

THE INDUSTRIAL TRIBUNALS

CASE REF: 9826/18

CLAIMANT: Shona Boyle

RESPONDENT: Caterpillar (NI) Ltd

JUDGMENT

The decision of the tribunal is that the claimant is engaged in like work to her comparators and that she is therefore entitled to an appropriate equality clause. A further hearing will be arranged to determine the financial element in that clause.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Wimpess

Members: Ms Mary O’Kane
Mrs Terri Cregan

APPEARANCES:

The claimant was represented by Ms Rachael Best, Barrister-at-Law, instructed by McCartan Turkington Breen Solicitors.

The respondent was represented by Mr Peter Bloch, Engineering Employer’s Federation.

SOURCES OF EVIDENCE

1. The tribunal received witness statements from the claimant, Mr Alan Kennedy Mr Alan Murphy, Ms Amanda Dunn and Mr Gordon Rea and heard oral evidence from them by way of cross-examination. An agreed bundle of relevant documents was also provided to the tribunal. Further material was subsequently provided at the tribunal’s request including a short additional written statement by Mr Murphy.

THE CLAIM AND THE RESPONSE

2. In her claim form the claimant brought an equal pay claim against the respondent on the basis that her job as a program specialist should be properly graded at Grade SG24 and in the alternative that her comparators were being paid at Grade SG24 for what is Grade SG23 work. The claimant contended that she was engaged in like

work to Derek Nesbitt, Alan Kennedy and Robert Cullinan all of whom worked in the respondent's Project Management Office ("PMO"). The three male comparators were on higher salary scale, SG24, than the claimant who was on the SG23 salary scale.

3. The respondent's response disputed that the claimant was employed in like work to her comparators and relied upon a review conducted by the respondent's job evaluations team which found that there was an 80% job match to her existing job description and therefore she was appropriately graded and that her role was not broadly similar to SG24s.

THE ISSUES

4. In compliance with directions given during the case management process the issues were agreed as follows:

Legal issues

1. Whether the claimant is engaged in like work with her comparators, namely Derek Nesbitt, Alan Kennedy, Robert Cullinan, 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. Have 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) At the relevant time was the claimant's work the same or of a broadly similar nature to that of her comparators, namely Derek Nesbitt, Alan Kennedy, Robert Cullinan, or any of them?
- (2) At the relevant time were there any material difference(s) between the work she does (did) or the work the comparator(s) do(es) did?
- (3) What at the relevant time 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 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 have 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 of pay genuinely due to material factor(s) and what is(are) the factor(s)?

The factors relied upon by the respondent are:

- Job activities
 - Complexity of work
 - Type of project
 - SG 24 role is a mentor/lead and SG 23 is not.
- (7) Can 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 8 above what is a period of any arrears and extent of any loss sustained by the claimant?
 - (10) If the claimant is successful what is her remedy?

At the outset of the hearing, it was agreed that the tribunal should only determine liability at this stage, but this requires all of these issues to be determined save for the amount of compensation that the claimant would be entitled to if her claim succeeds.

5. The respondent replied to a Notice for Additional Information/Written Answers by letter of 16 October 2019. In relation to the material factor defence the response set out the material facts relating to the things the claimant did as opposed to Mr Nesbitt, Mr Kennedy and Mr Cullinan as of December 2017 at the time of the job evaluation.

“Derek Nesbitt, at the time of the evaluation, was leading Project Triathlon. This involved at least 3 facilities these being Monkstown, Springvale and Larne. He was responsible for the closing of the factory at Monkstown and the sale of the factory to a third party. Some 500 jobs are involved and it was job last critical. In addition, he was responsible for transferring ownership of the Springvale facility to another Caterpillar company. This involved consideration of both facilities and capital.

In addition, there were multiprogram subsets (48) for which he was responsible. In addition, it had engineering and product knowledge

experience. As regards Mr Kennedy he was in charge of the relevant time of project falcon. This was critical as otherwise they would've been a gap production and possible job losses. In particular, he was responsible for the transfer of other Caterpillar products to Springvale for another Caterpillar company. This involved consideration of both facilities and capital.

There were 22 sub-projects and this was a new area business with new relationships and new processes involved.

As regards experience, Mr Kennedy had experience in production systems and experience of the SAP system.

Mr Cullinan was in charge of building construction products (Trinity) which was a new area of business. This was essential and critical as regards cost savings.

This was a new product introduction. Project management support had previously been provided by a third party. The overall project delivered £42 million OPACC (operating profit after cost of capital).

Mr Cullinan was responsible for managing the change, building relationships and taking the new product to market. He also trained and coached on building construction projects in India which included mentoring. He had experience in operations management.

The claimant was working at the relevant time on I6 Refresh, a generator set programme. She was co-ordinating cost reduction measures. She measured low complexity changes and co-ordinated those into a project plan. The level of cost saving was not critical but of benefit. The claimant worked with familiar teams and products which were less complex and less critical. Her experience was as a Project Lead but was not extensive in detailed expertise in specific areas.”

THE FACTS

6. The respondent is a leading manufacturer of construction and mining equipment, diesel and natural gas engines, industrial gas turbines and diesel-electric locomotives.
7. The claimant set out her history as an employee of the respondent and the basis of her claim in her witness statement. The claimant was first employed by the respondent by the respondent's predecessor to F G Wilson (Engineering) Limited as a Graduate Electronic Engineer in January 2003. The claimant is currently employed as a Program Specialist 1. In January 2005 the claimant was promoted to Grade 22 Engineer within the Electronic Control Design Department. In February 2006 the claimant was promoted to Grade 23 Sigma Black Belt. The claimant gave evidence that a Sigma Black Belt is essentially a Project Leader who is responsible for the delivery of projects. This role meant that she led projects throughout various areas of the respondent business including Continuous Product Improvement, Employee Engagement, Process Improvements, Supplier Design Change Requests, Lean

Product Development, New Product Information (NPI) and NPI Fastrack. In 2007 the claimant became a formal mentor to a graduate employee. She has been employed in her current role since 2010 working in the PMO with the three other permanent PMO team members. Mr Nesbitt and Mr Cullinan have been Engineering Project Team Leaders since 2010 and Mr Kennedy from 2008/2009. The claimant contended that their duties were the same as her own. According to the claimant the job title of Engineering Project Team Leader and subsequent job descriptions did not reflect their duties and this role does not fall within the scope of PMO job roles. From 2010 to 2015 the claimant's manager was Mr Gordon Rea and thereafter Mr Alan Murphy. Mr Rea is now Mr Murphy's manager.

8. The claimant's current role as Program Specialist 1 involves facilitating team projects to ensure that all deadlines are met within budget and scope. According to the claimant the respondent previously struggled with meeting delivery deadlines, particularly involving Electronic Power Diesel Generator projects and the PMO was created as a solution to the lack of clarity of these projects being completed on time. The claimant's role involved her in overseeing the time management for company projects by using project management software and skills to ensure that all projects were on track and to complete before the deadline. The claimant has autonomy over how her duties are carried out and how she managed clients and projects. During her time in the PMO the claimant and her colleagues have largely focussed on electric power projects which are diesel generators. As a team they worked on projects including Complex New Product Introduction, legislative product changes, cost reduction changes and quality improvement product changes. She also worked on other projects including process development and process changes for the Axles aftermarket, Diesel Engine Deletion and other miscellaneous [projects including digital marketing, a facility move (DCS Relocation), Solutions Project (Skyland) and Customer First Initiative which included establishing factory tours, a visitor centre and merchandise store. Since the claimant began her role in 2010 she has been involved in a mixture of new client work and often planned and controlled projects where no precedent existed. She was also involved in facilitating the project team in the development and control of project schedules by using project management tools and techniques.
9. The claimant, at paragraph 11 of her witness statement described her core job role in relation to project teams under the following headings:-
 - (i) Establishing, developing and maintaining relationships with the client including introductory and ongoing meetings with clients.
 - (ii) Completing planning pre work and developing the project charter to include the business case, project objectives, scope, project deliverables, constraints, risks, assumptions, team member list and OPACC, working alongside the project manager to develop a draft charter and overseeing logistics.
 - (iii) Planning the project with the team.
 - (iv) Controlling the project for the team.
 - (v) Supporting the team meeting.

- (vi) Preparing and distributing the business memo.
- (vii) Reporting project dates to senior management via the monthly Project Group Review.
- (viii) Any Other Business. This included uploading charter and fortnightly memos onto a shared intranet site every control cycle, providing dates/metrics to team members for their SMART goals, updating client project plans, providing training on project management processes and tools to project members as needed and mentoring new PMO staff members and overseeing resource loading and analysis if requested by the client.
- (ix) Additional Tasks which included compulsory and voluntary training courses, safety activities, generating innovation ideas and recording associated saving, recoding all work completed (chargeable and non-chargeable) and recording project team engagement.

The tasks listed by the claimant also included a lot of low level and routine tasks which any employee might be expected to undertake and it is not necessary to set these out.

10. In paragraph 12 of her witness statement the claimant explained that neither she nor her comparators undertook the role of project lead rather they assisted the project leader in the delivery of the project. She would also act up to Project Lead to cover annual leave or illness. In paragraph 15 of her witness statement the claimant stated that within her role in PMO in 2017 she was responsible as Project Leader for 13 complex new product introductions which impacted upon multiple power nodes, dual brands and global production facilities located in China, Brazil and Northern Ireland. The purpose of this project was to avoid product gaps and increase product margins. In her evidence to the tribunal the claimant corrected the reference to "Project Leader" and replaced it with the descriptor of "PMO Support."
11. The claimant also planned a product deletion project in 2017 for a client in Stafford which involved new relationships and processes. The claimant also supported the DCS relocation project in 2017 for a new client based in Italy. This project involved the transfer of processes and equipment assets out of a facility in France to be implemented into two facilities in Italy. The project was a critical cost saving exercise for the client and also an enabling project to allow closure of the Belgium facility.
12. In April 2017 the claimant volunteered for and was selected to be a team leader of the Woman's Initiative Network NI. In May 2019 the claimant volunteered and was selected as a WIBN NI Core team leader. The claimant set out her responsibilities in these roles in her witness statement.
13. In 2018 the claimant supported the Retail Power Density Project which was last valued at \$88.2 million.
14. The claimant stated that although both her duties and those of her comparators were the same, they all have their own individual career development plans, SMART goals,

project clients and interests with additional responsibilities and duties being continuously added to their job roles. For example, Mr Nesbitt had previously been assigned the SMART goal of creating macros to enable semi-automatic metric generation and since 2017 reviewing innovation ideas for Mr Murphy. Mr Kennedy had the SMART goal of testing software tools from an alternative software provider. Mr Cullinan had been a fire warden. Mr Nesbitt and Mr Cullinan have assisted Mr Murphy with the interview processes for PMO vacancies. The claimant was assigned the SMART goal of developing and recording a training video regarding the software Microsoft Project to be shared with Global Project Management colleagues' projects which remains in use.

15. The claimant also assisted in the respondent's targeted recruitment process since 2012. Since 2018 the claimant has coached employees in the targeted selection process.
16. The claimant gave evidence that a previous project portfolio assigned to her involved planning and controlling non NPI Engineering charge initiatives in projects led by Grade 22 engineers whom she coached and mentored.
17. Although the claimant was cross-examined at length about her work neither Mr Rea nor Mr Murphy took issue with the claimant's description of her duties (save for paragraph 14 of the claimant's witness statement). Mr Kennedy, one of the claimant's comparators, gave evidence which was largely supportive of the claimant's contentions.
18. According to the claimant since approximately October 2017 her comparators were asked to begin formal mentoring. The claimant believes that this was introduced to justify the Grade 24 position in relation to the GPM global department structure which the respondent merged with in 2017.
19. Further, since 2018 Mr Nesbitt, Mr Alan Kennedy and Mr Cullinan have delivered training courses in Project Management. The claimant also volunteered to do this. The same training is delivered by the claimant's global colleagues of a lesser grade than Grade 23 so this responsibility cannot explain the grade and pay disparity with the claimant's comparators.
20. The claimant described all of three male comparators as Project Team Leaders and claims that their duties between 2010 and 2017 were the same as hers and that the official title of Engineering Project Team Leader and subsequent job title did not reflect their duties which do not fall within the scope of the job roles. According to the claimant since 2010 neither she nor her comparators undertook the role of project lead but rather they assisted the project leader in the delivery of a project. Thus, Mr Nesbitt did not project lead Triathlon; Mr Alan Kennedy did not project lead Falcon and Mr Alan Kennedy did not lead Project Trinity. The position was rather that they each provided support to the relevant project leader who ultimately had responsibility for the successful delivery of each project. The claimant on occasion acted up to the role of project leader when the project lead was off work due to leave or illness. The claimant's comparators also acted up between 2010 and 2015.

21. Since 2018 Mr Cullinan has been acting as supervisor to a team of PMO staff based in England covering a maternity leave.
22. According to the claimant, Mr Cullinan's duties were the same as hers, Mr Nesbitt's and Mr Alan Kennedy's from 2010 to mid-2018.
23. The claimant believed that since late 2017 they were being provided with additional duties to differentiate their grade and pay from hers. These new responsibilities have not resulted in any associated pay rise for them, and the claimant questioned whether they substantiated the pay disparity.
24. According to the claimant, the work and duties carried out by the claimant and her comparators has been broadly similar since 2019. The claimant explained that there were subtle differences in their respective career paths and experiences in the projects they managed and the clients they work with, but the day-to-day tasks are the same and use the same project management processes and tools. According to the claimant covered seamlessly when a grade 24 was out of the office.
25. When the claimant questioned what the difference was between the grades, she was told that the projects she was planning as Grade 23 were template based and that her Grade 24 colleagues were using a clean sheet approach.
26. The claimant raised the issue of her grading in 2017. She suggested using an existing process, namely a job evaluation/review in which Human Resources would evaluate the post. According to the claimant, Mr Murphy's response was – "I wouldn't do that if I were you." Mr Murphy also said that the GPM had all the roles and responsibilities documented. The claimant responded that this would be a positive as it should be easy to compare and contrast. In November 2017 the claimant emailed Mr Murphy and advised him that she intended to raise a job evaluation and asked for his assistance. Mr Murphy asked the claimant to highlight the tasks that she undertook that were above and beyond her job description. The claimant provided a high-level summary rather than an exhaustive list of her duties. According to the claimant Mr Murphy initially told her that it would be completed before Christmas but subsequently advised her that it would not.
27. On 29 January 2018 the claimant met with Mr Rea, Mr Murphy and Mr Aureole Mes Boaye. Mr Murphy shared an Excel spreadsheet on screen which listed the high-level summary of areas that the claimant had previously identified and believed she undertook above and beyond her current grade specification. Each of these was compared against four grade SG23 personnel working outside Northern Ireland as the claimant was the only SG23 PMO member in Northern Ireland. These topics were not compared to any of the claimant's SG24 colleagues. The conclusion provided was that grade SG23 was the correct pay grade for the claimant's role. The claimant asked Mr Boaye to explain the respondent's job evaluation process to her. Mr Boaye was unable to do so, and the claimant asked him for a written copy of the process to provide clarity. The claimant stated that she was surprised that no one from HR had contacted her to understand what jobs she did on a day-to-day basis for comparison and requested clarity on how the job evaluation process was conducted and who was involved. The claimant reiterated her understanding of the process was that the comparison would be done between what she actually did and her existing job

specification. On 1 February 2018 the claimant contacted Mr Boaye for an update on her request for a copy of the evaluation process and clarity as to how it was conducted. Mr Boaye advised that HR was happy with the process but recommended to Mr Rea and Mr Murphy that a formal job evaluation process be undertaken. He said that this was extremely rare as HR had already agreed the process that had been conducted and the outcome that grade SG23 was suitable. He further advised that he had made contact with the job evaluation team in Peoria. He was not familiar with the process but expected it to take 30 days. The claimant advised him of her understanding of the process based on the respondent's website. She understood that there would be a questionnaire which she would complete with her supervisor/manager which would be processed through a system tool called JODI and that the output would be checked by the team in Peoria to ensure organisational consistency.

28. On 27 February 2018 the claimant attended a further meeting with Mr Rea, Mr Murphy and Mr Boaye. Mr Boaye shared a letter from EAME HR. Mr Boaye also had a copy of a Program Specialist job specification. Mr Boaye advised that the job evaluation had been conducted; had concluded that the current job code and salary grade was correct and that the process had now concluded from an HR perspective. The claimant was not provided with a copy of the job evaluation process that she had requested or given clarity as to how either evaluation had been conducted.
29. According to the claimant when she requested an internal job evaluation in November 2017 Mr Murphy asked her to highlight tasks that she undertook that were above and beyond her job description and she provided him with a high-level summary which was not an exhaustive list of her duties. The claimant contended that this approach did not reflect the respondent's job evaluation process which purported to adopt the Hay methodology as it did not compare her duties to her SG24 colleagues in the Northern Ireland PMO or compare her duties to her job specification. There was no observation of the claimant, no interview with her and no job analysis questionnaire. In addition, she was not contacted by HR or the compensation and benefits team to seek an understanding of her duties and responsibilities. The claimant also criticised the local HR team for not being aware of or familiar with the job evaluation process. The claimant was also unhappy that the second process appeared to have used the same information that was collected by Mr Rea and Mr Murphy in the first evaluation. The claimant did not believe that the alleged differences between the SG23 and SG24 grades would stand up to Hay evaluation.
30. The claimant also complained that Mr Rea had stated on numerous times that there would be no new SG24 positions made available in the department and that he believed that SG24 was too high for the role. Mr Murphy was alleged to have made similar comments and that there was no way that the job role of Program Specialist I would be possible at grade SG24 and in 2019 stated during performance feedback that he wished that he had a grade SG24 to give her, but he had not. Mr Rea denied saying that there would be no more grade SG24s in Northern Ireland but rather said that it would be challenging to put a business case together for another SG24 in Northern Ireland based on business need as there were currently three SG24s in Northern Ireland and none in India or China. He denied ruling it out completely. In his witness statement Mr Murphy stated that the demand for services over the years

had never justified or funded the creation of an additional SG24 role within the team and some years just about covered the costs that they had.

31. The claimant commented on the suggestion that a grade SG24 must be a Subject Matter Expert (“SME”) in a functional area outside the PMO. The claimant pointed out that each of the functional examples given were specifically aligned to her comparators’ roles prior to PMO. Mr Cullinan’s SME is operations; Mr Nesbitt’s is engineering, and Mr Kennedy’s is PCDM and supply chain. The claimant contended that they would not be considered or consider themselves to be SME in the stated areas today as these roles date back 9 –10 years. The claimant considered herself by way of example as SME in control systems, 6 Sigma, process improvement, lean product development, NPI and CPI.
32. The claimant also drew attention to her relationship with customers some of whom specifically requested her repeat services rather than an alternative resource in the PMO NI. According to the claimant all of her customers rated her highly.
33. The claimant also emphasised her willingness to travel to meet client needs and provided a number of examples. She also drew attention to the reluctance of some of her comparators to travel at short notice due to family commitments notwithstanding a comment by Mr Murphy that travelling at short notice was the difference between SG23 and SG24. The claimant also volunteered to travel on occasion, and this was turned down and on one occasion Mr Kennedy was chosen but the travel dates didn’t suit, and an agency worker was chosen instead.
34. The claimant was trained in the respondent’s Targeted Selection recruitment and assisted in hiring managers outside her department but was never asked to assist hiring within her department. She advised management of her interest in conducting the New Management curriculum in 2018 but was not requested to conduct training in it. The claimant believed that the reason for withholding this opportunity was to differentiate her from SG24 colleagues.
35. Mr Kennedy gave oral evidence to the tribunal and was cross-examined on it. He joined the SMO in 2008 at grade SG24. His job title from 2012 to 2018 was Senior Project Facilitator. Mr Kennedy performed all of the tasks set out in paragraph 11 of the claimant’s witness statement. Mr Kennedy also agreed with the claimant’s evidence that neither she nor her comparators were Project Leaders but rather in most teams there would be a Project Leader and a PMO representative. Mr Kennedy was unable to articulate any difference between his role and the claimant’s as he was not overly familiar with her role or what she did on a day-to-day basis. In cross-examination Mr Kennedy agreed that some of his work was more complex than the claimant’s but covered the same tasks. In terms of seamless covering when a grade SG24 was out of the office Mr Kennedy explained that if someone was off on holiday someone else would cover the project and made sure that there were no major slippages on the account, and it was a matter of keeping the project ticking over for a period of time. There would be a lot more work up front at the start of a project but a colleague covering absence would not be drawing up plans. The project would then be passed back to its owner on return. Mr Kennedy was asked whether the project charter for Project Trinity would enable a colleague to understand the complexity of the project. Mr Kennedy answered that they would struggle to do so but the charter

gave a good overview of what the project was trying to achieve. A colleague who was covering absence would pick up some of the complexity but not all of it.

36. Mr Rea's evidence was as follows:-

- (1) Historically staff in Northern Ireland have specialised in project coordination work.
- (2) Mr Rea managed the Electric Power Division PMO from November 2010 to 2015.
- (3) Mr Rea managed the claimant during this period.
- (4) During this period the team comprised of the claimant (SG23), Tracy Mooney (SG21), the three comparators (SG24s) and a SG23 and a SG24 based in Georgia USA, both of whom have since left the respondents employment.
- (5) The PMO became part of the wider global project management team in 2017.
- (6) To support the development of the wider team Mr Rea instigated a mentoring programme for more experienced team members in Northern Ireland to partner some of their less experienced colleagues in both China and India.
- (7) Mr Rea also requested team members to provide recordings such as demonstrating the bases of Microsoft projects or how to put together reports that could be shared with the business. Both the comparators and the claimant have been requested to do this in the past and the respondent does not distinguish the salary grades when conducting this work.
- (8) Due to the global nature of the business team members have been requested to travel to various locations worldwide to facilitate and support planning sessions. All the claimant's comparators have done so.
- (9) The GPM team is committed to offering flexibility to staff when and where possible. For example, working reduced hours, compressed four-day weeks, working remotely on ad hoc basis and taking short and long unpaid leave. The claimant has been supported in working from home and taking unpaid leave and working reduced hours (four-day week) for a number of years. The claimant was also supported in her request to move back to full-time hours when she was approaching maternity leave with her second child. This enabled her to use outstanding holiday leave and continue to work a four-day week. The claimant was also allowed to return to a four-day week after her return for maternity leave.
- (10) Mr Rea and Mr Murphy took part in the job evaluation assessment. The claimant was assessed against others doing similar type jobs and against SG23s and SG24s and what they did in their day-to-day role. The analysis was based on the type of work that was being carried out and typical day-to-day responsibilities, the size and complexity of the projects they were involved in

and the impact of these projects on the business. The analysis concluded that there is no differentiation between the claimant's role and other SG23 roles.

- (11) The main points of difference between the SG24 role and the SG23 role according to Mr Rea was as follows:
- a. Process
 - i. Program planning and coordination at Portfolio level.
 - ii. Working large scale projects that are highly complex.
 - b. People
 - i. Acting as a mentor for an assigned team of lesser experienced members of the GPM team globally.
 - ii. Participate in recruitment process, as necessary, to recruit new members to the GPM team.
 - iii. Manage a team of PMO co-ordinators, if necessary, based on previous team leadership experience.
 - c. Tools
 - i. Ad hoc requirements e.g., software migration, internal GPM improvement projects.
- (12) Mr Rea then went on to summarise the projects in which the claimant's comparators were involved in, the complexity of the projects and the high visibility nature of the projects within the business.
- i. Mr Nesbitt was involved in Project Triathlon which covered three Northern Ireland facilities – Monkstown, Springvale and Larne. One of the deliverables of the program was to close the factory at Monkstown and complete the sale of it to a third-party. Some 500 jobs were involved and it was job loss critical. In addition, another output of the project transferred ownership of the Springvale facility to another Caterpillar division. There were multiple sub-projects (48) involved.
 - ii. Mr Kennedy was involved in Project Falcon. This was a complex portfolio (22 sub-projects,) which involved the transfer of 7 complete product lines from other Caterpillar facilities (Gosselies, Arras and Dyersburg) to the Springvale facility. The success of the project was critical to delivering the long-term sustainability of the Springvale facility and the 200 people based there.
 - iii. Mr Cullinan was involved in Project Trinity. This project supported the Building Construction Product division within Caterpillar which was a new area business for GPM. This was essential and critical as regards to

delivering cost savings to the enterprise. Project management support had previously been provided by a third-party Project Management Consultancy, so this project was also delivering \$200,000 project management resource saving per annum. The overall project delivered \$42 million of operating profit after cost of capital. Mr Cullinan was responsible for managing the project management support within Caterpillar (He was not part of the GPM at the start of the project but was identified as a resource to do this based on his skillset and experience), building relationships in Leicester, UK with the client and taking the new project to market. This also involves leading the project set up in India and providing training and coaching to the local GPM team, which included ongoing mentoring.

- (13) Upon concluding their findings and proposed decision on the evaluation this was reviewed with global HR. Mr Rea also went through the analysis with his manager (Jeff Zircher) to ensure that the findings were consistent with their US colleagues as well. All agreed that the process was correctly followed and that the proposed recommendation was correct.
- (14) Mr Rea disagreed with the claimant's assertion that he had stated that there would be no more SG24 roles in Northern Ireland, but he had stated in the past that it would be challenging to put together a business case to justify another SG24 role in Northern Ireland.
- (15) Mr Rea regarded the claimant as a valued member of the team and the respondent bent over backwards to provide her with flexible working on a consistent basis.
- (16) The respondent continued to invest in the claimant's career and to try and position her as well as possible for potential SG24 roles that might become available within GPM or the respondent's wider business.
- (17) Whilst there have been roles at a higher grade that have become available and which the claimant would have been extremely well positioned to apply for, she did not do so and that was a matter ultimately for her own personal choice.

37. Mr Murphy's evidence was as follows:-

- (1) Mr Murphy became the PMO manager on 1 August 2015.
- (2) There was a structural reorganisation in 2017.
- (3) There had been a round of redundancies within the respondent business in 2016 with a focus on reducing costs. It was proposed to absorb the PMO in the GPM. Mr Murphy viewed this as a lifeline for the PMO team in a climate of redundancies and was an opportunity for the PMO team to start supporting projects in other business divisions and locations beyond Northern Ireland.
- (4) Mr Murphy was promoted on 1 June 2000 and Mr Rea became his manager.

- (5) Being part of the GPM brought changes and greater opportunities. Staff were expected to travel but this was not compulsory.
- (6) On the 9 November 2017 the claimant requested Mr Murphy's support in the job evaluation exercise. He emailed his support to her on the 14 November 2017 and asked her for more detail to support her claim. The claimant replied on the 15 November 2017.
- (7) On 22 November 2017 the claimant asked Mr Murphy for an update on the progress of the evaluation. The claimant said that if she did not get a salary increase from the evaluation, she would pursue legal action. Mr Murphy responded - "I would not do that if I were you. There are easier and quicker ways of gaining a promotion than going down that path." According to Mr Murphy this was sound career advice which was misinterpreted by the claimant.
- (8) The job evaluation exercise came up during the 2017 Year End Performance Review. Mr Murphy informed the claimant that progress was being made by HR and that it would be the New Year before she received feedback. Mr Murphy said that he would fully support the process and he made the point that recent threats of legal action were not productive input. The claimant denied mentioning legal action and accused Mr Murphy of lying or mishearing her. The claimant also suggested that Mr Murphy and Mr Rea would re-write the job description in order to prevent her from getting a pay increase. The claimant became increasingly angry and abusive and left the meeting in a temper. The Performance Review Meeting was never completed. In order to avoid escalation Mr Murphy did not approach the claimant for the remainder of the working day. The claimant described this as being subjected to isolation.
- (9) HR analysed and compared the job descriptions for both the SG23 and SG24 roles. HR requested more detail in relation to the activities and responsibilities for each salary grade. Mr Murphy and Mr Rea provided HR with a comparison of the claimant's activities and responsibilities with other SG23 employees within the global GPM team and provided Key Differentiators between the salary grades in question.
- (10) On 29 January 2018 a meeting was held at which the job comparison was shared with the claimant. Mr Boaye (HR) attended the meeting together with Mr Murphy and Mr Rea. The comparison concluded that the claimant's work-related activities were consistent with those undertaken by other SG23s. The claimant seemed to accept this information and asked HR to outline the evaluation process. Mr Boaye took this action away and also agreed after the meeting to reach out to the EAME Compensation and Benefits Team for their input to this job evaluation.
- (11) A further meeting was held on 9 February 2018 attended by Mr Murphy, Mr Boaye, Mr Rea, Greg Young and Maria Dowdswell at which the job comparison was discussed.

- (12) On 27 February 2018 a further meeting was held with the claimant at which the outcome of the evaluation was shared with her. The claimant was informed that evaluation had concluded that the SG23 grade was appropriate to her job function and job activities.
- (13) Mr Murphy went on in his witness statement to provide more information about the structure of the PMO and the allocation of projects. In 2017 the PMO team comprised of six employees- 3 male and 3 female. There were two SG23s and four SG24s. The salary grade of any Project Co-ordinator (“PCO”) would dictate the complexity of the assigned projects. Projects are assigned to the PMO Team according to client requirements, project complexity, skillset and/or experience of the PCO, subject matter experience of the PCO and available capacity across the PMO team. Projects are transferred within the PMO team to achieve the best fit and maintain a balanced workload across the team. The number of PCOs (whether employees or agency staff) and their salary grades that are employed in any given year is based on foreseeable demand. The respondent can only afford as many SG23s and SG24s on the team as the incoming demand for work dictates. If the demand for support for complex projects were to decline the respondent would have to consider reducing the number of SG24 PCOs on the team.
- (14) Mr Murphy then set out what he considered to be “differences of Practical Importance”. According to Mr Murphy, the respondent applies consistent and robust project management techniques in order to deliver continued value to its business partners. To enable this there is a requirement that SG23 and SG24 PCOs to follow consistent working practices but there are differences of practical importance between SG23 and SG24 PCOs. These include increased responsibility, portfolio management, external subject matter expertise, facilitation of training courses, mentoring, participation in interview recruitment panels, managing a team of PMO PCOs, as required, based on previous supervisory experience and additional special assignments such as creation of macros or software evaluation.
- (15) The SG24 is assigned more complex projects, which carry a higher level of responsibility often with a critical business impact (job creation/losses). Such projects would typically form part of higher-level strategic business portfolios. The assigned SG24 would manage the entire portfolio including the facilitation of governance meetings for senior management. This would involve managing all the projects within the entire portfolio or managing the more complex projects themselves and having other projects delegated to less experienced PCOs who would report back to the SG24s on progress. The SG24 would normally possess subject matter experience in areas outside the PMO with extensive experience in areas such as engineering, operations or sales and marketing. This enabled the PMO to provide an enhanced service by providing expertise and insight to project teams on specific issues. PCOs with such expertise are often requested by name by the respondent’s clients.
- (16) Within the GPM the majority of SG24s are managers of teams. The exception to this is where the respondent has team members with extensive skills in Project Management/Co-ordination, specific project management experience

and proven experience of team supervision/management who could expect to be assigned the most complex projects. In addition, with supervisory experience they could be expected to move into a role as a manager of a team on either a temporary basis, maternity cover or special assignment, or permanently. For this reason, team management experience is a prerequisite for the SG24 role. In 2018 Mr Cullinan had to take on the manager role for one year while Julie Burton was on maternity leave. Similarly, Mr Nesbitt had to take over Mr Murphy's role while he was on a one-year career break. The claimant did not possess previous team management experience.

- (17) Mr Murphy set out the projects assigned to claimant and her comparators in 2017 in similar terms to Mr Rea. Mr Murphy further stated that each of projects assigned to the claimant's comparators were too complex for a PCO at SG23 or less. The projects assigned to the claimant in 2017 were I6 Refresh, 4000 Breaker, ADEM5 and XQP20- 100. Mr Murphy described these projects as relatively simple in nature where a precedent existed, and complexity and risks were low. The claimant was also asked to support a project in Bologna, Italy which involved travel to Italy. The claimant was delighted at the opportunity and jumped at the chance. This was a new client and a new product for the PMO team, but the complexity and risks were deemed low. All of these projects were firmly within the expectations of a PCO at SG23.
- (18) Mr Murphy also stressed the need to maintain a differentiation between SG23 and SG24 roles but did state that the actual differentiation between the grades may have changed since the creation of a Northern Ireland based PMO in 2006 and may continue to change based on demand but at any one time there would always be a difference in the complexity of the projects allocated and the expectations placed on a PCO at SG23 as against one at SG24. In order to maintain the differential between SG23 and SG24 responsibilities and to respect the claimant's shorter working week, Mr Murphy ensured that the claimant's mentee list was considerably shorter than those of SG24s. The claimant was allocated 2-3 mentees whereas SG24s were given 6-7 mentees.
38. Ms Amanda Dunn gave evidence on behalf of the respondent in relation the job evaluation process and other matters relating to her dealings with the claimant. Mr Boaye who appears to have taken the lead in this particular case is no longer in the respondent's employment and was not called to give evidence. Ms Dunn has worked in the respondent's HR Department for 21 years. She explained that on a request that a job evaluation be undertaken HR would work with the Department Manager to document the main activities carried out as part of the job role. Consideration would be given to the percentage of time spent on each activity. Once the job evaluation was completed HR and the Department Manager would meet with the employee in question to seek input regarding work tasks and time spent. A matching activity will then place where the job roles/descriptions will be reviewed to determine the best match. As a rule of thumb, the HR Department looked for an 80% match to the generic job description. Once a match has been determined a meeting with the Department Head and HR Manager will take place to review the data and any conclusions. Feedback will be given to the employee. It would not be normal protocol to ask the Compensation and Benefits team to conduct a job evaluation on an existing role as it is responsible for evaluating new roles.

39. A chart was included in the hearing bundle which mapped out a comparison between the claimant's SG23 role and four other SG23s.
40. The comparison chart compared a number of areas listed under Candidate Discussion Points - quantity of projects, complexity of projects, types of projects, travel expectations, Training mentoring on-board GPM and non-GPM project management colleagues, training of project team mentoring, giving cover for SG24s, team lead/supervising and other.
41. A similar chart was provided described as a Job Activities Comparison between SG23s and SG24s which had 7 categories - Quantity of projects, complexity/type of projects, travel expectation, training/mentoring/onboarding of GPM (and non - GPM) project management colleagues, covering for SG24 colleagues, team lead/supervisory, subject matter expert. The quality of projects was not a valid measure for SG23s or SG24s. In terms of complexity/type of projects the SG23 was expected to perform any type of project for existing customers. SG24s were expected to perform any type of project, for existing or new customers, where no precedent existed. Where this is new business the SG24 coordinator is expected to establish the relationship with the product/business manager and to develop and carefully manage that relationship. Travel expectation for both SG23s and SG24s was as and when required. Training/mentoring/onboarding of GPM (and non-GPM) project management colleagues was undertaken by both SG23s and SG24s as and when required as was covering for SG24 colleagues. In terms of a team Lead/Supervisory role SG23s had none according to the entry in this column. For SG24s the text read required to be a dedicated mentor with an assigned team of mentees, the mentor must schedule regular 1-2-1 meetings for coaching, training, career development and sometimes personal issues. SG23s were not required to be a subject matter expert For SG24s the text for this requirement read "Must be an SME in a functional area outside the PMO e.g., operations, engineering, PC&DM, supply chain, purchasing etc."

SUBMISSIONS

42. The tribunal had the benefit of oral and written submissions by both representatives. The written submissions are appended to this decision.

Claimant's Submissions

43. The main focus of the claimant's submissions was on the claimant's comparators.
 - (1) Mr Nesbitt - The respondent relied upon Mr Nesbitt leading Project Triathlon at the time of the evaluation in December 2017. The claimant contended that as this project began in October 2016 long after Mr Nesbitt had been awarded SG24 status it could not be used to justify how he was originally awarded a SG24 role. Mr Nesbitt was also said to be responsible for multi programme sub-sets and had engineering and product knowledge experience. The claimant also has this experience.

- (2) Mr Kennedy - The respondent's case placed Mr Kennedy in charge of Project Falcon at the relevant time. Mr Kennedy gave evidence to the tribunal that he did not lead Project Falcon. Paedre Doyle was identified as project lead in the bundle. According to Mr Kennedy neither he nor the other comparators undertook the role of project lead but rather they all assisted the project leader in the delivery of the relevant project. Further, Mr Kennedy's involvement in Falcon was only since its inception in April 2017. He had been an SG24 since he was recruited in 2008 and therefore this could not be used to justify his grade SG24 role in 2018. Mr Kennedy also gave evidence that the job description that the respondent applied to the three comparators was not in fact the correct job description for these roles. He identifies another document which is more suited to his role. It was submitted that the job evaluation was therefore fundamentally flawed as it was based on the wrong job description. As the respondent used the wrong job description in conducting the job evaluation as regards Mr Kennedy the material factor defence and justification was fundamentally flawed.
- (3) Mr Cullinan - The respondent's evidence was that Mr Cullinan was in charge of the building construction projects including Project Trinity which was a new area of business. Mr Cullinan was not identified as the project lead in the project documentation. The claimant contended that even if it was a new area of business, it could not justify him being appointed as a grade SG24 on joining the PMO.
44. Ms Best submitted that the claimant like her comparators has autonomy as to how her duties were carried out and how she managed her own clients and projects. Mr Kennedy agreed with the claimant that neither he, she nor the comparators undertook the role of project lead. They all assisted the project leader in the delivery of the project. Ms Best drew attention to the omission of at least one project in the job evaluation. Mr Murphy admitted that this was a mistake.
45. Ms Best submitted that the claimant does like work to the comparators and any differences were not of practical importance in relation to terms and conditions of employment.

Respondent's Submissions

46. The respondent disputed that the claimant was engaged in like work to her comparators during the six years preceding her claim in July 2018. Mr Bloch submitted that the claimant's evidence about what she and her comparators did in their day-to-day work was not sufficient to discharge this evidential burden. There was no evidence that the duties that the claimant and her comparators engaged in between 2010 and 2017 are the same and the claimant's focus was instead on the list of projects that the comparators worked on. Mr Kennedy's evidence was that the charters for the project that the claimant worked on give no meaningful account. There are no dates of projects or details of the comparators, and the claimant just provided a generic list of their duties and subsets. In relation to covering for colleagues Mr Bloch placed reliance on Mr Kennedy's evidence that this just means keeping the work ticking over. Mr Bloch drew attention to the respondent's evidence that there is no requirement for the claimant to train; she had no supervisor experience and was not required to conduct job interviews. Further, the claimant was given less mentoring than her colleagues according to Mr Rea.
47. Mr Bloch stressed that the tribunal needed to concentrate on the work that was actually undertaken rather than how a job description or contract of employment describes the job and the duties entailed in it and there was no evidence of the claimant's or the comparators' duties prior to the 2017 evaluation.
48. Mr Bloch accepted on behalf of the respondent that there was no appeal procedure in relation to the job evaluation but pointed out that the claimant could have raised a grievance had she chosen to do so.
49. Mr Bloch submitted that if the claimant was engaged in like work there was a genuine material factor defence which did not involve gender due to the significance and involvement in the projects of the three comparators. Mr Bloch further submitted that in the event that the claimant persuaded the tribunal that she was engaged in like work to her comparators the respondent had provided a material factor defence. It did not matter whether it was a good or bad defence as long as it was not tainted by sex. Mr Bloch submitted that there was no evidence that the claimant's treatment was tainted by sex.

Claimant's Re-Joining Written Submissions

50. Ms Best pointed out that mentoring was first introduced for the comparators in October 2017 after they had been assigned grade SG24 positions therefore it is not a reason for the original grading. In addition, the claimant was asked to take over the mentoring of six individuals. The requirements for training came after the comparators had been appointed grade SG24.
51. The claimant is trained in the respondent's targeted selection recruitment program and has assisted managers outside her department. The introduction of interview training for the three comparators only began after the claimant had requested a job evaluation. Supervisory experience is not a prerequisite for a SG24s. Mr Bloch sought to criticise this submission on the basis that it was not based on evidence.

52. Ms Best submitted that in light of discovery laterally provided the claimant was clearly working at portfolio level. The projects at the bottom of the pyramid feed into programs which in turn feed into portfolios. The respondent's evidence is that the I6 refresh is a portfolio but the discovery shows that the I6 Refresh portfolio consisted of a number of programs which subsequently split into three phases. The claimant has been managing portfolios from 2015.
53. In relation to the material factor defence Ms Best submitted that once the claimant proved that she as a female was doing like work to three males in the same office it was automatic that her treatment was tainted by sex.

Additional Evidence

54. At the submissions hearing on 12 January 2023 the parties provided tables which compared the duties of the claimant and her comparators. As these were difficult to follow the parties were asked to re-visit these table and see if they could agree on a comparison table. In the event agreement was not possible and both parties produced new tables. The hearing was adjourned to 7 March 2023 to enable the parties to consider the evidence further and produce comparative tables to assist the tribunal in its consideration of the evidence and submissions.
55. In the event agreement was not reached and when the tribunal reconvened on 7 March 2023 additional evidence was presented in the form of a further statement by Mr Murphy together with additional documentation including tables. Ms Best also provided new tables and further supporting documentation. The tribunal was satisfied that it should receive this material.
56. Mr Murphy's evidence was that some of the projects were listed at program level and within each of these programs were lower sub projects. The higher-level projects in the table were listed in order to keep the table as concise as possible without listing all the individual sub projects. According to Mr Murphy the key difference between his comparative table and the claimant's table concerned which projects were included in the 'I6 Refresh' program. I6 stands for "In line 6" which refers to a caterpillar engine with six cylinders arranged in a straight-line configuration. Refresh refers to product improvements and/or product cost reductions. In Mr Murphy's table all of the sub projects listed alongside I6 Refresh included some degree of product improvement and/or cost reduction. Therefore, all such projects fall within the 'I6 Refresh' program and all such sub projects are included when a reference is made to 'I6 Refresh'.
57. In Mr Murphy's evidence to the tribunal he explained that the C9/1506 Phase 2 Project was not listed separately in the SG23 versus SG24 Comparison Chart because he considered it to be part of the I6 Refresh.
58. In response to this explanation and Mr Murphy's oral evidence to the tribunal Ms Best drew attention to a further document produced by the respondent entitled Product Engineering – I6 Projects and Phases which she submitted showed that the I6 Refresh Portfolio consisted of a number of programs which were split into phases. Ms Best further submitted that the claimant was managing this portfolio from 2015 as

referenced in her performance reviews. Mr Bloch did not accept that the claimant worked at portfolio level. Mr Bloch referred the tribunal to Mr Murphy's statement in which he described Project Triathlon as the most important portfolio (with 48 sub-projects) in progress for the respondent at that time and also drew attention to Projects Falcon and Trinity which were also complex portfolios. Mr Bloch went on to describe a portfolio as a complex bundle of work for an internal client supported by programs and projects and submitted that they were not comparable portfolios to the claimant's. Ms Best objected to this latter point on the basis that it was not given in evidence and drew attention to the lack of clarity in the respondent's evidence.

59. Mr Bloch reiterated that the claimant had to produce sufficient evidence to establish that she engaged 'like work' to her comparators and if she succeeded in doing so the employer must put up a defence that is not tainted by sex. It did not have to be a good defence.
60. Ms Best also produced a helpful glossary which described in relatively straightforward terms some of the technical terms deployed during the hearing and in the comparative table provided on behalf of the claimant which is appended to this judgment.
61. Ms Best also relied on a number of legal authorities to underpin her submissions. Firstly, Ms Best relied on **Shields v Coomes (Holdings) Ltd 1978 ICR1159, CA** in which it was held that 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 employee. Drawing on this Ms Best submitted that three matters that require consideration:
 - (1) Was the work of the same or a broadly similar nature?
 - (2) Were any differences of practical importance?
 - (3) The legal burden rests on the woman claimant.

Ms Best submitted that the first question should be answered in the claimant's favour and the evidential burden then shifted to the respondent to prove that there were differences which were of practical importance.

62. Ms Best also placed reliance on **Adamson and Hatchett Ltd -v- Cartledge EAT 1264/77** in which 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."
63. In this context Ms Best drew attention to the claimant's evidence as supported by Mr Kennedy and criticised the chart drawn up by the respondent as an ex post facto document produced well after everyone had been assigned grades in face of litigation and care should be taken in using it as a basis for justifying differences in work as it is a self-serving document. It was also clear from the chart that the claimant was working at portfolio level with the I6 Refresh portfolio and the projects which fed into it.

64. In relation to the material factor defence Ms Best placed reliance on **BMC Software Ltd v Shaikh [2019] ICR** at paragraph 1057 G where Underhill LJ stated:- “If an employer is going to seek to justify a pay disparity based on a factor such as the comparator’s promotion or superior “merit” or “market forces” it needs to be able to explain with particularity what those factors mean and how they were assessed and how they apply in the circumstances of the case. It is evident from the tribunal’s findings that BMC was simply unable to do that because of its chaotic and wholly non-transparent “employment systems”. The equal pay risks in having non-transparent pay systems is a common place of equal pay law.” Applying these comments to the present case Ms Best characterised the respondent’s evidence as chaotic and wholly non-transparent. Ms Best also placed reliance on the **Danfloss (Case 109/88) [1991] ICR 74** regarding the absence of transparency.
65. The first question is a legal question which is whether the employee is engaged in like work or broadly similar work. The evidential burden rest on the employee to prove this and it is then for the employer to demonstrate a material factor defence. It is for the respondent to prove whether the differences are of practical importance, and it has failed to do this. The respondent relied on the claimant’s statement with no cross examination of her based om lack of evidence. Ms Best submitted that there was no evidence as to when they were so graded by the decision maker and that is fatal to the respondent’s defence. Ms Best further submitted that the tribunal needed to look at why they were given the grades that they were and salary at that time. Ms Best also drew attention to a first instance judgment by an Employment Tribunal in **Samira Ahmed v BBC (10 January 2020)** in which it was held that the claimant’s work on “Newswatch” was like Jeremy Vine’s work on “Points of View”. The BBC tried to justify the difference in pay and was criticised for not calling evidence from the original decision makers as to the rates of pay [see paragraphs 154 to 155 of decision]. Ms Best pointed out that in the present case the tribunal had not heard from anyone involved in the original decision and that all that was available was a self-serving document produced when going to legal and a cobbled together a defence. Ms Best submitted that the respondent had to show how the grading in the PMO was arranged, justified and based.
66. Ms Best also placed reliance on **Calmac Ferries Ltd v Wallace [2014] ICR 453** in which it was stated that where a pay disparity exists the statute requires an explanation of the differences. Ms Best submitted that this was not provided by the respondent in the present case.
67. Ms Best submitted that being responsible for a portfolio was not part of the material factor defence. The performance review conducted by Mr Murphy stated that the claimant has a wide portfolio. Ms Best submitted that the claimant’s case was copper fastened by her working on a portfolio.
68. Ms Best described the respondent’s defence as shambolic with the respondent in a chaotic state trying to justify its position and the tribunal should expect more of the respondent whose approach to the case could be characterised as a movable feast. Accordingly, the claimant does like work and the burden shifted to the respondent.

69. Ms Best further submitted that the tribunal was obliged to take account of paragraph 102 of the EHRC Code of Practice on Equal Pay which deals with pay transparency as follows:

“Pay Transparency

Transparency means that pay and benefits systems should be capable of being understood by everyone (employers, workers and their trade unions). It should be clear to individuals how each element of their pay contributes to their total earnings in a pay period.

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.”

Based on this passage Ms Best submitted that the pay structure should be transparent with a clear basis for any differences. If an employee is able to show some element of disparity the employer must show that the pay system does not discriminate. Ms Best submitted that as the claimant is the only female in the team of four in the PMO this demonstrates a taint of sex discrimination.

70. Ms Best also relied on paragraph 21 of **Glasgow City Council & Others v Marshall and Others [2000] IRLR 272** to submit that there was rebuttable presumption of sex discrimination and that the respondent must satisfy the tribunal that the reasons for the disparity are genuine and not a sham and are the cause of the disparity.
71. Ms Best submitted that the respondent could not rebut this presumption as it did not call the decision maker and was trying to justify ex post facto that it is not guilty of direct or indirect sex discrimination. A relic may be a material factor but there was no evidence of this.
72. Ms Best also relied on **Capper Pass Ltd v Lawton [1977] ICR 83** in which the Employment Appeal Tribunal stated at page 87 paragraphs G to H.

“It seems to us that in most cases the inquiry will fall into two stages. First, is the work the same, or, if not, “of a broadly similar” nature? This question can be answered by a general consideration of the type of work involved, and of the skill and knowledge required to do it. It seems to us to be implicit in the words of subsection (4) that it can be answered without a minute examination of the detail of the differences between the work done by the man and the work done by the woman, But, secondly, if on such an examination the answer is that the work is of a broadly similar nature, it is then necessary to go on to consider the detail and to inquire whether the differences between the work being compared are of “practical importance in relation to terms and conditions of employment.” In answering that question the industrial tribunal will be guided by the concluding words of the subsection.”

Respondent’s Further Submissions

73. Mr Bloch took issue with the contents of the claimant's additional submissions and drew attention to Mr Murphy's explanation of the differences between the respective lists of functions. Mr Bloch submitted that there were two differing views. Mr Bloch also relied on Mr Murphy's evidence about that the steps he took following the previous submissions hearing to align the differences between the two tables. Mr Murphy's evidence also addressed the I6 Refresh project (see paragraph 56 above). Mr Bloch further submitted that the claimant produced no evidence of mentoring experience, training, interviewing or supervising and the claimant does not engage in training and interviewing.
74. During the course of submissions Mr Bloch clarified that Project Triathlon was a portfolio with programmes and sub-projects. Mr Bloch also accepted that the claimant did some mentoring but no interviewing. The respondent did not accept that Mr Nesbitt, Mr Kennedy and Mr Cullinan were project leads. Ms Best pointed out that Mr Kennedy was not challenged on this aspect of his evidence. Mr Bloch submitted that the 2017 job evaluation was a snapshot and the chart was not a job evaluation. Ms Best commented that this was produced for the purposes of litigation. Mr Bloch reminded the tribunal of the job evaluation but accepted that it was not a counsel of perfection and was based on Hays methodology. Ms Best commented that nor was it complete. Mr Bloch reiterated the points made in the response to the request for additional information in relation to the claimant and her comparators.

CONCLUSIONS

75. The main focus of this case was the roles undertaken by the claimant and her comparators in the PMO office. The PMO office was set up in 2006. There is no evidence before the tribunal as to who set it up and how it was staffed in 2006.
76. It was agreed that the work undertaken by the respondent had a pyramidal hierarchy with projects at the bottom feeding into programs which in turn fed into portfolios. The respondent's evidence in relation to the claimant and her three comparators focussed on their work on projects. However, any impression that all the comparators led their respective projects was undermined by both Mr Kennedy's evidence that he did not lead Project Falcon and the Project Trinity documentation which showed that the Mr Cullinan was not identified as a project lead. Further, as Ms Best pointed out Mr Nesbitt's promotion to SG24 long preceded his involvement in Project Triathlon.
77. The claimant also gave unchallenged evidence that her comparators were assigned training and mentoring roles after her request for a job evaluation. While the respondent might understandably wish to take steps to differentiate between the SG23 and SG24 grade going forward these changes cannot be used to support the job evaluation undertaken in 2017.
78. We are satisfied that the claimant's evidence to the tribunal contained sufficient detail of the projects that she was involved to discharge the evidential burden of showing that she was at the relevant time engaged in like work to her comparators. We are further satisfied that any differences were not of practical importance. The burden therefore shifts to the respondent.

79. The material factor defence put forward by the respondent relied on four factors - job activities, complexity of work, type of project and that the SG24 role is a mentor/lead whereas the SG23 role is not.
80. The most prominent feature of the material factor defence as set out in the respondent's reply to the request for additional information was being the Project Lead. As noted above this aspect of the respondent's evidence was undermined significantly by Mr Kennedy.
81. The respondent's case shifted somewhat during the course of the hearing with the emphasis moving from leading projects to being responsible for portfolios of work. The tribunal is conscious of the need to avoid being misled by terminology and focussing on the work that was being undertaken but it seems odd to say the least that the reply to the request for additional information did not use this term. In any event we are satisfied that the claimant was also responsible for a portfolio and therefore this is not a valid point of distinction.
82. Much of the respondent's evidence focussed on what SG24s were expected to do and while Mr Rea and Mr Murphy gave concrete examples of these so did the claimant.
83. The claimant's witness statement contained many examples of situations where she felt that she was treated badly by her employer. Little evidence was called to rebut this, but we do not need to found our judgment on this as the claimant did not seek to rely on it in submissions and was content to rest her case of sex discrimination on the fact that the three other members of the PMO office were all male.
84. The tribunal also considered the role of the respondent's Human Resources department in the evaluation exercise undertaken of the respective posts. We consider that while Mr Murphy and Mr Rea acted honestly and did their best to evaluate the posts fairly it would have been better had Human Resources played a more prominent role in this process. Mr Boaye was involved but he is no longer employed by the respondent and was not called to give evidence.
85. Having given careful consideration to all of the evidence and the competing submissions we are satisfied that the claimant was engaged in like work to her comparators. All were engaged in portfolio work and while it is clear that many of the projects within the comparators' portfolios were of greater importance and involved substantial sums of money contracts and job saving the essential work was broadly the same or similar. The burden therefore shifts to the respondent to prove that the variation between the claimant's contract and those of her comparators or any of them is genuinely due to a material factor. As set out above the factors relied upon by the respondent are: job activities, complexity of work, type of project and the SG24 role being a mentor/lead whereas the SG23 is not. Further details were set out in the respondent's reply to the claimant's Notice for Additional Information/Written Answers dated 16 October 2019. At the core of the respondent's material factor defence lie the complexity of work and type of project on which the claimant and her comparators were engaged. Our finding in respect of like work takes all of this information into account. It seems clear that SG24s are allocated more complex and important work than SG23s. There was no suggestion that the claimant as an SG23 was not capable

of undertaking such projects rather it was simply the case that such projects were not allocated to her. Thus, in a rather circular and self-perpetuating manner the claimant could never on the respondent's case be evaluated as SG24 due to the nature of the work that she was required to do. Further, the evidence suggests that a substantial part of the reason for not creating a SG24 post for the claimant was financial in that the PMO was self-funding and needed to be able to cover its salaries. While this is an entirely legitimate and understandable concern it does not and cannot feature in the material factor defence and certainly not as pleaded. For these reasons we are not satisfied that the material factor defence has been made out.

86. Accordingly, we conclude as follows:

- (1) The claimant is engaged in like work to her comparators and any differences were not of practical importance in relation to terms and conditions of employment.
- (2) The respondent has not proved that the variation between the claimant's contract and those of her comparators is genuinely due to a material factor which is not tainted by sex.
- (3) The claimant is entitled to have an equality clause incorporated in her contract. A draft clause was provided to the tribunal, and this is appended to our judgment. As it has been agreed that the issue of compensation will need to be considered separately the draft equality clause does not include figures in respect of the claimant's modified salary or the difference between that and her current salary.

Employment Judge:

Date and place of hearing: 14-16 November 2022, 12 January 2023 and 7 March 2023, Belfast

This judgment was issued to the parties on:

This judgment will be entered in the register within 7 days.

Draft Equality Clause

The term in the claimant's contract in relation to annual salary is modified to £ [INSERT AMOUNT] (the same as that of Mr Kennedy or Mr Nesbitt or Mr Cullinan) from date of claim 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 £ X in respect of the difference between the claimant's gross annual salary of [£ INSERT AMOUNT] and her modified gross annual salary of [£ INSERT AMOUNT] going forward from 9th July 2018 (claim date) to X (decision date).

