



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms A Morton

**Respondents:** East Lancashire Hospitals NHS Trust

## RESERVED JUDGMENT

**Heard at:** Manchester

**On:** 25,26 and 27 January 2023

**Before:** Employment Judge Holmes  
Mrs J P Byrne

### Representatives

For the claimant: In person

For the respondent: Mrs A Niaz – Dickinson (Counsel)

## RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

The respondent's material factor defence succeeds and the claimant was not entitled to equal pay in her role as a Senior Divisional Accountant at band 8b from 24 August 2012 to 16 May 2016.

## REASONS

1. By a judgment sent to the parties on 30 December 2021, the Tribunal found that the claimant was engaged upon like work to her chosen comparators, for the period that she was in post as a Senior Divisional Accountant for the respondent between 24 August 2012 and 6 May 2016. Her other claims were dismissed.

2. Following the judgment, the claimant applied to the Tribunal for permission to advance a material factor defence, in the alternative, the Tribunal having found in the claimant's favour upon the issue of like work.

3. That application was considered by the Employment Judge sitting alone, and by a judgment sent to the parties on 20 June 2022, the Tribunal granted the respondent

permission to advance such a defence, and gave directions as to how these issues should be determined.

4. Further case management orders were made on 30 June 2022, sent to the parties on 1 July 2022, and at that time the material factor defence (“MFD”) was identified in these terms:

- a) The claimant was employed in the Family Division;
- b) Although the claimant did like work to the SDAs in the SAS and Medicine Divisions, there were material factors which accounted for her pay being less than that of her comparators in those Divisions , namely , that the size and complexity of the SAS and Medicine Divisions was greater than that of the Family Division, and, as a consequence of this, the new SDA roles in those Divisions had been evaluated at the higher grade 8b.
- c) Charlotte Henson took the view that the appropriate banding for the new SDA role would be grade 8b.
- d) A subsequent Evaluation Panel confirmed the new SDA role at grade 8b.
- e) Those factors are significant and relevant, and are untainted by any sex discrimination.

5. Subsequently the claims were re-listed for the determination of the respondent’s defence. In the meantime, one of the panel members retired, and the parties were invited to consent to the Tribunal proceeding as a panel of two, which they duly did.

6. The hearing accordingly took place on 25, 26 and 27 January 2023. The respondent called Peter Dales, whose witness statement had been prepared , but not adduced, for the previous hearing, and re-called Charlotte Henson and Michelle Brown, who had previously given evidence. The latter prepared a further witness statement dated 26 January 2023, and the respondent sought permission for this to be admitted. The claimant did not object, and the Tribunal admitted the statement.

7. Accordingly, Peter Dales, Charlotte Henson and Michelle Brown gave evidence on the MFD. The claimant did not prepare any further witness statement, and was content to rely upon cross – examination, and her submissions.

8. The evidence was concluded on 26 January 2023, and the parties made their submissions on 26 and 27 January 2023. The Tribunal retired to consider its judgment, which is now given.

9. Having considered the evidence, the documents and the submissions, the Tribunal unanimously finds the following further facts, and recites the facts found in its previous judgment, which are relevant to the MFD advanced by the respondent.

9.1 In 2011 the structure of the Finance Department was that the Divisional Accountants reported to both the Chief Management Accountant, Charlotte Henson, and their respective Senior Divisional Accountant. In October 2011, a restructure of

the Finance Department was proposed. A Consultation Paper dated October 2011 was produced (pages 143 to 152 of the bundle). The structure at the time of the Consultation Paper was set out in Appendix 1 (page 149 of the bundle), and the proposal was that the post of Senior Divisional Accountant would be removed from the structure, so that Divisional Accountants would thereafter report only to the Chief Management Accountant (Appendix 2, page 151 of the bundle). All the Divisional Accountant roles were band 8a posts.

9.2 In 2011 into 2012 the NHS and the respondent Trust went through a period of change. Primary Care Trusts were being dissolved, and the services provided by them were being transferred. This resulted in the transfer of a number of services to the respondent. Most of these transferred into what became the medicine Division, which increased its size and complexity. Further, the respondent was preparing to make an application for Foundation Trust ("FT") status, which increased the workload for the Chief Management Accountant and the Chief Technical Accountant.

9.3 The work involved in these processes was Trust wide, and the senior staff needed knowledge of more than one Division. It was intended to transfer over £11m of services and 900 members of staff on 1 April 2011, at short notice which finally resulted in 60% of those staff members transferring to employment with the respondent. The changes which resulted from the FT application were predominantly medical. The view of the senior financial management was that the changes were mainly in relation to financial flows and business transfers, that this work would fall heavily on the central Finance team. There was to be increased staffing within Surgery and Medicine at that time.

9.4 At the time Jonathan Wood was the Director of Finance, Michelle Brown was Deputy Director of Finance, and Charlotte Henson was the Chief Management Accountant. They all explained the differences in the Divisional Accountant ("DA") and new SDA roles in their statements.

9.5 Against this background the structure of the respondent was reviewed. As a result the Surgery Division became the Surgical and Anaesthetic Services ("SAS") Division, the Diagnostic and Treatment services Division became the Diagnostic and Clinical Services ("DCS") Division, and a new Division, the Community Services Division, was created. The existing Divisions remained. The Finance Senior Management Team under the Chief Management Accountant, Charlotte Henson, in early 2012, reviewed the Finance Department structure. It was decided that the Senior Divisional Accountant role, as it then was, was too broad to be effective in supporting the Chief Management Accountant, and would be removed. Given the changes, and the impact on the SAS and Medicine Divisions, the view was taken that in the case of these two Divisions, a new SDA role would be created. This would, in the view of the Senior Management Team require a senior experienced accountant with a more strategic remit. A Job Description and Person Specification for these two new posts was produced (pages 595 to 618 of the bundle). A further Consultation Paper was prepared dated March 2021 (pages 154 to 156 of the bundle – the appendices appear not to be included) in which the rationale for this proposal was explained. It was only these two Divisions where this change was to be implemented, Surgery (now Surgery and Anaesthetics – "SAS") and Medicine. On 1 April 2021 a number of services were to move Divisions, creating greater size and complexity for these two Divisions.

Further transformational change was anticipated, which would also impact upon these Divisions. The proposal therefore was that a new post at band 8b level, replacing the current band 8a post in each of these Divisions, would be created, and band 7 deputy divisional accountants would support the new band 8b posts. None of this affected the Family Care Division, where the existing post of Divisional Accountant, at band 8a, the band on which the claimant had commenced her maternity leave, was retained.

9.6 Charlotte Henson's view at this time is that the new role would be banded at 8b. She considered that in her experience in NHS finance for 20 years these posts would merit a band 8b. It was not, however, a matter for her to determine, any such new post would have to go through the job evaluation process under Agenda for Change. Consequently she sent the job description for the new role to HR, with an Application for Re-banding (pages 644 to 648 of the bundle). It seems likely that Charlotte Henson (whose first experience of this process this was, and who was guided by HR) used the wrong form, as she sent in an "application for re – banding", whereas she was actually seeking to have new posts banded. It seems, however, that she also (pages 647 to 648) submitted an "application for banding of a new post", although the details in this form were left blank.

9.7 In the former, however, Charlotte Henson did provide details, and set out her proposal for two new band 8b posts. She said that they would "deliver a more strategic view within the two divisions", and in the box (on page 645) for the rationale for the "changes", she said that it was felt that the Medical and Surgery and Anaesthetic Services required additional financial support, so the aim was to replace a band 8a in each division with a band 8b and a band 7 support.

9.8 It seems that subsequently Michelle Brown submitted an application for banding of a new post (pages 661 to 662 of the bundle) on 15 October 2012. Again no details were provided in that form, and it may well be that this was little more than a formality, as the information required had previously been provided by Charlotte Henson.

9.9 Be that as it may, the process of evaluating the correct band for these posts involved HR providing information to the evaluation panel, who would then carry out that exercise. The whole process is computer – aided, and hence is described as Computer Aided Job Evaluation ("CAJE"). The panel did so "blind", in the sense that they did not see the material sent to HR in which any suggested level of banding would appear, nor would they know the identities of any individuals to which the banding decision would apply. Their task, therefore, was to set the correct band for the role, regardless of who was to be appointed, and of any suggested level from management. This process involved an initial exercise by HR, before the task was presented to the team, of "clustering". This was an exercise whereby, rather than continually re-evaluate roles which had been, or where similar roles previously had been, evaluated, HR would seek out other roles which had previously been evaluated, which would be "clustered" as it was put, and form a benchmark against which the new role would be evaluated. The panel would then look at the new role, and assess it against the existing one. They would then adjust the scores under the various criteria upwards or downwards, dependent upon whether they considered that certain criteria applicable to the new role and the clustered role should be scored the same, or higher, or lower.

9.10 In this instance the evaluation team comprised of Peter Dales and David Smithson. The documentation relating this exercise is at pages 652 to 691 of the bundle. There is some complication and potential confusion in this part of the documentation, as the evaluation team was asked not only to band the proposed SDA role, but also a role of Divisional Accountant in Contracting, and Commercial Business Manager.

9.11 In relation to the SDA role, however, HR had identified a role – Strategic Management Accountant – as one which was suitable for “clustering” against the SDA role. Consequently the banding information for that role, i.e the scores against the various criteria, was provided to the evaluation team. The team then assessed the SDA role (from the job description and other information provided) against the clustered role. That resulted in a document, pages 663 to 664 of the bundle, upon which there appear handwritten figures. This is a slightly confusing document, but it seems to the Tribunal that it was originally (i.e as produced with typed figures) used for another purpose, but as Peter Dales confirmed, he and his colleague added the manuscript scores. They resulted in a score of 600.

9.12 There are 16 headings under “Relevant Job Information”. Some relate to the qualities and qualifications of the post holder, others to the nature and duties of the role, others to “freedom to act”, mental and emotional effort and working conditions. None specifically relate to the size and complexity of the Division in which the post – holder is to be employed. Indeed, it seems unlikely that Peter Dales and his colleague were provided with any information about the Divisions in which the SDAs would be working, and were not provided with Charlotte Henson’s application form at pages 644 to 646 of the bundle, where she sets out her rationale for seeking to have these roles banded as 8b.

9.13 The results of that exercise can be seen at pages 663 and 664 of the bundle, and also at pages 685 to 691 of the bundle. This latter document is typed, and bears the names of both of the members of the evaluation team. It also bears the job reference number of 3565, the number applied to the SDA role. The total score of 600 is set out on the last page.

9.14 The respondent’s job evaluation procedures (pages 851 to 971 of the bundle) provide that band ranges are to be allocated on the basis of a range of scores, and the range of 585 to 629 equates to a band 8b.

9.15 For reasons that are not clear, (although the initial delay from April to October 2012 may be attributable to the wrong form being used by Charlotte Henson) that banding decision was not confirmed to Charlotte Henson until 13 May 2013 by Ben Pirraglia of HR (see pages 692 to 694 of the bundle). The covering email makes reference to the “Senior Divisional Accountant – 3565” in the subject matter line.

9.16 Whilst the claimant has queried whether the SDA role was in fact the one that was banded at an 8b by this process in May 2013, and subsequent enquiries may have suggested that there was some confusion about this, the Tribunal is satisfied, on the balance of probabilities, that it was.

9.17 The respondent had not waited for the evaluation to be completed , but had held interviews in May 2012 for these posts. It was decided that the Surgical and Anaesthetics post would go to external advert, and hence only the Medical Division role was appointed, the successful candidate being Shahid Ahmed. He was appointed on a 12 months temporary basis. Ben Roberts and Akhlaq Hussain were considered appointable, but were not appointed at that stage. The other post in the SAS Division was filled by an external candidate, Natalie Brockie, who was offered the post on 9 July 2012. Both Senior Divisional Accountants were therefore appointed on band 8b before the roles had been through evaluation.

9.18 Around this time, the Divisional General Manager role within Family Care was increased from a Band 8d role to a Band 9 role to reflect parity across Divisions – the roles were recognised as being the same level, despite the Division being smaller than others . Also, the overall lead Nurse role within the Family Care Division was rebanded from a Band 8b to a Band 8c. These decisions were made by the Executive, to maintain parity across the Divisions.

10. Those then are the relevant material facts found by the Tribunal. The credibility of the witnesses was not really challenged .

### **The Submissions.**

11. Both parties had prepared written closing submissions which they spoke to. It is not intended to rehearse them here, as they are available for examination on the Tribunal file. The respective submissions will be considered in context when the specific issues are examined below.

### **The Law.**

12. The relevant statutory provisions are s. 69 of the Equality Act 2010, which provides:

#### **69 Defence of material factor**

*(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—*

*(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and*

*(b) 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.*

(3) *For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.*

13. In the context of the material factor defence, a factor will only be material if it is a 'material difference between A's case and B's case'. Lord Nicholls in **Glasgow City Council and ors v Marshall and ors 2000 ICR 196,** cited by Mrs Niaz – Dickinson, emphasised that the difference in pay must be due to the factor relied on. In **Rainey v Greater Glasgow Health Board 1987 ICR 129,** Lord Keith stated that 'material' should be construed as meaning 'significant and relevant'. The House of Lords' decision in that case suggests that factors that can be regarded as being 'significant and relevant' go well beyond the personal qualities of the respective claimant and comparator (such as skill, experience or training) and can embrace extrinsic matters such as administrative considerations affecting the efficient operation of the employer's business or other activity. In order to be 'material' (or 'significant and relevant', to use Lord Keith's phrase), the factor relied upon has to explain the difference between the particular woman's pay and the particular man's pay. In other words, simply because a factor is potentially capable of constituting a material factor for the purposes of the section, does not mean that it will always be sufficient: it must be of actual significance and relevance to the particular case.

14. Tribunals will be expected to scrutinise any factor advanced by the employer in order to satisfy themselves that, even if it is in no way discriminatory, the factor sufficiently explains the variation between the claimant's and comparator's contracts. As Mr Justice Underhill, then President of the EAT, held in **CalMac Ferries Ltd v Wallace and anor 2014 ICR 453,** '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.'

15. Furthermore, the material factor must actually explain the pay differential in the individual circumstances of the case. The employer does not have to show that the material factor amounts to a 'good' or 'objective' reason for the pay disparity for the factor to be regarded as material. In **Glasgow City Council and ors v Marshall and ors** (above) Lord Nicholls raised the question of what yardstick is to be used in measuring 'materiality, or significance and relevance', and answered that although the factor must have been the cause of the pay disparity, it need not be material in a justificatory sense.

He said:

*"16. 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 this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or*

*pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a “material” factor, that is, a significant and relevant factor. Third, that the reason is not “the difference of sex.” This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within section 1(2)(c), may be a “material” difference, that is, a significant and relevant difference, between the woman’s case and the man’s case.*

And:

19. *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”.*

Thus, as Mrs Niaz – Dickinson submitted to us, the question for us is whether the factor relied upon explains the difference in pay, not whether it justifies it.

### **Discussion and findings.**

16. That, therefore is the test that we have had to apply. It seems to us that the respondent has advanced three factors that it relies upon as explaining the difference in pay between the claimant and her comparators. They were identified as :

- a) that the size and complexity of the SAS and Medicine Divisions was greater than that of the Family Division, and, as a consequence of this, the new SDA roles in those Divisions had been evaluated at the higher grade 8b.
- b) Charlotte Henson took the view that the appropriate banding for the new SDA role would be grade 8b.
- c) A subsequent Evaluation Panel confirmed the new SDA role at grade 8b.

17. The respondent has confirmed that the panel evaluation relied upon at (c) is that in May 2013.

18. Turning to the first of these, we consider that this has not been made out. An examination of the evaluation process reveals that the SDA was not banded at 8b because of the size and complexity of the SAS and Medicine Divisions. Indeed, as found above, those factors do not appear in the process at all. Rather, a more mechanistic, computer based, scoring process against the clustered role with which the SDA role was being compared was carried out. Nowhere in the evidence of Peter Dales, nor in the documentation , can the Tribunal discern any scoring which derives from the size and complexity of the Divisions in which the work was to be carried out. That is perhaps not surprising, given the nature of the exercise, which is to match and cross – refer job titles at national level. The “blind” nature of this exercise is likely to lead to an absence of what may be peculiarly local factors. The Tribunal can see no



documentation which was before the panel from which its members would know which Division(s) the appointees to the roles were to be allocated. Charlotte Henson's rationale would do so, but the panel did not (unbeknownst to her) see it. Thus the size and complexity of the two Divisions cannot have been a factor in the banding of the new roles at band 8b, so this factor must fail. It is to this factor only, we consider, that the finding that we made in relation to the fact that other SLT and other positions within the Family Division were upgraded, would be relevant. To that extent Michelle Brown's evidence about the reasons for this adds nothing, as we do not find this was, in any event, a material factor.

19. Turning to the next factor, (b), Charlotte Henson's view that the new SDA roles would be at band 8b, those factors are, in our view highly relevant. They are relevant to whether she had that view, and, if so, whether that was a factor which explains the difference in pay.

20. We are not, we must stress, concerned with whether Charlotte Henson was right, we are concerned with whether she had that view, and, if so, whether that was a factor in the difference in pay. If, of course, her view was so unreasonable or outlandish that we should hesitate to accept that she genuinely held it, that would be a legitimate reason to reject this as a material factor.

21. It was, however, not an unreasonable or outlandish view, nor was it one which she held in isolation. It was clearly shared by Michelle Brown and Jonathan Wood. It was expressed in the consultation documentation from the outset. There may be degrees to which the changes and challenges facing the respondent Trust in 2012 would affect all of the Divisions, including the Family Division, but the view formed by Charlotte Henson and her colleagues that the SAS and Medicine Divisions were likely to bear the brunt of these challenges, and hence require a higher level of accountancy support was one which we find she, and others, genuinely held.

22. Having established that, the next question is whether this factor has a causal effect upon the difference in pay that the claimant then suffered. In our view it clearly did. The difference in pay was because the new roles were banded at 8b, whilst the claimant remained on 8a. The roles were banded (possibly in breach, it is accepted, of the Trust's Job Evaluation Handbook) provisionally by Charlotte Henson because she needed them filled as soon as possible, and at a level that she considered appropriate. She set out to make them 8b roles, in the belief, and expectation (as was vindicated) that they would be band 8b posts.

23. This was thus a material factor which explains the difference in pay, and upon which the respondent can rely. Whether it was justified, of course, is not the question we must ask. We must, and will, go on in due course to ask whether it is tainted by any sex discrimination.

24. The next factor is (c) the evaluation by the evaluation team of the SDA role as a band 8b. The claimant challenged whether it was in fact the SDA role that was so evaluated, and given the confusing nature of the documentation, and the fact of two other roles being evaluated around the same time, we can see why she did so. We are, as our findings above show, satisfied that the SDA role was indeed formally evaluated under the banding process as a band 8b in May 2013. As observed, we do

not consider that this had anything to do with the size and complexity of the two Divisions, but it clearly happened.

25. That then , in our view, became the explanation for the difference in pay. It then supervened the first factor that we have found, Charlotte Henson's views as set out above, and from 13 May 2013 until the end of the claimant's service in the Family Division in May 2016 this remained the explanation for the difference in pay.

26. It is thus another potentially material factor. It is the explanation for that difference from 13 May 2013. It may be, as the claimant has said, the result of a flawed process, or the flawed application of that process, but it is not our remit to question that any further. If we are satisfied that this was the explanation, as we are, it is not for us, as the caselaw makes clear, to then assess if it is a good, bad, or indifferent explanation. That is to confuse explanation with justification, which is prohibited.

**Absence of sex discrimination.**

27. Having found two potentially material factors, the remaining issue for us is whether they fail on the issue of sex discrimination. If either of them are "tainted" by any form of sex discrimination , be it direct or indirect , the Tribunal would then , if the former, have to dismiss that factor, or, if the latter, then go on to consider justification (which it can do at that, but only that, stage).

28. As to direct discrimination, the Tribunal can see no basis for finding that either of the factors were tainted by sex discrimination. The second cannot be, as it was a purely blind and neutral exercise. The panel had no idea of the gender of any potential applicants, and the claimant has not sought to contend otherwise.

29. As to the first , the claimant has raised suspicions that Charlotte Henson's approach may have been discriminatory because the first two appointees were men. As emerged, however, a woman, Natalie Brock, was then appointed, which rather negates any such a contention. There is, the Tribunal considers nothing from which the claimant could seek to persuade the Tribunal that Charlotte Henson's provisional banding of the new SDA roles at 8b was anything other than gender neutral, or was motivated by any discriminatory intent.

30. That leaves indirect discrimination, which, of course, requires the claimant to show (at least as a *prima facie* case) that the PCP of setting the SDA roles at band 8b had a disproportionately disadvantageous effect upon her as a woman, of which there is just no evidence. The Tribunal has been provided with no evidence that fewer women than men are likely to be able to apply successfully for 8b roles, and indeed there is evidence that one of the two roles ultimately went to a woman.

32. In short, there is, the Tribunal is satisfied no taint of sex discrimination in these two material factors, and the defence under s.69 of the Equality Act 2010 succeeds, negating the application of the equality clause, and disentitling the claimant to equal pay in the period for which she claims it.

33. The Tribunal must therefore dismiss the claims, with some sympathy for the claimant who has been defeated on a highly technical, narrow and difficult legal issue which has required the Tribunal to take a highly focused and specific approach , which

has precluded it from taking into account wider issues about which the claimant, understandably probably feels aggrieved. Our enquiry, as this judgment hopefully explains, however, cannot extend to the general rights and wrongs of the process, its possible flaws, or unfairness. Whilst it may at first blush seem odd to the claimant , and any other lay observer, that the respondent could lose on the issue of like work, but then succeed in an MFD on similar grounds, the reason for that is that the Tribunal's task in respect of the issues raised at each stage was slightly different. The respondent did not do enough to persuade the Tribunal that there were differences of practical importance between the 8a and 8b roles to prevent them amounting to like work. It did, however, albeit somewhat at the eleventh hour, do enough to establish there were nonetheless two factors which amounted to an MFD. As it is hoped it is clear, one the employer has established that such factors were indeed the explanation, the Tribunal has no power to then consider whether the respondent ought to be permitted to rely upon them, or to assess any issues such as fairness. That would be to stray into the impermissible areas of justification.

34. The claimant has, therefore, lost solely upon a rather nuanced and difficult legal issue. As Mrs Niaz – Dickinson has recognised, as a self – representing party, she has conducted her case with courtesy, reasonableness and ability , to her great credit, and whilst the outcome will be disappointing , it is no reflection upon her.

Employment Judge Holmes  
DATE : 30 January 2023

RESERVED JUDGMENT SENT TO  
THE PARTIES ON:  
31 January 2023

FOR THE TRIBUNAL OFFICE