Neutral Citation No: [2019] NICA 67 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC11105** *Delivered:* **29/11/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

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BETWEEN:

DONNA NESBITT

Claimant/Appellant:

and

THE PALLETT CENTRE LIMITED

Respondent:

_____

Before: TREACY LJ, McCLOSKEY LJ and McALINDEN J

_____

McCLOSKEY LJ (delivering the judgment of the court)

Overview

[1] For reasons which will become clear it is the unanimous decision of this court that this appeal, ultimately, turns on a relatively net and uncomplicated issue of procedural propriety and fair hearing and should be allowed.

The Underlying Proceedings

[2] The Appellant was employed by the Respondent as a permanent, part-time office supervisor. From 2015 she was in dispute with the Respondent regarding her pay. The nub of this grievance was her assertion that all of the male employees in the Respondent's undertaking who had similar roles and, for the most part, had less years service than her, received higher wages. The Appellant added in her Form ET12 that she had "*… taken on extra duties and extra responsibilities ….*" in her post.

[3] The Appellant presented a total of three applications to the Industrial Tribunal ("*the Tribunal*"). The legal framework of the Appellant's first two applications to the Tribunal is evident from the following passage:

> "*I am aware that none of the employees listed as my comparators are an identical comparison. However I feel that the demands, skill and decision making of my position within this company are equal to and possibly greater which is why I feel that this difference in pay is unlawful and that I have been discriminated against on the grounds of gender/sex contrary to the Sex Discrimination (NI) Order 1976 and the Equal Pay Act (NI) 1970 as amended and/or relevant European law.*"

Elaborating the Appellant describes an alleged assault perpetrated against her by a member of senior management, certain fractious exchanges with other superiors, an investigation meeting, an allegation that she had engaged in gross misconduct by committing a breach of confidentiality and suspension from her employment. The outcome of the ensuing disciplinary process was a dismissal of the allegation of breach of confidentiality. These events all spanned the period October/November 2015.

[4] The Appellant remained off work thereafter. She asserts that she suffered from shock, distress and anxiety. She did not return to work subsequently. Her employment terminated some months later. This gave rise to the third of her applications to the Tribunal, which entailed a complaint of unlawful constructive dismissal.

The Tribunal's Decision

[5] It is clear that the Appellant's claims were conjoined. The Tribunal conducted hearings over a period of 6 non-consecutive days in May 2017 and October 2017. Its decision was promulgated on 17 August 2018 and is in the following terms:

> "*1. The claimant's claim of equal pay, pursuant to the Equal Pay Act (NI) 1970, as amended, is dismissed, the Respondent having established the genuine material factor defence, for the purposes of section 1(3) of the said Act.*
>
> *2. The claimant was unfairly constructively dismissed.*
>
> *3. The claimant was unlawfully discriminated, by way of victimisation, pursuant to the Sex Discrimination (NI) Order 1976.*

4. *The Tribunal makes a total award of compensation to be paid by the respondent to the complainant in the sum of £13,453.83.*

5. *The claimant's claim of sexual harassment, pursuant to the Sex Discrimination (NI) Order 1976 and her claim for unauthorised deduction of wages and/or breach of contract, for non-payment of bonus, are dismissed, upon withdrawal.*"

Thus two of the three claims succeeded. The Appellant was unrepresented in the Tribunal proceedings. The Respondent was represented by a member of the organisation Peninsula Business Services Limited.

[6] The compensation awarded by the Tribunal had the following components:

(a) Injury to feelings for discrimination by victimisation: £4500 plus interest at 8% from 22 October 2015 until August 2016, grand total £5514.90.

(b) For unfair constructive dismissal: a basic award of £5438.93, loss of earnings of £2000 and loss of statutory rights of £500, grand total £7938.93.

The Appellant exercised her right to apply for a review of the Tribunal's decision. This resulted in an increase in the gross award for injury to feelings from £4500 to £7000, together with appropriate interest (total £8578.74). In this way the overall award was increased by some £3000, from £13453.83 to £16517.67.

Notice of Appeal

[7] The Appellant challenges the decision of the Tribunal by appeal to this court. The main focus of the Appellant's initial Notice of Appeal is evident from the following passage:

"*In regard to my appeal against the decision to dismiss my claim for equal pay, the tribunal's finding that the respondent has proven that the variation is genuinely due to a material factor which is not the difference of sex and that factor may be such a material difference was perverse …..*"

There follows some suitable elaboration. The Appellant drew attention to, in particular, asserted inadequacies in the oral evidence adduced on behalf of the Respondent, asserted inaccuracies and inconsistencies in such evidence, the suggested absence of supporting documentary evidence, an asserted failure by the Tribunal to correctly understand certain aspects of the evidence and, finally, a

complaint that the Tribunal had failed to correctly appreciate and give appropriate weight to the evidence given by three witnesses on behalf of the Appellant.

[8] The initial Notice of Appeal concludes in the following terms:

> "*I provided evidence to the Tribunal to show that, on the face of it, I was receiving less pay than my comparators, who were in the same employment doing work of equal value. The Respondent raised four material factors for the reason for the difference in pay. As the burden of proof lay with the Respondent to prove to the Tribunal that these were genuine and material reasons, which were not the difference of sex, the Tribunal has failed in fairly determining all the evidence in relation to my claim for equal pay in light of the reasons outlined above. As aforementioned the Respondent/Mr Morrow's evidence was shown to be unsubstantiated, inconsistent and inaccurate. On the contrary my evidence was consistent, received no challenge by the respondent and was substantiated by the evidence provided by* [three named witnesses] *yet the Tribunal omitted any reference to this evidence in their decision accepting instead the implausible submissions of the Respondent/Mr Morrow, which were evidenced to be inaccurate and inconsistent ….* [and] *… further adverse inferences could have been drawn by the Tribunal regarding the credibility of the Respondent/Mr Morrow's evidence in light of the findings of victimisation and unfair constructive dismissal, Mr Morrow being one of the three senior managers found to have committed four acts of victimisation ….*
>
> *In addition, the evidence provided by the Respondent in relation to my work/role and those of my comparators was prepared solely for the purposes of defending this claim …*"

The appeal further entails a challenge to the Tribunal's award of compensation for unfair constructive dismissal.

[9] The Appellant having secured legal representation an amended Notice of Appeal (dated 09 April 2019), signed by counsel, materialised. Based on a combination of this amended notice, the skeleton argument of Mr Brian McKee (of counsel) and Mr McKee's submissions to this court, it is clear, subject to the court ruling on whether the proposed amendments should be permitted, that the Appellant's appeal has two elements:

> (i) The Tribunal erred in law "*in stopping the Equal Value Stage 1 Hearing to consider the GMF defence*".

(ii) The Tribunal erred in law "*in awarding the claimant a low-band award for injury to feelings*".

["GMF" denotes "genuine material factor", which is the statutory language: see *infra*.]

As will become apparent, the true thrust of ground (i) is not reflected in the above formulation. At the conclusion of the hearing conducted on 26 September 2019 this court afforded the Appellant's legal representatives the opportunity of providing a draft amended Notice of Appeal of which they availed subsequently.

Relevant Statutory Provisions

[10] As will become clear the most important of the provisions of primary and subordinate legislation bearing on the determination of this appeal are those relating to the procedure to be applied by tribunals in the processing and resolution of claims based on the Equal Pay (NI) Act 1970 (the "*1970 Act*"), as amended.

[11] Section 1 of the 1970 Act enacts the rule that there is to be equal treatment of men and women engaged in the same employment. The legislation devises the concept of a so-called "*equality clause*". By section 1(2) an equality clause is "*a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the 'woman's contract') and has one or more of the effects specified in the six categories, or situations, which follow*". Six situations, or categories, are then specified. The first is in section 1(2)(a), which provides:

> "*(a) Where the woman is employed on like work with a man in the same employment -*
>
> *(i) If (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and,*
>
> *(ii) If (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term ….*"

The third of the six categories, or situations, specified is, per **section 1(2)(c),** the following:

"[Where the equality clause has the effect that –]

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

This is the provision upon which the Appellant's equal pay claim was based.

[12] The overarching statutory criterion is that of "*work …… of equal value to that of a man in the same employment …*" **Section 1(5)** enshrines the following important provision:

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

In the present context the most important provision of the 1970 Act is **section 1(3).** This provides in material part:

> "*An equality clause falling within subsection (2)(a), (b) or (c) shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor –*
>
> *(a) in the case of an equality clause falling within subsection (2)(a) or (b) must be a material difference between the woman's case and the man's ….*"

This appeal belongs to the realm of subsection (2)(a). Section 1(3) enshrines what is commonly described as the genuine material factor ("GMF") defence.

[13] Other material provisions of the 1970 Act include, operative from 15 March 1984, **Section 2A:**

> "2A.–(1) Where on a complaint or reference to an industrial tribunal under section 2, a dispute arises as to whether any work is of equal value as

mentioned in section 1(2)(c) the tribunal may either-

(a) proceed to determine that question; or

(b) require a member of the panel of independent experts to prepare a report with respect to that question.

(1A) Subsections (1B) and (1C) apply in a case where the tribunal has required a member of the panel of independent experts to prepare a report under paragraph (b) of subsection (1).

(1B) The tribunal may-

(a) withdraw the requirement, and

(b) request the member of the panel of independent experts to provide it with any documentation specified by it or make any other request to him connected with the withdrawal of the requirement.

(1C) If the requirement has not been withdrawn under paragraph (a) of subsection (1B), the tribunal shall not make any determination under paragraph (a) of subsection (1) unless it has received the report.

(2) Subsection (2A) applies in a case where-

(a) a tribunal is required to determine whether any work is of equal value as mentioned in section 1(2)(c), and

(b) the work of the woman and that of the man in question have been given different values on a study such as is mentioned in section 1(6).

(2A) The tribunal shall determine that the work of the woman and that of the man are not of equal value unless the tribunal has reasonable grounds for suspecting that the evaluation contained in the study-

(a) was (within the meaning of subsection (3)) made on a system which discriminates on grounds of sex, or

(b) is otherwise unsuitable to be relied upon.

(3) An evaluation contained in a study such as is mentioned in section 1(6) is made on a system which discriminates on grounds of sex where a difference, or coincidence, between values set by that system on different demands under the same or different headings is not justifiable irrespective of the sex of the person on whom those demands are made.

(4) In this section a reference to a member of the panel of independent experts is a reference to a person who is for the time being designated by the Labour Relations Agency for the purposes of that paragraph as such a member, being neither a member of that Agency nor one of its officers or servants."

The cross-heading of this provision, "Procedure Before Tribunal in Certain Cases", is worthy of note. Section 2A is, unusually, a provision of primary legislation prescribing matters of procedure in relation to a judicialised tribunal.

Relevant Procedural Rules

[14] It is necessary to highlight the salient procedural rules which governed the underlying proceedings culminating in the impugned decision of the Tribunal. The starting point is the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005 (*"the 2005 Regulations").* The scheme of this measure, which came into operation on 03 April 2005, is to prescribe certain procedural requirements of a general nature in tandem with six discrete procedural codes. The latter are contained in Schedules 1 – 6 respectively. Two of these free standing codes are of relevance in this appeal. The first is the Industrial Tribunals Rules of Procedure 2005, contained in Schedule 1 (the "Rules of Procedure"). The second is the Industrial Tribunals (Equal Value) Rules of Procedure 2005, contained in Schedule 3 (the "*Equal Value Procedural Rules*").

[15] The 2005 Regulations introduced for the first time the overriding objective, per Regulation 3:

"(1) The overriding objective of these Regulations and the rules in Schedules 1, 2, 3, 4, 5 and 6 is to enable tribunals and chairmen to deal with cases justly.

(2) Dealing with a case justly includes, so far as practicable-

(a) ensuring that the parties are on an equal footing;

(b) dealing with the case in ways which are proportionate to the complexity or importance of the issues;

(c) ensuring that it is dealt with expeditiously and fairly; and

(d) saving expense.

(3) A tribunal or chairman shall seek to give effect to the overriding objective when it or he-

(a) exercises any power given to it or him by these Regulations or the rules in Schedules 1, 2, 3, 4, 5 and 6; or

(b) interprets these Regulations or any rule in Schedules 1, 2, 3, 4, 5 and 6.

(4) The parties shall assist the tribunal or the chairman to further the overriding objective."

It is necessary to take cognisance of Regulation 12:

"*The rules in Schedules* 3, 4, 5 and 6*… shall apply to modify the rules in Schedule 1 in relation to proceedings before a tribunal which consist, respectively, of –*

(a) An equal value claim (as defined in regulation 2(2))."

By Regulation 2(2):

"'Equal value claim' means a claim by a claimant which rests upon entitlement to the benefit of an equality claim by virtue of the operation of section 1(2)(c) of the Equal Pay Act (NI) 1970."

Pausing, the effect of this provision is to establish a tailor made procedural code governing the determination of equal value claims to which section 1(2)(c) of the 1970 Act applies (*supra*). This being a section 1(2)(c) case this specially devised procedural code applied fully to the determination of the Appellant's equal pay claim before the Tribunal.

[16] The Rules of Procedure contain two noteworthy general provisions. First, Rule 10(1):

> "*Subject to the following rules, the chairman may at any time either on the application of a party or on his own initiative, make an order in relation to any matter which appears to him to be appropriate. Such orders may be any of those listed in paragraph (2) or such other orders as he thinks fit. Subject to the following rules, orders may be issued as a result of a chairman considering the papers before him in the absence of the parties, or at a hearing.*"

As the foregoing text makes clear, what follows in rule 10(2) are simply illustrations of the kind of procedural orders which may be made by the chairman in the exercise of the demonstrably broad discretion conferred by rule 10(1). Second, Rule 26 of the Rules of Procedure provides:

> "*(1) A hearing under this rule is held for the purpose of determining outstanding procedural or substantive issues or disposing of the proceedings. In any such proceedings there may be more than one hearing and there may be different categories of hearing, such as a hearing on liability, remedies, costs or preparation time.*
>
> *(2) Any hearing of a claim under this rule shall be heard by a tribunal composed in accordance with Article 6(1), (2) and (3) of the Industrial Tribunals Order.*
>
> *(3) Any hearing of a claim under this rule shall take place in public, subject to rule 16.*"

The Equal Value Procedural Rules

[17] This discrete procedural code, contained in Schedule 3 to the 2005 Regulations, contains certain provisions which must be reproduced in full:

Rule 1

> "*The rules in this Schedule shall only apply in proceedings involving an equal value claim and they modify and supplement the rules in Schedule 1. If there is conflict between*

Schedule 1 and this Schedule, the provisions of this Schedule shall prevail."

Rule 2:

"(1) In addition to the power to make orders described in rule 10 of Schedule 1, the tribunal or chairman shall have power (subject to rules 3(3) and 6(4)) to make the following orders –

(a) the standard orders set out in rules 4 or 7, with such addition to, omission or variation of those orders (including specifically variations as to the periods within which actions are to be taken by the parties) as the chairman or tribunal considers is appropriate;

(b) that no new facts shall be admitted in evidence by the tribunal unless they have been disclosed to all other parties in writing before a date specified by the tribunal (unless it was not reasonably practicable for a party to have done so);

(c) that the parties may be required to send copies of documents or provide information to the other parties and to the independent expert;

(d) that the respondent is required to grant the independent expert access to his premises during a period specified by the tribunal or chairman in order for the independent expert to conduct interviews with persons identified as relevant by the independent expert;

(e) when more than one expert is to give evidence in the proceedings, that those experts present to the tribunal a joint statement of matters which are agreed between them and those matters on which they disagree; and

(f) where proceedings have been joined, that lead claimants be identified.

(2) Any reference in Schedule 1 or 2 to an order made under rule 10 of Schedule 1 shall include reference to an order made in accordance with this Schedule."

[18] The first indication that an "*equal value*" claim, procedurally, is to be conducted in a manner involving separate stages appears in the heading and text of **Rule 3**:

> **"C*onduct of stage 1 equal value hearing***
>
> (1) When in an equal value claim there is a dispute as to whether any work is of equal value as mentioned in section 1(2)(c) of the Equal Pay Act, the tribunal shall conduct a "stage 1 equal value hearing" in accordance with both this rule and the rules applicable to pre-hearing reviews in Schedule 1.
>
> (3) At the stage 1 equal value hearing the chairman or tribunal shall-
>
> (a) where section 2A(2A) of the Equal Pay Act applies, strike out the claim (or the relevant part of it) if, in accordance with section 2A(2A) of that Act, the tribunal must determine that the work of the claimant and the comparator are not of equal value;
>
> (b) decide, in accordance with section 2A(1) of the Equal Pay Act, either that-
>
> (i) the tribunal shall determine the question; or
>
> (ii) it shall require a member of the panel of independent experts to prepare a report with respect to the question,
>
> (c) subject to rule 4 and with regard to the indicative timetable, make the standard orders for the stage 1 equal value hearing as set out in rule 4;
>
> (d) if the tribunal has decided to require an independent expert to prepare a report on the question, require the parties to copy to the independent expert all information which they are required by an order to disclose or agree between each other;
>
> (e) if the tribunal has decided to require an independent expert to prepare a report on the

question, fix a date for the stage 2 equal value hearing, having regard to the indicative timetable;

(f) if the tribunal has not decided to require an independent expert to prepare a report on the question, fix a date for the hearing under rule 26 of Schedule 1, having regard to the indicative timetable; and

(g) consider whether any further orders are appropriate.

(4) Before a claim or part of one is struck out under paragraph (3)(a), the Secretary shall send notice to the claimant giving him the opportunity to make representations to the tribunal as to whether the evaluation contained in the study in question falls within paragraph (a) or (b) of section 2A(2A) of the Equal Pay Act. The Secretary shall not be required to send a notice under this paragraph if the claimant has been given an opportunity to make such representations orally to the tribunal as to why such a decision should not be issued.

(5) The tribunal may, on the application of a party, hear evidence upon and permit the parties to address it upon the issue contained in section 1(3) of the Equal Pay Act (defence of a genuine material factor) before determining whether to require an independent expert to prepare a report under paragraph (3)(b)(ii).

(6) When the Secretary gives notice to the parties of the stage 1 equal value hearing under rule 14(4) of Schedule 1, he shall also give the parties notice of the matters which the tribunal shall and may consider at that hearing which are described in paragraphs (3) and (5) and he shall give the parties notice of the standard orders in rule 4.

(7) The tribunal's power to strike out the claim or part of it under paragraph (3)(a) is in addition to powers to strike out a claim under rule 18(7) of Schedule 1."

(The terminology "*stage 2 equal value hearing*" first appears in Rule 3(3)(e).)

Rule 4

"*Standard Orders for stage 1 equal value hearing*"

(1) At a stage 1 equal value hearing a tribunal shall, unless it considers it inappropriate to do so and subject to paragraph (2), order that –

(a) before the end of the period of 14 days after the date of the stage 1 equal value hearing the claimant shall –

(i) disclose in writing to the respondent the name of any comparator, or, if the claimant is not able to name the comparator he shall instead disclose such information as enables the comparator to be identified by the respondent; and

(ii) identify to the respondent in writing the period in relation to which he considers that the claimant's work and that of the comparator are to be compared;

(b) before the end of the period of 28 days after the date of the stage 1 equal value hearing –

(i) where the claimant has not disclosed the name of the comparator to the respondent under sub-paragraph (a), if the respondent has been provided with sufficient detail to be able to identify the comparator, he shall disclose in writing the name of the comparator to the claimant;

(ii) the parties shall provide each other with written job descriptions for the claimant and any comparator;

(iii) the parties shall identify to each other in writing the facts which they consider to be relevant to the question;

(c) the respondent is required to grant access to the claimant and his representative (if any) to his premises during a period specified by the tribunal or chairman in order for him or them to interview any comparator;

(d) the parties shall before the end of the period of 56 days after the date of the stage 1 equal value hearing present to the tribunal a joint agreed statement in writing of the following matters –

(i) job descriptions for the claimant and any comparator;

(ii) facts which both parties consider are relevant to the question;

(iii) facts on which the parties disagree (as to the fact or as to the relevance to the question) and a summary of their reasons for disagreeing;

(e) the parties shall, at least 56 days prior to the hearing under rule 26 of Schedule 1, disclose to each other, to any independent or other expert and to the tribunal written statements of any facts on which they intend to rely in evidence at that hearing; and

(f) the parties shall, at least 28 days prior to the hearing under rule 26 of Schedule 1, present to the tribunal a statement of facts and issues on which the parties are in agreement, a statement of facts and issues on which the parties disagree and a summary of their reasons for disagreeing.

(2) Any of the standard orders for the stage 1 equal value hearing may be added to, varied or omitted as the tribunal considers appropriate."

[19] Further illumination of the stage 1/stage 2 dichotomy is provided by the rules which follow. The first of these is entitled "*Involvement of Independent Expert in Fact Finding*".

Rule 5:

"*Involvement of independent expert in fact finding*

5. - (1) This rule applies only to proceedings in relation to which the tribunal has decided to require an independent expert to prepare a report on the question.

(2) In proceedings to which this rule applies a tribunal or chairman may if it or he considers it appropriate at any stage of the proceedings order an independent expert to assist the tribunal in establishing the facts on which the independent expert may rely in preparing his report.

(3) Examples of the circumstances in which the tribunal or chairman may make an order described in paragraph (2) may include-

(a) a party not being legally represented;

(b) the parties are unable to reach agreement as required by an order of the tribunal or chairman;

(c) the tribunal or chairman considers that insufficient information may have been disclosed by a party and this may impair the ability of the independent expert to prepare a report on the question;

(d) the tribunal or chairman considers that the involvement of the independent expert may promote fuller compliance with orders made by the tribunal or a chairman.

(4) A party to proceedings to which this rule applies may make an application under rule 11 of Schedule 1 for an order under paragraph."

The next ensuing rule is entitled "*Conduct of Stage 2 Equal Value Hearing*".

Rule 6

"*Conduct of stage 2 equal value hearing*

6. - (1) This rule applies only to proceedings in relation to which the tribunal has decided to require an independent expert to prepare a report on the question. In such proceedings the tribunal shall conduct a "stage 2 equal value hearing" in accordance with both this rule and the rules applicable to pre-hearing reviews in Schedule 1.

(2) Notwithstanding rule 18(1) and (3) of Schedule 1, a stage 2 equal value hearing shall be conducted by

a tribunal composed in accordance with Article 6(1) of the Industrial Tribunals Order.

(3) At the stage 2 equal value hearing the tribunal shall make a determination of facts on which the parties cannot agree which relate to the question and shall require the independent expert to prepare his report on the basis of facts which have (at any stage of the proceedings) either been agreed between the parties or determined by the tribunal (referred to as "the facts relating to the question").

(4) At the stage 2 equal value hearing the tribunal shall-

(a) subject to rule 7 and having regard to the indicative timetable, make the standard orders for the stage 2 equal value hearing as set out in rule 7;

(b) make any orders which it considers appropriate; and

(c) fix a date for the hearing under rule 26 of Schedule 1, having regard to the indicative timetable.

(5) Subject to paragraph (6), the facts relating to the question shall, in relation to the question, be the only facts on which the tribunal shall rely at the hearing under rule 26 of Schedule 1.

(6) At any stage of the proceedings the independent expert may make an application to the tribunal for some or all of the facts relating to the question to be amended, supplemented or omitted.

(7) When the Secretary gives notice to the parties and to the independent expert of the stage 2 equal value hearing under rule 14(4) of Schedule 1, he shall also give the parties notice of the standard orders in rule 7 and draw the attention of the parties to paragraphs (4) and (5)."

Rule 7

"*Standard orders for stage 2 equal value hearing*

(1) At a stage 2 equal value hearing, a tribunal shall, unless it considers it inappropriate to do so and subject to paragraph (2), order that-

(a) by a date specified by the tribunal (with regard to the indicative timetable) the independent expert shall prepare his report on the question and shall (subject to rule 13) have sent copies of it to the parties and to the tribunal; and

(b) the independent expert shall prepare his report on the question on the basis of the facts relating to the question and no other facts which may or may not relate to the question.

(2) Any of the standard orders for the stage 2 equal value hearing may be added to, varied or omitted as the tribunal considers appropriate."

Further provision relating to the independent expert and the expert evidence is made, in considerable detail, in Rules 8 – 12.

The Procedures at First Instance

[20] The procedural conduct of the Appellant's claims by the Tribunal was initially confined to some limited formal documents contained in the evidence before this court and the text of the impugned decision itself. The importance of this issue emerged during the hearing when the emphasis upon the first of the two grounds (as amended) set forth in [9] above became clear. Adjudging it unlikely that it was in possession of all material case management records and directions, the court resolved to request these of the Tribunal. The ensuing co-operation of the Tribunal is hereby acknowledged.

[21] The Tribunal's case management of the Appellant's three conjoined claims has the following noteworthy features:

(i) The Respondent's formal responses to the Applicant's claims were submitted on 12 February 2016 and 01 June 2016 respectively.

(ii) The first of the Tribunal's "Case Management Discussions" ("CMDs") was conducted on 12 April 2016. Others followed.

(iii) During this phase the issues explored and orders made by the Tribunal related mainly to the Appellant's equal pay claim. The Appellant confirmed that her claim was for work of equal value and she identified four named comparators.

(iv) A further CMD was conducted by the Vice-President on 01 August 2016, the formal record whereof includes the following:

> "*I advised the parties that* [the equal pay] *claim required a statutory procedure which is set out in Schedule 3 to the Rules. That procedure required, in the first instance, a Stage 1 Equal Value Hearing. Essentially that hearing will determine whether or not an independent expert is required to assess the work of the claimant and the four comparators or whether this is an issue which can be left to the Tribunal to determine. It will also consider the potential orders described as standard orders which are set out in Rule 4 ….*
>
> *A copy of Rule 4 was provided to both parties …..*
>
> *The matter is listed for a Stage 1 Equal Value Hearing to address those matters at 10am on 30 August 2016 ….*
>
> *I then proceeded to issue directions for the final hearing in this matter. If the Stage 1 Equal Value Hearing determines that an independent expert is required in this case and if that independent expert cannot complete his or her report promptly, those directions may need to be revisited and varied.*"

This was followed by a series of specific case management directions relating to the provision of witness statements, disclosure of documents *et al*. The formal record continues:

> "*The hearing is listed for 5 days: from 5 – 9 December 2016.*"

(v) This was followed by a formal Notice of Hearing addressed to the parties, dated 16 August 2016, incorporating the following:

> "*An Industrial Tribunal will hear a Stage 1 Equal Value Part of the Equal Pay Claim at 10am on 30 August 2016 at ….*"

(vi) By its order dated 11 August 2016, consequential upon the foregoing CMD, the Tribunal directed that the Appellant's two claims would be "*considered and heard together*".

(vii) There was a further listing before the Tribunal (Employment Judge Murray) on 30 August 2016. The "Record of Proceedings" states *inter alia:*

"1. [The Respondent's representative] *confirmed that the respondent raises a genuine material factor defence (GMF defence) in these proceedings* [so that] *it is premature to have an equal value stage 1 hearing ….*

2. From the information before me it was clear that the GMF defence should be determined first and it also appeared to me from the information before me that this could and should be dealt with as part of the substantive sex discrimination hearing which is listed for 5 – 9 December 2016 ….

4. ……

(3) I directed that the Respondent set out particulars of the GMF defence raised in relation to each of the named comparators. Mr Dolan confirmed that the GMF defence as set out in the response form relates to four points made by the Respondent namely that the disparity in pay between the Claimant and her comparators is explained by the comparators' seniority, their line management responsibilities, the 'hands on work' they perform and their responsibility for others' work. The Respondent must set out in writing the particulars of how they say the disparity in pay is explained by these factors and that they are untainted by sex discrimination, in relation to each of the comparators."

( ) ……

(vii) Following this listing the Appellant continued to pursue her requests for disclosure of material documents bearing on her equal pay claim. In particular she contended that the Respondent had failed to comply with the Tribunal's order of 30 August 2016. This discrete complaint was rejected by the President at a further CMD held on 17 October 2016. The Respondent's "*GMF*" defence features prominently in the formal record then generated.

(viii) Further CMDs ensued, during the period November 2016 to February 2017. One of these, conducted by the President, was held on 13 January 2017. The central purpose of this listing was to determine whether the Respondent had failed to comply with the Tribunal's "unless order" made on 01 December 2016. The President determined

this issue in favour of the Respondent. In the detailed formal decision generated by this listing the President described the listing on 30 August 2016 (*supra*) as "*the Stage 1 Equal Value Hearing*". The President observed that the outcome of that hearing was that the EVS1** hearing should be deferred pending determination of the GMF defence. The President devised a revised timetable. This incorporated *inter alia* the provision by the Respondent of "*a signed and dated witness statement in relation to the Genuine Material Factor defence*" within a specified time limit.
[** denoting "Equal Value Stage One"]

(ix) By "*Notice of Hearing*" dated 23 March 2017 the parties were informed that "*the above claims*" would be listed for hearing between 08 and 12 May 2017.

(x) What occurred as regards the aforementioned scheduled hearing dates can be gleaned from a subsequent letter dated 20 July 2017 written by the Appellant:

> "*With reference to the application by the respondent to postpone the hearing listed for 2nd to 4th August indefinitely, I strongly object on the basis of the following. The initial hearing to deal with the above claims was scheduled for 8th May to 12th May 2017. On 10th May 2017 after hearing the equal pay claim it was felt that there was insufficient time to hear the remainder of the claims. It was decided to hear these on another date retaining the same tribunal panel. It proved difficult to find an agreeable date that could accommodate all parties involved and unfortunately the first available date was 2nd to 4th August 2017.*"

(xi) It is clear from the materials provided by the Tribunal that the scheduled continuation hearing dates of 02 to 04 August 2017 were vacated. This was followed by a further CMD conducted by the presiding judge on 12 September 2017. The formal record includes the following passage:

> "*I took into account, in particular, that the issue of the genuine material factor defence had been dealt with by the tribunal at the earlier hearing and therefore the other issues to be determined by the tribunal are, in essence, a new and separate hearing. Indeed, at an initial stage, it had been considered whether the genuine material factor defence should be held* [heard?] *as a completely separate hearing, with a decision from the Tribunal before*

*hearing the other matters. For good and proper reasons it was decided to hear **all** matters at one hearing, albeit with the genuine material factor defence being dealt with as a preliminary matter. Unfortunately, for reasons referred to above, this has not proved possible, due to circumstances which were not known at the time of the initial decision …*

In the circumstances, therefore, it was agreed that this matter would be listed [for 3 days] ***as soon as possible*** *….*"

(xii) In ensuing electronic correspondence reference was made to *inter alia* the Respondent's supplemental pleading/evidence relating to its "*Genuine Material Factor Defence*".

(xiii) Chronologically, the next development was a further CMD conducted by the presiding judge, on 02 November 2017. As recorded in the final decision of the Tribunal, the substantive hearing had been completed by further listings on 11, 12 and 13 October 2017. The formal record of this further CMD notes that it was stimulated by a letter from the Appellant attaching a medical report which she wished the Tribunal to consider in the event of any issue regarding remedies arising. In [3] of the formal record the presiding judge stated:

"*The claimant's claim, as recognised by both the claimant and the respondent's representative, dealt with two matters. Firstly, in relation to the equal pay claim by the claimant, the tribunal, following the substantive hearing, was required to consider whether the Respondent had established the genuine material factor defence. If it had, then the equal pay of the claimant will **not** require to be considered any further. However, if the respondent has failed to establish the genuine material factor defence, then the tribunal will require to arrange a further hearing(s) as appropriate and necessary, in relation to the claimant's equal pay claim. However, I pointed out to the claimant that it has been established in case law that awards for injury to feelings/personal injury are not available under the Equal Pay legislation …*

*Therefore, if the tribunal requires to hold any further hearing in relation to the claimant's equal pay claim, as referred to above, any remedy hearing, subject to any application by either party, will **not** involve compensation for injury to feelings*".

(xiv) The presiding judge conducted a further, and final, CMD on 23 November 2017. The formal record includes the following passage:

> "*The claimant confirmed that she was seeking to rely on the medical report ……. In relation to her remedy claim in relation to her claim for discrimination by way of victimisation pursuant to the* [Sex Discrimination Order] …
>
> *I fully accept that the tribunal, in addition to determining the general material factor defence and/or the claimant's claim for unfair constructive dismissal …… also has to determine the claimant's claim for discrimination by way of victimisation ….*"

The presiding judge, finally, adverted to the possibility of a <u>further</u> "*hearing*" in the event of the Respondent maintaining its objection to the admission of the medical report.

[22] The procedural conduct of the Appellant's claims is addressed in the substantive decision of the Tribunal at paragraph 1.3:

> "*The Tribunal, following a series of Case Management discussions, in the above matter, made relevant orders in relation to the claimant's claim for equal pay, whereby it was agreed that the Tribunal, at the commencement of the substantive hearing, would first determine whether the Respondent had established the defence to the claimant's claim of equal pay, of 'a genuine material factor' (GMF defence); and that, subsequently, at a further hearing, the Tribunal would determine the claimant's remaining claims. The Tribunal would then at the conclusion of both said hearings, reserve its decision and subsequently would give its decision, in writing, in relation to all the claimant's said claims as referred to above. It was further agreed that if, at the above hearing, the Respondent did not establish the GMF defence, then the matter would be relisted for a further hearing to determine all remaining issues in relation to the claimant's claim of equal pay, pursuant to the Equal Pay Act (NI) 1970, as amended (the 1970 Act), following any such failure by the Respondent, to establish the GMF defence.*"

The next succeeding paragraph – 1.4 – reiterates that the hearing conducted was one "*relating to determine the GMF defence of the Respondent …*" In its substantive decision the Tribunal also addressed certain issues bearing on the procedure which was being applied to the Appellants' conjoined claims. This is considered i*nfra*.

The Procedural Rules Analysed

[23] The mechanisms contained in both the 1970 Act and the subordinate rules to be applied to a tribunal's determination of equal pay cases are procedural in nature. The effect of section 2A of the 1970 Act is that in every equal pay case with a disputed issue of whether any work is of equal value under section 1(2)(c) the tribunal is given two choices. The first is to determine this issue unaided. The second is to commission a report on this issue from a member of the independent experts panel. While there are but two choices, these give rise to three possibilities. If the tribunal applies the first choice two possible outcomes may follow, namely resolution of the equal value issue in favour of or against the claimant. The third possibility entails preferring the second choice and, thus, deferring determination of the equal pay claim engaging an independent expert to assist the tribunal in its determination of the contested equal value issue.

[24] The GMF defence is enshrined in section 1(3) of the 1970 Act. It applies to three of the six equality clause situations specified in section 1(2). These three situations include section 1(2)(c) (the present case). There is a clear nexus between section 1(2)(a), (b) and (c) [on the one hand] and section 1(3) [on the other]. Thus in all cases where there is a dispute about whether the work in question is of equal value and the respondent employer raises the statutory GMF defence, the tribunal must apply its mind to the two procedural choices specified in section 2A(1). Furthermore, it must do so of its own volition, in every case.

[25] When one juxtaposes section 2A of the 1970 Act with Rule 3 of the Equal Value Procedural Rules it becomes clear that in equal pay cases in which an equal value dispute arises, with or without the intimation of the statutory GMF defence under section 1(3), the tribunal must conduct a "Stage 1"equal value hearing. The second compulsion to which the tribunal is subject is contained in rule 3(3): at the Stage 1 equal value hearing the tribunal "*shall*" make one of two decisions: it shall either decide to determine the disputed equal value issue unaided or it shall engage an independent expert. Notably, the tribunal is not obliged to make this decision at any particular stage of the Stage 1 hearing. There is no provision in the Equal Value Procedural Rules to this effect. Thus this discrete matter is governed by general provisions, in particular (but not exhaustively) Regulation 3 of the 2005 Regulations and Rule 10 of the Rules of Procedure (both *supra*). The procedure adopted by a tribunal in this discrete matter must also ensure observance of the parties' common law right to a fair hearing.

[26] The critical procedural rule in the context of the present appeal is Rule 3 of the Equal Value Procedural Rules (at [18] *supra*). The effect of Rule 3, considered in tandem with Rule 1, is to emasculate the broad case management discretionary powers conferred on the Tribunal by rule 10(1) of the Rules of Procedure. By Rule 3(1), in every case where there is a dispute as to whether any work is of equal value within the ambit of (*inter alia*) section 1(2)(c) of the 1970 Act the tribunal "*shall*"

conduct a "Stage 1 Equal Value Hearing" in accordance with both Rule 3 and any applicable provisions of the Rules of Procedure. By Rule 3(3) the tribunal is mandated ("*shall*") to conduct the "Stage 1" hearing in a prescribed and structured manner. At the beginning of the exercise the tribunal is obliged, by rule 3(3)(c), to make the standard orders contained in rule 4. By rule 3(5) the tribunal is empowered to hear evidence and receive argument on the GMF defence "*before determining whether to require an independent expert to prepare a report under paragraph (3)(b)(ii)*". This is an elaborate, bespoke procedural regime.

[27] Rule 3(3)(b) requires the tribunal, in every "Stage 1" equal value hearing, to make one of two decisions namely –

> "*… either that –*
>
> *(i) The tribunal shall determine the question; or*
>
> *(ii) It shall require a member of the panel of independent experts to prepare a report with respect to the question ….*"

The "*question*" is, by virtue of section 1(2)(c) of the 1970 Act and rule 3(1), whether, having regard to the demands of the applicant's employment it is "*of equal value to that of a man in the same employment ….*" The remaining provisions of rule 3 contemplate two distinct scenarios. The first is the scenario of the tribunal having declined to determine the GMF issue and having instructed an independent expert. In this scenario the tribunal must take the procedural steps specific in rule 3(3)(d) and (e). The second possible scenario is that wherein the tribunal, in the language of rule 3(3)(f), "*has not decided to require an independent expert to prepare a report on the question …*" In this scenario the tribunal must, per subparagraphs (f) and (g) of rule 3(3) –

> "*… fix a date for the hearing under rule 26 of Schedule 1, having regard to the indicative timetable and … consider whether any further orders are appropriate*".

Rule 26 of Schedule 1 (reproduced in [16] above) is a somewhat bland procedural provision of general application. It provides, in substance, that a hearing may be convened for the purpose of "*… determining outstanding procedural or substantive issues or disposing of the proceedings*" and authorises multiple hearings for different purposes.

[28] The Stage 1 hearing could in principle assume a variety of forms. This will invariably be an intensely case specific issue. In some instances the case for engaging an independent expert may be so compelling that the hearing will be of the brief case management variety. In others the tribunal may decide to invite and consider the parties' respective submissions on the section 2 dichotomy. The tribunal has a discretion whether to receive evidence and argument on the issue of

whether variations between the terms of the Applicant's contract and those of any comparator are genuinely due to a material factor reliance upon which does not involve treating the applicant less favourably on the ground of sex and does not amount to unjustified indirect discrimination. It is this court's understanding that tribunals routinely adopt this approach. The wisdom and attraction of doing so are clear given that a successful GMF defence gives rise to a dismiss of the applicant's equal pay claim and is thus manifestly harmonious with the overriding objective.

[29] To summarise, in equal pay cases in which there is an equal value dispute entailing a GMF defence or otherwise, a Stage 1 hearing is obligatory, with the following possible outcomes:

(i) The GMF defence is established.

(ii) The GMF defence is not established.

(iii) Final determination of the GMF defence and any other material issues is deferred to a further hearing/stage which will involve *inter alia* consideration of the evidence of an independent expert appointed by the tribunal.

In cases where outcome (i) applies, there is no right to equal pay and the claim must be dismissed. In cases where outcome (ii) or outcome (iii) applies, a further hearing is required. Outcome (ii) is not determinative: the employer is entitled to raise the GMF defence at the next stage, when both parties will be at liberty to adduce their own expert evidence (see the commentary in Blackstone's Employment Practice 2019, paragraphs 27.64 – 27.72 and Sweet and Maxwell's Encyclopaedia of Employment Law, Section 3B, paragraph 15.32.)

[30] In every case where the tribunal determines to conduct a "Stage 1" hearing there are two evidential rules of some importance. First, there is a presumption that the employee's work is of equal value to that of the comparator. Second, the burden of proof is on the employer to make out the "GMF" defence: see *Financial Times Limited v Burn (No 2)* [1992] IRLR 163.

[31] In cases where a tribunal opts to instruct an independent expert, at least one further stage in the proceedings, namely "Stage 2", must follow. The practical operation of the staged approach is illustrated in the recent decision of the English Court of Appeal in *Asda Stores v Brierley and Others* [2019] EWCA Civ 44. An illustration of the GMF defence being rejected without engagement of an independent expert by the Tribunal is found in *Collin and Hobson Plc v Yeates* UKEAT/0066/14/LA. Notably one of the unsuccessful grounds of appeal was that challenging the failure of the Employment Tribunal to appoint an independent expert: see [8].

The Present Case

[32] What procedural course was adopted by the Tribunal in the present case? As the review of its case management hearings and orders in [20] and [21] above demonstrates, the Tribunal determined to conduct a "Stage 1" equal value hearing. As noted, on 01 August 2016 the Vice President directed that "*the hearing*" would be conducted during the five day period 05 – 09 December 2016:

> "*Essentially that hearing will determine whether or not an independent expert is required to assess the work of the claimant and the four comparators or whether this is an issue which can be left to the tribunal to determine …….* [and] *……. will also consider the potential orders described as standard orders which are set out in Rule 4*".

The formal CMD record continued:

> "*The matter is listed for a Stage 1 Equal Value Hearing to address those matters at* ***10am*** *on* ***30 August 2016***."

[33] Having made this direction, in the presence of the parties, the Vice President "*… then proceeded to issue directions for the* ***final hearing*** *in this matter*" (emphasis added), continuing:

> "*If the Stage 1 Equal Value Hearing determines that an independent expert is required in this case and if that independent expert cannot complete his or her report* ***promptly****, those directions may need to be revisited and varied*".

The directions which followed required the parties *inter alia* to provide witness statements and bundle of documents by specified dates. The directions provided, finally:

> "*The hearing is listed for five days from* ***5 – 9 December 2016***."

This was followed by the formal "*Notice of Hearing*" to the parties notifying that the Tribunal would hear "*a Stage 1 Equal Value Part of the Equal Pay Claim*" at 10am on 30 August 2016.

[34] Pausing, it is clear that at this stage the Tribunal was adopting an orthodox Stage 1/Stage 2 procedural approach. The hearing scheduled for 5 – 9 December 2016 would be the "*Stage 2*" hearing. The Vice President's directions relating to the December 2016 hearing were in effect provisional. This hearing was contingent upon the outcome of the "*Stage 1*" hearing. If the latter hearing were to determine the contested equal value issue in favour of either the Appellant or the Respondent, a "*Stage 2*" hearing, properly so-called, would not be required. In the absence of either

of these determinations it would and, moreover, an independent would be instructed by the Tribunal in advance.

[35] In the event the hearing convened on 30 August 2016 did not proceed as envisaged in the Vice President's preceding CMD Order. The formal CMD record makes clear why. The Respondent's representative having intimated that his client was relying on the GMF defence, Employment Judge Murray decided:

> "*… the GMF defence should be determined first and it also appeared to me from the information before me that this could and should be dealt with as part of the substantive sex discrimination hearing which is listed for 5 – 9 December 2016.*"

It is appropriate to observe that the intimation of the GMF defence in this belated and unheralded manner was quite unsatisfactory. The Respondent was represented throughout. The Tribunal's carefully devised case management framework was abruptly disrupted and avoidable delay occurred in consequence.

[36] There followed a further CMD hearing on 29 November 2016 the formal record whereof includes the following:

> "*In relation to the claimant's equal pay complaint, the tribunal will be determining the Respondent's genuine material factors defence* ***only*** *at the hearing referred to at paragraph 11 below. Depending on the outcome of the hearing in relation to the respondent's genuine material factors defence an independent expert will be appointed to consider whether the claimant was performing work of equal value to that of her comparators or any of them at the date of her claim to the tribunal.*"

The "*hearing*" to which this passage relates was scheduled for 06 – 10 March 2017. In the event, following a postponement, this hearing was conducted between 08 and 10 May 2017. In her subsequent letter to the Tribunal the Appellant described this as "*hearing the Equal Pay Claim*". The Tribunal agreed with this assessment as its formal CMD record of 12 September 2017 indicates. The <u>other</u> aspects of the Appellant's claims (constructive dismissal and victimisation) were considered at the further, second hearing conducted between 11 and 13 October 2017.

[37] Following the latter dates, two further CMD exercises intervened prior to promulgation of the Tribunal's substantive decision. Each, as appears from [21] above, was precipitated by the Appellant's desire to adduce in evidence a medical report in the context of her victimisation claim in pursuit of the remedy of damages for injury to feelings and/or personal injury. In the formal CMD record dated 03 November 2017, the presiding judge, focusing on the equal pay claim, identified the following two possibilities:

(i) If the Respondent were to establish the GMF defence, the Appellant's equal pay claim "*…. will **not** require to be considered any further*".

(ii) Conversely, in the event of the Respondent failing to establish the GMF defence, the Tribunal "*… will require to arrange a further hearing(s) as appropriate as necessary, in relation to the claimant's equal pay claim*".

[38] What happened in the event? As noted in [5] above, the Tribunal's determination of the contested equal value issue was that the Respondent had established the GMF defence under section 1(3) of the 1970 Act, with the result that the Appellant's equal pay claim was dismissed. The question for this court is whether this conclusion is infected by error of law.

Appeal Ground 1

[39] It is necessary to examine the precise terms in which the first ground of appeal is formulated (see [9] above). This ground enshrines an assertion and a contention. The assertion is that the tribunal "*stopped*" the Equal Value Stage One hearing in order to consider the GMF defence. The contention is that it erred in law in so doing. The core submission of Mr McKee on behalf of the Appellant is formulated in the following extract from his skeleton argument:

> "*The claimant was forced to meet what was in fact a challenge to whether the roles were of equal value under the guise of a GMF. She lost all the advantages of the Equal Value Procedure and was handicapped in meeting the case. In the present case the Respondent did not call the comparators, so the claimant had no opportunity to question them. The claimant was unable to cross examine the Respondent's manager effectively because she did not have the information required. This was acknowledged by the Tribunal in its decision. The Tribunal did not consider whether to appoint an independent expert.*"

Mr McKee amplified this submission by pointing to a suggested contradiction: where (as in the present case) the GMF defence is based on "*job-related factors*", such as respective demands and responsibilities, this undermines the underlying assumption that the claimant's job is of equal value to that of any asserted comparator. In any such case (he argued) this has the procedurally unfair disadvantages noted.

[40] It is clear from the Tribunal's decision (at paragraph 3.1) that none of the four comparators identified by the Appellant was called by the Respondent to give evidence. The Tribunal noted that the elements of the Respondent's GMF defence

were seniority, line management responsibilities, hands on work and responsibility (generally). It recorded that the Appellant "*strongly challenged*" both the absence of documentary evidence supporting the defence and "*… the failure of the Respondent to call the said comparators and/or any other person with direct knowledge of their role/work …*" (Paragraph 34.4.) The next ensuing passage in the decision is of some importance:

> "*However, significantly, in the Tribunal's judgement, the claimant frankly and fairly acknowledged that she was not in a position, save in the general sense referred to above, to challenge his evidence* [ie the evidence of Mr Morrow, general manager] *in relation to the specific role/work of the comparators. In such circumstances, the Tribunal was not prepared to draw any inferences from any such failures by the Respondent (see paragraph 2.35 of the decision) and was satisfied that it was able to determine the necessary facts for the GMF issue, on the evidence placed before it during the course of the hearing …. In light of the claimant's said acknowledgment, the Tribunal was able to place considerable reliance on the documentation prepared by Mr Morrow, with the assistance of his representatives, of the examples of the said factors relied upon by the Respondent in relation to the claimant and her said comparators.*"

Thus the evidence which the Tribunal received of the roles, responsibilities (*et al*) of the Appellant's chosen comparators was given by the Respondent's general manager and none of the individuals concerned.

[41] One question which might arise out of the foregoing is whether there is an error of law in the Tribunal's disposal to attribute "*considerable reliance*" to the evidence of Mr Morrow and the related documentary evidence solely, or substantially, on the basis of the Appellant's acknowledgement of limited ability to challenge same. This would be erroneous in law if this court were to hold that the Tribunal thereby abdicated its inalienable responsibility to evaluate and determine the credibility and cogency of this evidence, treating the Appellant's acknowledgment as but one factor to be weighed with others.

[42] In the next ensuing passages of its decision the Tribunal considered Mr Morrow's evidence relating to the roles and responsibilities of the four comparator employees juxtaposed with those of the Appellant. The Tribunal diagnosed "*considerable overlap*" relating to the four GMF defence factors. It then made specific findings relating to the roles and responsibilities of the Appellant's four chosen comparators. This gave rise to the following omnibus conclusion (at paragraph 4.2):

> "*Having regard to the factors of seniority, line management responsibilities, hands on work and responsibilities, as relied*

upon by the Respondent, the Tribunal was satisfied the Respondent has established that the reason for the difference in pay is not due in any way to the difference of sex between the Complainant and her said comparators; but is due to the said factors, taken as a whole, not individually …

The Tribunal found no evidence that the said reason for the difference in pay was in any way a sham or pretence but was in the circumstances genuine …

The Tribunal therefore dismissed the Claimant's claim for equal pay, pursuant to the Equal Pay Act (NI) 1970, as amended, as the Respondent had established the Genuine Material Factor defence, for the purposes of section 1(3) of the said Act."

Having regard particularly to this passage we answer the question posed in [40] in the negative. The decision of the Tribunal then proceeds to examine the Appellant's separate claims for unfair constructive dismissal and discrimination by victimisation.

First Conclusion

[43] The first ground of appeal and the related submission of Mr McKee, both outlined in [39] above, conflate several issues, containing elements of breach of the procedural rules, misdirection in law and unfair hearing. We reject the assertion that the Tribunal "*stopped*" the "*Stage 1*" hearing in order to consider the GMF defence. This is confounded by our detailed study of the case management history above. The late introduction of the GMF defence simply had the effect of altering the contours of the "*Stage 1*" hearing and bringing about an adjournment of the initial cluster of substantive hearing dates.

[44] We consider that the Tribunal committed no error of law in any of the following respects:

(a) In applying the "Stage 1 Equal Value Hearing" mechanism to the Appellant's equal pay claim.

(b) In absorbing within (i) its consideration of the Respondent's GMF defence.

(c) In adopting a procedure whereby a staggered hearing entailing (i) and (ii) together, followed by (at a later date) the Appellant's claims for unfair constructive dismissal and victimisation on the ground of sex were considered.

All of the foregoing were harmonious with the applicable provisions of primary and subordinate legislation and the Tribunal's common law duty to ensure a fair hearing for both parties.

[45] We conclude that the Tribunal's decision was not in accordance with the requirements of section 2A of the 1970 Act and Rule 3(3) of the Equal Value Procedural Rules. The Tribunal was enjoined by these statutory provisions to consider whether, prior to determining the "equal value work" issue, a report from a member of the panel of independent experts should be commissioned. The combined effect of these provisions is that in every equal pay case involving a disputed issue of equal value of work, with or without a GMF defence, the tribunal is obliged to consider whether it is sufficiently equipped and confident to determine this issue without the assistance of independent expert evidence. There is no legal duty to appoint an expert. Rather the duty is to give conscientious consideration to whether to do so. In this case there is no primary evidence that the Tribunal complied with this duty and no evidence from which such compliance may legitimately be inferred. It follows that the Tribunal erred in law in this respect.

[46] A decision allowing this appeal does not follow inexorably from the foregoing conclusion. The relevant legislation does not provide, either expressly or by implication, that this result must follow. There are two possible analyses. The first is that this was a purely abstract error of law, of no material moment. The second is that this constitutes an error of law of substance as the Appellant was deprived of a fair hearing in consequence. The resolution of this issue will entail the application of well-established common law fair hearing principles.

[47] It is instructive to reflect on the principles formulated by Bingham LJ in *R v Chief Constable of Thames Valley Police, ex parte Cotton* [1990] IRLR 344 at [60]:

> "While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:
>
> 1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
>
> 2. As memorably pointed out by Megarry J in *John v Rees* [1970] Ch 345 at p.402, experience shows that that which is confidently expected is by no means always that which happens.

> 3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
>
> 4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.
>
> 5. This is a field in which appearances are generally thought to matter.
>
> 6. Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied. Accordingly if, in the present case, I had concluded that Mr Cotton had been treated unfairly in being denied an adequate opportunity to put his case to the acting chief constable, I would not for my part have been willing to dismiss this appeal on the basis that it would have made no difference if he had had such an opportunity (although the court's discretion as to what, if any, relief it should grant would of course have remained)."

Bingham LJ added at [65]:

> *"I think it important that decision-makers and judges should fix their gaze on the fairness of the procedure adopted rather than on the observance of rigid rules."*

The main relevance of this code of principles in this appeal is that the Appellant was given no notice of the Tribunal's procedural intentions following the six days of hearing and, hence, had no opportunity to make representations on the issue of engagement of an independent expert by the Tribunal or, indeed, retaining her own expert witness.

[48] In every case where, on appeal, it is contended that the decision making process of the court, tribunal or authority concerned is vitiated by procedural impropriety or unfairness the question for the appellate court is whether the avoidance of the vitiating factor/s concerned could have resulted in a different outcome. In this case the Tribunal failed to address the mandatory statutory question of whether to instruct an independent expert witness in a context involving

a substantial dispute concerning the roles, demands and responsibilities of the Appellant's four chosen comparator employees, none of whom gave direct evidence. The Respondent's evidence bearing on these issues had elements of the second hand and hearsay, together with the subjective. Furthermore, the Appellant was unrepresented and no expert witness testified on her behalf. In these circumstances we consider that the error of law which the court has diagnosed cannot be dismissed as trivial or technical. It was, rather, a matter of substance. Its avoidance could have given rise to an outcome favourable to the Appellant in respect of her equal pay claim. Beyond this assessment it is inappropriate for this appellate court to venture. The Appellant's hearing was, further, unfair in consequence, in the sense explained in [47]. The first ground of appeal succeeds accordingly.

Second Ground of Appeal

[49] As set forth in [9] above, the second ground of appeal is that the Tribunal erred in law in awarding the Appellant compensation for injury to feelings in accordance with the so-called "low band". In its decision the Tribunal, having dismissed the Appellant's equal pay claim, turned to consider her remaining two claims, namely unfair constructive dismissal and discrimination by victimisation. At paragraph 5.1 the Tribunal enunciated its intention to "*make the following findings of fact, as set out in the following subparagraphs …..*" Carefully analysed, what follows in the text of the decision includes material which cannot be characterised "*findings of fact*". Rather it contains multiple recitations of parts of the evidence, quotations from documentary evidence and commentary on the part of the tribunal. This analysis applies to paragraphs 5.2 – 5.19.

[50] In paragraph 6.1 reference is made to "*the facts as found by the tribunal*". In paragraph 6.2 one finds the first pronouncement by the Tribunal that it is "*satisfied*" about a particular matter (ie finds as a fact) that the Appellant had made a claim of equal pay at two specified meetings and had, therefore, carried out a protected act as defined in Article 69 of the 1976 Order. The main conclusion which follows is that the suspension of the Appellant was a deliberate act on the part of the Respondent in reaction to the equal pay claim intimated by her which the Respondent both resisted and resented (per paragraph 6.2). Next the Tribunal made a specific finding that the whole of the disciplinary process in which the Respondent was engaged following the Appellant's suspension "*.. was a sham and tainted throughout by the fact that the claimant had made a claim of equal pay*". The outcome of this process was that the Appellant had "*no case to answer*" in respect of the alleged breach of confidentiality.

[51] The Tribunal's next finding was that there was no good reason for the Respondent's failure to pay a Christmas bonus to the Appellant. There followed a further specific finding that the termination of company sick payments to the Appellant without notice constituted "*a further act of victimisation*" triggered by her claim of equal pay. The Tribunal concluded that the Appellant had been the victim of discrimination by victimisation. The decision continues:

> "*The tribunal was satisfied that the claimant was very upset and stressed by the said actions of the respondent and is therefore entitled to an award of injury to her feelings. The tribunal also considered the claimant's claim for personal injury; but reminded itself of the circumstances in which the report of the claimant's General Practitioner was admitted in evidence. Having considered the said report, the tribunal noted, in particular, that there appeared to be considerable overlap between the claimant's said injury to her feelings and the findings of acute stress/anxiety and depression noted by her doctor in this report, which were not the subject of any detailed evidence. In the circumstances, the tribunal concluded that any element of personal injury suffered by the claimant would be fully reflected in the tribunal's award of compensation for injury to her feelings, as set out below.*"

[52] In the next ensuing paragraph the Tribunal states:

> "*The tribunal decided that the award of compensation to the claimant for injury to her feelings fell within the lower band, as set out in the case of* ***Vento v Chief Constable of West Yorkshire Police*** *[2003] IRLR 103 as amended in the recent case of* ***De Souza v Vinci Construction Limited*** *[2017] EWCA Civ 879 and makes an award of £4,500 for the injury to her feelings.*"

To this the Tribunal added interest at 8% from 22 October 2015. Having regard to the dates when the acts of victimisation occurred in the present case, the applicable scales as adjusted and updated, were the following:

(i) Lower band: £600 - £6000

(ii) Mid band: £6000 - £18000

(iii) Upper band: £18000 - £30000.

The Tribunal then made the twofold further conclusion that the Appellant had been unfairly constructively dismissed and that no action on her part had contributed to this. Noting that the Appellant had secured alternative employment with her brother immediately following the constructive dismissal, the decision continues:

> "…….. *the tribunal decided it was just and equitable, in the circumstances, to award the claimant a sum of £2,000 based on the undisputed figures of loss produced by the claimant, to reflect any loss of earnings incurred by her since her resignation*

during the period of temporary employment which was now effectively at an end."

[53] The total compensation awarded to the Appellant was £13453.83 with the following breakdown:

(i)	Injury to feelings for discrimination by victimisation, including interest:		£5514.90
(ii)	Constructive dismissal –		
	(a)	Basic award:	£5438.93
	(b)	Compensatory award, loss of earnings:	£2000
	(c)	Compensatory award, loss of statutory rights:	£500
(iii)	Sum of (i) and (ii):		£13453.83

[54] The Appellant applied for a review under Rule 36 of the Rules of Procedure. This was partially successful, the Tribunal determining to increase the award for injury to feelings from £4500 to £7000 plus interest, thereby substituting a revised award of £8578.74 for £5514.90, an increase of some £3000.

[55] In the amended Notice of Appeal, it is stated that the "*question for the court*" is:

> "*… whether the decision of the tribunal to award an amount for injury to feelings in the Low Band was one which no reasonable tribunal properly applying the law could have done.*"

Counsel's skeleton argument formulates the governing test thus:

> "*The test for challenging an award of the tribunal is whether the award was so excessive (or low) as to amount to an error of law, or be manifestly wrong.*"

Developing this ground Mr McKee highlighted that the Appellant had been absent from work with illness related to the acts of victimisation for five months, during which period she had suffered four distinct acts of victimisation altogether.

[56] What is the correct test to be applied in determining this second ground of appeal? The starting point is the statute which makes provision for appeals from Industrial Tribunals to the Court of Appeal. Article 22 of the Industrial Tribunals (NI) Order 1996 (the "*1996 Order*") provides:

> "*(1) A party to proceedings before an industrial tribunal who is* ***dissatisfied in point of law with a decision of the tribunal*** *may, according as rules of court may provide, either –*
>
> *(a) appeal there from the Court of Appeal, or*
>
> *(b) require the tribunal to state and sign a case for the opinion of the Court of Appeal.*
>
> *(2) Rules of court may provide for authorising or requiring the tribunal to state, in the form of a special case for the decision of the Court of Appeal, any question of law arising in the proceedings."*
>
> [Emphasis added.]

The wording of this provision is uncomplicated. It conveys that in appeals of this species, the question for the Court of Appeal is whether the tribunal, within the confines of the grounds of appeal, erred in law in some material respect or respects.

[57] Of what does the error of law threshold consist? The decision in *Belfast Port Employer's Association v Fair Employment Commission for Northern Ireland* [1994] NIJB 36 concerned an appeal by case stated from a decision of the county court that the appellant had discriminated on the ground of religious belief or political opinion contrary to the Fair Employment (NI) Act 1976. The appeal was brought under Article 61 of the County Courts (NI) Order 1980 which provides in material part:

> "*Except where any statutory provision provides that the decision of the county court shall be final, any party dissatisfied with the decision of a county court judge upon any point of law may question that decision by applying to the judge to state a case for the opinion of the Court of Appeal …*"

The county court judge upheld the employer's appeal against a decision of the Fair Employment Agency that the employer had discriminated against the complainant, ruling that there was no case to answer. The test which the judge formulated was whether the respondent to the appeal, the Fair Employment Commission for Northern Ireland (the "*FEC*"), had discharged the onus of establishing the alleged discrimination. Carswell LJ stated at p 6:

> "*… The judge seems to have apprehended that where evidence has been given on both sides, the complainant must ultimately prove that he was discriminated against on grounds of religion. He does not appear to have appreciated the correct application of*

> *the well established principle that where one finds a person or group treated less favourably in circumstances which are consistent with that treatment being based on religious grounds it is generally right to draw an inference that that was the reason for it."*

The judge's basic error was his failure to regard the circumstances as *prima facie* proof of discrimination which called for an explanation, compounded by his disregard of the principle that a holding that there is no case to answer should be restricted to exceptional or frivolous cases only.

[58] One of the reformulated questions which the Court of Appeal had to determine was:

> *"Whether on the facts which I found my conclusion that the employers did not discriminate against the complainants on the ground of religion was one which a tribunal properly directing itself could reasonably have reached."*

The Court of Appeal determined this question by the application of the well known principles in *Edwards v Bairstow* [1956] AC 14. Lord Radcliffe stated at page 36:

> *"When the case comes before the* [appellate] *court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."*

The formulation of Viscount Simonds, at page 29, was the following:

> *"For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand."*

Carswell LJ also cited with approval the approach of Philips J in *Watling – v – William Baird Contractors* [1976] 11 ITR (at pages 71 – 72) equating the same test with a finding that the tribunal's conclusion was "*plainly wrong*" or, in the legal sense, perverse.

[59] The *Edwards v Bairstow* principles have been applied by the Northern Ireland Court of Appeal in a variety of contexts. These include an appeal by case stated from a decision of the Lands Tribunal (*Wilson v The Commissioner of Evaluation* [2009] NICA 30, at [34] and [38]), an appeal against a decision of an industrial tribunal in an unfair dismissal case (*Connelly v Western Health and Social Care Trust* [2017] NICA 61 at [17] – [19]) and a similar appeal in a constructive dismissal case (*Telford v New Look Retailers Limited* [2011] NICA 26 at [8] – [10]). The correct approach for this court was stated unequivocally in *Mihail v Lloyds Banking Group* [2014] NICA 24 at [27]:

> *"This is an appeal from an industrial tribunal with a statutory jurisdiction. On appeal, this court does not conduct a rehearing and, unless the factual findings made by the tribunal are plainly wrong or could not have been reached by any reasonable tribunal, they must be accepted by this court."*

[60] A valuable formulation of the governing principles is contained in the judgment of Carswell LCJ in *Chief Constable of the Royal Ulster Constabulary v Sergeant A* [2000] NI 261 at 273:

> *"Before we turn to the evidence we wish to make a number of observations about the way in which tribunals should approach their task of evaluating evidence in the present type of case and how an appellate court treat their conclusions.*
>
> *……..*
>
> *4. The Court of Appeal, which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.*
>
> *5. A tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless –*
>
> *(a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the tribunal (Fire Brigades Union v Fraser [1998] IRLR 697 at 699, per Lord Sutherland); or*
>
> *(b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: Edwards (Inspector of Taxes) v Bairstow [1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36."*

This approach is of long standing, being traceable to decisions of this court such as *McConnell v Police Authority for Northern Ireland* [1997] NI 253.

[61] Thus in appeals to this court in which the *Edwards v Bairstow* principles apply, the threshold to be overcome is an elevated one. It reflects the distinctive roles of first instance tribunal and appellate court. It is also harmonious with another, discrete stream of jurisprudence involving the well-established principle noted in the recent judgment of this court in ***Kerr v Jamison*** [2019] NICA 48 at [35]:

> *"Where invited to review findings of primary fact or inferences, the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour,*

> *consistency and credibility …….. the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently ….."*

Next the judgment refers to ***Heaney v McAvoy*** [2018] NICA 4 at [17] – [19], as applied in another recent decision of this court, ***Herron v Bank of Scotland*** [2018] NICA 11 at [24], concluding at [37]:

> "*To paraphrase, reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses.*"

[62] In ***Vento*** the initial decision was made by the Employment Tribunal. There followed an appeal to the Employment Appeal Tribunal ("*EAT*") which reduced the award of £65,000 damages for injury to feelings and aggravated damages to £30,000. A further appeal to the Court of Appeal ensued. The court rejected the argument on behalf of the employer that the test for interfering with the EAT's award was that of perversity. Mummery LJ stated at [25]:

> *"The true position, on authority and in principle, is that the Court of Appeal exercises a second appellate jurisdiction in respect of decisions of the employment tribunal. It has been settled by decisions binding on this court that the question for the Court of Appeal is whether there is an error of law in the decision of, or in the proceedings before, the employment tribunal. As Sir John Donaldson MR said in Hennessy v Craigmyle & Co Ltd [1986] IRLR 300 at 305:*
>
> > *'It is too often forgotten that, in the context of appeals from the Employment Appeal Tribunal, the Court of Appeal is a second tier appellate court ... second tier appellate courts are primarily concerned with the correctness of the trial court's decision.' "*

And at [31]:

> *"It is true that the appeal to this court is from a decision or order of the Employment Appeal Tribunal, allowing or dismissing an appeal to it from the employment tribunal. There is no appeal route from the employment tribunal directly to the Court of Appeal bypassing the Appeal Tribunal. In substance, however, the question of law on which an appeal lies is one arising from the decision of or in the proceedings before the employment tribunal. The appeal to this court involves a*

> *determination of the very same questions as were before the Appeal Tribunal, ie is there an error of law arising in the decision of, or in the proceedings before, the employment tribunal? And, if so, what should be done about it? As in the case of appeals from the ordinary courts, the focus of the appellate body, whether at the first, second or any remoter tier of appeal, is on the determination of the proceedings in the trial court or tribunal. Attention and respect will be paid by the Court of Appeal to the conclusions of the Appeal Tribunal in the exercise of its specialist appellate function. But we are unable to accept the contention that the intervening decision of the Appeal Tribunal has the effect of preventing this court (or any higher court) from taking the decision of the employment tribunal as the relevant point for deciding whether there is an error of law and, if there is, how the appeal court should exercise its powers to rectify the error."*

[63] The English Court of Appeal was determining an appeal in which the statutory jurisdictional basis was that of "*……. any question of law arising from any decision of, or arising in any proceedings before, an employment tribunal …*": see section 21 of the Employment Tribunals Act 1996. The judgment contains no reference to the *Edwards v Bairstow* principles. Notwithstanding they are readily identifiable in the following passage of the judgment of Mummery LJ at [38]:

> "*The decision of the employment tribunal on this point ought only to be overturned if it is shown to be a perverse conclusion, that is a decision which no reasonable tribunal, properly directing itself on the law and on the materials before it, could reasonably have reached. An appellate tribunal or court is not entitled to interfere with such a conclusion simply on the basis that it would itself have reached a different conclusion on the same materials.*"

[64] Appeals to this court under Article 22 of the 1996 Order can, in the abstract, raise different questions. For example the main question of law may be whether the tribunal correctly interpreted the relevant legislation; or correctly understood and applied a decision or decisions binding on it; or directed itself correctly in law. In each of these illustrations the central question for this court will be whether the tribunal committed a material error of law in making its decision. However, there is a distinct cohort of appeals, as the brief review of the decided cases above demonstrates, in which the appeal on a point of law to this court centres on findings of fact by the tribunal or conclusions based upon its assessment of the evidence. While this is not necessarily an exhaustive prescription, we consider that appeals falling within this description attract the application of the *Edwards v Bairstow* principles.

[65] Where on the notional spectrum does the present appeal lie? We are mindful that the Appellant relied on a medical report which the Tribunal received in evidence. The Tribunal plainly took this into account. It committed no error in reminding itself (at 6.5) that, in terms, this was a medico-legal report introduced at a comparatively late stage of the proceedings. Nor did it commit any error in its assessment of considerable overlap between the asserted injury to the Appellant's feelings and the anxiety *et al* assessed by her doctor. This lay manifestly within the Tribunal's margin of appreciation. Furthermore, in opting to reflect "*any element of personal injury*" suffered by the Appellant in the award of compensation for injury to her feelings, the Tribunal selected a course reasonably open to it and entailing no error of law. This court notes, as did the Tribunal, that there was a delay of some months in the proffering of the Appellant's resignation and, further, she was fit to commence alternative employment immediately thereafter, ie some five months following the index events.

[66] As the foregoing resume clearly demonstrates, the Tribunal's discrete conclusion relating to the appropriate *Vento* "band" was based upon its assessment of the relevant evidence, both documentary and *viva voce*. We consider it clear that the second of the Appellant's grounds of appeal falls to be determined by the application of the *Edwards – v – Bairstow* principles. This is clearly – and correctly – recognised in the formulation of this ground of appeal at [55] *supra*.

[67] Ultimately, following the statutory review, the compensation awarded to the Appellant for injury to feelings/personal injury was £7000 (plus interest). This belongs to the lower *echelons* of the ***Vento*** "mid-band". Comparing the distinctive judicial functions at first instance and on appeal, the signal advantage which the Tribunal had was the opportunity to assess the Appellant extensively during a lengthy period of substantive hearings and subsequent case management hearings. The Tribunal also had at its disposal the Appellant's formulation of her claims (she was unrepresented) and the multiple letters written by her. We can identify no indications that the Tribunal has committed any material error of law in this aspect of its decision. It has clearly paid careful attention to the relevant evidence and has expressed itself in measured and balanced terms. The threshold to be overcome in order for this ground of appeal to succeed, frequently though unattractively described as that of perversity, is manifestly not satisfied. For the foregoing reasons we dismiss the second ground of appeal.

Omnibus Conclusion

[68] The first ground of appeal succeeds for the reasons given. The second ground of appeal is dismissed. This will entail remittal to a differently constituted tribunal in the terms of a final order to be settled having considered counsel's draft and any further submissions invited by the court. The issue of the costs of this appeal also remains to be finalised.