy's contract and tried out various people to replace him. One of them was the Claimant and a decision was made to offer the role to her.

115 On 15 March 2012 Barney Jones instructed someone in the Talent and Rights Negotiating Group to negotiate a deal with the Claimant's agent. In his email to her he set out what the role entailed and in terms of the pay for the work, he said,

"we currently offer Ray Snoddy £440 per recording and I would have thought that this was a fair starting point for Samira too ... I would not object to a very modest increase on what Ray gets paid, though I don't think this should be necessary. If the agent says there must be a significant increase or she won't do it... then we will choose a different presenter."

116 On 19 March 2012 the Negotiating Group sent an offer to the Claimant's agent. The payment offered was £440 per programme. It was made clear that the contract was offered subject to the Claimant providing her services through a service company. That was a normal stipulation for contracts with on-air talent. The Claimant's agent tried to negotiate a higher fee but without any success. The Claimant accepted the offer and signed the contract on 25 May 2012. It was an annual contract. It provided that the Claimant was to present 40 programmes for which she was to be paid £440 per programme. Although the contract did not mention it, the Claimant was paid £185 for any pre-recorded interviews carried out on an additional day. The Claimant started as presenter of Newswatch on 1 October 2012.

117 Thereafter the same contract was agreed annually. In 2014 the rate for any pre-recorded interview was increased to £200. In 2015 the fee was increased to £465 per programme.

118 In 2012 the Claimant also contracted with the BBC to present Sunday Morning Live on BBC 1. That was an interactive TV ethics and religion debate show that was broadcast at 10 a.m. immediately after the Andrew Marr show. She presented that in 2012 and 2013. Since 2014 she has also presented Front Row on Radio 4.

119 On 21 October 2016 the Claimant's contract for Newswatch was changed. The new contract was made with her personally. It was headed "*BBC News Presenter/Journalist Fixed-Term Non-Exclusive Contract of Employment (OATS contract – Statutory Benefits)*". This contract was different from the contracts on which graded staff were employed. The end date was given as 20 October 2017. It provided that she was to be paid £18,391 per annum for 48.5 days (43 days' work and 5.5 days' holidays.) That figure was arrived at by calculating what the Claimant would be paid for 43 programmes at £465 per programme (£19,995) and applying to that a discount to account for the Respondent paying the employer's National Insurance and pension contributions. The reality was that the Claimant's fee was reduced to £427.70 per programme and she did not get any paid holiday. The contract also provided that the BBC was authorised to deduct from that any amount that it was instructed to pay in respect of her tax or National Insurance contributions. It also provided that she was entitled to all statutory benefits, such as holiday pay, statutory sick and redundancy pay and pension.

120 On 5 October 2017 that contract was extended to 31 December 2017. In November 2017 it was extended to 31 March 2018. In March it was extended to 30 June 2018. The Claimant was unhappy with the new contract and raised issues with her managers about it.

121 In an email sent to Gavin Allen (BBC Senior News Controller) on 16 October 2017 the Claimant said that she expected the Respondent to tackle all the issues that she had raised. One of the things that she wanted was a proper salary review and comparison on equal pay with Jeremy Vine on Points of View. She said that she regarded him as the appropriate male comparator. At that stage the Claimant did not know exactly how much he was paid for that but she was certain that it was a lot more than she was being paid. She contacted him in late 2017 to ask him about his pay but was not able to speak to him. He finally spoke to her about it in February/March the following year.

122 The Claimant was one of the women on whose behalf the NUJ raised a collective grievance claiming that they had received less pay than men doing the same or equivalent work (see paragraph 45 above).

123 The BBC responded on 10 January 2018 that it did not operate a collective grievance procedure and that it did not believe that it was appropriate to do so at that time because, although there were some common concerns, they were primarily individual pay matters. It said 39 of the 121 individuals named in the grievance had already raised pay/grading concerns and they had either received a response or their cases were still under review. They suggested that the remaining 81 should first try to resolve matters informally by meeting with the manager who had been tasked with reviewing their pay and grading. That manager supported by HR would undertake a thorough investigation into their concerns and, if their concerns were not resolved as a result of that, they could progress matters further. It refused to provide pay information about any of the male comparators, including Jeremy Vine.

124 On 29 January 2018 Noelle Britton (Managing Editor, Current Affairs and Daily News Programmes) told the Claimant that she would be looking into her equal pay claim informally with Peter Reid from HR.

125 Around 20 February 2018 HR staff in Reward and Pensions identified certain on-air talent who had not by then been mapped on to the Career Path Framework (see paragraph 47 above). One of these was the Claimant in her role as presenter of Newswatch. Mr Rangarajan's view was that the role should be passed through the criteria for Band F although it might not make it into that Band. On 21 February Chris Howard in HR Reward and Pensions said that as a result of the responses received Steve Walsh was going to add Newswatch to the spreadsheet as Band F and score the role. Later that day Steve Walsh said that he had put it through the criteria for Band F and that the scores had come out very low. He said that as the programme was broadcast across the UK it passed the hurdle for getting into Band F but, if it were not for that, it might be better placed at Lead Presenter Premium in Band E. He said that following a conversation with Lisa Tsavalos (nee Nicholls) the view of the Managing Editor was that it should be mapped at Lead Presenter Premium E. Less than an hour later Lisa Tsavalos said that following her conversation with Noelle Britton the feeling was that Newswatch was more of an E Lead Presenter role rather than the E Lead Presenter Premium role. Following that it was decided to update the spreadsheet and to map the Claimant to Band E Lead Presenter.

126 The job description for the Band E Lead Presenter role stipulated that one of the following would apply – broadcasting on BBC World news, broadcasting to a distinct political entity, typically with its own elected assembly or broadcasting to a geographical region, outside of the UK. The job description for the Band E Senior Lead Presenter (or Lead Presenter Premium) role stated that the purpose of the job was to present whole live news or current affairs led programmes of half an hour or more, and to be the named presenter of one of two types of programmes, one of which was specialist subject matter on high impact live news BBC programmes across the UK.

127 The job description for a Band F Chief Presenter defined the job purpose as,

“Presentation of daily news, news related and discussion programmes on TV and/or radio that often include the broader news arena. Will include

contributions from UK wide and national politicians, international policy makers, organization leaders and opinion formers. Must be able to adapt on air to changing circumstances, have the highest level interviewing skills to get the best out of people being interviewed and hold them to account.”

It also stated,

“Job holders will have high level input to the programming planning and require individuals with high profiles that attract audience share.”

The job description provided an indication of the responsibilities and accountabilities associated with the job, but made it clear that the extent to which any of them would be required in any particular case would vary from role to role based on the individual requirements of each role.

128 On 7 March 2018 there was a short meeting of the Senior Management Remuneration Committee conducted by conference call. Noelle Britton and Peter Reid were among those who attended the meeting. At that meeting the Committee (which included Anne Bulford, Deputy Director General) approved the Claimant’s role as presenter of Newswatch being mapped on to a Band E Lead Presenter role on the CPF with a proposed FTE annual salary of £86,513. There was no consultation with the Claimant about the mapping of her role prior to the decision being made.

129 On 19 March Anne Bulford and Noelle Britton met with the Claimant to discuss the concerns that she had raised.

130 In about February or March 2018 Jeremy Vine telephoned the Claimant. He said that he had not spoken to her earlier as it had been awkward because there had been ongoing negotiations about his pay for Points of View. He said that he had agreed to take a reduction in his pay and told her what he had been paid before and after the reduction. That was the first time that the Claimant found out how much more than her he had been paid.

131 On 23 April Noelle Britton and Peter Reid met with the Claimant to inform her of the outcome of the attempts to resolve her concern informally. Ms Britton said that she found that where pay differentials existed they were not related to gender. She told the Claimant that her FTE salary for the role to which she had been mapped on the CPF was £86,341. What she proposed as an informal resolution was to increase that to £93,951. That would give her a part-time OATS salary of £20,012, which would equate to £465.38 per programme. Alternatively, she could move to a staff contract at a salary of £17,851, which would equate to £415.14 per programme. The new OATS contract could be backdated to 21 October 2016. The Claimant said that she was not content with Ms Britton’s findings and asked her to take a further look at her case on an informal basis.

132 On 26 April Gavin Allen met with the Claimant to consult with her about the mapping of her role on the CPF. Mr Allen told her that the consultation period would last a few more weeks and it would then go to the News Board, which would consider the feedback that had been provided, and that the final decision would ultimately be signed off by Anne Bulford and Tony Hall. He said that it was not a “stitch-up” and was a genuine consultation. That was not true. The decision to map the Claimant to a Band E role had already been made and approved by Anne Bulford at the meeting

on 7 March 2018. The Claimant informed Mr Allen that she had obtained more information about Jeremy Vine's pay on Points of View and said that what she had found out was shocking. The Claimant also informed Ms Britton that she had received information about a major equal pay gap with Points of View.

133 On 11 May 2018 the Claimant asked Anne Bulford whether an appropriate senior person could look at her equal pay concerns and where Newswatch had been placed in the CPF system.

134 On 17 May 2018 the Claimant told Mr Allen that she would accept a staff job to present Newswatch but made it clear that she did not accept that it was a Band E role as Band E roles were suitable for regional presenters. She maintained it was a Band F role. On 18 May Mr Reid informed her that the payment of £20,012 on her OATS contract would be backdated to 21 October 2016 and would continue until 30 June 2018, when she would be given a staff employment contract.

135 On 11 June 2018 the Claimant asked for written reasons as to why her claim for equal pay with Points of View had been rejected. The reasons were provided on 13 June 2018. They were that the difference in pay was attributable, not to gender, but to the following reasons – Points of View was a different kind of programme with different demands on the presenter as an entertainment programme, which had had some of the BBC's biggest names presenting it, it had broader scope covering audience feedback across the BBC and not just news, it was a long-standing programme which was strongly associated with the BBC and had high audience recognition and Jeremy Vine's profile with BBC audience was high. It was also pointed out that the Claimant had been paid the same as Ray Snoddy and that since 2004 the differential between the two programmes had existed on a similar scale.

136 Jessica Cecil, a Senior Project Director, looked again informally at the Claimant's concerns over her pay for Newswatch. She concluded that the Claimant was not entitled to the same pay as Mr Vine because, although Points of View shared some of the same subject matter as Newswatch, it was produced and presented in an entirely different way and had far more prominence. Hence, she did not think that it was credible to compare the presenting responsibilities of the two programmes. In her view, there was no equal pay comparison. She also concluded that because the Claimant had been paid in line with her male predecessor on Newswatch, she had not been paid less than her male comparator. It is not clear whether that was a reference to Ray Snoddy or Jeremy Vine. The Claimant was relying on Jeremy Vine as a comparator and she had been paid less than him. Ms Cecil sent her conclusion to the Claimant on 29 June 2018.

137 The Claimant had also complained about being paid less than male comparators on Front Row and Nightwaves, and those matters were resolved informally by the Claimant being awarded additional back pay for those two programmes.

138 The Claimant's OATS contract was extended to 30 September 2018 while her staff contract was agreed and finalised.

139 On 3 July Gavin Allen wrote to the Claimant that he had considered her feedback about her role being mapped to Band E Lead Presenter but did not agree with her analysis.

140 On 15 August 2018 the Claimant raised a formal grievance for equal pay for her work on Newswatch backdated to September 2012 and in relation to the new CPF banding of her role.

141 On 1 October 2018 the Claimant commenced working on a permanent staff contract for presenting Newswatch. Her continuous employment start date was 21 October 2016. Her salary was £17,581 for presenting 43 shows.

142 Mark Taylor (Manager, Operations Engineering) and Amanda Beattie (from Croner, an external employment law company) were appointed to consider the Claimant's grievance. They were supported by Paula Greenwood in HR. They met with the Claimant on 2 October 2018. They interviewed Noelle Britton on 30 October 2018.

143 On 26 November 2018 Emma Trevelyan (Senior Commercial Rights and Business Affairs Manager) provided information in respect of Jeremy Vine's pay on Points of View to Paula Greenwood. The information that she provided was materially incorrect in a number of respects. She said that Jeremy Vine had been paid £1500 when he started in 2007. That was incorrect. Mr Vine had started in 2008 at a fee of £3,000. She said that it had increased to £3,000 in 2008 when the BBC had entered into a long-term contract with Jeremy Vine. That was not correct. She said that Points of View was an entertainment programme. That was incorrect. It was classified as a Factual programme. She then set out the fees that had been paid to previous Points of View presenters (see paragraph 83 above).

144 On 27 November the grievance panel interviewed Natasha Wojciechowski, the HR Director. There was a discussion about the difference between Band E and Band F roles. Her view was that although the Claimant's role covered the whole of the UK and she held senior BBC people to account, it did not meet the band F criteria because it was a pre-recorded show and only 15 minutes long. In a note after the interview she said,

"We acknowledge the unique and specialist nature of this role and have reflected this by mapping it into the Senior Lead Presenter category which is designed, in part, for very specialist roles which demand a higher salary than other Lead Presenter roles."

It appears from that that she considered the appropriate band for the Claimant's role to be Senior Lead Presenter. The Claimant's role, however, had been mapped on to the Lead Presenter band.

145 The panel interviewed Jessica Cecil on 7 December 2018, Gavin Allen on 12 December 2018 and Bob Shennan on 14 January 2019. It appears that the panel also interviewed Rob Burley on 10 December 2018 and Robert Ketteridge on 14 December 2018 but we did not have the notes of their interviews. The panel was also provided with audience figures for Newswatch and Points of View.

146 On 29 November 2018 the Claimant presented her claim form to the Employment Tribunal.

147 On 11 February 2019 the Claimant was sent the grievance outcome. The panel rejected the Claimant's claim that she was entitled to the same pay as Jeremy Vine.

It concluded that the two programmes and the respective roles of the presenters were not comparable for the following reasons: (1) The two programmes were different genres - Points of View was an Entertainment programme and Newswatch was a News programme (2) Newswatch was presented by journalists and Points of View by household names with a background and profile in entertainment, and the market value of entertainment presenters was higher (3) Newswatch addressed viewers' opinion on the BBC's news output while Points of View addressed viewers' opinions on all of the BBC's output and (4) Points of View was aired on BBC 1 on Sundays with high audience figures and Newswatch was aired on BBC News Channel on a Friday night and again on Saturday morning on BBC1 during the Breakfast News programme with the latter transmission attracting a large audience. In the event that the programmes and the roles were deemed to be sufficiently similar, the panel was satisfied that the setting of Jeremy Vine's fee was decided based on his profile and experience and his market value and the resulting need to pay him at that level in order to retain him. That conclusion could only have been based on the information provided by Emma Trevelyan which was incorrect in respect of the setting of the Jeremy Vine's fee for Points of View.

148 The Claimant appealed on 20 February 2019. The appeal was conducted by Bill Matthews (Appeal Manager BBC) and Samantha Wood (consultant from Croner). The appeal panel interviewed John Neal (Editor of Newswatch) on 7 May 2019 and Sarah Ward Lilly (Senior News Controller) on 23 May 2019.

149 The appeal panel sent its outcome to the Claimant on 5 July 2019. It said that the purpose of the appeal had been to review the grievance process and outcome and not to re-investigate the original grievance in detail. It set out the evidence that it had considered, which was the evidence gathered at the original grievance hearing and the further evidence supplied by the Claimant for the appeal. It set out the names of the witnesses whom the panel had interviewed. It did not uphold her appeal in respect of the equal pay claim using Jeremy Vine as a comparator. It concluded that there were reasons for the differential in pay between her and Jeremy Vine, those reasons were not based on gender and that they had been properly explained to her in the grievance outcome letter. The panel did not find any errors in the grievance process. It then set out its conclusions for the difference in pay. These largely mirrored the reasons of the original grievance panel.

Conclusions

Like work

147 We considered first whether the Claimant's work on Newswatch was the same as or broadly similar to the work of Jeremy Vine on Points of View. In considering that we focused on what each of them did. Each of them presented a fifteen-minute long pre-recorded programme. Each programme had a magazine format and was presenter-led. Each programme aired and discussed the viewers' opinions on BBC programmes, the only difference being that Points of View included comment on all the BBC's programmes, including news, whereas Newswatch dealt only with viewers' comments on news programmes. In each case the producer decided the content of the programme and communicated that in advance to the presenter. The Claimant sometimes suggested topics that could be covered and some of her suggestions were accepted. The presenters were not obliged to view the programmes that were going to feature in that week's show but there was an expectation that they would

view some of them. In both cases, the producers wrote the script. In each case, the producer wrote it in a way that fitted with the style of the presenter and the general tone of the programme. In each case, the script was provided to the presenter before recording began. Points of View was generally more light-hearted in tone. In both cases, the producers arranged any interviews that were going to feature in the show and recorded any clips or interviews that were going to feature on it.

148 On the day of the recording Mr Vine spent about 3.5 hours in Broadcasting House and the Claimant spent about 4 hours there. Each of them read the script from autocue, and introduced the programme and the clips that were being discussed. The Claimant read out the viewers' opinions. Mr Vine did not, they were read out by someone else. The Claimant conducted interviews quite often, Mr Vine rarely did. In each case, the questions were written by the producers. In each case, the presenters sometimes tweaked the script and made stylistic changes but could not make any substantial changes unless they were agreed by the producer. The Claimant sometimes suggested changes to the questions for the interviews and these were often accepted. In both cases, the presenters had to make the viewers feel that they were on their side and had to be able to hold the BBC to account. The editing was done by the producers, The Claimant quite often made suggestions about editing, especially in relation to the interviews.

149 It is clear from the above (which is a summary of what is set out at paragraphs 52 - 71 above) that the work that the Claimant and Jeremy Vine did in presenting their respective programmes was the same or, if not the same, very similar. We have pointed out above that there were some differences in the two programmes – Points of View dealt with the viewers' comments on all BBC programmes and Newswatch with their comments on news, the Claimant conducted more interviews, the tone of Points of View was generally lighter – but they were minor differences and, more importantly, had no impact on the work that the two presenters did, or the skills and experience required to present the programmes. The Respondent argued that the lighter tone of Points of View and the occasional attempts to be humorous meant that different skills were required to present it. The presenter of Points of View needed to have “*a glint in the eye*” and to be cheeky. We had difficulty in understanding what the Respondent meant by a “glint in the eye” and how that translated into a “skill” or “experience” to do a job. How does one acquire such a skill or experience? In any event, the light-hearted tone and any cheekiness were achieved primarily by the script being written in a particular style. The attempts at humour came from the script. Jeremy Vine read the script from the autocue. He read it in the tone in which it was written. If it told him to roll his eyes, he did. It did not require any particular skill or experience to do that. We do not accept that the lighter tone of Points of View meant that the Claimant's work and that of Mr Vine were not broadly similar.

150 The Respondent in its Grounds of Resistance claimed that the work of the two presenters was not the same because of the audience figures of the two programmes and because Points of View was a high-profile entertainment programme of many years' standing which had in the past been presented by high-profile entertainment presenters whereas Newswatch was part of the BBC's news programming. We deal with those two points below although we are not convinced that they have any bearing on the issue of whether the two presenters did the same work.

151 The Respondent has in its pleadings and closing submissions said many times that Points of View was an entertainment programme. We understood it to mean by that that it was in the Entertainment genre rather than that it tried to be funny. The Respondent has certain distinct genres of programmes – News, Factual and Entertainment being three of them. Points of View was not in the Entertainment genre, it was in the Factual genre. That was clear from the oral and documentary evidence before us. Therefore, whatever is said in general about programmes in the Entertainment genre does not apply to Points of View. The difference in genre between News and Factual in this case had no impact on the work that the two presenters did, which was virtually the same. Although it was not in dispute that Points of View had been presented in the past by people who are now recognised as high-profile entertainment figures, it was not clear whether they had all been recognised as such when they were first appointed to present Points of View. It was also argued in the Respondent's closing submissions that Mr Vine bore additional responsibility following in the footsteps of well-known presenters and, in particular, Terry Wogan. It had not previously been part of the Respondent's case that the work on the two programmes was not the same because one carried greater responsibility. We do not accept that Mr Vine's role had any additional responsibility. It certainly was no greater than the responsibility of the presenter of Newswatch having regard to the circumstances which led to the creation of Newswatch.

152 The difficulty with audience figures is that they show the number of people who watched a programme, but not why they watched it. It is also clear that there are certain times of the day (Saturday morning or Sunday afternoon being examples) when large numbers of people watch BBC 1. When Jeremy Vine was appointed to present Points of View in 2008 its average audience figure for the 16+ group was about 1.8 million. It declined thereafter and since 2013 has been around the 1 million mark (a fall of 44%). The minute by minute audience figures for Points of View for 2016-2018 showed that in general there was no increase in audience figures when Points of View came on and more often than not the figures decreased. The average audience figures for the 16+ group for Newswatch between 2012 and 2018 on the News Channel fluctuated between 106,000 and 142,000, but were 1.5 million when its broadcast on BBC Breakfast on Saturday morning was included. What the audience figures show is that between 2012 and 2018 1.5 million people watched Newswatch every week and a little more or less than 1 million watched Points of View. It has no bearing on the issue of whether the Claimant's work on Newswatch was the same as or broadly similar to that of Mr Vine on Points of View.

153 Having considered the points made by the Respondent, our conclusion is that the Claimant's work on Newswatch was like Mr Vine's work on Points of View under section 65(1) of the Equality Act 2010. In those circumstances, it is not necessary for us to decide whether their work was of equal value. In case we are wrong in concluding that it was like work, we set out briefly what we would have concluded if we had had to determine whether their work was of equal value in terms of the demands made on them. Having regard to the nature of the activities actually entrusted to them, the training or skills necessary to do the job and the working conditions in which they were carried out, we would, on the basis of the findings of fact we have made, have concluded that their work was of equal value.

Material factor defence

154 Once the Claimant has established that her work on Newswatch was like that of Jeremy Vine (a man) on Points of View and that she was paid less than he was, the presumption is that that the difference in pay is due to the difference in gender. The burden then passes to the Respondent to prove that the difference in pay was caused by some factor other than the difference in sex. That means that it has to prove why the Claimant and Mr Vine were paid the sums that they were paid. The burden is not discharged by witnesses who had no involvement in setting those rates of pay speculating on what the reasons might have been or attempting to provide an ex post facto justification for the disparity in pay. In order to discharge the burden the Respondent needs to adduce evidence about what factors were relied upon to determine the rates of pay offered to the Claimant and Mr Vine. It cannot rely simply on assertions that it made in its pleadings. If the Respondent fails to discharge that burden (i.e. it cannot prove that any of the factors that it has set out in its defence were in fact the cause of the difference in pay), the Claimant succeeds. She does not have to prove that the difference in pay was due to the difference in gender. Equally, it is not for the Tribunal to speculate on whether some factor, other than the ones put forward by the Respondent, might have been the cause of the disparity in pay.

155 In this case the levels of pay were effectively determined and set when the Claimant and Jeremy Vine were appointed to present their respective programmes. Jeremy Vine's pay remained the same until it was reduced in January 2018. The Claimant's pay was increased by a small amount in 2015 and then changed slightly when she went on to the OATS contract in October 2016. In both cases the contracts were renewed annually but there was no evidence before us that the rates of pay were considered afresh at that stage. As Mr Leatham said in his evidence, "*as neither the editorial content of Points of View nor the funding had altered there would have been no real reason to look at his fees.*" In Mr Vine's case, maintaining his pay at that level was on occasions explained or justified because his total earnings, including from his other work, exceeded £100,000. Therefore, the focus of our inquiry has to be what was in the minds of the people who decided to pay Mr Vine £3,000 in 2008 and those who decided to pay the Claimant £440 in 2012. The difference in pay in this case is striking. Jeremy Vine was paid more than six times what the Claimant was paid for doing the same work as her. There needs to be clear evidence about what the cause of that difference was.

156 We have not heard evidence from anyone who was involved in those decisions and negotiations. Mr Leatham was not involved in any decisions or discussions relating to Points of View in 2008. We recognise that those decisions were made long ago and that some of the personnel involved in them may no longer be employed by the Respondent. However, those difficulties are easily surmountable if an organisation has transparent pay structures or processes for determining pay and for recording the rationale of its decisions about levels of pay. The BBC found itself in difficulties in this case because it did not (and, to an extent, still does not) have a transparent and consistent process for evaluating and determining pay for its on-air talent. It has no records (or, if it has them, it has not produced them) of how the pay levels for the Claimant and Jeremy Vine were determined. The only contemporaneous documentary evidence that we had before us were the two emails from Jill Ridley to Roger Leatham in March 2008 relating to the appointing of Jeremy Vine and two emails in March 2012 relating to the appointment of the Claimant (one from Barney Jones and one from the Negotiating Group making the offer). The effect

of that is that there is no evidence before us of the factors that were relied upon to determine the initial levels of pay for the Claimant and Mr Vine.

157 Nor has the Respondent called any of the witnesses who dealt with later contracts for Points of View or expressed views on what Mr Vine was paid, such as Andrea Coles, Emme Trevelyan and Paul Luke. Mr Rangarajan and Mr Leatham gave evidence in general terms about the two programmes, how a presenter's work is valued and about the Claimant and Mr Vine (although neither of them had detailed knowledge of the experience of either the Claimant or Mr Vine). We have taken into account that evidence to the extent that it assists us in determining whether the Respondent has proved that any of material factors upon which it relies was the reason for the Claimant and Mr Vine's pay being set at level at which it was. We deal below with each of the factors.

Profile of the two programmes

158 What the Respondent means by "the profile" of a programme in this context is the genre in which it sits, when and where it is aired, the audience figures, how well-established it is, and its subject-matter. There was no evidence before us that those who made the decision to pay Jeremy Vine £3,000 in 2008 and those who made the decision to pay the Claimant £440 in 2012 took any of these matters into account or that they based their decisions on these matters.

159 The Respondent's case is that these factors must have been taken into account because they are the kind of factors that are normally taken into account, and the levels of pay for the two presenters must have been the result of those factors being taken into account. In the absence of any evidence to show that these factors were taken into account, we are not prepared to assume that they were. Furthermore, we think that if they had been taken into account, it is very unlikely that anyone could have concluded that the difference in the profiles of the programmes was such that the correct levels of pay for the presenters were £3,000 for one and £440 for the other. We say that for the following reasons.

160 If the genre of the two programmes had been taken into account, it would have shown that Newswatch was in the News genre and Points of View in Factual. There was no evidence before us that presenters working in Factual were paid more than those working in News. There was evidence that some of the highest paid in the 2017 high earners' list were those who worked in News. Both programmes were aired on BBC1 at times when there were high numbers of viewers (Saturday morning and Sunday afternoon). The audience figures were about the same – 1.8 million for Points of View and about 1.5 million for Newswatch at the start, and later about 1 million for Points of View and 1.5 million for Newswatch. Points of View was of longer standing. There was no evidence before us that presenters of more established programmes were paid more than those who presented new programmes. The subject-matter of both programmes was the viewers' opinions about BBC's programmes. Points of View covered all programmes and Newswatch news programmes. If all those factors had been taken into account, it would have shown that there was very little difference between the two programmes. The fact that the presenter of one programme was paid more than six times what the presenter of the other was paid suggests to us that the profile of the two programmes (as defined by the Respondent) was not taken into account. The Respondent has

failed to prove that the difference in pay was caused by a difference in the profile of the two programmes.

Profile of the two presenters

161 The Respondent's case is that the difference in pay was due to the differences between the public profile and level of audience recognition of the Claimant and Mr Vine. It is not entirely clear what the Respondent means by "public profile" and "audience recognition" in this context and how it measured those. In its closing submissions, the Respondent submitted that Mr Vine had a very high profile by 2007/8 as could be seen from the Wikipedia entry and the undated table compiled by an unknown person (see paragraph 74 above). It also pointed out that by 2007 he was presenting Panorama and had presented the Radio 2 show for four years. In terms of audience recognition, the Respondent relied on the 2010 O & O survey of radio magazine artists and the talent reports of 2014, 2015 and 2017 (see paragraph 106 above).

162 Those who made the decision to pay Mr Vine £3,000 in 2008 could not have taken into account any of the audience recognition evidence upon which the Respondent relies for the obvious reason that it post-dates their decision. There was no evidence before us that they had, or took into account, any audience recognition material, or that it played any part in the decision to pay him £3,000. Nor was there any evidence before us of what they knew of his public profile at the time and what part that played in their decision. Mr Leatham's evidence was that he was aware that Jeremy Vine had built up his reputation presenting the Radio 2 show, which had a strong regular audience, and that he was broadly aware that he had done work as a correspondent and presenter on television for the BBC but that he did not have detailed knowledge of that. Mr Leatham also gave evidence that in 2007/2008, in comparison with Terry Wogan, who was an "*extremely high-profile presenter*" Jeremy Vine was up and coming and did not have the same status as Terry Wogan (see paragraph 80 above).

163 There was no evidence before us that the Claimant's public profile was taken into account by Barney Jones or anyone else in deciding to pay her £440. By 2012 the Claimant had worked for five years as a presenter and correspondent on television for the BBC and had co-presented the Channel 4 news with Jon Snow for nine years. Nor was there any evidence that they had, or took into account, any audience recognition information about her. The Respondent relied on the On-Air Survey conducted by Populus in December 2017 to show that audience recognition of Jeremy Vine was much higher than that of the Claimant. That evidence does not assist us at all. Firstly, we are concerned with the audience recognition of the two presenters in 2008 and 2012. Secondly, what matters is the audience recognition information that was known to the individuals who set the pay levels. Thirdly, what matters is what part that played in their decisions. On all those points, we had no evidence at all.

164 The Respondent has failed to prove that the difference in pay was caused by the differences between the profiles and audience recognition of the Claimant and Jeremy Vine.

Broadcasting range and experience

165 Much of what we have said in relation to the previous factor applies equally to this one. It is clear from the Respondent's closing submissions that when they talked of public profile, they meant broadcasting range and experience. We do not know what those who set the levels of pay knew about the broadcasting range and experience of the Claimant and Mr Vine and what part it played in their paying them what they did. What the evidence before us does indicate strongly is that broadcasting and experience was not taken into account in setting the pay for the presenters of Newswatch. If it had been, the Claimant would not have been paid the same as Ray Snoddy who had had no broadcasting experience when he was appointed to the role.

Differences between the market rates payable for the Claimant and Jeremy Vine

166 The Respondent made it clear in preliminary hearings that when it referred to the market rate payable for Mr Vine it meant the market rate payable for him for Points of View. The market rate payable for a job normally means the level of remuneration paid elsewhere (in the market) for doing that job. In the context of the present case, it would be the remuneration paid to someone presenting a programme like Points of View on another television channel. In relying on this factor, the Respondent said that it was doing so in circumstances where retaining high profile presenters was important to its strategic objectives. In its closing submissions it referred to "*the very significant market power*" that Mr Vine had, his high profile and the negotiations conducted on his behalf in relation to the long-term contract. It would appear from that that the Respondent's focus was on Jeremy Vine's market rate for Points of View – i.e. what it needed to pay to get him to present that programme – rather than the market rate for a presenter of the programme. In either case, the Respondent has to prove that those who made the decision to pay Mr Vine £3,000 came to the conclusion that that was the market rate payable for him, what they meant by that and how they assessed it. There was no evidence before us that market rate was a factor that they considered, what they meant by it, how they assessed it and what conclusion they reached. The Respondent submitted that we could nevertheless conclude from all the evidence before us that that they decided to pay him £3,000 because they had concluded that it was the market rate payable for him. We consider below the evidence that was before us.

167 Points of View and Newswatch are unique to the BBC. No other television channel broadcasts a programme on which it discusses its viewers' opinions on its programmes. There was no evidence before us of what other channels paid presenters for presenting similar fifteen-minute pre-recorded News or Factual programmes. There was no evidence before us of what Jeremy Vine would have been paid on another channel for presenting a fifteen-minute pre-recorded Factual programme.

168 There was no clear evidence before us of what Terry Wogan had been paid in 2007 – it could have been £2,000, it might have been £3,500. What is clear from what Roger Leatham said about Mr Vine's status compared with that of Terry Wogan in 2007 is that Jeremy Vine's market rate would have been significantly lower than that of Terry Wogan. We had no reliable evidence about the rates of pay of previous presenters of Points of View (see paragraphs 80 – 85 above).

169 In support of its submission that the Points of View team must have decided to pay Jeremy Vine £3,000 because it was the market rate payable for him, the Respondent relied on the negotiations between Roger Leatham and Alex Armitage, Jeremy Vine's agent, at the end of 2007 which led to the signing of a three-year deal for Mr Vine to work exclusively for the BBC and to present various radio and television programmes. Points of View was not part of those negotiations or that deal. The Points of View team had no involvement in those negotiations and there was no evidence that they were made aware of the details of the negotiations. They were aware of the existence of a long-term contract. By the time the Points of View approached Mr Vine, he had already signed a deal to work exclusively for the BBC for the next three years. He did not have the option to work for anyone else. It cannot, therefore, be said that he was paid that rate to stop him going elsewhere or to retain him. In those circumstances, neither the negotiations nor the fear of Jeremy Vine fleeing to work for a rival could have played any part in the Points of View team deciding what to pay Mr Vine.

170 The Respondent also relied on Mr Armitage's email of 15 October 2019. For the reasons given at paragraph 78 (above), we attached no weight to that email.

171 The Respondent also relied on the profile of Points of View and the fact that Entertainment presenters are paid more than News presenters. We have dealt with that above (see paragraphs 151, 158-160).

172 It is clear from comments made by a variety of individuals after 2008 that the rate of £3,000 was seen as being high. In March 2012 the Head of Production described it as "*a rate at the top end for show of this type*" and advised the production team to ensure that there were alternative succession plans; In September 2015 Paul Luke, Head of Business Affairs, said that Mr Vine's fee represented "*a substantial part of the budget for the programme*"; In April 2016 Paul Luke said, "*the POV rates really have no comparison and were it not for historical precedent would be unaffordable*"; By the end of 2017 the commissioning meeting was looking at what a reasonable price for the series would be and decided that it had to do some negotiating on Mr Vine's fee; On 13 January 2018 Jon Swain said that stand-in presenters for Jeremy Vine had been paid £1,000 and had been very happy and described it as "*easy money as it's so little work*". In January 2018 Jeremy Vine was offered and accepted £1,300. At that stage he was looking for a longer rather than a shorter commitment to carry on presenting it. He did not leave after that but left in July 2018 when the programme's format changed to not having a presenter on screen. All of that has to be seen in the context where there had been a sharp fall in the audience figures for Points of View. All of the above are indicators that the rate of £3,000 from 2008 to 2018 was higher than the market rate payable for Jeremy Vine.

173 Having considered all the evidence we are not persuaded that the Points of view team offered Mr Vine £3,000 because it concluded on the basis of some material before it that that was the market rate payable for him. The evidence indicates the contrary – that Jeremy Vine was paid above the market rate payable for him for Points of View.

174 The Respondent submitted that the Claimant's pay for Newswatch represented the market rate for the role. In her case, the focus appears to be on the market rate for the role rather than for her. If the Respondent wants to use "market rate" to

explain the pay difference, it must mean the same in both cases. In support of that submission, it relied on the fact that she was paid the same as Ray Snoddy and the fact that the role was mapped under the Career Path Framework on to a Band E Lead Presenter role. As far as the former is concerned, it is a clear indicator that the Claimant's profile and broadcasting range and experience were not taken into account in determining her level of pay. If it had been, she would not have been paid the same as Ray Snoddy. Only news-related on-air roles formed part of the PWC review and were brought within the CPF structure. Factual on-air roles have not been made the part of any evaluation-based system. If the role of Points of View presenter had been made part of any such system and evaluated in the same way, it is extremely likely that it would have come out as being the same band and level as the presenter of Newswatch. In the absence of both roles being evaluated in the same way, the fact that one has does not provide us with any great assistance in determining the comparable market rates for the two roles.

175 It is not for us to determine whether the Claimant's role was correctly evaluated under the CPF. However, there are a number of aspects about the process which caused us concern. The decision was made very quickly on 21 February without any consultation or input from the Claimant. It moved within an hour from having passed the hurdle for band F but probably being better placed at Band E Lead Presenter Premium to being mapped to Band E Lead Presenter. If the criteria in each job description are applied rigidly, the Claimant's role does not appear to fit into any of them. It does not fit into the criteria for Band E Lead Presenter. It was approved by the Senior Management Remuneration Committee on 7 March 2018 and Mr Allen then went through a charade of having a consultation with the Claimant on 26 April 2018. The Respondent's HR Director told the grievance panel that they had acknowledged the unique and specialist nature of the Claimant's role and had reflected that by mapping it on to the Senior Lead Presenter category. The Claimant had been told that she had been mapped to the Lead Presenter role. No one followed that up with the HR Director.

176 Having considered all the evidence before us, we concluded that the Respondent had not proved that the decision makers in each case had considered the market rates payable for the Claimant and for Mr Vine to present their respective programmes and had come to the conclusion that the market rate payable for Mr Vine was £3,000 and for the Claimant was £440.

Market pressures when Mr Vine's pay was set

177 The Respondent's case is that Mr Vine's pay for Points of View was set in a context where a rival broadcaster had made an offer for his services. We have dealt with this in the section above. The team that decided to offer Mr Vine £3,000 for Points of View did not know anything about rival broadcasters having made an offer for his services. By the time he was offered Points of View he had signed a deal to work exclusively for the BBC for the next three years. He could not work elsewhere. There was no market pressure to offer him vast sums of money to prevent him going elsewhere. Mr Vine accepted the reduction of his fee to £1,300 in January 2018. He did not leave because of that but because of the change to the programme to use a voiceover format with no presenter on screen.

178 In respect of the above five factors, we cannot conclude on the evidence before us that these matters were taken into account in each case and were the reason for

the pay being set at the level at which it was, both at the outset and thereafter. As we have said above (at paragraph 155) the rates were effectively set at the outset and thereafter the status quo was maintained and justified. The levels of pay were not considered afresh and evaluated every time the contracts were renewed. It is clear from the evidence that there was disquiet about the level of pay for Points of View and that the audience figures had declined sharply. If the pay level had been considered afresh and properly evaluated, it is very likely that it would have decreased. Our conclusion is that the Respondent has failed to prove that any of the above factors were the reasons for the Claimant and Mr Vine's pay at any stage.

The difference in contracts

179 Prior to 21 October 2016 both the Claimant and Jeremy Vine were engaged as freelancers via contracts with personal service companies. That was something which the Respondent required. From 21 October 2016 to 30 September 2018 the Claimant was engaged on a fixed-term contract with her personally under which she was entitled to all statutory benefits ("the OATS contract") and from 1 October 2018 the Claimant was employed on a permanent staff contract as a Band E Lead Presenter. From January 2018 Jeremy Vine was assessed as being employed for tax purposes and was paid net of tax and NI contributions. The issue for us whether any differences in pay after 21 October 2016 and after 1 October 2018 were caused by the two of them being engaged under different contracts.

180 The changes in the Claimant's contract in October 2016 and Mr Vine's contract in January 2018 took place to change their status for tax purposes to comply with HMRC guidelines. The contracts did not determine their levels of pay. Their levels of pay remained the same but certain deductions were made from them – in the Claimant's case it was to cover the employer's NI contributions and in Mr Vine's case it was to deduct tax and NI contributions. The amount that they received under the new contract was determined by reference to what they were paid under their old contract. The large pay discrepancy that had arisen as a result of that continued under the Claimant's OATS contract. When the Claimant was initially put on the OATS contract it led to her pay being reduced from £465 a programme to £427.70. Had that continued, £37.30 of any difference between her pay and that of Mr Vine would have been caused by her new contract. However, on 18 May 2018 the Claimant was informed that she would be given £20,012 on her OATS contact (which equated to £465 per programme) and that that would be backdated to 21 October 2018. Thus, the change in contract did not contribute in any way to or cause the difference in pay. The historical pay rates continued after that date.

181 In April 2018 the Claimant was given the choice to continue on that OATS contract or to move to a permanent staff contract. If she chose the latter, her pay would be determined by reference to grade to which her role had been mapped on the CPF. The Claimant chose to be employed on a permanent staff contract although she did not accept that her role was a Band E role. In July 2018 Mr Allen informed her that his view was that her role had been correctly mapped under CPF. On 1 October 2018 the Claimant commenced in that role. Her salary was the highest that she could be paid as a Band E Lead Presenter. We concluded that any difference from that date between her pay and what Mr Vine had been paid when he did the same work her was caused by the contract under which she was employed after that date. The Respondent had shown that the difference in pay after that date was due to a material factor that did not involve sex discrimination.

182 We, therefore, concluded that the Respondent had failed to show that the difference between the Claimant's pay and that of Mr Vine between May 2012 and 30 September 2018 was because of any of the factors upon which it relied. It had failed to discharge the burden on it under section 69(1) of the Equality Act 2010 and to rebut the presumption of sex discrimination that arose when she proved that her work was like his work and that she was paid less than him. In those circumstances, the sex equality clause applies during that period.

Employment Judge Grewal

Date 10 January 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

Date 10 January 2020

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FOR THE TRIBUNAL OFFICE