Appeal No. UKEAT/0092/16/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 4, 5 and 17 January 2017
Judgment handed down on 9 August 2017

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

BMC SOFTWARE LTD — APPELLANT

MS A SHAIKH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS MING-YEE SHIU (of Counsel) Instructed by: CMS Cameron McKenna 78 Cannon Street London EC4N 6AF
For the Respondent	MR ANDREW MacPHAIL (of Counsel) Instructed by: LB Law 123 Honor Oak Park London SE23 3LD

SUMMARY

EQUAL PAY ACT - Material factor defence

EQUALITY ACT 2010

Ground 3A and Paragraph 3 of the Judgment

The ET erred in law by concluding that breach of the sex equality clause amounted to dismissal and therefore was sex discrimination contrary to section 39(2)(c) of the **Equality Act 2010** ("EqA").

The reasoning as to the difference between causes of action under the **Equal Pay Act 1970** ("EPA") and those under the **Sex Discrimination Act 1975** ("SDA") of this Tribunal in **Newcastle upon Tyne City Council v Allan and Others; Degnan and Others v Redcar and Cleveland Borough Council** [2005] ICR 1170; [2005] IRLR 504, namely that a claim under the **SDA** was essentially a claim made in tort, whereas a claim under the **EPA** was essentially a claim in contract (see paragraphs 7 to 13 of the Judgment), applied also to the cognate provisions in the **EqA** and the same separation of remedies as applied in the predecessor legislation is preserved by sections 124 (breach of discrimination provisions) and 132 (breach of an equality clause) **EqA**.

Moreover, the clear division between the **EPA** and the **SDA** (see section 6(8) **SDA**) and, thus, the elimination of any overlap between or of the possibility of duplication of causes of was maintained by section 70 **EqA**. Section 71 **EqA** provided for a cause of action to be available in cases relating to terms as to pay where there was no equality clause but it did not provide any general exception to section 70 **EqA** and it was not a "gateway" for claims of sex discrimination to arise out of breach of a sex equality clause. Put broadly section 70 **EqA** has the effect of making the two statutes mutually exclusive and even though a breach of an

equality clause in the form of a failure to pay a woman the same as a man for like work is plainly a form of sex discrimination, a complainant cannot succeed in both an equal pay claim and a sex discrimination claim respect of that breach.

European Union treaty provisions and legislation do not require section 70 **EqA** to be given a broad interpretation consistent with the prohibition of discrimination on the grounds of gender arising from those treaty provisions and legislation. There is no lacuna in the domestic legislation and the judgment of the Court of Appeal in **Rowstock Ltd v Jessemey** [2014] EWCA Civ 185, [2014] IRLR 368 has no application to the present context. Nor was horizontal direct effect, as sanctioned by paragraphs 44 to 56 of the judgment of the Court of Justice of the European Communities in the case of **Kücükdeveci v Swedex GmbH** [2010] EUECJ C-555/07 and paragraphs 77 to 81 of the judgment of the Court of Appeal in **Benkharbouche v Embassy of the Republic of Sudan; Janah v Libya** [2015] EWCA Civ 33; [2015] IRLR 301 applicable.

Nor was the fact that the Respondent employee could not recover compensation for injury to feelings a reason for dis-applying section 70 **EqA**. There had been no breach of the principle that European Union law requires an effective remedy as established in **Marshall v Southampton and South West Hampshire Area Health Authority (No 2)** [1993] IRLR 445.

Grounds 1 and 2 - Misdirection, Adequacy of Reasons and Perversity

The ET had not misdirected itself but it had failed to explain the conclusions arrived at in relation to the material factor defence and the case was remitted to the same ET for it to state its reasons after hearing further submissions; **CalMac Ferries Ltd v Wallace and McKillop** UKEATS/0014/13/BI, **Skills Development Scotland Co Ltd v Buchanan and Holland**

UKEATS/0042/10/BI and **Bury Metropolitan Borough Council v Hamilton; Sunderland City Council v Brennan** [2011] IRLR 358 considered.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal by the Appellant Employer against the Judgment and Reasons of an Employment Tribunal ("ET"), comprising Employment Judge Robin Lewis, Mrs Brown and Ms Rathbone, sitting at Reading over four days in October 2015 with one further day deliberating in Chambers. The Reserved Judgment and Written Reasons were sent to the parties on 30 October 2015. By them the Employment Tribunal concluded that the Respondent Claimant's equal pay claim, her constructive unfair dismissal claim, her "*claim of discrimination by constructive dismissal under the Equality Act 2010*", and her claim of wrongful dismissal succeeded. Henceforth I will refer to the parties as "Appellant" and "Respondent".

2. I have not found this an easy case. It is factually dense and the argument on the merits took two days. Some of the difficulty has been of my making, by raising what has become ground 3A (see below). This provides some explanation as to why the preparation of this Judgment has been so long delayed. I can only offer my sincerest apologies to the parties for any inconvenience and distress caused by this delay.

3. Nine other claims of direct sex discrimination were either withdrawn or failed. Five were withdrawn[1] and one was confined only to an internal appeal (with the allegations relating to the handling of an internal grievance being withdrawn) after the Respondent had given evidence and two more were withdrawn during closing submissions (see paragraph 9 of the Reasons at page 6 of the Appeal Bundle). The remaining two were considered and dismissed at

[1] In the case of the withdrawal of allegations against her manager Mr Corcoran, the ET describes this as "*a memorable moment in evidence*" - see paragraphs 46 and 47 of the Reasons at page 16 of the Appeal Bundle.

paragraphs 98 to 101 of the Reasons (at page 31 of the Appeal Bundle). There is no cross-appeal against that finding. That being so, normally not even as much of an explanation as is set out above would be necessary on an appeal but in this appeal the Appellant submits these findings are highly relevant to the argument that the ET has erred in its analysis and I need to look at them in even more detail later in this Judgment.

4. At a Preliminary Hearing on 5 July 2016 Her Honour Judge Eady QC permitted the appeal to proceed to a Full Hearing on amended grounds of appeal, which added inadequacy of reasons as a dimension to the first existing ground. She did not, however, permit the existing ground 4 to proceed. It had taken issue with the reasoning at paragraphs 93 and 94 of the Written Reasons. These paragraphs are part of a section of the Written Reasons, which is headed "Unfair dismissal" and which starts at paragraph 81 and ends at paragraph 94. This section of the Written Reasons discusses the claim for "constructive unfair dismissal", which by paragraph 81 is said to have been "*brought under the provisions of section 95(1)(c) of the Employment Rights Act 1996*". This claim is summarised at paragraph 82 as relating to "… [t]*hree broad headings of trust and confidence, …* [t]*he first related to the restructuring exercise and its outcome; the second to the conduct and outcome of the grievance procedure; and the third to the equality clause*". Paragraphs 83 to 92 deal with and dismiss the first two ways in which the "*trust and confidence*" point had been put forward at the ET by the Respondent. There is no cross-appeal and so I need not consider those matters further.

5. But the Respondent succeeded on the third way in which she put her constructive unfair dismissal claim. The ET's reasoning in support of that conclusion is at paragraphs 93 and 94:

> **"93. The third matter upon which the claimant relied was breach of the equality clause. We accept that the claimant, by operation of the Equality Act, had implied into her terms and conditions of employment a statutory equality clause. We accept that upon learning that there appeared to have been breach of the equality clause, the claimant relied upon that as a matter of complaint and grievance.**

> **94. We find that the equality clause lies at the heart of the relationship of trust and confidence between employer and employee. It is fundamental to the relationship, and breach of it is objectively likely to destroy or seriously damage the relationship. Error or misunderstanding by the employer do not amount to proper cause for the breach. The breach was referred to prominently as a material consideration in her resignation letter, and we accept that in so writing, the claimant accurately expressed the considerations which led her to resign. Accordingly, such of the claimant's claim of constructive dismissal as relies upon breach of the statutory equality clause succeeds and is upheld. For avoidance of doubt, we find under this heading that the claim of constructive dismissal succeeds both under the [Employment Rights Act] 1996 and under section 39 of the Equality Act 2010."**

6. By ground 4 of the original grounds of appeal the Appellant sought to challenge the conclusion expressed at paragraph 94 that the breach of a sex equality clause was "*objectively likely to … seriously damage the relationship*" of trust and confidence between employer and employee. HHJ Eady concluded this was not arguable at a Full Hearing and therefore dismissed it. Consequently, ground 4 was dismissed at that stage and ground 5, which challenged the finding of wrongful dismissal, became ground 4.

The First Two Days of the Appeal Hearing

7. The pivotal point of the Reasons is the success of the equal pay claim and the failure of the "*material factor*" defence pursuant to section 69 of the **Equality Act 2010** ("EqA"). Originally this was also the focus of the appeal and is addressed by grounds 1 and 2 of the amended grounds of appeal. In her argument on the first day of the appeal hearing Ms Shiu of counsel, who appeared for the Appellant Employer, both on this appeal and at first instance, accepted that grounds 3 (appeal against the finding of constructive unfair dismissal) and 4 (appeal against the finding of wrongful dismissal) were entirely dependent upon the success or failure grounds 1 and 2. This had been the analysis of HHJ Eady in July 2016 at the Preliminary Hearing (see her Reasons at pages 147 to 149 of the Appeal Bundle). Mr MacPhail of counsel, who appeared on behalf of the Respondent Employee, as he had done at the ET hearing, structured his argument along the same lines. Both presented their respective cases with clarity and economy and I am grateful to them.

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8. So it was common ground throughout the first day of the hearing of this appeal that I need not address questions of (constructive) unfair and wrongful dismissal because grounds 3 and 4 were contingent upon the success or failure of grounds 1 and 2, which challenged the finding there had been a breach of the sex equality clause. Oral submissions on the amended grounds of appeal having been completed in good time on the first day of the hearing I adjourned overnight indicating that I would endeavour to deliver a Judgment late in the morning or in the afternoon of the following day. Whilst considering the matter overnight I became concerned as to whether by paragraph 3 of the Judgment upholding what was said to be a "*claim of discrimination by constructive dismissal under the Equality Act 2010*", the ET had reached a conclusion and made a consequential order it might have had no power to make because of the effect of the provisions of section 70 of the **EqA**. I sent an email to both counsel early the following morning briefly explaining my anxiety and inviting them to attend and make oral submissions on the subject.

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9. At that hearing Ms Shiu applied for permission to re-amend the grounds of appeal. Mr MacPhail opposed that application and I decided that Ms Shiu should submit a draft of her proposed amendments, which, after a short adjournment, she did. I then heard full oral argument as to whether or not to permit an amendment in the form of that draft. For reasons given in an extempore oral Judgment, which has been transcribed, I permitted the amendment and, the Respondent having expressed a preference for further submissions to be made orally, I adjourned the making of further submissions to 17 January 2017, giving appropriate consequential directions. I heard the further submissions on that day.

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10. Therefore, the final scope of this appeal, as expressed in the re-amended grounds of appeal has been as follows:

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i. Did the ET err in law in respect of section 69 **EqA** or are the Reasons given in support of that conclusion inadequate? (ground1)

ii. Was the rejection by the ET of the Appellant's genuine material factor defence perverse? (ground 2)

iii. Can the Respondent succeed on constructive unfair dismissal or on both sex discrimination and constructive unfair dismissal if the equal pay claim fails? (ground 3 as re-amended)

iv. By parity of reasoning does the same apply to wrongful dismissal? (ground 4)

v. Did section 70 **EqA** preclude the ET from concluding that the constructive dismissal arising out of the breach of an equality clause gives rise to sex discrimination? (ground 3A, introduced by way of re-amendment).

11. To summarise what might be an overlong introduction, grounds 1 and 2 had formed the subject matter of the submissions on 4 January 2017. Ground 3, as amended, new ground 3A and ground 4 were the focus of the hearing on 17 January 2017. Before considering any of them I need to summarise the ET's Reasons.

The Reasons - The Facts

12. The Reasons address liability only and do not deal with any aspect of compensation (see paragraph 17 at page 8 of the Appeal Bundle). The Reasons also contain a somewhat long introduction dealing with procedural history between paragraphs 1 and 7, with amendments between paragraphs 9 and 13, with other case management matters between paragraphs 14 and 18 and with what are called "*General observations*" between paragraphs 19 and 23. I may need to come back to some aspects of these paragraphs later but for the time being I can put them to one side.

13. What follows is a summary of the ET's detailed factual analysis between paragraphs 24 and 65.21 (see pages 9 to 24 of the Appeal Bundle). The Respondent started to work for the Appellant in 2004. It is the UK subsidiary of an American corporation and sells IT products and markets its IT services globally. She worked in sales, which the ET found to be a "*demanding, and at times tough*" environment (see paragraph 29 of the Reasons at page 10 of the Appeal Bundle). But the ET did not accept that "*there was a section within the respondent which operated in a manner hostile to female staff*" (see paragraph 30 of the Reasons also at page 10). The ET also found that whilst "*numerical success was very important*" and "*successful sales attainment against target was necessary to progression*" it was "*by no means sufficient*" for advancement (paragraph 33 of the Reasons at page 11 of the Appeal Bundle). It also found that the Respondent's perspective was mainly focused upon herself and that she had "*limited perception of the bigger picture*" (see paragraph 34 of the Reasons also at page 11).

14. The Respondent compared herself to two male colleagues, referred to as "*Mr A*" and "*Mr B*". The ET noted that the Appellant's approach at the hearing was that the Respondent (paragraph 36 of the Reasons at pages 11 and 12 of the Appeal Bundle):

> **"36. … was a successful and valued colleague, of whom we heard no criticism, and whose contribution to the respondent was valued, such that the respondent did not want to lose her from its workforce and did not welcome her resignation. …"**

Likewise, there was "*no personal or professional criticism of either Mr A or Mr B*" (see the same paragraph). The Respondent is recorded as having been "*Channel Account Manager*" until April 2007, "*Account Manager*" from May 2007 until June 2010 and after that "*Account Manager - MSM*". Her basic pay in July 2013 was £60,000.00. The records disclosed that two of her pay rises had been described as "*merit*" (see paragraph 38 of the Reasons at page 12 of the Appeal Bundle).

15. "*Mr B*" had the longest service. It seems likely he was employed before 2001 but he became "*Account Manager Senior*" at the start of that year, "*Account Manager Master*" the following year and "*Account Executive*" at the beginning of 2007. His record showed that he had been awarded "*merit*" increases on four occasions. His basic pay after 2010 was between £60,000.00 and £68,000.00 (see paragraph 40 of the Reasons at pages 12 and 13 of the Appeal Bundle).

16. "*Mr A*" joined the Appellant as an "*Account Manager*" also in about 2004. He became a "*Senior Account Manager*" in 2007 and an "*Account Executive*" in 2008 (see paragraph 39 of the Reasons at page 12 of the Appeal Bundle). There was an element of controversy about the findings at paragraph 39 of the Reasons as to his starting remuneration, which was computed by the deduction of subsequent pay increases, identified from the records. The figure arrived at was £55,000.00. There was also some question mark over whether his basic pay in July 2007 was £65,000.00. I did not understand it to be controversial, however, that by 2010 his basic pay was £75,000.00. The record in his case showed that increases were either on account of "*merit*" or "*merit adjustment*" or "*general promotion*". At paragraph 43.13 of the Reasons (see page 16 of the Appeal Bundle) the ET computed that in respect of the Respondent and her comparators the records disclosed nine references to increases described as being based on "*merit*" and made the following observation:

> **"43.13. … There was no evidence of what that word meant in any of the nine contexts, there was no evidence of any application, assessment, decision or reasoning process, or of the conventional steps which often accompany pay considerations. In the absence of such evidence, it is possible that the word has been used as a record keeping device, merely to say that a pay increase was given to someone who was thought to deserve it."**

17. I should record that the ET was fully aware of the Appellant's contention that taken overall, when bonuses and commissions were included the Respondent's total remuneration was not less than that of her comparators. This had been a controversial aspect of the case and

A the ET ruled that the Respondent was not permitted to resile from a list of issues which confined the issue of equal pay to basic pay and excluded commission earnings. The ET accepted that might be a relevant consideration in relation to the calculation of compensation but otherwise precluded evidence of that from being advanced at the hearing on liability (see paragraphs 10 to 12 of the Reasons at page 6 of the Appeal Bundle).

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18. The ET rejected the Respondent's case that she was of higher status because of the nature of her work selling mainframe computer equipment (see paragraphs 49 to 52 of the Reasons pages 17 and 18 of the Appeal Bundle). The ET also accepted that a ranking exercise of sales personnel, which followed changes brought about by the American parent company to the sales structure (known as "*Project Apollo*"), was conducted on a "*gender - neutral*" basis in "*good faith*" and "*objectively*" by the relevant Vice President, Mr Bullimore (see paragraph 56 of the Reasons at page 18 of the Appeal Bundle).

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19. The Respondent did not welcome this change; the ET described her reaction to the restructure as "*immediately negative*" and she accepted "*that nothing that the respondent could ever have said would have made her do*" the work (see paragraph 62 and 63 of the Reasons at page 20 of the Appeal Bundle). The critical events are summarised by the ET at paragraph 65 of the Reasons (see page 20 of the Appeal Bundle) as follows:

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> **"65. We summarise in outline the events which followed. There was a period of some uncertainty during April, which may have been a reflection of the respondent's tendency not to place human resource decisions in writing. We accept that the claimant may have thought by expressing immediate concern, she may have a way out of the decision. In the course of May, she applied for relocation into a wholly different function within the respondent, for which she was interviewed unsuccessfully. While that application remained a live prospect, the claimant's concerns about the new direction were slightly placed to one side. After the claimant had been told that her application was unsuccessful, she initiated the grievance process, attended a meeting with Mr Corcoran and in due course was told that the grievance had failed. She appealed, and attended a grievance appeal hearing before Mr Harwood. On the day after she was told that her grievance appeal had failed, the claimant resigned with immediate effect …"**

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20. Over the succeeding five pages of the Reasons in subparagraphs of paragraph 65 the ET go into more detail. In view of the above excellent summary I need not go into all of this detail but I think it helpful to emphasise some of it.

21. On 8 May 2014, by email, the Respondent was told that if she had not been successful in her application for an alternative position, then the Appellant would "*look to accept your resignation*". The ET regarded this as "*a reasonable view, reasonably expressed*" (see paragraph 65.3). The Respondent raised a formal grievance on 13 June 2014 by email, part of which related to her very recent discovery that "*Mr A*" had a higher basic pay than she did (see paragraph 65.5). Mr Corcoran, who had been allocated the task of hearing her grievances, "*approached the allegation of unequal pay with scepticism, based in part on unawareness of the legal technicalities*" (see paragraph 65.8). After the grievance hearing Mr Corcoran conducted "*a reasonable enquiry into what he identified as the issues*" (see paragraph 65.11) and his written report dated 8 July 2014, by which he rejected the grievances, was found by the ET to be "*the outcome of a reasonable enquiry, reasonably conducted and represent*[ing] … [his] *good-faith assessment*" and the ET accepted (see paragraph 65.13) that in the report:

> **"65.13. … the section on equal pay … sought to explain differentials in pay between the claimant and Mr A and Mr B on the basis of differences in grading, entry level, and promotions. The fact that we have found those contentions insufficient to make good the material factor defence in law does not prevent them from having represented Mr Corcoran's reasonable opinion at the time. …"**

22. The Respondent appealed and her appeal was heard on 6 August 2014 by Mr Harwood, a Vice President. He rejected the appeal by letter of 2 September 2014, something which the ET found to be a reasonable outcome, although on the question of equal pay the ET regarded his reasoning as "*a bland denial, simply incorporating Mr Corcoran's conclusions*" (see paragraph 65.20). On 3 September 2014 the Respondent sent a letter of resignation raising seven points, including her complaint that she was being paid less than the comparators.

The Reasons - The Law

23. The ET's discussion of the law in the Reasons starts with a recitation of section 69 **EqA** (see paragraph 66 of the Reasons at page 24 of the Appeal Bundle). As was pointed out by HHJ Eady at the Preliminary Hearing, the ET chose to omit some words, making it clear that words had been omitted by a series of dots. Moreover, on the basis that neither side had suggested they were relevant, the ET decided not to refer to either section 69(1)(b) or section 69(2). I propose to set out the whole of subsections (1) and (2) indicating by italics what appears at paragraph 66:

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

24. The ET referred to paragraphs 6, 7 and 16 of the judgment of a division of this Tribunal presided over by the then president, Langstaff J, in the case of **CalMac Ferries Ltd v Wallace and McKillop** UKEATS/0014/13/BI. The ET first quoted a passage from paragraph 7. This too was edited by the ET in the sense that the last sentence was not quoted in full, although, again, the omission was made clear by a series of dots. The full text reads as follows and again I indicate what is to be found at paragraph 67 of the Reasons by italics:

> ***"7. As under the Equality[2] Act 1970, to which the Marshall case related, so to*****[o]*** ***under the Equality Act 2010*** **[d]***o the provisions of sections 65 and 66, taken together, set up a prima facie presumption that the difference between the woman's terms and condition*****[s]*****, where the woman is the claimant, and that of the man's, where the man is the comparator, is due to sex discrimination against the woman. The defence is for the employer to prove under section 69(1). However, if he shows that there is a material factor which, in the words of Lord*** **[Nicholls]****, is genuine and is the cause of the disparity, is material, and does not "involve treating A less favourably because of A's sex", then, by virtue of section 69 (2), it is for A (the claimant) to show that, as a result of the factor identified by the employer, women as a group doing equal work to hers are disadvantaged compared to men doing equal work."**

[2] A very rare solecism in the judgments of Langstaff J; he means the **Equal Pay Act**. The words in square brackets are to correct typographical errors on the part of the ET.

25. The ET then set out a passage from the speech of Lord Nicholls in **Glasgow City Council v Marshall** [2000] ICR 196 (pages 202F-203B), which had been quoted by Langstaff J in paragraph 6 of **CalMac**, albeit that the last sentence, which reads "*Third, that the reason is not 'the difference of sex'*" was omitted. Finally, at paragraph 69 of the Reasons (see page 25 of the Appeal Bundle) the ET set out part of paragraph 16 of **CalMac**. Again, part of the paragraph is omitted, although that is in no sense surprising because it is a long paragraph and devoted to the specific facts of that appeal.

The Reasons - the Findings on the Material Factor Defence

26. The ET made findings about the payment structure at paragraph 43 of the Reasons (the relevant passages are at pages 14 and 15 of the Appeal Bundle). I have already referred above in paragraph 16 of this Judgment to paragraph 43.13 but before turning to the ET's findings on the material factor defence I think it is necessary to highlight some of the other features of paragraph 43 of the Reasons.

27. At paragraph 43.4 the ET concluded that the "*job map*" had no pay bands attached to it and "*therefore did not represent one of the conventional purposes of a grading system, namely that of achieving some kind of equity between individuals carrying out what might appear to be different types of work financially, but which merited equal status and therefore equal terms and conditions, including pay*". Nor was it "*a coherent indicator of status*" (see paragraph 43.5) and "*no system of formal or regular appraisal*" (see paragraph 43.6), and there was "*no formal or regular system of pay review*" (see paragraph 43.7). The system was characterised by the ET as a "*system of ad hoc pay increase*" and an example, in respect of a Ms Nowak, of it being possible for employees to ask for pay increases or managers to suggest pay increases is recorded at paragraph 43.9. There was evidence of regular quarterly meetings of managers and

A the ET accepted that pay increases would have to be justified by a manager to his fellow managers and "*ultimately in budgetary terms*" (see paragraph 43.10). On the other hand increases were not governed by a written procedure or criteria, there was no appeal system and no system of centrally recording such increases (see paragraph 43.11).

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28. I mentioned above at paragraph 12 of this Judgment that the Reasons included introductory passages to which I may need to return. One of these at paragraph 14.1 referred to "*individual email trails relating to decisions affecting the individual pay or employment of the claimant and comparators*". Because such email trails were not included in the hearing bundle the ET indicated that it inferred the Appellant had not "*conduct*[ed] *a reasonable or proportionate search*" for such documents. The ET returned to this at paragraph 43.11 repeating that there had been "*incomplete disclosure*".

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29. Finally, at paragraph 43.12 the ET recorded the acceptance by the witness Ms Phillips, the HR Country Leader, "*that a system such as this was vulnerable to improper use, and that the respondent would have difficulty showing that it had not been improperly used*". Reference was then made to what had been said by Mr Harwood at the grievance appeal hearing that the system of pay increase "*will always blow hot and cold depending on who your manager is*". The ET took that to mean:

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> **"43.12. … that while pay rises could not be in the gift of any individual manager, there might be managers who were more proactive than others in putting forward their direct reports for pay increases. Mr Corcoran for example did not put forward any of Mr A, Mr B or the claimant for a pay increase between 2010 and 2013 and, as stated above, his only direct report in that period who was considered for a pay increase had been put forward by Mr Glover. We do not agree with Mr MacPhail that we should read Mr Harwood's words to mean that the system worked on whim, or arbitrarily."**

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30. In the case of "*Mr A*" the ET understood the material factor defence being advanced by the Appellant to be that he had been promoted to Account Executive. At paragraphs 70 and 71

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A of the Reasons (see pages 25 and 26 of the Appeal Bundle) the ET record what it described as a number of inconsistencies between the account given in the answers to the questionnaire and the salary records. The questionnaire stated that the promotion had been in September 2008 but the only record of a salary increase appears to have been in April 2007 or March 2009. The position of Senior Account Manager did not appear in the job map although the position of Account Manager and Account Executive did. There was no record of the process by which "*Mr A*" was promoted and no record or evidence as to why he had received a pay increase in March 2009. Nor did the evidence explain why, as an Account Executive, which is identified as a grade 10 post on the job map, "*Mr A*" was paid more than the Respondent, who was an Account Manager, which might be classified and paid, according to the job map, anywhere between grades 7 and 11. As a result, at paragraph 73 of the Reasons (see paragraph 26 of the Appeal Bundle), the ET reached this conclusion:

> **"73. We are unable to find that the respondent has discharged the burden of proving that the discrepancy in pay with Mr A from 1 April 2009 onwards was due to his promotion; or that his promotion was material, or that the difference in pay was not attributable to sex and accordingly the defence fails in relation to that matter."**

31. The second material factor defence related to "*Mr B*" and was that it had been necessary to pay a higher salary in order to recruit him. The ET found it extraordinary that the Appellant could not show when "*Mr B*" had commenced employment (see paragraph 74 of the Reasons at page 26 of the Appeal Bundle). There were inconsistent accounts as to when he had actually started and no evidence about that or the circumstances in which he had joined the Appellant. Accordingly, the ET concluded that (see paragraph 77 of the Reasons also page 26):

> **"77. We are unable to find that the respondent has discharged the burden of proving that the discrepancy in pay with Mr B at any time was due to his recruitment (whether that word refers to a starter salary or a transfer salary); or that his recruitment was material, or that the reason[3] in pay was not attributable to sex and accordingly the defence fails in relation to that matter."**

[3] Consistent with the wording of paragraphs 73 and 80 of the Reasons (and with the wording of section 69(1) **EqA**) this should be "difference".

32. In respect of both comparators the Appellant also relied upon "*merit adjustments*" as a material factor defence. But this came into the case by an amendment permitted on the basis that no further evidence would be called on the issue and, in the result, the ET concluded there was no evidence to explain or justify the "*merit adjustments*". In this context also the ET referred back to paragraph 43.13 of the Reasons and on the basis that the Appellant could refer only to the fact that the Respondent and her two comparators had by and large "*been successful performers against quota*" (see paragraph 78 of the Reasons at page 27 of the Appeal Bundle), something which the ET did not accept would "*necessarily*" be the basis for a merit increase, reached this finding at paragraph 80 of the Reasons:

> **"80. We are unable to find that the respondent has discharged the burden of proving that any discrepancy in pay with either comparator at any time was due to any merit increase; or that any merit increase was material, or that the difference in pay was not attributable to sex and accordingly the defence fails in relation to that matter."**

The Reasons - the Findings on Unfair Dismissal and Wrongful Dismissal

33. Having referred to section 95(1)(c) of the **Employment Rights Act 1996** and to the well-known cases of **Western Excavating (ECC) Ltd v Sharp** [1978] IRLR 27 and **Malik v BCCI** [1997] IRLR 462 the ET directed itself that the question was whether the employer had "*conducted itself without proper cause in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee*" and that the issue of constructive dismissal had to be proved objectively. The ET analysed the question of breach of trust and confidence in respect of three discrete matters; the restructuring exercise, the grievance procedure and the equality term. In respect of the first two the ET concluded in paragraphs 83 to 91 of the Reasons at pages 28 to 29 of the Appeal Bundle that there had been no breach.

34. The ET then turned in paragraphs 93 to 94 (set out above at paragraph 5 of this Judgment) to consider equal pay although the ET had already introduced its conclusions by saying in paragraph 92:

> **"92. It seems to us that the right approach is to remind ourselves that the repudiatory breach which we have found (see below) is the failure to pay equal pay. …"**

and the concluded at paragraph 94 "*that the claim of constructive dismissal succeeds both under the* [Employment Rights Act] *1996 and under section 39 of the Equality Act 2010*". Likewise, ET concluded in paragraphs 95 and 96 that the same breach gave rise to a wrongful dismissal.

The Reasons - the Findings on Sex Discrimination

35. By paragraphs 97 to 100 the ET rejected the Respondent's complaints of direct sex discrimination in relation to the grievance appeal and in relation to the rejection of her equal pay complaint. The ET also considered and rejected in paragraph 101 the claim that there had been direct sex discrimination in the allocation of pay grades. In doing so the ET said this:

> **"101. … we consider that we need add to what is stated above only that[4] if we were called upon to consider the application of gradings from the job map as a discrete complaint of discrimination, our conclusion would be that there is no evidence of the purported grading system having been applied to the claimant to any standard or in any manner worse than was applied to actual or hypothetical male comparators."**

Submissions

Ground 1

36. Ms Shiu submitted that in relation to ground 1 the ET had misdirected itself at paragraph 66 of the Reasons by editing section 69 **EqA** in a way that eliminated the vital distinction which the statute draws between discrimination causally based on gender difference and discrimination not based causally on gender difference but having a disproportionate impact on a particular gender group; putting it another way, between direct and indirect

[4] The word "that" seems to a typographical intrusion.

discrimination. Secondly, she submitted that at paragraphs 67 to 69 of the Reasons by looking too rigidly at the **Marshall v Glasgow City Council** case and by reading too much into the judgment in the **CalMac** case the ET had transformed simple issues of genuineness and causation into a detailed forensic examination of the origin and cogency of evidence measured against generalisations as to reasonableness and of normative pay practice.

37. The right approach was that set out at paragraph 14 of the judgment of a division of this Tribunal presided over by the then President, Underhill J, in **Bury Metropolitan Borough Council v Hamilton; Sunderland City Council v Brennan** [2011] IRLR 358. There he set out a structural analysis of what was then the "*genuine material factor*" defence provided by section 1(3) of the **Equal Pay Act 1970** ("EPA"), which I can summarise as:

i. identify the employer's explanation, which the employer must prove, for the differential;

ii. decide whether that explanation is "*tainted with sex*";

iii. as part of deciding ii. above it will also be necessary to decide:

a. whether the differential results from direct discrimination, in which case that will be the end of the matter, or

b. whether the differential results from indirect discrimination, in which case, in order to have a defence, the employer must prove "*that the differential is objectively justified, applying the classic proportionality test*",

c. but, if the explanation is not "*tainted with sex*", then the fact that the employer cannot objectively justify the differential is not a basis for rejecting the defence;

iv. when considering iii. above once the Claimant shows a *prima facie* case of discrimination the burden of proof shifts to the employer to show that there was no discrimination.

Ms Shiu submitted that in relation to iii. and iv. above the ET had gone wrong.

38. Whilst Ms Shiu accepted that under section 69 **EqA** the burden was on the employer to prove that the pay differential was due to a material factor and that the less favourable treatment did not arise because of the gender of the complainant, the way in which the matter had been approached by the ET entirely diminished the very clear evidence, accepted by the ET, that, whatever the imperfections of the system of awarding pay rises, there was no finding the pay system was a sham or a pretence and there was no evidence it was operated either generally, or specifically in the case of the Respondent, on the basis that women were to be paid less than men.

39. There was no finding of sham or pretence in paragraph 42. Indeed, there the ET had identified "*the expectations of the tribunal may not be a material consideration in an equal pay case*", which, she submitted, was something the ET had subsequently gone on to forget. The shortcomings, so far as the ET were concerned, of the system of pay increases, were considered by the ET in paragraphs 43.6 and 43.7 (see page 14 of the Appeal Bundle). But it was never found by the ET this was not genuinely the system adopted by the Appellant. Moreover, at paragraph 56 of the Reasons the ET found that in the ranking exercise undertaken by Mr Bullimore he had acted in good faith. Nor was there any finding of sex discrimination in either paragraph 43.9 or paragraph 43.10; indeed, both demonstrated the contrary.

40. In fact, the ET had found there was no sex discrimination at paragraph 101 of the Reasons (see above at paragraph 35 of this Judgment). That was not surprising because the Respondent had withdrawn allegations of direct discrimination against Mr Corcoran, her line manager (see paragraph 47 of the Reasons at page 16 of the Appeal Bundle). Moreover, he believed that female employees had been successful within the Appellant's pay system and the system was not unfair or discriminatory (see paragraph 65.8 of the Reasons at page 22 of the Appeal Bundle). Nor had the Respondent made any complaints until the restructuring about "*any aspect*" of her employment or about "*remuneration systems*" or that "*she or other women were at a disadvantage*" working for the Appellant (see paragraph 48 of the Reasons also page 16 and paragraph 88 at page 29 of the Appeal Bundle). Above all, it was important to recognise that there was no claim of indirect discrimination. Had there been one it would have been for the Respondent to prove and, if raised, it must have been rejected, having regard to the finding at paragraph 30 of the Reasons (see page 10 of the Appeal Bundle and see above at paragraph 13 of this Judgment where the passage is quoted) that no there was no sectional hostility towards female staff.

41. What this all amounted to, she submitted, was that essentially the ET had adopted the approach of asking whether the system of awarding pay increases was justifiable? The ET had found the system not to be arbitrary or whimsical (see paragraph 43.12 at page 15 of the Appeal Bundle) and accepted that it was subject to some scrutiny (see paragraph 43.10 on the same page) but thought it significant there was a lack of formality and that it might be open to improper use (see paragraphs 43.11 and 43.12 on the same page). It found the expression "*merit*" to be undefined and there was no evidence of what it called "*the conventional steps which often accompany pay considerations*" (see paragraph 43.13 at page 16 of the Appeal Bundle). On analysis, the ET's real criticism was that the system was subjective, the word

"*merit*" being "*used as a record keeping device, merely to say that a pay increase was given to someone who was thought to deserve it*" but that was not a finding of improper use and the Appellant was condemned at paragraph 78 of the Reasons (see page 27 of the Appeal Bundle) because it:

> **"78. … had no evidence to give of what the merit was in any of the increases, why the increase was initiated, by whom, when, how it was considered; and how, why or by whom the decision was reached. …"**

In other words the Appellant had failed to establish a material factor defence because it failed to justify the pay increases. This, Ms Shiu submitted, amounted to deciding the wrong issue. The ET had fallen into the error, identified by Underhill J in the **Bury Metropolitan Borough Council** case, of rejecting the defence because of a failure of objective justification even though sex discrimination had not been proved.

42. In support of that submission she also referred me to the decision of a division of this Tribunal presided over by Lady Smith, **Skills Development Scotland Co Ltd v Buchanan and Holland** UKEATS/0042/10/BI. She described this as a similar case to the instant appeal in the sense that there was no finding of sex discrimination (see paragraph 16 of the judgment) and that the finding appears to have been made as a result of a criticism of the employer's actions in relation to pay (see paragraph 37 of the judgment).

43. Ms Shiu relied on paragraph 41 where Lady Smith pointed out that all sorts of factors might "*be destructive of the genuineness of the employer's explanation*" but that such a finding had to be made and without it unreasonable conduct, which in **Skills Development** was a delay in addressing pay disparity, of itself could not lead to a failure of the material factor defence. Moreover, the error in the **Skills Development** case was the same error as arose in the instant appeal. At paragraph 42 Lady Smith identified it as a failure "*to realise that their findings in*

fact were demonstrative of the Respondent having tendered and their having accepted an explanation which was genuine, material and which was not gender related". This was exactly what had happened in the instant appeal.

44. Alternatively, Ms Shiu submitted that the Reasons were inadequate. The repeated formulation at paragraphs 73, 78 and 80 of the Reasons stated the conclusions reached but not the reasoning by which those conclusions had been reached.

45. Mr MacPhail's argument in response to the submissions made in support of ground 1 started with reliance on the first sentence of paragraph 7 of the judgment of Langstaff J in the case of **CalMac** (quoted above at paragraph 24 of this Judgment). Both in relation to sections 65 to 69 **EqA** and in relation to the predecessor statute, the **EPA**, Parliament had adopted the mechanism of a rebuttable presumption of sex discrimination as a tool to address what might nowadays be called "the gender pay gap". If a woman doing like work, as had been conceded in this case, to a man, was being paid less than the man, then the burden passed to the employer to rebut the presumption that difference arose as a result of gender.

46. In the instant case the Appellant had failed to rebut the presumption or, putting it in the language used by Lord Nicholls in **Marshall v Glasgow City Council**, the Appellant had failed to show that the difference in pay was genuine, material and the cause of the disparity. The Appellant's submissions as to a lack of finding of discrimination were essentially irrelevant. This is what **Marshall v Glasgow City Council** itself had been all about. Unless the Appellant proved that the difference in pay was because of material factors, reliance on which did not involve treating the Respondent less favourably because of her sex, then the material factor defence must fail.

47. Here the Appellant had simply not proved that the difference in pay was due to the factors it had advanced. There was no question of any misdirection; paragraphs 66 to 68 of the Reasons provided an entirely correct self-direction, even though the quotations both from the statute from authority were edited. This had simply been for convenience of presentation and it cannot have resulted in any misdirection. Each of the material factors put forward had been rejected; promotion at paragraph 73, recruitment at paragraph 77 and merit at paragraph 80. Absent any misdirection, these were findings of fact, which could not be interfered with on appeal.

48. Nor was there inadequacy of reasoning in relation to paragraphs 73, 77 and 80 of the Reasons. They were being examined in isolation by the Appellant but when set in the context of the paragraphs preceding the conclusions it was perfectly clear what the reasoning had been. This was an extensive and carefully thought through Decision on the part of the ET, which addressed all relevant considerations.

49. Ms Shiu also advanced an alternative way of looking at ground 1, which was by comparison with the statutory reversal of the burden of proof now enacted in section 136 **EqA**. In **Igen Ltd v Wong and Others** [2005] EWCA Civ 142, [2005] ICR 931, [2005] IRLR 258 the Court of Appeal, in approving the guidelines set out in the judgment of a division of this Tribunal presided over by His Honour Judge Ansell in **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] IRLR 332, accepted that the ET had directed itself correctly that "*unreasonable behaviour was not the same as discriminatory behaviour*" (see paragraph 48 of the judgment). This had to be borne in mind when considering the first guideline (see the Annex following paragraph 78 of the judgment in **Igen v Wong**) and it was part of the perspective confirmed by paragraph 56 of the judgment of the Court of Appeal in the

later case of **Madarassy v Nomura International plc** [2007] EWCA Civ 33, [2007] ICR 867, namely that the "*bare facts of a difference in status and a difference in treatment*" are not "*without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*". But it was precisely this kind of thinking, which had led the ET to the first sentence of paragraph 43.12 (see page 15 of the Appeal Bundle and above at paragraph 29 of this Judgment). This approach wrongly required the Appellant to prove that it had not manipulated the system whereas the Appellant was only required to prove that it had a system, which resulted in the differential and that it was a differential not relating to sex. Paragraph 43 of the Reasons really deals with the potential for unreasonable conduct and the potential for impropriety but not with the reality of how the system operated. The issue was not one of potential for unreasonable conduct or for impropriety but whether the Appellant had behaved unreasonably or improperly and the ET had not made any such finding against the Appellant.

50. Mr MacPhail submitted that this was misconceived. It was not necessary for the ET to conclude that the material factor was a sham or a pretence. The issue was whether the Appellant had proved the material factor defence. The ET had been quite right to conclude it had failed to do so, notwithstanding the absence of any finding that the material put forward by the Appellant was a sham or pretence.

51. The finding of an absence of sex discrimination at paragraph 101 of the Reasons was only the second consideration in relation to section 69 **EqA**. It was a consideration not relevant unless the pay differential resulted from the material factor, the burden of proving which was placed on the Appellant by the statute. Therefore, the reversal of the burden proof pursuant to section 136 **EqA** was irrelevant. What mattered was whether the Appellant had proved on the

balance of probability that promotion, recruitment or merit accounted for the differential in pay. In deciding that the Appellant had not proved these material factors the ET had quite correctly taken account of its finding of a lack of compliance by the Appellant with its disclosure obligations and had been entitled to view the system of pay increases as capable of improper use. It had also been entitled to have regard to the lack of evidence, which the Appellant had been able to produce on the issues of promotion, recruitment and merit. No reasons could be given for the promotion, the evidence about recruitment was vague and nobody had been able to explain what merit meant in the context of any particular pay increase.

Ground 2

52. Ground 2 asserted that the rejection by the ET of the material factor defence was a conclusion not open on the evidence and/or a conclusion that no reasonable Tribunal properly directing itself on the evidence could have reached. There were three material factor defences; the starting salary of "*Mr A*"; the recruitment of "*Mr B*"; the system of "*Merit adjustments*". These were respectively rejected at paragraphs 73, 77 and 80 of the Reasons (see pages 24 and 25 of the Appeal Bundle).

53. Ms Shiu submitted in relation to the starting salary of "*Mr A*" that at paragraphs 38 and 39 of the Reasons the ET had simply got the figures wrong. The figure arrived at by the ET at paragraph 39 as the starting salary of "*Mr A*" was arrived at by a process of subtraction, this was an unnecessary process because the figures were set out in documents that were before the ET and were produced to me as pages S29 and S31 of the Supplementary Bundle. The latter, which relates to the Respondent, shows that as a "new hire" in July 2004 her proposed salary was £4,167 per month. The former shows that in December 2004 as a new hire "*Mr A*" paid £4,166.67 per month. In other words, they were paid the same salary. Page S29 also

A contradicts the factual finding in paragraph 39 that "*Mr A*" was being paid £59,000.00 per annum with effect from July 2006 because the monthly amount of £4,267.50 shown there amounts to £51,210.00 per annum.

B

54. Moreover, the ET had ignored page S30 in dismissing the material factor defence that "*Mr B*" was paid more than the Respondent because he had been paid more on recruitment. He was already being paid more than the starting salaries of "*Mr A*" or the Respondent four years

C before either were recruited.

55. As to "*Merit adjustments*" Ms Shiu relied only on perversity. In this context, she

D repeated her submissions in relation to ground 1 as also supporting the argument that no reasonable Tribunal properly directing itself on that evidence could have reached the conclusion that it did at paragraph 80 of the Reasons. Also ignored by the ET was the fact that the salary

E of "*Mr A*" had overtaken that of "*Mr B*" by 2007, something which demonstrated that the "*Merit adjustments*" system was effective in operation.

56. Mr MacPhail did not accept that the ET had got its figures wrong at paragraphs 38 and

F 39 of the Reasons. He contended that the Appellant was not entitled to take this point without a further amendment to the Notice of Appeal because it was essentially a point not argued before the ET. In any event, it made no difference even if the ET had got their figures wrong. The

G issue was not the starting salaries of the Respondent and "*Mr A*" but an explanation as to why they had diverged so substantially over subsequent years and pages S29 to S31 of the Supplementary Bundle did not help on that issue. He made the same point in relation to the fact

H that "*Mr A's*" salary had overtaken that of "*Mr B*". The issue was not why one had been paid more than the other but why both earned more than the Respondent?

Grounds 3, 3A and 4

57. By the amendment, which I allowed, ground 3 was extended to cover not only constructive dismissal (paragraph 2 of the Judgment) but also discrimination (paragraph 3 of the Judgment) and Ms Shiu's position was the same in relation to both; each was dependent on the validity of paragraph 1 of the Judgment and if this Tribunal allowed the appeal on either ground 1 or ground 2 then it followed the appeal must also succeed in relation to paragraphs 2 and 3 of the Judgment and also in relation to ground 4 (wrongful dismissal). The new ground 3A, which relates only to paragraph 3 of the Judgment, however, was independent of success or failure in relation to ground 1.

58. Her argument in relation to ground 3A was based on sections 70 and 71 **EqA**, provisions which do not appear to have been considered in the Reasons. But it is not surprising that they were not considered because they were never drawn to the attention of the ET.

59. The heading to section 70 is "*Exclusion of sex discrimination provisions*" and it reads as follows:

> **"(1) The relevant sex discrimination provision has no effect in relation to a term of A's that -**
>
> **(a) is modified by, or included by virtue of, a sex equality clause or rule, or**
>
> **(b) would be so modified or included but for section 69 or Part 2 of Schedule 7.**
>
> **(2) Neither of the following is sex discrimination for the purposes of the relevant sex discrimination provision -**
>
> **(a) the inclusion in A's terms of a term that is less favourable as referred to in section 66(2)(a);**
>
> **(b) the failure to include in A's terms a corresponding term as referred to in section 66 (2)(b)."**

Subsection (3) identifies the "*relevant sex discrimination provision*" in relation to "*Employment*" as being section 39(2) **EqA**.

60. The heading to section 71 **EqA** is "*Sex discrimination in relation to contractual pay*" and it reads as follows:

> **"(1) This section applies in relation to a term of the person's work -**
>
> **(a) that relates to pay, but**
>
> **(b) in relation to which a sex equality clause or rule has no effect.**
>
> **(2) The relevant sex discrimination provision (as defined by section 70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of section 13 or 14."**

61. Ms Shiu submitted that it was impossible to read section 70 as doing anything other than precluding a discrimination claim and an equal pay claim arising from the same facts, except in the circumstances defined by section 71(2), namely where direct discrimination could be proved. Ms Shiu also submitted the real point of the section was to ensure that breaches of a sex equality clause would not automatically give rise to an award of compensation for injury to feelings in respect of sex discrimination.

62. She referred me to the decision of the Court of Appeal in **Hosso v European Credit Management Ltd** [2011] EWCA Civ 1589, [2012] IRLR 235. The subject matter of the claim was the unequal grant of share options as between the Claimant and her male colleagues. She brought proceedings under both **EPA** and the **Sex Discrimination Act 1975** ("SDA"), although the latter claim was out of time. By section 6(6) **SDA** the discrimination provisions of section 6(2) did not apply to benefits "*regulated by the woman's contract of employment*". At first instance the Claimant succeeded under the **EPA** but that decision was reversed by this Tribunal on the basis that the share options were not contractual.

63. The Court of Appeal dismissed the appeal and in doing so discussed the concept of regulation by contract. Ms Shiu relied on paragraph 29 of the judgment of Stanley Burnton LJ but essentially that is part of a discussion as to whether the exercise of a discretion conferred by

a contract of employment was "*regulated*" by the contract. Mummery LJ in his judgment at paragraph 41 referred to section 8(5) **SDA**, which might be regarded, at least in part, as a predecessor to section 70 **EqA**, but he did so by way of summary of counsel's submission. Whilst I agree it is arguable he accepted Mr Allen QC was correct to suggest that the effect of the section was that "*contraventions of contractual provisions were for the EPA and complaints of discriminatory non-contractual matters were for the SDA*".

64. Mr MacPhail did not accept that sections 70 and 71 **EqA** led to the conclusion an employee could not pursue both a sex discrimination and an equal pay claim arising out of the same factual context. Although the ET had concluded that there was no direct discrimination that did not preclude a finding of discrimination in relation to the breach of the sex equality clause because the failure to rebut the presumption of gender discrimination inherent in a failure of the material factor defence must mean that there had been gender discrimination.

65. It cannot have been the intention of Parliament to prevent a woman from having an effective remedy if she resigned as a result of discovering that her employer was breaching the terms of a sex equality clause by paying less than a man engaged on like work. The ET had been entirely correct in finding at paragraph 94 of the Reasons (set out in full at paragraph 5 of this Judgment above) "*that the equality clause lies at the heart of the relationship of trust and confidence between employer and employee*" and, in consequence, that the breach of the equality clause resulted not only in a constructively unfair dismissal under the provisions of the **Employment Rights Act 1998** but also, upon resignation, amounted to a dismissal under section 39(2)(c) **EqA**. The key to this, submitted Mr MacPhail, must be section 71(2) **EqA**, which he argued allows claims based on direct discrimination arising from a breach of an equality clause to be brought under section 39 **EqA**.

66. Insofar as section 70 **EqA** might be regarded as inconsistent with this approach then he submitted that I should consider the impact of a variety of European Union treaty provisions and legislation with a view to giving section 70 a broad interpretation consistent with the prohibition of discrimination on the grounds of gender arising from European treaty provisions and legislation. The provisions that he relied upon were what is now Article 157 of the **Treaty on the Functioning of the European Union** ("the principle of equal pay"), what is now Article 19 of the same treaty ("action to combat discrimination"), Article 6 of the **Treaty on the European Union** ("recognition of fundamental human rights - in particular Article 21 of the Charter"), the **Equality Directive** and the **Equal Treatment Directive**. He also relied upon Article 14 of the **ECHR**.

67. He referred me to the judgment of the Court of Appeal in **Rowstock Ltd v Jessemey** [2014] EWCA Civ 185, [2014] IRLR 368 as an example of a lacuna (in that case in section 108(7) **EqA**) being remedied by reference to a broad interpretation consistent with the obligation of the United Kingdom to implement fully the law of the European Union. He urged me to take the same course. Alternatively, he submitted that horizontal direct effect of the provisions referred to above would achieve the same objective, arguing that direct effect was sanctioned by paragraphs 44 to 56 of the judgment of the Court of Justice of the European Communities in the case of **Kücükdeveci v Swedex GmbH** [2010] EUECJ C-555/07 and paragraphs 77 to 81 of the judgment of the Court of Appeal in **Benkharbouche v Embassy of the Republic of Sudan; Janah v Libya** [2015] EWCA Civ 33; [2015] IRLR 301.

68. Mr MacPhail submitted that a reason for dis-applying section 70 **EqA** related to remedy. He reminded me of the principle that European Union law requires an effective remedy as established in **Marshall v Southampton and South West Hampshire Area Health Authority**

(No 2) [1993] IRLR 445. The remedies relating to equal pay, as provided for by section 132 **EqA**, arguably do not provide for the making of an award based on injury to feelings. Accordingly, confining a case of discrimination solely to the equal pay route would leave an employee without any remedy in respect of injury to feelings, such as the Respondent had suffered upon discovering that she was paid less than "*Mr A*" or "*Mr B*". The cases of **Kücükdeveci** and **Benkharbouche**, referred to above, were cases about effective remedy and established that Article 47 of **the Charter of Fundamental Rights of the European Union** has horizontal direct effect.

Discussion and Conclusions

69. Although I am taking it out of chronological sequence, I propose firstly to discuss ground 3A. As I mentioned above, when considering the Appellant's argument in relation to the case of **Hosso**, section 8(5) **SDA** might be thought of as being, at least in part, a predecessor to section 70 **EqA**. Sections 8(2), (3) and (4) **SDA** also mapped out the relationship and the divide between the **EPA** and the **SDA**. But duplication of causes of action was not the issue in **Hosso** and although there was some discussion of demarcation I do not think that case takes matters further in the present context.

70. But the demarcation was emphasised in those statutes by the extent to which remedies differed according to whether the cause of action was under the **EPA** (section 2(1)) or the **SDA** (section 65(1)(b)). This was explained by the then President of this Tribunal, Burton J, in **Newcastle upon Tyne City Council v Allan and Others; Degnan and Others v Redcar and Cleveland Borough Council** [2005] ICR 1170; [2005] IRLR 504 as being attributable to the fact that a claim under the **SDA** was essentially a claim made in (statutory) tort (with section 66(4) expressly providing power to award compensation for injury to feelings), whereas a claim

under the **EPA** was essentially a claim in contract with no similar power to award compensation in relation to injury to feelings (see paragraphs 7 to 13 of the Judgment).

71. Put very broadly those provisions can be described as having had the effect of making the two statutes mutually exclusive. It seems to me that is also the object of section 70 **EqA** and that separation of remedies is preserved by sections 124 (breach of discrimination provisions) and 132 (breach of an equality clause).

72. I can find no precursor to section 71 **EqA** in either the **EPA** or the **SDA**. At first sight, it might seem that sections 70 and 71 are in some way complementary, an impression fostered by the appearance of the phrase "*no effect*" in subsection (1) of both sections. On reflection, however, I think this is not the case; in my view, although both are dealing with contractual terms they have the opposite effect; section 70 **EqA** precludes discrimination provisions from applying to breach of a sex equality clause; section 71 **EqA** includes direct discrimination in respect of terms as to pay in respect of which a sex equality clause is not effective.

73. Section 70(3) **EqA** identifies the "*relevant discrimination provision*" as being, in an employment case, section 39(2) **EqA**, which is the provision rendering discrimination during employment unlawful. By section 39(2)(a) an employer must not discriminate against an employee as to his or her terms of employment. The other paragraphs of subsection 39(2) (i.e. (b) to (d)) do not refer explicitly to "*terms*" but in some circumstances their subject matter may well involve the terms of employment. In any event section 70(3) identifies the "*relevant sex discrimination provision*" as section 39(2) **EqA** and draws no distinction between its component parts. By section 70(1) **EqA** the whole of section 39(2) **EqA** has "*no effect in relation to*" either a term modified by a sex equality clause (section 70(1)(a)) or a term that

A would be modified were it not for the fact that a material factor defence had been established (section 70(1)(b)). To my mind because the provision has "*no effect*", it prevents successful reliance on the employment discrimination provision in section 39(2) **EqA** in circumstances where section 66 **EqA** applies. But not only does the "*relevant discrimination provision*" have no effect, by section 70(2) a less favourable term (section 70(2)(a)) or no term at all (section 70(2)(b)) cannot amount to sex discrimination.

C 74. I need go no further in the instant appeal than to say that in my judgment the meaning of section 70 **EqA** is that although a breach of an equality clause in the form of a failure to pay a woman the same as a man for like work is plainly a form of sex discrimination, a complainant D cannot succeed in both an equal pay claim and the sex discrimination claim respect of that breach. Moreover, although these exclusionary concepts may be rather intricate I think that is the clear meaning of section 70 **EqA**.

E 75. I do not accept Mr MacPhail's argument that section 71(2) **EqA** provides an exception to the exclusionary scope of section 70 **EqA** by allowing claims based on direct discrimination arising from a breach of an equality clause to be brought under section 39 **EqA**. In my view F section 71 **EqA** deals with an altogether different situation to that dealt with by section 70 **EqA**. The latter covers the situation where there is an equality clause but section 71 **EqA** addresses the situation where an equality clause has "*no effect*" in relation to a pay term.

G 76. Unlike section 70, the lack of "*effect*" in section 71 does not arise as a result of the operation of the section but it is a precondition to the operation of the section. Thus section 71 deals with situations where the circumstances set out in section 65 **EqA** are not present and that H has the result that section 66 **EqA** does not have any effect. Put another way, the equality

clause has no effect as there is no "*corresponding term*" because there is no actual comparator. There is little academic commentary that I can find relating to section 71 **EqA** although it is addressed in the Explanatory Notes. I accept Explanatory Notes to a statute are not necessarily an accurate or a reliable guide to statutory interpretation. But where there is little else I think they may be consulted. The Explanatory Note to section 71 **EqA**, gives this example:

> **"An employer tells a female employee "I would pay you more if you were a man" … In the absence of any male comparator the woman cannot bring a claim for breach of an equality clause but she can bring a claim of direct sex discrimination …[5]".**

This seems to me to illustrate the territory covered by section 71 **EqA**. Therefore the section is not an exception to section 70 **EqA** although it does identify circumstances where a sex discrimination claim can arise out of a term of the contract relating to pay. To my mind far from providing a general exception this reinforces the division made by section 70 **EqA** between a remedy under the equal pay provisions and sex discrimination. It only apples where section 70 **EqA** does not and it allows for a sex discrimination claim limited to direct discrimination and based on the "*treatment of the person*".

77. Consequently, I reject Mr MacPhail's argument that section 71 **EqA** unlocks section 70 **EqA**. Nor do I accept the premises upon which Mr MacPhail's broader arguments related to the treaties and directives of the European Union and the provisions of the ECHR are based, namely that there is a lacuna in domestic legislation and/or that it does not provide an effective remedy. Article 4 of the **Equal Treatment Directive** requires the elimination of direct and indirect discrimination on the grounds of sex "*with regard to all aspects and conditions of remuneration*". By Article 17 "*judicial procedures for the enforcement of obligations*" under the Directive must be available to the parties and by Article 18 a Member State must introduce such domestic measures as it determines are necessary:

[5] The words omitted deal with "dual discrimination" arising by virtue of section 14 **EqA**, which I believe has not yet been brought into force.

> **"… to ensure real and effective compensation for the loss and damage sustained by a person injured as a result of discrimination on the grounds of sex, in a way which is persuasive and proportionate to the damage suffered."**

78. I cannot accept that there is any analogy between the circumstances of this appeal and the problem facing the Court of Appeal in **Rowstock v Jessemey**. It does not seem to me there is any basis for saying that the **EqA** has failed to implement fully the terms of the **Equal Treatment Directive**. Accordingly, there is no need to interpret section 70 **EqA** by reference to anything other than the words of the section. As stated above these seem to me to be perfectly clear. Nor can I accept that this case bears any similarities to the problems in the cases of **Kücükdeveci** and **Benkharbouche**, which were essentially about horizontal effect where domestic implementation had not yet taken place. By contrast, the implementation in the laws of the United Kingdom of the **Equal Treatment Directive** and the Treaty obligations, to which it gives effect by detailed legislation, is of long-standing.

79. In my judgment there is also an insuperable difficulty for Mr MacPhail in respect of his argument that the **EqA** does not provide the Respondent with an effective remedy. Article 18 of the **Equal Treatment Directive** gives a considerable measure of discretion to a Member State in determining what is the necessary "*real and effective compensation for the loss and damage sustained by a person injured*". The regime adopted by the United Kingdom of compensating in respect of unequal pay for what is essentially a breach of contract in accordance with its own domestic and long established principles in respect of such compensation and compensating in respective of discrimination in accordance with its rather broader domestic and long established principles in respect of compensation in tort seems to me to be well within the discretion or, as it is sometimes referred to, margin of appreciation, afforded to the United Kingdom by Article 18. It does not seem to me that there is any basis in the circumstances of this case for the argument that the Respondent has not been afforded an

effective remedy. That the remedy might be broader and take in other heads of damage is not the same as the remedy being ineffective.

80. On my interpretation of the relevant provisions of the **EqA** the ET was wrong in law to reach the conclusion that the "constructive dismissal" gave rise to a breach of section 39(2)(c) **EqA** and the appeal on ground 3A of the Notice of Appeal must be allowed. As to disposal this is a pure point of law, which requires no further consideration by the ET and, consistent with paragraph 21 of the judgment of Laws LJ in **Lincoln College v Jafri** [2014] EWCA Civ 449, [2014] ICR 920 is a matter which I can decide without remission. Accordingly, the appeal will be allowed on the basis that the claim of discrimination arising pursuant to section 39(2)(c) **EqA** must be dismissed. I should repeat that this does not affect the judgment that there has been a constructive unfair dismissal. HHJ Eady did not allow that ground of appeal to proceed and nothing I have said can have any bearing on that aspect of the case, although, perhaps, it is a topic on which more might need to be said on some future occasion.

81. Having dealt with the re-amended grounds of appeal I must go back to the amended grounds of appeal. It is common ground that grounds 3 and 4 are entirely dependent on the success or failure of grounds 1 and 2 and so I must concentrate on these.

82. Ground 1 contains a number of different criticisms of the Reasons. The first is that there has been a misdirection. By partial quotation of the statute Ms Shiu submitted that the ET had conflated direct discrimination and indirect discrimination with the result that it was, in effect, requiring objective justification of the factors relied upon by the Appellant. The second is the same, or a very similar, point made in relation to the authorities of **Marshall v Glasgow City Council** and **CalMac**. Ms Shiu argued that ET had concerned itself too much with an

objective analysis of the factors put forward by the Appellant and too little with whether the difference in pay was because of the factors.

83. I agree that caution should be exercised when editing statutory material or passages from authority. I also think it important to understand the context in which the passage quoted from **CalMac** by the ET arises. The issue in **CalMac** was whether the ET had erred by refusing to strike out the Claimants' cases. The premise upon which the Employer/Appellant's argument was based was that the Claimants had accepted that the Appellant had a genuine reason, which had resulted in the disparity, were not arguing this was due to direct discrimination and had not alleged indirect discrimination (see the synopsis of the competing arguments at paragraph 14 of the judgment in **CalMac**).

84. Paragraph 16 of the judgment resolves that issue in favour of the Claimants, the Respondents to the appeal, in the sense their position was that the factor relied upon had not been admitted or accepted by them and, therefore, remained to be proved at the forthcoming hearing. The first part of the paragraph identifies the position of the Claimants as being that they did not accept the reason put forward and were putting **CalMac** to proof of it. But I think it is important to recognise the limitations of the judgment in **CalMac**. This Tribunal was not purporting to lay down any principle but only examining whether the Employment Judge had correctly exercised her discretion.

85. It seems to me that the real significance of **CalMac** is the acceptance that the analysis of the nature of equal pay by Lord Nicholls in **Marshall v Glasgow City Council**, i.e. that unequal treatment in terms of pay or other contractual benefits of a woman by comparison with the man doing like work gives rise to "*a rebuttable presumption of sex discrimination*", has

A inevitably been carried through into the **EqA**. It was this hurdle that the Appellant had to surmount.

B 86. I also agree with Ms Shiu that the ET's reasoning cannot be construed as amounting to a finding of sham, pretence or bad faith on the part of the Appellant. But to my mind Mr MacPhail is right in his submission that whilst a finding of bad faith would be fatal in terms of a material factor defence, such a defence cannot succeed simply because the Appellant acted in C good faith in operating the pay system in the way it did. The second stage of Lord Nicholls' analysis is that the employer must go on to prove that the difference in pay or contractual benefit is due to the factor relied upon. This is emphasised, if emphasis is necessary, by section D 69(6) **EqA**, which explains that "*a factor is not material unless it is a material difference*" between the case of the man and the woman.

E 87. The third aspect of the misdirection or misdirection asserted by ground 1 relates to the reversal of the burden of proof. This stems from the analysis set out at paragraph 14 of the judgment in the **Bury Metropolitan Borough Council** case. Given that section 136(1) **EqA** must relate to all contraventions of the Act, including a breach of an equality clause (see section F 136(4)), I entirely understand why Underhill J included reversal of the burden of proof in the analysis of paragraph 14.

G 88. I cannot accept Mr MacPhail's argument that transfer of the burden of proof is not a relevant consideration. I confess, however, that I have not quite grasped what it adds to the scheme of section 69(1) **EqA**. If unequal pay as between a man and a woman engaged on like H work gives rise to a rebuttable presumption of sex discrimination and section 69(1) **EqA** gives a defence to the employer who can prove that the difference is because of a material factor not

"*tainted by sex*" (I use the shorthand with the same reservations at did Underhill J), then it seems to me that, for most purposes, without any need for recourse to section 136, the same situation will be arrived at in terms of equal pay by the operation of section 69 as applies via section 136 in other species of discrimination.

89. Ms Shiu argued that the absence of any findings as to discrimination in relation to the system of granting pay increases meant that there was no *prima facie* case of discrimination and therefore no burden shifted to the Appellant to disprove discrimination. It seems to me that in cases where a woman engaged on like work with a man is paid at a lesser rate of remuneration the presumption of sex discrimination has already arisen and it can only be displaced by proving a non-discriminatory material factor has caused the difference. Proving good faith on the part of the employer and proving that there is no obvious direct discrimination in general terms will not be enough in many cases. If it was enough I am fearful that there would be a serious danger of the equal pay provisions of the **EqA** being rendered less effective. I do not accept the underlying premise of Ms Shiu's argument on misdirection that once good faith and a general non-discriminatory attitude can be proved then the case will only succeed if there has been indirect discrimination. The fundamental issue in such cases, to my mind, is likely to be whether the factor is material.

90. I do not agree with Ms Shiu that the decision of Lady Smith in **Skills Development Scotland Co Ltd** is in any sense a paradigm. It seems to me to be a case that turned on its own facts. The ET in that case may have been oblivious to the real significance of its findings but that does not seem to me to be inevitably the state of affairs in every case where there is a genuine factor and no obvious general discrimination. To my mind this summarises the factual findings in the instant appeal but tells nothing of the materiality of the factor. In my judgment

this lies at the heart of this appeal before discussing it further I need to consider the other aspect of ground 1.

91. The other error of law relied upon by Ms Shiu was that the ET did not adequately state its reasons for reaching the conclusion that the material difference factor defence had not been made out. In some respects this represents a bridge between ground 1 and ground 2. The critical passages of the Reasons are paragraphs 73, 77 and 80. These state conclusions but not the reasoning process by which the conclusions have been reached.

92. In practical terms, I think it is difficult to reach a conclusion as to ground 1, particularly in relation to the adequacy of reasons, without considering ground 2 even though that complains of conclusions being reached without adequate evidential support and/or perverse conclusions.

93. Ground 2 is something of a miscellany of different aspects of the evidence. Ms Shiu submitted that the ET, having made findings that the Appellant had failed in its obligations as the disclosure and that the Appellant operated a system pay rises that was open to improper use, has failed to explain how those factors are relevant to the conclusions reached. Moreover, these findings are to be set against the other indications that the ET had found this was genuinely the pay rise system, which was operated and was subject to some form of review.

94. Also in ground 2 there is a complaint that the ET has indulged in and exercise in mathematical deduction as to the respecting starting salaries of the Respondent and "*Mr A*" when it was unnecessary to do so because the actual evidence was before the ET. Mr MacPhail suggested this was not a point open to the Appellant but whatever the force of that, it seems to

be very unsatisfactory for an equal pay case to be decided by what is really a process of mathematical guesswork when the actual material is to hand.

95. Then there is the overarching point that the ET has made a number of findings that individual and employees of the Appellant in executive/management positions had not been motivated by direct discrimination. These lead to the conclusion in paragraph 101 of the Reasons.

96. Nevertheless, by itself, I find ground 2 unconvincing. Likewise, I think all but one of the criticisms of misdirection in the ground 1 whilst arguable cannot be sustained. But what does concern me is the repeated mantra of paragraphs 73, 77 and 80 of the Reasons. As I have pointed out above these are really conclusions.

97. Mr MacPhail submitted that it was obvious from the extensive findings made by the ET what the reasoning amounted to. There is considerable force in that submission. The ET clearly state that the Appellant only had itself to blame because it had not produced the necessary exculpatory evidence about its pay rise system and its application in the case of the Respondent and the comparators.

98. But that observation can only carry the Reasons so far. It is not a substitute for a reasoned explanation as to the factors identified by analysis in the judgment of Lord Nicholls in **Marshall v Glasgow City Council**. In respect of all three conclusions (i.e. paragraphs 73, 77 and 80) I am left wondering whether, in each case, the ET has concluded that the explanation put forward by the Appellant was not genuine. The ET has said that the difference in pay was not due to "*Mr A*"'s promotion but it has not said why that is the case (see paragraph 73). It has

said that the pay differential was not due to "*Mr B*"'s recruitment but not why that was so (see paragraph 77). It has said that pay increases were not due to "*merit*" but not why that was so (see paragraph 80). In each case, it is said also that these factors were not material and in respect of all three factors the ET has been unable to say that the difference in pay was not attributable to sex.

99. If the factor was genuine, it is difficult (although I accept that there are differing degrees of difficulty, according to which factor is under consideration) to understand, without further explanation, why the difference in pay is not due to the factor. I think it is particularly difficult to understand, if the pay rise system is genuine, why the difference in pay is not due to the fact that the comparators received "*merit*" increases when the Respondent's did not. Of course, even if the "*merit*" increases were genuine and the discrepancy in pay was due to them, the Appellant might still fail to discharge the burden of proving materiality but the ET needed to explain that finding in order for the Appellant to understand why it had failed to prove material factor defence.

100. I accept that if what the ET meant by the repeated formulation it had not been proved "*the difference in pay was not attributable to sex*" was that aspect of the factor was irrelevant if causation or materiality had not been proved, then that would be unexceptionable. If, on the other hand, the ET had made some specific finding in that respect, then it was bound to articulate it either in the relevant paragraphs or, at least, in some other part of the Reasons, to which those paragraphs could be obviously connected. It is unsatisfactory and confusing that in other parts of the Reasons the opposite findings appear to have been made.

101. In the case of **Vairea v Reed Business Information Ltd** UKEAT/0177/15/BA I explained, in paragraphs 86 to 91 of the judgment, that the more compact Rule 62(5) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (SI No. 2013/1237) had made no difference to the requirement stated by the Court of Appeal in **Meek v City of Birmingham District Council** [1987] IRLR 250 and recapitulated in **Greenwood v NWF Retail Ltd** [2011] UKEAT/0409/09/JOJ, [2011] ICR 896 (one of the familiar authorities of this Tribunal) for the reasoning to be adequately stated so that the parties could understand the outcome of the case. I have come to the conclusion that paragraphs 73, 77 and 80 of the Reasons, even set in the context of a long and careful Decision, do not fulfil that requirement. For that reason only I will allow the appeal on ground 1. Whether or not there has been a misdirection as to law or whether the decision is one that no reasonable Tribunal properly directing itself on the evidence could have arrived at seems to me to be open to question but in the end I have concluded that neither is made out and I will not allow the appeal on those grounds. It also follows that the appeal cannot succeed on grounds 3 and 4.

102. As to disposal, I take the view that this matter should be remitted to the same ET, unless that is not possible, a matter that I would leave to the Regional Employment Judge, for it to state, after hearing submissions from the parties, its reasons for reaching the conclusions at paragraphs 73, 77 and 80 of the present Reasons. Any directions in relation to a further hearing will also be a matter for the Regional Employment Judge.