EMPLOYMENT TRIBUNALS

Claimant: Mrs E Desert

Respondent: North Cumbria Integrated Care NHS Foundation Trust

Heard at: Manchester

On: 6 and 7 November 2023 (in person)
8, 10 and 11 November 2023 (by CVP)
21 November 2023 (in Chambers)

Before: Employment Judge K M Ross (sitting alone)

REPRESENTATION:

Claimant: Mr Walker (Solicitor)
Respondent: Mr Stubbs (Counsel)

JUDGMENT

Stage 1 Equal Value Hearing pursuant to Employment Tribunals (Equal Value) Rules of Procedure 2013

The judgment of the Tribunal is that:

1. The Tribunal does not have reasonable grounds for suspecting that the evaluation contained in the Job Evaluation Study NHS Job Evaluation Scheme is unreliable pursuant to section 131(6)(b) Equality Act 2010.

2. In the alternative, the respondent can show that any difference in terms is due to a material factor which is relevant and significant and does not directly or indirectly discriminate against the worker because of her sex pursuant to section 69 Equality Act 2010.

3. Accordingly, the claimant's claim of equal value is struck out.

REASONS

Introduction

1. This case has an unfortunate procedural history.

2. The claimant remains employed by the respondent as a Consultant Clinical Psychologist. She is a highly regarded and valued employee. She began working for the respondent's predecessors in 1991.

3. Within the NHS, employees are banded in accordance with the Job Evaluation Study referred to as "Agenda for Change" or "AFC". Under the job evaluation process Agenda for Change the claimant was categorised as a Band 8D in 2005. As time passed, the claimant became concerned that she was inaccurately banded under the respondent's Job Evaluation Study. The clamant formally raised a request for re-banding in September 2016. The process was concluded in 2018 when the claimant was re-banded to Band 9. In accordance with Agenda for Change, the claimant's pay was backdated to the date a new job description was agreed in 2018.

4. This claim relates to the period August 2013 to October 2018. The claimant says that she was engaged on work of equal value to her comparators, Professor Dagnan and his predecessor Mr Roberts. They were both assessed at Band 9 under AFC.

5. The claimant presented her claim in the Employment Tribunal on 8 August 2019. There was a case management hearing on 11 March 2020 and at that stage it was brought as both a "like work" and/or a "work of equal value" claim. There were two further case management hearings in 2020. By 9 October 2020 Mr Walker, the claimant's representative, clarified that the claim was an equal value claim only.

6. A further case management hearing was heard before me on 10 June 2021. At that stage there was a misunderstanding as to how the parties put the case. I recorded that the respondent was not running a material factor defence argument, that both parties had agreed there was no need for an independent expert and that the issue was a purely factual one for the Tribunal to decide, namely what were the additional duties that the claimant took on and when. Regretfully, clarification that these issues were inaccurate from the respondent's perspective was not provided by the respondent until just before the final hearing which was listed before Employment Judge Leach, Ms Berkeley Hill and Ms Dowling on 9 and 10 January 2023.

7. At that point it was clarified that the respondent was running a material factor defence argument and that there should be a stage one equal value hearing in accordance with the Employment Tribunals (Equal Value) Rules of Procedure, as normally required in equal value claims.

8. The issues were clarified by Employment Judge Leach (see paragraphs 12.1 to 12.6 of his case management order – pages 68-69 of the bundle for this hearing).

9. By the outset of this hearing the issues were further refined between the parties and agreed before me as follows:

(1) Was the claimant's work and the work of her comparator, Professor David Dagnan, given different values during the period August 2013 to October 2018 by a Job Evaluation Study? The relevant Job Evaluation Study is the NHS Job Evaluation Scheme where staff are employed on Agenda for Change contracts. The relevant job evaluations for the comparator are for the role of Professor Dagnan's predecessor, Mr Roberts, in 2008 and the evaluation of Professor Dagnan's role in February/March 2023.

(2) If so, does the Tribunal have reasonable grounds for suspecting that the evaluation contained in that study is unreliable? The claimant relies on section 131(6)(b) Equality Act 2010. The claimant does not rely on section 131(6)(a) Equality Act 2010.

(3) If not, applying section 131(6) the Tribunal must determine that the claimant's work was not of equal value to the work of her comparator.

(4) Assuming that the claimant's work is of equal value to the work of her comparator, can the respondent show that the difference in pay is due to a material factor reliance on which does not involve direct or unjustified indirect discrimination? (Section 69 Equality Act 2010) The respondent says the material factor is that the claimant had a substantive role of Consultant Clinical Psychologist which had been grade as Band 8D under the Job Evaluation Study in use within the NHS whereas the comparator's role had been graded as Band 9 under that same study.

(5) Should the Tribunal require an independent expert to prepare a report on the question as to whether the claimant's work is of equal value to that of her comparator?

Evidence

10. I had an agreed bundle of documents of 582 pages in both paper and electronic format.

11. I heard from the claimant, her witness statement being entitled "Third Witness Statement". I also heard from Ms Hodgkison, Mr Tim Evans and Professor David Dagnan.

Findings of Fact

12. I found the following facts.

13. The claimant began working for the respondent in 1991 and continues to work for them. She is described as a highly regarded and valued employee. She is a consultant clinical psychologist.

14. The Job Evaluation Study in the NHS is referred to as "Agenda for Change" or AFC. Under the job evaluation process in Agenda for Change contracts within the NHS the claimant was categorised a band 8D in 2005.

15. It was not disputed that the way Agenda for Change contracts are evaluated is by reference to national job profiles. The national job profile for a clinical psychologist consultant is band 8C – 8D (p93).

16. The band for Clinical Psychologist Consultant, Professional Lead/Head of Psychology Services is Band 8D-9 (p93). There are nationally agreed job profiles for roles within the NHS in the job evaluation study AFC. The job profile for a Clinical Psychologist Consultant is p106 and the national job profile for a Clinical Psychologist Consultant Professional Lead Head of Psychology service job statement is at page 107.

17. The Agenda for Change documents and extracts from the NHS job evaluation Handbook are at pages 109-110.

18. The NHS Job Evaluation Handbook recognises that "All posts change over a period of time. For most the job evaluation outcome will not normally be affected unless there are significant changes".

19. It explains that the process for seeking a rematch of a post must be by agreement between the post-holder and their manager. The claimant agreed that the process is for the manager to agree the post holder's request to be put forward for re-evaluation and for the job holder and manager to agree a job description. The Guidance records that the first step is for "the postholder must submit either an agreed job description or agreed evidence showing which skills and responsibilities applicable to the post have changed".

20. In late 2009 the claimant's line manager Nigel Roberts retired. He was the Professional Head of Psychological Therapies. He was originally graded Band 8D under AFC but following his application for regrading he was matched at Band 9 in October 2008. (P135, 6)

21. The claimant agreed that Mr Roberts had been Head of Specialty as well as a Trust Professional Head (p118).

22. When Mr Roberts retired, Professor Dagnan successfully applied for the Professional Lead for Psychological Services. However, he did not take up his post immediately as he was asked by the Chief Executive of the Trust to take up a temporary leadership role elsewhere in the Trust.

23. Elizabeth Bolt was asked to take on the Professional Lead aspect of Mr Roberts' role and the claimant took on other leadership aspects of his role.

24. In 2012 the respondent created a new structure for Professional Leadership posts across the Trust, as part of a restructure whereby community services from NHS Cumbria had transferred into Cumbria Partnership NHS Foundation Trust. A consultation paper is at pages 142-5. The structure included Clinical Directors on a geographical basis at six localities, Professional heads and Pathway Leads. (P143)

25. The claimant said her service was Cumbria wide so did not sit in any specific locality during that period.

26. The claimant also agreed that Trust wide there were nine Professional Heads (p144). Some specialties had previously had a Professional Head but others had not. The claimant agreed that from 2009 Mr Roberts was her Professional Head and she was professionally accountable to him. She accepted he was also Head of Service.

27. Professor Dagnan a Consultant Clinical Psychologist who was also Head of Service successfully applied for the Head of Professions post for Psychology in 2012. The post is described at page 144. He was already at Band 9 when he applied and remained so throughout the period. He also held other Clinical Director roles as described in paragraph 9 of his statement. He never received any payment for his additional Clinical Director roles. I find that when he first undertook the Clinical Director roles there was no additional payment for a non medically qualified practitioner. He was advised informally by Human Resources that, given he was already at Band 9, the highest Band under AFC he would have to step outside the scheme if he wished to pursue payment for those roles. He chose not to do so.

28. I find that the claimant accepted in cross examination that it was in accordance with AFC that there was no requirement for a review of the banding of Professor Dagnan when he was successfully appointed to Head of Professions where he and his manager did not see the need for it, particularly where he was already banded at the highest Band, Band 9 under AFC.

29. The geographical basis for Clinical Directors lasted between 2012 and 2014. After that date Clinical Directors became speciality based. The claimant agreed in cross examination that she could raise issues with those Clinical Directors during the 2012-14 period. The claimant applied for and became a Clinical Director in June 2014. The claimant agreed that she was not appointed a clinical director during the period August 2013 - June 14.

30. When the claimant was originally appointed a Clinical Director, no specific remuneration attached to the position. At that time Clinical Directors could not access the extra £10,000 which was paid per annum to a medically qualified clinician carrying out a Clinical director role.

31. The job description for Clinical Director role is at pages 146-154. In or around 2016 a grievance was lodged on behalf of the clinical directors who were not also medically qualified doctors. The grievance was successful and after that £10,000 per annum was paid to clinical directors whether or not they were medical doctors, and the sum backdated. The claimant was therefore in receipt of £10,000 per annum for her medical director role from June 2014 until October 2018 when her job was successfully re-evaluated at Band 9. The additional £10,000 was not paid after October 2018.

32. The claimant said that she was doing the work of Head of Specialty from 2010 onwards. I find she agreed she knew the process under Agenda for Change (AFC) to challenge her banding.

33. The claimant explained she had an Operational line manager and a Clinical Professional Head and these are different people. She said her operational line manager was Tim Evans but Nina Hill stepped in to his position for a time in or around 2017/18 whilst he was on secondment elsewhere.

34. The claimant said from 2014 she was doing two roles: her substantive role as Head of Specialty and also separately the Clinical Director role.

35. There is a factual dispute between the parties whether, when the claimant's role was re-banded in 2018 it was only her Head of Speciality Role or whether it also included her Clinical Director " CD" role.

36. It is not disputed that the claimant did not receive a clinical director salary of £10,000 per annum after she was re-banded in 2018.

37. The claimant said she could not formally progress the problem of her incorrect banding because she had no appraisal for six years. The claimant says Tim Evans was aware of her roles and responsibilities in 2012 and 2013.

38. The Tribunal finds it implausible that the claimant who is a highly intelligent person who was in a senior position did not formally raise a request to be re-banded because she was not regularly appraised.

39. The Tribunal finds the first occasion the claimant formally requested re-banding was on 29 September 2016 when she submitted a job description for job matching to her manager Tim Evans p429.The Tribunal finds this followed a meeting with Tim Evans in June 2016 when the claimant raised the issue. The Tribunal finds before the claimant invoked the formal matching procedure the claimant had informal discussions about her pay banding with Professor Dagnan and Mr Evans. The claimant agreed in her witness statement and in cross examination that she invoked the formal procedure under agenda for change in September 2016.

40. Mr Evans acknowledged the request and explained there were points to clarify. See email 6 October 2016.

41. The next email exchange started in November 2016 where the claimant provided a further amendment to her job description following discussion with Tim Evans- page 433. Mr Evans had spoken to Professor Dagnan on the clinical side of the claimant's role and there is email communication reflecting his views (pages 431 and 430).

42. The email correspondence reflects the different views of the claimant and her managers. The claimant considered her position as a "dual role" (page 429). She also stated, "I think the difficulty is that my job is quite different than other CDs-the combination between my consultant and CD role is intrinsically linked."

43. By contrast her managers were stating concerns about that approach. See email Prof Dagnan where he states the combination of the two roles is "not something that the care group can make a unilateral decision on. The re-banding request is effectively proposing to refine the structure of Elspeth's CD role and create a JD that combines the CD and clinical responsibilities; regardless of the validity of this particular request this could have implications for other CDs in other care hence my suggestion that the issue re-brought to your attention for consideration".

44. There was no further action on the matter until May 2017. The claimant further amended her job description see email 17 and 24 May 2017, page 436 and 437 with attached job description for the dual role at page 438 onwards.

45. In July 2017 Nina Hill became the claimant's line manager. Page 369. It was not disputed that the claimant had various conversations with Ms Hill but they were unable to agree a job description.

46. A document created around January 2018 entitled "summary of changes" showing the changes to the claimant's job role has columns setting out the comments of her managers see page 265-9. I find the triumvirate referred to in the managers' comments section were confirmed by the claimant to be the Head of Nursing, her Operational Manager Nina Hill and the Medical Director.

47. On 16 May 2018 the claimant wrote to Mr Smillie, who was both the Finance Director and at that time acting Head of Human Resources "HR" asking about the progress of her job matching (page 459).

48. He responded the same day stating that firstly there should be an accurate JD banded "for the non-CD elements" of the claimant's role. He said secondly the process was for the claimant and her manager (Nina Hill at that time) to agree the job description "JD" as accurate. However, he went on to state "if this is not possible then this should be escalated, in this instance to Deputy Ops Director or another equivalent person by agreement of all parties to mediate the discussion to reach agreement".

49. He then recorded a final option "if this does not resolve the matter then the situation needs to be escalated into an HR process that the HR business Partner team will advise you on".

50. I find that option two was followed. Mr Evans became involved in a mediator role. In fact he said it was a hybrid role rather than purely a mediator role as he had active involvement in finding a resolution. There was further communication in July (pages 460-3).

51. The job description which is entitled "final job description for ED (Elspeth Desert) for Head of Specialty and Consultant Clinical Health Psychologist." Is at page 463 with the attached job description.

52. I find on 17 July 2018 Maria Stevens from HR asked Mr Evans which job description was being reviewed: Clinical Director or Consultant Psychologist. Mr Evans responded, "it's both".

53. The Tribunal finds that Mr Evans had conceded the argument and agreed, in order to resolve this matter, to put forward a job description that included both the claimant's roles as Head of Specialty and Clinical Director as the claimant had wanted.

54. In reaching this finding the Tribunal has regard to the fact Mr Smillie, who was an extremely senior person within the respondent organisation at that time as both Finance director and acting Head of HR, had directed Mr Evans to be appointed as mediator. The Tribunal is satisfied from Mr Evans evidence that he had authority from Mr Smillie to reach the agreement which he made with the claimant about her job description.

55. By 6 September 2018 it appeared that agreement had been reached see page 483 with attached final job description at page 484-9 signed by the claimant on 5

September 2018. Although it was not formally signed by the Trust there is no dispute that Mr Evans agreed to that job description after some further communication.

56. Perhaps unfortunately the claimant decided on 10 October 2018 following a brief discussion in a pub car park to remove the "CD" title from the job description. The job description was in other respects at pages 522-539 the same as the earlier versions which had progressed on the basis of the duties of both roles being included in the job description.

57. The job description was sent for matching and returned promptly as a band nine (pages 270-77).

58. Payment at Band 9 was backdated to October 18 when the job description had been agreed. This is in accordance with the NHS job evaluation handbook which states, "if the banding outcome changes as a result of re-evaluation that changes should be backdated and manager agreed the job has changed" (page 110).

59. I am therefore satisfied and find that the job which was re-banded in October 2018 was the "whole job" encompassing both the claimant's Clinical Director duties and her Head of Speciality duties despite the fact the words "Clinical Director" had been removed from the title. I find, relying on the claimant's contemporaneous evidence that the roles were "inextricably linked".

60. The claimant presented a grievance. She sought pay at band 9 also for the period 2009 -18, identified concern about the delay in the job matching process, concern about the failure to backdate the re-banding following the band match at Band 9 and sought payment of CD role back to 2014.p337-343. The grievance is not dated but an investigating officer interviewed Nina Hill, Tim Evans and Maria Stevens and David Dagnan in 2019. An investigation report was produced and an outcome at pages 405-07 dated 1 November 2019.

61. Very unfortunately, there is a complete lack of focus and clarity in the questions put to the respondent's witnesses by the investigator which caused ambiguous answers to be given.

62. This caused a grievance report and outcome to be issued which was inconsistent with the facts as found in this case.

The Law

63. Both counsel had helpfully agreed a detailed list of authorities which is attached to this Judgment.

64. I had particular regard to **Element v Tesco Stores [2023] ICR 208**, a recent and very helpful decision from the Employment Appeal Tribunal where there is a very useful analysis of section 80(5) Equality Act regarding a Job Evaluation Study ("JES").

65. I remind myself that although the claimant's claim is in essence for "backpay" at Band 9 for the period August 2013 to October 2018, her claim has been brought as a claim for equal value to two named comparators, through the Equality Act 2010. I must remind myself that this hearing is a Stage One Equal Value hearing and I must

apply the law to the facts having regard to the issues identified and agreed at the outset of this hearing.

66. I turn to the first issue: was the claimant's work and the work of her comparator, Professor David Dagnan, given different values during the period August 2013 to October 2018 by a Job Evaluation Study? The relevant Job Evaluation Study is the NHS Job Evaluation Scheme where staff are employed on Agenda for Change contracts. The relevant job evaluations for the comparator are for the role of Professor Dagnan's predecessor Mr Roberts in 2008 and the evaluation of Professor Dagnan's role in February/March 2023.

67. There is no dispute that the answer to this question is yes.

68. I refer to my finding of fact. Until the claimant's job was re-evaluated in October 2018 to Band 9, the claimant was working at Band 8D. Professor Dagnan's predecessor Mr Roberts was working at Band 9 once his job had been re-evaluated and Professor Dagnan had worked throughout at Band 9 and was re-evaluated as band 9 in February/March 2023.

69. I therefore turn to the second question, which is a critical question: does the Tribunal have reasonable grounds for suspecting that the evaluation contained in that study is unreliable? The claimant relies on section 131(6)(b) Equality Act 2010. The claimant does not rely on section 131(6)(a) Equality Act 2010.

70. I remind myself of the provisions of section 131 Equality Act 2010: assessment of whether work is of equal value. Section 131(5) explains that subsection (6) applies where:

(a) A question arises in the proceedings as to whether the work of one person (A) is of equal value to the work of another (B); and

(b) A's work and B's work have been given different values by a Job Evaluation Study.

71. There is no dispute that subsection (6) is engaged. Both parties agree that the respondent had a Job Evaluation Study under the NHS Agenda for Change and that in accordance with that study the claimant, who was given a value of Band 8D prior to 2018, had a different value to her comparators.

72. I then turn to section 131(6) which states:

"The Tribunal must determine that A's work is not of equal value to B's work unless it has reasonable grounds for suspecting that the evaluation contained in the study:

(a) was based on a system that discriminates because of sex; or

(b) is otherwise unreliable."

73. As stated above, the claimant's representative clarified that the claimant does not suggest that Agenda for Change (the respondent's Job Evaluation Study) or the claimant's evaluation under it was based on a system that discriminates because of

sex. Accordingly, the relevant section for me is to consider whether the Job Evaluation Study is "otherwise unreliable".

74. At this point it is prudent to note that section 131(9) states:

> "'Job Evaluation Study' has the meaning given in section 80(5) Equality Act 2010."

75. I therefore turned to consider section 80(5) Equality Act 2010. It states:

> "A Job Evaluation Study is a study undertaken with a view to evaluating, in terms of the demands made on a person by reference to factors such as effort, skill and decision making the jobs to be done:
>
> (a) by some or all of the workers in an undertaking or group of undertakings; or
>
> (b) in the case of the Armed Forces, by some or all of the members of the Armed Forces."

76. A review of the case law shows that Job Evaluation Studies are sometimes used as a sword to advance a claim for equal pay but also (as in this case) as a shield by the employer to block a claim for equal value.

77. The decision in **Element v Tesco Stores** reminds me that the burden of proof is on the claimant to show that the Job Evaluation Study in this case was "otherwise unreliable":

> "But if a respondent seeks to rely on a JES that complies with section 80(5) (formerly section 1(5)) to show that the jobs have not been given an equal value under the JES in a bid to strike out the equal value claim, it is for the claimant to show reasonable grounds for suspecting that the evaluation contained in the study was flawed – either because of a taint of sex discrimination or because it was otherwise unreliable."

78. Stacey J went on to consider whether the so-called "Eaton test" remained relevant. Stacy J was considering a "sword" case rather than a "shield" case. She conceded that:

> "Armstrong was a case in which the JES was being used as a shield by the respondent employer. It is therefore not necessary for me to decide if it should be followed in the determination of the question of what an employer has to show to a Tribunal when advancing a section 131(6) Equality Act 2010 defence to an equal value claim as it is not relevant to this appeal."

She did however note obiter:

> "I note however that it would appear to add a layer of complexity and tautology not contained in the statutory wording and some of the words in the list have similar meanings and risk resembling a thesaurus."

79. I go back to the words of the statue at section 80(5) Equality Act 2010:

"A Job Evaluation Study is a study undertaken with a view to evaluating in terms of the demands made on a person by reference to factors such as effort, skill and decision making the jobs to be done:

(a) by some or all of the workers in an undertaking or group of undertakings; or

(b) in the case of the Armed Forces by some or all of the members of the Armed Forces."

80. The "Eaton test" suggests that in addition to the statutory wording a JES must:

- be thorough in analysis and capable of impartial application;
- take into account demand factors connected only with the requirements of the job rather than the person doing it;
- be analytical in assessing the component parts of particular jobs rather than simply their overall content on a "whole job basis";
- be a single study covering both claimant and comparator; and
- be completed.

81. Neither party disputes that the system adopted by the NHS under the Job Evaluation Study in Agenda for Change is anything other than a Job Evaluation Study which satisfies section 80(5). The claimant's concern is that under Agenda for Change her evaluation at Band 8D was no longer accurate during the period August 2013 to October 2018 because her job had changed.

82. In so far as the "Eaton test" is applicable I rely on the witness statement of Ms Hodgkison to show that the Agenda for Change Job Evaluation Scheme is thorough in analysis and capable of impartial application, takes into account factors connected only with the requirements of the job rather than the person doing it, is analytical in assessing the component parts of particular jobs rather than simply their overall content on a "whole job basis" and is a completed single study covering both claimant and comparator; and has been completed.

83. I rely on Ms Hodgkison's statement to find that the NHS Job Evaluation Process matches jobs against national profiles. Each profile represents a commonly occurring job in the NHS. National profiles have been developed by NHS Staff Council Job Evaluation Group ("JEG") in partnership with professional groups and trade unions. I find based on her evidence there are groups (called "job families") of national profiles for administrative roles, allied health practitioners, clinical practitioners, emergency services, health science services, nurses and midwives, homecare, residential care, social work support services and professional managers.

84. I rely on her evidence that each national profile is comprised of 16 factors as listed in paragraph 5 of her statement. I rely on her evidence at paragraph 6 of her statement that each factor has a number of levels to which points are assigned on an increasing scale. I rely on her evidence that the weighting allocations described are not specific to the respondent. The weighting mechanism has been created by NHS

employers which has to be strictly adhered to by all NHS Trusts. I rely on her evidence that the Trust carried out job matching in line with the nationally agreed process set out in the NHS Job Evaluation Handbook, that it is a single, complete study.

85. The NHS Job Evaluation Handbook at pages 109-110 of the bundle clearly sets out the process to be adopted to challenge the evaluation of a particular job. The claimant does not suggest that there was anything wrong with the process of job evaluation under Agenda for Change.

86. At this point I turn to the process identified by Agenda for Change for revising/re-banding. It acknowledges at paragraph 3.2:

> "All posts change over a period of time. For most, the job evaluation outcome will not normally be affected unless there are significant changes.

It goes on to state:

> "The decision about whether changes are significant and warrant a re-evaluation should be made in partnership by knowledgeable job evaluation practitioners."

87. The process is identified at page 110:

> "Where a postholder and their manager agree that the demands of the post have changed significantly then a rematch or re-evaluation of the post needs to be carried out."

It goes on to state:

> "To make a request for re-evaluation or rematch the postholder must submit either an amended agreed job description or agreed evidence showing which skills and responsibilities applicable to the post have changed."

88. I am satisfied that the Job Evaluation Scheme in NHS Agenda for Change was a valid Job Evaluation Study within the meaning of section 80(5) Equality Act 2010. I must then turn to consider whether or not the claimant has shown that the study was "otherwise unreliable".

Discussion and Conclusions

89. The claimant relies on the fact that her job had changed between 2009 and 2018 to say that therefore her banding at 8D was no longer accurate and was thus unreliable.

90. She explained in detail, as my finding of fact describes, how she was taking on additional responsibilities. It is not disputed that during the period 2014 to 2018 the claimant successfully applied for the role for Clinical Director role and was eventually paid for that role (following a grievance lodged by other non medical Clinical Directors).

91. However, I find that I must look at the process for re-evaluation of a role. The process under the respondent's Job Evaluation Study clearly states that it is for the postholder to raise with their manager the issue that the demands of the post have changed significantly and to agree either an amended agreed job description or

provide agreed evidence showing which skills and responsibilities applicable to the post have changed.

92. The claimant accepted in cross examination that it was for the postholder to do this. She accepted that she only did this formally from September 2016.

93. The claimant relies on the fact that she did not have appraisals for a period of six years as the reason why she did not formally instigate the process at an earlier occasion. The claimant is a highly intelligent woman carrying out a very senior role in the respondent's organisation. I am not satisfied that a failure of the organisation to conduct appraisals is sufficient to discharge the claimant's responsibility to raise the matter formally.

94. There is no dispute it took some time between 2016 and 2018 to agree a revised job description. I find this was largely because of the tension between the parties as to the "whole job role". The claimant considered that her Clinical Director duties and responsibilities were integral to her Head of Speciality role. The respondent was resistant to that argument until, in an effort to mediate the stand-off between the parties, Mr Evans agreed (see my finding of fact) that the Clinical Director elements of the role could go forward in the job description.

95. The chronology shows that there was delay on both sides during that two year period.

96. So far as the claimant's evaluation under the Job Evaluation Study during August 2013-October 2018 is concerned, I find the claimant's job changed over time as jobs do and as the NHS Job Evaluation Handbook recognises. The extent to which her job changed and when is far from clear.

97. However, the answer to that problem of changing role was for the claimant to make a request for re-evaluation seeking an agreed job description with her manager. Under the respondent's Job Evaluation Scheme, that facility was available to the claimant, but she did not avail herself of it until September 2016.

98. The claimant accepted in cross examination the assessment of her comparators banding. She also accepted that under AFC, there was no requirement for Professor Dagnan's role to be re-banded when he secured the Head of Professions role if he and his manager considered there was no need and given he was already at Band 9, the highest band. Ms Hodgkison also confirmed in re-examination being taken to page 144 and the job description for Trust Professional Head at page 118, that if a role had already been banded , there was no need for a re-banding exercise.

99. Accordingly, I find there is nothing to suggest either of the claimant's comparators' banding was unreliable.

100. I turn back to the banding of the claimant's role. In the context of a valid National Job Evaluation Scheme, which it is agreed to be non discriminatory, where there is a clearly identifiable process for the claimant to follow if she considers that her own banding is no longer reliable and the claimant has failed to follow it, I am not satisfied that the claimant has adduced evidence that there are reasonable grounds for suspecting that the evaluation is unreliable.

101. Furthermore, once the claimant had presented a formal concern in September 2016, I am not satisfied that the fact there was a delay in agreeing a job description suggests that the job evaluation study was unreliable. It is clear looking at the chronology that there was delay by both the respondent and also by the claimant.

102. I remind myself of the guidance of Burton J in **Diageo plc v Thomson EATS/64/03**, para 17 quoted with approval in **Element v Tesco**:

> "*Almost every study is going to be capable of being suggested to have some defects, but it will only be a study which is invalid, and invalid in accordance with proper and rigorous assessment, that will fall foul of the (Eaton) test and will not be available under the statute as a block to s2 Equal Pay Act application."*

103. Therefore as the claimant has failed to satisfy me that there were reasonable grounds for suspecting the Job Evaluation Study was unreliable, and there is a valid JES which finds that the claimant and her comparator are engaged on roles banded differently, then her claim fails at that point.

104. However, in case I am wrong about that and the claimant is able to suggest that the Job Evaluation Study was unreliable I turn to consider the next issue, which is: If not, applying section 131(6) the Tribunal must determine that the claimant's work was not of equal value to the work of her comparator.

105. This is a stage one hearing so I am not required to carry out that evaluation. Instead I am required to move to issue 4: assuming that the claimant's work is of equal value to the work of her comparator, can the respondent show that the difference in pay is due to a material factor reliance on which does not involve direct or unjustified indirect discrimination? (Section 69 Equality Act 2010). The respondent says the material factor is that the claimant had a substantive role of Consultant Clinical Psychologist which had been graded as Band 8D under the Job Evaluation Study in use within the NHS whereas the comparator's role had been graded as Band 9 under that same study.

106. I reminded myself of section 69 of the Equality Act 2010 and the case law. Section 69 provides:

69. <u>Defence for Material Factor</u>

(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which:

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

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that as a result of the factor A and persons of the same sex doing work equal to A's are put at a

particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

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

(4) …

(5) …

(6) For the purposes of this section a factor is not material unless it is a material difference between A's case and B's."

107. I remind myself that when considering the defence I should do so on the presumption that the claimant's work is of equal value to that of her comparators and bear in mind that the burden of proof is on the respondent to make out the defence.

108. As I was reminded by the respondent's counsel, in **Glasgow City Council & Others v Marshall & Others [2000] ICR 196** Lord Nicholls stated that the material factor will succeed if the employer can show that the factor put forward as the reason for the pay differential at issue is:

- Genuine and not a sham or a pretence;
- The cause of the disparity i.e. the factor must be material in the sense it is significant and relevant;
- Not the "difference of sex" i.e. not due to sex discrimination whether direct or indirect; and
- A material difference i.e. a significant and relevant difference between the woman's case and the man's case.

109. Lord Nicholls went on to say:

"It is apparent that an employer who satisfies the third of these requirements is under no obligation to prove a 'good' reason for the pay disparity. In order to fulfil the third requirement he must prove the absence of sex discrimination, direct or indirect. If there is any evidence of sex discrimination such as evidence that the difference in pay has a disparately adverse impact on women the employer will be called upon to satisfy the Tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity."

110. I also reminded myself of the guidance of Underhill J in **Newcastle-upon-Tyne NHS Hospitals Trust v Armstrong & Others [2010] ICR 674** where he summarised the law as it was under section 1(3) of the Equal Pay Act 1970:

"It is necessary for a Tribunal first to identify the employer's 'explanation' for the differential complained of (a preferable phrase to the conventional but clumsy terminology of a 'material factor' to which the differential is 'due') and then to consider whether that explanation involves sex discrimination, applying the

well-known principles which underly both the relevant UK legislation and the jurisprudence of the European Court of Justice."

111. Section 69 of the Equality Act 2010 is the replacement version of section 1(3) of the Equal Pay Act 1970.

112. Stepping back at that stage, the employer's explanation for the differential in pay between the claimant and her comparators is the Job Evaluation Study which graded the claimant and her comparators differently in the period 2013 to 2018.

113. The claimant's representative has specifically stated that the claimant does not suggest that explanation (the Job Evaluation Scheme itself or the claimant's evaluation under the scheme) involves sex discrimination. Accordingly, even on this simplistic analysis the claimant's claim must fail.

114. I turn back to the **Glasgow City Council v Marshall** case.

115. I turn to the first point, which is the need for the employer to satisfy the Tribunal that the relevant factor is not a sham or pretence. The Tribunal reminds itself that the word "genuinely" which was contained in section 1(3) of the Equal Pay Act is not contained within the 2010 Act. I remind myself of the guidance in **Bury Metropolitan Borough Council v Hamilton [2011] ICR 655** which reminds me that the terms "sham" or "pretence" are essentially concerned with honesty.

116. I am satisfied that there is no sham or dishonesty in the material factor relied on here. The claimant and her comparator were paid in accordance with their banding under Agenda for Change. This was not a sham in the sense of **Bury Metropolitan Borough Council v Hamilton [2011] ICR 655 EAT**. I reminded myself that in that case the Tribunal had been wrong to find that the explanation (that the comparators' jobs were suitable for bonuses and the claimant's jobs were not) was a sham on the basis it was no longer operative by the time of the claims.

117. I turn to the next point under **Marshall** – the cause of the disparity. There is no dispute that the cause of the disparity was that the claimant had been evaluated under Agenda for Change at Band 8D and her comparator had been evaluated at Band 9. That is clearly a material difference in the sense it is significant and relevant.

118. I turn to the next critical issue, which is that it is not "the difference of sex" i.e. not due to sex discrimination, whether direct or indirect.

119. Usually a claimant makes allegations of direct or indirect discrimination in an equal value claim. The claimant expressly says there is no allegation of direct or indirect sex discrimination and does not raise any allegations of a provision criteria or practice "PCP" causing a statistical disadvantage for women and there is no evidence of that in this case.

120. Accordingly, the material factor defence is made out and the claimant's claim must fail.

121. I particularly remind myself that this is an equal pay claim. If there is a claim for direct discrimination, there has to be more than an assertion by the claimant – there must be some evidential basis for it. However, this does not apply here as the

claimant specifically says there is no direct sex discrimination. As for indirect discrimination under section 69(2) Equality Act 2010, it is for the claimant to show that the facts are such to indicate potential indirect discrimination. This could be the identification of a rule or practice operated by the employer which impacts disproportionately on the claimant and other women; or in the absence of anything that can be identified as a discrete rule or condition for which the employer is responsible, statistical evidence which shows the same disproportionate impact. I remind myself, as stated by Judge Peter Clark in the EAT in **Kings College London v Clark EAT 1049/02**:

> "Where an employer can show that the explanation for a difference in pay has nothing to do with sex then it matters not if the explanation is based on a genuine mistaken belief as to the facts."

122. In this case there was not a mistaken belief as to the facts. There was a Job Evaluation Study which was operating in accordance with its own rules but over time from the claimant's perspective, it was no longer reflective of the work she was actually doing.

123. The respondent has shown the material factor was the pay banding scheme. As counsel for the respondent put it, even a bad reason which is not sex tainted is acceptable within the meaning of the law. That is not to say that there was a "bad reason" in this case, but the absence of any sex taint means that the material factor defence is made out.

124. The claimant's representative relies on **Benveniste v University of Southampton [1989] ICR 617**; **Co-operative Group Limited v Walker [2020] ICR 1450**; and **Secretary of State for Justice v Bowling [2012] IRLR 382**.

125. The Tribunal notes that the case of **Bowling** distinguishes **Benveniste**. **Bowling** and concludes:

> "The question was…simply what the explanation for the continuing differential was. If it had nothing to do with gender that is the end of the matter."

126. I have found the reason in this case that the reason for the continuing differential between August 2013 and October 2018 was that the claimant remained banded at Band 8D and the respondent was banded at Band 9 in accordance with Agenda for Change. That is the explanation for the treatment. There is no evidence or allegation or sex discrimination and accordingly the reason has nothing to do with gender and that is the end of the matter.

127. Finally, I turn to the last issue which is whether or not an independent expert should be appointed. Strictly speaking it is not necessary for me to decide this issue because for the reasons set out above, I have found the Tribunal does not have jurisdiction to hear the claimant's equal value claim and it is struck out.

128. However, for the sake of completeness in case I am wrong about that I address this issue.

129. The claimant said that an independent expert was not necessary and wished the Tribunal to decide the equal value issue. The respondent stated that an independent expert was necessary.

130. I am mindful of the complexity of equal value claims and the delay which can occur, as indeed has already happened in this case. However, if I am wrong in my judgment above, I am satisfied that an independent expert is necessary in this case. There is a factual dispute about what exactly the claimant was doing in terms of her job between 2013 and 2018, the relevant period. In addition there is the so-called “vexed question” of the Clinical Director role. It is not disputed that the claimant was paid £10,000 per year for performing her duties under that role between 2014 and 2018. I have found that the claimant's banding at band 9 in October 2018 was on the basis of a job description which included the claimant's Clinical Director duties, although at the last minute the title “Clinical Director” was removed from the title. I find the Tribunal will require the assistance of an independent expert who looks at the duties carried out by the claimant between 2013 and 2018 and has regard to the duties carried out by the claimant's comparators during the relevant period.

131. I have some sympathy for the claimant, given the procedural history of this case and given she considers that she was doing additional tasks outside her Band 8D role for a considerable period prior to 2018, when she was finally re-banded, although of course the complete accuracy of memory can sometimes be fallible as the Gestin case reminds us.

132. However, the claim before the Employment Tribunal is a claim for equal value, at stage one, so that is the law to be applied to the facts and that is what I have done.

Employment Judge K M Ross
Date:4 December 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
5 December 2023

FOR THE TRIBUNAL OFFICE

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