



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103706/2022

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Preliminary Hearing in person held in Glasgow on 14, 15, 16 and 17
November 2022; parties' further written representations on 22, 24 and 29
November 2022; and Members' Meeting in chambers, held remotely on
Microsoft Teams, on 29 December 2022

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Employment Judge Ian McPherson
Tribunal Member E Farrell
Tribunal Member S Singh

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Ms Lynne Edgar

Claimant
Represented by:
Mr Ronald Clarke -
Solicitor

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Scottish Water

Respondent
Represented by:
Ms Samantha Mackie -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous, reserved Judgment of the Employment Tribunal is that:

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- (1) Having considered the respondent's representative's case management
application dated 24 November 2022 seeking a privacy or anonymity
Order, in terms of Rule 50 of the Employment Tribunal Rules of
Procedure 2013, and notwithstanding no objection by the claimant's
representative to the making of the Order as sought at heads (1), (2) and
(3) of the respondent's application, the Tribunal has refused the
respondent's application in its entirety for the reasons given at
paragraph 73 of the following Reasons for this Judgment, and the

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Tribunal has also decided not to make any Rule 50 Order on its own initiative, it not being in the interests of justice to do so, nor is it necessary to do so to protect the Convention rights of the claimant's comparator, Mr Matthew Bingham.

- 5 (2) The respondent's stated material factor defences, pled in terms of Section 69 of the Equality Act 2010, as per paragraphs 18 and 20 of their ET3 response grounds of resistance intimated on 3 August 2022, are not established on the evidence led before this full Tribunal at this Preliminary Hearing.
- 10 (3) Accordingly, the claim and response shall be listed for a Final Hearing in person before a differently constituted full Tribunal, on dates to be hereinafter assigned by the Tribunal, to determine whether or not the claimant and her comparator, Mr Matthew Bingham, are or have been doing like work, in terms of Section 65 of the Equality Act 2010.

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REASONS

Introduction

1. This case called before us, as a full Tribunal, on the morning of Monday, 14 November 2022, for a 4-day public Preliminary Hearing to determine, as a preliminary issue, the respondent's material factor defence to the claimant's equal pay claim.
- 20 2. Notice of this Preliminary Hearing had previously been issued by the Tribunal to both parties on 3 October 2022 but, in error, it stated it would be an Employment Judge sitting alone, when it had been assigned for a full Tribunal.
3. An amended Notice of Hearing was issued on 10 November 2022 confirming
- 25 it was a full Tribunal, as has been ordered by Employment Judge Frances Eccles, on 31 August 2022, after a telephone conference call Case Management Preliminary Hearing held by her with both parties' solicitors.

Claim and Response

4. The claimant, acting through her solicitor, Mr Ronald Clarke, of Thompsons Scotland, Solicitors, Glasgow, presented her ET1 claim form in this case to the Tribunal, on 4 July 2022, following ACAS early conciliation between 11 January and 21 February 2022.
5. She complained of unlawful sex discrimination by the respondents, including equal pay, and specifically pled equality of terms with her named comparator, Matthew Bingham, in terms of **Sections 65 and 66 of the Equality Act 2010**.
6. She sought a declaration and award of compensation for pecuniary loss, plus interest, from the Tribunal, against the respondent as her continuing employer.
7. Her claim was accepted by the Tribunal administration, and served on the respondent by Notice of Claim issued on 6 July 2022, for an ET3 response to be lodged by the respondent by 3 August 2022. Further, both parties were advised that 31 August 2022 was assigned for a one-hour telephone conference call Case Management Preliminary Hearing before an Employment Judge sitting alone.
8. Although not required by the Tribunal until 10 August 2022, the claimant's solicitor, Mr Clarke, had lodged the claimant's completed Preliminary Hearing Agenda with the Tribunal on 13 July 2022, and thus without sight of any ET3 response from the respondent.
9. An ET3 response was timeously lodged on behalf of the respondent on 3 August 2022, by Ms Samantha Mackie, solicitor with Shoosmiths LLP, Edinburgh, defending the claim, and enclosing detailed grounds of resistance.
10. At paragraphs 17 and 19 of the ET3 paper apart, it was denied that the claimant and her comparator do like work, and / or work of equal value, and stated that: ***“Although they have the same job title, the Claimant and her alleged male comparator are differentiated by a range of skills, experience, duties, responsibilities and potential to progress as narrated above.”***

11. At paragraphs 18 and 20, it was submitted that, esto the Tribunal were to find like work / work of equal value, the respondent contends that 5 identified material factors account for the difference in pay between the claimant and her chosen comparator, Mr Bingham. These material factors were listed at paragraphs 18.1.1 to 18.1.5 for the like work claim, and repeated (as
5 paragraphs 20.1.1 to 20.1.5) for the equal value claim.
12. It was further denied that the claimant is entitled to compensation or interest as claimed, or at all, and that it is unnecessary for the Tribunal to make a declaration as sought by the claimant.
- 10 13. That ET3 response was accepted by the Tribunal on 5 August 2022, and a copy sent to the claimant's solicitor and ACAS.
14. Following Initial Consideration by Employment Judge Shona Maclean, on 8 August 2022, she instructed the claim and response proceed to the listed Case Management Preliminary Hearing on 31 August 2022.
- 15 15. On that date, the case called before Employment Judge Frances Eccles. The claimant was represented by her solicitor, Mr Clarke, and the respondent was represented by a Ms G Watson, solicitor with Shoosmiths LLP.
16. Ms Mackie, the respondent's solicitor on record, who had lodged their ET3 response, on 26 August 2022, returned the claimant's PH Agenda combined
20 with her own additional comments, rather than lodging the usual respondent's PH Agenda, which had been due by 24 August 2022, as per the Tribunal's directions of 6 July 2022.
17. Having heard parties' legal representatives in Case Management Preliminary Hearing, on 31 August 2022, Employment Judge Eccles noted that it was
25 agreed that the claim should be listed for a Preliminary Hearing to consider the respondent's "**material factor defence**" as detailed in paragraphs 18 and 20 of the paper apart (grounds of resistance) to the ET3 response, as follows:
1. **Market factors relating to difficulty in recruitment and / or retention;**

2. ***Skills-related or other relevant supplements;***
3. ***Experience;***
4. ***Responsibility and potential; and***
5. ***Where applicable, in conjunction with one or more of the factors above, cost.***

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18. In her written PH Note dated 9 September 2022, and issued to both parties under cover of a letter from the Tribunal dated 12 September 2022, Judge Eccles listed the issues to be determined by the Tribunal at this Preliminary Hearing, as follows:

10 (1) ***Whether the difference in pay is because of one or more of the material factors which did not involve treating the claimant less favourably because of her sex?***

(2) ***If the factors are found to be tainted by indirect sex discrimination, they are a proportionate means of achieving a legitimate aim?***

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19. Further, Judge Eccles allowed the claimant until 23 September 2022 to respond in writing to the material factors relied upon by the respondent; and fixed this 4-day Preliminary Hearing for 14 to 17 November 2022, before a full Tribunal, with the respondent to lead and provide a Joint Bundle of Productions no less than one week before the start of this Hearing; and for parties to exchange any documents they intended to rely upon no less than 4 weeks before this Hearing.

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20. At that Hearing before Judge Eccles, the claimant agreed to provide a Schedule of Loss by 16 September 2022. A 3-page Schedule of Loss was thereafter provided to the respondent on 12 September 2022, seeking total arrears of pay (to 14 November 2022) in the total amount of **£7,353.39**, plus interest.

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21. Further, on 21 September 2022, Mr Clarke, the claimant's solicitor, provided the Tribunal with the claimant's 3-page reply to the respondent's material factor defence. That reply put the respondent to strict proof in relation to each of the 5 material factor defences pled in terms of **Section 69 of the Equality Act 2010.**

Preliminary Hearing before this Tribunal

22. At this Preliminary Hearing, the claimant appeared as a witness, and to instruct her solicitor, Mr Clarke, who appeared as her legal representative. The respondent was legally represented by Ms Mackie, accompanied by a trainee solicitor to take notes on a laptop. The respondent led two witnesses on their behalf, Ms Georgie Reid, and Mr Scott Fraser, both Corporate Affairs Managers, for West and South-East regions respectively.

23. In terms of the case management orders previously made by Judge Eccles on 31 August 2022, and further directions given by Employment Judge McPherson, on 9 November 2022, by letter issued to both parties' solicitors from the Tribunal clerk, in light of Judge McPherson's pre-Hearing reading into the casefile, when he learned he would be chairing the full Tribunal the following week, the Tribunal received a Joint Bundle, with index, running to 39 documents, extending to some 145 pages for 35 documents, and we further note and record that documents 36 to 39 were not paper documents, but video clips, 2 of which were shown to the Tribunal (with descriptors provided in the index) on the large video display screen in the public hearing room on day 1, Monday, 14 November 2022.

24. In the course of the Preliminary Hearing before for us, the Tribunal allowed additional documents to be added to the Joint Bundle. Firstly, on day 1, we allowed the claimant's reply of 12 September 2022 to the respondent's material factor defence to be inserted as additional pages 42A/C, it having been omitted by error when the Bundle was prepared, and, further, on day 2, we also allowed, as additional pages 146 to 150, the respondent's internal

emails of 1 and 15 July 2021 regarding recruitment of a Corporate Affairs Specialist, which were spoken to by their second witness, Mr Fraser.

25. We had also received a proposed indicative Witness Timetable, which we
5 adopted, using the parties' own time estimates as *maxima*, by making a formal
Timetabling Order under **Rule 45**, and adding time for Tribunal panel
questions, at 1/2 hour per witness, which facility parties' document had
strangely omitted.
26. Acting on her own initiative, the respondent's solicitor had prepared a draft
10 Agreed Statement of Facts, and sent it to the claimant's solicitor, on 3
November 2022.
27. As the draft had not been agreed, Ms Mackie applied to the Tribunal, on 10
November 2022, for an order for parties to agree a Joint Statement of Facts.
When that was referred to Judge McPherson, he directed, and the Tribunal
15 clerk emailed both solicitors, on Friday, 11 November, stating that her
application would be discussed at the start of the Hearing on Monday
morning, 14 November 2022.
28. We made various interlocutory rulings, on 14, 15 and 16 November 2022,
delivered orally to parties at the time by the Judge, after in chambers
20 deliberation with the non-legal members of the Tribunal, and as oral reasons
were given at the time, and we were not asked to confirm them in writing, we
simply note them in summary form here, as follows:
- (1) On day 1, Monday, 14 November 2022, we allowed additional pages to
25 be added to the Bundle – at pages 42A/C; we adopted parties'
indicative Timetable; and we allowed the Joint Statement of Facts, as
amended by the claimant's representative (see paragraph 30 below),
and we allowed the claimant's representative another 45 minutes
cross-examination of the respondent's first witness, Ms Reid on day 2.

5 (2) On day 2, Tuesday, 15 November 2022, we initially refused the respondent's application to be allowed to add additional pages 146/150 to the Bundle, being emails of 1 and 15 July 2021, as per email application from Ms Mackie at 09:46am, during the evidence of the respondent's first witness, Ms Reid, given it was far too late, given Judge Eccles' PH Note of 12 September 2022, and we were not satisfied it was a complete email exchange, but we allowed it later, on a renewed application, made by Ms Mackie, opposed by Mr Clarke for the claimant, before we heard from their second witness, Mr Fraser, considering it in the interests of justice to do so at that stage.

10 (3) On day 3, Wednesday, 16 November 2022, when we heard evidence from the claimant, during her cross-examination by Ms Mackie, solicitor for the respondents, her solicitor, Mr Clarke, took objection to the line of questioning, when she was asked about the table at page 121 of the Bundle. While included in the Bundle, it had not been put to either of the respondent's two witnesses by Ms Mackie when giving their evidence, although the Judge had asked Mr Fraser to comment upon it (without objection by either party's solicitor) during the Tribunal's questions of him. Having heard both solicitors, and considered the EAT judgment in **A Joseph v Brighton & Sussex University Hospital NHS Trust [2015] UKEAT/0001/15/ JOJ**, by HHJ David Richardson, referred to by Mr Clarke, the Tribunal decided, having regard to the interests of justice, and the overriding objective under **Rule 2**, as also **Rule 41**, where the Tribunal may regulate its own procedure, and it is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts, that Ms Mackie should be allowed to cross-examine the claimant on that document, as it formed part of an agreed Bundle provided by parties to the Tribunal, and it was in the interests of justice to allow the matter to be properly and fully ventilated, and Mr Clarke would have the right, in re-examination, to revisit matters with the claimant, if he considered it appropriate to do so. As such, the

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Tribunal repelled his objection, and allowed the document to be formally admitted, and put to the claimant.

Agreed Statement of Facts

29. As detailed earlier in these Reasons, at paragraph 27 above, the Tribunal was presented by Ms Mackie with a draft “**Agreed List of Facts**” running to 46 separate numbered paragraphs, extending over 2 typewritten pages. It dealt with agreed facts in relation to the respondents’ pay structure (1 to 22); agreed facts in relation to the claimant (23 to 34); and agreed facts in relation to the claimant’s comparator and the claimant (35 to 46).
30. As amended on Monday, 14 November 2022, Mr Clarke, the claimant’s solicitor, confirmed that the respondents’ draft was now agreed by the claimant, subject to deletion of paragraphs 3 and 30, and amendment of paragraph 26, to delete the words after “2003”.
31. Those facts, as then so agreed between the parties on 14 November 2022 are not set out here, but we have inserted them in our own findings in fact, at paragraph 37 of these Reasons, where they are identified by the suffix **ASF (x)**, at the end of the agreed statement, where “x” is the paragraph number used in the Agreed Statement of Facts

Findings in Fact

32. We have not sought to set out every detail of evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are as set out below, in a way that it is proportionate to the complexity and importance of the relevant issues before the Tribunal.
33. Certain limited facts were agreed between the parties, as per the Agreed Statement of Facts, to which we refer. We have had regard to them, but, given the extent of disputed facts in this case, we do not consider ourselves restricted by only them, and our own findings in fact are more extensive in

scope and extent, and often more detailed, than in parties' jointly Agreed Statement of Facts.

34. While Ms Mackie, in her written closing submissions for the respondent, presented us with her suggested findings in fact, at her Facts section, at her paragraphs 3 to 16, we have had regard to what she has proposed for our consideration, but we have not considered ourselves bound by it, as we consider that some of her proposed findings in fact are not relevant or material to the issues to be determined by the Tribunal.
35. Mr Clarke, in his written closing submissions, at his paragraph 62, and in his paragraph 63 (1) to (14), suggested we accept certain parts of the claimant's evidence, which we have done, and incorporated into our findings in fact, at paragraphs 37(95) to (103) below, where her evidence in those respects was not challenged by the respondent's solicitor.
36. We have not, however, accepted his proposed findings about the claimant's comparator, Mr Bingham, in the period October 2019 to June 2021, at his paragraphs 62 and 63(5), either not working, or doing very little freelance work and that in consequence the comparator had become deskilled. We have no clear and cogent evidence about Mr Bingham's employment status over that period, and Mr Clarke's assertions that the comparator was either not working, or doing very little freelance work and in consequence had become de-skilled, was mere assertion, unsupported by any direct evidence, and at odds with Ms Reid's oral evidence to the Tribunal about what Mr Bingham had informed the interview panel when he was interviewed for the Corporate Affairs Specialist post in June 2021.
37. In these circumstances, and as is our primary, fact-finding role, we have made the following findings in fact, on the basis of the evidence heard from the various witnesses led before us over the course of this Final Hearing, and the various documents in the Joint Bundle of Documents provided to us, as also the additional documents allowed by us, as spoken to in evidence, and the Tribunal has found the following essential facts established:

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- (1) The Claimant, who is female, is employed by the Respondent as a Corporate Affairs Officer. As at the date of the Preliminary Hearing before this Tribunal, she has carried out this role for over 7 years since March 2015.
- (2) The Claimant is a member of a trade union. **ASF(23)**
- (3) Specifically, she is a member of the Unison trade union, and the education officer in the Scottish Water branch of the union.
- 10 (4) The Claimant commenced her employment (with the Respondent) on 7 April 2003. **ASF(26)**
- (5) She worked as an Administrator / Personal Assistant from September 2003 to December 2005.
- 15 (6) During her employment (with the Respondent), the Claimant has also held the roles of Business Analyst (December 2005 / August 2006), Developer Services Administrator (August 2006 / April 2007), Training Advisor (April 2007 / July 2012), and Commercial Analyst and Communicators Advisor (July 2012 / March 2015). **ASF(27)**
- (7) In 2017 the Claimant commenced the role of Corporate Affairs Officer (a Band-C role). **ASF(28)**
- 20 (8) The Claimant joined the Corporate Affairs team in 2017 after her role of Communications Advisor was job matched following a restructure of her team. **ASF(29)**
- (9) The Respondent is a body corporate, established under Section 20 of the Water Industry (Scotland) Act 2002, and having its principal office at The Bridge, Stepps.
- 25 (10) It has approximately 4269 employees, and employs 85 staff at its principal office, which is the Claimant's work location.

- (11) The Claimant remains employed by the Respondent within the Corporate Affairs team for the West region. There are similar teams for the North region, and South-East region, as well as a central hub team, a corporate responsibility team, and a public affairs team.
- 5 (12) In total, as at the date of this Preliminary Hearing, there are 10 Corporate Affairs Officers employed by the Respondent, including the claimant and her comparator, Mr Matthew Bingham. Of those 10, Mr Bingham is the only male employed in that Band C role.
- 10 (13) In the West region, the Corporate Affairs team comprises a Manager (Ms Georgie Reid), a Corporate Affairs Specialist (Laura Boyce), and 2 Corporate Affairs Officers, being to claimant and her comparator Mr Bingham, together with a graduate, Logan Stewart, as a Band D role.
- 15 (14) Both the Claimant and her comparator are managed by Georgie Reid (Corporate Affairs Manager). **ASF(37)** Her role is Band A. The Specialist role is Band B, and the Officer role is Band C.
- (15) Ms Reid became the claimant's line manager around September / October 2020, when she was appointed Corporate Affairs Manager (West).
- 20 (16) The Claimant submitted an internal application for the Corporate Affairs Specialist role on 26 May 2021. **ASF(39)** She did so by submitting her CV, a copy of which was produced to the Tribunal at pages 83-84 of the Bundle, and after discussion with Ms Reid, about whether or not she should apply for the Specialist post.
- 25 (17) The interview panel consistent of three Corporate Affairs Managers. Georgie Reid, Scott Fraser and Gavin Steel. **ASF(40)**
- (18) They came from the West, South-East and North regions respectively, and they were all Band A employees, with differing backgrounds and experience – Ms Reid came from media and journalism, and the two

others were longer serving employees with Scottish Water, and one of them came from a private sector utility background.

(19) The Respondent operates a recruitment policy. **ASF(1)**

5 (20) A copy of their recruitment policy and recruitment procedure dated February 2022 was produced to the Tribunal at pages 54 to 63 of the Bundle.

10 (21) That document superceded an earlier version in place from January 2015, but updated in February 2022, following a general overview of policy (by the Strategic Resourcing Team, People Directorate) to bring it up to date and in line with “Workday”, following communication and discussion with the Consultation / Negotiation Forum.

15 (22) For the purposes of this Preliminary Hearing, neither party was able to advise this Tribunal what changes had been made in February 2022, and whether there were any material changes to relevant parts of the recruitment policy and procedure. Neither party understood that there had been any material changes, and the Tribunal proceeded on the basis of that common understanding.

20 (23) The recruitment policy is stated to apply to **“the recruitment and selection of people into and within Scottish Water”** (at page 55 of the Bundle), and the policy, and the aims of the policy, are set out in full (at page 54 of the Bundle) as follows:

Recruitment Policy

25 *We believe that Scottish Water must attract, recruit, develop and retain talented people from varied backgrounds to deliver and sustain high performance and best serve our customers. Our recruitment policy and procedures are vital in achieving this aim.*

Through external recruitment, we will increase the diversity of our workforce demographic and introduce the talent of the future. We aim

to recruit a workforce that reflects the diversity of the people in the communities in which we live and work.

We need to plan and think for the long term when recruiting externally and when growing talent within the business. We will actively consider if any vacancy is an opportunity to recruit a modern apprentice into an entry level position or offer internal progression.

Internal recruitment presents opportunities to retain and develop our people; supporting them to maximise their full potential and nurture individual talents. Where appropriate, we will facilitate opportunities for individuals to broaden their skills and experience. In some circumstances, we will proactively manage job moves within the business to support an individual's development and to achieve our aim to develop the leaders and expertise that we need for the future.

Our selection process recognises the need to identify individuals that can meet the technical requirements of the job now, whilst also thinking ahead to what skills and capabilities may be needed in the future.

We will recruit and promote those whose behaviour is aligned with Scottish Water's Vision so our workforce is flexible and adaptable for the future.

Aims

When recruiting, Scottish Water aims to make sure that:

- We appoint the best possible candidate for the job on the basis of their relevant merits and skills, technical and interpersonal, as measured against the requirements of the role.*
- We build on the skills and development of internal talent by supporting opportunities for career development and directing and managing job moves as appropriate.*

- *We facilitate internal redeployment and support affected individuals to find suitable alternative opportunities.*
- *We actively strive to recruit a diverse workforce and, as far as possible, to remove or reduce any barriers to enable equal participation in the recruitment process.*
- *We operate an inclusive recruitment process with professionalism, consistency and fairness, which is cost and time effective, and that supports Scottish Water's Vision.*

(24) The recruitment procedure is set out in full at pages 56 to 63 of the Bundle produced to the Tribunal. For present purposes, the relevant and material parts of the recruitment procedure referred to or relied upon by parties at this Preliminary Hearing, were as follows:-

1. Equality and Diversity

Scottish Water seeks to recruit individuals on the basis of their ability and the requirements of the job. We want to ensure that no individual receives less favourable treatment than another on the grounds of disability, gender, race, religion or belief, age, sexual orientation, marital status, parental status or caring responsibilities.

Recruiting managers must ensure that the recruitment and selection process is inclusive and barrier free. When requested, reasonable adjustments must be made to the process to enable a person with a disability to participate on the same level as others.

2.1 Stages of the Recruitment Process

Recruiting managers are responsible for carrying out the various stages of the recruitment and selection process using Scottish Water's e-recruitment system.

The recruitment process consists of the following stages:

1. *Agreeing a vacancy and obtaining authorisation*

2. Advertising
3. Short listing
4. Selection process including interview
5. Appointment and sending regrets
- 5 6. Start date and induction of new start

Guidance on all stages is available on Scotty here Recruitment (sharepoint.com). Support and advice is available from SWRecruitment@scottishwater.co.uk

2.2 Review your requirements

10 Before undertaking any recruitment activity, the recruiting manager must:

- Review the long term plans for the business area - what's needed now and in the future.
- Consider the requirements and composition of the team e.g. internal development opportunity, skills shortage, succession planning, demographics (i.e. ageing workforce).
- 15 • Ensure that there is a business need to recruit and decide on what basis the job will be filled e.g. permanent or temporary, modern apprentice, contingent worker.

2.3 Authorisation to recruit

20 When recruiting for any job (permanent or temporary employee or contingent worker) the recruiting manager must obtain approval from Finance and the appropriate Director. Approvals are managed in the e-recruitment system as part of the Job Requisition process.

2.4 Advertising

25 Where a job is to be advertised, the recruiting manager creates a Job Requisition in the e-recruitment system.

Internal vacancies will be published on the Scotty Careers site to encourage internal candidates to apply where they have the appropriate qualifications, experience and skills.

5 *In addition, vacancies to be advertised externally will be shown on the external Scottish Water Careers site, the Jobcentre Plus website and our social media channels. Other options, such as job boards and press, are available.*

10 *Whilst the majority of Scottish Water vacancies will be advertised for open recruitment, a number will not be. This is to support our managed development of internal talent and future capability and to facilitate internal redeployment or restructures. This must be agreed with People at the outset of the recruitment process.*

3.1 Short Listing and Selection Methods

The selection process will consist of at least the following two stages:

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- *Short list from online application form/ CV*
 - *Interview*

In addition to interview, recruiting managers may use a range of other selection techniques; for example, aptitude and psychometric testing, presentations, ability testing or practical assessment.

20 *Any methods used will be based on the requirements of the job, and will assess behaviours, skills, knowledge and capabilities needed to carry out the role effectively. In such circumstances, reasonable notice and relevant information will be given to ensure that candidates have sufficient time and information to prepare.*

25 *Selection is a two way process, candidates are equally assessing the job and Scottish Water. Those involved in recruitment should consider how best to represent Scottish Water ensuring all candidates have a positive experience irrespective of the outcome. Candidates will be given every opportunity to ask*

questions to learn about Scottish Water and the job for which they are applying.

If a recruiting manager has a close personal or family relationship with a candidate they must not participate in the recruitment and selection process involving that individual.

Appointments will be made on the basis of the candidate's ability, qualifications, experience and skills as related to the requirements of the job and will take account of development needs and/or potential.

3.2 Feedback

Feedback is available on any stage of the recruitment process and candidates should contact the recruiting manager to arrange feedback. This will normally take place within one month of a candidate being informed of the outcome, subject to the availability of both parties.

3.3 Application Form/CV

Candidates will apply using the e-recruitment system. Completed applications are confidential and access should only be made available to those directly involved in the recruitment and selection process.

The recruiting manager will assess the candidates' suitability against the short listing criteria drawn up for the job (this should be listed in the job advert). Candidates will be selected to progress to the next stage of the process. Short listing comments will be uploaded to the e-recruitment system and unsuccessful candidates notified of the outcome of their application at the earliest opportunity.

3.4 Interview

Interview panels will be made up of at least two members. The same panel will generally interview all short listed candidates for each job. At interview, candidates will be asked broadly comparable questions prepared in advance by the interview panel based on the requirements of the job. In response to

candidate responses, the panel will ask more probing secondary questions as well as those tailored to the candidate's work record.

Recruiting managers conducting interviews must ensure that the questions asked are not in any way discriminatory or unnecessarily intrusive. Questions should focus on the needs of the job and the skills needed to perform it effectively.

Candidates will be rated jointly by the interview panel on their responses to each question area compared to Scottish Water's behavioural competency framework. Interview outcome forms should be uploaded to the e-recruitment system. On no account should any job offer be made during or immediately at the end of an interview.

The recruiting manager will let all interviewed candidates know the outcome of the selection process as soon as possible, either by telephone or email.

4.1 Appointment to a Vacancy

The recruiting manager will initially make a conditional verbal offer to the candidate. Details of the role including salary, allowances, location and any other relevant details such as if a development plan is required, should be stated and agreed with the candidate at this point. Any conditional offer should comply with the terms outlined in sections 4.2 to 4.7 below. Where a recruiting manager wishes to make an offer outwith these guidelines they must seek approval from People Connect before making any offer, verbal or otherwise to a candidate.

Once the conditional offer is accepted by the candidate, the recruiting manager enters the details of the offer into the e-recruitment system for processing by People Connect.

People Connect cannot issue any conditional offer of employment until the recruiting team has uploaded all the associated recruitment documentation (i.e. interview shortlisting and interview notes) onto the e-recruitment system.

4.2 Appointment of a Candidate with Development Needs

Where the candidate appointed has development needs, a development plan will be put in place at the time of appointment. Milestones will be clear and will specify timescales and/or objectives to progress to the target salary. The duration of a development plan may vary, generally from 6 to 24 months, depending on specific circumstances.

Payments linked to the achievement of development milestones will be the only method of salary progression the employee receives during the period of the development plan. This means that the employee will not generally be eligible for pay progression during the period of the development plan. They will remain eligible for any Annual Out-performance Incentive Plan (AOIP) payment.

4.3 Salary on Appointment

When appointing the successful candidate, the recruiting manager may take a number of factors into account, such as:

- The skills, experience and ability of the candidate
- Their current salary
- The salaries of peers
- The internal and external market rate for the job

Appointments may be made under the base salary for the band when a development plan is in place. Internal candidates may be offered up to a 5 per cent increase on their current basic salary. Any proposal to make an offer out with the terms of this guidance must be approved by People Connect before any offer is made to a candidate.

8. Records of the Recruitment and Selection Process

Appropriate records must be kept to demonstrate the fairness of decisions made during the selection process and to support any feedback given to candidates.

5 *The short listing scoring and at least the interview outcome form showing overall interview scores for each candidate should be uploaded to the e-recruitment system.*

10 *Any other selection documentation should be stored locally for 12 months in accordance with the Data Protection Act, i.e.. as personal data this must be password protected if stored electronically and any paper copies must be kept in locked cabinets and only accessed by the relevant manager.*

People Connect will periodically conduct random audit checks to check adherence to the process and the quality of information uploaded to the e-recruitment system and will feedback to recruiting managers as appropriate.

15 (25) For the purposes of this Preliminary Hearing, the Tribunal was provided with copies of some documentation relating to the recruitment and selection process for the Corporate Affairs Specialist role that both the claimant and her comparator applied for and both were interviewed for by a panel in June 2021.

20 (26) Specifically, the Tribunal was provided with a copy of Matt Bingham's undated CV (at pages 81-82 of the Bundle), and the claimant's undated CV (at pages 83-84), both received by the Respondent as their respective applications for the Corporate Affairs Specialist role, as well as the completed interview pack and panel notes for their interviews on 22 June 2021 (claimant) and 23 June 2021 (Mr Bingham), including their respective scenario press releases written as part of the interview process. Pages 92 to 119 refer – pages 92 to 105 for Mr Bingham, and pages 106-119 for the claimant.

25 (27) Mr Bingham's CV (at pages 81 and 82 of the Bundle) included the following information:-

Professional Summary: *“With 20 years’ experience in radio and television news and over a decade in local government communications I am well*

placed to deliver on all aspects of media relations, corporate communications and crisis management. Throughout my career I have worked to tight deadlines – often under pressure. I am adaptable and technically competent using digital editing packages as well as utilising new communications platforms such as social media. I have always maintained good contacts within organisations and the press and am adept at dealing with people no matter their role within an organisation – from Chief Executive to care worker.”

Skills:

- Experienced and adaptable media professional
- Strategic and corporate communications
- Excellent copywriting skills
- Social media engagement
- Media operations knowledge
- Relationship building
- Exemplary written and verbal communication
- Press and Public Relations
- Website Development

Work History:

- Communications Officer Media Relations, 11/2008 to 10/2019
Inverclyde Council, Greenock
- Broadcast Journalist, 04/2006 to 11/2008 Freelance
- Reporter, 11/2000 to 04/2006 STV Glasgow
- News Editor, 11/1991 to 11/2000, Radio Clyde Glasgow

(28) The Claimant's CV (at pages 83 and 84 of the Bundle) included the following information:-

Key skills :

- Excellent communication & interpersonal skills
- 5 • Excellent office skills & Strong organisational ability
- Very good knowledge of MS Windows, Office & Internet
- Excellent research and reporting skills
- Enthusiastic team player

Employment History:

- 10 • Scottish Water Corporate Affairs Officer March 2015 – Present
- Scottish Water Commercial Analyst July 2012- Nov 2015
- Scottish Water Training Advisor April 2007 – July 2012
- Scottish Water Developer Services Administrator Aug 2006 – April 2007
- Scottish Water Business Analyst Dec 2005 – Aug 2006 (6-month
15 secondment)
- Scottish Water Administrator / Personal Assistant Sept 2003 – Dec 2005

(29) There was also produced to the Tribunal, at pages 64 to 70 of the Bundle, the **Corporate Affairs Officer** role profile, dated 8 June 2017, which defines the main purpose of that Band C role, and key accountabilities / tasks of that role,
20 as follows:

Main Purpose of the role:

To build confidence and trust in Scottish Water customers and stakeholders, through the provision of communications and engagement support for all SW

group activities which will protect and enhance the organisations reputation and achieve sustainable business outcomes.

The role-holder will ensure all appropriate communication and engagement opportunities and channels are identified, risks are minimised and value added to Scottish Water.

5

Key Accountabilities/Tasks:

- 10 1 *Participate in the development and delivery of communications and engagement plans, which will promote SW activity and keep all key audiences fully informed, aware and engaged.*
- 2 *Dealing with enquiries from stakeholders including the media, both proactively and planned, and responding effectively to unplanned day-to-day requests to provide clear, factual and accurate information which represents SW's position.*
- 15 3 *Use the full range of digital channels including website and appropriate social media as part of our communications delivery to maximise audience reach and engagement.*
- 20 4 *Creating audience-appropriate content which is clear and consistent and meets the needs of our customers, stakeholders and staff and aligns with business objectives.*
- 5 *Recording, monitoring and evaluating all communications and engagement activity to support customer experience measurement and ensure continual improvement and innovation.*
- 25 6 *To work collaboratively with colleagues in all parts of Scottish Water and associated partners to ensure that all aspects of the capital*

programme that impact on customers, stakeholders and reputation are communicated effectively allowing a joint team approach to delivering customer excellence.

- (30) Further, there was also produced to the Tribunal, at pages 71 to 78 of the Bundle, the **Corporate Affairs Specialist** role profile, similarly dated 8 June 2017, which defines the main purpose of that Band B role, and key accountabilities / tasks of that role, as follows:

Main Purpose of the role:

To provide senior and specialist communications and engagement support which builds confidence and trust in Scottish Water customers and stakeholders, for all SW group activities which will protect and enhance the reputation and achieve sustainable business outcomes.

The role-holder will ensure all appropriate communication and engagement opportunities and channels are identified, risks are minimised and value added to Scottish Water.

The role holder will be required to deputise for the Corporate Affairs Manager in their region and operate at a senior level internally and externally in relation to the management of sensitive, complex or challenging issues.

Key Accountabilities/Tasks:

1 Provide advice, guidance, mentoring, coaching and support to communications and engagement officers in their own team and other regional and hub teams.

2 Lead the development and delivery of communications and engagement plans, which will promote SW activity, keep all key audiences fully informed, aware and engaged and minimise the risk to SW's reputation.

- 3 *Dealing with sensitive and complex enquiries from stakeholders including the media, both proactively and planned, and responding effectively to unplanned day-to-day requests to provide clear, factual and accurate information which represents SW's position and*
5 *minimises the risk to SW reputation.*
- 4 *Use the full range of digital channels including website and appropriate social media as part of our communications delivery to maximise audience reach and engagement.*
- 5 *Creating audience-appropriate content which is clear and consistent and meets the needs of our customers, stakeholders and staff and*
10 *aligns with business objectives.*
- 6 *Responsibility for maintaining a focus in the region on the SEM (Stakeholder Experience Measure) measure and the impact the performance of the team has on the monthly score.*
- 15 7 *To work collaboratively with senior colleagues in all parts of Scottish Water and associated partners to ensure that all aspects of the capital programme that impact on customers, stakeholders and reputation are communicated effectively allowing a joint team approach to delivering customer excellence with particular responsibility for high impact*
20 *and/or reputational risk.*

(31) Ms Reid's evidence to this Tribunal was that the Role Profiles for both the Specialist and Officer posts were "**generic**", and once the successful candidates were appointed, they did not get a role specific Job Description, and that the appointee might be asked to do all or any of the tasks in the Role Profile.
25

(32) No other documentation from the Respondent's e-recruitment system, or their HR and payroll system records, relevant to the claimant and her comparator, their recruitment and selection, and their respective pay banding and placing,

was produced to the Tribunal as part of the Bundle lodged and used at this Preliminary Hearing.

- 5 (33) Specifically, there was not produced to the Tribunal the advert and short-listing criteria used for the Corporate Affairs Specialist role, the short-listing scores, nor the comparative interview scores for the other people interviewed for that role in June 2021.
- 10 (34) On the information available to the Tribunal, in Mr Scott Fraser's oral evidence, there were 18 applicants for that Band B role, and they offered 10 interviews. Both the claimant and her comparator, Mr Bingham, were shortlisted and interviewed, and both were unsuccessful in securing a Band B Specialist post.
- (35) From the evidence given to the Tribunal at this Preliminary Hearing, by both Ms Reid and Mr Fraser, the interviews for the Specialist post followed a broadly similar process for all candidates interviewed.
- 15 (36) They were interviewed remotely, on Microsoft Teams, and the 3 interview panel members (each of whom were located at different locations) took it in turns to chair the panel, ask questions of candidates, and take notes, and thereafter have a consensus session, after each interview, to agree those notes, and outcomes, including the scores allocated for each question. From
20 the copy notes produced to the Tribunal, it was not clear which member of the interview panel had completed which notes.
- (37) The interviews having been conducted remotely, by video conferencing on Teams, the group dynamics for the interview panel were different from what they would have been if the interviews had been held in person, and the full
25 panel together in the same place at the same time as the candidates being interviewed.
- (38) The claimant was interviewed on 22 June 2021, as interview 3, while Mr Bingham was interviewed on 23 June 2021 as interview 8.
- (39) The Claimant's total interview score was 13. **ASF(41)**

- (40) Matthew Bingham submitted an external application for the Corporate Affairs Specialist role. **ASF(42)**
- (41) Matthew Bingham's interview score was 23. **ASF(43)**
- (42) Neither the Claimant nor her comparator were successful in the Band B recruitment. **ASF(44)**
- (43) Ms Reid's evidence to this Tribunal had Mr Bingham losing out to the successful candidate by one point.
- (44) The successful applicant was an internal candidate, who is the current Corporate Affairs Specialist within the Corporate Affairs team. **ASF(45)**
- (45) That appointee was Laura Boyce. She had previously been a Corporate Affairs Officer working alongside the claimant in the West region Team.
- (46) In her evidence to the Tribunal, Ms Reid described Ms Boyce as having the same skills as Mr Bingham, but she had Scottish Water experience, and she described that as "***a huge bonus.***"
- (47) The interview panel's summary comments on Mr Bingham's interview were that it was a "***very close decision for appointment to the Band-B role and were inspired to give positive feedback based on this to establish if Mr Bingham had any interest in pursuing the Band-C role of Corporate Affairs Officer***" (page 104). **ASF(46)**
- (48) After the Specialist interview outcomes were signed off by the panel, Ms Reid approached Matt Bingham about a Band C role as a Corporate Affairs Officer. In her evidence to the Tribunal, she described him as "***having a huge set of skills to enhance my team, and the whole Directorate.***"
- (49) Ms Reid, in her evidence to the Tribunal, stated that she knew from Mr Bingham's interview for the Specialist post, that he did not have a regular income, so she felt that he might be persuaded to accept the lower graded role of Officer at Band C, and at a salary within Band C that would not offend

Mr Bingham based on his previous responsibility and role at Inverclyde Council.

- 5 (50) She further stated that she got permission from Alan Thomson, Head of Corporate Relations, to ask Mr Bingham, and that she would have concluded matters if he had said that he was not interested in the Officer role. She stated that he spoke of his need to secure employment for stability, and as he would be joining such a small team, he would accept the post of Corporate Affairs Officer if he got paid at his last full-time salary of £35,000 at Inverclyde Council.
- 10 (51) Ms Reid further explained to the Tribunal that it was not a job offer to Mr Bingham, at that stage, as there were others to interview, and that she offered him a salary of £36,500, being the middle of Band C, as it did not make good business sense to offer him a salary at the top of Band C, and to take account of inflation and increments which she felt that he might have received at the Council, if his employment there had continued. Stating that she did not view Mr Bingham as a Band C, as his skills are more aligned to a Band B role, she described it as a “**no brainer**” to get Band B talent for a Band C salary, saying that if Laura Boyce had not performed so well, Matt Bingham would have got the Band B Specialist role.
- 15 (52) From the additional documents produced by the Respondent on day 2 of this Preliminary Hearing, Tuesday, 15 November 2022, being email from Gavin Steel entitled “**Corporate Affairs Specialist – notification of candidates**” dated 1 July 2021 (page 146 of the Bundle), and email from Gavin Steel entitled “**Recruitment**” dated 15 July 2021, some contemporary documentation was provided to the Tribunal.
- 20 (53) In his email of 1 July 2021, sent at 15:29, Mr Steel, Corporate Affairs Manager (North) wrote to Jean O’Neill (HR), with copy to Judy Wakker (Senior Leader, Corporate Affairs), Georgie Reid, and Scott Fraser, stating : [as redacted by the Tribunal, to anonymise by use of initials only the unsuccessful candidates identified in that email]
- 25
- 30

“Jean,

We’ve now been able to speak to the internal candidates who weren’t successful in the Corporate Affairs Specialist interview process – and also those we are keen to consider for the Corporate Affairs Officer role.

5 *Could you therefore go ahead and decline the unsuccessful candidates who were:*

- *BMcK*
- *CT*
- *GMcQ (has applied for Corporate Affairs Officer)*
- 10 • *HA*
- *JR*
- *KW*
- *Lynne Edgar*
- *Matt Bingham (if possible, could you transfer Matt Bingham’s application*
15 *to be considered under the Corporate Affairs Officer post – he has indicated that he would like to be considered for this and we would be keen to consider him for it)*

I assume a formal message will go to the internal candidates, as well as to those we haven’t been in contact with?”

20 (54) Mr Bingham had not applied for the Corporate Affairs Officer post that the Respondent was then recruiting for. He was **“transferred in”** for consideration of appointment to that role, at Band C, and appointed to that post, without further interview by the Respondent, as he had recently been interviewed for, but he was unsuccessful in his application for the Band B
25 Corporate Affairs Specialist.

(55) In his further email of 15 July 2021, sent at 10:04, Mr Steel, Corporate Affairs Manager (North) wrote to Judy Wakker (Senior Leader, Corporate Affairs), Alan Thomson (Corporate Relations), Georgie Reid, and Scott Fraser, stating : [as redacted by the Tribunal, to anonymise by use of initials only other persons identified in that email. We understand “CA” in the email to be the author’s shorthand for Corporate Affairs.]

“Judy,

Many apologies that we haven’t kept you up-to-date and have got our comms out of sequence here.

The outcome of Tuesday’s conversations was the Scott settled on offering his C role to DK. Georgie confirmed her decision to offer her C role to Matt Bingham; and the offer to K was already agreed.

We spoke late yesterday afternoon to the successful candidates, although all of them were asked to be discreet. All of them were delighted and have accepted the offer informally, although there will be detail to work through.

I’m happy to ring L and let her know about K / apologise for not doing so in advance, but equally understand if you prefer to do that? The intention is to let the unsuccessful candidates know today, and then we should be ready to issue something to CA as a whole later today or tomorrow.”

(56) Further, in a later email of 15 July 2021, sent at 10:21, Mr Steel, Corporate Affairs Manager (North) wrote again to Judy Wakker (Senior Leader, Corporate Affairs), Alan Thomson (Corporate Relations), Georgie Reid, and Scott Fraser, stating:

“Thanks Judy,

I think salary has only been discussed so far with Matt Bingham, who indicated that he would wish to be considered for the C role so long as we were at least able to match his previous salary at Inverclyde Council, which

was £35k. Alan's guidance was that, as this is well within the band, it should be okay so I think the offer was on this basis. Georgie may be able to confirm."

- 5 (57) No other documentation was produced to the Tribunal by the Respondent to explain the audit trail for Mr Bingham's appointment as Corporate Affairs Officer, or the basis for his salary placing within the Band C, nor approval from Finance or the appropriate Director, at the starting salary of £36,500.
- (58) The Respondent operates a pay band structure. **ASF(2)**
- 10 (59) From the Pay Progression 2021 salary ranges from 1 July 2021 (as produced to the Tribunal at pages 47 to 49 of the Bundle), salary Band B had a salary range of **£34,609 to £47,149**, while salary Band C had a range of **£30,605 to £42,575**.
- 15 (60) For the relevant salary Bands and ranges for Pay 2022, backdated to 1 April 2022, as per the Pay 2022 document produced to the Tribunal, at pages 50 and 51 of the Bundle), salary Band B has a salary range of **£35,384 minimum to £47,924 maximum**, while salary Band C has a range of **£31,380 minimum to £43,350 maximum**.
- (61) The Corporate Affairs Officer is a Band-C role. **ASF(4)**
- (62) There are different levels of pay within each pay band. **ASF(5)**
- (63) The Corporate Affairs Specialist position is a Band-B role. **ASF(38)**
- 20 (64) The Respondent recognises Unite, Unison and GMB for collective bargaining. **ASF(24)**
- (65) Pay decisions are negotiated with the Trade Unions. **ASF(25)**
- (66) In 2017 pay in Band-C ranged from £25,600 to £37,810. **ASF(6)**
- (67) From July 2021 pay in Band-C ranged from £30,605 to £42,575. **ASF(7)**
- 25 (68) In 2021 and 2022 the Respondent's employees in pay bands A-F received an incremental pay increase. **ASF(8)**

- (69) Pay progression is the term used to describe the annual incremental increase that the Respondent's employees generally receive. **ASF(9)**
- (70) The incremental pay increase is a pay increase that is not linked to performance. **ASF(10)**
- 5 (71) Employees last received an individual performance related pay increase in 2019 prior to the COVID-19 pandemic. **ASF(11)**
- (72) The Respondent advised employees in April 2020 that it would not make pay awards based on individual performance during the COVID-19 pandemic. **ASF(12)**
- 10 (73) The Respondent did not make a performance related pay increase in 2021 or 2022 as a result of the COVID-19 pandemic. **ASF(13)**
- (74) In 2021 employees within the Claimant's pay band received a 2% increase effective from 1 July 2021. **ASF(14)**
- (75) Aspire was the Respondent's performance management programme. **ASF(15)**
- 15 (76) A development plan is a record of agreed objectives which may result in an employee moving up the pay band. **ASF(16)**
- (77) The Respondent stopped using Aspire (in) 2020. **ASF(17)**
- (78) The Respondent stopped using Aspire as a result of the COVID-19 pandemic. **ASF(18)**
- 20 (79) Employee objectives were recorded on Aspire. These objectives were performance related. **ASF(19)**
- (80) The Respondent intends to introduce a new programme to manage performance named My Story. **ASF(20)**
- 25 (81) My Story will replace Aspire. **ASF(21)**

- (82) My Story was introduced in September 2022 and at this time is not related to pay. **ASF(22)**
- (83) There was produced to the Tribunal, at page 120 of the Bundle, an undated Manager's evaluation for the claimant for her 2018-2019 Aspire Review, showing that she was rated as "**Through Gateway 1**".
- (84) From the document produced at page 45 of the Bundle, being Claimant Gateway Information, undated, the Tribunal was provided with some information about the Claimant's Gateway Rating and Aspire Rating for years 2012-2013 to 2018-2019, showing that her record was last updated on 28 May 2019, with "**Reasonable Contribution**" as her Aspire Rating for 2018-2019.
- (85) The claimant's manager at that time was a Mr Ruaraidh MacGregor. Ms Reid, as the claimant's current line manager, was not involved in the claimant's then Aspire ratings, as it was before she became the claimant's line manager.
- (86) Matthew Bingham commenced his employment (with Scottish Water) on 23 August 2021 his salary at that time was £36,500. **ASF(35)**
- (87) Matthew Bingham's current salary is £38,143. **ASF(36)**
- (88) The Claimant received a 5.5% increase effective from 1 April 2022. **ASF(31)**
- (89) The Claimant's salary was £30,605 until the 2022 increase. **ASF(32)**
- (90) The Claimant's current salary is £32,289. **ASF(33)**
- (91) A 'biteable' is an internal term that refers to a video clip. **ASF(34)**
- (92) The Respondent produced to the Tribunal, and the Tribunal viewed on day 1 of the Preliminary Hearing, on Monday, 14 November 2022, two biteable video clips, one by the comparator, Mr Bingham, dated 21 January 2022, on the Kilmarnock Road Start on Site, and another, by the claimant, dated 5 July 2022, on Taps for Top Up Tuesday.

- (93) Neither video clip was of assistance to the Tribunal as both post-dated Mr Bingham's start date with Scottish Water, and neither was relevant or material in explaining to the Tribunal why the Claimant and her comparator were paid the sums that they were paid.
- 5 (94) Before raising her Tribunal claim against the respondent, presented on 4 July 2022, the claimant engaged in ACAS early conciliation between 11 January and 21 February 2022. A copy of the ACAS early conciliation certificate was produced to the Tribunal at page 26 of the Bundle.
- 10 (95) Further, the Tribunal heard from the claimant in evidence at this Preliminary Hearing that she had engaged in the respondent's internal grievance procedure, but her grievance had not been upheld by the respondent, so she raised her Tribunal claim having completed the respondent's internal process.
- 15 (96) Asked by the Judge about her use of the respondent's internal grievance procedure (as detailed at paragraphs 12 to 15 of the paper apart to the ET1 claim form), the claimant stated that she went to Ms Reid informally first, in October 2021, after being informed by Mr Bingham that he was paid more than her, then went through a 3-stage internal grievance procedure, but her grievance was not upheld.
- 20 (97) As the Bundle provided by parties to the Tribunal contained no paperwork related to her grievance, nor its outcome, the claimant provided further detail in answer to the Judge's request for clarification.
- 25 (98) In her oral evidence in reply to the Judge, the claimant expanded on the brief detail provided in the ET1 paper apart. In particular, she spoke of stage 1 being an email to Brian Lironi, Director of Corporate Affairs; stage 2, to a manager, Stephen Boon, and stage 3, a meeting with Kevin Roy, General Manager.
- (99) While paragraph 14 of her ET1 paper apart had quoted a single sentence from Mr Roy's stage 3 outcome letter of 14 April 2022, stating that Mr Roy had found nothing to indicate there had been any inequality of pay or

unfairness within the claimant's team, the claimant stated to the Tribunal that Mr Lironi had written back to her to say "**everything was above board**", and she further stated in evidence that Mr Roy had stated at the grievance meeting (where the claimant had been accompanied by her trade union representative, Emma Phillips) that "**If we give Lynne money, others will want more money.**"

5
10
(100) On the evidence available to the Tribunal, in the period from 2015 to 23 June 2021, the claimant received tailored training from the Respondent in relation to the Corporate Affairs Officer role; She regarded herself as more than competent in the role; and her experience was such that she informally trained / assisted in the induction of her own line manager, Georgie Reid, when she started in the team.

15
(101) Further, the Claimant worked continuously as a Corporate Affairs Officer in the period from 2015 to 23 June 2021, and, during that period, she carried out all of the work of the Corporate Affairs Officer in the team; and, during that period, the Claimant received no negative criticism or feedback from her line-managers.

20
(102) To the contrary, in the period from 2015 to 23 June 2021, the Claimant received positive feedback from her line-managers; she received positive feedback from her fellow colleagues in the wider team; and the Claimant did not receive any negative criticism or feedback from customers/stakeholders.

25
(103) Further, to the contrary, in the period from 2015 to 23 June 2021, the Claimant received positive feedback from her customers/stakeholders; and, having worked continuously for the Respondent since September 2003 (as per her CV at pages 83 and 84 of the Bundle) she had acquired various skills and experience in her other roles which aided her in the role of Corporate Affairs Officer.

30
(104) The Claimant was experienced and proficient in that role. The interview panel's summary comments (at page 118 of the Bundle), after her interview on 22 June 2021 for the Corporate Affairs Specialist role, recorded that the

Claimant “**reflected that she is experienced and proficient in her current area of expertise**” in the role of Corporate Affairs Officer, but that she would “**benefit from further developing her technical skills and experience in a broader range of the activities that Corporate Affairs carries out on behalf of Scottish Water.**”

- 5
- (105) Further, the interview panel also recorded that “**Some real strengths were reflected in the examples given, but not all of them are at the core of the role that we are recruiting for. We would have liked to see more evidence of ability and willingness to operate at a senior level.**”
- 10 (106) Her experience was such that she was shortlisted for the role of Corporate Affairs Specialist. From March 2015, the Claimant had been actively working for the Respondent carrying out all of the everyday tasks of a Corporate Affairs Officer and, as of 23 June 2021, the Claimant had far more relevant experience in that role than the comparator.
- 15 (107) When the Respondent decided upon the salary payable to Mr Bingham, when he joined the Respondent as a new employee, in August 2021, the Claimant was not consulted by the Respondent. There was no clear and cogent evidence provided to the Tribunal as to the date when Mr Bingham’s starting salary of £36,500 was decided upon.
- 20 (108) There was no clear and cogent evidence provided to the Tribunal as to what factors the Respondent took into account in fixing Mr Bingham’s starting salary, having regard to the factors listed at Section 4.3 (Salary on Appointment) of the Respondent’s Recruitment Procedure.
- (109) The Tribunal does not know, to what extent, if at all, the Respondent considered salaries of peers, or internal / external market rate for the job of Corporate Affairs Officer, as per that Section 4.3 of their Recruitment Procedure.
- 25
- (110) At this Preliminary Hearing, the Respondent did not provide clear and cogent evidence explaining why Mr Bingham was paid the starting salary he was

paid, having regard to his skills, experience and ability. Ms Reid, in her telephone discussion with Mr Bingham, appears to have taken account of his skills, experience and ability, and his former salary at Inverclyde Council.

5 (111) The only explanation provided to this Tribunal (by the witness Georgie Reid) was that it was related to Mr Bingham's last salary when employed by another organisation, namely Inverclyde Council, and that this level of salary was signed-off by Alan Thomson, the respondent's Head of Corporate Relations.

10 (112) This Tribunal heard no evidence from Mr Thomson, and so it had no evidence directly from him as to the factors that he took into account when deciding upon the starting salary to be paid by the Respondent to Matthew Bingham at £36,500.

Tribunal's Assessment of the Evidence led at the Final Hearing

15 38. In considering the evidence led before the Tribunal, we have had to carefully assess the whole evidence heard from the various witnesses led before us, and to consider the many documents produced to the Tribunal in the Joint Bundle, and additional documents lodged and used at this Final Hearing, as spoken to in evidence before us, which evidence and our assessment we now set out in the following sub-paragraphs:

20 **(1) Ms Georgie Reid: Respondent's Corporate Affairs Manager (West)**

(a) The first witness called by the respondent's solicitor was the claimant's line manager, Ms Georgie Reid. We heard her evidence, on affirmation, on day 1, Monday, 14 November 2022, carried over to the morning of day 2.

25 (b) Aged 54, Ms Reid has been employed by the respondent for almost 4 years, and she leads the West region Corporate Affairs team of 4, herself as team manager, a Specialist (Laura Boyce)

as deputy, and 2 Officers, being the claimant and her comparator, Matt Bingham.

5 (c) Ms Reid advised the Tribunal that she was menopausal, and that she had brain fog, and she requested permission (which we granted) for her to be allowed to use a small desk fan, while giving her evidence to the Tribunal.

10 (d) She was examined in chief by Ms Mackie, the respondent's solicitor, there being no pre-exchanged witness statements ordered in this case, and then cross-examined by Mr Clarke on behalf of the claimant.

(e) Ms Reid's evidence continued over to day 2, when she was asked questions of clarification by the Tribunal panel, and then re-examined by Ms Mackie.

15 (f) In giving her evidence to the Tribunal, Ms Reid explained her own role and her background as a former print journalist, before coming to work for the respondent, first as a consultant to build a new corporate website, and later as an employee.

20 (g) She explained the structure of the respondent's Corporate Affairs teams across Scotland, and the West region team in particular, where she was appointed the West region Corporate Affairs Manager, in September / October 2020, with the team then herself, and two Officers, being the claimant and Laura Boyce.

25 (h) Under reference to documents in the Bundle, Ms Reid spoke of her involvement in the interviews for Corporate Affairs Specialist in June 2021, and how Mr Bingham, a close runner up in the Specialist interviews, at Band B, had thereafter been recruited as a Corporate Affairs Officer, at Band C, starting in August 2021.

- 5 (i) Ms Reid spoke of being aware of Matthew Bingham (known as Matt) as a broadcast journalist on TV and radio, and how their paths had crossed on big national stories in the past, and that she was aware of his standing and reputation in the communications industry as somebody good at his job.
- 10 (j) In giving her evidence to the Tribunal, we felt that Ms Reid relied too much on her menopausal brain fog, when she was hesitant in answering questions asked of her, and it was clear to us, from her whole evidence to the Tribunal, that she was very much enamoured by Matt Bingham joining her team.
- 15 (k) Her use of language, referring to him as the “**golden egg**”, showed us how she felt about Mr Bingham as an asset for the West region, and that his appointment as a Corporate Affairs Officer was a win, win, win situation – for her, for him, and for the organisation.
- 20 (l) On day 2 of her evidence, Tuesday, 15 November 2022, after overnight reflection, Ms Reid had provided Ms Mackie, the respondent’s solicitor, with 2 e-mails (of 1 and 15 July 2021) to lodge as additional documents.
- 25 (m) As detailed earlier in these Reasons, the Tribunal refused Ms Mackie’s application at that time, so those documents were not put to this witness. Nonetheless, in answering questions put to her, Ms Reid relayed the contents of those emails, with a clarity that had been missing from her vague evidence the previous day.
- 30 (n) Ms Reid was defensive in her body language, when giving evidence to the Tribunal, with her arms folded during cross-examination, and her reply during cross-examination was often that she did not remember, or she could not recall, so her answers were at best vague.

- 5 (o) That said, Ms Reid was crystal clear, in answer to Ms Mackie's questions about the material factor defences pled by the respondent, that there were no "**market forces**" at play. No doubt, in light of this evidence, when it came to the respondent's closing submissions, on day 4, Ms Mackie intimated that the respondent no longer relied upon market forces (difficulties in recruitment / retention) as a material factor.
- 10 (p) When asked questions by Ms Mackie, during examination in chief, about the respondent's Aspire performance management programme, and how pay bands and progression were dealt with within Scottish Water, Ms Reid was candid and frank that she did not really know.
- 15 (q) She knew that she was Band A, but it appeared from her answers to questions at this Tribunal that she had an incomplete understanding of the respondent's pay bandings, and their internal pay policy in light of the Scottish Government's Public Sector Pay Policy, as mentioned in the document produced at page 46 of the Bundle, detailing "**Scottish Water Pay Award 2020 – arrangements for an unusual year – managers**".
- 20 (r) Ms Reid thought that that document had been issued by the respondent's HR, but she could not say when, other than to speculate it might have been around July 2020. In the Bundle index, this document, although titled, had no source, and no date other than 2020, either on the index, or on page 46 itself.
- 25 (s) Similarly, when asked about the Pay Progression 2021 document, produced at pages 47 and 48 of the Bundle, included in the Bundle index, titled, but with no source, and no date other than 2021, Ms Reid assumed it was sometime before July 2021, and thought it had maybe come in some email to managers.

- 5 (t) Ms Reid explained that Aspire was before her time as the claimant's line manager, and she was not aware of how pay was dealt with by the organisation, as she had no direct input, and she understood it was dealt with by the respondent's People Directorate.
- 10 (u) When asked about the pay award examples, at page 49 of the Bundle, the witness stated she could not assist the Tribunal by what was meant by "**band minimum movement**" in the final column notes to the tabulated example for Band C pay from 1 July 2021.
- 15 (v) When she was asked, in evidence in chief, about the respondent's Recruitment Policy and Procedure, at pages 54 to 63 of the Bundle, described in the index as dated February 2022, as confirmed at page 63 of the Bundle, Ms Reid stated that she could not say what applied in June / August 2021, but the interviews for the Corporate Affairs Specialist had followed along the lines of this document, and they had a panel of 3 managers, including herself as one of the interview panel. They had short-listed, and used interview questions, and a practical assessment, for all candidates interviewed for that Band B post.
- 20 (w) She described herself, along with the other 2 panel members, Gavin Steel and Scott Fraser, as being the "**recruiting managers**" for the Specialist posts. Further, she described the Role Profiles for both the Specialist and Officer posts as being "**generic**", and stated that once the successful candidates were appointed, they did not get a role specific Job Description, and that the appointee might be asked to do all or any of the tasks in the Role Profile.
- 25 (x) Ms Reid stated that she had seen the claimant's and Mr Bingham's CVs for the Corporate Affairs Specialist post, but she
- 30

had not seen the claimant's updated CV, produced at page 85 of the Bundle, as that was not submitted by her as part of her 2021 application for that Specialist post, and that the first time she had seen it was in the Bundle. When the claimant came to give her evidence, on day 3, we learned that she had prepared this updated CV, and given it to her solicitor, and that is how it came to be in the Bundle.

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(y) Further, during her evidence in chief, Ms Reid stated that, having considered the comparator, Mr Bingham's CV, at page 81/82 of the Bundle, she felt all of the skills and experience shown there were transferable to the Band C role (for Corporate Affairs Officer), and that Mr Bingham's CV showed that he had all of the essential skills for the Band B role as Specialist.

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(z) She described his experience as a "**golden egg**", as he had not come to a communications role straight from journalism, but via a journey through other roles, print and broadcast, producer and presenter, where a communications role in the public sector is different from operating in the private sector, and where there is more transparency and honesty, and more open and fair communication. She described him as a "**highly sought-after candidate**" for a role within Scottish Water.

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(aa) Ms Reid acknowledged that Mr Bingham's CV stopped at October 2019, after 11 years at Inverclyde Council as a Communications Officer Media Relations from November 2008, and she explained in her evidence in chief that between October 2019 when he left that employment, and August 2021, when he joined Scottish Water as a new employee, she understood what had happened in the intervening period.

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(bb) In particular, Ms Reid stated that, from what Mr Bingham had he told the panel at his June 2021 interview, for the Specialist post,

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5 he had been on sick leave, on account of his personal family circumstances, and he took time to recover. When the Council were not prepared to extend his sick leave any further, he left Inverclyde Council, and went freelance again, to have more time with his family. Covid then hit from March 2020, and by June 2021, he felt that he had to try and get new employment to support his young family.

10 (cc) Asked about Mr Bingham's performance at that interview, Ms Reid described him as speaking very well, and confidently, and that he was able to describe his experience relative to the role of Specialist, and that he showed a diversity of understanding of the role and responsibilities of the job, and going beyond reactive work, to proactive work.

15 (dd) Overall, we were satisfied that Ms Reid was doing her best to recall matters from the Specialist interviews in June 2021, and her approaching Mr Bingham thereafter about taking up employment with the respondent in a Band C role as a Corporate Affairs Officer.

20 (ee) As such, she was a generally credible witness, but her evidence was often scattergun, and not focused. Further, while we do not believe that she was deliberately trying to mislead the Tribunal, we did have a question mark over the reliability of certain parts of her evidence.

25 (ff) As a general observation, we also note and record that she was at ease in painting a picture of Mr Bingham as a member of her team in a very positive light, while her evidence about the claimant was often less than complimentary. Indeed, at points, Ms Reid's oral evidence to this Tribunal appeared to us to be a conscious and deliberate attempt to demean the value of the

claimant's work, as if to justify the difference in pay between the claimant and her comparator.

5 (gg) When giving her evidence to the Tribunal as to why the claimant had been short-listed for the Corporate Affairs Specialist post, Ms Reid stated that it was to give the claimant the opportunity for interview for the senior post, and we can understand why, in the work dynamics of a small team, Ms Reid may well have decided to short-list her for interview, when she also short-listed her work colleague, Laura Boyce.

10 (hh) Another example was when Ms Reid was asked questions by Ms Mackie about the email documents included in the Bundle, at pages 139 to 144, dated 29 August to 1 September 2022, about water and roads at a specific address in Ayrshire, raised by a local councillor, where the relevance of the document being
15 included in the Bundle was not related to the preliminary issue before this Tribunal for judicial determination.

(ii) While, in her email to the claimant, on 1 September 2022, Ms Reid had stated that the claimant's draft response to the councillor required "**a wee tweak**", her evidence to the Tribunal
20 was indicative of the need for a more substantial re-drafting, although, to put her evidence in context, Ms Reid did tell us that the claimant's skills were still in development, and it was not appropriate to rip her piece of work apart.

(jj) She described the claimant's draft as not showing the writing
25 skills required by a person in the middle of Band C, but at the bottom of Band C, as emerging and developing skill, whereas she then described Mr Bingham's writing skills as not emerging, but developed, and that his knowledge of Scottish Water will come from his peers, and others in the organisation.

5 (kk) Finally, it is disappointing for the Tribunal to have to note and record that that particular document, and Ms Reid's evidence about it, appeared to have been lodged by the respondent to discredit the claimant, when various other documents in the Bundle (to which Ms Reid was taken, and spoke in her evidence) went to the credit of Mr Bingham.

10 (ll) On a similar vein, the 2 video clips which the Tribunal were shown by Ms Mackie, during Ms Reid's evidence in chief, were used by the witness to describe Mr Bingham's Kilmarnock Road video as a "**one man**" job from idea to delivery of content, where much is instinctive from Mr Bingham's 20 years plus in the communications industry, where he had honed his skills, whereas the claimant's Top Up Taps video was a very basic film created by her, based on templates created already by Laura
15 Boyce.

(mm) That said, Ms Reid added that she has sought to hire people who have these skills, whether male or female, and that it is not about gender, but about getting skill sets, and what people can bring to the department.

20 **(2) Mr Scott Fraser: Respondent's Corporate Affairs Manager (South-East)**

25 (a) The second, and final, witness called by the respondent's solicitor was Mr Scott Fraser. We heard his evidence, on affirmation, on day 2, Tuesday, 15 November 2022, carried over to the morning of day 3.

(b) Aged 46, Mr Fraser has been employed by the respondent for some 16 years, and he leads the South-East region Corporate Affairs team, a role he has had for the last 5 years.

- (c) Mr Fraser was examined in chief by Ms Mackie, the respondent's solicitor, there being no pre-exchanged witness statements ordered in this case, and then cross-examined by Mr Clarke on behalf of the claimant.
- 5 (d) His evidence continued over to day 3, when he was asked questions of clarification by the Tribunal panel, and then re-examined by Ms Mackie.
- (e) In giving his evidence to the Tribunal, Mr Fraser explained his own role and his background in previous roles within Scottish
10 Water, and he also detailed the structure of the respondent's Corporate Affairs teams, and his South East region team in particular, where he is Corporate Affairs Manager, at Band A, with a Corporate Affairs Specialist as Band B, and 2 Corporate Affairs Officers at Band C.
- 15 (f) Under reference to documents in the Bundle, Mr Fraser spoke of his involvement in the interviews for Corporate Affairs Specialist in June 2021, and how Mr Bingham had thereafter been recruited as a Corporate Affairs Officer for the West region starting in August 2021, while another successful candidate was appointed
20 to that role in his region.
- (g) In answer to a question of clarification raised by the Judge, arising from Mr Fraser's evidence to the Tribunal about the respondent's pay structure and pay bandings, the witness clarified that pay bands at Scottish Water have a stated start and
25 finish amount but, unlike many other public sector employers, there were no spinal column points, or incremental points, on a pay scale table published by the employer and available to employees.
- (h) Mr Fraser spoke to the additional 2 email documents for the
30 respondent, added to the Bundle, as pages 146 to 150, following

Ms Mackie's renewed application for them to be allowed in by the Tribunal, which, as we detailed earlier in these Reasons, we allowed, despite Mr Clarke's objection, earlier that morning, after the close of Ms Reid's evidence, and before we heard from Mr Fraser.

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(i) Overall, we were satisfied that Mr Fraser was doing his best to recall matters from the Specialist interviews in June 2021, and as such, he was a generally credible witness, but his evidence often lacked focus, or certainty as to what had happened.

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(j) By way of example, there was no clarity in his evidence as to who on the interview panel wrote which interview notes, and no transparent audit trail of sign off of the interview panel's recommendations for appointment, and what was to happen with Mr Bingham in particular.

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(k) While we do not believe that Mr Fraser was deliberately trying to mislead the Tribunal, we did have a question mark over the reliability of certain parts of his evidence.

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(l) As a general observation, we also note and record that Mr Fraser did not come across as a confident witness. His concentration level appeared narrow, and when he lost focus, and his ability to answer some questions posed in cross-examination, and by the Tribunal panel, he appeared overwhelmed.

(3) Ms Lynne Edgar: Claimant

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(a) The last witness heard by the Tribunal was the claimant herself. We heard her evidence, on oath, on day 3, Wednesday, 16 November 2022, and it concluded at the close of proceedings later that afternoon. She had been present in the Tribunal

hearing room on each sitting day, so she had seen and heard the oral evidence given by both Ms Reid and Mr Fraser.

5 (b) Aged 42, Ms Edgar has been employed by the respondent since 2003, and working in Corporate Affairs since March 2015, when her job title was Communications Adviser, becoming Corporate Affairs Officer in 2017. She gave her evidence in chief by answering questions asked of her by her solicitor, Mr Clarke, there being no pre-exchanged witness statements ordered in this case. She was then cross-examined by Ms Mackie, solicitor for the respondents, before being asked questions of clarification by the Tribunal panel, and there was no re-examination by Mr Clarke.

10 (c) In giving her evidence to the Tribunal, the claimant came across well, as a credible, honest and plain-speaking individual who, despite a concern about lack of pay parity with her comparator, and a failure to resolve matters internally though using the respondent's grievance procedure, had had to bring Tribunal proceedings against her employer, yet she was a continuing employee of the respondent.

15 (d) She confirmed as accurate the terms of her CV submitted in May 2021, when she applied for, and was interviewed for, a post of Corporate Affairs Specialist at Band B, as per pages 83 and 84 of the Bundle.

20 (e) Ms Edgar spoke of her work experience and transferable skills from many different positions within Scottish Water over the last 19 years, as detailed in that CV, and while perhaps somewhat overconfident in her own abilities, she did not come across to the Tribunal as seeking to embellish her case, nor to be evasive or equivocal in her answers to questions asked of her in cross-examination, or by the Tribunal panel.

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- (f) The claimant came across clear and consistent in her conviction and belief about her pay inequality situation, and she generally came across well to the Tribunal in giving her evidence at this Preliminary Hearing.
- 5 (g) That said, the Tribunal must note and record that, in her evidence in answer to the Judge's questions of clarification about her use of the respondent's internal grievance procedure (as detailed at paragraphs 12 to 15 of the paper apart to the ET1 claim form), the claimant stated that she went to Ms Reid informally first, in
10 October 2021, after being informed by Mr Bingham that he was paid more than her, then went through a 3 stage internal grievance procedure, but her grievance was not upheld.
- (h) As the Bundle provided by parties to the Tribunal contained no paperwork related to her grievance, nor its outcome, the claimant
15 provided further detail in answer to the Judge's request for clarification, and that further detail we have incorporated into our findings in fact earlier in these Reasons, at paragraph 37, sub-paragraphs (95) to (99) above.
- (i) Of significance, for present purposes, is that in her oral evidence
20 in reply to the Judge, the claimant expanded on the brief detail provided in the ET1 paper apart. In particular, she spoke of stage 1 being an email to Brian Lironi, Director of Corporate Affairs; stage 2, to a manager, Stephen Boon, and stage 3, a meeting with Kevin Roy, General Manager.
- (j) While paragraph 14 of her ET1 paper apart had quoted a single
25 sentence from Mr Roy's stage 3 outcome letter of 14 April 2022, stating that Mr Roy had found nothing to indicate there had been any inequality of pay or unfairness within the claimant's team, the claimant stated to us that Mr Lironi had written back to her to
30 say "**everything was above board**", and she stated to us that

Mr Roy had stated at the meeting (where the claimant had been accompanied by her trade union representative, Emma Phillips) that “***If we give Lynne money, others will want more money.***”

5 (k) In giving this part of her evidence to the Tribunal, the claimant came across again (as she had done before) as a genuine person, speaking confidently and with clear recollection, of what she clearly recalled had happened during the internal grievance procedure, albeit neither her ET1 claim form, nor her more recent reply to the respondent’s pled material factor defence, lodged by her solicitor, had sought to refer to these remarks by Mr Lironi and Mr Roy.

10 (l) Ms Mackie did not object to the claimant giving this evidence, on the basis that it had not been foreshadowed in the legal pleadings for the claimant before the Tribunal, and so there had been no fair notice given, nor did she seek an adjournment to take instructions, with a view to the Tribunal allowing her to further cross-examine the claimant on that part of her evidence. The claimant’s evidence in this regard went unchallenged by the respondent’s solicitor.

15 (m) We also accepted the claimant’s evidence about there now being 10 Corporate Affairs Officers across the 3 regions and central hub at Scottish Water, on the basis that she stated that she had been given that figure by Brian Lironi, the respondent’s Director of Corporate Affairs, and of those 10, 9 were female (including the claimant) and 1 was male (being Mr Bingham), as per information in the respondent’s internal directory.

20 (n) This figure of 10 was at odds with the respondent’s ET3 response which had stated that there were 7 Corporate Affairs Officers, a fact Ms Mackie had invited the claimant to agree with at paragraph 30 of the draft Agreed List of Facts which had

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asserted that: “***There are 7 Corporate Affairs Officers that work within the Claimant’s team.***”

(o) Again, the claimant’s evidence in this regard went unchallenged by the respondent’s solicitor.

5 (p) Mr Clarke had indicated at the start of this Preliminary Hearing that the claimant did not agree with the figure of 7, so he had that paragraph 30 deleted, before the claimant agreed to sign off the revised Statement of Agreed Facts.

(4) Persons not led in evidence before this Tribunal

10 (a) At the start of the Preliminary Hearing, on day 1, the Tribunal noted the respondent’s two witnesses, Ms Reid and Mr Fraser, and that Mr Alan Thomson, the respondent’s Head of Corporate Relations, was not being led as a witness for the respondent albeit, in earlier case management of the claim, the respondent
15 had indicated that he would be led as a witness.

(b) It was only on 2 November 2022 that Ms Mackie, the respondent’s solicitor, advised the Tribunal, and the claimant’s solicitor, that they would be calling Scott Fraser as their second witness, instead of Mr Thomson.

20 (c) No reason was given by Ms Mackie at that stage, nor was any full explanation provided by her to this Tribunal, other than briefly responding to the Judge, when he raised a question about the respondent’s witness list, when discussing housekeeping matters at the close of evidence on day 1, and why Mr Thomson
25 was not now being led, to which Ms Mackie responded to say that the respondent had decided that he was not required, as he was not involved in the process, only at sign-off, and Ms Reid and Mr Fraser were its only witnesses.

- 5 (d) While, in his closing submissions for the claimant, on day 4, Mr Clarke referred to the respondent failing to discharge its burden of proof and leading no evidence from Mr Thomson as the decision maker, and that being “**bewildering**”, the Tribunal notes and records that the claimant’s solicitor made no application to the Tribunal to consider making a Witness Order to compel Mr Thomson’s attendance as a relevant and necessary witness.
- 10 (e) Given the burden of proof on the respondent, at this “**material factor**” Preliminary Hearing, the Tribunal well understands why Mr Clarke did not do so, and why, in his oral closing submissions, he described the respondent’s decision not to call Mr Thomson “**a fatal mistake**”, and why, in his view, the respondent not having led Mr Thomson, their “**material factor**” defence “**is, and always has been, doomed to failure, since they decided not to call Alan Thomson.**” .
- 15 (f) We address the absence of Mr Thomson later in these Reasons when discussing and deliberating upon parties’ competing closing submissions. The respondent having decided not to call him, it was not for the Tribunal, acting on its own initiative, to consider issuing a Witness Order for Mr Thomson’s attendance.
- 20 (g) Indeed, we note and record here the recent judgment of the Court of Appeal in **QX v Secretary of State for the Home Department [2022] EWCA Civ 1541**, where the judgments of Lady Justice Elisabeth Laing, Lord Justice Nugget, and Lord Justice Coulson, issued on 22 November 2022, are a timely reminder that a Court cannot compel a party to call a particular witness whom a party does not wish to call, and that “**party autonomy is paramount**” in civil litigation, per Lord Justice Coulson, at paragraphs 133 to 135, agreed with by the other
- 25 judges at paragraphs 128 and 129. In our view, the same principle applies here in the Employment Tribunal by analogy.
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- 5 (h) The other individual from whom the Tribunal did not hear any evidence was, of course, the claimant's comparator, Matt Bingham. Neither party sought to call him as a witness, and the Tribunal understands why, given this Preliminary Hearing was on the respondent's "**material factor**" defence, and not a merits Hearing into whether or not the claimant and her comparator are engaged in like work, or work of equal value.
- 10 (i) Many of the documents lodged in the Bundle related to Mr Bingham, and we heard much in evidence, from the respondent's witnesses in particular, about Mr Bingham, and his skills and experience.
- 15 (j) After our preliminary discussion, in private deliberation within chambers, after the close of both parties' closing submissions on day 4, we had the Tribunal clerk write to both parties' legal representatives, on 18 November 2022, to enquire whether either party had any application to make to the Tribunal for any order under **Rule 50 of the Employment Tribunal Rules of Procedure 2013** (privacy and restrictions on disclosure).
- 20 (k) As we address the matter of privacy / anonymity later in these Reasons, at paragraphs 62 to 73 below, we say no more about it here.

Closing Submissions from Parties

- 25 39. Procedure and timetabling for closing submissions from both parties' solicitors on day 4, Thursday, 17 November 2022, had been detailed by Judge McPherson in the case management directions set by him, and intimated to both parties' solicitors, with the Tribunal's letter to them sent on 9 November 2022, along with other directions.
40. In particular, the Judge had ordered as follows:

(3) *It is further ordered that, for the purpose of oral closing submissions on day 4 of the Preliminary Hearing, to start at 10am on Thursday, 17 November 2022, the parties' solicitors shall each provide by email to the Glasgow ET, and copy sent at the same time to the other party's solicitor, by no later than 09:00am on Thursday, 17 November 2022, a document in Word format, not PDF, containing a list of statutory provisions and case law authorities to be relied upon by the each party's solicitor, with hyperlinks, to a free to access website, e.g. Bailli, to assist the Tribunal's and parties ready access to caselaw, together with a written skeleton argument of the legal submissions to the Tribunal, to speak to in oral submissions lasting no more than one hour, 30 minutes, respondents' solicitor first, and to which the claimant's solicitor shall then have the opportunity for a reply, likewise lasting no more than one hour, 30 minutes.*

(4) ***Hard copy authorities are not required.***

(5) *Parties' representatives shall liaise and co-operate with each other in preparing a single, joint list of authorities, for use by the Tribunal.*

41. Despite the Tribunal's clear and unequivocal order (4) above, the respondent's solicitor provided the Tribunal, on day 1, with bound, indexed, hard copy "***Respondent's List of Authorities***", with 8 cited case law authorities, running to some 211 pages, namely:

1. **Rainey v Greater Glasgow Health Board [1987] AC 224**
2. **Glasgow City Council v Marshall (HL) [2000] ICR 196**
3. **Bury Metropolitan Borough Council v Hamilton and others [2011] ICR 655**
4. **Secretary of State for Justice v Miss C Bowling [2012] IRLR 382**
5. **Miss A Parkinson v Ainscough Crane Hire Ltd: 3353017/2017**
6. **Co-Operative Group v Walker [2020] ICR 1450**

7. **Miss J Dowling v KPMG UK Limited: 4107832/2020**

8. **Ms D Kalotra v Cisilion Ltd and Craige Winter-Nolan: 2302473/2020**

42. Thereafter, when Mr Clarke intimated the claimant's written skeleton argument, on the evening of Wednesday, 16 November 2022, he also
5 intimated the single, jointly agreed list of authorities, as follows:

1 to 8. As per the respondent's list (above)

9. **Calmac Ferries Ltd v Wallace [2014] ICR 453**

10. **BMC Software Ltd v Shaikh [2019] EWCA Civ 267**

11. **Newcastle Upon Tyne NHS Hospitals Trust v Armstrong &ors
10 UKEAT/0069/09**

12. **Da Silva v London and Quadrant Housing Trust UKET
3201006/2018**

13. **Villalba v Merrill Lynch & Co and ors 2007 ICR 469**

14. **Cumbria County Council v Dow [2008] IRLR 91 EAT**

15. **Smith v Atex Media Command Ltd: ET 2601163/05**

16. **Chamberlain v North West Leicestershire District Council: ET
190250/08**

17. **Guest v Ferro (Great Britain) Ltd EAT 287/77**

18. **Samira Ahmed v BBC: ET2206858/2018**

20 43. Ms Mackie's written closing submissions made no observation or comment upon the **Bowling** and **Kalotra** cases cited by her at item numbers 4 and 8 in her respondent's list of case law authorities. 3 of her cited cases were unreported, first instance ET judgments, being **Parkinson, Dowling**, and **Kalotra**, not binding on this Tribunal. Similarly, Mr Clarke's case law cited
25 unreported, first instance ET judgments, some reported in IDS, being **Da**

Silva, Smith, Chamberlain, and Ahmed, and likewise not binding on this Tribunal.

44. Both parties' legal representatives are reminded that when making closing submissions to a Tribunal, they should only cite reported case law authorities that set forth an important legal principle from the higher Tribunals and Courts that are binding upon an Employment Tribunal, and not other unreported, and non-binding, judgments from other first instance Employment Tribunals.

Respondent's Submissions

45. Ms Mackie intimated the respondent's closing submissions by email sent on 17 November 2022 at 09:00am.

46. As a full copy is held on the Tribunal's casefile, and we had access to it during our private deliberations, it is not necessary to repeat here its full terms verbatim. That is neither appropriate, nor proportionate. At paragraph 44, she intimated that: "***The Respondent will no longer rely on Market forces (difficulties in recruitment / retention) as a material factor.***"

47. As Mr Clarke observed, on day 4, when making his oral closing submissions for the claimant, it was unfortunate for him that Ms Mackie did not concede this matter earlier, given Ms Reid's evidence on day 1, as his written closing submission for the claimant, prepared the previous evening, had included his paragraphs 65 to 72 about market forces, now withdrawn as a material factor defence being relied upon by the respondent, but still leaving the other 4 pled material factors in place and relied upon by the respondent.

48. This Tribunal agrees with that observation by Mr Clarke, as also with his reference to the Supplementary Information document (produced to us at page 80 of the Bundle), where Mr Alan Thomson had stated: "***Corporate Affairs carried out a more recent recruitment process throughout June and July 2021, using the Corporate Affairs Officer role profile, to recruit a number of new employees at the base of Band C. This demonstrates***

that it is possible to recruit individuals with the relevant skills at that salary.”

49. With no disrespect intended to Ms Mackie, by reason of the brevity of our summary, we have summarised her respondent’s skeleton argument, extending to 12 typewritten pages, running to 56 numbered paragraphs, as follows:

- Preliminary matters (paragraphs 1 and 2)
- Facts (paragraphs 3 to 16)
- Issues (paragraph 17)
- Legal Principles (paragraphs 18 to 21)
- The Material Factors (paragraphs 22 to 45)
- No Taint of Indirect Sex Discrimination (paragraphs 48 to 48)
- Proportionate Means of Achieving a Legitimate Aim (paragraphs 49 to 55)
- Conclusion (paragraph 56)

50. In her conclusion, at paragraph 56, Ms Mackie stated that:

“The Respondent can satisfy the tribunal that there is one of the material factors relied upon that account for the difference in pay between the Claimant and her comparator, that are not tainted by sex. The defence should succeed.”

51. We discuss her submissions, where appropriate, later in these Reasons, under our ***Discussion and Deliberation*** section below.

Claimant’s Submissions

52. Mr Clarke intimated the claimant’s closing submissions by email sent at 19:43 on the evening of 16 November 2022.

53. As a full copy is held on the Tribunal's casefile, and we had access to it during our private deliberations, it is not necessary to repeat here its full terms verbatim. That is neither appropriate, nor proportionate.

54. With no disrespect intended to Mr Clarke, by reason of the brevity of our
5 summary, we have summarised his claimant's written submission extending to 14 typewritten pages, running to 90 numbered paragraphs, as follows:

- Introduction (paragraphs 1 to 7)
- Law (paragraphs 8 to 36)
- Submissions
- 10 • Primary submission (paragraphs 37 to 52)
- Material time (paragraphs 53 and 54)
- Experience (paragraphs 55 to 64)
- Market factors relating to difficulty in recruitment and / or retention (paragraphs 65 to 72)
- 15 • Skills related or other relevant supplements (paragraphs 73 to 77)
- Responsibility and potential (paragraphs 78 to 83)
- Where applicable, in conjunction with one or more of the factors above, cost (paragraphs 84 to 87)
- Conclusion (paragraphs 88 to 90)

20 55. In his conclusion, Mr Clarke set forth the claimant's position as follows:

“88. In the premises, the Respondent has failed entirely to discharge its burden of proof and thus has failed to show that the difference in pay between the Claimant's pay and that of the comparator from August 2021 to date was because of any of the alleged material factors upon which it relied.

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89. *It has failed to discharge the burden on it under section 69(1) EqA and to rebut the presumption of sex discrimination that arises in circumstances where the Claimant and the comparator (it is assumed) have been doing like work and she is being paid less than the comparator.*

90. *In the circumstances, the Claimant invites the Tribunal to so find and to list this case for a 'like-work' hearing at which the Tribunal can consider whether the Claimant's work is like the comparator's work within the meaning of s.65 (2)(a) and (b) EqA."*

10 56. We discuss his submissions, where appropriate, later in these Reasons, under our ***Discussion and Deliberation*** section below.

Reserved Judgment

15 57. After the close of parties' closing submissions on day 4, Thursday, 17 November 2022, we reserved Judgment to be issued in writing in due course, and that afternoon the Tribunal had some private deliberation in chambers. A further day was required, and the Tribunal agreed to meet again, remotely by video conferencing, for further private deliberations at a Members' Meeting with the Judge, on a date to be arranged.

20 58. An update was provided to both parties' solicitors by email from the Tribunal sent on 18 November 2022, along with an enquiry whether either party had any case management application to make to the Tribunal for any Order under **Rule 50 of the Employment Tribunals Rules of Procedure 2013.**

25 59. Written representations were thereafter received by the Tribunal dated 22, 24 and 29 November 2022. We deal with those written representations in the next section of our Reasons, starting at paragraph 64 below.

60. A Members' Meeting was then arranged for 29 December 2022, the earliest mutually convenient date for the full Tribunal. It was held remotely using Microsoft Teams videoconferencing. We had hoped to be able to finalise the terms of our Judgment and Reasons by week commencing 23 January 2023,

but , unfortunately, other judicial business meant there was a delay in the Judge progressing the draft after our Members' Meeting. Parties were updated by the Tribunal, by letter issued on 27 January 2023, explaining the delay, and stating that the revised target date for promulgation of our Judgment would be w/c 6 February 2023, subject to non-legal member availability to comment to the Judge on the draft.

61. This unanimous Judgment represents the final product from our private deliberations and reflects our unanimous views as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

10 **Privacy / Anonymity: Parties' Written Representations**

62. As indicated earlier in these Reasons, at paragraph 59 above, this is a matter raised by the Tribunal after hearing parties' closing submissions on day 4.

63. In the letter issued by the Tribunal, on 18 November 2022, on instructions from the Judge, it was stated as follows:

15 (5) *One of the many caselaw authorities provided to the Tribunal was Parkinson v Ainscrough Crane Hire Ltd [ET 3353017/2017]. In that Judgment from the Watford ET, that Tribunal ordered that the identities of comparators and other employees of the respondent whose salaries were disclosed should be anonymised.*

20 (6) *In the present case, neither party has made any application to the Tribunal, during earlier case management, or at yesterday's closing submissions, for the Tribunal here to make any order under Rule 50 of the ET Rules of Procedure 2013 (privacy and restrictions on disclosure).*

25 (7) *Given the comparator, Mr Matt Bingham, was not led as a witness, the Tribunal is concerned that he may not be aware of the claim being heard these last 4 days, and that documents relating to his performance at interview, his CV, and pay details, as well as evidence given by the witness, Ms Georgie Reid about his personal family circumstances,*

have been disclosed in public hearing and, so far as relevant and material to the issues before the Tribunal for determination, may be disclosed to the public in the Tribunal's written Judgment & Reasons which then form part of the public record online.

5 (8) *In these circumstances, and having regard to Mr Bingham's Convention rights under ECHR article 8, being the Convention right to respect for private life, family life, correspondence and home, the Tribunal has decided that it should advise that both parties have liberty to apply to the Tribunal, by case management application under Rule 29, if they consider that the Tribunal should make any privacy or*
10 *anonymity order under Rule 50; any such application must be intimated to the other party's solicitor, under Rule 92, and, subject to any comments / objections by the other party, any application (if any is made) will be determined by Employment Judge Ian McPherson, as the*
15 *allocated Judge, on the papers, in chambers, and without the need for any oral Hearing.*

(9) *Parties must intimate any such application to the Glasgow ET, by email, within the next 7 days at latest, including the factual and legal basis for any Rule 50 order being sought by them from the Tribunal. If an*
20 *application is made by one party, then the other party must respond ASAP, and certainly within no more than 7 days thereafter.*

(10) *If parties do not seek any Rule 50 Order, then they should confirm that position within the same 7-day period.*

(11) *In that latter event, the Tribunal may itself, acting on its own initiative,*
25 *still consider whether any Rule 50 Order is required and, if so, in what terms.*

64. We received parties' written representations on 22 and 24 November 2022. By email sent on 22 November 2022, Mr Clarke, the claimant's representative, stated pre-emptively, further to the Tribunal's letter of 18 November 2022, that
30 : ***"We have obtained the claimant's instructions which are that she***

would have no objection to an [Order] (sic) being made under rule 50 of the ET Rules of Procedure 2013 in respect of the comparator should the respondent make such an application or should such an order be considered by the Tribunal of its own initiative.”

- 5 65. Further, by email from Kim Pattullo, partner at Shoosmiths LLP, the respondent’s solicitors, sent on 24 November 2022, we received a case management application in the following terms:

10 **“I am writing on behalf of the Respondent. By letter dated 18 November, the Tribunal wrote to both parties to enquire whether either wished to make a case management application under Rule 29 in order to seek a privacy or anonymity order under Rule 50.**

On behalf of the Respondent I now make the application seeking a Rule 50 Order.

15 **In respect of the Rule 50 Order, I apply for the following be the subject of a privacy or anonymity order:**

1. **The identity of the alleged male comparator, Mr Matt Bingham.**
2. **The evidence pertaining to his CV, performance at interview and pay details.**
3. **The evidence given by witness Ms Georgie Reid about Mr**
20 **Bingham’s personal family circumstances.**

As the Tribunal has already identified, these are issued (sic) relating to Mr Bingham and his family’s Article 8 Convention Rights relating to his (and his family’s) right to respect for their private life, family life, correspondence and home.

25 **Mr Clarke acting for the Claimant has already advised he has no objection to this application but I confirm having copied this e-mail to him in accordance with Rule 92.”**

66. By letter from the Tribunal dated 28 November 2022, issued on the Judge's instructions, the Tribunal requested direct comment from the claimant's representative to the respondent's representative's application made on 24 November 2022. In reply, by email dated 29 November 2022, from Mr Clarke, he confirmed, on behalf of the claimant, that the claimant did not object to a **Rule 50** Order being made further to the respondent's application dated 24 November 2022.

67. Rather than decide the matter, on the papers, and in chambers, by the Judge only, without the need for an oral hearing with parties, the Judge decided to discuss the matter collegiately with the non-legal members of the Tribunal too. Parties were so advised by correspondence from the Tribunal on 12 December 2022.

68. In considering the respondent's application, we looked first at the terms of **Rule 50 of the Employment Tribunal Rules of Procedure 2013**, which is in the following terms:-

Privacy and restrictions on disclosure

50.—

(1) ***A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.***

(2) ***In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.***

(3) ***Such orders may include—***

- 5
- (a) *an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;*
- (b) *an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;*
- 10
- (c) *an order for measures preventing witnesses at a public hearing being identifiable by members of the public;*
- (d) *a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.*
- 15
- (4) *Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.*
- 20
- (5) *Where an order is made under paragraph (3)(d) above—*
- (a) *it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;*
- (b) *it shall specify the duration of the order;*
- 25
- (c) *the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on*

the door of the room in which the proceedings affected by the order are taking place; and

(d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.

5 (6) “**Convention rights**” has the meaning given to it in section 1 of the **Human Rights Act 1998**.

69. Next, we noted that **Section 10A of the Employment Tribunals Act 1996** relates to confidential information, **Section 11** relates to restriction of publicity in cases involving sexual misconduct, and **Section 12** relates to restriction of
10 publicity in disability cases. None of those provisions apply in the present case.

70. The respondent’s application did not cite any relevant case law for consideration by the Tribunal, so we have received a self-direction from the Judge, and we have noted, in particular, the guidance on **Rule 50** Orders given by the Employment Appeal Tribunal sitting in Scotland in the judgment of Lord Summers, in **A v Burke and Hare [2021] EA-2020-SCO-000067-DT** (formerly **UKEATS/0020/20/DT**). As outlined at paragraph 34 of **A v Burke and Hare**, open justice is of paramount importance in the context of
15 employment law, and derogations from it are only justified when necessary, in the interests of justice. Further, as outlined at paragraph 35 of the **A v Burke and Hare** judgment, derogations from the principle of open justice must be shown to be necessary. It is not sufficient that derogation is desirable.

71. There is also the appellate guidance provided by Mrs Justice Simler, then EAT President (now Lady Justice Simler in the Court of Appeal) in **Fallows v News Group Newspapers Limited [2016] ICR 801**, confirming, at paragraph
25 48, that the power to make **Rule 50** Orders is wide, but there are relevant principles to be considered, including that the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies with the person seeking that derogation. It must be established by clear and

cogent evidence that harm will be done. As such, there is a high evidential threshold to support the making of a **Rule 50** Order.

72. She also held that the open justice principle is grounded in the public interest, irrespective of any particular public interest the facts of the case give rise to. It is no answer therefore for a party seeking restrictions on publication in an employment case to contend that the employment tribunal proceedings are essentially private and of no public interest accordingly.

73. After private discussion at our Members' Meeting held remotely on 29 December 2022, we have decided to refuse the respondent's application, and not to grant any **Rule 50** Order on our own initiative. We did so for the following reasons:

(1) The fact that the respondent's application is not opposed by the claimant does not mean that we must grant the application. We need to bring our own independent and objective judicial decision making to the unopposed application.

(2) Having initially considered this application, we were content that, in the interests of justice, we might be disposed to grant it but only at head (3) of the application. However, after further discussion, we decided that it might be best to discuss once we had a draft Judgment prepared, as the way it was written up may allay the respondent's concerns.

(3) Giving full weight to the principle of open justice, we recall that Mr Bingham's name was used openly in the ET1 claim form, ET3 response, and documents in the Bundle, and quite openly in evidence given by both parties' witnesses in a public hearing, and that without either party having requested any **Rule 50** Order, before or during the Hearing. Parties did not request a Private Hearing. As such, we do not see how granting heads (1) or (2) of the respondent's application is in the interests of justice.

- 5 (4) Mr Bingham's CV, performance at interview and pay details are all relevant matters for the Tribunal to detail, as are the claimant's, from the evidence given in open court in a public hearing, so we do not agree that the comparator's details should be anonymised, or redacted. That is not a level playing field with evidence from the claimant.
- (5) The respondent's application does not address why, in considering whether to make a **Rule 50** Order, in such broad terms, Mr Bingham's privacy should be given greater weight than the principle of open justice.
- 10 (6) The evidence given by Ms Georgie Reid about Mr Bingham's personal family circumstances is covered by his **Article 8, ECHR Convention rights**, and we are content that such detail does deserve anonymity / privacy, and that is why we initially considered that head (3) could be given or granted by the Tribunal.
- 15 (7) However, after further discussion, we have decided not to grant head (3), as, in writing up this Judgment, we have simply referred to Mr Bingham's personal family circumstances, without going into any of the detail provided by Ms Reid.
- 20 (8) In the present case, the application made by the respondent's solicitor fails to explain why privacy or anonymisation to the extent sought is necessary in the interests of justice. We do not find, in view of the case law that we have cited, that the respondent has discharged the burden on them to explain clearly and cogently why a derogation from the fundamental principle of open justice and full reporting should be
- 25 allowed by the proposed terms of a privacy or anonymisation Order as sought here by the respondent.
- (9) For all of these reasons, we have refused the respondent's application in its entirety at heads (1), (2) and (3).

Issues before the Tribunal

74. The case called before the full Tribunal not for full disposal, including remedy if appropriate, but only on the disputed preliminary matter of the respondent's pleaded "**material factor**" defences, as per Employment Judge Eccles' PH Note issued on 12 September 2022, as reproduced earlier in these Reasons, at paragraph 17 above. The issue of whether or not the claimant and Mr Bingham, as her chosen comparator, are or have been doing like work, or work of equal value, has not been determined by us, or indeed any Tribunal as yet.
75. The issues for determination by us at this Preliminary Hearing were addressed in the competing written closing submissions that we received from both parties' solicitors, for which we are most grateful, and, in our discussion and deliberation, in the following section of these Reasons, we have taken account of the written and oral submissions from Ms Mackie for the respondent, and from Mr Clarke, on behalf of the claimant.

15 **Relevant Law**

76. While the Tribunal received written closing submissions from Ms Mackie and Mr Clarke, parties' solicitors, with some statutory provisions recited, and with some case law references, the Judge has required to give the Tribunal a self-direction on the relevant law to cover all aspects of the case before this Tribunal.
77. As per **Rule 62 of the Employment Tribunal Rules of Procedure 2013**, we must concisely identify the relevant law, and state how that law has been applied to our findings in fact in order to determine the issues before this Tribunal.
- 25 78. **Part 5, Chapter 3 of the Equality Act 2010** enables a woman to claim equality with a man where she is engaged on "like work", work "rated as equivalent" under a job evaluation scheme or where her work is of "equal value" to that of her male comparator. This is achieved by implying a "sex equality clause" into every contract of employment. In this case the claimant

contends that she does 'like work' or work of 'equal value' to the male comparator.

79. Once it has been proved (or in this case assumed for the purpose of this Preliminary Hearing) that a woman is employed on like work or on work of equal value then an equality clause will operate in her favour unless the employer can demonstrate that the variation in contract terms is due to a material factor other than sex.

80. In that respect, we have had regard to the terms of **Section 69 of the Equality Act 2010**, which, so far as material for present purposes, provides, as follows:

Defence of material factor

(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.*

(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.*

81. The other statutory provision that we need to take note of is what **Section 136 of the Equality Act 2010** provides, as follows:

Burden of proof

- 5 (1) *This section applies to any proceedings relating to a contravention of this Act.*
- (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.*
- 10 (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*
- (4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*
- (5) *This section does not apply to proceedings for an offence under this Act.*
- 15 (6) *A reference to the court includes a reference to—*
- (a) *an employment tribunal;*

- 20 82. **Section 136 of the Equality Act 2010** applies to equal pay claims. The effect of this section is that it falls to the claimant to show that she is engaged on terms less favourable than a man doing equal work. If she can do that then the burden shifts to the respondent to show that the difference in treatment can be explained by a material factor. If the respondent succeeds in that, the claim will progress only if the claimant can show that the material factor is tainted by indirect sex discrimination: **Bradley v Royal Holloway & Bedford New College, University of London [2014] UKEAT/0459/13/SM**, per Mr
- 25 Justice Langstaff, then President of the EAT. If she does that then again, the burden shifts to the respondent to show that any such material factor is objectively justified as a proportionate means of achieving a legitimate aim.

83. **Section 69** provides potentially two defences, one to direct discrimination and one to indirect discrimination. This is because the statutory wording adopts the conventional concepts of direct and indirect discrimination. It raises a presumption that the difference in pay is because of the claimant's sex. To avoid liability the employer must prove that the inferior pay is not because of the claimant's sex. If the employer fails to do so, it is liable as there is no defence to direct discrimination.
84. Alternatively, a claimant must prove that the disparity was caused by indirect discrimination. If the claimant does this the burden of proof is on the employer to show that the cause is a material factor that is a proportionate means of achieving a legitimate aim, in other words it must objectively justify the difference.
85. In **Glasgow City Council and others v Marshall and others [2000] UKHL 5**, Lord Nicholls of Birkenhead, with whom all the other Law Lords agreed, set out in his leading speech what was required to establish the material factor defence under what was then **Section 1(3) of the Equal Pay Act 1970** (which was to the same effect as **Section 69 of the Equality Act 2010**). He stated as follows:
- “The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge the burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a ‘material factor’ that is, a significant and relevant factor. Third, that the reason is not “the difference of sex”. This phrase is apt to embrace any*

form of sex discrimination, whether direct or indirect. Fourth, the factor relied upon is or, in a case falling within section 1(2) (c), may be a “material” difference that is a significant and relevant difference, between the woman’s case and the man’s case.

5 *When section 1 is thus analysed, 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*
10 *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.*

86. The Court of Appeal has recently affirmed the long-standing approach of
15 **Marshall** in **Walker v Co-operative Group Limited [2020] EWCA Civ 1075**. The Court held that (absent indirect discrimination) the material factor defence does not require an employer to show that any difference in pay is justified. As Lord Justice Males in giving his judgment in **Walker** explained, at paragraph 60:

20 *“As is clear from Glasgow City Council v Marshall [2000] 1 WLR 333 there are two issues here: the first is causation (the employer must prove that the reason for the difference is not “difference of sex”); the second is materiality (the employer must prove that the factor relied upon is “significant and relevant”). Proof of these matters is sufficient for the defence of material factor*
25 *to succeed. The employer is not required to prove that the pay disparity is justified.”*

87. **Section 69** does not provide clarification as to what is meant by “*material*”.
30 **Section 69(6)** states that a factor will only be material if it is a material difference between A’s case and B’s case. However greater elaboration on what this means was provided by the House of Lords in **Rainey v Greater**

Glasgow Health Board [1987] UKHL 16. Lord Keith of Kinkel stated at paragraph 13 that:

“The difference must be “material”, which I would construe as meaning “significant and relevant”, and it must be between “her case and his”. Consideration of a person’s case must necessarily involve consideration of all circumstances of that case. These may go well beyond what is not very happily described as “the personal equation” ie the personal qualities by way of skill, experience or training which the individual brings to the job. Some circumstances may on examination prove to be not significant or not relevant, but others may do so, though not relating to the personal qualities of the employee. In particular, where there is no question of intentional sex discrimination whether direct or indirect (and there is none here) a difference which is connected with economic factors affecting the efficient carrying on of the employer’s business or other activity may well be relevant.”

88. We have also taken into account relevant provisions from the **Equality and Human Rights Commission’s Statutory Code of Practice on Equal Pay**, in force since 6 April 2011, in particular, paragraph 9 which states that : ***“The Act’s provisions on equal pay and sex discrimination are intended to ensure that pay and other employment terms are determined without sex discrimination or bias.”***

89. The Code also states that although the law on equal pay may seem complicated its purpose is simple – to ensure that where women and men are doing equal work, they should receive the same rewards for it (paragraph 27). Further, the Code states that the equal pay provisions apply to all contractual terms including wages and salaries, non-discretionary bonuses, holiday pay, sick pay, overtime, shift payments, and occupational pension benefits, and to non-monetary terms such as leave entitlements or access to sports and social benefits (paragraph 31).

90. Paragraphs 75 to 90 of the Code deal with the ***“Material Factor Defence”***. Paragraph 76 states that the employer must identify the factor(s) and prove:

- (1) It is the real reason for the difference in pay and not a sham or pretence;
- (2) It is causative of the difference in pay between the woman and her comparator;
- 5 (3) It is material: that is, significant and relevant;
- (4) It does not involve direct or indirect discrimination.

91. The Code also states that whether the defence is made out will depend on the specific circumstances in each case (paragraph 78). If the material factor accounts for only part of the variation in pay, the woman is entitled to a pay
10 increase to the extent that the defence is not made out (paragraph 79).

Discussion and Deliberation

92. In coming to our final decision in this case, the Tribunal has carefully reviewed and analysed the whole evidence led before it, both orally in sworn / affirmed evidence, and within the various documents spoken to in evidence at the
15 Preliminary Hearing, and produced to us in the Joint Bundle, and additional documents.

93. Ms Mackie and Mr Clarke both spoke to the terms of their written submissions, so there is no need to rehearse their written points again here again. We have taken full note of them in our deliberations. Ms Mackie did however, in
20 speaking to her written submissions, add various supplementary points orally, and Mr Clarke made an oral reply to Ms Mackie's oral submissions. Again, we have taken note of both of their oral submissions too, in our discussion and deliberation.

94. At paragraph 7 of his written submissions for the claimant, Mr Clarke
25 submitted that there are two primary factual issues to be determined by the Tribunal, namely:

(1) ***To what extent, if at all, were the alleged material factors operating on the mind of the decision-maker, Mr. Alan Thomson, in June / July 2021? and***

5 (2) ***If one or more of the alleged material factors were operating on the mind of Mr. Thomson to what extent were they significant and relevant at that time?***

95. In coming to our reserved decision in this case, we have gratefully adopted his two proposed primary factual issues, but in doing so, we have rephrased to refer to the respondent's decision-maker, but not personalised that to Mr Thomson, and deal with them now in the remaining paragraphs of this section of our Reasons.

96. As redrafted by this Tribunal, the issues for us to address are now as follows:

15 (1) ***To what extent, if at all, were the alleged material factors operating on the mind of the respondent's decision-maker in June / July 2021? and***

(2) ***If one or more of the alleged material factors were operating on the mind of the respondent's decision-maker to what extent were they significant and relevant at that time?***

97. The first matter for us to decide upon is who was the respondent's decision-maker at the relevant time of deciding a starting salary for Mr Bingham on him joining the respondent's employment. The claimant's solicitor, Mr Clarke, asserts that it was Mr Alan Thomson, the respondent's Head of Corporate Relations.

98. In evidence before this Tribunal, Mr Fraser spoke of Mr Thomson's budget, and that while he could have said no to the salary proposed by Ms Reid, Mr Fraser's evidence to us was that was not a real option, as he believed Mr Thomson would "***sign-off***" a salary based on the value of an individual to the organisation, and Mr Thomson had never been known to say no before when asked about a starting salary. We also heard that it was Mr Brian Lironi's

budget, as Director of Corporate Affairs, and that he was Mr Thomson's line manager.

99. There was no clear evidence before us as to who held the budget, or who had what delegated powers / responsibilities in terms of budget. On the limited evidence made available to us, it seems to us more likely than not that it was Mr Lironi who held the overall budget, for all Communications staff across Scotland, including Ms Reid's team in the West region.
100. The only clear adminicle of evidence before us was what we found in the respondent's recruitment policy and procedure. Section 4.1 dealt with appointment to a vacancy, the role of the recruiting manager, and processing by People Connect before any conditional offer of employment could be issued to a successful candidate. We do not know, because the respondents provided no such documentation in the Bundle, if and when Mr Bingham was sent a conditional offer, if so, what it said, and nor do we know when he accepted the offer of employment, conditional, or otherwise.
101. All we know, for certain, from the agreed fact **ASF (35)**, is that Mr Bingham's start date was 23 August 2021, and that he had been interviewed, for the Specialist, Band B, post on 23 June 2021. The only reference that we have seen to his salary at Inverclyde Council being £35,000 is within Mr Steel's email of 15 July 2021.
102. As we have recorded above, in our findings in fact, at paragraph 37(57), no other documentation was produced to the Tribunal by the Respondent to explain the audit trail for Mr Bingham's appointment as Corporate Affairs Officer, or the basis for his salary placing within the Band C, nor approval from Finance or the appropriate Director, at the starting salary of £36,500.
103. Further, there was no evidence before us that, in deciding upon Mr Bingham's starting salary, the respondent had appointed him as a "***candidate with development needs***", as per section 4.2 of their recruitment procedure. There was no evidence of any development plan having been required for him, which, in terms of section 4.1 of their recruitment procedure, we note and

record should have been stated and agreed with him at the point of a conditional verbal offer of appointment.

104. We have considered, but discounted, the possibility that maybe the recruitment interview panel was the decision-maker, but it seems to us that that view is itself problematic. Mr Bingham was interviewed by the 3-person panel for the Specialist, Band B role, and he was not interviewed by any other panel for the Band C Officer post to which he was appointed. The only discussion with him about salary was with Ms Reid, and she gave us her account of that discussion.
105. We did not see any job advert for the Corporate Affairs Officer post, and so we do not know, and none of the witnesses told us, what, if anything, that job advert said expressly about a specific salary, or salary range, for that Band C level post. In these circumstances, there has not been presented to us any clear and transparent audit trail explaining the rationale for Mr Bingham's starting salary at £36,500.
106. We considered, but discounted, whether Ms Reid could be identified as the respondent's decision-maker, but we do not consider that she can be. She was a member of the 3-person interview panel that interviewed Mr Bingham, and she – and she was far as we can ascertain from the available evidence – she alone had discussions with him about his starting salary.
107. We note and record, from Ms Mackie's closing submissions for the respondent, at her paragraph 14, that she there stated : ***“The panel agreed to hire Mr Bingham. As Mr Bingham was filling a vacancy in Ms Reid's team, Ms Reid and sought sign off on the panel's salary decision from Alan Thomson. She proposed to Alan that a figure of £36,500 would be appropriate to take into account incremental pay rises since Matt was last employed in his role at Inverclyde Council in 2019. Mr Thomson agreed and confirmed it was perfectly acceptable to offer this amount as this was within the banding for Band-C.”***

108. In our view, that submission made by the respondent's solicitor is in error in one material respect: that 3-person panel was interviewing for the Specialist, Band B post, so they cannot properly be regarded as the recruiting managers for the Corporate Affairs Officer post at Band C that the claimant was appointed to in the West region. As Mr Steel's email of 1 July 2021 clearly records, as per our finding in fact at paragraph 37 (53) above, Jean O'Neill in HR was asked to ***"if possible, could you transfer Matt Bingham's application to be considered under the Corporate Affairs Officer post – he has indicated that he would like to be considered for this and we would be keen to consider him for it)"***.
109. We were provided with no evidence from the respondent as to how that recruitment exercise was conducted, and on what basis Mr Bingham was selected for appointment. There was no evidence provided to us about how many applicants there were for the Band C Officer posts, who was short-listed for interview, who interviewed, and who was appointed.
110. As Ms Mackie's written closing submission explained, at her paragraph 13 : ***"Gavin Steel wrote to Jean O'Neill on 1 July 2021 to request that Mr Bingham's application be transferred to the Band-C role (page 146). The Respondent's recruitment policy does not prescribe the steps that the panel should take to transfer an application made in respect of a role in a higher band to a lower band (page 54)."***
111. In the evidence we heard from Ms Reid, she informed us that she kept Mr Thomson ***"informed"*** about the hiring process for Mr Bingham, but it is difficult for the Tribunal, in the absence of having heard directly from him, in circumstances where the respondent has chosen, for whatever reason, not to lead him as a witness before us, to know whether he, or somebody else, was the respondent's decision-maker. Without identifying the decision-maker, it is not appropriate for us as the fact-finding industrial jury to speculate on what might have been in the decision-makers' mind at the relevant time.

112. The difficulty for the Tribunal in this case is matters are not at all clear from the available evidence presented to us. On one view, Ms Reid might be thought to be the decision-maker, and that her recourse to Mr Thomson was for approval, or sign-off, of a decision that had already been taken by her, where it was she, and she alone, who had discussion with Mr Bingham, after his interview, and before he was offered the appointment as Corporate Affairs Officer.
113. She spoke of discussing matters with her interview panel colleagues, Mr Steel and Mr Fraser, on a Teams call, and under cross-examination, Ms Reid stated that she would have offered Mr Bingham more, if matters had been left up to her. However, she was clear that she went to Mr Thomson for approval – on that basis, she was not the decision-maker, but a local, regional manager making a recommendation to a more senior manager for approval, or not, as the case may be.
114. In his submissions for the claimant, her solicitor, Mr Clarke, stated that the respondent is not entitled to reflect Mr Bingham's potential with his salary. At paragraph 40 of the respondent's closing submission, Ms Mackie stated that: ***"Ms Reid's evidence on this point was that 'employees should be paid for what skills and abilities they must have to do the role' which highlights the decision to hire Mr Bingham at his level of pay was based on the skills and experience he brought with him. He already demonstrated in his interview that he had the potential and capability to operate at the band-B level. The Scottish Water Recruitment Policy provides for potential in the selection process 'Our selection process recognises the need to identify individuals that can meet the technical requirements of the job now, whilst also thinking ahead to what skills and capabilities may be needed in the future'(page 54). As Ms Reid stated herself, 'with any new employee' you cannot begin to assess performance before they have started the job, but you can review all the relevant information and make a decision based on that***

information as to which person is the ‘best possible candidate’ for the position, a requirement of Scottish Water’s recruitment policy.”

115. The terms of the respondent’s recruitment policy and procedure are clear from the copy documentation provided to us at this Hearing, and so too is the extent of the pay differential between the claimant and Mr Bingham when he was appointed to the Officer role. As Mr Clarke put it, in his written submission for the claimant, at his paragraphs 44 to 50:

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44. The difference in pay in this case is striking. The comparator is paid 18% more than the Claimant for doing the same work (it is assumed). There needs to be clear evidence about what the cause of that difference was.

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45. Bewilderingly, the Tribunal did not hear any evidence from the Decision Maker. No documents were produced as to how he determined the Pay Decision. There was no paper trail whatsoever. There was no evidence provided of the factors that the Decision Maker considered to determine the level of pay for the comparator.

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46. The Tribunal did hear evidence from Georgie Reid who made a recommendation in relation to pay but no evidence at all in relation to the decision.

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47. There was no evidence that the Decision Maker took any of the alleged material factors into account or that he based his decision on these factors. The only evidence that the Tribunal had was from Ms Reid who informed the Tribunal that she did not send any documents to Mr Thomson before he made the Pay Decision and that she did not send him the comparator’s CV (pages 81 -82) or the interview scoring document (pages 92-105). Based on the totality of the evidence all the Decision Maker had before making his decision was the information that he gleaned from two Teams meetings with Georgie Reid. The first meeting

lasted on Ms Reid's evidence 5-10 minutes and the second a "few minutes". Ms Reid was unable to give any clear or coherent evidence as to what was discussed during these meetings beyond the impression that she thought Mr Bingham to be a good candidate. There was no evidence that she discussed the alleged material factors with the Decision Maker.

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48. *This paucity of evidence and the failure by the Respondent to call the key witness in the case means, it is submitted, that the Respondent simply cannot satisfy its burden of proof in respect of its assertion that the material factors were the reason for the difference in pay. In the absence of such evidence the Tribunal cannot conclude that the alleged material factors played any part in the Pay Decision or that any or all of them were operating on the mind of the Decision Maker at the material time.*

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49. *If it be the Respondent's case that these factors were taken into account because they are the kind of factors that are normally taken into account and the level of pay of the comparator must have been the result of these factors, the Claimant submits that in the absence of any actual evidence to show these factors were taken into account the Respondent cannot discharge its burden of proof.*

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50. *In the premises, the primary submission on behalf of the Claimant is that there is an unassailable argument that in the absence of direct oral evidence from the Decision Maker (or any other evidence as to how he reached his decision) the Respondent cannot and has not discharged its burden of proof and the Tribunal should find accordingly.*

116. We have carefully considered what was the material time for the respondent's decision-maker to have taken account of the material factors relied upon now

by the respondent, and did that decision-maker (whomsoever they might be) base his / her decision on any of those factors.

117. On the evidence before us, whether the decision-maker was Alan Thomson, or somebody else, the decision about what to pay Mr Bingham must have been arrived at at some point between 23 June 2021, when he was interviewed by a panel for the Specialist, Band B, post, and 23 August 2021, when he started work for the respondent. Again, on the available evidence, it seems to us, on balance of probability, it was at some point on or around 15 July 2021, as alluded to in Mr Steel's email of that date sent at 10:21.
118. We agree with the submission made by Mr Clarke, at his paragraphs 53 and 54, about the "**material time**", and that anything after that end point when that decision on pay was made by the decision-maker (probably somewhere between 15 July and 23 August 2021) is completely irrelevant, and "**the Tribunal should completely exclude and put out of its mind all of the evidence about how the comparator has actually performed since he started work for the respondent**", as this could not have been known at the time the pay decision was made.
119. His submission in this regard is well-founded, we accept it, and we have put out of our mind the evidence led from Ms Reid in particular about how Mr Bingham has performed, in comparison to the claimant, since he started his employment with Scottish Water.
120. Further, on the evidence before us, there is no evidence that Ms Reid discussed the alleged material factors with Alan Thomson. She spoke of discussion with her colleagues on the interview panel, but not of discussions with anybody else, whether in Corporate Affairs directorate, HR / People Connect, or Finance. As such, we find that the respondent has failed to discharge its burden of proof, as there is no clear and cogent evidence available to us from whomsoever was the respondent's decision-maker.
121. In considering this case, the Tribunal has been conscious that it is accepted by both parties that the respondent's pay banding structure applies to all

employees of Scottish Water, regardless of their gender. As Ms Mackie stated, in paragraph 46 of her skeleton written submission for the respondent:

5 ***“The Claimant accepted the pay band structure applies to everyone regardless of whether they’re male or female, including her own line manager Georgie Reid. She explained herself that it is not uncommon for ‘all employees’ to find it difficult to progress through the bands. The Tribunal will appreciate that the test that it needs to assess is not one of fairness. Whether the Claimant believes that the pay banding that applies to everyone should be different, is not the subject of this claim.”***

10 122. Further, and as recorded by Ms Mackie, at her paragraphs 47 and 48, we note and record that she there submitted that: ***“The Claimant accepted that the Respondent’s recruitment policy at 4.3 provides the procedure for salary upon appointment (page 60). She accepted that none of the factors that the recruiting manager can take into account relate to sex.”***;

15 and ***“The Claimant accepts that the use of a panel adds to the objectivity of the process.”***

123. The Tribunal understands that an employer may well decide to have a wide range within any salary banding structure to as to allow for the possibility of employees on the same salary banding to operate at different levels within a

20 specific pay banding range. We can also readily understand, and accept, as sound business sense, Ms Reid’s genuine belief that she needed to offer Mr Bingham a salary that was attractive, and not demeaning, so as not to lose him, whom she clearly thought then was a great candidate, and so she took steps, through Mr Thomson’s sign-off, to offer a salary that did not allow Mr

25 Bingham to slip through the net, and not be recruited for the benefit of the organisation.

124. As per our findings of fact, at paragraph **37(5)**, Ms Reid’s evidence was that she offered Mr Bingham a salary of £36,500, ***“being the middle of Band C, as it did not make good business sense to offer him a salary at the top of Band C, and to take account of inflation and increments which she***

30 ***felt that he might have received at the Council, if his employment there***

had continued. Stating that she did not view Mr Bingham as a Band C, as his skills are more aligned to a Band B role, she described it as a “no brainer” to get Band B talent for a Band C salary, saying that if Laura Boyce had not performed so well, Matt Bingham would have got the Band B Specialist role.”

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125. We lay emphasis on the use of the word “*if*” in that finding. There was no documentary evidence led before us about what Mr Bingham’s salary was when he was employed at Inverclyde Council, or what it might have been had he remained employed there. Further, there was no suggestion from Ms Reid that she needed to offer him some form of “*incentive*” to come and join Scottish Water by offering more than was whatever the advertised starting salary was published as in the job advert.

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126. We refer to our specific findings in fact, at paragraph 37(107) to (112) above, which we repeat here for ease of reference:

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(107) When the Respondent decided upon the salary payable to Mr Bingham, when he joined the Respondent as a new employee, in August 2021, the Claimant was not consulted by the Respondent. There was no clear and cogent evidence provided to the Tribunal as to the date when Mr Bingham’s starting salary of £36,500 was decided upon.

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(108) There was no clear and cogent evidence provided to the Tribunal as to what factors the Respondent took into account in fixing Mr Bingham’s starting salary, having regard to the factors listed at Section 4.3 (Salary on Appointment) of the Respondent’s Recruitment Procedure.

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(109) The Tribunal does not know, to what extent, if at all, the Respondent considered salaries of peers, or internal / external market rate for the job of Corporate Affairs Officer, as per that Section 4.3 of their Recruitment Procedure.

5 (110) *At this Preliminary Hearing, the Respondent did not provide clear and cogent evidence explaining why Mr Bingham was paid the starting salary he was paid, having regard to his skills, experience and ability. Ms Reid, in her telephone discussion with Mr Bingham, appears to have taken account of his skills, experience and ability, and his former salary at Inverclyde Council.*

10 (111) *The only explanation provided to this Tribunal (by the witness Georgie Reid) was that it was related to Mr Bingham's last salary when employed by another organisation, namely Inverclyde Council, and that this level of salary was signed-off by Alan Thomson, the respondent's Head of Corporate Relations.*

15 (112) *This Tribunal heard no evidence from Mr Thomson, and so it had no evidence directly from him as to the factors that he took into account when deciding upon the starting salary to be paid by the Respondent to Matthew Bingham at £36,500.*

20 127. Further, we agree with Mr Clarke's closing submission for the claimant that the respondent did not lead evidence from Mr Alan Thomson, the respondent's Head of Corporate Relations, but we do not agree with him where he states that that was a "***fatal mistake***". We do, however, agree with him that it was "***bewildering***", but on the evidence before us, we have to take the evidence as parties chose to present it to us, for this is an adversarial process, not inquisitorial, and that therefore involves us taking into account, *quantum valeat*, that is for as much as it is worth, the evidence led from each of Ms Reid, and Mr Fraser, as the respondent's witnesses, and the claimant herself.

30 128. The respondent has sought, by leading evidence only from Ms Reid and Mr Fraser, to discharge the burden of proof placed upon them, but they have failed to establish the pled material factor defences, because they have failed to establish, clearly and cogently, who was the decision-maker, and what factors did they take into account in settling upon a specific figure for Mr

Bingham's starting salary, at the material time. On the evidence before us, there is no certainty as to when, date-wise, that decision was taken, nor by whom it was taken.

129. At best, the Tribunal has been presented, from the respondent, with an incomplete picture of what happened, and no clear and cogent evidence in answer to ***Kipling's six honest men*** – who, what, where, when, how, and why?
130. Given the respondent's production to us of their recruitment policy and procedure, as referred to and reproduced, in material parts, within our own findings in fact, earlier in these Reasons, and its reference to recruiting managers keeping records, there are documents and information that were not provided to us by the respondent within the Bundle, and so there is information which is not known to us. It is a known unknown.
131. No argument was presented to us, by the respondent, that Mr Bingham's interview and appointment having been more than 12 months before this Hearing, the respondent no longer hold relevant documents any longer, either on paper, or electronically, as required by section 8 of their recruitment procedure.
132. That said, as we understand Mr Bingham is a continuing employee of the respondent, we would expect that the respondent must still have some contemporary records of his recruitment, selection and appointment, as also his terms and conditions of employment, which could have shed some valuable light upon what salary he was offered and when, even if it does not clarify why his starting salary was set at the level of £36,500.
133. Put simply, despite 3 days of evidence, we still do not really know how the salary paid to Mr Bingham, on him joining the respondent's employment, was decided upon, in accordance with section 4.3 of the respondent's recruitment procedure, nor by whom, nor precisely when.

134. Ms Mackie, the respondent's solicitor, in her written closing submission, at her paragraph 56, stated that: "***The Respondent can satisfy the tribunal that there is one of the material factors relied upon that account for the difference in pay between the Claimant and her comparator, that are not tainted by sex. The defence should succeed.***"
135. Having carefully considered the whole evidence led before us, and both solicitor's closing submissions, we cannot agree with Ms Mackie's submission that the material factor defence should succeed. The respondent has withdrawn the "***market forces***" / "***difficulties in recruitment / retention***" factor previously relied upon, and we cannot be satisfied as regards the other 4 factors upon which the respondents continue to rely, simply because we have been unable to ascertain, with any certainty, who was the respondent's decision-maker, and accordingly unable to ascertain what factors were or were not taken into account at the material time.
136. Even if the Tribunal had been satisfied that the starting salary for Mr Bingham, as the claimant's chosen comparator, was related to his skills and experience (which we have no reason to doubt, based on the evidence we heard at this Hearing) , it was not suggested to us by the claimant's solicitor that that factor would not have been relevant or material for the decision-maker, the simple fact of the matter is that we do not know for the respondent has not clearly and transparently explained to us, by way of clear and cogent evidence, whether the pay difference between the claimant and Mr Bingham is, in whole or in part, explained by his previous skills and experience.
137. While Mr Thomson was not led as a witness, the Tribunal has to have regard to the totality of the evidence made available to us by both parties. We have decided that it is not appropriate for us to draw an adverse inference from the mere fact that he was not led as a witness for the respondent, and we have decided the matter upon the basis that the respondent has not satisfied the Tribunal on the burden of proof placed by statute upon it as the employer.

Disposal

138. For the foregoing reasons, we have unanimously found that the respondent's stated material factor defences, pled in terms of **Section 69 of the Equality Act 2010**, as per paragraphs 18 and 20 of their ET3 response grounds of resistance intimated on 3 August 2022, are not established on the evidence led before this full Tribunal at this Preliminary Hearing.
139. Accordingly, we have ordered that the claim and response shall be listed for a Final Hearing in person before a differently constituted full Tribunal, on dates to be hereinafter assigned by the Tribunal, to determine whether or not the claimant and her comparator, Mr Matthew Bingham, are or have been doing like work, in terms of **Section 65 of the Equality Act 2010**.
140. To allow that Final Hearing to be listed as soon as possible, we have instructed the clerk to the Tribunal, when sending out a copy of this Judgment to both parties' representatives, and to ACAS, to issue date listing letters to both parties' solicitors, with a view to the Like Work Hearing being listed on dates to be assigned by the Tribunal, in the period between **April and June 2023**, having regard to availability of parties, and their respective witnesses and representatives.

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G. Ian McPherson

Employment Judge

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7 February 2023

Date of Judgment**Date sent to parties**

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