



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Hinchey

Respondent: The Eye Academy (Richmond) Limited

Heard at: Reading **On: 23-25 April 2019, 26 November 2020 (and in chambers on 27 November 2020)**

Before: Employment Judge Gumbiti-Zimuto
Miss J Cameron and Mr D E Palmer

Appearances
For the Claimant: Mr N Bidnell-Edwards, counsel
For the Respondent: Ms A Reindorf, counsel

RESERVED JUDGMENT

The claimant's complaint is not well founded and is dismissed.

REASONS

1. In a claim form presented on the 28 March 2018 the claimant brought complaints of direct sex discrimination and equal pay. The respondent denied the complaints. The claimants complaints were that she was not paid equal pay to her colleague who did like work and was refused information win respect of pay when it was requested.
2. At a preliminary hearing on the 5 July 2018 the issues to be decide by the Tribunal were set out as follows:

Section 13: Direct discrimination because of sex

- (i) Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act 2010, namely denied the claimant information relating to the remuneration of her male colleague and comparator Mr Kamlesh Patel.
- (ii) Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on a hypothetical comparator.

- (iii) If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
- (iv) If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 65: Equal Pay

- (v) Was the claimant employed on like work as her male comparator, Mr Kamlesh Patel? In deciding this question the employment tribunal must ask:
 - a. Are the claimant and Mr Patel's work the same or, if not the same, broadly similar, and
 - b. Are the differences (such as they are) between their work of no practical importance taking into account: (i) the frequency with which the differences occur and (ii) the nature and extent of the differences.
 - (vi) If the employment tribunal finds that the claimant was employed on like work to Mr Patel, can the difference in pay be explained by way of the material factor defence, as follows:
 - a. Mr Patel has greater skills, qualifications and experience in comparison with the claimant;
 - b. He adopted greater flexibility;
 - c. He acted as Practice Manager at time and was the previous owners "right hand man" and continues to perform this role.
3. At the start of proceedings on the 26 November 2020 the claimant's counsel pointed out that the complaint of direct sex discrimination was no longer being pursued by the claimant. The Tribunal has therefore been concerned only to determine the questions in respect of equal pay.
 4. Sections 66 to 70 of the Equality Act 2020 apply where a woman is employed on work that is equal to the work that a comparator of the opposite sex does. A woman's work is equal to a man if it is like the man's work (section 65 (1) (a)). A woman's work is like a man's work if, the woman's work and the man's work are the same or broadly similar, and such differences as there are between their work are not of practical importance in relation to the terms of their work (section 65(2)).
 5. If the terms of the woman's work do not (by whatever means) include a sex equality clause, they are to be treated as including one. A sex equality clause is a provision that has the effect that (a) if a term of the woman's is less favourable to her than a corresponding term of the man's is to him, the woman's term is modified so as not to be less favourable; if the woman does not have a term which corresponds to a term of man's that benefits him, the woman's terms are modified so as to include such a term (section 66 (1) and (2)).
 6. The sex equality clause in the woman's terms has no effect in relation to a difference between her terms and the man's terms if the employer shows

that the difference is because of a material factor reliance on which does not involve treating her less favourably because of her sex than the employer treats the man. If the factor is within section 69(2), it must be shown that it is a proportionate means of achieving a legitimate aim. A factor is within section 69(2) if the woman shows that, as a result of the factor, she and persons of the same sex doing work equal to her are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to her. The long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim. A factor is not material unless it is a material difference between the woman's case and man's. (Section 69)

7. The hearing of proceedings commenced on the 23 April 2019, and on that day we heard evidence from the claimant who provided a written statement as her evidence in chief. Her evidence concluded on 24 April. The claimant also relied on the witness statement from Hilary Ruth Railton. Also on the 24 April we commenced to hear evidence from the respondent's witnesses. That day we heard from Brian Ellis, Julian Stallard, and Alan Thompson. On 25 April we continued with evidence from Heather Rogers and Kim Patel. All the respondent's witnesses produced written statements as their evidence in chief. The case was then adjourned part heard to continue on the 19 July 2019. On the 15 July 2019 it became clear that the case could not proceed on the 19 July and the hearing date was vacated. Regrettably it was not possible to list the case to resume for hearing until 26 November 2020. On 26 November the Tribunal heard evidence from Romana Hashim and upon conclusion of the evidence submissions from the parties. The Tribunal met in chambers on the 27 November 2020 when we discussed the case and reached the decision set out in this judgment. The Tribunal proceedings on the 26 November and the Tribunal deliberations on 27 November 2020 were conducted remotely using court video platform.
8. The claimant and Mr Kim Patel (the comparator) were both employed by Brian Ellis and his business partner Alan Thompson. The claimant commenced employment with Ellis and Thompson Optometrists on 6 November 2000. When the claimant commenced her employment the comparator was already employed. Neither the claimant or the comparator were qualified as dispensing opticians but both had passed the same number of exams for the ABDO Dispensing Optician course.
9. When the comparator was recruited, earlier in 2000, Ellis and Thompson were looking for an experienced person for dispensing duties with lab experience, the comparator fitted the bill. Additionally, the comparator had management experience, could balance the till each night and complete the banking. The comparator was employed on "*a salary well above the rate for an unqualified optician as he was already earning a good salary and we knew he would not join us if the pay was less*".
10. Describing the comparator's role Brian Ellis says the following: "*Kim also negotiated favourable terms with various frame and lens suppliers. He was also very technically skilled and patients really appreciated the speed and*

accuracy he demonstrated in producing spectacles. It is safe to say that no other member of staff performed the same role as Kim Patel."

11. In contrast when the claimant was appointed Brian Ellis says the following: *"When we employed Julie in 2000 she had been working as a dispensing assistant ... At the time, we were looking for a dispensing assistant and were offering an above average salary because we were understaffed and getting very busy ... We were not looking for any managerial experience at the time and to the best of my recollection Julie did not mention any managerial experience in the interview. We offered her the role of Full time Assistant with responsibility for spectacle dispensing and she accepted the role."*
12. Alan Thompson, speaking of the comparator, gave evidence that: *"as a manufacturing opticians we needed his experience of laboratory knowledge and ability to negotiate on our behalf with suppliers... he was able to be involved in all aspects of the practice needs including dispensing spectacles and he was given more responsibility including being a key holder and overseeing financial considerations."* The claimant would not have been considered for that role, she did not have the experience or skills. The claimant's role and the comparators roles were different, and it was never the intention to create the same or similar role. Speaking of the comparator Alan Thompson said, *"It was for his skills with optics that we hired him."* Alan Thompson accepted that there was a lot of crossover between the things that the claimant did and the things the comparator did, however the comparator's role *"goes way beyond"* the claimant's role. The claimant was not authorised to contact and negotiate with suppliers in the way the comparator was. While Alan Thompson made reference to *"gut instinct"* when questioned about the difference in the qualifications and skill of the claimant, it was clear that his evidence was not limited to relying on gut instinct. He explained his view of the claimant and the comparator. Asked whether he could justify the difference in pay between the claimant and the comparator he stated that he could *"but not instantly"*. The effect of his evidence, which we accept, was to put forward differences between the roles of the claimant and the comparator which he had observed.
13. The claimant lists the duties she carried out in common with the comparator as including ordering glasses for patients, dispensing, and performing most of the duties of a dispensing optician.
14. The comparator comments on his role in contrast to the claimant in the following way: *"I would be running the practice in the absence of the owners; I negotiated the large scale deals on frames and lenses with the manufacturers; In charge of stock levels for both frames and lenses (claimant on occasionally called sales reps to order new frames on ad hoc basis not as a regular part of her job); key holder; a named person to attend when the alarm goes off; cashing up and daily banking; assists the owners with their dispensing orders; complicated dispensing tasks; often last person to leave and lock ups; supervises SC apprentice glazer; flexible hours (often more than 40 hours)."*

15. Brian Ellis, who was well aware of the work of both the claimant and the comparator described the comparator as having a larger role than the claimant, with technical skills that the claimant did not have.
16. In June 2006 it was announced that the comparator would be in charge of running the practise in the absence of both partners (p67). The claimant accepted that prior to TUPE transfer the comparator had management responsibilities which consisted of acting as practise manager in absence of the owners of the business, however the claimant contends that this was never actually exercised because the owners of the business were never both off at the same time. The evidence from Brian Ellis, Alan Thompson and the comparator was that this was wrong, there were occasions when the comparator was running the practise in the absence of both partners. The Tribunal accept the evidence that this did occur on occasions, about 5-6 times a year the comparator would provide cover as practise manager.
17. Ellis and Thompson had been run in an informal manner; the staff did not have job descriptions and did not use job titles, they had only been given contract of employment just before the acquisition. In 2013 the claimant and the comparator were both provided with written contracts of employment for the first time. The comparator signed his contract on 4 December 2013. The written contract included the following under the heading "job description": *"The Employee is engaged initially to perform the duties of Dispensing Optician. The Employee will, however, be expected to carry out any other reasonable duties in line with his/her responsibilities to assist in the smooth running of the business. From time to, with his/her agreement, the Employee's job description may be changed."*
18. The claimant was also provided with a draft written contract, she refused to sign the contract. The draft contract was in identical terms to that provided to the comparator.
19. In August 2014 there was a TUPE transfer to the respondent. The respondent purchased the trade and assets of Ellis and Thompson, as part of extensive due diligence it reviewed the roles and remuneration of all the staff, including the claimant and the comparator. The claimant and her comparator were both given name badges with the job titles as Dispensing Associate.
20. In 2015 the claimant received a new draft contract of employment that referred to her a "Dispensing Associate", the claimant did not sign the contract. Since the claimant refused to sign the draft contract provided by Ellis and Thompson following the TUPE transfer the claimant did not have a signed written contract of employment. Unlike the comparator who had a signed written contract of employment. The claimant now refused to sign the draft contract provided by the respondent.
21. In April 216 the claimant was provided with a job description, the claimant is wrong in her evidence that her and the comparator were given identical job

descriptions, no job description was provided to the comparator by the respondent.

22. The parties produced a document with the heading “*daily staff focus*” (p447). The claimant accepted that the document set out “some” of her duties. The document stated the following:
*“Kim [the comparator]: daily dispensing duties, cash up, and daily banking, help with reception and lab flow work
Julie [the claimant]: daily dispensing duties; security tag frames; price up and display frames; keep Harj updated with any frame stock and please help with reception desk and incoming phone calls.”*
23. Following the TUPE transfer the claimant and the comparator were both set sales targets by the respondent, the claimant’s sales target was higher than that of the comparator.
24. Heather Rogers, the respondent’s finance manager, described how following the TUPE transfer the comparator was the main contact for management relating to queries and support. The comparator completed, at the request of head office, tasks such as financial reporting, banking reconciliations, petty cash queries and stock take management.
25. Julian Stallard worked with the claimant and the comparator as practice manager for a period of 4 months. He states that the claimant and the comparator both worked as non-qualified dispensing associates within the practice. However, their roles were different with the comparator performing a more senior role within the practice. The claimant played a lesser role, she was involved in dispensing, checking of completed spectacles for adult clients, ordering the lenses for her own orders, visual merchandising, reception duties. The comparator was involved in dispensing, glazing, checking of completed adult spectacles, lens ordering both for his own dispenses as well as those of Alan Thompson and Julian Stallard, the banking and trouble shooting. The comparator “was technically very competent and able to explain and adjust specs to overcome problems reducing the incidents of non-tolerances”. Julian Stallard lists the following in respect of the comparator; he was a key holder and an alarm code holder, he had an extensive knowledge of lenses, played a supervisory role to both reception and glazing staff.
26. The claimant gave evidence that she was required to carry out duties, of a menial nature, that the comparator was not required to such as making drinks, general housekeeping duties and covering reception. This is contested by the respondent and by the comparator whose evidence was that all staff shared in carrying out these tasks from time to time. The claimant referred to sexually discriminatory remarks, the comparator denied having heard such comments, it was not alleged that he had made the comments. The Tribunal having seen the claimant give evidence in person during the hearing consider that it is unlikely that she would have tolerated such practises without objection, the Tribunal are not satisfied that the evidence establishes that the claimant was required to carry out duties of a menial nature, that the comparator was not required to such as making

drinks, general housekeeping duties and covering reception or that discriminatory remarks were made.

27. Romana Hashim, owner and managing director of the respondent, gave evidence that the comparator was not issued with a job description and he had a signed contract. Romana Hashim stated that the claimant and the comparator would not have been issued with the same job description as they did not do the same job.
28. Prior to the acquisition Romana Hashim had been told that the comparator was the unofficial manager of the practice and assumed full responsibility in the absence of Brian Ellis and Alan Thompson. Following the acquisition Romana Hashim spent time in the practice and saw for herself what everyone did. Her evidence was that the comparator performed a role that held more responsibility than that of the claimant. For the period of about 1 ½ years following the acquisition there was no practice manager and during this period the comparator assumed managerial responsibility which included an authority to negotiate and sign supplier contracts. The comparator often worked longer hours, he did not receive additional pay for the extra hours worked.
29. The comparator was a key holder for the business, he attended alarm call outs, he was responsible for banking and produced management information. The comparator was a skilled laboratory technician, he supervised the on-site lab and liaised with other practices. The comparator worked every Saturday, in contrast the claimant worked 3 out of 4 Saturdays.
30. The respondent issued all the staff with name and badges which described them as one of three things; dispensing optician, dispensing associate or receptionist. Romana Hashim was a dispensing optician, the claimant and the comparator were both dispensing associates. The respondent's contention is that this did not indicate that the jobs they did were same, it was for the purposes of facing the public.
31. The claimant's and the comparator's evidence align in that they both had to dispense high end products. The comparator's evidence was clear that after the TUPE transfer he and the claimant carried out many tasks that were the same, he accepted that 90% of the tasks performed by the claimant and himself were the same.
32. While the claimant contends that she took on management responsibilities this was not established by the evidence and our conclusion is that the claimant did not have management responsibilities. The comparator did have management responsibilities however these diminished in scope with the appointment of the practice manager but continued to some limited extent.
33. The claimant and the comparator were both contracted to work 40 hours a week. The comparator on occasion would work in excess of this and he

was not paid for the extra hours worked. The comparator started work and finished work later than the claimant.

34. The comparator was a keyholder and as such at times had to open up or lock up although this was usually done by managers. The comparator was expected to and did on some occasions respond to the alarm going off in the shop premises out of hours.
35. It is in dispute between the parties whether the comparator was given the role of unofficial practice manager after the TUPE transfer. The claimant contends that she liaised with head office on day-to-day issues such as account queries on frames and lenses. The claimant states that she was not aware that the comparator completed monthly reports as she never saw any such reports. The Tribunal accept that the claimant did take on the role of unofficial practice manager for period of 1 ½ years when there was no practice manager. The evidence established that the comparator spent time working in the back office and that when he was in there working the comparator could have been doing management type duties such as preparing KPI report and other management reports. The claimant however did not accept that this was a significant feature of his role. The claimant accepted that she did carry out such work.
36. In so far as the banking duties were carried out by the comparator the claimant states that she and all other staff were involved in counting the takings at the end of the day and helped to resolve any discrepancies to the till in respect of the day's takings. The claimant's contention was that the suggestion that the comparator "was authorised to 'oversee' banking procedures is misleading in terms of the role play by all involved". While the Tribunal accept that the claimant and others played a role as described, we concluded that the comparator has responsibility in respect of banking and the reconciliation of the days takings that the claimant did not and that distinguished his role from hers.
37. We are satisfied that the evidence shows that the comparator was liaising with external labs, sourcing and building company wide relationships with specialist laboratories as suggested by the respondent. The claimant accepted that she was not involved in negotiating large scale deals and while she was sceptical at the suggestion that the comparator did, we are satisfied that from the perspective of this respondent he did do so.
38. The claimant states that she is able to carry spectacle repairs just as the comparator does, however, the comparator has skills in respect of spectacle making that the claimant does not possess and he is able to perform tasks of greater skill than the claimant. The claimant accepted that the comparator did lab work and glazing to an extent that she did not do. The claimant did some lab work but she did not do any glazing.
39. The claimant was unable to comment on whether the claimant was able to resolve IT issues but she states that MS handled the majority of computer issues and liaised with third parties. The claimant states that she liaised

with the respondent's IT providers before TUPE who would then remotely resolve issues. The Tribunal is of the view that the resolution of any IT issues was not a feature of significance in either the claimant's job role or the comparator's job role.

40. The comparator carried out the liaison with other practices in the group, in particular relating to lab work.
41. The claimant was involved in designing the respondent's window case. This was something that the comparator played no part in.
42. The claimant contends that she spoke to Romana Hashim about her pay in about July 2017. Romana Hashim had no recollection of speaking with the claimant about her salary at this time and denies that she had refused to provide the claimant with any pay information. The claimant resigned her employment on the 5 December 2018. Her letter of resignation did not mention her reasons for resigning. The claimant served a questionnaire which was dated 4 December but received by the respondent on the 6 December 2018 after the claimant's resignation. After being chased to provide the information the respondent replied to the questionnaire on the 20 December 2018.
43. The claimant submits that the claimant and the comparator were both employed as dispensing associates, were required under their contracts to work 40 hours per week, and mainly did so, the comparator became Alan Thompson's "right hand man" and was regarded as having superior knowledge on the basis of "gut instinct", the claimant did at least 90% the same work as the comparator, though she decorated the window display and earned 25% less. The claimant contends that the respondent is in breach of the equal pay clause implied in the claimant's contract, and that she should have been paid the same salary as the comparator.
44. The respondent submitted that there is ample evidence that the comparator did a distinctly different job to the claimant throughout their employment. They were both dispensers, but beyond that they were recruited to perform different duties and at different levels of seniority, they had different experience and skills, they performed different tasks and they held different levels of responsibility. The respondent submits that the claimant was simply not as versatile or proficient as the comparator. The Claimant's answers under cross-examination showed that her claim was based on speculation and incomplete knowledge and at times dishonest in her evidence. The respondent submits that the claimant cannot shift the burden of proof on these facts and this evidence, however, if the claimant has succeeded in shifting the burden of proof, the respondent submits that it has satisfied the requirements of the material factor defence.

Conclusions

Was the work required under their contracts of employment the same, or of a broadly similar nature?

45. At the time of the appointment of the claimant and the comparator they were not employed on like work. On the claimant's appointment Ellis and Thompson were seeking a dispensing assistant they were not looking for any managerial experience, the claimant was appointed as a full time assistant with responsibility for spectacle dispensing.
46. In contrast the comparator was appointed for his experience of laboratory knowledge and ability to negotiate on the company's behalf with suppliers. In addition the comparator was able to be involved in all aspects of the practice needs including dispensing spectacles, he had management experience and he was given more responsibility including being a key holder and overseeing financial considerations including banking.
47. After the TUPE transfer the claimant and comparator over time did 90% of similar tasks but the comparator had managerial responsibilities in this time that the claimant did not. There was a period when there was no practise manager and the claimant assumed management responsibility for about 1 ½ years. When the practice manger was appointed the comparator continued to have a role in banking and key holder duties that the claimant did not. The comparator continued to carry out duties of a technical nature that the claimant could not.
48. The claimant could not fulfil the comparator's role in the respondent's business in full. The comparator however could fulfil the claimant's role in the respondent's business in full. The claimant contends that she and the comparator were provided with contracts of employment by Ellis and Thompson that contained identical terms (see pages 87-89 and 83-85 the comparator). These documents were provided to the claimant and the comparator as a formality prior to the TUPE transfer rather than as intending to set out the roles performed by either the claimant and the comparator. The comparators signed contract was produced, the claimant never signed her contracts whether produced by Ellis and Thompson or the respondent. The claimant was also given a job description setting out her role by the respondent, a similar document was not provided to the comparator. The claimant and the comparator were both provided with identical name badges and business cards with their job titles both recorded as "*Dispensing Associates*". The comparator accepted that his role was 90% the same as the claimant's.
49. The comparator carried out work that included managerial duties that the claimant did not do, and technical work that the claimant did not have the skill to carry out. The claimant had responsibility for the respondent's window case design, the comparator did not have this responsibility.
50. We did take into account that the work that the claimant and the respondent did was in 90% of matters the same type of work. The level of skill,

experience,, and qualifications between the claimant and the comparator in respect of the 90% has not been distinguished.

51. The difference in the work done by the claimant that is not done by the comparator, and the work done by the comparator that is not done by the claimant is significant. The claimant's work on window case design was an interest that the claimant developed over time and would not feature in her or the comparator's job description at the commencement of their employment. The comparator did not have the interest in doing the window case designs that the claimant had, and so he did not do it. The claimant did not have the technical skills to carry out the technical work that the comparator did to the level that he did it. The comparator's skills were in a different category to the claimant's to the extent that the claimant could not do this part of the comparator's role. The claimant's contract of employment did not contain a requirement to carry out managerial functions in the way that the comparator was required to. The comparator was running the practice in the absence of the partners before the TUPE transfer, then following the TUPE transfer initially acting as practice manager for a period of about 1 ½ years, and after the appointment of the practice manager carrying out banking. The comparator also had technical work to carry out, this involved working in the lab and supervision of staff, the work involved skills that the claimant did not have.
52. The distinction between the claimant's role and the comparator's role amounts to about 10% of the comparator's role. This 10% distinction, in our view, is sufficient for us to conclude that the claimant and the comparator did not carry out work that was *the same, or of a broadly similar nature*. The claimant's role was very different from the comparator's role when they were respectively recruited. There were always many common features between the claimant's role and the comparator's role, the roles always involved a significant element of acting as a dispensing associate. What is significant for the Tribunal is that when the comparator was recruited he was recruited because he was required to carry out work with a technical skill set that went beyond that of a dispensing associate and this continued over the period before and after the TUP transfer. There was a significant distinction in respect of managerial responsibility prior to the TUPE transfer which carried over after the TUPE transfer, even though after the appointment of practice manager this function diminished in scope for the comparator, illustrated by the fact that the comparator ceased having to prepare management reports after the practice manager was appointed. There did however remain a residual managerial function for the comparator which was not within the expectation of the claimant's role, an example is that the comparator was a key holder who on occasion was required to attend if called out to attend an alarm going off at the shop, external lab liaison where the comparator was responsible for sourcing and building company wide relationships with specialist laboratories. We also consider it significant that the comparator had an involvement in respect of banking that featured as a function within the comparators role that did not exist in the claimant's role.

53. The distinction in the claimant's role and the comparator's role remained throughout the period of the claimant's employment, despite the fact that the scope of the duties expected of the comparator changed over time. The differences were significant and important to the respondent's business. We recognise that there were other distinctions between the claimant and the comparator's roles that were not significant and important. The hours worked and the times that the claimant and comparator worked, carrying out minor repairs, the work that the comparator did with Alan Thompson, and providing IT support, this does not however diminish from our conclusion that the roles were not the same or broadly similar. We do consider that it was significant that the comparator worked every Saturday and the claimant only worked 3 out of 4. This would be particularly significant for a retail business whose busiest day is a Saturday.

54. The claimant and the comparator were not employed on like work.

Was there a material factor justifying the difference in pay?

55. If the conclusion of the Tribunal that notwithstanding that the claimant and the comparator were employed on work which was 90% the same but was not like work is wrong, we have however come to the conclusion that there was a material factor which was the reason for the difference in pay.

56. The burden is on the employer to show that the factor put forward as the reason for the pay differential is genuine and not a sham or pretence, a material factor, not 'the difference of sex', and a material difference.

57. If the claimant and the comparator did perform like work, the respondent contends that the difference in pay is explained by the comparator's greater skills, qualifications and experience, his flexibility and the responsibilities he was given.

58. As to skills, qualifications and experience, the comparator was taken on to fulfil a need for an experienced person for dispensing duties with lab experience. The comparator had worked for ten years at an optical manufacturing company carrying out lens production, glazing and spectacle frame repairs, and he had also worked as a branch manager for five years and was able to balance the till each night to complete the banking. The comparator had a broader knowledge of lenses to the claimant.

59. The claimant was taken on when Ellis and Thompson were looking for a dispensing assistant, when the claimant was interviewed they were not looking for someone to work in the lab, the comparator was already employed to do that. The claimant's prior experience was that of a dispensing assistant and was not comparable to the comparator. The claimant did not have previous experience or expertise in technical lab work. The claimant and the comparator were taken on for different roles. The comparator was brought in to do tasks additional to dispensing and to run the practice.

60. Before the TUPE transfer the comparator worked 10am to 7pm. Afterwards he changed his hours to the same as the claimant's, save that he worked four Saturdays a month as opposed to the claimant's three. It was accepted by the claimant that the comparator stayed on to work additional hours more often than the claimant. While the respondent relies on this we do not consider it a material difference.
61. There was evidence that the comparator acted as an assistant to Alan Thompson. The claimant accepted that the comparator worked with Alan Thompson in his office but did not accept that the work that the claimant did with and for Alan Thompson was qualitatively different to the work that she did. The Tribunal in this respect have not been convinced that it has been shown that there was a material difference in some of the work that the claimant did for Alan Thompson in contrast to the claimant, however the comparator had a greater technical ability which allowed him to provide a greater level of assistance to Alan Thompson than the claimant could.
62. There has been no argument put forward of indirect sex discrimination and we consider there is no evidence of it. The claimant has given evidence suggesting sexually discriminatory conduct and practices but we did not find this was established as having occurred. We do not consider there is a basis for tainting the fact of the comparator's appointment and pay for reasons Ellis and Thompson considered justifiable with sex discrimination.
63. The historical reasons for the recruitment of the claimant and the comparator at different times, in different roles, at different levels of pay considered justified for the roles at the point of recruitment, has not been tainted by any considerations for sex discrimination. The difference in the skills, qualifications and experience of the claimant and the comparator, in our view, is such that there is a genuine material difference that is the reason for the difference in pay.
64. The conclusion of the Tribunal is that the claimant and the comparator did different jobs throughout their employment. While both were dispensers, they were recruited to perform different duties and at different levels of seniority, they had different experience and skills, they performed different tasks and they held different levels of responsibility.

Employment Judge Gumbiti-Zimuto

Date: 26 January 2021

01.02.2021

Sent to the parties on:

J Moossavi

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For the Tribunals Office

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