EMPLOYMENT TRIBUNALS

Claimant: Ms A Morton

Respondents: East Lancashire Hospitals NHS Trust

RESERVED JUDGMENT

Heard at: Manchester **On:** **30 September 2019;1 to 7 October 2019 ; 24 to 26 May 2021; 26 August 2021 (In Chambers)**

Before: Employment Judge Holmes
Mrs J P Byrne
Mrs S Ensell

Representatives
For the claimant: In person
For the respondent: Mrs A Niaz – Dickinson (Counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The claimant was not constructively , and hence not unfairly, dismissed.

2. The claimant's claims of sex discrimination were presented out of time , and it would not be just and equitable to extend time for their presentation. They are dismissed.

3. The claimant's equal pay claim was presented within the relevant time limit.

4. The respondent breached the equality clause in the claimant's contract of employment, and she did not receive equal pay in the period from 24 August 2012 to 16 May 2016.

5. Any remedy to which the claimant is entitled will be considered after the parties have , by **11 April 2022** notified the Tribunal as to whether any further hearing is required, and, if so, what issues the Tribunal will be required to determine, the estimated length of hearing, and dates to avoid.

REASONS

1.By a claim form presented on 3 July 2018 the claimant brought claims of sex discrimination, and for equal pay. She subsequently amended her claims to add a claim of unfair dismissal , in the form of constructive dismissal, the claimant having resigned her employment with the respondent on 27 July 2018, giving and working four weeks notice. That amendment was allowed, and the respondent amended the response accordingly.

2.At a preliminary hearing on 5 December 2018 the Tribunal was satisfied that the claims , as amended , had been identified , and made case management orders for the final hearing, which had been listed for 30 September 2019.

3.At the start of the final day of the hearing , there was an agreed List of Issues, which were identified as :

Sex discrimination – section 13, Equality Act (2010) ("EqA (2010)")

1. Was the Claimant treated less favourably than a hypothetical comparator because of her sex in relation to allegations 1-11 ?

2. Did the Claimant lodge her claim within the time limit specified at section 123(1), EqA (2010)?

3. If not, would it be just and equitable to consider the Claimant's claims under section 123(1)(b), EqA (2010)?

Equal pay, sections 64-66, EqA (2010)

4. Did the band 8a Divisional Accountant role held by the Claimant until 15 May 2016 amount to 'like work' as defined by section 65(2)-(3), EqA (2010) when compared with the roles held by the Claimant's named comparators :

a. Shahid Ahmed
b. Aklaq Hussain; and
c. Michael Pollard?

5. Should the Claimant's contract therefore be modified to include a sex equality clause within the terms of section 66(2), EqA (2010)?

6. Did the Claimant lodge her claim within the time limit specified at section 129(2), EqA (2010), i.e. 6 months from the last day of her appointment as a Divisional Accountant on 15 May 2016?

7. Did the Claimant continue to work within a stable employment relationship after 15 May 2016 in her role as Directorate Manager – Women and Newborn Services or does the Claimant not need to rely on that relationship?

8. If so, was the Claimant's claim accordingly lodged within 6 months beginning with the day on which her stable working relationship ended?

Victimisation, section 27, EqA (2010)

9. Did the grievances that were raised/lodged by the Claimant on 9 November 2015 and 4 September 2017amount to protected acts for the purposes of 27(2) EqA 2010?

10. Did the Claimant suffer a specific detriment(s) because she had done the protected acts ?

(i) A delayed, protracted grievance process.

(ii) Being told by a senior manager to "get some resilience".

(iii) The appointment of an investigating officer who the claimant alleges had obtained an improper promotion.

(iv) The Respondent's HR Director asking the Claimant to meet him in his office the day before the Claimant's grievance appeal hearing and asking the Claimant to drop her appeal as it was unlikely to go anywhere and was potentially a waste of a lot of senior management time.

(v) The claimant being denied promotion opportunities.

11. Did the Claimant lodge her claim within the time limit specified at section 123(1), EqA (2010)?

12. If not, would it be just and equitable to consider the Claimant's claims under section 123(1)(b), EqA (2010)?

Constructive unfair dismissal, section 95(c), Employment Rights Act (1996)

13. Did the Respondent breach the Claimant's trust and confidence as set out within her Schedule of Allegations ?

14. If so did the breach (or breaches) amount to a repudiatory breach of the claimant's contract of employment entitling her to resign without notice?

15. If so, did the Claimant waive any or all of the breaches of her employment contract and/or affirm her employment contract?

16. If not did the claimant resign in response to the fundamental breach of contract?

4.Whilst the issues relating to remedy were identified, the Tribunal has , with the agreement of the parties , only considered liability at this stage. The issue of any ***Polkey*** reduction, however, if it arises will be considered as part of determination of the liability issues.

5.The hearing started on 30 September 2019. Evidence was heard over 6 days until 7 October 2019. The hearing could not be concluded due to flooding at the Tribunal venue. It was accordingly postponed until 24 to 26 May 2021. The Employment Judge did raise with the parties his concerns at the long gap between the first part of the hearing and the resumed hearing (occasioned by unavailability of the Panel, and the effect of the Covid 19 pandemic) but both wished to proceed. The parties prepared a draft Aide Memoire to assist the Tribunal, but, perhaps as a consequence of the claimant being unrepresented, this turned into a contentious, rather than an agreed, document, so its utility was somewhat diminished. Accordingly , on 24 , 25 and 26 May 2021 further evidence was heard, and closing submissions were made. Mrs Niaz - Dickinson had prepared written submissions, and spoke to these. The claimant had also prepared written submissions, and was content to rely solely upon these. The final part of the hearing was held partly with CVP participation.

6. The Tribunal convened in Chambers on 26 and 27 August 2021 to commence its deliberations. Judgment is now given, with the Tribunal's apologies for the delay, occasioned in part by pressure of judicial business, in part by restricted access to judicial premises and resources, and in part by technological issues. A further slight hindrance has been the omission of the number "2" from the case number in many of the documents and communications with the Tribunal, which has led to instances where file and document retrieval has been delayed.

7.The claimant was unrepresented , and the respondent was represented by Mrs Niaz – Dickinson of counsel. The claimant gave evidence and called Vanessa Wilson as her witness. For the respondent, Jonathan Wood, Neil Berry, Michelle Brown, Charlotte Henson, Akhlaq Hussain , and Kevin Moynes gave evidence. Although witness statements from Peter Dales and Michael Potter was produced to the Tribunal, these witnesses were not called to give live evidence. There was an agreed bundle, and a draft Chronology (not in the bundle).

8.Having heard the witnesses, read the documents and considered the submissions of both parties, the Tribunal unanimously finds the following relevant facts:

8.1 The claimant (formerly Adele Ryan) was first employed by the respondent as a Divisional Accountant for the Medical Division in January 2007. The claimant's offer letter dated 2 February 2007 is at pages 73 to 74 of the bundle, and a Statement of terms and Conditions of Employment is at pages 75 to 78 of the bundle, signed and dated by the claimant 25 October 2007. The post was at the time a temporary one for 12 months. The respondent operates pay bands for its employees in the Finance Division. The lower band was set at band 7, then there were bands 8a and 8b. The claimant was a band 8a. During her employment the claimant worked in some roles on an interim basis, for example, as a band 8b Financial Controller between October 2008 and November 2009.

8.2 In 2011 the claimant became pregnant, her baby being due in September 2011. Her maternity leave commenced on 16 September 2011. By this time her employment had become permanent, and she was working still as a Divisional Accountant. There seems some lack of clarity as to which Division she was employed in, as she was originally employed in the Medicine Division, but is also described as working for "Corporate Services". In her last Personal Development Review ("PDR") before her

maternity leave started in September 2011, held on 25 August 2011 with Charlotte Henson, the claimant expressed frustration and lack of satisfaction with the role she had been put into, working with Estates and Facilities, where she felt isolated and under- motivated. She expressed the desire, upon her return from maternity leave to be put into a more valued position, to advance her career, which she felt had come to a bit of a standstill (page 86 of the bundle)

8.3 In 2011 , at that time , the structure of the Finance Department was that the Divisional Accountants reported to both the Chief Management Accountant, Charlotte Henson, and their respective Senior Divisional Accountant. In October 2011, whilst the claimant was on maternity leave , a restructure of the Finance Department was proposed. A Consultation Paper dated October 2011 was produced (pages 143 to 152 of the bundle). A copy was sent to her by Susan Hargreaves, Head of Finance , along with a copy of the job description for the Divisional Accountant band 8a role that the claimant held (pages 115 to 124 of the bundle).

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

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

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

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

8.8 Jonathan Wood had claimed that the complexity of the Medical Division changed due to the majority of Community services transferring into that Division. The claimant challenged this, in relation to the transfer and merging of the divisions, and put to him that Community was a standalone Division in 2012 , which did not merge until 2014/15. He and the respondent's other witnesses accepted this.

8.9 Against this background the structure of the respondent was reviewed. As a result the Surgery Division became the Surgical and Anaesthetic Services ("SAS") Division, the Diagnostic and Treatment services Division became the Diagnostic and Clinical Services ("DCS") Division, and a new Division, the Community Services Division, was created. The existing Divisions remained.

8.10 The Finance Senior Management Team under the Chief Management Accountant, Charlotte Henson, in early 2012 , reviewed the Finance Department structure. It was decided that the Senior Divisional Accountant role , as it then was, was too broad to be effective in supporting the Chief Management Accountant, and would be removed. Given the changes , and the impact on the SAS and Medicine Divisions, the view was taken that in the case of these two Divisions, a new SDA role would be created. This would, in the view of the Senior Management Team require a senior experienced accountant with a more strategic remit. A Job Description and Person Specification for these two new posts was produced (pages 595 to 618 of the bundle). This is unfortunately an undated , or otherwise identified by any reference to when it was created, document.

8.11 Charlotte Henson's view at this time was that the new role would be banded at 8b. She considered that in her experience in NHS finance for 20 years these posts would merit a band 8b. It was not, however, a matter for her to determine, any such new post would have to go through the job evaluation process under Agenda for Change. Consequently she sent the job description for the new role to HR, with an Application for Re-banding on a New Post (pages 165 to 168 of the bundle). The posts were therefore advertised as band 8b posts.

8.12 On 20 March 2012 , whilst the claimant was still on maternity leave, Charlotte Henson sent her an email (page 159 of the bundle) informing her that there was to be a slight change to the structure, in that two band 8b posts were to be created , within the Surgery and Medicine Divisions. A further Consultation Paper was prepared dated March 2021 (pages 154 to 156 of the bundle – the appendices appear not to be included) in which the rationale for this proposal was explained. It was only these two Divisions where this change was to be implemented, Surgery (now Surgery and Anaesthetics – "SAS") and Medicine. On 1 April 2012 a number of services were to move Divisions, creating greater size and complexity for these two Divisions. Further transformational change was anticipated, which would also impact upon these Divisions. The proposal therefore was that a new post at band 8b level , replacing the current band 8a post in each of these Divisions , would be created, and band 7 deputy divisional accountants would support the new band 8b posts. None of this affected the Family Care Division, where the existing post of Divisional Accountant, at band 8a, the band on which the claimant had commenced her maternity leave, was retained.

8.13 It is unclear whether the Consultation Paper was provided to the claimant , but the claimant met with Charlotte Henson on 28 March 2021, and they discussed the changes to the Finance Department , and the new roles. The claimant was asked if she was interested in applying for either of them, but having been off work , she was unsure how she would perform at interview , and did not feel it was the right time to be applying for such a role. The closing date for the applications for the new post (Senior

Divisional Accountant) was 2 April 2012, and the claimant was provided with the link for applications at 16.47 on 28 March 2021 (see page 160 of the bundle). This was after her meeting with Charlotte Henson, and was the result of Charlotte Henson asking that the link be sent to her.

8.14 There were three applicants shortlisted for the posts, Ben Roberts, Shadid Ahmed and Akhlaq Hussain. The posts were not advertised externally, and these applications were received in April 2012.

8.15 After interviews in May 2012, all three candidates were considered appointable. After some discussion, however, it was decided that the Surgical and Anaesthetics post would go to external advert, and hence only the Medical Division role was appointed, the successful candidate being Shahid Ahmed. He was appointed on a 12 months temporary basis. Ben Roberts and Akhlaq Hussain were considered appointable, but were not appointed at that stage.

8.16 Charlotte Henson subsequently received from the Agenda for Change HR department the banding that had been applied to the new post of Senior Divisional Accountant, by letter dated 15 May 2013 (pages 692 to 694 of the bundle), but this was over year later. This was not in accordance with the Procedure provided in the Agenda for Change Job Evaluation Handbook , which requires new jobs to be evaluated before they are advertised, unless the formal approval is given by the HR Department.

8.17 The other post in the SAS Division was filled by an external candidate, Natalie Brock, who was offered the post on 9 July 2012. Both Senior Divisional Accountants were appointed on band 8b.

8.18 There were further changes in July 2012, whilst the claimant was still on maternity leave. Michelle Brown, then Deputy Director of Finance , sent an email to the Finance Department on 17 July 2012 to inform everyone of what were termed “interim finance department arrangements” (page 226 of the bundle, duplicated at page 228). These were made in response to changes in the workload for the Finance Department arising from the respondent’s application for Foundation Trust status, and the requirement for a financial savings plan, known as the Cost Improvement Programme (“CIP”), which coincided with the early start of the maternity leave of the Head of Contracting.

8.19 These new arrangements meant that Ben Roberts, who was the Divisional Accountant in the Family Care Division , would take on a new role, that of Senior Divisional Accountant - Contracting , in the Diagnostics and Clinical Support (“DCS”) Division, and Akhlaq Hussain would be appointed as Commercial Business Manager – CIP , also in the DCS Division. This latter role had been created as an interim role by the Divisional General Manager of the DCS Division, where Akhlaq Hussain was the Divisional Accountant. Both were band 8b appointments, at the point of appointment, and this was subsequently confirmed after the formal banding process had been completed (pages 756 to 770 of the bundle).

8.20 An amendment to contract letter for Akhlaq Hussain was produced (pages 229d to 229e of the bundle) which erroneously refers to his appointment as Senior

Divisional Accountant for the Corporate Division, when he was in fact appointed as Commercial Manager CIP for the DCS Division.

8.21 The claimant asked , in an email to Charlotte Henson, who had asked her to contact her when she had seen the email to discuss her role upon her return from maternity leave, on 17 July 2012 , whether she had missed any opportunities available. Charlotte Henson replied the same day , to the effect that Akhlaq Hussain was moving out of Finance to become a Business Manager, and Ben Roberts was covering the maternity leave of the Head of Contracting (page 225 of the bundle).

8.22 Charlotte Henson decided to appoint Ben Roberts and Akhlaq Hussain into these positions due to Michelle Brown's opinion that they were appointable when interviewed previously for the SDA roles, referred to above.

8.23 The claimant was due to return from maternity leave, and was in discussion with Charlotte Henson as to the role to which she would return. She was offered a role as Divisional Accountant in the Family Division, which by an email of 24 July 2012 (page 227 of the bundle) she accepted, indicating that she was looking forward to this, and was seeking an early start date in August 2012. She had previously indicated that she would like a new role upon her return from maternity leave, as she had felt she was not progressing as she wished in her previous role..

8.24 The claimant duly returned to work, on 24 August 2012, in that role, and Charlotte Henson continued to have PDRs with her. The first one she held since the claimant's return to work was on 1 October 2012 (pages 88 to 93 of the bundle). On her return from maternity leave, the claimant considered that the SDA/DA roles within the clinical divisions were the same. As a clinical divisional accountant, she was the first port of call for any financial issue to the Division she worked in , and she considered that all such accountants :

- Attended the same meetings (Trust wide and Divisional)
- Produced the same work (costings, business cases, forecasting, budget setting)
- Trained budget holders
- Understood and disseminated complex financial information
- engaged with clinicians and the same level of senior managers, among many other tasks

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

8.26 On 27 November 2013, the claimant asked employment services if they could send her a copy of the job banding evaluation report for the band 8b SDA posts, appointed to the previous July. Ben Pirraglia spoke to her via the telephone and told her that there was no banding report. He said that Finance had sent the incorrect forms and as such it had not gone forward for banding. He forwarded her the correct

forms, and asked if she wanted them to be banded, to put the job descriptions on the correct form and reapply for them to be banded.

8.27 From January 2014 for three months, the claimant acted up to a Band 8b role supporting Charlotte Brown as acting Chief Management Accountant , whilst still continuing to cover her role in Family Care. An Amendment to Contract document was produced (page 94 of the bundle) reflecting the claimant's temporary promotion to the band 8b post until 31 March 2014. Her appointment as acting Chief Management Accountant was announced by email from Charlotte Henson on 2 January 2014 (pages 248 and 249 of the bundle). The claimant retained her duties as finance lead in Family Care. On learning of this proposal , Vanessa Wilson , the Divisional General Manager of the Family Care Division raised concerns (in an email of 21 December 2013 , pages 253 and 254 of the bundle) with Michelle Brown that she felt she would lose the claimant , as the role was the same but paid more. She also wanted to know how the claimant's work as DA in that Division would be covered. She also stated that she disagreed with the difference in banding for accountancy support in the Divisions, and was told the senior divisional accountants have corporate responsibilities. She was also told the senior divisional accountants 'went to more meetings'.

8.28 The surgical Divisional Accountant post was advertised again, as Natalie Brockie was moving out of finance into an operational role. The same job description was used.

8.29 The claimant commenced her second maternity leave on 8 October 2014. At the time, she was feeling relieved to leave as she had become quite segregated from Finance. She was based on a completely different site to the main finance team, and found many reasons not to attend finance meetings if she could. Her relationship with Charlotte Henson was strained, and she felt that Michelle Brown did not appreciate her comments or ideas in any meetings. She felt that she was not wanted within the department, despite good feedback she had received from budget holders and senior managers.

8.30 While she was on maternity leave, the claimant suffered with post natal depression. This was not diagnosed until shortly before her return to work, when a health visitor recognised she needed help and she went to the doctor for a referral for counselling. She had suggested anti-depressants, but she did not want to take the drugs. She underwent talking therapies. She became anxious and depressed.

8.31 The claimant returned from maternity leave on 21 August 2015.

8.32 Thereafter the claimant continued to raise issues relating to the differences in banding of the DA and SDA roles. She had a number of one to ones, and meetings with Michelle Henson or Charlotte Brown . She has detailed these in her witness statement and her record of "Informal Meetings" as part of her Statement of Case for her grievance appeal (page 422 of the bundle). In particular, she had a meeting with Michelle Brown on 9 November 2015, in which she again raised the issue of the banding of the SDA roles.

8.33 Whilst the claimant makes claims about what was said in this meeting (there are no notes of it in the bundle) , the Tribunal needs to make no determination of these

matters, other than to record that the claimant maintained her challenge to the banding of the SDA roles, and Charlotte Brown continued to justify the difference on the grounds that the two Divisions to which the SDAs were assigned were more complex and required a higher level of financial support, knowledge, skill and strategic finance input, and had additional duties to support the Chief Management Accountant role.

8.34 Following this meeting Michelle Brown did enquire further into the banding of the SDA roles, by contacting HR, who then had difficulty in locating the banding documentation. Meetings between the claimant and Michelle Brown continued.

8.35 In March 2016 the claimant applied for a new role within the Family Care Division, as Interim Directorate Manager for Women and New Born Services ("WNS"). Whilst still within the Family Care Division, it was a move out of the Finance Department , and was agreed with Vanessa Wilson and Mark Willett, the Divisional General Manager and Divisional Director. After an initial conditional offer, by letter of 26 April 2016 (page 103 of the bundle) she was offered the role of interim Directorate Manager for Women and New Born Services, on a 12 month secondment from the finance team. She was appointed as the Directorate Manager for Women and Newborn Services, paid at an 8b, from 16 May 2016 . Her responsibilities included all areas of business relating to the Women and Newborn Directorate . This letter states that the claimant's employment will be subject to the Agenda for Change terms and conditions of service.

8.36 During this secondment the claimant continued to question the banding of her substantive post as a band 8a. She formally raised this in a letter of 5 December 2016, addressed to Michelle Brown (page 288 of the bundle). She expressed the view that she and the band 8b post holders carried out the same roles in their Divisions. She referred to the job descriptions, which she said were mostly identical, and any additional aspects of the band 8b role were already part of the band 8a role responsibilities. She pointed out that she had been promised the evidence to justify this difference in banding, but this had not been sent to her. She asked that the matter now be formally investigated under the Grievance Policy, suggesting that , as she had raised the issues informally, the Stage 2 of the Policy should apply.

8.37 Michelle Brown's response (with HR advice), sent to the claimant on 15 December 2016 (page 292 of the bundle) was that she had been unable to trace any original evidence relating to the banding of the two posts, and so was resubmitting the posts for evaluation, and would revert back to the claimant when the process had been completed. As the claimant was really complaining about the banding of her substantive role, she should take the matter through the banding appeals process.

8.38 Following the initial 12 month secondment, the claimant was offered and accepted the position in WNS on a permanent basis without the role going back out to recruitment. A letter dated 31st March 2017 confirmed the update to a permanent position (page 104 of the bundle) . This document is another Amendment to Contract document, which states that , the claimant's employment status is being updated to permanent, and confirmation is given of the contracted hours and salary on band 8b. The document goes on to state that all other conditions of service remain as stated on the claimant's existing contract of employment.

8.39 During this period, the banding appeals process was undertaken. The job description for the SDA role was submitted to the job evaluation panel in April 2017 (see pages 696 to 711 of the bundle). The job description is at pages 666 to 670 of the bundle, and the accompanying person specification is at pages 671 to 674.

8.40 The result of this exercise was sent to Akhlaq Hussain, to whom the matter had been allocated as the claimant's last line manager in Finance, on 20 April 2017 (pages 702 and 703 of the bundle). It confirmed the banding of the SDA post at band 8b.

8.41 A meeting was held between the claimant and Akhlaq Hussain on 8 May 2017, Lynn Waddicor from HR was present, and the claimant was accompanied by Catherine Simm. The notes of the meeting are at pages 303 to 305 of the bundle. In essence the claimant continued to make the case that the two roles were the same, and should be banded the same. She highlighted the similarity of the job descriptions. She was asked if she was seeking re-banding of the 8a role, which she said she was not. To that extent the claimant was not complaining that her role was incorrectly banded, but that the SDA role was. She asked what differences there were between the two roles, and Akhlaq Hussain said that there were differences in line management, and the complexity of the transformation work that the Divisions in question required. The claimant came back to the job descriptions for each role , and asked where these differences were reflected in them. It was agreed that there would be a further meeting to discuss the matter.

8.42 There was further email traffic between the claimant and Akhlaq Hussain in May and June 2017 about the next meeting. One point of discussion was the date from which, if the claimant's contentions were accepted, she should have been paid at the higher rate applicable to band 8b. She suggested the start of her maternity leave on 24 August 2012, but she made the point that she was not grieving that her job had been incorrectly banded, but that others had been paid more for doing the same job.

8.43 A further meeting was held on 22 June 2017 between the claimant and Akhlaq Hussain. No notes of this meeting appear in the bundle.

8.44 Akhlaq Hussain sought HR advice following the meeting, and then on 23 June 2017 sent the claimant an email (pages 310 and 311 of the bundle). This was his outcome of the grievance that the claimant had raised. In the email, he said this:

"The role you have been undertaking was the Divisional Accountant for Family Care, and that role has been banded at a Band 8a and as we have discussed and we both agreed that the role is appropriately remunerated at Band 8a. And as such there is no need to update the job description and request a re-banding as the current job description principally reflects the role and duties undertaken. Where some of the wording and processes might have become dated, this does not in any way change the fundamental duties performed by the Divisional Accountant nor affect the banding of the role.

The concern you raised around the banding of the Senior Divisional Accountant and the Divisional Accountant being different when you feel they carry out the same role in the divisions and this is based on differences [sc. "not"] being accurately reflected in

the respective job descriptions. As I have explained previously there are differences in the two roles, these namely are:

- *Line Management of an Assistant / Divisional Accountant*
- *Deputising for Senior Divisional Accountant and Assistant Director of Finance at Trust Meetings*
- *Representing Finance at the Transformational Programme Boards*
- *Even though all the Divisional Accountants are support the divisions in formulating business cases and service developments, the business cases and service developments in ICG and SAS are more complex and have more interdependencies across the organisation and health economy when compared to business cases and service developments in the other divisions*

However, even though the role of Senior Divisional Accountant may not have been fully articulated in the Job Description, that is not a reason to suggest that your role as Divisional Accountant is therefore the same as the Senior Divisional Accountant and per se you should have been remunerated at a Band 8b.

It is Michelle's understanding that this is still in the informal process and therefore is not in the formal grievance process."

8.45 The claimant did not accept this outcome, and by email of 7 July 2017 she requested that the matter be taken to the second formal grievance stage (page 312 of the bundle).She also expressed her concern that she had not been able to discuss any other matters she wished to grieve about (i.e apart from the banding issues) with Akhlaq Hussain.

8.46 By letter of 19 July 2017 (page 319 of the bundle) Michelle Brown responded to the claimant (referring to an email from her of 10 July 2017 which does not appear to be in the bundle). She explained how she had considered the issues raised were banding issues, which she believed had been addressed. She acknowledged that there may have been some miscommunication, and that the claimant wished to progress her grievances. She invited her to specify the nature of the issues she wished to raise , against whom, and what her desired outcome would be.

8.47 The claimant by letter of 4 September 2017 (pages 319a and 319b of the bundle) duly responded, saying this:

"To ensure clarity for everyone, my concerns were and remain:

There has been a lack of process followed within finance for many years, with favoured members of staff receiving roles that have not been advertised nor discussed with other members of the department. These include:

o The opportunities AH and BR were given at Band 8b following not being successful at interview for the 'Senior Divisional Accountant' roles

o The role of Band 8c Assistant Director of Finance that CH was 'moved sideways' into,despite the fact that her substantive role was a Band 8b

o The medical division accountant role that Akhlaq was moved into, despite less than 18 months earlier he had failed at interview for

- The Senior Divisional Accountant roles that did not go through a banding process were introduced while I was on maternity leave and I was not consulted with properly. The roles within those divisions did not change - there was no additional responsibility, no difference in the experience level or levels of working autonomously and no difference that I could see (nor were adequately explained despite asking on a number of occasions) between those roles and that of my own in another clinical division

With respect to the latter, my main concern wasn't that the role hadn't been banded - it was that other members of staff have been paid more to do the same job. The job descriptions are virtually identical and the reason I agreed to the roles going to panel was that I believed both would go for comparison. Apparently, the reason the SDA role has been more highly banded is due to 'factor 2' scoring higher. I am told this is scored based on the person specification, which in both job descriptions is the same.

I sent the letter as I was not getting a response. You did suggest that this was a banding challenge and should be addressed through the Trust's banding process; however I did not agree and discussed the reasons for this with Lynne Waddicor. She suggested the way forward was to have the roles banded at the next panel and to await the outcome. In the meantime, Akhlaq Hussain was allocated to deal with this issue, which in my opinion was inappropriate given our previous discussions.

I agree, there have been some mis-communications - in the main due to my concerns not being listened to and the issue being delegated. My request for a second stage grievance hearing was on advice from a HR colleague. I believed I was following the grievance policy when I asked to move my concerns to a more formal setting

In terms of who the grievance is against, I believe it needs to be dealt with by the decision maker, which was yourself. With respect to a satisfactory outcome, I had originally said that I wanted it to be recognised I had been disadvantaged and gain an apology. I have never been offered an apology, even following agreement that process had not been followed. This issue has been avoided for too long and I feel my confidence, and hence career, have taken a backward step. Given all three of the male accountants were uplifted a band, with no process for two of them, no banded job description for the third and no clear criteria for the role being different to the one I had in Family Care for over 4 years, the outcome I would like is to have my pay uplifted from the time I came back in 2012."

8.48 The claimant's grievance was allocated to Jonathan Wood, Director of Finance. Michelle Brown informed the claimant of how the process (now described as a "grievance appeal") would be taken forward by letter of 19 September 2017 (page 320 of the bundle).

8.49 By letter of 25 September 2017 Jonathan Wood informed the claimant of the arrangements for the hearing of the claimant's grievance on 23 October 2017 (page 372 of the bundle).

8.50 Michelle Brown compiled the management Statement of Case for this grievance hearing. It is at pages 321 to 325 of the bundle, and includes some 15 Appendices to be found (save where they duplicate other documents elsewhere in the bundle) at pages 328 to 371 of the bundle.

8.51 The grievance hearing was held on 23 October 2017. The notes of the hearing are at pages 376 to 381 of the bundle. The claimant was represented by Catherine Simm, Michelle Brown, supported by Lynne Waddicor of HR, represented the management side, and Jonathan Wood was supported by David Smithson of HR.

8.52 Jonathan Wood did not announce his decision at the end of the meeting, but considered the matters raised, and then wrote to the claimant with his outcome on 24 October 2017 (pages 382 to 384 of the bundle). In his letter he said this:

"You helpfully summarised your grievance. In summary your grievance is:

1. You do not recognise the differential in pay band between the Divisional Accountant (8a) and the Senior Divisional Accountant (8b). You contest that the duties and responsibilities for both roles are equal and therefore both roles should attract the same pay. Therefore you were seeking to be paid at 8b from August 2012.

2. You consider there to have been a lack of process in relation to a number of appointments in the Finance Team and that you were denied opportunities to apply for certain roles.

You and Catherine outlined your case. You relied on the job descriptions for both roles and pointed out to the panel that, in your opinion, there wasn't sufficient difference to merit a disparity in pay band. You stated that in your belief, the levels of responsibilities for both roles were the same. You went on to describe your concerns about the recruitment processes in relation to the Head of Contracting and to the Senior Divisional Accountant in ICG when it became vacant again in August 2013. You were of the view that these opportunities should have been circulated more widely and by not doing so, you were denied an opportunity to apply. However, you did explain that you were given an opportunity to apply for the Senior Divisional Accountant role whilst you were on maternity leave but chose not to do so. Michelle Brown responded to your grievance. She recognised that the job descriptions were very similar and acknowledged that the difference between the roles, that was anticipated when they were created, should have been better described when the 8b job description was developed. Notwithstanding that, Michelle maintained that in practice there was a clear step up in the levels of skills, knowledge and responsibilities required for the 8b role and she had summarised this in her statement of case. Michelle went onto explain the circumstances relating to the appointments to the other posts in the Finance Team. She explained that both of the members of staff who were appointed had been deemed appointable at the original interviews for the Senior Divisional Accountant. On that basis they had been slotted in to the other posts, given they were very similar roles and in the case of the Head of Contracting were very soon after the original interview. Michelle did acknowledge that with hindsight she could have gone back out to advert for the Senior Accountant role in ICG given that one year had passed. Michelle disagreed with your belief that there had been an attempt to deny you an opportunity for promotion within the team and pointed to two separate occasions

where you had been successful in obtaining acting up positions. Lynne Waddicor then explained the processes that took place in relation to the evaluation of the roles in question.

At the conclusion of the meeting you helpfully clarified that you were not contesting that the role of the Divisional Accountant (8a) was incorrectly banded and it was in your view the more senior role that wasn't sufficiently different to merit an 8b. There was a lot of information presented at the meeting and some of the issues date back as far August 2012. Some of the issues are complex and in some cases haven't been, helped by the apparent lack of documentation,, particularly in relation to the job evaluation processes.. However I have carefully considered everything that was presented in reaching my conclusion:

In terms of the role of Senior Divisional Accountant, it was clear there was always an intention to create a more senior role reflective of working in a more complex environment with a requirement for a higher degree of skill, knowledge and experience. You confirmed that you understood this intention and It was on this basis you made the decision not to apply for the role. However I do conclude that this was not adequately described in the job description and whilst the new job description was banded at a higher band, this was more to do with the interpretation of the job evaluation panel rather than the way. the duties, responsibilities and skills required for the role were described. Having said that, it was clear from the information presented that in practice there has been a demonstrative step up in levels of responsibilities, skills, knowledge and experience to enable the post holders to carry out the 8b role. These additional requirements were set put by Michelle in her statement of case, which you agreed were an accurate reflection of what was expected of the role. I have concluded that if these additional elements have been incorporated into the job description at the outset, it would have eliminated any doubt as to the merits of the 8b outcome, and offered a suitable differential between the two roles. Given this, and the fact you stated you were not contesting the 8a banding I'm afraid I cannot uphold your grievance. However, for completeness I will ask Michelle to ensure the 8b job description is updated to take account of the additional elements, resubmitted for evaluation and circulated to everyone so that the differences are visible to all.

In relation to your assertion that you have been denied opportunities to apply for certain roles, I have concluded the following:

When the Senior Divisional Accountant role was first established you were given every opportunity to apply. Whilst I understand the: circumstances which informed your decision, it is clear that the opportunity was shared with you and it was your decision not to apply. Both unsuccessful candidates for this role were deemed appointable. Shortly after the interviews a similar opportunity at the same band became available. In light of the fact there were appointable candidates from, the previous recruitment and that only a few weeks had passed, it was decided to offer this opportunity to them. I have concluded that this was a reasonable course of action given these circumstances. The same approach was taken when the Senior Divisional Accountant in ICG became vacant again in August 2013. In this case it may have been more appropriate for the job to be re-advertised given the time that had passed since the first interview. I will ensure Michelle reviews this to inform recruitment procedures in the future. However, it was clear that despite this you have been given and have

accepted other opportunities to act up when they have arisen. So, taking all this into account I cannot conclude that there has been any attempt to deny you opportunities and do not uphold your grievance."

8.53 To expand upon the reasons, Jonathan Wood's evidence was that he had concluded that there were differences between the roles of SDA and DA. He concluded that there had been a requirement to create more senior roles, by the associated Divisional General Managers, reflective of working in a more complex environment with a requirement for a higher degree of skill, knowledge and experience. This helped to supplement the constraints in the Chief Management Accountant role, to work alongside the Chief Management Accountant and to provide strategic level financial support to the Divisions of Surgery and Medicine. He also concluded that the SDA role, required a step up in levels of responsibility, ability, skills , knowledge and experience.

8.54 Jonathan Wood, however, agreed that the job description for the SDA did not adequately represent the duties of that role, and directed that a new job description be prepared for the SDA role. Precisely when and how this occurred is unclear, there is no papertrail in the bundle which relates to this exercise. Michelle Brown says at para. 87 of her witness statement that she believes the job descriptions were updated and circulated, but there is no evidence of this. It may well be that the version of the job description for the SDA role which was then created was that which was subsequently provided to Michael Potter of MPA Consulting for evaluation in March 2018 , under cover of Lynne Waddicor's email of 20 March 2018 (page 508 of the bundle) as an attachment entitled "Band 8B senior Divisional Accountant Nov 17.docx" (pages 509 to 514 of the bundle) is what was produced, but this is far from clear. This is clearly a later document, as the previous references to the Chief Management Accountant have been removed, as that role had been.

8.55 The claimant did not agree with the grievance outcome, and , as she was advised she could, appealed against it. This appears to have been by email of 7 November 2017, but this is not in the bundle. Her Grounds of Appeal (undated) however, are, at pages 390 to 391 of the bundle. Her appeal, however, was acknowledged by Kevin Moynes, Director of HR and Organisational Development, by letter of 14 November 2017 (page 392 of the bundle) . By a further letter of 20 November 2017, Kevin Moynes informed the claimant of the arrangements for the appeal, which was to be heard on 21 December 2017. The claimant was invited to provide her written Statement of Case by 7 December 2017.

8.56 The claimant did prepare a Statement of Case, which is at pages 419 to 433 of the bundle, which includes a number of attachments at pages 434 to 466 of the bundle. In it she stated that she was not appealing against the findings which related to the recruitment process for the new SDA positions. Whilst she did not accept those findings , she was proceeding solely in respect of the banding issue. Included in her documents for the appeal were two job descriptions for the DA and the SDA roles, and the relevant Person Specifications (pages 437 to 445, and 446 to 455 of the bundle respectively).

8.57 It is to be noted that the version of the job description for the SDA role at pages 446 to 452 of the bundle is slightly different from that which is to be found at (amongst

other places, perhaps) pages 595 to 600, and page 666 to 670 of the bundle, and at pages 509 to 514. That difference , in respect of earlier versions, as far as the Tribunal can discern, is largely accounted for by the inclusion in this version in the claimant's appeal document , at box 2, of an organisational chart entitled "Divisional Support", which does not appear in other, earlier, versions of this document referred to. The text of all the other boxes, however, appears to be identical in all versions.

8.58 At some stage (it is unclear when, probably in preparation for the appeal) the claimant has highlighted the only differences between the job descriptions for the DA and SDA roles, which are that the SDA job description contains these additional requirements:

To take a pro-active role in the division to- ensure the engagement and a thorough understanding of the divisions performance both within the division and the Trust.

The post holder will be responsible for managing members of their team and providing cover as required for the Chief Management Accountant post.

Ensuring Mandates are completed and the schemes are worked through and reconciled.

Ensuring the Budget Setting outputs are a true representation of the division's financial requirements.

Participating in discussions and debates as appropriate.

Report on the SLM position assisting the Managers to understand and use the information that is available.

8.59 The management Statement of Case was prepared on 21 December 2017, pages 467 to 472 of the bundle, to which there were four Appendices, largely comprising material which had been before the previous hearing, and the minutes and outcome thereof.

8.60 Prior to the hearing, Kevin Moynes on 19 December 2017 , by email (page 486 of the bundle) invited the claimant to meet with him. This was to be an informal meeting, to help him understand the case. It was, he told the Tribunal, and was accepted, his normal practice, to meet with each side in the absence of the other in advance of an appeal hearing. His purpose was to clarify the grounds of appeal, and to discuss possible outcomes and resolutions.

8.61 The claimant agreed (also page 486 of the bundle), and said that she was only appealing one aspect of the grievance. She duly attended the meeting, the following day, without any accompanying colleague, although she had been told she could bring one. Kevin Moynes was also unaccompanied, and no notes were taken. The claimant took what Kevin Moynes said in this meeting as an attempt to dissuade her from pursuing the appeal. In terms of what he actually said the Tribunal accepts the claimant's account of that conversation, albeit it accepts that Kevin Moynes was trying to explore if there could be any other way of resolving the issues raised by the claimant , rather than incurring the expense and expending time involved in holding

the appeal. Whether or not he intended her to, the Tribunal accepts that the claimant took his remarks as a discouragement to pursue the appeal, and an indication that he did not consider it had merit.

8.62 The Tribunal is , however, quite satisfied that , whatever the merits or the wisdom of holding such a meeting with the claimant alone, and whatever was said, Kevin Moynes was in no way influenced or motivated by the nature of the matters that were being raised by the claimant in her appeal. It mattered not what type of issues she was raising, he would have had the same meeting, and said the same things, to any other appellant, whatever the subject matter. There was no sex discrimination, nor any victimisation, in what he did.

8.63 The claimant did proceed with the appeal, which was held on 21 December 2017. Kevin Moynes chaired the panel, which consisted of two other members, one from the union side, and one from management. The notes of the appeal are at pages 488 to 489 of the bundle. Vanessa Wilson accompanied the claimant, who called Catherine Simm as her witness. Jonathan Wood, supported by an HR business partner presented the management side.

8.64 When Catherine Simm was called to give evidence in the appeal, she explained how she was a trained evaluator under Agenda for Change. She had previously been with the claimant in meetings. She explained her view that the exercise had not been carried out correctly, and why.

8.65 In Jonathan Wood's presentation he explained that he could see how the claimant had come to feel as she did, and accepted that the process could have been clearer. He explained how the job descriptions done in 2012 and 2017 would have been created by different panels, and that they would not have been prepared by anyone in finance.

8.66 The panel adjourned to consider their decision. They concluded that they cold not do so, however, without further information, in particular:

Could the job description for the Band 8b that was evaluated in 2012 be found?
Could the job description for the Band 8b that was evaluated in 2017 be found?
Were both job descriptions sent to the Quality Assurance panel?

8.67 The panel concluded that there was some lack of clarity on the processes followed. Due to the lack in clarity of the banding process, the apparent similarity of the job descriptions and the fact that Agenda for Change job evaluation was not an exact science, the panel concluded it was appropriate for the accurate and up to date job descriptions for both the Divisional Accountant and SDA role to be sent to an external job evaluation panel. The panel noted that the job descriptions did, on the face of them appear similar, but there were some differences, for example line management. The management side had explained that there were differences during the hearing, however, the significance of the differences was not clear on the face of the job description. As Kevin Moynes was not an expert in the Agenda for Change job evaluation / job matching process, it was agreed during this meeting, that, the prudent action was to get current up-to date job descriptions for both the SDA and Divisional Accountant roles re-evaluated by a single independent source. This would be

undertaken by an independent organisation with no Trust involvement and that whatever the outcome was, the Trust would act upon.

8.68 There was communication during the adjournment between Kevin Moynes, HR and the panel members. By an email dated 12 January 2017 he circulated his draft response to the members of the appeal panel for their comments (page 496). There had been some delay in getting this out to the panel members due to annual leave over the Christmas period. He wrote to the claimant on 12 and 18 January 2017 to keep her updated on this (page 498-500).

8.69 In reply, Carla Ellis , the union side member of the panel expressed concerns , in an email of 12 January 2018 , (page 496 of the bundle) that submitting the roles for further evaluation at this stage may be seen by the claimant as an opportunity for manipulation of the job description to ensure that it met band 8b. Whilst she saw the benefit in this exercise, she made the point that they could not change the facts of the situation when the claimant was in post.

8.70 Whilst Kevin Moynes and his panel considered this would be a useful exercise, it was not, ultimately, considered necessary for it to be carried out before the determination of the claimant's appeal. Hence , on 9 February 2018 he wrote to the claimant with the outcome of her appeal.

"The case has been made more complex due to the time that has passed and the fact that very few of us who are involved in resolving the issue now have any organisational memory around the issues. The whole Afc job evaluation and re-banding process at that time, specifically the paperwork, was far from adequate and certainly not robust. However, based on the Information the panel have received, we are assured that:

• The Senior Divisional Accountant was job matched back in 2012 - it is not entirely clear, but it looks like the post was clustered with a Strategic Management Accountant. There were two panel members that carried out the matching, one manager and one union representative. The result was 8b. We cannot find any evidence of the matching being Quality Assured (QAd) at that time. On 'balance of probability', if it had been QA'd at that time, we would suggest it was likely to have come out again at 8b.

The same role/JD was job matched and QA'd more recently on the 11th April 2017. The matching panel was made up of three individuals including a union representative. Again, the role came out at 8b.

Therefore, The Senior Divisional Accountant role came out at 8b, whether it was assessed some time ago or more recently and was not considered 'the same' as the 8a role. This means, in the panel's view, that all internal processes have been exhausted. The panel did consider the job description for both 8a and 8b to be similar, although there were some additional responsibilities in the 8b role such as line management. As a result the panel recommends that the current and most up to date 8a and 8b JDs are put through the job matching process, independently of the Trust."

8.71 On 20 February 2018 the claimant sent an email to Kevin Moynes, in these terms (page 504 of the bundle):

"(I) am looking at my options with respect to taking this outside of the organisation. Obviously, this is a difficult decision and I have some questions about your letter that if answered may help me:

I asked in the appeal if 'all three jobs' that were new at the same time in 2012 had been matched. Management spoke about the Divisional Accountant for contracting having been matched – not the Senior Divisional Accountant (SDA) role. Was the SDA role matched? You write 'the same role/JD was job matched and QA'd more recently on the 11th April' - you mention the panel for matching. Was the QA panel made up of the same representatives? Or was there an entirely separate panel made up of different representatives on the same day? At the end of the letter, you suggest the 'most up to date 8a and 8b JD's' are sent externally for matching. Can you confirm that these are the JD's that have been used in the last year to recruit to the current jobs, or have new JD's been written and discussed with staff? Will I be informed as to the outcome?"

8.72 Kevin Moynes did not reply to this email. He sought advice from Lynne Waddicor upon it. It appears no one responded to the claimant.

8.73 Kevin Moynes then requested the most recent job descriptions, being the job descriptions amended following the grievance hearing, to be sent out externally and independently job evaluated. The updated job descriptions were sent to MPA consulting, an independent Agenda for Change consultancy service who undertake independent / external job evaluations under the Agenda for Change Job Evaluation handbook. This process was undertaken by Lynne Waddicor who confirmed to him by an email dated 20 March 2018 that the job descriptions had been sent and that a response should be received by 5pm the next day (page 534-535). She received an email from MPA consulting on 21 March 2018 confirming the outcome of this process (page 536 - 554). The outcome of this process was taken forward by Charlotte Henson (page 555-558). This, however, related to the incumbent post – holders, and she did not communicate the results to the claimant.

8.73 The results of the exercise carried out by MPA Consulting are set out in the witness statement of Michael Potter. The job descriptions (including the relevant person specifications) for the DA and SDA roles are at pages 508 to 530 of the bundle. Whilst these documents themselves are undated, the email to which they were attached, and sent by Lynne Waddicor to MPA Consulting on 20 March 2018 , dates them both at "November 2017".

8.74 On 21 March 2018 Michael Potter sent to Lynne Waddicor the results of the banding exercise that had been carried out. It resulted in the DA role being banded at 8a, and the SDA role at 8b. The email in question is at page 536 of the bundle, and the supporting material is at pages 536 to 554 of the bundle.

8.75 The claimant remained in post in WNS, but was off work sick from 2 March 2018. A statement of fitness to work was provided dated 2 March 2018 recording the reason for her absence as "stress at work" (page 105 of the bundle).In her role as Directorate Manager she was required to work closely with the Clinical Director for Women and Newborn Services, Fiona Hamer, together with the Clinical Director for

Neonatology and the Matrons covering these areas as well as the Divisional Director of Nursing and Head of Midwifery for Women and Newborn Services, Angela O'Toole. The role of a Directorate Manager is pivotal to the function of the Directorate. Each Directorate Manager reported to Neil Berry into me as their line manager. It became apparent to him that the working relationships between the claimant and Angela O'Toole were not the best . In time it also became apparent that working relationships between the claimant and Carmel Hindle, Divisional Governance Lead, were not good either, and he worked with the parties concerned to improve these working relationships. He felt that interpersonal relationships here were forming a blocker and emphasised to everyone that they needed to focus on the work required and getting the job done. The claimant was very well regarded , and his experience of her was that she was someone who delivered what was required in the context of a very difficult job.

8.76 A long term sickness review meeting was arranged and took place on 9 April 2018. Neil Berry attended this accompanied by Nicole Howarth, HR Business Partner. The claimant attended and chose not to be accompanied. A note was taken of this meeting , and this was converted into the outcome letter dated 16 April 2018 (pages 559-560 of the bundle).

8.77 In this meeting the claimant explained that, whilst on sick leave, she had bumped into Caroline Cowman (Matron for NICU) and this had put work back in her mind and brought on anxious feelings. Caroline Cowman was a matron in Neonatal ICU at the time. She also referred to the correspondence relating to the grievance appeal process. In this meeting he wanted to stay away from these issues and rather to focus on supporting the claimant in her role as Directorate Manager. and on the issues in hand, being her sickness absence, supporting her back to work and supporting her in her role as Directorate Manager. The claimant stated that she felt her role was pointless. Neil Berry said that he considered the role of Directorate Manager to be crucial and explained this to her. He emphasised her contribution to the Directorate and that this was of critical importance, and discussed practical options for the way forward. In the meeting he suggested that mediation could take place between the claimant and Angela O'Toole, and the claimant said that she would think about this.

8.78 The claimant remained on sickness absence and a further long term sickness review meeting took place on 26 April 2018. Neil Berry was accompanied by Nicole Howarth who took a note and produced the outcome letter dated 8 May 2018 (page 561). This was a much more positive meeting; and the claimant advised that she felt close to wanting to return to work. She reported that she had one more session of counselling and had benefited from the sessions. The claimant raised with Neil Berry the way in which she felt decisions were made within the directorate and more specifically that she felt that Angela O'Toole was undermining her. He make various enquiries with the Clinical Director for the Directorate and the Divisional Medical Director. From his enquiries and experience within the Division, he did not accept that there was a culture as the claimant had described. He could, however, see how specific situations had led to the claimant's perception. To prevent this taking place again, and to support the claimant , he suggested that each individual situation be considered and focused on, on its own merits and basis. In addition he asked that should this situation arise again that the claimant should come straight to him so that they could work through the issue immediately.

8.79 The claimant returned to work on 15 May 2018 and Neil Berry held a return to work meeting with her on this date. His note of this meeting is recorded in the return to work form at pages 562-563 of the bundle.He had a further return to work one to one with the claimant on 17 May 2018. His handwritten note of this meeting is at pages 564-565 of the bundle. The claimant had a phased return to work over four weeks, returning to full time employment in week five. The claimant said she felt undermined with respect to elements of her role, which meant she found it difficult to deliver on aspects of the job description. Neil Berry asked her to work through the job description and describe which elements she found difficult to deliver, and why she felt that way. He sought to identify priorities that she would work and focus on following her return to work , and was keen to support her in these.

8.80 Following the claimant's return to work Neil Berry had regular one to one meetings with her. He held a one to one meeting with the claimant on 23 May 2018 (page 566 of the bundle). The same day, 23 May 2018, the claimant's application for a post with Salford Royal Foundation NHS Trust was acknowledged (page 570b of the bundle). It is unclear when she applied for this post, but it must have been around this time.

8.81 On 31 May 2018 the claimant had a further one to one meeting with Neil Berry (page 567 of the bundle). He had a further meeting on 19 June 2018 (page 568 of the bundle) in which he and the claimant reviewed her job description to focus, on the areas she felt she could not deliver upon and why she felt this was the case. Again he reemphasised to her that her role was of direct and crucial importance to the Directorate we identified priorities for the next three months.

8.82 On 14 June 2018 the claimant received a provisional offer for her new post with Salford. She informed Neil Berry of this , verbally, on or around that date. She said that she did not want to formally resign until she had received a formal unconditional offer. He agreed that we would not process her resignation until she had received the formal job offer.

8.83 On 20 July 2018 the claimant received an unconditional offer of employment from Salford (page 570c of the bundle).

8.84 The claimant formally resigned by a letter dated 23 July 2018 which she sent by email, and is at page 569-570 of the bundle. When the claimant formally submitted her notice she requested that she be allowed to leave early. Neil Berry had discussed this with her prior to receiving her formal resignation letter. He responded to her formal resignation letter by letter at page 572 of the bundle. He agreed that the claimant could leave after serving six weeks' notice, two of these being on annual leave, her contractual notice period was three months under her contract of employment . The letter in the Tribunal bundle is a draft , but is not disputed.

8.85 Following acceptance of the claimant's resignation Neil Berry emailed to formally announce her resignation (page 573 of the bundle) and to thank her for her good work. In his letter acknowledging the claimant's resignation he noted that she had raised some issues with the Directorate and suggested that they had a discussion about these matters. The claimant had two meetings with Neil Berry, on 13 August

and 16 August 2018 (the notes are at pages 581and 582 of the bundle) . In each of them she referred to issue that she was having in the Women and New - born Services Division , and relationships with individuals , particularly Angela O'Toole. She complained that she was being undermined.

8.86 In these meetings the claimant continued to accuse Angela O'Toole of undermining her in her role. She also referred to Helen Donald, who was the matron in gynaecology, who had previously held the role of a Business Manager. The claimant said that she felt Helen was also deliberately undermining her role. Neil Berry asked the claimant to go into and explain the issues in more detail. The claimant and Neil Berry had a final handover meeting on 16 August 2018. Since the claimant's departure the role was advertised and her role has now been appointed to and is a Band 8b.

Findings of fact in respect of the like work issue.

8.87 In her role as Divisional Accountant in the Family Division, the claimant's duties were to:

Attend meetings , Trust wide and Divisional

Produce costings, business cases, forecasting, budget setting

Train budget holders

Understand and disseminate complex financial information

Engage with clinicians and the senior managers, among many other tasks

8.88 The Divisions of Surgery and Medicine were larger in size of headcount and budgets and as a result had more management accounts staff assigned to deliver the work required which was sufficient to deal with the increased workload. These Divisions had always been larger than the Family Care Division. As the budgets were larger, so was the number of staff to deal with the workload. The claimant considered that the type of work was no different and hence, the skills and knowledge required to do the job were no different. In 2012 , however, the Tribunal accepts that there were a number of changes and issues facing the respondent , which did impact, in due course upon the size and complexity of the SAS and Medicine Division, but that did not mean that the Family Care Division where the claimant worked was not facing the same challenges and issues, albeit probably on a smaller scale.

8.89 In her role as DA in the Family Care Division the claimant attended various meeting which were also attended by the new SDAs in the SAS and Medicine Divisions. Her perception was that there was no difference between the work that they were doing, and the work that she was doing.

8.90. The claimant raised these issues in one to one meetings with Charlotte Henson, as referred to above. She was told that their Divisions were larger, and hence more complexity and strategic leadership was required. She was also told that the SDAs had to deputise for Charlotte Henson in her absence, something the claimant did not accept they actually did. Whilst Akhlaq Hussain gave evidence that he did this, he did not provide any detail as to how often this occurred. Shadid Ahmed, another SDA, did not in fact do this, although Natalie Brockie did. Charlotte Henson gave no details of how often this occurred in practice.

8.91 Around 2012, the Divisional General Manager role within Family Care was increased from a Band 8d role to a Band 9 role , to reflect parity across Divisions . The roles were recognised as being the same level, despite the Division being smaller. Also, the overall lead Nurse role within the Division was rebanded from a Band 8b to a Band 8c, again to reflect parity across the divisions.

8.92 The claimant acted up as Chief Management Accountant for the first three months of 2014 . During this period she was unaware of any cover for that role being provided by either of the SDAs.

8.93 Akhlaq Hussain was first appointed as one of the SDAs, initially on a temporary basis, in the Medicine Division, with effect from 1 November 2013 (see pages 234 and 235 of the bundle). In that role he had line management responsibility for the Assistant Divisional Accountant for Medicine, and later, (though when is unclear, given that the Division did not merge into what became the Integrated Care Group until 2014 or 2015), for the Divisional Accountant for Community. There was no evidence before the Tribunal of what this entailed, or how much time , and how frequently, he was engaged in this aspect of the work.

8.94 He left this role, however, on 1 November 2014 when he was appointed the Divisional Accountant for Estate & Facilities and Corporate Services.. Thereafter, in March 2016, he was appointed to the newly created role of Senior Business Accountant.

9. Those then are the relevant material facts found by the Tribunal. It will be appreciated that there are a number of aspects covered in the evidence which the Tribunal has not referred to, as the Tribunal did not consider them relevant to the issues before it. In particular, the Tribunal has not determined the extent to which the respondent did or did not adhere to, or properly apply, the provisions of Agenda for Change in evaluation of the band 8a and 8b post. Whilst the internal grievance process understandably did address these points, and each side has prayed in aid factors from that process which may or may not be of relevance, as will be seen below, the job evaluation processes cast very little light upon the central issue that the Tribunal has to determine for the equal pay claim, i.e whether the claimant was engaged upon like work.

10. Similarly, in view of its findings in respect of compliance with the time limits for the presentation of the sex discrimination claims, and whether time should be extended, the Tribunal has not determined all the factual issues that would have been necessary if those claims could be heard, although it heard a lot of evidence on the merits of those claims.

11. The credibility of the witnesses was not really challenged , though the accuracy and reliability of the evidence given was critical. The Tribunal has found that all the witnesses were honest and gave evidence of the position as they saw it, but, to some extent, they were handicapped in trying to recall detail of events that occurred so long ago, unless the same were well documented. That the respondent’s evidence was could not always be relied upon as accurate can be seen from the way in which the statements initially made by the three of the respondent’s witnesses to the effect that

the Community Division staff and budgets that transferred in 2012 were merged into the Medicine division, hence the complexity of the Division increased, were accepted not actually to be the case. The Community Division came with its own Divisional Accountant and management structure, and was not actually merged until 2014/15. This was conceded, but demonstrates a lack of accuracy on the part of the respondent. There has also been a lack of clarity in the documentation produced by the respondent, especially in relation to various versions of , or iterations of, job descriptions, which have been hard to pin down to specific timescales.

The Submissions.

12. Both parties had prepared substantial closing submissions Mrs Niaz - Dickinson spoke to hers , but the claimant wished to rely upon hers without oral supplementation. It is not intended to rehearse them here, as they are available for examination on the Tribunal file. The respective submissions will be considered in context when the specific issues are examined below.

The Law.

13. The relevant statutory provisions are set out in the Annexe to this judgment. The applicable caselaw has been cited largely in the submissions of both parties, and will be further referred to, where necessary, in the course of this judgment, along with any other relevant authorities which the Tribunal considers germane .

Discussion and Findings.

(A). The Sex Discrimination claims.

14. The claimant brings two types of sex discrimination claims – direct and victimisation . They are:

Direct Sex Discrimination

1. In 2012 when the claimant was absent from work on maternity leave whilst a restructure occurred. Michelle Brown failed to give her an opportunity to apply for a Senior Divisional Accountant role.

2. In 2012 when the claimant was absent on maternity leave whilst a restructure occurred Michelle Brown did not give her the opportunity to apply for the other Senior Divisional Accountant role, a Commercial Business Manager role (for Cross Divisional Savings Programme).

3. In November 2013 the respondent failed to advertise a role for Senior Divisional Accountant, Medicine Division, when it became vacant.

4. In November 2013 the respondent moved sideways into the position of Senior Divisional Accountant a colleague, Mr Akhlaq Hussain, without undergoing a recruitment process. Mr Hussain was slotted at Band 8(B).

5. The claimant raised her concerns informally with Michelle Brown about the failure to notify her of promotional job opportunities when on maternity leave in 2012 and the appointment made in November 2013 at a meeting on 9 November 2015. Ms Brown told the claimant she would liaise with HR and meet with the claimant within one week. She did not meet with the claimant until August 2016 a delay of approximately nine months

6. The respondent appointed a male colleague as an Investigating Officer into her grievance despite the fact that he had achieved one of the promotions about which she had complained (the individual was Mr Akhlaq Hussain).

7. When the claimant raised concerns about Mr Hussain being appointed an Investigating Officer in her grievance the respondent failed to act on her concerns.

8. The respondent failed to provide the claimant with a complete grievance report despite being requested on several occasions.

9. The respondent failed to provide the claimant with an appropriate right of appeal (the claimant had to request a second stage procedure).

10. The HR Director Kevin Moynes asked the claimant to meet him in his office the day before her appeal hearing where he asked her to drop the appeal as it was unlikely to go anywhere and was "potentially a waste a lot of a senior management's time".

11. The panel chair of the appeal hearing Kevin Moynes was not objective and pre-determined the outcome.

12. The claimant relies on a hypothetical male comparator in the same circumstances as herself in relation to each of the above allegations.

<u>Victimisation (Section 27 Equality Act 2010)</u>

1. The claimant made a grievance against the Trust for not sharing recruitment opportunities, not following recruitment procedures, failure to ensure the posts were put through the trust banding process and allowing different payments to staff doing the same role. As a result the Trust took several negative actions that the Claimant views as victimisation;

a. Delayed protracted grievance process - 6 years
b. The claimant was told by senior management to 'gain some resilience'.
c. The investigating officer appointment was the person that obtained the promotion improperly
d. HR Director Kevin Moynes asked the claimant to meet him in his office the day before her appeal hearing where he asked her to drop the appeal as it was unlikely to go anywhere and was "potentially a waste a lot of a senior management's time".
e. As a direct result of all of the above the Claimant was denied promotional opportunities.

2. This denial of promotion the Claimant believed amounts to victimisation.

Discussion and findings – were the sex discrimination claims presented within time, and if not, should the Tribunal extend time for their presentation on the basis that it would be just and equitable to do so?

15. The respondent submits, correctly, that the last act of discrimination relied upon by the claimant relates to the grievance appeal decision of Kevin Moynes on 9 February 2018 (page 502 of the bundle). The claimant lodged her claim on 3 July 2018, having obtained her early conciliation certificate on 4 June 2018. She started early conciliation on 4 May 2018. That was within the three month period running from 9 February 2018, and during that period the primary limitation period would have expired on 9 May 2018. That accordingly brought into operation the "stop the clock" provisions, so that the conciliation of 4 May to 4 June 2018 would not run for the purposes of calculation of the limitation period. That period of one month would then be added to the end of the conciliation period, so that the new limitation period would expire on 4 July 2018. The claimant presented her claims on 3 July 2018, one day within that extended period, and hence her claim, at least in respect of the last act of alleged discrimination, was presented within time.

16. That, however, does not mean that all her preceding discrimination claims would be in time. For them to be so, the claimant would have to establish that the matters she complains of amounted to conduct extending over a period of time, so as to fall within s.123(6) of the Equality Act 2010.

17. It will be appreciated therefore, that if her final alleged act of discrimination, the only one in respect of which her claims were presented within time, is found not to be an act of discrimination, the claimant has no in - time discrimination claims upon which to base her preceding, out of time claims, on the basis of conduct extending over a period of time. It is also important to focus upon the nature of the one in - time claim that the claimant makes. It is the outcome of the grievance appeal. It is not the meeting that she had with Kevin Moynes before the appeal hearing. That was on 20 December 2017, and hence, whilst that is also one of the claims the claimant seeks to make, it is clearly well out of time.

18. It is therefore necessary, in order to determine the time limit issues for all the sex discrimination claims (but not the unfair dismissal or equal pay claims, where different time limits apply) for the Tribunal to determine whether the one in - time claim was or was not an act of sex discrimination.

19. The claimant's complaint about the outcome, apart from the delay in it being provided to her, is that it was an act of victimisation, i.e it was unfavourable treatment <u>because</u> she had raised a grievance relating to equal pay, or sex discrimination. With all due respect to the claimant, this confuses the circumstances of the unfavourable treatment with the reasons for it. Obviously, the very fact that the claimant was appealing a grievance in which she had raised issues of equal pay and sex discrimination means that those issues had a connection to the subsequent unfavourable treatment of the appeal being rejected. To that extent, but for her grievance, the treatment would not have occurred. That is, however, not the correct test. The nature of the grievance under appeal does not make its rejection an act of victimisation, or direct discrimination. What the claimant needs to show , at least to

raise a prima facie case, is that the appeal was rejected because it was in relation to these issues. In other words, the Tribunal has to ask would the appeal have been allowed if it did not relate to these issues ? The Tribunal can see no basis for so finding. The claimant disagrees with the outcome, obviously, but it was a reasoned and considered outcome. That it may be wrong does not make it an act of victimisation or direct discrimination.

20. That Kevin Moynes may have been pre-disposed to reject it, and had , in his ill – advised meeting with the claimant, sought to dissuade her from continuing with it, is a matter which we have considered, but we do not consider that this renders the outcome an act of discrimination. The claimant, of course, complains about that meeting, as a separate claim, but we note that Kevin Moynes has such meetings generally, and did not single out the claimant .

21. In short, the outcome of 9 February 2018 was not an act of discrimination, either victimisation or direct discrimination, and that claim fails.

22. That leaves the Tribunal now having to consider the effect of this finding upon the other discrimination claims. These are now out of time, and cannot be rescued by any in - time claim. The claimant accordingly has to invoke the just and equitable extension of time for the Tribunal to consider them.

The just and equitable extension.

23. This raises the issue of whether it would be just and equitable to extend the time for presentation of these claims. In deciding whether to exercise our discretion , we take into account the guidance upon how we should approach this task set out in ***British Coal Corporation v.Keeble [1997] IRLR 336*** , cited by Mrs Niaz – Dickinson in her submissions. In the event that any of the claims as presented, are out of time, the Tribunal has to consider whether to extend time under , on the basis that it would be just and equitable to do so. This discretion, of course, is the same as conferred by several other discrimination statutes, and caselaw has evolved as to how a Tribunal should approach the exercise of its discretion. One of the leading cases is ***Robertson v. Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434*** ,a judgment of the Court of Appeal. Of particular note is the judgment of Auld L J, who made it clear that there was no presumption of extension, but rather the converse was the case, extension was the exception, not the rule, and an out of time claimant had to convince a Tribunal why an extension should be granted.In terms of the principles upon which a Tribunal should approach the exercise of the discretion, the EAT in ***Chohan v. Derby Law Centre [2004] IRLR 685*** endorsed the approach taken in ***British Coal Corporation v. Keeble*** to the effect that Tribunals should consider the factors listed in s.33 of the Limitation Act 1980 , which applies to the exercise of discretion to extend time in personal injury claims before the civil courts. Those factors are:

The length of and reasons for the delay;

The extent to which the cogency of the evidence is likely to be affected by the delay;

The extent to which the party sued had co-operated with any requests for information;

The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;and

The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

24. Those factors, whilst useful, must not, however, be regarded as a checklist, or exhaustive. In ***London Borough of Southwark v. Afolabi [2003] ICR 800*** the Court of Appeal held that the s.33 factors were of utility, but that as long as no significant factor was left out of consideration, a failure to follow the express provisions of s.33 would not be a error of law. In that case, delay of 9 years was, exceptionally, not fatal to the application to extend time.

25. The Tribunal must therefore consider the factors set out in the caselaw above in turn, in relation to each claim that is out of time.

(i).The length of and reasons for the delay.

The length of the delay varies, of course, in respect of each claim. The shortest is in relation to the allegation relating to Kevin Moynes' meeting with the claimant on 20 December 2017. Any claim arising out of that would have to have been presented (subject to any early conciliation extension) by 20 March 2018. The claimant did not go to ACAS until 8 May 2018, and did not present the claims until 3 July 2018, over three months after the expiry of the initial three month time limit.

26. That is a significant period of time, being twice that permitted by the legislation. That, of course, is in relation to the claim arising out of the meeting on 20 December 2017. The claimant's other claims, of course, precede that. They stretch back, in fact, to 2012. A significant factor, the Tribunal considers, is that the matters of which the claimant seeks to complain were historic, and became increasingly so once she had moved out of the Finance Department in May 2016. She grieved, as she was entitled to, but the matters of which she was complaining (in addition to the claim for equal pay) were already stale , and largely academic, by the time she submitted that grievance on 15 September 2017. Thus the period of delay for all of the claims of sex discrimination (direct or victimisation) ranges from three months to six years.

27. In terms of reasons for this delay, the claimant not really advanced any. In her written closing submissions she refers (at point 3) to the time limit issues. Whilst largely addressing the equal pay limit (which is a different consideration) , she makes the point that she went to ACAS within the 3 month time limit, which is correct if one calculates from the grievance appeal outcome , but, for the reasons outlined above, this is not the relevant date. Nowhere in her evidence or her submissions did she really address the reason why she did not bring her Tribunal claims about these matters, as opposed to her equal pay claim, within the initial three month time limit, or , in the case of the very historic claims, much sooner.

28. It is appreciated that the claimant was absent on maternity leave, and that she was also off sick for some of the relevant time periods. In relation to the latter, however, she was absent from 2 March to 15 May 2018 , but did not lodge her claims when she

returned to work , despite seeking early conciliation on 4 May 2018, whilst she was off sick.

29. The claimant grieved, of course, but her grievance related to matters that were already very stale. Awaiting and exhausting an internal grievance procedure is understandable, and a matter that a Tribunal may well take into account in deciding whether to exercise the discretion to extend time, but a claimant who does so really needs then to move with some expedition once the final outcome is known. A further point to bear in mind is that , in relation to the sex discrimination claims as a whole, the claimant did not appeal those matters, she only appealed in respect of the "banding" issue, i.e. the equal pay claim. Thus she had grieved , and had an outcome about all the other issues by 24 October 2017. She only appealed the equal pay element, and got that outcome in February 2018. She did not, however, bring any claims until July 2018.

30. The claimant in her email of 20 February 2018 was clearly contemplating "taking the matter out of the organisation", as she said, but did not do so for another 5 months. The claimant accepted that she was aware of the relevant time limit, and that she knew that referring the matter to ACAS was not the same as starting a Tribunal claim. She is an intelligent and literate woman. She has not, the Tribunal considers, given good reasons for the delay in presenting these claims, particularly in respect of the historic acts of discrimination that she now seeks to advance. It is hard to avoid the conclusion that she only decided to make these historic claims of discrimination once she had decided to leave, and to add them on to her equal pay claim, always her real bone of contention.

ii)The extent to which the cogency of the evidence is likely to be affected by the delay.

31. The Tribunal accepts, as the hearing demonstrated, that this was not a material factor, largely because the matters at issue were well – documented. As has been seen, however, witnesses have had also to rely upon memory, and this has been impeded to some extent by the delay in presenting the claims.

The extent to which the party sued had co-operated with any requests for information.

32. The claimant does not say, nor could she, that she had been unable to present these claims because the respondent failed to supply any information that she had requested from it.

iii)The promptness with which the claimant acted once she knew of the facts giving rise to the cause of action.

33. The claimant did not, in the view of the Tribunal, act with promptness. She was aware of the matters that she alleges amounted to acts of discrimination against her early on, and indeed raised them in her grievance. She did not, however, act promptly to bring any claims in relation to them. By October 2017 she knew the response of the respondent to all her claims, but did not appeal all of those, only the banding issue. Even if she was reasonable in awaiting the outcome of her equal pay appeal before

bringing that claim, on her own case, she had suffered historic discrimination since 2012, and that would not be eliminated or resolved simply by any finding in respect of the banding issues. Yet still she waited before bringing these claims.

iv)The steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action.

34. The claimant has not told the Tribunal of any steps to obtain advice that she took once she knew of the possibility of taking action.

Conclusion on the just and equitable extension.

35. Whilst there has been no , or little, forensic prejudice to the respondent in these out of date claims being considered, absence of prejudice is not in itself enough to warrant the granting of an extension of time. As observed in ***Robertson*** cited above , extension of time is the exception, not the rule, and a party seeking one must establish the good grounds for granting one. The Tribunal considers that this claimant has failed to do so. It is hard to avoid the impression that, having decided to leave the employment of the respondent, and pursue a claim for equal pay, which was, and remains her main concern, she has sought to add in these additional, and largely historic, claims. This has added to the complexity and length of these proceedings, and has prejudiced the respondent in that regard. Taking all the factors rehearsed above into account, the Tribunal does not consider it just and equitable to grant the extension of time sought for these claims, and they are dismissed.

36. By way of postscript, and a further factor, if any was required, in weighing up respective prejudice, the Tribunal would add that , in terms of merits, the Tribunal was likely to have dismissed the sex discrimination claims in any event. The claimant may recall how, in her cross examination upon most of them, she conceded that there were, or could be, good, non – discriminatory reasons for her treatment. The Tribunal half expected her to withdraw them in any event. The prejudice to her in losing the chance to present what were weak claims is therefore minimal.

(B).Unfair dismissal.

37. We turn now to the unfair dismissal claim. The first issue, of course, is whether the claimant was constructively dismissed. Indeed, it is the sole issue, as the respondent does not contend , in the alternative, that any constructive dismissal was for a potentially fair reason, and was in fact fair.

The Law.

38. Section 95(1)(c) of the Employment Rights Act 1996 provides that there is a dismissal when the employee terminates the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

39. The classic statement of the law on constructive dismissal is set out in the judgment of the Court of Appeal in ***Western Excavating (ECC) Limited v Sharp [1978] ICR 221*** which held that for an employer's conduct to give rise to a constructive

unfair dismissal it must involve a repudiatory breach of contract. There are three elements to a constructive unfair dismissal, namely:

That there was a fundamental breach of contract on the part of the employer;

The employer's breach caused the employee to resign; and

The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

40. In order for a Tribunal to deal with these matters it must identify the contractual term or terms, either express or implied, which have allegedly been breached. It must then go on to identify a fundamental breach of that contract on the part of the employer. Aside from any breach of the equality clause, the implied term of trust and confidence would be the term of the contract which had allegedly been breached by the respondent by various acts or omissions over a period of time which, the claimant says, cumulatively amounted to a fundamental breach. The Tribunal, therefore must firstly decide whether the employer was guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

41. That implied term of trust and confidence , as recognised in cases such as ***Wood v. W M Car Services (Peterborough) Ltd [1981] IRLR 347*** and ***Mailk v BCCI [1997] IRLR 462*** is that the respondent will not , without reasonable and proper cause, conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. It is clear that in order to establish that there has been a fundamental breach of contract it is not necessary to show one fundamental act or omission. There does not need to be one event, there can be a series of events which cumulatively amount to a breach of that implied term. In such circumstances, where there is not one individual act or omission relied upon, but a series of actions that are alleged to amount to that breach, where they culminate in one particular act that is known as the "last straw", and in order to establish that a claimant has been constructively dismissed there has to be a last straw.

42. Indeed in the leading case on this issue, ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35,*** a decision of the Court of Appeal and the judgment of Lord Justice Dyson, it is clear from the discussion in that case of the nature of constructive dismissal, that in order for there to be a constructive dismissal where there is a series of acts, the final straw must be there, and although the final straw may be relatively insignificant, it must not be utterly trivial. There must be a final straw, otherwise there can be no constructive dismissal. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. The judgment goes on to say:

"A claimant cannot subsequently rely on those acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

Moreover, and this is an important part of the judgment:

"An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence have been undermined is objective."

43. So to the extent that the claimant might have perceived that as being the case, the Tribunal cannot rely solely on that, it must look objectively on the act complained of. The Tribunal has therefore to examine whether there was , cumulatively in this instance, a fundamental breach of contract, entitling the claimant to resign, in response to which she did resign, and did not delay her resignation too long so as to affirm the contract.

44. In this case the Tribunal can , and should, start with the end of the process, by examining whether the claimant has established any last straw, and, if she has, whether she resigned in response to it, and did so promptly.

45. What then is the last straw relied upon by the claimant ? It is the grievance appeal outcome, communicated to her on 9 February 2018. The claimant resigned on 23 July 2018, giving notice which expired on 16 August 2018.

46. Was the appeal outcome a final straw? The caselaw is clear that a last straw need not be a breach of contract in itself, and may be a minor event, but it must contribute something to the preceding cumulative fundamental breach. In this instance, whilst the claimant disagreed with the appeal outcome, which was, in effect, to reject her claim that her pay should have been equal to those employed on band 8b, she did concede that the respondent had duly considered her appeal, and reached a conclusion which was a genuine one, even if she disagreed with it. Whilst the claimant complained of the delay , it was the outcome, not the delay which she relies upon. To be clear, there was no last straw relating to any alleged breach of the equality clause, as that had ceased in May 2016.

47. The Tribunal cannot see how the outcome did contribute to the fundamental breach of contract, assuming (for these purposes) that the respondent's actions and omissions thitherto had potentially amounted to a fundamental breach of contract. The claimant accepted that panel had reached a genuine conclusion, and had considered her appeal, it just did not agree with her. That cannot , in the view of the Tribunal amount to, or contribute to, any alleged breach of the implied term of trust and confidence. In short, there was no last straw.

48. If, however, the Tribunal were wrong on that, it would then have to consider whether the claimant did in fact resign in response to the alleged fundamental breach of contract on the part of the respondent. In her resignation letter (page 570 of the bundle) the claimant does not expand upon the reasons, but offers to discuss them in an exit interview. She had two meetings with Neil Berry, on 13 August and 16 August 2018 (the notes are at pages 581and 582 of the bundle). In each of them she referred to issues that she was having in the Women and New - born Services Division , and relationships with individuals , particularly Angela O'Toole. She complained that she

was being undermined. She had, of course, also by that time obtained alternative employment. That is not, of itself , fatal to her claim that she was constructively dismissed, but it is another important factor. She said in cross – examination that she would have stayed employed by the respondent until she found another job, however long it took. The greater the length of time that elapses between the last breach on the part of the respondent, and the resignation, the weaker the causal connection must be with the subsequent resignation. This is not an affirmation point, it is one of causation. After some time the breach must cease to be the operative cause of the resignation, and the obtaining of a new job , or other reasons, become it. Add to that the other issues that the claimant was having with colleagues in WNS, and the Tribunal considers that the claimant has failed to satisfy the Tribunal that her resignation was a response to any (assumed for these purposes) fundamental breach of contract on the part of the respondent, even if one could take the grievance appeal outcome as the last straw. The claimant was not constructively dismissed.

49. That analysis means that it is not necessary for the Tribunal to consider whether the other matters relied upon by the claimant as amounting to fundamental breach of contract actually did. Once the claimant had left the Finance Department in 2016 (until when there may well have been a breach of the equality clause , to be discussed below) any such breach then ended, and she then had two years in WNS, where there was no such breach. Without going further into all the other matters relied upon, the Tribunal in any event had reservations as to whether the claimant would have been likely to succeed in those aspects as well. It is, however, unnecessary for the Tribunal to decide these points, given its finding upon the absence of any last straw, and the delay in the claimant's resignation, both of which are fatal to her constructive dismissal claim .

(C). The Equal Pay claim - (i)Jurisdiction.

50. Before considering the merits of this claim, the respondent has raised a jurisdictional issue which must be determined first. If the respondent is correct, the Tribunal cannot consider the equal pay claim any further. If the equal pay claim was presented out of time, there is no jurisdiction to extend time, unlike the position in discrimination claims.

To recap, the issues raised are:

6. Did the Claimant lodge her claim within the time limit specified at section 129(2), EqA (2010), i.e. 6 months from the last day of her appointment as a Divisional Accountant on 15 May 2016?

7. Did the Claimant continue to work within a stable employment relationship after 15 May 2016 in her role as Directorate Manager – Women and Newborn Services or does the Claimant not need to rely on that relationship?

8. If so, was the Claimant's claim accordingly lodged within 6 months beginning with the day on which her stable working relationship ended?

51. The reference to "stable employment relationship" is from s.129 of the Equality Act 2010 , which is set out in full in the Annexe, and makes reference to the six month time

limit which applies in a “standard case” , from the last day of the employment or employment, or, in a “stable work case”, from the date that the stable working relationship ended.

52. The respondent’s case is that , as the claimant’s appointment as a DA in Finance ended on 16 May 2016, this is standard case, and the 6 month time limit ran from that date. The claim is therefore out of time. The claimant, on the other hand, relies upon the stable work provisions , and contends that as she claimed within 6 months of the end her employment with the respondent, and hence within 6 months of the end of that stable working relationship, her claim is in time.

53. In support of the respondent’s case, Mrs Niaz – Dickinson relied upon the following. The claimant confirmed that she makes no complaint about her role in Women and Newborn Services (“WNS”), a service still within East Lancashire Hospitals. The claimant was appointed to a band 8b role in May 2016 at WNS , at which point she accepted she was paid at the band 8b rate and received such pay until her resignation. She agreed that her complaint is that she should have received the Band 8b rate of salary while working as a DA in the Family Care Division until May 2016.

54. The claimant did not lodge her claim until 3 July 2018, having obtained an early conciliation certificate on 4 June 2018. The claimant agreed that the WNS role was a significantly different non-accountancy role (pages 100a-100e and 437-445 of the bundle). She accepted that it was contractually a different appointment into a different role within the same organisation and that she knew when she applied that she would be moving to a different role outside of Finance. She stated that she had no choice to remove herself from finance. Mrs Niaz – Dickinson referred the Tribunal to the case of ***Preston v Wolverhampton NHS Trust [2000] IRLR 506*** .

55. Against that , the claimant points out that she was not issued with a new contract when she was appointed to WNS. As previously, all that was issued was a letter confirming the variation of the terms of her contract, which remained subject to the terms and conditions of Agenda for Change.

Discussion and Findings.

The Equal Pay claim : (i)Jurisdiction.

56. The original provision (in the Equal Pay Act 1970 s 2(4), before its amendment in 2003) used the phrase 'has been employed in the employment'. The amended provision was introduced to take into account the decision of the ECJ in ***Preston v Wolverhampton NHS Trust [2000] IRLR 506***, especially in relation to 'stable employment' cases under sub-s (3). However, there appeared to be still one possible trap for the employee, that if the employer changed the employee's contract *by firing and re-hiring* (as opposed to merely varying an ongoing contract) the equal pay time limit might be triggered: ***Cumbria County Council v Dow (No 2) [2008] IRLR 109***. On appeal, the point was more fully argued under this section and it was held that, although the entering of the contract with the same employer could prima facie have that effect, the employee may now be able to rely on the 'stable relationship' exception (which was held to be fully in line with EC law as set out in ***Preston***): ***Slack v***

Cumbria County Council [2009] IRLR 463. Further, it was held in ***Dass v College of Haringey, Enfield and North East London UKEAT/0108/12*** that the phrase 'stable relationship' is to be given an autonomous interpretation as it appears in this section; it does not have to be interpreted in the light of the continuity of employment provisions in the Employment Rights Act 1996.

57. There remained, however, the potentially difficult point that a termination of contract (even if followed by new employment with that employer) would potentially start the six-month time limit running, whereas a mere variation of the contract would not. In ***Potter v North Cumbria Acute Hospitals NHS Trust (No 2) [2009] IRLR 900*** it was held that the change from the Whitley Council pay system to the new Agenda for Change pay system was a variation, not a termination and so the time limit did not rule out a challenge to the old system several years later; the EAT specifically stated that even major changes to contracts can be made by way of variation. On appeal this decision was upheld, but on the different ground that the employees had been under a 'stable employment relationship' through the change and so came within the 1970 Act, s 2(2) and (4) in any event (applying ***Slack*** above): ***North Cumbria University Hospitals NHS Trust v Fox [2010] IRLR 804***. One further point from that judgment is that it was held that the 'stable relationship' provision can apply where the employment was continuous (as well as discontinuous, as it had been in the leading case of ***Preston*** above). This means that it is potentially applicable to a case of continuing employment but with one or more changes in role/promotions: ***Barnard v Hampshire Fire and Rescue UKEAT/0179/18***; on remission, the second ET held that a promotion *into management* did still break the stable relationship, but the EAT disapproved of this in principle and held that each case must be considered in its particular context: ***Barnard v Hampshire Fire and Rescue Authority [2020] IRLR 176***.

58. On the basis of that review of the authorities, and the evidence of how the changes to the claimant the Tribunal has no hesitation in finding that this is a stable work case. The changes to the claimant's employment were effected simply by a series of amendment to contract documents. She was employed under Agenda for Change, and there was , throughout her employment with the respondent, merely a series of variations to her contract of employment, the last of which was to reflect her appointment to WNS. As ***North Cumbria University Hospitals NHS Trust v Fox [2010] IRLR 804*** cited above shows, the stable work provisions apply in the case of continuous employment where there are a series of changes in role or promotions. A review of the documentation issued to the claimant upon the changes to her employment with the respondent show that these were variations, not new contracts. She was employed in a classic stable employment relationship, and hence the relevant limitation period did not start to run when she ceased to be employed as a DA in Finance , and she could bring her claim at any time up until the expiration of 6 months after her employment with the respondent ended, as she did. The equal pay claim, therefore, was presented in time, and may proceed.

The Equal Pay claim : (ii) The merits.

59. It is right to observe that the claimant's case for equal pay has largely been based upon her view that the 8b band has been over – evaluated, and that the role does not merit an 8b banding. In other words, she considered that the 8b role should not have been rated as higher than the 8a role. That, however, does not alter the legal position.

If the respondent has “over – evaluated” the 8b roles, and the claimant was indeed engaged in like work, it must pay her the same as the men who were paid on band 8b.

60. It is also right to say that a lot of the respondent’s explanation for the comparator posts being banded at 8b appears to have been that management decided had that they should be set at band 8b, and then sought, retrospectively to have this validated in the job evaluation process under Agenda for Change. It is , of course, a somewhat circular argument to say that the band 8b roles were rightly banded at 8b because the respondent wanted them to be. The genesis of this equal pay claim is largely the fact that the respondent proceeded to create , and appoint to, the new SDA post , and band it as a band 8b, before having it evaluated.

61. What the correct banding for the SDA role was, or should have been, is, of course, not the issue before the Tribunal. The evaluation process did not specifically have to consider whether the work done by the claimant at band 8a and the work done by the SDAs at band 8b was like work. That, however, is the task of the Tribunal. To some extent, the exercise carried out by the respondent of evaluating the SDA role in April 2017 did not, and was not likely to , address the issue of whether the claimant and her comparators were carrying out like work. Rather , what that exercise examined was whether the SDA role was correctly banded at 8b. It concluded that it was. What that exercise did not do was evaluate whether the claimant’s DA role was correctly banded at 8a (which she had not sought), or whether the two roles, as carried out, were like work. That is a crucial distinction continually to be borne in mind. Whilst much of each side’s arguments have been based upon whether the two roles have been correctly banded within the strict, almost mechanical and mathematical , parameters prescribed by the Agenda for Change, a moment’s reflection will confirm how different an exercise that is from the one that the Tribunal has had to carry out.

62. To highlight those differences, one need only examine the exercise carried out by MPA Consulting at the conclusion of the claimant’s appeal. That did indeed compare the DA and SDA roles, but it did so purely on the basis of the job descriptions and person specifications for the two roles. No evidence was taken by anyone actually carrying out the roles, it was a purely paper exercise. This would also be the case in respect of any previous banding exercise. It will be appreciated, therefore, that whilst a potential source of some evidence which may show up differences between the two roles, the banding exercises have been of little or no assistance to the Tribunal in its task. It is also irrelevant , though part of the claimant’s grievances, whether the respondent did or did not adhere to the procedures prescribed by Agenda for Change for the evaluation of new posts.

63. In determining whether work is like work the Tribunal forms its own view. To that extent, the findings of others, in the course of any grievance process, or any subsequent job evaluation process, whilst of some potential weight, cannot displace the Tribunal’s own findings upon all of the evidence before it. It is accordingly a question of fact for the Tribunal whether the man's work and the woman's work are of the same nature or of a broadly similar nature.

64. Things can be of the same nature even when they are different (cf cheese and yoghurt) and that allows for some initial flexibility in the definition. Further flexibility is provided by the possibility that like work will be satisfied where the work is of a 'similar'

nature, and yet more by the acceptance that such similarity need only be broad. The Tribunal should not take too pedantic an approach or undertake too minute an examination (***Capper Pass Ltd v Allan [1980] IRLR 236,***). They should consider the matter in broad, general terms, and look at the wood, not the trees (***Dorothy Perkins Ltd v Dance [1977] IRLR 226***). It is, however, the nature of the work done which is in issue. That means on the one hand, one should look to the work done as opposed to the work that might be done under the contractual terms of employment. On the other hand, it is only the work that is done under contract that is relevant, since if regard was had to all work actually done, there could be no useful comparison made. The fact that an individual chooses to do more than the job requires should not make any difference when it comes to assessing what his work is. It is the work on which, not the work for which, a person is employed that is relevant (***Redland Roof Tiles Ltd v Harper [1977] ICR 349***).

65. It is necessary to assess the similarity of the nature of the work, as opposed to the similarity of the tasks performed; for that is the second stage of the test (***Waddington v. Leicester Council for Voluntary Services [1977] IRLR 32*** cited by Mrs Niaz - Dickinson). There is not, however, complete separation between the 'like work' and 'material factor' elements in an equal pay claim.

66. Granted that he and she do the same sort of work on the test of 'broadly similar nature' then (and only then: ***Dorothy Perkins Ltd v Dance[1977] IRLR 226*** below) the Tribunal then goes on to the second part of the test and investigates more closely what they actually did. Did they perform the same tasks? And if not, are the differences in what they do of any practical importance in relation to the terms and conditions of employment? In other words, does the difference in what they do justify their being given different terms of employment? Are they, in that sense, different jobs? But it is best to avoid the word 'job': what is in issue here is the tasks performed, and that is only part of what makes up a job.

67. Again, however, it must be emphasised that the question is how important are the differences in the things they actually do under and in terms of their contractual duties, as opposed to the things they might theoretically be required to do by their contracts of employment. What the contract requires a person to do is irrelevant except to the extent that it is actually done in practice (***Capper Pass***, above). It follows that the job description may be of no importance, and the job specifications may mean little (***Dorothy Perkins***, above). The question is what happens in practice, not what might be required of the employee under the terms of the contract.

68. An important question is whether the comparison is with what is actually done by the comparator, or with what is required by the terms and conditions under which the comparator is employed. If the former, then a claimant may fail because her chosen comparator is exceptionally talented or hard-working, and is someone who does more than is required by his job. If the latter is the correct approach, then it would appear that the terms and conditions of employment are being given priority over what is actually done. The test , however, is to be found in the words of Lord Denning MR in ***E Coomes (Holdings) Ltd v Shields [1978] IRLR 263*** *at 266*:

"Second, there must be an inquiry into (i) the "differences between the things that the woman does and the things that the men do"; and (ii) a comparison of them so as to

see "the nature and extent of the differences" and the "frequency or otherwise with which such differences occur in practice": and (iii) a decision as to whether those differences are, or are not "of practical importance in regard to terms and conditions of employment".

This involves a comparison of the two jobs—the woman's job and the man's job—and making an evaluation of each job as a job irrespective of the sex of the worker and of any special personal skill or merit that he or she may have…"

69. The reference to *"the frequency or otherwise with which such differences occur in practice"* is important, It is not only a question of whether the man does in fact do something significantly different from the woman. It is also a question of how often he does it. Section 65(3) of the Equality Act specifically states that in assessing whether the differences between what he does and what she does are of any practical importance, the Tribunal should have regard to the frequency with which the differences occur, as well as the nature and extent of the differences. As will be seen, the frequency of the occurrence of some of the alleged differences relied upon by the respondent has not always been easy to establish.

70. The 'things done' by an employee may include the exercise of responsibility. Thus a senior clerk and a junior clerk are not necessarily engaged on like work even if they carry out apparently similar tasks (***Eaton Ltd v Nuttall* [1977] ICR 272**), cited by Mrs Niaz - Dickinson . However, it follows from what was said above that the issue here is whether the one does in fact exercise a greater degree of responsibility than the other, (see ***Waddington v Leicester Council for Voluntary Service*)** again).

71. If a woman can show that she does the same sort of work as a man in the same employment, and that the differences (if any) in the things they respectively do are not so significant as to justify different terms and conditions of employment, then it is still open to the employer to disprove sex discrimination by proving some other material factor distinguishing the two cases. That is, of course, the material factor defence under s.69 of the Act. The Tribunal will return to that issue in due course.

72. Two matters must be kept in mind when the Tribunal carries out its task. The first is that the Tribunal is concerned with comparing the work done by the claimant and her comparators between the date of the inception of the band 8b roles in July 2012, and the date that the claimant ceased to be a Divisional Accountant in May 2016, a period of just under 4 years. The respondent could not produce evidence of the SDA posts being evaluated as band 8b posts when they were first created. It therefore, in November 2017, carried out evaluation of those posts after the event, and some four years after they had been created.

73. Whilst not accepting the claimant's suspicions that the respondent was creating materials for ex - post facto justification, the Tribunal does accept the need for care when considering materials which reflected the respective roles as they were understood to be carried out some 4 years later. Rather, the Tribunal has focussed upon the evidence of what work was done by the claimant and her comparators during the period in question. Further, as the caselaw emphasises, the focus must be upon the work actually done, not what could contractually be required to be done. To that end, job descriptions, for example, are of limited assistance, if they do not accurately

reflect what work a worker actually did. It is a common feature of job descriptions that , whilst they frequently set out what tasks the worker could be expected to carry out, they offer no insight into what proportion of the worker's working time that will actually be spent on any particular task or tasks. That also appears to be a feature of the banding process, it is entirely paper – based.

74. To some extent, the claimant's equal pay claim has its roots in the job descriptions for the DA and SDA roles. She was first struck by the similarity between the two. Like other facets of the documentation in this case, the lack of dates upon documents has made it difficult to identify what document was created , and of application to either of the two roles , and when.

75. The starting point appears to be the two job descriptions, to be found most conveniently at pages 437 and 446 of the bundle, as part of the claimant's Grievance Appeal Statement of Case. These documents also include the Person Specifications for each post. The claimant identified only 6 items in this description which differed from the otherwise identical description for the band 8a role. The respondent has accepted , in hindsight , that the job description for the band 8b post was not sufficiently detailed and did not adequately reflect the differences in the roles. That, however, may not be the case, when considered at the time that the SDA roles were created, in 2012. There is a danger that as the SDA role has evolved, what was appropriate to be included in the job description in November 2017, may not have been appropriate in 2012.

76. The Tribunal considers that , in general terms, these two posts were , as at the inception of the SDA role in 2012, broadly similar. The respondent has not seriously suggested that they were not. The holders of both posts were Divisional Accountants, carrying out broadly similar accountancy work. They were the most senior accountants in their Divisions, and hence part of the senior management team in each Division, with responsibility for delivery of accountancy information within, and outwith, their respective Divisions. Further, as a clinical divisional accountant, the claimant was the first port of call for any financial issue to the division she worked in, and she and all such divisional accountants :

- Attended the same meetings (Trust wide and Divisional)
- Produced the same work (costings, business cases, forecasting, budget setting)
- Trained budget holders
- Understood and disseminated complex financial information
- engaged with clinicians and the same level of senior managers, among many other tasks.

77. That the respondent did not create a different band, but sub-divided the existing band 8 into "a" and "b", and simply added the epithet "Senior" to the band b post, rather supports the conclusion that these two posts involved very similar work. The DAs and the SDAs did the same type of work, in broad terms.

78. Once that has been established, the Tribunal must then go on to examine whether there really were any differences of practical importance which would prevent this

broadly similar work from being like work for the purposes of the equal pay claim. This is the real battleground.

79. The differences relied upon by the respondent in the evidence have been , in summary:

The size and complexity of like Divisions.

The need to support the Division on improvements.

The need to manage and appraise staff.

Cover for the Chief Management Accountant

Cover for Assistant Director of Finance.

Cover for Senior Business Accountant.

Lead on transformation programme.

Represent DAs and Heads of Department.

Buddy and support DA's.

Lead on cross divisional efficiency projects.

SDAs were Senior Managers on all rotas.

80. The Tribunal has therefore considered each of these, and whether they do, singly, or cumulatively, constitute differences of practical importance so as to prevent the work done by the claimant and her SDA comparators from being like work. The Tribunal considers that first three (and the other two relating to cover for the superior post) can be considered as one linked factor, as they all relate to the nature and issues faced by each of the two Divisions to which the SDA roles were assigned.

81. In doing so, the Tribunal has considered particularly the evidence of the claimant, and of Akhlaq Hussain, who, at first blush, having carried out both roles, may have been thought to be best placed to aware of , and able to demonstrate the differences between the roles. It transpired, however, that he only carried out the SDA role for 12 months , between 1 November 2013 and October 2014. That is almost 18 months after the inception of the role, and then 18 months before the claimant moved out of Finance. His evidence is thus of less assistance as to the position over the whole of the 4 year period in question that might otherwise have been the case. For part of this period , of course, from January to April 2014, the claimant was acting up as Chief Management Accountant. The respondent called no other SDA postholders.

Factor 1: Increased size and complexity, and the changes and challenges faced by the Divisions, and to which the SDA roles were assigned.

82. This is a major part of the justification advanced by the respondent for the difference in the DA/SDA bands, and has been referred to by a number of its witnesses. In particular, this factor was highly influential in Jonathan Wood's decision on the grievance. He expressly stated that the SDA role required a step up in levels of responsibilities, ability, skills knowledge and experience. The claimant does not dispute that these two Divisions did become (although precisely when maybe more contentious) larger and more complex , or that they faced the considerable changes that the respondent has referred to, but does not consider that is a difference of practical importance. In particular , she relies upon the point that she made in her grievance appeal, at page 424 of the bundle as follows:

"*Management teams within clinical divisions at ELHT:*

Family Care is a clinical division with all the same complexities of ICG and Surgery - elective/non-elective care; specialist services; the need for tertiary centres; SLA's; socialcare/delayed discharges; multiple site working etc. Contracting support is across multiple commissioners including Local Authorities, CCG's and Specialist Commissioners . Over the years a number of changes to the senior management team have happened - in order to ensure equality across divisions:

DGM was uplifted to Band 9 to reflect the role was the same as the other DGM's

Divisional nurse was uplifted twice - once to Band 8c and more recently to Band 8d

HRBP's and Divisional Analysts are the same grade across the clinical divisions" Divisional Directors are paid the same management supplement

'Directorate managers' are all Band 8b

More recently, the Quality & Safety lead was upgraded to a Band 8a

The only role to be different in the senior management team within Family Care is the accountant- yet the interaction/relationship between accountant and each of these roles is the same. If the pressures/knowledge/skills required are so significantly different, why is this not reflected in other roles?"

83. This point has been well made by the claimant on a number of occasions. The factual basis for it has not been challenged, so the Tribunal accepts that, notwithstanding that the Family Care Division is contended to be smaller , and not to involve as much complexity , as the two Divisions to which the SDA roles were assigned, the trend has been to upgrade other members of the SLT to give them parity with the other , larger and allegedly more complex, Divisions.

84. This issue has never been adequately addressed by the respondent. Jonathan Wood sought to do so in his Management Statement of Case for the appeal where (at page 471 of the bundle) he says this:

"Clinical Divisions are not More or less complex to each other

The structure was set up to reflect the additional pressures of ICG and SAS and the complex nature of these crossing numerous boundaries across the Trust. This was originally done post TCS and in line with our FT aspirations, recognising the additional complexity of the changes required. This remains the case now with significant transformation schemes in respect of the emergency care pathway and productivity and efficiency. Both of these cross over in to all divisions, for example, theatres work covering most specialties (including those in family care)."

85. His heading, with respect, does not accurately reflect or address the point that the claimant was actually making. The claimant was not saying that the Family Care Division was as complex as the other two Divisions, she was questioning why, if that was so, other SLT posts had been upgraded, but hers was the only one that had not. This is a different , and more nuanced , point.

86. The Tribunal considers that this is a highly salient point. Translated to the like work context, its relevance is this. The respondent seeks to argue that despite being broadly similar, the context in which the claimant carried out this work, i.e the Division in which she did so, was a difference of practical importance, so as to prevent the work being like work. Indeed, the Tribunal discerns this as a major plank in the respondent's case. It has its origins in the respondent's intention to create the SDA roles only in the two chosen Divisions , as band 8b posts. It wanted them to be different because they were being carried out in those two specific Divisions only. That may well have been achievable, had the respondent then treated the other Divisions, and the other SLT posts therein, consistently. It , however, did not.

87. Neither Jonathan Wood, nor, with respect, Mrs Niaz – Dickinson, in her comprehensive submissions, addressed why , if size and complexity of the respective Divisions was a difference of practical importance, it was not so for these other SLT posts within Family Care. There is a complete lack of explanation as to why these other posts were upgraded. As the claimant observes, these issues of relative size and complexity would affect most , if not all , of the other SLT roles within Family Care, yet they were upgraded. If the changes did not affect the Family Care Division so as to require a step up in levels of responsibilities, ability, skills knowledge and experience, what justified upgrading of the banding for all these posts ? The Tribunal has not been told.

88. It is, therefore, in the Tribunal's view , not open to the respondent to rely upon the relative size and complexity of the Family Care Division when compared with the other two Divisions as being a difference of practical importance in respect of the claimant's work, when it clearly was not in respect of any other work done by members of the SLT. There has been, the Tribunal accepts, some suggestion that issues of size , complexity and the impending changes faced by the respondent would impact particularly on Finance, but it has been put no higher than that, and there has been no evidence led by the respondent as to why factors which are contended to amount to differences of practical importance in respect of the claimant's position in Finance within Family Care were not so considered in respect of the banding of other members of the SLT in the same Division.

89. This is an important matter, as , of all those matters advanced by the respondent, this alleged difference in size and complexity , and therefore in the need for higher

levels of responsibility, ability, skills, knowledge and experience, may well have had the best prospect of amounting to differences of practical importance. The respondent, however, has failed to explain this apparently anomalous treatment of the other SLT roles within Family Care.

90. That leaves the other elements, which are, in descending order of potential effect , as follows:

Factor 2 :The SDA roles involve line management subordinates.

The claimant does not dispute that this is factually correct. She makes the point, however, that the SDA role involves only the line management of one subordinate, an assistant Divisional Accountant. She also submitted that in 2012, these members of staff were not in post for some time due to a delay in recruitment. Line management of a member of staff involves regular conversations about workloads and formal development meetings, usually once/twice a year. Delegation of work was done by all the accountants. She suggested that these line management tasks were not onerous in the majority of cases. She pointed out , rightly, that neither Charlotte Henson nor Akhlaq Hussain gave evidence of what amount of time was taken up in undertaking these tasks.

91. The Tribunal agrees with the claimant that the respondent has not adduced enough evidence to establish that this additional responsibility did in practice amount to a difference of practical importance. At one point that responsibility may have been to line manage two such persons (Akhlaq Hussain's evidence), but that was not until Community was also integrated , which was not until at the earliest April 2014. For the first two years, it seems, there would only have been one such person to line manage, and the position in the SAS Division may have been the same (there is no evidence of there being more than one subordinate for whose line management the SDA in that Division would have been responsible).

92. Virtually no detail has been provided of what this line management actually entailed. It was asserted , and the Tribunal would accept, that it was likely to involve appraisal. No further detail has been provided (certainly no actual appraisals carried out by any SDAs have been produced), and the Tribunal's expectation , in the absence of any evidence to the contrary, is that this would be an annual exercise. From its experience of such processes in the NHS and other public sector employers, the Tribunal doubts that this would involve more than a couple of days work, preparation of the relevant documents and a meeting between appraiser and appraisee. Quite what else was involved and, bearing in mind Lord Denning's dicta, and s. 65(3) how frequently, is far from clear.

93. The Tribunal accepts that this was a difference from the claimant's work, where she had no such responsibilities, but, given the lack of clarity of the respondent's evidence about its frequency, and the nature and extent of it, absent any other factors, the Tribunal would not consider this factor alone would amount to a difference of sufficient practical importance to prevent the work being like work.

Factor 3:SDAs provided cover for the Chief Management Accountant.

94. The claimant and the Tribunal accept that this could occur on occasions. The claimant, however, points out that there was an assistant management accountant role that covered the CMA post when not available (p226) . She met with the SDA/DAs regularly , and there were no discussions about them covering large, Trust wide and Executive meetings at that time . Further, the claimant acted up to the CMA role for three months in 2014, and at that point, there was no cover provided to the role by the SDAs.

95. In any event, the cover of such meetings would simply be to record events and bring back topics for discussion and decision. No SDA would have been able to make decisions in a meeting on behalf of the CMA. Charlotte Henson would expect staff to come back to discuss any decisions that needed to be made.

96. Again, the Tribunal noted that there was a lack of detail in the evidence from the respondent as to how often, in practice, this occurred. Further, the Tribunal finds it significant that no mention is made of the SDAs covering for her in Charlotte Henson's own witness statement, nor does Aklaq Hussain's statement mention it. The Tribunal also takes the claimant's point that covering a meeting is not deputising, a term that the respondent has used, and that may be something of an overstatement.

97. The Tribunal is left with a very vague impression of how often this actually occurred, and how important a factor it was . To the extent that it did happen, the Tribunal does not consider it of such significance that it amounts to a difference of any practical importance.

Factor 4: SDAs provided cover for the Senior Business Accountant.

98. The same observations as to what "cover" means can be made in this context as with the CMA, but, more crucially, as the claimant points out, the role of Senior Business Accountant was not created until December 2015 (see page 256 of the bundle) , so for the first three years of the SDA role, this cannot have been feature of it. In fact the appointment was made on 1 March 2016, when Akhlaq Hussain was appointed to the role.

99. Again, therefore, for almost all of the bulk of the period with which the Tribunal is concerned, July 2012 to May 2016 , this cannot amount to a difference of practical importance.

Factor 5: SDAs provided cover for the Assistant Director of Finance.

100. The respondent made reference to meetings that the SDAs would cover for the Assistant Director of Finance, but this was much later than 2012. Charlotte Henson stated that it depended on the person in the role who covered a meeting – for example Shahid Ahmed would not, but Natalie Brockie did , due to her ability

101. The same observations as to what "cover" would entail apply, as above. Further, the claimant makes the point (not controverted by the respondent) that ,if this occurred at all, it was much later than 2012. Further, as previously, the respondent has provided scant detail in its evidence of how often this actually occurred.

102. The Tribunal cannot see , on the evidence before it, that this would amount to a difference of practical importance.

Factor 6 : To lead on transformation programme.

103. The Tribunal considers that this , in terms of finance, would also have been the responsibility of the DA role as well, and is not a difference of practical importance.

Factor 7: To represent DAs and Heads of Department.

104. The role of the DA was also to represent their Head of Department. The only difference is that the SDA had a DA for support. This is not a difference of practical importance.

Factor 8 :To buddy and support DA's.

105. This is really but another facet of Factor 2 above. As observed , scant detail of how much time the SDAs spent doing this has been provided.

Factor 8 : To lead on cross divisional efficiency projects.

106. The evidence was that the DA role also involved this work. This is not a difference of practical importance.

Factor 9 : Senior Manager on all rotas.

107. As the claimant points out , this was not a feature of the SDA role as such, but was a consequence of the role being banded at band 8b. It is thus a circular argument to say that it was a difference of practical importance , as it is only a consequence of the banding, and not a reason for it.

108. In overall terms, the respondent's submissions (at para.50) contend that the "primary distinction" between the roles relate to "the complexities and challenges within the roles as well as line management responsibility and deputising for the Chief Management Accountant". In other words, Factors 1 , 2 and 3 above. Those are also the points made by Aklhaq Hussain in his email to the claimant of 23 June 2017 , at page 310 and 311 of the bundle, which was referred to in Mrs Niaz – Dickinson's closing submissions.

109. As has been seen, the Tribunal considers that Factor 1 does not assist the respondent, given the failure to explain why other SLT positions within the Family Care Division were upgraded. There are only two ways of looking at that. Either, they were upgraded because the respondent did indeed recognise that there were similar challenges and complexities with that Division, as in the two Divisions with the SDAs, so there was in fact no difference between the Divisions, or , there was indeed such a difference, but it were not considered to be relevant as to whether the other members of the SLT in that Division should have parity with their counterparts in the other two Divisions. Either way, the respondent cannot show that these were differences of practical importance so as to prevent the work being like work.

110. The other two factors have been examined, and amount to line management of one, possibly two, members of staff, and occasional, vague and unspecified coverage

for the CMA. These factors too have not been established as amounting to differences of practical importance to the Tribunal's satisfaction. Given that the other factors are, on the respondent's own case, rather subsidiary, and in part are concomitants of other factors, the Tribunal finds that the evidence does not establish that there were, in the relevant period between July 2012 and May 2016 , differences of practical importance to prevent the claimant's work, and that of her comparators in the SDA role, being like work, and the Tribunal finds that the claimant was indeed, between those dates, engaged upon like work. Her claim on this basis accordingly succeeds.

Conclusion and remedy issues.

111. Reviewing the pleadings, the Tribunal notes that no material factor defence has been pleaded. It was, however, included as Item 6, in the draft List of Issues, but not in the final agreed version. The respondent has not argued that defence, nor has it particularised what the relevant material factor may be. If the respondent seriously wishes now to seek to advance such a further defence, it would , the Tribunal considers, now need permission to amend the response.

112. If, however, the matters to be relied upon for a material factor defence are the same as were unsuccessfully relied upon as constituting differences of practical importance for the purposes of arguing that the claimant was not engaged upon like work, the respondent will doubtless appreciate that, even if permission to amend is granted, it will face an uphill struggle. If, of course, there is some other, hitherto unheralded, factor that will be relied upon, the position may be different, but there will still need to be an amendment application.

113. Assuming that there is no further issue upon liability, and the finding that the respondent was in breach of the equality clause in the claimant's contract of employment, the Tribunal will proceed to remedy, if necessary. To assist, the Tribunal will set out its view of the likely issues upon remedy, and indicate what it can, and what it cannot award the claimant in relation to her successful equal pay claim.

114. Firstly, the claimant is entitled to a finding that the respondent breached the equality clause in her contact of employment. The Tribunal needs to specify when it did so. The end point is simple, as that is 16 May 2016, when the claimant moved out of Finance, and went up, in any event, to a band 8b. The starting point is not quite as obvious, but it would seem to the Tribunal to be no earlier that 2 July 2012, as that was the date from which Ben Roberts, and Akhlaq Hussain were first appointed to the SDA roles on band 8b. It is appreciated that there were then changes, but in terms of those roles, they came into existence at that time, and 2 July 2012 would appear to be the earliest date from which the claimant's entitlement to equal pay could have arisen.

115. The claimant, however, in her schedule of loss (page 70 of the bundle) has suggested that this should be from her return from maternity leave, which was on 24 August 2012. If the respondent agrees this period, the dates of any award will be 24 August 2012 to 16 May 2016. If, however, either party seeks to argue for a different period, that will require further argument, and possibly a hearing. In any event, the Tribunal cannot make any award of arrears of remuneration going back more than 6 years before presentation of the claim form, which in this case was on 3 July 2018, and so would limit any award prior to 3 July 2012.

116. In terms of any tax liability, HMRC's 'Employment Income Manual' addresses the implications of the definition of earnings for equal pay awards in the section 'EIM02530 — Employment Income: arrears of pay and awards under the Equal Pay Act 1970'. The Manual — which, although at the time of publication, is expressed to have been last updated on 13 September 2021, makes it clear that awards made under the Equality Act 2010 are awards of arrears of pay and, as such, are to be treated as earnings falling within the terms of s.62 Income Taxes (Earnings and Pensions) Act 2003. This means that, even though the arrears are paid in a lump sum, sometimes more than six years after they became due, the tax liability is treated as arising in the year of entitlement (i.e. each year represented in the award of compensation). The Manual refers to another section — EIM42290 — which makes clear that the employer should operate a special PAYE procedure to calculate tax arising in each year covered by the award.

117. Equal pay compensation can attract interest. The power to award interest on awards in equal pay cases in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 ('the 1996 Regulations') are expressly saved by provisions of the Equality Act 2010 (Commencement No.4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 SI 2010/2317, Article 21(1) .

118. The effect is that those Regulations are regarded as having been passed pursuant to s.139 of the Equality Act 2010 , with the consequence that they continue to govern the award of interest in respect of claims successfully brought under it. Under the 1996 Regulations, Employment Tribunals are required to consider whether to make an award of interest without the need for any application by any party in the proceedings — Reg 2(1). Reg 3(1) provides that interest shall be calculated as simple interest accruing from day to day. By virtue of Reg 3(2) of the 1996 Regulations, as amended by the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 SI 2013/1669, the rate of interest in England and Wales is that which is fixed, for the time being, by S.17 of the Judgments Act 1838.The current rate is 8 per cent.

119. Interest on arrears of remuneration, rather than accruing over the whole period in respect of which arrears are awarded, only begins to accrue from the 'midpoint' date — Reg 6(1)(b) of the 1996 Regulations. This is the date halfway between the date of contravention of the equality clause and the date on which the Tribunal calculates the interest (in most cases, the date of the remedies judgment) — Reg 4. Thus, an award of back-pay under the Equality Act 2010 typically only attracts interest in respect of half the period of the award. The Tribunal may, however, award interest in respect of a different period if it considers that 'serious injustice' would be caused if it followed the rules set out above — Reg 6(3).

120. In terms of what may be more contentious , the claimant has in her Schedule of Loss claimed additional pension contributions, and a sum for being on the incorrect point of the pay scale applicable to her new employment when she started her new post with Salford. Section 132 entitles the Tribunal to make an award of arrears of pay, or "damages". As it may be questionable whether the employer's pension contributions would amount to arrears of pay (they do not for the purposes of unlawful deductions from wages claims), such sums pay be recoverable as damages. Similarly, as the

claimant's claim based on her incorrect position on the relevant pay scale when she started with Salford would be a consequential loss claim, this too would have to be claimed as an award of damages. The Tribunal is making no further observations on these two heads of claim, but if they are to be pursued the claimant needs to qualify them, and advance her arguments that the Tribunal should include them in any award it makes.

121. Awards for injury to feelings are not available in equal pay claims, and the claimant does not appear , in her Schedule of Loss, to be making any such claims under her equal pay claims.

122. The Tribunal will afford the parties some time to see if they can resolve these remedy issues without a further hearing. If they cannot, a further hearing will be required, and the parties will be required to identify the issues that the Tribunal will be required to determine. Directions for any remedy hearing will then be issued.

Employment Judge Holmes
DATE : 30 December 2021

RESERVED JUDGMENT SENT TO THE PARTIES ON 13 JANUARY 2022

FOR THE TRIBUNAL OFFICE

ANNEXE

The relevant statutory provisions.

A.Sex Discrimination

s. 13 Direct Discrimination:

Direct discrimination is defined by Section 13 of the Equality Act 2010 as follows:-

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

Comparator:

Section 23(1) of the Equality Act 2010 provides that:

"On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material differences between the circumstances relating to each case".

Victimisation:

Section 27 of The Equality Act 2010 defines victimisation as:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

Burden of Proof:

Section 136 of The Equality Act 2010 provides that:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if (A) shows that (A) did not contravene the provision.

s.123 Time limits

(1) Subject to section 140B], proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) N/a

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

B.Equal Pay.

s. 65 Equal work

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

(a) like B's work,

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

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

(2) A's work is like B's work if—

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

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

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

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

(b) the nature and extent of the differences.

s.129 Time limits

(1) This section applies to—

(a) a complaint relating to a breach of an equality clause or rule;

(b) [N/a]

(2) Proceedings on the complaint or application may not be brought in an employment tribunal after the end of the qualifying period.

(3) If the complaint or application relates to terms of work other than terms of service in the armed forces, the qualifying period is, in a case mentioned in the first column of the table, the period mentioned in the second column[, subject to [[section 140B]].]

Case	*Qualifying period*
A standard case	*The period of 6 months beginning with the last day of the employment or appointment .*
A stable work case (but not if it is also a concealment or incapacity case (or both))	*The period of 6 months beginning with the day on which the stable working relationship ended.*
A concealment case (but not if it is also an incapacity case)	*The period of 6 months beginning with the day on which the worker discovered (or could with reasonable diligence have discovered) the qualifying fact.*
An incapacity case (but not if it is also a concealment case)	*The period of 6 months beginning with the day on which the worker ceased to have the incapacity.*
A case which is a concealment case and an incapacity case.	*The period of 6 months beginning with the later of the days on which the period would begin if the case were merely a concealment or incapacity case.*

132 Remedies in non-pensions cases

(1) This section applies to proceedings before a court or employment tribunal on a complaint relating to a breach of an equality clause, other than a breach with respect to membership of or rights under an occupational pension scheme.

(2) If the court or tribunal finds that there has been a breach of the equality clause, it may—

(a) make a declaration as to the rights of the parties in relation to the matters to which the proceedings relate;

(b) order an award by way of arrears of pay or damages in relation to the complainant.

(3) The court or tribunal may not order a payment under subsection (2)(b) in respect of a time before the arrears day.

(4) In relation to proceedings in England and Wales, the arrears day is, in a case mentioned in the first column of the table, the day mentioned in the second column.

Case	***Arrears day***
A standard case	*The day falling 6 years before the day on which the proceedings were instituted.*
A concealment case or an incapacity case (or a case which is both).	*The day on which the breach first occurred.*

C.Unfair Dismissal:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
