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# THE INDUSTRIAL TRIBUNALS

CASE REF: 1083/15

**CLAIMANT:** Margaret Mercer

**RESPONDENT:** C & H Jefferson Solicitors

## DECISION

Using the agreed statement of Main Legal Issues, as set out at paragraph 3 of this decision, the unanimous decision of the tribunal is as follows:

### Legal Issues

- (1) Whether the claimant is engaged in like work with her comparators, namely A; B; C; or any of them under Section 1(2)(a) and 1(5) of the Equal Pay Act (Northern Ireland) 1970 as amended.

Answer:- Yes with A, B and C.

- (2) If the claimant is engaged in like work as in 1 above, has the respondent proved that the variation between the claimant's contract and those of her comparators or any of them is genuinely due to a material factor which is not the difference of sex under Section 1(3)(a) of the Equal Pay Act (Northern Ireland) 1970 as amended?

Answer:- No

- (3) Has the claimant established a contravention under Section 1(2) of the said Act?

Answer:- Yes in relation to annual salary only.

- (a) What are the terms of any equality clause under Section 2(1) of the said Act?

The term in the claimant's contract in relation to annual salary is modified to £99,500 (the same as that of A) from 9 June 2015 onwards unless and until there is a further contractual agreement between the claimant and the respondent or a further statutory modification.

The respondent is ordered to pay the claimant £116,542 in respect of the difference between the claimant's gross annual salary of £70,000 and her modified gross annual salary of £99,500 going forward from



1.2 The claimant and her comparators are solicitors. At all relevant times they were employed by the respondent which is a solicitor's Firm, incorporated with effect from 2011. The respondent has two main departments: insurance defence litigation and commercial/property. At all relevant times the claimant and her comparators worked in the insurance defence litigation department.

1.3 The claimant was promoted to Salaried Partner on 1 December 2008. At that time the respondent had four grades of fee earning solicitors:-

Equity Partner;  
Salaried Partner;  
Associate Solicitor; and  
Assistant Solicitor.

The claimant's comparators were already Salaried Partners at that time: C from 2000, B from June 2005 and A from December 2005. As Salaried Partners the claimant and her comparators were performing like work and their remuneration was made up of the same annual salary and discretionary bonus which, at that time, was calculated in bands, depending on seniority, from a "bonus pool" at the end of each financial year with solicitors at the same grade receiving the same bonus payments.

1.4 On 1 June 2009 the claimant's comparators and D, a female Salaried Partner (hereinafter referred to as D) were promoted to a newly created grade of Salaried Partner, called Salaried Partner with access to profit share following their unsuccessful applications for promotion to Equity Partner grade. As Salaried Partners with access to profit share their remuneration was made up of:-

- (i) a higher annual salary than that of a Salaried Partner; and
- (ii) a guaranteed/contractual profit share/performance bonus calculated at 20% of fees billed in excess of £200,000 per annum.

1.5 The method of calculating the discretionary bonus payable to the claimant was changed from the financial year 1 June 2014 - 31 May 2015, from that set out at paragraph 1.3 above to 20% of the amount by which her professional fees billed (net of VAT) in the previous financial year exceeded her cost to the Firm.

## 2. **The Respondent's Defence**

2.1 On 30 July 2015 the respondent presented a response to the claimant's claim in which it denied any breach of the Equal Pay Act (Northern Ireland) 1970 or European Law.

- 2.2 At paragraph 6.2.1 of its response, the respondent accepted that the claimant was receiving less remuneration than her male comparators but did not accept that she was undertaking like work with them. The respondent contended that, although the claimant and her male comparators were all qualified solicitors, there were significant differences in the work they and the claimant were undertaking both in respect of legal work and other responsibilities. In addition, the respondent contended that, if the claimant proved that she was undertaking like work with her comparators, there were genuine material factors which were not the difference of sex and which explained and justified any differences in pay.
- 2.3 The respondent also denied that the claimant was undertaking work of equal value to that of her comparators. On 15 September 2015 the claimant's solicitor clarified that the claimant's claim was grounded on like work only.

### 3. **Agreed Statement of Main Legal and Factual Issues**

- 3.1 The parties provided the tribunal with an agreed statement of the main legal and factual issues to be determined by the tribunal. By way of preamble to the statement, it was stated:-

*“The Respondent accepts that the Claimant is employed in the same employment as her male comparators and that her salary is less than theirs and that arrangements for bonuses are different and can result and have resulted in the Claimant earning less bonus than her comparators.*

*The Respondent disputes the Claimant undertakes like work with that of her male comparators under Section 1(2)(a) and 1(5) of the Equal Pay Act (Northern Ireland) 1970 as amended.”*

- 3.2 The agreed legal and factual issues were then set out as:-

#### Legal Issues

1. Whether the Claimant is engaged in like work with her comparators, namely A; B; C; or any of them under Section 1(2)(a) and 1(5) of the Equal Pay Act (Northern Ireland) 1970 as amended.
2. If the Claimant is engaged in like work as in 1 above, has the Respondent proved that the variation between the Claimant's contract and those of her comparators or any of them is genuinely due to a material factor which is not the difference of sex under Section 1(3)(a) of the Equal Pay Act (NI) 1970 as amended,

3. Has the Claimant established a contravention under Section 1(2) of the said Act and if so:-
  - (a) What are the terms of any equality clause under Section 2(1) of the said Act?; and
  - (b) What is the period of any arrears of any remuneration or damages due to the Claimant under Section 2(1) of the said Act?
4. Has the Claimant's legal rights and entitlements under Article 141 of the Treaty of Rome or the Equal Pay Directive been infringed?

#### Factual Issues

1. Is/was the Claimant's work the same or of a broadly similar nature to that of her comparators, namely A; B; C; or any of them?
2. Is/were there any material difference(s) between the work she does (did) or the work the comparator(s) do(es)/did?
3. What is/were the nature and extent of the differences, if any, between the work she does/did and the work the comparator(s) do(es)/did?
4. What is/was the frequency or otherwise with which any such differences occur(red) in practice?
5. Are any differences between the work she does/did and of the work the comparator(s) do(es)/did, not of any practical importance in relation to terms and conditions of employment?
6. If the Claimant is employed in like work with her comparators, or any of them, is the difference in pay genuinely due to a material factor and what is the factor(s)?
7. Can the Respondent demonstrate that the material factor(s) are not tainted by (a) direct; or (b) indirect sex discrimination and if the same are tainted by indirect discrimination, has the Respondent objectively justified same?
8. Is the Claimant entitled to an equality clause/forward pay with her comparators, or any of them and what are the terms of the equality clause?
9. If the Claimant is entitled to an equality clause under 9 above, what is the period of any arrears and the extent of any loss sustained by the claimant?"

#### 4. Sources of Evidence

- 4.1 The tribunal received evidence from Mr Gareth Jones, Director, on behalf of the respondent. Mr Jones gave his direct evidence by way of a witness statement and a supplemental witness statement, both of which he adopted under oath and he was cross-examined and re-examined.
- 4.2 The tribunal received evidence from the claimant. She gave her direct evidence by way of witness statement which she adopted under oath and she was cross-examined and re-examined. The tribunal received a written report from Ms Niblock of ASM Chartered Accountants which had been commissioned by the claimant. The report contained financial and arithmetical information in relation to salaries, bonuses and compensation, if the claimant's claim was successful. The tribunal was informed that the report was agreed in respect of figures subject to comment by the respondent in relation to the narrative.
- 4.3 The tribunal received two agreed bundles of documentary evidence and written submissions on behalf of the claimant and the respondent.
- 4.4 The tribunal also received:-
- (i) two bundles containing legal provisions, the Code of Practice on Equal Pay, case law, and publications, namely:-
- (1) the Equal Pay Act (Northern Ireland) 1970;
  - (2) the Sex Discrimination (Northern Ireland) Order 1976;
  - (3) the Equal Pay Directive (75/117/EC);
  - (4) the Burden of Proof Directive (97/870/EC);
  - (5) the Recast ET Directive No. 2006/54/E;
  - (6) Cadman v Health and Safety Executive : C-17/05(2006);
  - (7) Defrenne v Sabena : C-43/75(1976) ICR 547;
  - (8) North and Others v Dumfries and Galloway Council [2013] IRLR 737;
  - (9) McCarthys Ltd v Smith [1980] ICR 672;
  - (10) Albion Shipping Agency v Arnold [1981] IRLR 525;
  - (11) Sita UK Ltd v Hope UK EAT/0787/04 [2005] All ER(D)27 (AUG);
  - (12) Handels v og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening [1991] ICR 74;
  - (13) Capper Pass Ltd v J B Lawton [1976] IRLR 366 EAT;
  - (14) E. Coomes (Holdings) Ltd v Shields [1978] IRLR 263 CA;
  - (15) Waddington v Leicester Council for Voluntary Service [1977] ICR 266;
  - (16) Morgan v Middlesbrough Borough Council EAT/0375/04;
  - (17) Dorothy Perkins Ltd v Dance [1977] IRLR 226, EAT;

- (18) Rudland Roof Tiles Ltd v Harper [1977] ICR 349EAT;
- (19) National Vulcan Engineering Insurance Co Ltd v Wade [1977] IRLR 109, EAT.
- (20) National Vulcan Engineering Insurance Co Ltd v Wade Reversed [1978] IRLR 225CA;
- (21) Glasgow City Council and Others v Marshall and Others [2000] IRLR 272HL;
- (22) Newcastle-Upon-Tyne NHS Hospitals Trust v Armstrong and Others [2010] ICR 674;
- (23) Benviste v The University of Southampton [1989] ICR 617 EAT;
- (24) Redcar and Cleveland Borough Council v Bainbridge [2008] IRLR 776;
- (25) Rainey v Greater Glasgow Health Board [1987] AC224;
- (26) Bilka-Kaufhaus GmbH v Weber von Hartz [1987] ICR 110;
- (27) Hampson v The Department of Education and Science [1989] ICR 179, CA;
- (28) Secretary of State for Defence v Mrs Diana Elias [2006] EWCA Civ 1293;
- (29) De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80;
- (30) Kucukdeveci v Swedex GmbH & C K G;
- (31) O'Brien v Ministry of Justice [2013] UKSC6;
- (32) British Leyland Ltd v Powell [1978] IRLR 57;
- (33) Eaton Ltd v Nuttall [1977] ICR 272, EAT;
- (34) Ministry of Defence v Armstrong [2004] IRLR 672, EAT;
- (35) Rainey v Greater Glasgow Health Board [1986] ICR 129, HL;
- (36) Nelson v Carillion Services Ltd [2003] ICR 1256;
- (37) Homer v The Chief Constable of West Yorkshire Police [2012] UKSC15;
- (38) Evesham v North Hertfordshire Health Authority and Secretary of State for Health [2000] IRLR 257;
- (39) IDS Equal Pay Employment Law Handbook August 2008;
- (40) Harvey on Industrial Relations and Employment Law – Division K/Section 4(B)/paragraphs 206/250 and 501-516.

## 5. **The Relevant Legal Provisions**

### **Article 157 of the Treaty on the Functioning of the European Union**

5.1. Article 157 of the Treaty on the Functioning of the European Union (TFEU) formerly Article 141 of the EC Treaty and before that Article 119 of the EEC Treaty, states:-



- (a) Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied;
- (b) For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:-

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.

### Recast Directive

5.2 Article 157 has been supplemented by a number of Directives which have been consolidated in the Recast Directive 2006/54/E.

5.3 Article 1 states:-

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. It contains provisions to implement the principle of equal treatment in relation to a number of matters including pay. It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

5.4 Article 2.1(a) defines direct discrimination as:-

Where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.

5.5 Article 2.1(b) defines indirect discrimination as:-

Where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared to persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the aims of achieving that aim are appropriate and necessary.

5.6 Article 4 states that:-

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

5.7 Article 19 states that:-

- (i) Member States shall take such measures as are necessary, in accordance with the National Judicial Systems, to ensure that, when persons who consider themselves wronged because the principle of equal pay has not been applied to them, establish, before a Court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

### The Equal Pay Act (Northern Ireland) 1970

5.8 The right to equal pay was introduced in Northern Ireland in December 1975 by the Equal Pay Act (Northern Ireland) 1970. The relevant provisions are set out below.

**1. Requirement of Equal Treatment for Men and Women in same Employment.**

(1) If the terms of a contract under which a woman is employed at an establishment in Northern Ireland do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that:-

(a) where the woman is employed on like work with a man in the same employment:-

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable; and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefitting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;

(b)-(f) .....

(3) An equality clause falling within subsection (2)(a), (b) or (c) shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor:-

(a) in the case of an equality clause falling within subsection (2)(a), ..., must be a material difference between the woman's case and the man's.

(4)...

(5) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.

(6)

(1) Subject to the following subsection, for the purposes of this section –

(a) “employed” means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;

(8)-(14) .....

## 2. **Disputes as to, and Enforcement of, Requirement of Equal Treatment**

(1) Any claim in respect of the contravention of a term modified or included by virtue of an equality clause, including a claim for arrears of remuneration or damages in respect of the contravention, may be presented by way of a complaint to an industrial tribunal.

(1A)-(3) .....

(4) A determination shall not be made by an industrial tribunal in the following proceedings, that is to say:-

(a) on a complaint under subsection (1),

(b)-(c) .....

unless the proceedings are instituted on or before the qualifying date (determined in accordance with section 2ZA).

- (5) A woman shall not be entitled, in proceedings (including proceedings before an industrial tribunal) brought in respect of a contravention of a term modified or included by virtue of an equality clause, to be awarded any payment by way of arrears of remuneration or damages in respect of a time earlier than the arrears date (determined in accordance with section 2ZB).

**2ZA “Qualifying date” under section 2(4)**

- (1) This section applies for the purpose of determining the qualifying date, in relation to proceedings in respect of a woman’s employment, for the purposes of section 2(4).
- (3) In a standard case, the qualifying date is, subject to section 2ZAA, the date falling six months after the last day on which the woman was employed in the employment.

**2ZB “Arrears date” in proceedings under section 2(5)**

- (1) This section applies for the purpose of determining the arrears date, in relation to an award of any payment by way of arrears of remuneration or damages in proceedings in respect of a woman's employment, for the purposes of section 2(5).

- (2) In this section:-

“concealment case” means a case where:-

- (a) the employer deliberately concealed from the woman any fact:-
- (i) which is relevant to the contravention to which the proceedings relate, and
  - (ii) without knowledge of which the woman could not reasonably have been expected to institute the proceedings, and

- (b) the woman instituted the proceedings within six years of the day on which she discovered the fact (or could with reasonable diligence have discovered it);

“disability case” means a case where:-

- (a) the woman was under a disability at the time of the contravention to which the proceedings relate, and
- (b) the woman instituted the proceedings within six years of the day on which she ceased to be under a disability;

“standard case” means a case which is not:-

- (a) a concealment case,
  - (b) a disability case, or
  - (c) both.
- (3) In a standard case, the arrears date is the date falling six years before the day on which the proceedings were instituted.

6. **The Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996**

The relevant provisions are:-

**Rate of Interest**

4.-(1) Interest shall:-

- (a) subject to paragraph (2), be applied at the same rate as is in force, during the period for which it is to be calculated, in relation to decrees in the county court;
- (b) be calculated as simple interest which accrues from day to day.

(2) Where the rate of interest applied under paragraph (1)(a) has varied during a period for which interest is to be calculated, the tribunal may, if it so desires in the interests of simplicity, apply such median or average of those rates as seems to it appropriate.

**Calculation of Interest**

5.-(1) In this regulation and regulations 6 and 7 in relation to any award under the relevant legislation:-

“day of calculation” means the day on which the amount of interest included on the sums so awarded is calculated by the tribunal;

“mid-point date” means the date half-way through the period mentioned in paragraph (2) or, where the number of days in that period is even, the first day of the second half of that period.

(2) The period referred to in paragraph (1) is the period beginning on the date of the contravention or, as the case may be, of the act of discrimination to which the award in question relates and ending on the day of calculation (both dates inclusive).

### Decision in writing

7.-(1) Subject to paragraphs (2) and (3):-

- (a) in the case of any sum awarded under the relevant legislation for injury to feelings, any interest included shall be for the period beginning on the date of the contravention or, as the case may be, the act of discrimination to which the award relates, and ending on the day of calculation (both dates inclusive);
- (b) in the case of all other sums of damages or compensation (other than any sum referred to in regulation 6), and all arrears of remuneration awarded under the relevant legislation, interest shall be for the period beginning on the mid-point date and ending on the day of calculation (both dates inclusive).

(2) Where any payment has been made before the day of calculation to the complainant by or on behalf of the respondent in respect of any loss or matter to which an award under the relevant legislation relates, interest in respect of the corresponding part of the award shall be calculated as if the references in paragraph (1), and in the definition of “mid-point date” in regulation 5, to the day of calculation were to the date on which the payment was made.

(3) Where a tribunal is of the opinion that, in relation to any award under the relevant legislation there are circumstances, whether relating to the case as a whole or to a particular sum in an award, which have the effect that serious injustice would be caused if interest were to be awarded in respect of the period or periods in paragraph (1) or (2), it may:-

- (a) calculate interest, or as the case may be, interest on the particular sum for such different period, or
- (b) calculate interest for such different periods in respect of various sums in the award,

as it considers appropriate in the circumstances, having regard to the provisions of these Regulations.

## 7. **The Equality Commission for Northern Ireland Code of Practice on Equal Pay**

### 7.1 Paragraph 1 of the Code states:-

The Equal Pay Act (NI) 1970, as amended, (the Equal Pay Act) gives women (and men) the right to equal pay for equal work. It makes sex discrimination unlawful in relation to contractual pay and benefits. An employer can only pay a man more than a woman for doing equal work if there is a genuine and material reason for doing so which is not related to sex.

### 7.2 Paragraph 7 of the Code states:-

The Code is admissible in any proceedings under the Equal Pay Act. The Code is not binding on the tribunal but the tribunal may take into account an employee's failure to follow its provisions.

### 7.3 Paragraph 8 of the Code states:-

It is in everyone's interest to avoid litigation, and the Code recommends equal pay reviews as the best way to ensure that a pay system delivers equal pay. Employers can avoid equal pay claims by regularly reviewing and monitoring their pay practices, in consultation with their workforce. Consultation is likely to increase understanding and acceptance of any changes required. Involving recognised trade unions or other employee representatives also helps to ensure that pay systems are transparent.

### 7.4 Paragraph 9 of the Code states:-

The Code includes, as good equal pay practice, a summary of the Commission's guidance on how to carry out an equal pay review. The full guidance is in the Commission's Equal Pay Review Kit.

### 7.5 Paragraph 17 of the Code states:-

The woman can compare any term in her contract with the equivalent term in her comparator's contract. This means that each element of the pay package has to be considered separately and it is not sufficient to compare total pay.

A woman can claim equal pay with a male comparator who earns a higher rate of basic pay than she does, even if other elements of her pay package are more favourable than his.



7.6 Paragraph 18 of the Code states:-

Once a woman establishes that she and her comparator are doing equal work, it is up to her employer to show that the explanation for the pay difference is genuinely due to a 'material factor' that is not tainted by sex discrimination. This defence is known as the 'genuine material factor' defence. For example, an employer may argue that the man is paid more because he is better qualified than the woman.

7.7 Paragraph 19 of the Code states:-

The Equal Pay Act applies to **contractual** pay or benefits. The Sex Discrimination (NI) Order 1976, as amended, (Sex Discrimination Order) covers **non-contractual** issues such as recruitment, training, promotion, dismissal and the allocation of benefits; for example, flexible working arrangements or access to a workplace nursery.

7.8 Paragraph 20 of the Code states:-

The Sex Discrimination Order complements the Equal Pay Act by covering **non-contractual pay** matters, such as promotion and discretionary bonuses. If a woman wishes to make a claim in respect of non-contractual or discretionary payments her claim will be made under the Sex Discrimination Order. If she considers that a term in a collective agreement or an employer's rule is discriminatory and may affect her, it can be challenged under the Equal Pay Act or the Sex Discrimination Order, depending on whether it is contractual or not. If there is any doubt as to which piece of legislation a payment falls under, legal advice should be sought.

7.9 Paragraph 62 of the Code states:-

Transparency means that pay and benefit systems should be understood by everyone (employers, employees and their trade unions). Employees should understand how each element of their pay packet contributes to total earnings in a pay period.

7.10 Paragraph 63 of the Code states:-

An employer should keep records that will allow him or her to explain why he or she did something, showing clearly what factors he or she relied on at the time that the decision was made. As employees may bring complaints or make inquiries about pay decisions which were taken many years previously, employers should keep records that will help them to explain why pay decisions were made.

7.11 Paragraph 64 of the Code states:-

Where the pay structure is not transparent and a woman is able to show some indication of sex discrimination in her pay, the employer carries the burden of proving that the pay system does not discriminate.

7.12 Paragraph 66 of the Code states:-

The principle of transparency set out above does not mean that an individual has the automatic right to know what another individual earns. It means that a woman has the right to know how the calculations are made, not the content of the calculation. Employers should balance the ideal of transparency with the rights of individual privacy. The equal pay questionnaire cannot be used to require an employer to disclose confidential information, unless the tribunal orders them to do so.

8. **The Relevant Legal Principles**

- 8.1 The Equal Pay Act (Northern Ireland) 1970 makes it unlawful for an employer to discriminate between men and women, on the ground of sex, in respect of any contractual term in their contracts of employment, whether pay or other and whether verbal or written. Although entitled The Equal Pay Act (Northern Ireland) 1970, it does not cover non-contractual terms even if they relate to pay.
- 8.2 Claims in respect of non-contractual terms must be brought under the Sex Discrimination (Northern Ireland) Order 1976.
- 8.3 Claims which are not covered by the Equal Pay Act (Northern Ireland) 1970 or the Sex Discrimination (Northern Ireland) Order 1976 can be brought directly under Article 157 of TFEU in respect of contractual and non-contractual terms but only in respect of pay.
- 8.4 The Equal Pay Act (Northern Ireland) 1970 and the Sex Discrimination (Northern Ireland) Order 1976 must be read, so far as possible, to give effect to Article 157 of TFEU and the related Directives, as interpreted by the Court of Justice (North v Dumfries and Galloway Council [2013] IRLR 737, SC).
- 8.5 As explained at pages 39 and 55-56 of the IDS Employment Law Handbook on Equal Pay, 2008 Edition (in relation to the Equal Pay Act 1970 which is the equivalent of the Equal Pay Act (Northern Ireland Act 1970), the Equal Pay Act 1970 “achieves its objective by implying an ‘equality clause’ into every employee’s contract of employment (male and female), enabling a woman (in this case) to bring a tribunal claim where she is treated less favourably than a comparable man in relation to a contractual term ....The effect of this is that where a woman is employed on:-
- like work;
  - work that has been rated as equivalent under a job evaluation study; or

- work of equal value;

with a man in the 'same employment', then, provided that her employer has no 'genuine material factor' defence, she has the right to have her contract modified so that none of her terms is less favourable than his. This may be done by adapting an existing term of her contract so that it corresponds to that in the contract of her male comparator, or by inserting a new term into her contract where such a term is included in the man's contract but not in hers."

8.6 It was made clear by the House of Lords in **Hayward v Cammell Laird** that Section 1 of the Equality Act (Northern Ireland) 1970 does not permit the tribunal to look at the claimant's overall contract even if doing so would demonstrate that the woman claiming equal pay is earning more. The tribunal must consider each individual contractual term separately. That is because Section 1(2) of the Equal Pay Act (Northern Ireland) 1970 refers to "any term of the woman's contract" rather than "the contract". This principle is also explained at paragraph 17 of the Equality Commission for Northern Ireland Code of Practice on Equal Pay, as set out at paragraph 7.5 above.

8.7 The onus is on the claimant in this case to prove on the balance of probabilities that:-

- (i) she is employed in the same employment as her comparators;
- (ii) she is employed on like work with her comparators, or any of them;
- (iii) (a) at least one of the contractual terms in her contract of employment is or has become less favourable than a similar term in the contracts of employment of her male comparators or any of them; and/or
  - (b) her contract does not include a corresponding contractual term, benefitting her male comparators or any of them, that is included in their contracts of employment.

8.8 If the claimant proves (i)-(iii) above, then as explained by Lord Nicholls of Birkenhead, at paragraph 23 of his judgement in **Glasgow City Council v Marshall (2000) IRLR 272 HL:-**

*"The scheme of the (Equal Pay) Act is that a rebuttable presumption of sex discrimination arises once the gender based comparison shows that a woman doing like work or work related 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 (under Section 1(3) of the Equal Pay Act*

*(Northern Ireland) 1970) to show that the explanation for the variation is not tainted with sex. In order to discharge this 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 the reason. The factor relied upon must be the cause of this 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 that the factor relied upon is or, in a case within Section 1(2) (equal value cases) may be a ‘material’ difference, that is, a significant and relevant difference, between the woman’s case and the man’s case.”*

- 8.9 If the respondent establishes a defence under Section 1(3), then even if the claimant is performing like work and is paid less, the equality clause that is deemed to be included in her contract of employment by virtue of Section 1(1) of the Equal Pay Act (Northern Ireland) 1970 will not operate to modify any contractual term in her contract of employment which is or has become less favourable than a similar term in the contracts of her male comparators or to include a contractual term benefitting her comparators in their contracts of employment but not in hers. The reason for that is that the Equal pay Act (Northern Ireland) 1970 is not concerned with fair pay. It is only concerned with sex related pay discrimination: (***Strathclyde Regional Council & Others v Wallace & Others (1998) IRLR 146 HL***).
- 8.10 However, if the respondent fails to establish a defence under Section 1(3), then the equality clause which is deemed to be included in her contract of employment, by virtue of Section 1(1) of the Equal Pay Act (Northern Ireland) 1970, will operate, by virtue of Section 1(2), to modify any contractual term in her contract which is less favourable than a comparable term in her comparators contracts and to include a contractual term benefitting her comparators in their contracts of employment which is not included in her contract of employment. The modified or new contractual term will be incorporated into her contract of employment from the date of the presentation of her claim on 9 June 2015 and will remain in place going forward from that date without temporal limitation, unless and until there is a further contractual agreement between the claimant and the respondent or until there is a further statutory modification by reason of a subsequent operation of the equality clause. That is because, as Elias J stated in ***Sorbie v Trust House Forte Hotels Ltd (1977) ICR 55, EAT*** and ***Sodexo Ltd v Guttridge and others ORS (2008) IRLR 752, EAT*** (as referred to in the IDS Employment Law Handbook on Equal Pay 2008) and as confirmed more recently by Simler P in ***Reading Borough Council v James (2018) IRLR 790, EAT***, a woman cannot continue to compare herself with a male comparator if he ceases to be a

comparator but she does not lose such enhanced rights as have already been incorporated into her contract from the date of the presentation of her claim. Those rights have by then become crystallised and the woman remains entitled to enforce them as a term of her contract. The decision in ***Evesham v North Hertfordshire Health Authority and Secretary of State for Health [2000] IRLR*** has no relevance to the circumstances of this case as the factual circumstances of that case are completely different.

- 8.11 In addition to establishing her future entitlements, the claimant is entitled, by virtue of Section 2ZB(3) of the Equal Pay Act (Northern Ireland) 1970, to arrears of pay for up to 6 years prior to the date of the presentation of her claim, provided that she can establish that she has been performing like work with her comparators or any of them during that period and that the relevant term of her contract has been less favourable during that period or for a part of it and/or that a term that has benefitted her comparators or any of them during that period has not been included in her contract during that period or for a part of it.
- 8.12 Under the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996, if the tribunal makes an award, it must consider, whether an application has been made or not (in this case it has been made), whether to award interest on any sum awarded, including arrears.

The Interest must be applied at the same rate as is in force during the period for which it is to be calculated as simple interest which accrues from day to day.

Where interest is being considered in respect of awards other than injury to feelings, interest is calculated from the mid-point date of the contravention to the date of calculation inclusive.

The power to award interest under the Regulations is discretionary, although, if the tribunal decides not to make an award, it must give reasons for its decision not to do so, but the discretion relates only to the decision whether or not to award interest at all; if it decides to make an award there is no discretion as to the manner in which it is to be calculated nor (save in exceptional circumstances where serious injustice would be caused) the period for which it shall be awarded (Harvey on Industrial Relations and Employment Law P1 [1130]).

## 9. **The Respondent's Equal Opportunities Policy**

- 9.1 The respondent has an Equal Opportunities Policy which appears to have been introduced around 2007. The policy states:-

*"The Firm is an Equal Opportunity Employer. The aim of the policy is to ensure that no job applicant or employee receives*

*less favourable treatment on the grounds of age, sex, marital status, disability, religious belief, political opinion, sexual orientation, race, nationality, ethnic or national origin, nor should they be disadvantaged by conditions or requirements that have that effect and are neither justified nor relevant to the job.*

*Selection criteria and personnel procedures will be reviewed regularly to ensure that individuals are recruited, promoted and treated solely on the basis of merit and ability.*

*The Firm recognises and will uphold the right of all of its employees to work in an atmosphere which is free from harassment and intimidation. Any breaches of this policy will be regarded as misconduct and will lead to disciplinary action.”*

- 9.2 The respondent did not use a formal or transparent selection process to recruit or promote solicitors prior to the introduction of its Equal Opportunities Policy in 2007 and apart from two promotions, one in 2008 for Salaried Partner and the other in 2009 for Equity Partner, the respondent has not used one up to the date of this hearing. Instead, up to the date of this hearing, appointments and promotions have been determined following informal discussions among the Equity Partners, now Directors:-

without any job descriptions or eligibility and selection criteria having been drawn up and published;

without positions having been advertised internally or externally; and

without solicitors having been given the opportunity to apply for assessment against published selection criteria on the basis of merit.

- 9.3 The outcome of some promotions has been communicated internally by way of email. Other outcomes have been communicated internally by what the claimant described as the “office rumour mill” or by “osmosis”.

## 10. **Credibility**

- 10.1 The tribunal found both parties to be inconsistent on occasions. For example, in relation to the claimant, the tribunal agreed with Mr Mulqueen’s submission that during the course of her cross-examination, the claimant accepted initially that, in light of the respondent’s reasons for promoting E to Equity Partner, his promotion did not amount to an act of sex discrimination, only to contend that it was an act of discrimination at a later part of her cross-examination.

- 10.2 However, the tribunal found that the inconsistencies and changes, in the respondent’s case, which Mr Grainger described as ‘moving the goal posts’, outweighed those of the claimant and undermined its

defence to a significant extent. The tribunal will refer to examples of these inconsistencies and changes at the relevant parts of this decision.

## 11. **Background to the Claimant's Claim**

11.1 The claimant was recruited by the respondent as an Assistant Solicitor in September 1999 and has worked in the insurance defence litigation department since that time. No formal or transparent selection process was used in her selection for appointment. Instead, following a Partners' meeting, she was approached by Mr Jones and F (a former Equity Partner/Director) and was invited to join the Firm to work with F who was extremely busy. She was approached because F had been impressed with her as a very able litigation solicitor, albeit working in a plaintiffs' Firm. At that time the claimant had over fifteen years post qualification experience as a solicitor working in High Court and County Court plaintiff litigation which included employers' liability, public liability, road traffic accidents, industrial diseases and repetitive strain injuries. The claimant was not given a written contract of employment, a statement of main terms and conditions or a job description.

11.2 When the claimant joined the respondent in September 1999, there were four grades of fee earning solicitors:-

Equity Partners;  
Salaried Partners;  
Associate Solicitors;  
Assistant Solicitors.

11.3 The claimant's comparators commenced employment with the respondent:-

B in July 1978;  
A in October 1979; and  
C in August 1984.

They also worked in the insurance defence litigation department at all relevant times. They had not been given written contracts of employment, written statements of main terms and conditions or job descriptions following their appointments.

11.4 The claimant's comparators were promoted to Salaried Partner grade:-

C in 2000;  
B on 1 June 2005; and  
A on 1 December 2005;

without any formal or transparent selection process and were paid the same annual salary and discretionary bonus.



- 11.5 The claimant was promoted from Assistant Solicitor to Associate Solicitor on 1 June 2005, again without any formal or transparent selection process.

The Claimant's Promotion to Salaried Partner – 1 December 2008

- 11.6 During 2008, following several years of significant growth, especially in the commercial/property department, the respondent decided to consider promotions from Associate Solicitor grade to Salaried Partner grade and, for the first time, used a formal selection process with expert assistance from Deloitte.

- 11.7 The eligibility criteria for the post of Salaried Partner in 2008 were:-

- (i) one year's employment as an Associate Solicitor by 1 December 2008; and
- (ii) a billing threshold of £180,000 per annum, being the average over the previous twenty four month or the last full twelve month period or pro rata for those who worked part-time.

In addition all candidates were required to have had a clear disciplinary record and to have complied with office policies and management systems.

- 11.8 Although no job description was drawn up identifying the duties and responsibilities of the post, selection criteria were drawn up as follows:-

- Proven ability to sustain strong relationships with significant clients including client feedback for which a maximum of 15 marks out of a total of 55 marks could be awarded. The claimant received 13 marks;
- Ability to contribute to future growth, sustainability and profitability of the Firm including work development and market awareness for which a maximum of 15 marks out of a total of 55 marks could be awarded. The claimant received 12 marks;
- Introduction of new business for which a maximum of 10 marks out of a total of 55 marks could be awarded. The claimant received 5 marks;
- Ability and expertise for which a maximum of 15 marks out of a total of 55 marks could be awarded. The claimant received 13 marks.

- 11.9 The claimant's overall mark was the second highest and she and two of the other three Associate Solicitors who had applied were promoted to Salaried Partner grade on 1 December 2008. They joined the existing Salaried Partners, including the claimant's comparators. Their promotions were announced internally by email on 27 November 2008.

11.10 There was no suggestion that the claimant was not performing like work with or was not being paid the same salary and bonus as her comparators between 1 December 2008, when she was promoted to Salaried Partner, and 1 June 2009 when her comparators and D were promoted from Salaried Partners to Salaried Partners with profit share.

The Claimant's male comparators unsuccessful applications for promotion to Equity Partner Grade in 2009

11.11 In 2009 the respondent decided to run a similarly structured selection process to the 2008 Salaried Partner process to consider the promotion of eligible Salaried Partners to Equity Partner, again with expert assistance from Deloitte.

11.12 The eligibility criteria for the Equity Partner post were two years' employment as a Salaried Partner by 1 June 2009 and an average billing of £250,000 over the previous twenty four month period or the last twelve month period. As for the Salaried Partner post each candidate was required to have had a clear disciplinary record and to have complied with office policies and management systems.

11.13 Again no job description was drawn up identifying the duties and responsibilities of the post. Selection criteria were drawn up and the total overall mark was 45 for this process. The selection criteria were:-

- (i) Proven ability to sustain strong relationships with significant clients for which a maximum of 15 marks out of 45 marks could be awarded. This criterion was virtually identical to that for the Salaried Partner post. The only difference was that the criterion for the Equity Partner post did not require 'client feedback' which was required for the Salaried Partner post.
- (ii) Ability to contribute to future growth, sustainability and profitability of the Firm including work development and market awareness for which a maximum of 15 marks out of 45 marks could be awarded. This criterion was identical to the second criterion for the Salaried Partner post.
- (iii) Introduction of new business for which a maximum of 10 marks out of a total of 45 marks could be awarded. This criterion was identical to the third criterion for the Salaried Partner post.
- (iv) Contribution to management of the Firm for which a maximum of 5 marks out of a total of 45 marks could be awarded. This criterion was substituted for 'ability and expertise' which was used in the Salaried Partner post.

11.14 The claimant did not meet the eligibility criteria for Equity Partner as she had not been a Salaried Partner for two years by 1 June 2009 and

did not have an average billing of £250,000 over the previous twenty four month period or over the last twelve month period. She was not therefore invited to apply.

- 11.15 Seven Salaried Partners did meet the eligibility criteria: five from the insurance litigation department, namely the claimant's comparators, D and G and two from the commercial/property department where there had been a higher level of growth.
- 11.16 Four of the seven eligible Salaried Partners applied: the claimant's male comparators and D. They all worked in the insurance defence litigation department. Neither of the two Salaried Partners who worked in the commercial/property department applied.
- 11.17 Although the respondent was able to find some documents relating to this selection process, it could not find the documents on which the individual or overall scores for the candidates had been recorded. The tribunal was not told what the overall threshold mark was, except that it was a "so significant" mark. None of the four eligible candidates ie, the claimant's comparators and D achieved the "so significant" mark and none of them was therefore promoted.

The newly created grade of Salaried Partner with access to Profit Share/Performance related Bonus

- 11.18 The Equity Partners discussed whether they should simply indicate that none had been successful, which they felt could risk damage to morale and could dis-incentivise those who had taken part. They were also concerned that it could create a risk of them leaving the Firm and taking significant clients with them. Therefore, as the claimant's comparators and D were all valued, productive solicitors who were contributing significantly to the Firm, to client retention and Firm development and who had, according to Mr Jones, at that time (2009) significant control and influence over important clients of the Firm, the Equity Partners decided to introduce an entirely new (for them) level of seniority within the Firm which they called Salaried Partner with access to profit share and to promote them to it. The claimant's comparators and D received a salary increase, from £60,000 to £80,000 for B, A and D and from £60,000 to £85,000 for C (£80,000 plus £5,000 for ISO responsibilities which was non fee earning work) and a profit share/performance bonus arrangement to be paid at 20% of any billing in excess of £200,000 per annum.
- 11.19 Although Salaried Partner with access to profit share was a completely new grade between Salaried Partner and Equity Partner, the respondent introduced it without:-
- (i) considering whether an equality impact assessment or equal pay audit/review should be carried out;

- (ii) drawing up a job description which would, at least, have been a starting point for identifying any duties or responsibilities, legal or otherwise, which were additional to those of the Salaried Partner grade;
- (iii) considering, identifying and documenting appropriate eligibility and selection criteria against which eligible candidates could apply;
- (iv) conducting a further selection process.

That was so, notwithstanding that they had just carried out two formal selection processes with expert guidance and assistance from Deloitte, following which the importance of the above matters should reasonably have been apparent to them.

11.20 The respondent promoted the claimant's comparators and D to the newly created grade/post of Salaried Partner with access to profit share without having carried out any of the matters set out above, notwithstanding that:-

- (i) none of the claimant's male comparators or D had merited appointment to Equity Partner level following what appears to have been a fair selection process and, according to Mr Jones, none had complained about not being appointed;
- (ii) the Equity Partner trawl notice had made it clear that although the respondent envisaged making at least two appointments depending on the profitability of the business, there was no commitment to make a certain number of appointments or any appointment;
- (iii) none of the claimant's comparators or D was working in the commercial/property department, which was where the main area of growth within the respondent had been at that time;
- (iv) although neither of the two eligible Salaried Partners who worked in the commercial/property department, where the main growth had been, had applied for promotion to Equity Partner grade, they may have wished to apply for this lower grade, if it had been advertised, particularly as it attracted a significant salary increase and a guaranteed/contractual profit share/performance bonus; and
- (v) the claimant and the other Salaried Partners who had not been eligible to apply for the Equity Partner position may have wished to apply for this new post, depending on the eligibility criteria, if it had been trawled.

- 11.21 The claimant's comparators B and A ceased to be entitled to a 20% profit share with effect from 1 June 2014. That was because they had entered into agreements (unwritten at that stage) with the respondent that, in the lead up to the handover of their work to other solicitors in preparation for their planned retirements (B in 2017 and A in 2020), their salaries would be increased from £80,000 to £99,500, to reflect their average bonuses while Salaried Partners with access to profit share, and in consideration of that, they would no longer have access to the 20% profit share bonus of fees billed over £200,000 with effect from 1 June 2014.
- 11.22 There was no change to C's contractual terms in relation to salary or access to a profit share bonus until after the claimant's claim had been presented. It is not therefore relevant to the claimant's claim in light of the legal principles which have been referred to at paragraph 8.10 above.
- 11.23 The claimant did not find out about the promotions of her comparators at the time they took effect on 1 June 2009 because they had not been announced internally. Instead the claimant found out about them around 2010 through what she described as the "office rumour mill". She then spoke to Mr Jones who confirmed to her that the appointments had taken place. She asked him when it would be possible for her to apply for promotion to the next stage and was informed that there would be no more movement in the Firm for the foreseeable future.
- 11.24 The claimant raised a number of matters with Mr Jones during 2012 and 2013 about her pay, and the fact that promotions were taking place again without any formal or transparent selection process.
- 11.25 In June 2014 the claimant informed Mr Jones informally that she wanted to be paid the same salary as her male comparators and to have her bonus calculated on the same terms as theirs and that she wanted him to raise those matters with the other Directors. Although Mr Jones accepted that the claimant may have raised these matters at their meeting, he did not inform her that her male comparators were paid more because they had additional legal and/or other responsibilities which she did not. Mr Jones informed the tribunal that when he left that meeting his understanding was that the only thing the claimant wanted him to raise with the other Directors was the way her discretionary bonus was calculated and that was the only matter he raised with them at that stage.
- 11.26 On 18 September 2014 Mr Jones met with the claimant to inform her that the Directors had agreed to introduce a new discretionary bonus scheme for the year ending 31 May 2015. The claimant referred Mr Jones to the fact that she was not being paid the same as her male comparators and D and indicated again that she wanted to be paid the same salary and to have her bonus calculated in the same way as the

Salaried Partners with access to profit share because she was doing the same or similar work. Again, Mr Jones did not inform the claimant that they were paid more because they had additional legal and/or other responsibilities which she did not. Mr Jones did, however, agree to raise the matter with the other Directors at their next meeting which took place on 13 October 2014.

- 11.27 As the claimant had not heard from Mr Jones by 16 October 2014, she approached him on that date. He told her that the Directors had discussed the matter but had decided to defer the issue of her salary and bonus until the end of the financial year i.e. 31 May 2015 when it would then be looked at in the wider context of a review of the Firm's business and salaries. Again Mr Jones did not inform the claimant that her male comparators were paid more because they were undertaking additional legal and/or other responsibilities which she did not or even that he and the other Directors did not accept that she was performing like work with the Salaried Partners with access to profit share. Although Mr Jones did not understand the claimant to be raising an equal pay issue, because of the inclusion of D, and although he was under no legal or contractual obligation to do so, the tribunal agrees with Mr Grainger that, if her comparators and D were being paid more because they were undertaking additional legal and/or other responsibilities in addition to their normal legal case load, it is difficult to understand why Mr Jones did not tell the claimant that at that time.

#### The Claimant's Grievance – 23 October 2014

- 11.28 Following her discussion with Mr Jones on 16 October 2014, the claimant lodged an internal grievance on 23 October 2014, seeking equal pay with her comparators and D on the ground that she was performing like work with them.
- 11.29 A grievance meeting took place on 30 October 2014. It was conducted by two Directors, Mr Rutherford and Mr Lennon on behalf of the respondent.
- 11.30 On 18 November 2014 Mr Rutherford and Mr Lennon informed the claimant by letter that they had decided to reject her grievance and set out their reasons for doing so. In relation to like work they explained:-

*“Whilst we have no hesitation in recognising and commending your competence and skill as a solicitor with many years’ experience and your service within the Firm, we are of the view that your work as a salaried partner with the commensurate salary is not as demanding as that of a salaried partner benefitting from a profit share arrangement. This is because you do not fulfil the responsibilities and duties undertaken by Salaried Partners benefitting from a profit share arrangement which are additional to their normal legal caseload.”*

### The Claimant's Grievance Appeal – 18 November 2014

11.31 The claimant appealed the grievance and a grievance appeal meeting took place on 9 December 2014. It was conducted by two other Directors, Mr Jones and Mr Tinman. On 23 January 2015 they sent the claimant a letter dismissing her appeal and set out their reasons for doing so. They informed her, inter alia, in their letter that they had rejected her like work claim for the same reasons as Mr Rutherford and Mr Lennon.

### The Claimant's Statutory Questionnaire - 9 April 2015

11.32 The claimant then served a Statutory Questionnaire on the respondent in relation to her contention that she was doing equal work with her comparators but was being paid less. On the 9 April 2015, the respondent replied to the claimant's Statutory Questionnaire and stated, inter alia, that it did not agree that the claimant was doing equal work to that of her comparators.

## 12. **The Claimant's claim to the Industrial Tribunal – 9 June 2015**

12.1 On 9 June 2015 the claimant presented her claim to this tribunal asking for the same increased salary (the claimant was unaware of her comparators' salaries at that date) and the same guaranteed profit share arrangement/bonus of 20% of fees over £200,000, which her comparators had been in receipt of since 1 June 2009, on the ground that she was doing like work with all of them.

12.2 On 30 July 2015 the respondent presented its response to the claimant's claim.

At paragraph 6.2.1 of its response, the respondent denied any breach of the Equal Pay Act (NI) 1970 as amended or under European law. The respondent accepted that the claimant was receiving less remuneration than her comparators but did not accept that she was undertaking like work with them. The respondent stated that although the claimant and her comparators were all qualified solicitors there were significant differences in the work her comparators were undertaking both in respect of legal work and other responsibilities. The respondent also stated that, in the event that the claimant proved that she was performing like work, genuine material factors, which are not the difference of sex explained and justified any differences in pay.

## 13. **The Claimant's Claim for Equal Pay Based on Like Work**

### The Statutory Requirements

13.1 As set out at paragraph 8.7 above, the onus is on the claimant in this case to prove under Section 1(2) of the Equal Pay Act (Northern Ireland) 1970, on the balance of probabilities that:-

- (i) she is employed in the same employment as her comparators which is conceded by the respondent;
- (ii) she is employed on like work with her comparators or any of them. The respondent disputes that she is employed on like work with any of her comparators and contends that if she proves that she is employed on like work, there are a number of genuine material factors, which are not the difference of sex, which explain and justify the difference in pay; and
- (iii) at least one of the contractual terms in her contract of employment is or has become less favourable than a similar term in the contracts of employment of her comparators or any of them or that her contract does not include a corresponding contractual term benefitting her comparators or any of them, that is included in their contracts of employment. The respondent conceded that the claimant's salary is less than theirs and that arrangements for bonuses are different and can and have resulted in the claimant earning less bonus than for comparators.

13.2 As set out at paragraph 5.8 above, like work is defined in Section 1(5) of the Equal Pay Act (Northern Ireland) 1970 as follows:-

*“A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.”.*

### The Relevant Legal Principles in Relation to Like Work

13.3 It is common case that the onus is on the claimant to prove on the balance of probabilities that:-

- (i) she was carrying out like work with that of her comparators, or any of them, at the date of the presentation of her claim on 9 June 2015, as that determines what she is contractually entitled to moving forward from 9 June 2015; and
- (ii) she was also carrying out like work with and was paid less than her comparators or any of them for the six year period prior to



the date of the presentation of her claim, as she is claiming 6 years arrears of pay.

- 13.4 It is common case that the definition of like work, as set out in Section 1(5) of the Equal Pay Act (Northern Ireland) 1970 requires the Tribunal to determine two questions separately and sequentially: ***Waddington - v- Leicester Council for Voluntary Services [1977] IRLR 32 EAT.***
- 13.5 As explained at page 121-122 of IDS Employment Law Handbook on Equal Pay November 2008, the first question is whether the claimant and her comparators or any of them are employed on work that is of the same or a broadly similar nature. This requires the tribunal to carry out:
- (i) a general consideration of the nature of the work (not the specific tasks as they are considered at the second question stage) carried out by the claimant and her comparators; and
  - (ii) the knowledge and skill to do them: ***Capper Pass Ltd -v- Lawson [1977] ICR 83.***
- 13.6 If the claimant establishes that her work is of the same or a broadly similar nature, then the second question requires the tribunal to consider the specific tasks or details (not the nature of the jobs which are considered at the first question stage) of the jobs of the claimant and her comparators and to determine:-
- (i) whether there are any differences in the tasks and duties the claimant and her comparators carry out.
  - (ii) if so, whether the differences are of practical importance in relation to terms and conditions of employment, having regard to:-
    - (a) the frequency or otherwise within which the differences occur in practice;
    - (b) the nature of the differences; and
    - (c) the extent of the differences.
- 13.7 As explained at page 122 of IDS Employment Law Handbook on Equal Pay, November 2008, it “is for the claimant to prove that she does the same work or work of a broadly similar nature but the evidential burden of showing “differences of practical importance” rests on the employer – ***Shields v E Coomes (Holdings) Ltd 1978 ICR 1159, CA.***”
- 13.8 As explained at pages 123 and 124 of the IDS Handbook what “is significant” at the second question stage is “not the nature of the jobs

done by the claimant and her comparators, but the differences (if any) in the tasks and duties that they respectively perform". In ***Adamson and Hatchett Ltd -v- Carlidge EAT 1264/77***, as set out at page 124, "the EAT held that tribunals must look closely at the detail to decide if there are any differences in the work actually done, how large those differences are and how often they operate. To help determine the existence or otherwise of such differences, the employer must provide the tribunal with a sufficiently detailed analysis of the jobs in question."

- 13.9 Mr Mulqueen and Mr Grainger both referred to the fact that authorities have suggested that in determining whether differences exist that are of practical importance, the tribunal should consider whether the differences are such as to put the jobs of the claimant and her male comparators into different categories or grades in an evaluation study. In the absence of expert evidence in relation to such a job evaluation study, the tribunal does not consider it appropriate to do so.

Question 1 - Was the claimant doing work of the same or broadly similar nature to that of her comparators?

- 13.10 As set out at paragraph 13.5 above, this question requires the tribunal to carry out a general consideration of:-

- (a) the nature of the work carried out by the claimant and that of her comparators; and
- (b) the knowledge and skill required to do that work.

The Nature of the Work carried out by the Claimant and her Comparators

- 13.11 It was common case that at the date of the presentation of her claim on 9 June 2015 and throughout the previous six years, the claimant and her comparators were all working in the respondent's Insurance Defence Litigation department in defence litigation on behalf of insurers at a senior level. The claimant and her comparator C both specialised in general defence litigation and still do. The claimant's comparator B specialised in a chest disease insurance defence litigation and continued to do so until his retirement in 2017. The claimant's comparator A specialised in other industrial diseases insurance defence litigation and still does.

The Knowledge and Skill required to do that Work

- 13.12 The tribunal is satisfied that, in light of the nature of the work carried out by the claimant and her comparators, a high level of knowledge and skill is required. The tribunal is also satisfied that in light of the facts found by the tribunal and the concessions made by and on behalf of the respondent, as set out below, the claimant's knowledge and skills are at the same high level as her comparators.

- 13.13 As set out at paragraph 11.1 above the claimant was recruited by the respondent in 1999 because F, an Equity Partner at that time, had been impressed with her as a very able litigation solicitor.
- 13.14 At that time the claimant had over fifteen years post qualification experience as a solicitor working in High Court and County Court plaintiff litigation which included employers' liability, public liability, road traffic accidents, industrial diseases and repetitive strain injuries.
- 13.15 Like her comparator C, the claimant specialises in general insurance defence litigation at a senior level. Her comparator B specialises in chest disease insurance defence litigation at a senior level and her comparator A specialises in other industrial diseases insurance defence litigation at a senior level.
- 13.16 As part of her work, the claimant advises in high value claims and in the making of very large lodgements without input from Counsel.
- 13.17 The claimant's high level of knowledge and skill was recognised by senior members of the judiciary in references they provided when the claimant applied for promotion to Salaried Partner in 2008.
- 13.18 Mr Rutherford and Mr Lennon stated in their letter of 18 November 2014 dismissing the claimant's grievance that they had no hesitation in recognising and commending the claimant's competence and skill as a solicitor within the Firm.
- 13.19 Mr Jones and Mr Tinman stated in their decision of 23 January 2015 dismissing the claimant's grievance appeal that the Directors acknowledged unequivocally the claimant's expertise, skill and competence in her work on behalf of her clients.
- 13.20 The respondent confirmed, in its reply dated 9 April 2015, to the claimant's Statutory Questionnaire that it recognised and commended the claimant's competence and skill as a solicitor.
- 13.21 The respondent stated in its response, dated 24 November 2015, to the claimant's request for additional information, dated 29 October 2015, that the claimant and her comparators each undertook legal work at a senior level in the litigation department.
- 13.22 The respondent acknowledged, in its letter to the claimant's solicitor, dated 9 February 2016, that the claimant and her comparators were "all excellent senior lawyers".
- 13.23 Mr Jones stated in his first witness statement, dated 6 April 2016, that the respondent accepted that the claimant's "case load, the difficulty of the cases she handles and the skills she effectively applies to provide a high standard of service for the clients are comparable to her

comparators, to D and to the senior solicitors in the Litigation Department”.

13.24 During cross-examination, Mr Jones accepted that in terms of litigation work the claimant was performing broadly similar work to that of her comparators;

13.25 Mr Mulqueen stated, in his closing submission stated that:-

*“For the purposes of these proceedings, the Respondent accepts that the Claimant was undertaking work of a broadly similar nature to that of her comparator(s).”*

13.26 The tribunal concludes from the facts found and set out at paragraphs 13.11-13.25 above that in the light of the nature of the work carried out by the claimant and her comparators and the knowledge and skill required to do it that the claimant was doing work which was of the same or a broadly similar nature to that of her comparators at the date of the presentation of her claim on 9 June 2015 and during the six year period before that.

#### Question 2 - Differences of Practical Importance

13.27 As the claimant has established that her work was of the same or a broadly similar nature to that of her comparators, the practical and evidential onus shifts to the respondent to identify any differences in the work of the claimant and her comparators, which it contends are of practical importance. The tribunal is then required to consider the specific tasks or details of the claimant’s and her comparators’ jobs to determine:-

- (a) whether there are any differences in the work the claimant and her comparators or any of them actually do;
- (b) how large those differences are; and
- (c) how often they operate (see paragraph 13.8 above).

#### Examples of Inconsistencies in and Changes to the Respondent’s Defence of the Claimant’s Claim of Like Work

13.28 As set out at paragraph 10.2 above, the tribunal found a number of inconsistencies in and changes to the respondent’s defence which undermined its defence to a significant extent. The tribunal sets out some of those inconsistencies and changes in relation to like work below.

#### Differences - Legal Work and Other Responsibilities

13.29 The respondent's Directors, Mr Rutherford and Mr Lennon informed the claimant, inter alia, in their decision, dismissing her grievance, that they were not of the view that her work was the same or similar to that of her comparators because:-

*“Whilst we have no hesitation in recognising and commending your competence and skill as a solicitor with many years’ experience and your service within the Firm, we are of the view that your work as a salaried partner with the commensurate salary is not as demanding as that of a salaried partner benefitting from a profit share arrangement. This is because you do not fulfil the responsibilities and duties undertaken by Salaried Partners benefitting from a profit share arrangement which are additional to their normal legal caseload.”*

13.30 The Tribunal is satisfied that Mr Rutherford and Mr Lennon were making it clear to the claimant in the above extract from their letter dismissing her grievance that the differences of practical importance between the work she carried out and the work her comparators carried out related, for like work purposes, to responsibilities and duties which were additional to their normal legal caseload. They did not suggest that the differences related to legal work as well. Mr Jones and Mr Tinman did not suggest that in their decision dismissing the claimant's grievance appeal and the respondent did not suggest it in its reply to the claimant's Statutory Questionnaire.

13.31 The respondent then changed its position in relation to that at paragraph 6.2.1 of its response to the claimant's claim to this tribunal when it said:-

*“the Respondent does not accept that the Claimant undertakes like work with her named comparators, B, A and C. Although the Claimant and her Comparators are all qualified solicitors there are “significant differences” in the work they undertake **both in respect of legal work and other responsibilities** (the tribunal's emphasis).”*

13.32 The respondent reverted to its original position, ie that the differences for like work purposes were in relation to additional responsibilities and duties other than legal work, in its response to the claimant's request for details of the significant differences which were referred to at paragraph 6.2.1 of its response to her claim to this tribunal.

#### Extent of Claimant's Performance of the Additional Duties'

13.33 Mr Jones accepted, during cross-examination, that Mr Rutherford and Mr Lennon were also informing the claimant in the extract from their decision dismissing her grievance, set out at paragraph 13.29 above, that she was not performing any of the responsibilities or duties, some of which were performed by her comparators “at all”.

13.34 In its reply to the claimant's notice for additional information, the respondent changed its mind and stated that the claimant did not perform like work differences "to the same degree" as her comparators.

13.35 Mr Jones stated, during cross-examination, that he did not agree with what Mr Rutherford and Mr Lennon had said in the extract from their grievance decision (see paragraph 13.29) above, that the position was more nuanced than that and that the respondent was not saying that the claimant did not demonstrate some of them to "some extent". The tribunal found that evidence of Mr Jones to be inconsistent with his and Mr Tinman's decision dismissing the claimant's grievance appeal in relation to like work, in which they informed the claimant that they were dismissing her appeal "for the reasons referred to in" Mr Rutherford and Mr Lennon's decision dismissing her grievance.

#### Extent of Comparators performance of the Additional Duties

13.36 Neither Mr Rutherford and Mr Lennon nor Mr Jones and Mr Tinman had indicated the extent to which the claimant's comparators performed the additional responsibilities and duties they were performing in their decisions dismissing the claimant's grievance and grievance appeal. In its reply to the claimant's Statutory Questionnaire, the respondent stated for the first time that the claimant's comparators ie all of them, were undertaking their additional responsibilities and duties "**to a significant degree**" (the tribunal's emphasis). The respondent confirmed that in its response to the claimant's claim to this tribunal.

13.37 However, in his first witness statement, Mr Jones evidence in relation to the like work additional responsibilities and duties was that the respondent accepted that not all of the claimant's comparators performed them "**in equal measure**" (the tribunal's emphasis).

#### The Additional Responsibilities (like work differences)

13.38 The respondent informed the claimant on five occasions, namely:-

- (i) in Mr Rutherford and Mr Lennon's grievance decision;
- (ii) in Mr Jones and Mr Tinman's grievance appeal decision;
- (iii) in its reply to the claimant's Statutory Questionnaire;
- (iv) in its response to the claimant's claim to this tribunal;
- (v) in its reply to the claimant's notice for additional information;

that the additional responsibilities were:-

Control and development of their own client base;  
Directing/allocating the caseload of other solicitors;  
Business Development, Marketing and Responsibilities for ISO Quality Standard Compliance.

13.39 In response to paragraph 25 of the claimant's notice for additional information the respondent indicated that the differences of practical importance for like work purposes included all the genuine material factors as well as the above additional responsibilities set out at paragraph 13.38 above.

13.40 In his first witness statement, Mr Jones identified the key like work differences of practical importance as being in relation to:-

Control of significant clients;  
Direction and allocation of work to other fee earners; and  
Involvement in and attitude to Business Development and Marketing.

13.41 Having considered the evidence of Mr Jones and the claimant together with the documentary evidence and submissions and the inconsistencies and changes referred to above, the tribunal found the following relevant facts in relation to the alleged differences of practical importance for the purpose of like work.

#### Control & Development of their Own Client Base

##### Control of Significant Clients

13.42 As set out at paragraph 13.38 and 13.39 above, the respondent identified the first difference of practical importance for like work purposes as *control and development of their own client base* on five occasions. However, Mr Jones changed that to "*control of significant clients*" in his first witness statement.

In its response dated 14 January 2016 to a further request for information from the claimant, dated 15 December 2015, the respondent stated that the claimant's comparators "*all have (or had) control of a number of significant corporate clients but that the claimant does not have control of significant corporate clients to the same extent*". However, in its letter dated 14 February 2016 in which it set out the factual issues relating to the genuine material factors, the respondent stated:- "*whilst the Claimant has control of a number of clients these are not significant clients*".

13.43 In his first witness statement, Mr Jones defined significant clients as "those that provide a stream of repeat business to the Firm and therefore contribute significantly to the fee income of the Firm". He defined having control of a client in his first witness statement as:-

- (i) being the main contact point for the client;
- (ii) taking primary responsibility for co-ordinating any presentations or tenders to the client;
- (iii) organising meetings with the client;

- (iv) submitting any management information required by the client; and
- (v) often being responsible for receipt of new instructions and retention or distribution of that work amongst other solicitors in the department.

#### The Claimant's Comparator B

13.44 It was common case that B had control, as defined by Mr Jones, of clients 38 and 44 at and since the time of his promotion to Salaried Partner with access to profit share. Client 38 was and still is a significant client but client 44 was not. The tribunal is therefore satisfied that B has been in control of his own client base at all relevant times. However as client 44 was not a significant client in 2009 or since, B has not been in control of significant clients.

13.45 The additional responsibility of developing their own client base which the claimant had been informed of on five occasions (see paragraph 13.38 above) was removed by Mr Jones in his first witness statement, presumably because the respondent did not consider it to be a "key difference at that stage". However, insofar as development of their own client base is still part of their responsibility, there was no dispute that B undertakes development of his own client base by continuing to secure and by increasing instructions on matters in his specialist area from his clients.

#### The Claimant's Comparator A

13.46 There was dispute between the claimant and the respondent as to whether A had control/joint control of his own client base and/or significant clients. Mr Jones contended that A controlled client 38 with B because, while B was in control of client 38's chest diseases work, A led the solicitors H and I who did deafness work for client 38. The tribunal is satisfied that A and B had regular meetings with H and I to discuss client 38's work, case handling and the provision of management information. However, in light of Mr Jones' evidence, during cross-examination, that B was the more senior of the two and the overall head and his acceptance that A did not carry out the functions which were included by Mr Jones in his definition of control, the tribunal is not satisfied that A controlled client 38 with B.

13.47 Although the respondent stated and Mr Jones confirmed in his first witness statement that client 44 was also controlled by both A and B, the documentation provided by the respondent indicates that A has opened very few files in respect of client 44. In those circumstances and in the absence of any other evidence which supports that claim, the tribunal is not satisfied that A controls client 44 together with B.

13.48 The tribunal is satisfied that A is responsible for undertaking the industrial diseases work in respect of client 2. However, the tribunal is



satisfied that D has been responsible for controlling and developing client 2 since 2012.

- 13.49 The tribunal is satisfied that A is responsible for undertaking personally and allocating the industrial diseases work (other than that carried out by B) in respect of clients 8, 37, 39, 44, 48, and 49. However, the tribunal received no evidence which would lead it to conclude that A controlled or shared the control of any of those clients, using Mr Jones' definition of control.
- 13.50 The tribunal is not therefore satisfied that A has control of his own client base or control of significant clients. Although development of his own client base had been identified as an additional responsibility on five occasions, Mr Jones did not include it in his key summary of like work, presumably because he did not consider it to be a key responsibility. However, insofar as it is still an additional responsibility, the tribunal is satisfied that the work carried out by A in respect of client 38, would involve development of it.

#### The Claimant's Comparator C

- 13.51 The tribunal is satisfied that C was responsible for the control and development of client 12, which was a significant client, at the date of his promotion to Salaried Partner with access to profit share on 1 June 2009 and that he continued to have control of that client until 2013, when the client was bought over and its work went to the transferee solicitors. The tribunal is therefore satisfied that C did have responsibility for control and development of his own client base at the date of his promotion on 1 June 2009 until 2013, but not thereafter. However, as C had only control of client 12, he did not have control of significant clients during that period.

#### The Claimant

- 13.52 The claimant contended and Mr Jones accepted, during cross-examination, that she took over the responsibility for control and development of clients 1, 3 and 6 in 2012 and that she continues to have that responsibility. The tribunal is therefore satisfied that the claimant has had responsibility for control and development of her own client base from the end of 2012 and continues to. The tribunal is satisfied that clients 3 and 6 were significant clients while under the control of F, the former Equity Partner/Director and that they continued to be significant clients for approximately 12 to 18 months after the claimant took over that responsibility. In those circumstances the tribunal is satisfied that the claimant did have control of significant clients for 12 to 18 months, but that she no longer has that control of significant clients.

#### The Fourth Salaried Partner with access to profit share on 1 June 2009 D

13.53 The tribunal is satisfied that D did not have control of a significant client or her own client base at the time of her promotion to Salaried Partner with access to profit share on 1 June 2009. The tribunal is satisfied that following the retirement of F, the former Equity Partner/Director in December 2012, D took over responsibility for control and development of client 2, which was and still is a significant client. It is unclear to the tribunal whether D had responsibility for the control and development of any other clients. In light of that ambiguity, while the tribunal is satisfied that D had control of and responsibility for development of her own client base from 2012, she did not have control of significant clients, ie client 2 from 2012.

## Conclusion

13.54 The tribunal is not satisfied that there are any differences of practical importance as defined at paragraph 13.6 above in relation to the claimant and A and C. In addition, the tribunal is satisfied that the fact that the claimant did not have responsibility for control and development of her own client base to the same extent as B, is of no practical importance in relation to terms and conditions of employment in light of the fact that, although:-

- (i) A had no responsibility for the control and development of his own client base;
- (ii) C only had responsibility for the control and development of his own client base until 2013;
- (iii) D only had responsibility for the control and development of her own client base from 2012;
- (iv) none of the claimant's comparators including B and D had control of a number of significant clients;

they all had the same contractual term in respect of annual salary (apart from C who received an additional £5,000 in respect of ISO responsibilities as they were not fee earning) and access to profit share performance bonus/consolidated salary and bonus.

## Directing/Allocating the Caseload of Other Solicitors/Fee Earners

### The Claimant's Comparator B

13.55 The tribunal is satisfied that B has been directing and allocating work throughout the period that he has been a salaried partner with profit share namely to:-

- (i) J until he left the Firm;
- (ii) H since 2011/12 when he was allocated to B and A to assist with their work; and
- (iii) I since 2014 when she was also allocated to B and A as part of succession planning in preparation for their retirements.

### The Claimant's Comparator A

13.56 The tribunal is satisfied that A has been directing and allocating work to:-

- (i) H since 2011 when he was allocated to A and B to assist with their work; and
- (ii) I since 2014 when she was also allocated to A and B as part of succession planning for their retirements.

#### The Claimant's Comparator C

13.57 The tribunal is satisfied that C did not direct or allocate the caseload of other solicitors at any stage.

#### The other Salaried Partner with access to profit share D

13.58 The tribunal is satisfied that D has been directing and allocating the caseload of other solicitors in respect of client 2 since the end of 2012 when she took over responsibility for control and development of client 2 following F's retirement.

#### The Claimant

13.59 There was dispute between the claimant and the respondent as to whether she directed and allocated the caseload of other solicitors. On the one hand, the respondent stated in its response, dated 24 November 2015, to the claimant's Notice for Additional Information, that:-

*"In 2012 following his retirement, the claimant took over ownership and control of three of F's former clients (clients 1, 3 and 6). She allocates some of their matters to other fee earners;"*

On the other hand, the respondent stated in its letter, dated 9 February 2016, that "unlike A and B, the claimant and C do not direct and allocate matters from their client base to other solicitors,".

However, during cross-examination, Mr Jones accepted and the tribunal is satisfied that the claimant had been allocating work from client 1 to J until he left the Firm in 2013. She then allocated that work to K, L and M and continues to do so.

13.60 Mr Jones accepted during cross-examination and the tribunal is satisfied that the claimant's evidence is supported by the correspondence passing between her and client 1 which is set out in the second bundle of tribunal documents.

13.61 The tribunal is satisfied that the fact that the claimant was not directing and allocating the case load of other solicitors to the same extent as B, is of no practical importance in relation to terms and conditions of employment in light of the fact that A, C and D all have the same contractual term as B in relation to annual salary (apart from C who

received an additional £5,000 in respect of ISO responsibilities as they were non fee earning) and access to a profit share bonus/consolidated salary and bonus notwithstanding that A and D did not have responsibility for directing and allocating work until 2011 and 2012 respectively and as C had never undertaken that responsibility.

### Business Development/Marketing and Responsibilities for ISO Quality Standard Compliance

#### Involvement in and Attitude to Business Development and Marketing

##### The Claimant's Comparator B

13.62 B's contribution to marketing and business development lies in his control of client 38 and 44 and his inclusion in Chambers and Partners directory as a leader in his field.

##### The Claimant's Comparator A

13.63. The respondent indicated in its response, dated 30 July 2015, to the claimant's claim to this tribunal and in its response, dated 24 November 2015, to the claimant's request for additional information that the claimant's comparator A did not undertake business development or marketing.

13.64 Notwithstanding that, in its letter of 9 February 2016 (setting out its genuine material factors), the respondent stated that A undertakes and proactively contributes to business development and marketing through his participation in the preparation of **articles** (the tribunal's emphasis) for the Firm's website.

13.65 In his first witness statement Mr Jones stated that A has "through his good reputation managed to secure and develop work for the Firm from various sources including client 37 and client 48 and that he also prepared **an article** (the tribunal's emphasis) for the Firm's website news page, a copy of which was included in the agreed bundle of documents.

13.66 In relation to client 37, the statistics on files opened by A from 09/10 to 30/11/15 show that A opened very few files in respect of client 37 during that period. While the tribunal appreciates that this work may well have been allocated to another solicitor, the tribunal does not know how much work was generated by A for the Firm in respect of this client. In relation to client 48 the same statistics indicate that A has opened relatively few files from this client for the Firm since 09/10. Again the tribunal appreciates that A may have generated more work which was allocated to other solicitors in the Firm but on the evidence before it, the tribunal does not know whether that is the extent of the work generated by A in respect of client 48 or if more work was generated by him.

## The Claimant's Comparator C

13.67 Mr Jones' evidence in his first witness statement in relation to C's contribution to business development and marketing is consistent with the information provided by the respondent in its response, dated 24 November 2015, to the claimant's Notice for Additional Information and more particularly with the respondent's letter, dated 9 February 2016, setting out the respondent's genuine material factors. According to Mr Jones C "has always made significant efforts to promote the Firm and develop contacts and this has resulted in a number of pieces of work and clients being secured, including corporate clients, over the years some of whom have provided repeat business, although that work has not been carried out by C himself but has been passed to others such as L and N. C has also been responsible for co-ordinating the Firm's submissions for Chambers and Partners Directory. He has strong relationships with senior members of client 11 and has organised client attendances at sporting events, charity dinners etc. Until the client 12 run off he maintained a strong relationship with the client 12's claims manager and has recently also promoted the Firm's expertise in the chest disease and deafness claims to the company responsible for client 12's run off claims."

13.68 The tribunal is satisfied that Mr Jones' evidence in his first witness statement indicates that C's contribution to business development and marketing has been significant throughout the period of comparison. However, when Mr Jones' evidence in his first witness statement is compared with his letter, dated 9 September 2015 to C, in which he states:-

*"We fully appreciate your added value to the Firm in promotion and generating business not just for you but also for colleagues and you have helpfully outlined your recent contributions in this regard. We accept that this work requires input which may impact on time for your own fee earning work but **in recent years has not necessarily generated a significant level of business.** .....", [the tribunal's emphasis]*

it has led the tribunal to the conclusion that Mr Jones has exaggerated C's contribution in his first witness statement and that C's contribution was not as significant in more recent years as that portrayed by Mr Jones in his first witness statement.

## The Claimant

13.69 There was significant dispute between the claimant and the respondent with regard to her contribution to business development and marketing.

13.70 In its letter of 9 February 2016, setting out its genuine material factors, the respondent stated that:-

*“Until very recently, since the lodgement of her claim, the claimant **has not been involved in** (the tribunal’s emphasis), and has stated on occasions that, undertaking and proactively contributing to business development and marketing to secure new business (particularly corporate business) is not part of her role.”*

13.71 However, in his first witness statement Mr Jones contradicted that when he stated:-

*“It is correct that Peggy Mercer has in more recent times, since the lodgement of her claim, become **more actively** (the tribunal’s emphasis) involved in efforts to promote the Firm. However, in the past, although when asked she participated in client events, tenders and new client initiatives, it was noticeable that she did not appear to take the lead in, or initiate, such matters. Peggy has stated to myself, and also to Mark Tinman, on occasion that it is the Equity Partners/Directors responsibility to seek and secure new business for the Firm. A similar comment was also noted as having been made by Peggy in the course of the first meeting concerning her grievance. It is, I believe, also of note that Peggy was the only partner not to provide any information when asked to for inclusion in the Legal 500 Directory for 2015.”*

13.72 The tribunal preferred the claimant’s evidence that in relation to the matters set out at paragraph 13.71 above, what she had actually said was that it was the equity partners/director’s responsibility as well as that of Salaried Partners to seek and secure new business for the Firm.

13.73 The tribunal is also satisfied that the claimant’s failure to provide information for inclusion in the legal 500 directory for 2015 was due to the fact that, for whatever reason, she had not received Mr Jones’ email.

13.74 In light of the inconsistency at paragraphs 13.70 and 13.71 and in light of the additional inconsistencies in and changes to the respondent’s defence, which have been set out at paragraphs 13.29 - 40 above, the tribunal prefers where there was conflict, the claimant’s evidence. The tribunal has therefore found the following facts in relation to the claimant’s contribution to business development and marketing.

- (1) The claimant has been attending social and corporate functions since the commencement of her employment with the respondent and has been building strong relationships with representatives of insurance clients of the Firm. On occasions she has travelled to Liverpool, Glasgow, London and Brighton and Poole to do so, and has never refused to attend any such

function or had to be directed to do so.

- (2) The claimant has helped to prepare Tender documents and volunteered to attend the last 2 presentations in respect of client 8, the first in London with Mr Jones, Mr Lennon and A and the second with Mr Lennon and O.
- (3) In January 2004 the claimant attended a presentation to client 16 in Dublin with Mr Jones in an attempt to secure work for the Firm and, at the request of Mr Jones, willingly addressed a number of topics that the client was interested in.
- (4) In 2009 the claimant volunteered to take part in the respondent's first ever marketing committee along with Mr Jones, P, M and Q and received the same email, dated 12 January 2009 which Mr Jones, Mr Rutherford and P received from the PR Company about the meeting that had just taken place in relation to marketing the Firm.
- (5) In June 2011 when client 2 decided to impose a new reduced fee arrangement on their panel solicitors she suggested challenging their fees to F and Mr Jones and with their support did so successfully.
- (6) In April 2014, at the request of client 7, the claimant attended its offices and met representatives of client 20 to discuss strategy in relation to dealing with their cases in Northern Ireland, including making lodgements. The claimant did so because she felt that may lead to an opportunity for the respondent in the future.
- (7) Early in 2014 the claimant collaborated with a solicitor for client 1 in England/Wales in relation to redrafting the member's handbook (the claimant dealt with the Northern Ireland perspective) and took the opportunity to offer the respondent's services for conveyancing and drafting wills which was not covered by the scheme.
- (8) In October 2014 through her contacts with client 1, the claimant was able to secure a new source of work through a new scheme.
- (9) In October 2015 at the request of company A's solicitors and a particular insurance company, the claimant agreed to provide legal assistance to a legal expenses organisation. The claimant assisted in redrafting the member's handbook from a Northern Ireland perspective. The claimant did this to secure Wills/Probate, conveyancing and employment work for the Firm.

The tribunal noted that at paragraph 36.38 of his second witness



statement, Mr Jones stated in relation to the claimant's initiatives at paragraphs 7, 8 and 9 above:-

*“These are good initiatives to be involved in, however it remains to be seen whether they will generate any significant work for the Firm”.*

- (10) The claimant has engaged socially with members of client 7 which has led to her receiving instructions including a large loss claim with a reserve in excess of £1m.
- (11) The claimant has also brought work to the Firm from family and other private clients.

### Conclusion

13.75 In light of the tribunal's findings as set out above, the tribunal is satisfied that the only difference in relation to this additional responsibility is that the claimant has undertaken it to a much greater degree than her comparators.

### Responsibility for ISO Quality Standard Compliance

13.76 The tribunal is satisfied that although the claimant, B and A contributed to client feedback information for ISO, the claimant's comparator C has had responsibility for ISO Quality Standard Compliance since 2007 when he was a Salaried Partner and that he continued to be responsible for it after he was promoted to Salaried Partner with Profit Share on 1 June 2009 and that from that date he has been paid an additional £5,000 in respect of it.

### Conclusion

13.77 In light of the tribunal's findings, as set out at paragraphs 13.1 to 13.76 above, the tribunal is satisfied that the claimant has proved, in accordance with Section 1(5) of the Equal Pay Act (Northern Ireland) 1970 that her work and the work of all her comparators is of the same or a broadly similar nature and that any differences between the things she does and the things they do are not of practical importance in relation to their terms and conditions of employment. The tribunal is therefore satisfied that the claimant was employed on like work with all her comparators at the date of the presentation of her claim on 9 June 2015 and that she has been employed on like work with them going back six years to 9 June 2009.

## 14. **Less Favourable Terms - Annual Salary and Bonus**

14.1 As set out at paragraph 8.7 above, the onus is on the claimant in this case to prove on the balance of probabilities that:-

- (i) she is employed in the same employment as her comparators;
- (ii) she is employed on like work with her comparators, or any of them; and

- (iii) (a) at least one of the contractual terms in her contract of employment is or has become less favourable than a similar term in the contracts of employment of her male comparators or any of them; and/or
- (b) her contract does not include a corresponding contractual term, benefitting her male comparators or any of them, that is included in their contracts of employment.

14.2 The respondent has accepted and the tribunal is satisfied that the claimant has proved that she has been employed in the same employment as her comparators at all relevant times. For the reasons set out above, the tribunal is also satisfied that the claimant was employed on like work with all her comparators at the date of the presentation of her claim on 9 June 2015 and that she has been employed on like work with them going back six years to 9 June 2009.

14.3 The onus is also on the claimant to prove that at least one of the contractual terms in her contract of employment is or has become less favourable than a similar term in the contracts of employment of her comparators or any of them or that her contract does not include a corresponding contractual term benefitting her comparators or any of them, that is included in their contracts of employment.

#### Annual Salary and Bonus

14.4 At the date of the presentation of her claim on 9 June 2015, the claimant's pay was made up of a contractual annual salary and a discretionary performance bonus. C's pay was made up of a contractual annual salary and a contractual performance bonus. B and A's pay was made up of a contractual annual salary only. That was because, in preparation for their planned retirements (B in 2017 and A in 2020), their salaries and bonuses had been consolidated by agreement into a higher annual salary with effect from 1 June 2014.

#### Annual Salary

14.5 Using the figures set out in Ms Niblock's report which the tribunal was informed were agreed between the parties, subject to comment in relation to the narrative, the tribunal is satisfied that the claimant's annual salary at the date of the presentation of her claim on 9 June 2015, which therefore fell into the respondent's financial year 1 June 2015 – 31 May 2016, was £70,000. At that same date C's annual salary was £88,000 and B and A's annual salaries were £99,500 each. The tribunal is therefore satisfied that the contractual term in the claimant's contract in respect of annual salary was less favourable than the contractual term in the contracts of her comparators.

#### Performance Bonus

- 14.6 The respondent accepted in the agreed statement of main legal and factual issues that the arrangements for bonuses of the claimant and her comparators were different and could and did result in the claimant earning less bonus than her comparators.
- 14.7 With effect from 1 June 2014 the claimant's discretionary bonus was calculated as 20% of the amount by which her professional fees billed (net of VAT) in the previous financial year exceeded her cost to the Firm. At that same date C had a contractual entitlement to a profit share/ performance bonus calculated at 20% of fees billed by him in excess of £200,000 in the previous financial year.
- 14.8 At the date of the presentation of her claim on 9 June 2015, the fees billed by the claimant ie the income generated by her was higher than that of C and in fact higher than any of her comparators as was her bonus. That was also the position in the previous financial year when the new bonus scheme came into force.
- 14.9 Although the respondent accepted that the arrangements for bonuses are different and can and have resulted in the claimant earning less bonus than her comparators, the tribunal is not satisfied that the respondent's method of calculating the claimant's bonus from 1 June 2014 was less favourable than its method of calculating C's bonus. That is because the claimant's bonus would have been lower using the method applied to C.
- 14.10 Prior to the financial year commencing 1 June 2014, the claimant's bonus had been calculated from a bonus pool with each salaried partner in that pool receiving the same share. On the basis of the figures in Ms Niblock's report, the tribunal is not satisfied that this method of calculating the claimant's bonus was less favourable than the method that was used to calculate her comparator's bonuses during that earlier period. That is because in the five year period between the financial year commencing 1 June 2009, when the claimant's comparators were promoted to Salaried Partner with access to profit share, to the financial year commencing 1 June 2014, when the method of calculating the claimant's bonus was changed, the claimant's overall bonus was significantly higher than it would have been if it had been calculated using the method applied to her comparators. That is because during those five years the claimant's overall bonus was £34,000. It would have been £14,288 if it had been calculated using the method applied to her comparators.
- 14.11 The tribunal considers, as the claimant has pointed out, that the real issue in this case is the allocation of work. The claimant contends that the respondent has indirectly discriminated against her on the grounds of her sex in relation to the allocation of work. The tribunal is satisfied that the allocation of work is discretionary, not contractual. In those circumstances, as pointed out at paragraphs 8.1 - 8.3 of this decision, it

is not covered by the Equal Pay Act (Northern Ireland) 1970. That does not mean that such a claim cannot be considered and determined by an Industrial Tribunal. It can be but only if the claim is being brought under the Sex Discrimination (Northern Ireland) 1976 in which the remedy would be damages and injury to feelings rather than modification of the contract and arrears. The claimant did not make such a claim.

14.12 Although Mr Mulqueen stated in his first submission that the claimant is entitled to have her terms in respect of bonus as well as salary modified, if she proves that she has been carrying out like work with that of her comparators, the tribunal concludes that it is only the claimant's contractual term in relation to annual salary that is less favourable for the purpose of this claim. However, the claimant is only entitled to have her contract modified in respect of annual salary if the respondent fails to prove its genuine material factor defence.

## 15. **Genuine Material Factor Defence**

### The Relevant Legal Principles

15.1 The tribunal is satisfied that the claimant has proved that:-

- (i) she has been employed in the same employment as her comparators;
- (ii) that she has been employed on like work with her comparators at the date of the presentation of her claim on 9 June 2015 and back to 9 June 2009 which is the six years' arrears period; and
- (iii) that her contractual term in relation to salary is less favourable than the contractual term in all of her comparators' contracts and that A's is the highest.

15.2 As set out at paragraph 8.8 above, it was explained by Lord Nicholls of Birkenhead, at paragraph 23 of his judgement in ***Glasgow City Council -v- Marshall [2000] IRLR 272HL*** that there is a rebuttable presumption that the variation between the claimant's contract and her comparators' contracts in terms of annual salary is presumed to be due to the difference of sex.

15.3 Lord Nicholls added that in those circumstances the burden passes to the respondent (under Section 1(3) of the Equal Pay Act (Northern Ireland) 1970) to show, on the balance of probabilities, that the explanation for the variation in annual salary is not tainted by sex. To discharge that burden the respondent must satisfy the tribunal that:-

- (i) the proffered explanation, or reason, is genuine and not a sham or pretence;

- (ii) that the less favourable treatment is due to that explanation or 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. The factor must be “material” in a positive sense, rather than in a justificatory sense;
- (iii) the reason is not the “difference of sex”. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect;
- (iv) the factor relied upon is a “material” difference, that is, a significant and relevant difference between the woman’s case and the man’s case.

15.4 At page 202 of IDS’s Employment Law Handbook, 2008 Edition the position is summarised as:-

*“Essentially the Employer, in raising a genuine material factor (GMF) “defence”, is saying:-*

*“I know that the work of the woman and the work of her comparator are of equal value (in this case like work) but the man is paid more for a particular reason and that reason has nothing to do with the fact that the claimant is a woman or that the comparator is a man.”.*

15.5 If the respondent establishes a defence under Section 1(3), then even if the claimant is performing like work and is paid less, the equality clause that is deemed to be included in her contract of employment by virtue of Section 1(1) of the Equal Pay Act (Northern Ireland) 1970 shall not operate to modify the contractual term in her contract of employment relating to annual salary so that it is equal to that of her highest paid comparator. The reason for that is that the Equal pay Act (Northern Ireland) 1970 is not concerned with fair pay. It is only concerned with sex related pay discrimination: (***Strathclyde Regional Council & Others -v- Wallace & Others (1998) IRLR 146 HL***).

15.6 However, if the respondent fails to establish a defence under Section 1(3), then the equality clause which is deemed to be included in her contract of employment, by virtue of Section 1(1) of the Equal Pay Act (Northern Ireland) 1970, will operate, by virtue of Section 1(2), to modify any contractual term in her contract which is less favourable than a comparable term in her comparators contracts and to include a contractual term benefitting her comparators in their contracts of employment which is not included in her contract of employment. The modified or new contractual term will be incorporated into her contract from the date of the presentation of her claim on 9 June 2015. For example, that means that she will be entitled to the same contractual annual salary as her comparators (or the highest earning comparator)

going forward from that date without temporal limitation, unless and until there is a further contractual agreement between the claimant and the respondent or until there is a further statutory modification by reason of a subsequent operation of the equality clause. That is because, as Elias J stated in **Sorbie -v- Trust House Forte Hotels Ltd (1977) ICR 55, EAT** and **Sodexo Ltd -v- Guttridge and others ORS (2008) IRLR 752, EAT** (as referred to in the IDS Employment Law Handbook on Equal Pay 2008) and as confirmed more recently by Simler P in **Reading Borough Council -v- James (2018) IRLR 790, EAT**, a woman cannot continue to compare herself with a male comparator if he ceases to be a comparator but she does not lose such enhanced rights as have already been incorporated into her contract from the date of the presentation of her claim. Those rights have by then become crystallised and the woman remains entitled to enforce them as a term of her contract.

- 15.7 In addition to establishing her future entitlements, the claimant is entitled, by virtue of Section 22B(3) of the Equal Pay Act (Northern Ireland) 1970, to arrears of the difference in pay from the date of the presentation of her claim on 9 June 2015 for six years back to 9 June 2009, provided that she can establish that she has been performing like work with her comparators or any of them during that period and that the relevant term of her contract has been less favourable during that period or part of it or that a term that has benefitted her comparators or any of them during that period has not been included in her contract during that period or a part of it.
- 15.8 It is open to the respondent to rely on more than one genuine material factor to explain the variation in contractual annual salary. However, if the respondent fails to establish that the genuine material factors relied upon are genuine and not a sham or pretence that is the end of their defence. Even if the respondent establishes that the genuine material factors are genuine unless the respondent also proves that they are the cause of the disparity that will be the end of their defence. If the respondent establishes that the genuine material factor or factors are genuine and the cause of the disparity, the burden will shift to the claimant, in accordance with **Nelson -v- Carillion Services Limited [2003] ICR 1256** to establish that the material factor or factors relied upon by the respondent are tainted with direct or indirect sex discrimination. If the claimant can establish that the material factor or factors are tainted by direct discrimination then the respondent's section 1(3) defence will fail because direct discrimination cannot be justified. If however, the claimant proves that the material factor or factors relied upon by the respondent are tainted by indirect sex discrimination, the burden shifts back to the respondent to objectively justify the disparity caused by the material factor or factors, otherwise the claimant will succeed in her claim for equal pay. In **Bilka -v- Kaufhaus GmbH -v- Weber Von Hartz [1986] IRLR 317** the European Court held that an employer can objectively justify a pay practice or system if he can establish that:-

- (i) it corresponds to a real need (legitimate aim) on the part of the employer's business;
- (ii) it is appropriate with a view to achieving the objectives pursued; and
- (iii) it is (reasonably) necessary to achieve those objectives.

15.9 The respondent is relying on a genuine material factor defence in this case.

Summary of the Main Inconsistencies and Changes in the Respondent's Genuine Material Factors Defence

15.10 As set out at paragraph 10.2 above, the tribunal found a number of inconsistencies in and changes to the respondent's defence which undermined its defence to a significant extent. The tribunal sets out some of these inconsistencies and changes in relation to genuine material factors below.

15.11 Mr Rutherford and Mr Lennon informed the claimant, in their decision dated 18 November 2014, dismissing her grievance that if she proved that she was performing like work, they would be relying on a number of genuine material factors in defence of her claim. They also informed her that those genuine material factors "involve evidence of/potential for the following attributes (i.e. all of them), in addition to excellent legal skills in the conduct of caseloads common to all experienced solicitors" and they listed them as follows:-

- Ownership and Control of Key Client Base;
- New Business Development;
- Proactive contribution to marketing to generate work for the Firm recognising the competitive market and the need to explore new ways of securing business for the future;
- Income generation beyond the level of salaried partner level;
- Potential for career development i.e. leadership skills, motivating a team of professional colleagues and support staff and involvement in aspects of quality assurance compliance (ISO);
- Recognition of Professional Reputation in journals such as Chambers and Legal 500;

15.12 The respondent confirmed those factors in its reply dated 13 February 2015 to the claimant's Statutory Questionnaire but changed the requirement for all of them to be met to the "**majority**" (the tribunal's emphasis) of them.

15.13 The respondent repeated them again in its response, dated 30 July 2015, to the claimant's claim to this tribunal but stated that the claimant's comparators and D met some or all of the genuine material



factors “to a greater degree with more demands on them than on Salaried Partners”.

15.14 By letter dated 9 February 2016, as directed by the tribunal, the respondent set out the factual issues relating to the genuine material factors which had not been identified in the agreed statement of main legal and factual issues. The respondent stated at the outset of their letter:-

*“Set out below as directed by the Tribunal are the Respondents GMFs referred to at paragraph 7 of the factual issues:-*

*The respondent contends that whilst the Claimant and her comparators are all excellent senior lawyers, the difference in pay is genuinely due to the fact that the Claimant is a salaried partner unlike her comparators who are Salaried Partners with access to 20% profit appointed to the grade in 2009 when they (along with D) were unsuccessful in their applications to become Equity Partners and was in recognition of their contribution to the firm at the time and additional responsibilities they have undertaken in the period since 2009. Some of the following factors which are material to the difference in pay, also distinguish the work (paragraphs 1-5 of the factual issues) of the Claimant who is a salaried partner from her comparators who are Salaried Partners with access to 20% profit.”.*

15.15 The two versions of genuine material factors are set out in the table below:-

<b>The Genuine Material Factors as identified in the respondent’s grievance decision, grievance appeal decision and in the responses to the claimant’s Statutory Questionnaire claim to this tribunal and notice for additional information.</b>	<b>The Genuine Material Factors as identified in the respondent’s letter of 9 February 2016</b>
Ownership and control of key client base.	1. Control/ownership and development of a number of significant clients.
	2. Directing/Allocating the caseload of other solicitors.
New business development	3. Business development and marketing.
Proactive contribution to marketing to generate work for the Firm recognising the competitive market and the need to explore new ways of securing business for the future.	
Potential for career development i.e. leadership skills, motivating a team of	4. C willingly undertakes responsibility for ISO Quality Standard

professional colleagues and support staff and involvement in aspects of quality assurance compliance (ISO).	Compliance which is non-fee earning work.
	5. The leadership skills by reference to (1) to (4) above necessary to motivate professional colleagues and support staff.
Income generation beyond the level of salaried partner level.	6. Ability to generate fee income comparable to and preferably higher than that of Salaried Partners.
Recognition of Professional Reputation in journals such as Chambers and Legal 500.	

15.16 Mr Jones clarified during cross-examination that it was his understanding that the genuine material factors which are set out in Mr Rutherford and Mr Lennon's decision dismissing the claimant's grievance are the applicable ones.

15.17 Mr Jones stated, during cross-examination, that the respondent had weighted control of significant clients and fee generation "as the two most important genuine material factors because they were perhaps the things that affected the respondent most". However he accepted that he did not use the word weighting in either of his witness statements.

### **The Genuine Material Factors**

#### **Ownership and Control of Key Client Base**

#### **Control/Ownership and Development of a Number of Significant Clients**

15.18 In light of the facts found by the tribunal at paragraphs 13.44 to 13.53 of this Decision, the tribunal concludes that this factor does not explain the variation in annual salary between the claimant and her comparators. That is because although the claimant did not meet the factor of ownership and control of key client base to the same extent of B:-

- (i) A had the same contractual entitlement to pay as B, although he did not perform it at all;
- (ii) C and D also had the same entitlement, although they only met it for part of the time.

15.19 In relation to the alternative version, namely control/ownership and development of a number of significant clients, although the claimant only met that factor for 12 to 18 months, none of her comparators met it at all.

#### **New Business Development**

Proactive contribution to marketing to generate work for the Firm recognising the competitive market and the need to explore new ways of securing business for the future

### Business Development and Marketing

15.20 In light of the facts found by the tribunal at paragraphs 13.62 - 13.74, the tribunal is not satisfied that this factor explains the difference in annual salary because the claimant met it to a greater extent than her comparators.

### Directing/Allocating the caseload of other solicitors

15.21 In light of the tribunal's findings set out at paragraphs 13.55 - 13.61, the tribunal is satisfied that although the claimant did not meet this factor to the same extent as B, as A and D did not have that responsibility until 2011 and 2012 respectively and as C never had that responsibility and yet all three had the same contractual entitlement to pay, the tribunal is not satisfied that this factor explains the variation in annual salary.

### Potential for career development i.e. leadership skills, motivating a team of professional colleagues and support staff and involvement in aspects of quality assurance compliance (ISO)

#### C willingly undertakes responsibility for ISO Quality Standard Compliance which is non-fee earning work

#### The leadership skills by reference to (1) to (4) above necessary to motivate professional colleagues and support staff

15.22 In addition to its findings which are set out at paragraphs 13.42 - 13.76 above, the tribunal is satisfied that the claimant has demonstrated the leadership skills necessary to motivate professional colleagues by assisting Mr Lennon with his preparation for a tender in respect of client 8, notwithstanding the short notice she had been given and his reaction at the time.

In light of those findings, the tribunal is not satisfied that this genuine material factor explains the difference in salary.

The fact that the claimant was late for a photoshoot for the respondent's new website, does not lead the tribunal to the conclusion that this genuine material factor explained the variation in her pay. In addition, whether or not the claimant had been abrasive to a member of staff, the tribunal does not consider that that demonstrated that the claimant lacked the potential to motivate and support staff. In addition, the fact that the claimant, like her comparators B and A and also D, does not have responsibility for ISO quality standard compliance for which C was paid separately, does not explain the difference in pay.

### Income generation beyond the level of salaried partner level

#### Ability to generate fee income comparable to and preferably higher than that of Salaried Partners

15.23 The tribunal is satisfied, as pointed out by Mr Jones in his first witness statement, that fee income generation in litigation fluctuates, depending on when cases conclude and invoices are issued. The tribunal is also satisfied that in relation to the very high value work the claimant carries out on behalf of client 7, it also depends on when instructions are received. Using Ms Niblock's figures, the tribunal is satisfied that at the time of the claimant's grievance in October 2014, her average income generation was lower than all of her comparators. Notwithstanding that, the tribunal is satisfied that it met the criteria of this genuine material factor. In addition, by the time her claim had been issued in 2015 her average income generation was higher than that of C and at the time of the Hearing of her claim, it was still higher. The tribunal is also satisfied that her income generation was higher than that of C in five of the seven years that C was a salaried partner with access to profit share. It was also higher than that of A in three of those seven years and that of B in two of those seven years. The tribunal is not therefore satisfied that this factor explains the difference in salaries.

#### Recognition of Professional Reputation in journals such as Chambers and Legal 500

15.24 The tribunal is satisfied that B was recognised in the Chambers Journal. The tribunal is satisfied that the claimant and her comparators were also recognised in the Legal 500 Journal. Although the claimant missed an entry for one year, the tribunal is satisfied that the claimant's high level of knowledge and skill was recognised by senior members of the judiciary in references they provided when she applied for promotion to Salaried Partner in 2008. In light of these facts, the tribunal is not satisfied that the respondent has proved that the fact that B's professional reputation was recognised in the Chambers Journal, explains the difference in salary between the claimant and her comparators.

15.25 For the reasons set out above, the tribunal is not satisfied that the respondent has proved its defence under Section 1(3) of the Equal Pay Act (Northern Ireland) 1970

## 16. **Remedy**

16.1 As the respondent has failed to establish its genuine material factor defence under Section 1(3) of the Equal Pay Act (Northern Ireland) 1970, the equality clause, which is deemed to be included in the

claimant's contract of employment by virtue of Section 1(2), will operate to modify the contractual term in her contract of employment in relation to annual salary so that it is no less favourable than that of her comparator A, (who had the highest salary) from the date of the presentation of her claim on 9 June 2015. The modified contractual term will be incorporated into her contract of employment from the date of the presentation of her claim on 9 June 2015 and will remain in place going forward from that date without temporal limitation, unless and until there is a further contractual agreement between the claimant and the respondent or until there is a further statutory modification by reason of a subsequent operation of the equality clause. The tribunal is not satisfied that the decision in *Evesham v North Hertfordshire Health Authority and Secretary of State for Health [2000] IRLR 257* has any relevance to this case because the circumstances in each case are very different. In that case, the claimant having established work of equal value against her chosen comparator, sought to be paid at the level of another person in respect of whom she had not proved a case of equal value.

16.2 The tribunal is therefore satisfied that the claimant is entitled to have her annual salary increased to £99,500 with effect from the date of the presentation of her claim on 9 June 2015 without temporal limitation unless and until there is a further agreement between the claimant and the respondent or until there is a further statutory modification by reason of a subsequent operation of the equality clause. Although Mr Mulqueen asserted in his replying submission that the consolidation of A's bonus into basic pay arose for a genuine business reason related to his retirement arrangements and to facilitate the smooth handover of case files, the respondent did not include that as a genuine material factor in either the original version of its genuine material factors or in the version which was set out in its letter dated 9 February 2016, both of which are set out at paragraph 15.15 above. It is not therefore appropriate for the tribunal to take that into account when modifying the term of the claimant's contract in respect of annual salary.

16.3 The respondent is also ordered to pay the claimant £116,542 in respect of the difference between the claimant's gross annual salary of £70,000 and her modified gross annual salary of £99,500 going forward from 9 June 2015 (claim date) to 22 May 2019 (decision date). The calculation is set out below:-

Difference in Salary Each Year	Daily Rate	No. of Days from 9.6.15 (date of claim) to 22.4.19 (decision date)	Total
<b>£29,500</b>	<b>£80.82</b>	<b>X1,442</b>	<b>£116,542</b>

16.4 The claimant is also entitled to the differences (arrears) in annual salary for the six years prior to the date of the presentation of her claim

on 9 June 2015. That is because the tribunal is satisfied that she has been performing like work with her comparators throughout that period and has been paid a lower annual salary. As the date of the presentation of the claimant's claim on 9 June 2015 falls within the respondent's financial year, 1 June 2015 - 31 May 2016, the claimant is entitled to arrears back to the financial ending 31 May 2010.

- 16.5 The respondent is therefore ordered to pay the claimant £137,000 gross in respect of arrears of pay calculated as set out below:-

Year Ending	A's Salary	Claimant's Salary	Difference
	£	£	£
1. 31.05.15	106,000	67,500	38,500
2. 31.05.14	80,000	61,500	18,500
3. 31.05.13	80,000	60,000	20,000
4. 31.05.12	80,000	60,000	20,000
5. 31.05.11	80,000	60,000	20,000
6. 31.05.10	80,000	60,000	20,000
		<b>Total</b>	<b>137,000</b>

#### Interest

- 16.6 The tribunal considered the respondent's submission in relation to the method of calculating the interest of those arrears. However, the tribunal was not persuaded that the respondent would suffer serious injustice if interest was calculated in the way suggested by the respondent. However, the tribunal is of the opinion that the respondent would suffer a serious injustice if the claimant's entitlement to interest continues after the year commencing 1 June 2014 (financial year 2014 - 31 May 2015) when A's bonus was consolidated with his salary. That is because, from 9 June 2015 (the date of her claim), the claimant's pay will be made up of the salary paid to A during the financial year of her claim (1 June 2015 to 31 May 2016) which is effectively his salary and previous bonus as well as her own bonus. While the tribunal must consider each term of the contract separately in accordance with Section 1(2) of the Equal Pay Act (Northern Ireland) 1970 for the purpose of determining whether any term in the claimant's contract should be modified, the tribunal considers that it is entitled to look at the effect of its decision when considering whether a serious injustice would be caused to the respondent in relation to the period of calculation of interest.

- 16.7 The tribunal therefore awards the claimant interest on arrears from the mid-point date of the year ending 31 May 2014 back to the year ending 31 May 2010.

The respondent is therefore ordered to pay the claimant interest of £19,711, calculated as set out below:-

Year Ending	Amount of Salary Arrears	Rate of Interest	Annual Interest on total arrears At 8%	Daily Rate (7,880/365)	No of days 1.6.10 - 31.5.15 (inclusive)	No of days from mid-point date (inclusive) 30.11.12	Total
<b>31.5.10</b>	£20,000	8%	£7,880		1,827	913 days	
<b>31.5.11</b>	£20,000						
<b>31.5.12</b>	£20,000						
<b>31.5.13</b>	£20,000						
<b>31.5.14</b>	£18,500						
<b>Total Arrears</b>	<b>£98,500</b>			<b>£21.58</b>		<b>X913</b>	<b>£19,710.79</b>

17. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

**President:**

**Date and place of hearing: 21 November 2016 - 28 November 2016, Belfast.**

**Date decision recorded in register and issued to parties:**