Neutral Citation Number: [2020] EWCA Civ 1075

Case No: A2/2019//3016/EATRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HON LORD SUMMERS
UKEAT/0087/19

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/08/2020

Before :

LORD JUSTICE BEAN
LORD JUSTICE MALES
and
LORD JUSTICE PHILLIPS

- -

Between :

SAMANTHA WALKER	**Appellant**
- and -	
(1) CO-OPERATIVE GROUP LIMITED	**Respondent**
(2) RICHARD PENNYCOOK	

- -
- -

Daphne Romney QC (instructed by **Charles Russell Speechlys LLP**) for the **Appellant**
Andrew Burns QC and **Alice Carse** (instructed by **Addleshaw Goddard LLP**) for the **Respondents**

Hearing date: 23 July 2020

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Approved Judgment

Lord Justice Bean:

1. Samantha Walker was employed by the Co-operative Group Ltd ("the Co-op") from 25 March 2013 to 4 April 2017. By a claim issued in the employment tribunal ("ET") at Manchester on 29 September 2017 she made numerous claims, some of them also against Richard Pennycook, the Co-op's Chief Executive Officer. They were as follows:

    a) Equal pay;

    b) "Ordinary" unfair dismissal;

    c) Automatic unfair dismissal within s 103A of the Employment Rights Act ("ERA") 1996 (relating to protected disclosures);

    d) Detriments on the grounds of protected disclosures within s 47B of the ERA 1996;

    e) Victimisation because of protected disclosures: s 27 of the Equality Act ("EA") 2010;

    f) Direct sex discrimination;

    g) Indirect sex discrimination;

    h) Associative indirect disability discrimination: s 19 of the EA 2010;

    i) Associative discrimination arising from disability: s 15 of the EA 2010.

2. The hearing took place over ten working days before Employment Judge Sherratt and two lay members. Both parties were represented by Queen's Counsel: Simon Devonshire for the Claimant and Andrew Burns for the Respondents. The tribunal was occupied for seven working days in deliberation and drafting. Their judgment, promulgated on 13 November 2018, runs to no less than 397 paragraphs and is a thorough examination of every aspect of the claims. Their conclusion was that:-

    1. The Claimant was unfairly dismissed by the first respondent (this was "ordinary" unfair dismissal under s 98 of the ERA 1996).

    2. The Claimant's work was, from a date to be determined, equal to that of her named comparators, having been rated as equivalent in a job evaluation study ("JES"). The defence of material factors failed.

    3. The Respondents directly discriminated against the Claimant on the ground of sex in relation to the decision to grade the Claimant's performance as only "partially achieved" for 2015 without an adequate year end appraisal.

    4. All other claims were dismissed against both Respondents.

3. The employers appealed against the finding on equal pay and the rejection of the material factor defence; Mrs Walker cross-appealed against the rejection of her direct

discrimination claim other than in relation to the grading of the Claimant's performance for the year 2015.

4. The hearing at the Employment Appeal Tribunal was heard in London by Lord Summers, sitting alone. He allowed the employers' appeal against the decision on equal pay; dismissed their appeal against the limited finding of direct sex discrimination in respect of the year-end appraisal (there has been no appeal to this court on that aspect of the case); and dismissed Mrs Walker's cross-appeal on direct sex discrimination.

5. Mrs Walker now appeals to this court with the permission of Simler LJ on both equal pay and direct sex discrimination.

The facts

6. The Co-op promoted Mrs Walker to the role of Group Chief HR Officer ('CHRO') in around February 2014. She had previously been Director – Group HR Strategic Projects. By early 2014 her base salary was £215,000**.**

7. The Co-op was not in a healthy state at the start of 2014. At a meeting of the Group Remuneration and Appointments Committee ('Remco') on 26 February 2014, the Group CEO, Euan Sutherland, explained the background to proposed changes to the executive team. A paper on Executive Structure and Remuneration was considered at a Remco meeting on 4 March 2014. It emphasised the need for an executive team with the potential to deliver a critical transformation of the business. The ET noted:

> "The executive agenda was said to be possibly the most complex one facing a large business in the country at that time involving fixing a business on the verge of financial collapse, turning around the food business after years of neglect, re-forming a membership system that was faltering from a fundamental disconnect, effecting a major governance change, rediscovering the purpose of the mutual sector's largest contributor, redefining the social goals agenda to create a forceful campaigning organisation, balancing the highly sensitive political agenda across all of Westminster, removing the taint of scandal and refreshing an iconic national brand. The objectives of the remuneration proposals were:
>
> - Retention of continuing executives through the transformation period (the next 3-4 years);
> - Reflection of increased roles and responsibilities in the remuneration packages where appropriate;
> - Standardisation of the packages and terms for new executives;
> - Bringing consistency to executive packages and contractual terms."

8. The Co-op put members of the executive team into tiers: the CEO in Tier 1, the COO in Tier 2; the Divisional Chief Executives in Tier 3 and Mrs Walker, Paula Kerrigan (Strategy Director), Nick Folland (Chief External Affairs Officer) and Alistair Asher (Group General Counsel) in Tier 4. The Tier 4 band was £350-550,000.

9. After a lengthy discussion at Remco on 4 March 2014 it was agreed that the salary for Mrs Walker's role, as well as that of the Strategy Director (Ms Paula Kerrigan), would be £400,000 to reflect that both were new to executive roles. Mrs Walker's salary was later increased to £425,000 when, as the ET found, she "pushed back a little".

10. The equal pay claim named Mr Folland (NF) and Mr Asher (AA) as comparators. Mr Folland's salary had been set taking into account what was described as his "deep experience that will ensure that we develop and sustain the internal and external relationships that are vital to our future success"; he was also to work on the reform of the Co-op's membership system. Mr Asher's 30 years of experience in the legal profession, including as a senior partner in Allen & Overy, and his "significant role in the design of the business model which ultimately saved the Bank from resolution [sic]" , were taken into account when determining his level of salary and other benefits.

11. For the Respondent before the ET Mr Burns put forward four material factors:

    a) Vital roles –the Co-op saw AA and NF as vital to the immediate survival of the Co-op. They were part of the core team who with RP refinanced the Bank and reformed governance so that the Co-op was not regarded as ungovernable and bound to fail. The Claimant and a strong HR function were important but not regarded as vital, as was AA and NF's core work.

    b) Executive experience –Remco considered that both the Claimant and Paula Kerrigan were newly promoted to the Executive and unproven at that level, unlike everyone else on the team at that time. The proposed increase from £215,000 to £500,000 seemed excessive for individuals who had no experience at executive level. Remco did not feel there was any justification for more than doubling their salaries in those circumstances.

    c) Flight risk –it was crucial in the eye of the storm to maintain stability and the top team of people and support the interim CEO. Euan Sutherland had recruited NF as his Chief of Staff and AA as his corporate lawyer, but then left abruptly. There was an understandable concern that they might consider following him out. Had either of them followed him then that could have brought down the Co-op.

    d) Market forces –AA was on a higher pay package as he was a top corporate lawyer with particular expertise in the Co-op Bank separation and was paid at the high market rate for top general counsel. This exceeds the market rate for CHROs.

12. In their findings of fact the ET accepted that when Remco fixed the salaries of Mrs Walker and her two comparators in February and March 2014 these four material factors applied and were not related to sex; and that each of these material factors was

at that time a reason for the difference in pay between Mrs Walker and her two comparators.

13. In the latter half of 2014 the Hay Group was appointed to develop a group wide grading structure to introduce consistent grades across all the different businesses which made up the Co-op Group. To provide a ceiling, in February 2015 the work of the two comparators and Mrs Walker had been rated by a JES which scored Mrs Walker's role higher than the roles of her comparators.

14. It was common ground that the Hay JES was presented to Mr Pennycook in March 2015. The Claimant, as CHRO, started communicating its findings within the Co-op at the end of the summer of 2015. However, the ET accepted Mr Pennycook's evidence that the contents of the JES were not communicated to Remco.

15. In October 2015 Mr Pennycook prepared a confidential note to non-executive directors of the Co-op proposing that with immediate effect Mrs Walker should report to the Chief Operating Officer, Pippa Wicks, to allow Mrs Walker to continue to pursue the operational HR agenda while Ms Wicks would be responsible for executive level HR and interactions with Remco.

16. There followed a period of discussion with Mrs Walker about her future role but no agreement was reached by 25 March 2016, when she began a period of sick leave.

17. On 1 April 2016 the Co-op gave Mrs Walker 12 months' notice of the termination of her employment in a letter from Mr Pennycook, which so far as material stated:

> "We have spoken over the last three months about the changes that we want to make to the HR function. As indicated to you and for the reasons that I explained, we are now at the point where those changes have to be implemented and so I am writing, formally, to give you 12 months' notice to terminate your employment with the Group, as required under your service agreement with the Group. Unless you accept a new role with the Group, your employment will terminate on 2 April 2017 when your notice expires."

18. The ET found at **[296]:**

> "In our judgment the reason for the dismissal was that set out in Mr Pennycook's 1 April 2016 letter, to the effect that the first respondent needed to make changes to the HR function and they were now at the point where the changes had to be implemented and so she was formally given 12 months' notice to terminate employment as required under the service agreement, but with the opportunity for the employment to continue after the end of the period of notice should the claimant accept a new role on different terms within the Group."

19. Mrs Walker (unusually, as it seems to me) served the entire 12 month period of notice and left the Co-op on 4 April 2017.

The equal pay provisions of the EA 2010

20. Sections 64-66 and 69 of the 2010 Act provide, so far as relevant:

> **"64. Relevant types of work**
>
> (1) Sections 66 to 70 apply where—
>
> (a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;…….
>
> **65. Equal work**
>
> (1) For the purposes of this Chapter, A's work is equal to that of B if it is—
>
> (a) like B's work,
>
> (b) rated as equivalent to B's work, or
>
> (c) of equal value to B's work.
>
> …………..
>
> (4) A's work is rated as equivalent to B's work if a job evaluation study—
>
> (a) gives an equal value to A's job and B's job in terms of the demands made on a worker……
>
> (6) A's work is of equal value to B's work if it is—
>
> (a) neither like B's work nor rated as equivalent to B's work, but
>
> (b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.
>
> **66. Sex equality clause**
>
> (1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.
>
> (2) A sex equality clause is a provision that has the following effect—
>
> (a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;
>
> (b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term……

…

69. Defence of material factor

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

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

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

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

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

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

The equal pay claim in the ET and EAT

21. The ET made the following findings:

> "315. The Tribunal is prepared to accept that when the Remuneration Committee fixed the salaries of the claimant and her comparators in February and March 2014 the four material factors referred to above applied to the claimant and to her comparators. Those factors do not seem to the Tribunal to be in any way related to sex. There is no reason why the roles fulfilled by any of the relevant people could not have been fulfilled by people of the other gender.
>
> 316. Having accepted that there were material factors justifying the pay differentials between the claimant and her comparators at the time of their salary increases in February and March 2014, we have also found that by February 2015 their work had been rated by a job evaluation study with the role performed by the claimant scoring higher than the roles of her comparators.
>
> 317. We are aware that the important roles carried out by the claimant's comparators in connection with the saving of the Co-op were reducing in importance up to the time of the salaries being fixed and thereafter. We are aware that what was referred to as the rescue phase finished at the end of the third quarter of

> 2014 and that the recovery phase started from October 2014. At some stage between February 2014 and February 2015 in our judgment the importance to the respondent of the roles carried out by the claimant's comparators declined relative to the importance to the respondent of the work being done by the claimant, particularly in respect of the recovery phase. In our judgment the value of the claimant's job had on the basis of the job evaluation study, albeit by slim margins, overtaken those of her comparators by the time of the study.
>
> 318. In these circumstances we find that the historical explanations for the pay differential given at the time the pay was set were no longer material at the time of the Hay job evaluation study and that value of the claimant's work was equal to that of her comparators.
>
> 319. The point at which the claimant gained the right to equal pay with her comparators is a matter that falls to be determined as part of a remedy hearing as set out in the List of Issues."

22. In the EAT Lord Summers allowed the Co-op's appeal against this finding. He accepted two submissions of Mr Burns for the employers: firstly, that there had been no new decision about pay since March 2014, and therefore no basis for finding that the material factors accepted by the ET as of that date had ceased to be operative; secondly, in the alternative, that there was inadequate evidence to support the decisions that the material factors had ceased to apply.

The direct discrimination claim in the ET and EAT

23. The ET upheld one aspect of the direct discrimination claim. They found that the Respondents had discriminated because of sex against Mrs Walker in assessing her performance in 2015 as only '*partially achieved'.* The ET accepted that two male colleagues, Mr Bulmer and Mr Murrells, were material comparators who were '*arguably not treated as harshly in their assessments as was the claimant."* These were identified as facts from which the ET could infer direct discrimination. The ET went on to ask whether the Respondents had discharged the burden of showing that Mrs Walker's treatment was *'in no sense whatsoever'* due to sex and concluded that they had not.

24. However, the ET rejected the remainder of the direct discrimination claim. They found that the dismissal was for the reasons given in Mr Pennycook's letter of 1 April 2016 giving 12 months' notice (namely the reorganisation of the HR function); and that it was for some other substantial reason ("SOSR") justifying dismissal.

> "296. In our judgment the reason for the dismissal was that set out in Mr Pennycook's 1 April 2016 letter, to the effect that the first respondent needed to make changes to the HR function and they were now at the point where the changes had to be implemented and so she was formally given 12 months' notice to terminate employment as required under the service agreement, but with the opportunity for the employment to

> continue after the end of the period of notice should the claimant accept a new role on different terms within the Group.
>
> 297. This is consistent with the view expressed by Mr Pennycook as long ago as October 2015 when he proposed to the Remuneration Committee making an immediate change to have the claimant report in to the COO to allow her to continue to pursue the operational HR agenda whilst Pippa Wicks will pick up Exec level HR and the interactions with the Remuneration Committee. The changes to the HR function following the giving of notice to the claimant were consistent with the stated intention.
>
> 298. We find that the reasons set out in writing by the respondent when giving notice to the claimant under her service agreement, which were the only reasons for dismissal given to the claimant in the absence of any formal process, were the reasons for the dismissal and that they amounted to substantial reasons justifying the termination of the employment of the claimant holding the CHRO position that she held."

25. In the section of their decision dealing with the allegations of discrimination they went on to reject the allegation that Mrs Walker's dismissal was tainted by sex discrimination. As to that they held:

> "368. The fifth matter is the decision to give the claimant notice on 1 April 2016. In this regard the claimant compares herself with a hypothetical and/or Messrs Folland, Asher, Bulmer and Murrells. We know that Messrs Folland and Asher were given notice where Messrs Bulmer and Murrells were not. The circumstances in which Messrs Folland and Asher left were different from the claimant because when they were given notice it was with a view to them leaving, whereas with respect to the claimant contractual notice was given with the possibility of her, during the notice period, agreeing a new role to take effect at the end of the period of notice. As things transpired there was no such agreement.
>
> 369. We remind ourselves of the letter of notice referred to above at paragraph 228 to the effect that the company wanted to make changes to the HR function and they needed to be implemented. On this basis we are satisfied that the claimant and/or the hypothetical comparator holding the CHRO position would both have been given contractual notice to terminate their roles together with an invitation to find a new role during the notice period failing which they would leave at the end of it. We do not therefore conclude that the giving of notice was an act of direct discrimination against the claimant because of her sex."

26. The EAT dismissed Mrs Walker's appeal against the rejection of the claim for sex discrimination in relation to her dismissal. Lord Summers dealt with this aspect of the case in a single paragraph:

> "24. I am not satisfied that the Respondent have [*sic.*] demonstrated any error of law in connection with the ET's decision that the notice of termination and the termination of employment were not acts of direct sex discrimination. In my view the ET was entitled to conclude that the Appellants' reason for dismissal was their wish to make changes in its HR function (paras. 296-298; 369). While there is a competing narrative, it is for the ET to evaluate the reasons for the notice and subsequent termination. I am unable to conclude that the ET's view was perverse and note that there was material to support its conclusions; see e.g. the Note of proposed changes in October 2015 (para 297); the dismissal letter (para 228) and Mr Pennycook's note to non-executive directors of October 2015 (paras 175-6). I am satisfied that the conclusion reached was one that was open to the ET; I am further satisfied that no sufficient basis has been laid with which to challenge the ET conclusion."

Grounds of appeal

27. On the equal pay aspect of the case Daphne Romney QC (who did not appear below) submits that (a) once the ET had accepted that the material factors which originally justified the pay differentials between the Claimant and her two comparators in February 2014 no longer did so by February 2015, they were entitled to find that the equal pay claim succeeded from at least that date and there was no basis for the EAT to interfere; (b) the EAT misapplied the burden of proof, the burden being on the employer to show a material factor; and (c) the EAT misunderstood the ratio of *Benveniste v University of Southampton* [1987] ICR 617 as requiring a fresh decision, or omission to act, to displace a material factor where the circumstances justifying the material factor no longer applied.

28. On the direct discrimination appeal, Ms Romney submitted that the ET erred in law in dismissing Mrs Walker's claims against both the Co-op and Mr Pennycook that the decision to give her notice and the termination of her employment were acts of direct sex discrimination. The EAT, she argued, was thus wrong to reject Mrs Walker's appeal against that aspect of the ET's findings.

The parties' submissions: equal pay

29. Ms Romney QC for the Appellant submitted that the ET's reasoning (at paras 314-319), though compressed, was a clear finding that while the four material factors were valid explanations of the pay differential in February / March 2014, they were no longer material by 12 February 2015 when the JES was accepted by the Respondents, being by that point "historical explanations". Ms Romney emphasised the shift in the importance of Mrs Walker's role relative to her comparators from at least after the rescue period ended in October 2014. She argued that, notwithstanding the EAT's interpretation in *Bainbridge v Redcar & Cleveland Borough Council* [2007] IRLR 494, as upheld by this court at [2007] IRLR 984, an equivalent or higher score for the

claimant in a JES can be evidence pointing to equal value even for the period before the JES came into effect – as Elias P pointed out in *Hovell v Ashford & St. Peter's Hospital* [2009] ICR 1545. The burden of proof was on the Co-op to show that a factor remained material; the burden was not on Mrs Walker to disprove materiality. Following Lord Nicholls in *Marshall v Glasgow City Council* [2000] 1 WLR 333 HL at 339C-340B, the sex equality clause at s 66 of the EA 2010 has effect unless the employer shows that there is a material factor explaining the difference in terms which is unrelated to sex.

30. Conversely, and contrary to the EAT's reasoning, *Benveniste* is not authority for the proposition that a new decision, or a failure to make such a decision, is needed to displace the previous material factors. The fallacy of that proposition could be tested by the hypothesis that were it true, a claimant could never claim arrears for the period between the time a sex equality clause came into operation, and the time at which a fresh decision was made to close the pay differential on the basis of the sex equality clause, which would (said Ms Romney) be absurd. Neither is the reason why a material factor "evaporates" to do with the length of time that has elapsed, but whether there are circumstances that render a material factor immaterial. Even if practically, the university employer in *Benveniste* only considered salary changes in an annual cycle, that was irrelevant to the basis of the decision, which was that the pay differential had evaporated from the point at which the financial constraints in question no longer existed.

31. The same principle was applied in *Secretary of State for Justice v Bowling* [2012] IRLR 382, though in that case, because one of the material factors (that the comparators had started on different points on an incremental pay scale), though historical, continued to obtain, it continued to negate the effect of the equal pay clause. Ms Romney QC submitted that the authorities show the correct question to be how long an employer can "hang on" to a historical explanation for the pay differential that prima facie breaches a sex equality clause.

32. Andrew Burns QC for the Respondents submitted that with relation to the material factors under section 69 EA 2010, "material" means "causative", as opposed to "justificatory", following Lord Nicholls' analysis in *Marshall*. A factor is material if it is the cause of the pay differential, as opposed to being an objective justification or "good reason" for it. The question is then whether the material factor is tainted by sex. The ET's mistake was to find that the material factors were no longer material by 12 February 2015 because, on the basis of the JES, Mrs. Walker's job was rated as at least equivalent to those of her comparators. That was a mistake of law because on 12 February 2015, the causes of the pay disparity with her comparators remained the four material factors, none of which, as the ET found, was tainted by sex. *Bainbridge* and *Bowling* both supported the proposition that historical factors can be material if they are still causative. Where a factor is causative, it cannot simply evaporate; something else must happen to produce a new cause for the pay differential. That is why, for example, recruitment premiums can continue for years, if they remain the causative factor of the pay differential.

33. Mr Burns further submitted that even if (which was not accepted) the "vital roles" material factor was no longer causative by the time the JES study was accepted by Mr Pennycook on 12 February 2015, there remained three other material factors (flight risk, executive experience, and market forces) each one of which was fatal to the claim.

The parties' submissions: the direct discrimination appeal

34. Ms Romney QC submitted that the ET erred in law because whether the Respondents' decision to give notice, and ultimately dismiss, Mrs Walker was tainted by sex discrimination had to be tested by reference to the reason for dismissal in fact advanced and relied upon by the Respondents in their evidence at the hearing (which was poor performance), and not some other reason. The ET found that Mrs Walker was treated more harshly than her comparators over the performance issues said to justify the level of bonus she was awarded, so that the burden of proof shifted to the Respondents to prove that there was no discrimination whatsoever. They failed to do so on that issue. Yet the ET did not go on to apply the same conclusion to the performance issues ostensibly relied upon by the Respondents as justifying the decision to give notice. This is illogical. The ET failed to take any account of the chain of causation between a discriminatory view of Mrs Walker's performance and the decision to dismiss her. Had it done so, it would have concluded that the discriminatory appraisal and/or Mr Pennycook's views about her, her performance, and her reaction to the restructure, was an underlying part of the decision to dismiss, so that it could not be said that there was no discrimination whatsoever in the decisions to give notice of dismissal and then to dismiss.

35. Mr Burns QC observed that Mrs Walker no longer challenges the ET's finding of fact that the reason for her dismissal was the one set out in the letter giving her notice – namely that the Co-op wanted to make changes to its HR function. Her challenge is put on the basis that the ET erred in law by failing to consider whether a reason *not* found by the ET to be the reason for the dismissal was discriminatory. That, it was submitted, was bad in law. If a claim of direct discrimination for dismissal is to succeed, the actual reason for dismissal needs to be discriminatory.

Discussion

The equal pay appeal

36. The basis of the equal pay claim was that the Claimant's work was rated as equivalent to that of Mr Folland or Mr Asher by the job evaluation study carried out by the Hay Group and presented to Mr Pennycook in February 2015: indeed, Ms Romney emphasised, her job was scored slightly more highly that that of either of the two comparators. I am not greatly impressed by Mr Burns' point that the JES results were not communicated to Remco at that stage. The ET found at paragraph 312 that Mr Pennycook accepted the Hay evaluations of the roles, including those of Mrs Walker and her two comparators "in the full knowledge of the Claimant's score relative to the scores of all of the other executive roles". That is sufficient for it to form the basis of a claim under s 65(1)(b).

37. There was a debate between counsel about whether a "trigger event" is required to set up an equal pay claim. Ms Romney advanced what seemed to me to be an ambitious argument that in the latter part of 2014, once the crisis had begun to abate, the Co-op were under a continuing duty to review the differences in pay between Mrs Walker and her comparators. She relied on the decision of this court in *Benveniste v University of Southampton* [1989] ICR 617. In that case the claimant was appointed as a lecturer at a time when the university was operating under financial constraints. It was agreed that by reason only of such constraint her salary would be lower than the normal figure for

her age and qualifications. When the financial constraints ended (a concept which would sadly be inconceivable in the current financial climate in higher education) the employers failed to increase her salary to the rate paid to four male comparators engaged on like work. There was no relevant distinction between the applicant and the comparators on the basis of skills or experience. This court upheld the claim for equal pay. Neill LJ said at 628A:-

> "The case was argued on the basis that the 1981 constraints came to an end at the end of that year *or of that academic year*. In my judgment, therefore, the material difference between the Applicant's case and the case of the comparators evaporated when the financial constraints were removed."[Emphasis added]

38. Ms Romney emphasised the word "evaporated" used by Neill LJ. But her argument gives it a weight which it cannot bear, for several reasons. The first is that as Neill LJ said earlier in the judgment (at 624H), and as is so well known as to be a matter of judicial knowledge, "[academic] salaries seem to be fixed at the beginning of the academic year": the annual consideration of lecturers' pay was an obvious fresh decision if any was required. Secondly, the case was decided before *Glasgow City Council v Marshall* [2000] 1 WLR 333 and must therefore be viewed with caution. Thirdly, since it is a case in which there had been only one material factor operating at the time of the claimant's appointment at a lower salary than that of her male comparators, and that material factor had ceased, the result of the case seems obvious (though I do note that the claimant had failed in both the ET and the EAT).

39. Any suggestion that a JES can be relied on with retrospective effect in a claim for equal pay under what is now s 65(1)(b) of the EA 2010 is defeated by the judgment of this court in *Redcar & Cleveland BC* v *Bainbridge* [2009] ICR 133. The relevant point is succinctly made in the headnote: "where a claimant's job is rated as equivalent with a comparator following a job evaluation scheme, the statutory language looks to the present and to the future but not to the past." As Elias LJ observed in *Hovell v Ashford & St Peter's Hospitals NHS Trust* [2009] ICR 1545 the position may be different for a claim based on like work or work of equal value, but that is inapplicable in the present case.

40. The ET were entitled to find that the JES established that as of February 2015 Mrs Walker's job was rated as equivalent to those of Mr Folland and Mr Asher, but that does not mean in itself that her claim was bound to succeed. The ET had accepted that in February 2014 there were four material factors distinguishing her case from that of Mr Asher and three in relation to Mr Folland. That brings me to *Glasgow City Council v Marshall*, which both Ms Romney and Mr Burns accepted is (so far) the leading case in equal pay law. At page 339 Lord Nicholls of Birkenhead said:-

> "The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge 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 this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a 'material' factor, that is, a significant and relevant factor. Third, that the reason is not 'the difference of sex'. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within section 1(2)(c), may be a 'material' difference, that is, a significant and relevant difference, between the woman's case and the man's case.
>
> When section 1 is thus analysed, it is apparent that an employer who satisfies the third of these requirements is under no obligation to prove a 'good' reason for the pay disparity. In order to fulfil the third requirement he must prove the absence of sex discrimination, direct or indirect. If there is any evidence of sex discrimination, such as evidence that the difference in pay has a disparately adverse impact on women, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity.
>
> Some of the confusion which has arisen on this point stems from an ambiguity in the expression 'material factor'. A material factor is to be contrasted with an immaterial factor. Following the observations of Lord Keith of Kinkel in *Rainey v Greater Glasgow Health Board* [1987] A.C. 224, 235, the accepted synonym for 'material' is 'significant and relevant'. This leaves open the question of what is the yardstick to be used in measuring materiality, or significance and relevance. One possibility is that the factor must be material in a causative sense. The factor relied on must have been the cause of the pay disparity. Another possibility is that the factor must be material in a justificatory sense. The factor must be one which justifies the pay disparity. As already indicated, I prefer the former of these two interpretations. It accords better with the purpose of the Act….."

41. As Underhill P observed in the EAT in *Secretary of State for Justice v Bowling* [2012] IRLR 382 at para 7:-

> "To label [an explanation for a difference in pay] as "historical" is not helpful. All causes are, in one sense, historic in that they occur in the past: the real question is whether they have ceased to operate as an explanation for the differential complained of as at the date under consideration."

Thus in the *Bowling* case an incremental pay scale had been the original cause of the differential in pay between the claimant and her comparators, and it remained the cause at the time of her claim.

42. In the present case the critical question is whether all the material factors which, as the ET found, explained the pay differential between Mrs Walker and either Mr Asher or Mr Folland in February 2014 had ceased to operate as an explanation for the difference in February 2015. In the case of Mr Asher there is simply no finding that the market forces which explained why a commercial lawyer of his experience had to be remunerated at a particular level if he was to be attracted to the job had ceased or even diminished. Ms Romney implicitly accepted this by concentrating her argument on the comparison between the Claimant and Mr Folland. The three material factors which had been found to apply to him in February 2014 were "vital role", "executive experience" and "flight risk".

43. On the "vital role" issue Ms Romney points to the ET's finding at paragraph 317 that "at some stage between February 2014 and February 2015, in our judgment, the importance to the Respondent of the roles carried out by the Claimant's comparators declined relative to the importance to the Respondent of the work being done by the Claimant, particularly in respect of the recovery phase".

44. I am not sure that this can be interpreted as a clear finding of fact that Mr Folland's role was no longer more vital than Mrs Walker's. But even if it can, Ms Romney is in more difficulty on the subject of executive experience. I have noted earlier the view expressed by Mr Pennycook to Remco in February 2014 that Mr Folland had "deep experience that will ensure that we develop and sustain the external and internal relationships that are vital to our future success" and that he would continue to work on the reform of the Co-op's membership system. His salary on first appointment in May 2013 had been £350,000; it was increased to £425,000 in July 2013 when his responsibilities were expanded; and in February 2014 it was further increased to £550,000. The ET did not find, and there is no material referred to in their decision in reliance on which they could have found, that the greater executive experience of Mr Folland by comparison with Mrs Walker had ceased 11 or 12 months later to be causative of the difference between his pay and hers. Whether it *justified* the difference was not a question for the ET: that is the ratio of *Marshall.*

45. As to the material factor of flight risk, Ms Romney argued that since Mr Folland was given notice in January 2015 this was no longer a material factor on which the Co-op could rely. I entirely disagree. Either Mr Folland remained a valid comparator in February 2015 or he did not. If he did, the differential in pay which had arisen in February 2014 continued to be explained one year later by the fact that his pay had been set at a level high enough to persuade him not to leave. In any event the material factor of greater executive experience in Mr Folland's case was enough on its own for the Co-op's defence to succeed.

46. The ET's conclusion on equal pay at paragraph 318 was that "the historical explanations for the pay differential given at the time the pay was set were no longer material at the time of the Hay job evaluation study and that [the] value of the Claimant's work was equal to that of her comparators." With respect, this overlooks the fact that in respect of each of the two comparators there was at least one material factor, if not more than one, which remained causative of (or which explained) the differential in pay. Lord

Summers was therefore right to allow the Co-op's appeal and not to remit the equal pay claim to the ET for further consideration.

The direct discrimination appeal

47. Like the ET and the EAT, I regard this as a straightforward matter. The decision under scrutiny is the giving of notice to the Claimant on 1 April 2016 to terminate her employment 12 months later. The ET had found that the reason for the dismissal was the reorganisation and that it was SOSR justifying the termination of her employment. At paragraphs 368-369 they found that any hypothetical male comparator holding the CHRO position would, like the Claimant, have been given contractual notice to terminate his role together with an invitation to find a new role during the notice period, failing which he would have left at the end of it.

48. Ms Romney argues that the decision to give notice to the Claimant was attributable partly to Mr Pennycook's unfavourable view of her performance; that the ET found that his 2015 year-end appraisal of her performance was discriminatory; the dismissal decision was thus tainted by discrimination and that the tribunal should have found that the employers had failed to discharge the burden of proving that it was not.

49. But, as Lord Hope of Craighead DPSC said in *Hewage v Grampian Health Board* [2012] ICR 1054, the burden of proof provisions "have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other". Like Lord Summers in the EAT I consider that the ET was entitled to conclude that the reason for dismissal was the Co-op's wish to reorganise its HR function. As he said, "while there is a competing narrative, it is for the ET to evaluate the reasons for the notice and subsequent termination". Ms Romney was reduced to arguing, in effect, that having found against the Respondents in respect of the year-end appraisal at paragraph 366 of their decision, the ET must have forgotten that when reaching their conclusions about the dismissal at paragraphs 368-369. Plainly they had not.

Conclusion

50. I would dismiss the appeal on both grounds.

Lord Justice Males:

51. I agree that this appeal should be dismissed on both grounds for the reasons given by Bean LJ. I add some observations on the equal pay claim because it appears to me, with respect, that the approach of the ET does not fully reflect the scheme of the statutory provisions at sections 64 to 70 of the Equality Act 2010.

52. Bean LJ has set out the essential findings and reasoning of the ET at [21] above.

53. In summary, it appears that the ET (1) treated Mr Folland and Mr Asher as comparators of Mrs Walker at the time when salaries were fixed in February and March 2014, (2) found that the four material factors applied at that time, (3) found that those factors "justified" the pay differential, (4) found that between February 2014 and February 2015 the importance of Mr Folland's and Mr Asher's roles declined, while that of Mrs Walker's increased, so that by February 2015 the value of her job had overtaken theirs, (5) found that, as a result, "the historical reasons" for the pay differential "were no

longer material" and (6) deferred for the remedy hearing determination of the precise date at which that had occurred.

54. The essential starting point for an equal pay claim is proof that the claimant (A) "is employed on work that is equal to the work that a comparator of the opposite sex (B) does". As section 64 of the 2010 Act makes clear, only then does consideration of the statutory sex equality clause and the possibility of a material factor defence become relevant. The ET did not find that Mrs Walker's work was equal to that of Mr Folland or Mr Asher from the time when she took on her new role in February 2014, but only that it had become equal between then and February 2015, leaving the date at which this had occurred to be determined later. In my judgment that was not a satisfactory approach, either conceptually or practically. Conceptually, it left unresolved the essential starting point for Mrs Walker's claim. Practically, it ran the risk that much of the case would have to be re-litigated as part of the remedy hearing. The ET should either have made a finding as to the date on which Mrs Walker was doing work which was equal to that of a named comparator or should have found that she had failed to prove this at any stage before February 2015.

55. It was, therefore, potentially misleading for the ET to analyse the position in terms of whether a material factor defence applied as at February 2014. The true position, on the ET's findings, was that Mrs Walker's work was not equal to that of Mr Folland or Mr Asher at that time, so that an equal pay claim would not have got off the ground: the statutory equality clause had no application, the issue of material factor could not arise, and there was no need to "justify" the pay differential.

56. There were two ways in which Mrs Walker could seek to prove that, thereafter, she was employed on work that was equal to the work of a comparator. First, she could rely under section 65(1)(b) and (4) on the findings of the job evaluation study, but that spoke only about the position as at February 2015 and had no retrospective effect (*Redcar & Cleveland Borough Council* v *Bainbridge* [2008] EWCA Civ 885, [2009] ICR 133). It appears that this is the principal way in which Mrs Walker put her case. Second, she could seek to prove as a fact under section 65(1)(c) that her work was of equal value to that of a comparator at some stage earlier than February 2015. It is not clear to me whether she ever sought to identify a time before February 2015 when this had occurred but, in any event, the analysis of the ET is confined to the passage set out by Bean LJ at [21] above. Essentially, the ET seems to have found that the importance of Mr Folland's and Mr Asher's jobs had declined relative to Mrs Walker's, presumably because by February 2015 they had largely succeeded in performing the "vital roles" for which they were being handsomely remunerated, which were to ensure "the immediate survival of the Co-op": by February 2015 the rescue phase had been completed and the recovery phase was under way.

57. Ultimately, the only positive finding which the ET made in this regard was that Mrs Walker was employed on work that was equal to that of Mr Folland and Mr Asher by February 2015. In my judgment, therefore, there was no basis in the findings made by the ET to apply the provisions of sections 66 to 70 of the 2010 Act at any date before February 2015.

58. Perhaps because it was wrongly focusing on the existence of material factors in February 2014, the ET has unfortunately failed to make findings about the position of Mr Folland as at the relevant date of February 2015. At paragraph 147 the ET recorded

without comment the evidence of Mr Pennycook that Mr Folland had left the Co-op in January 2015, but it seems clear that this was a mistake. The parties' agreed chronology states that Mr Folland was made redundant in May 2015, while Ms Romney's submission on the issue of "flight risk" was on the basis that he was given notice in January 2015 but actually left in May. It appears that there was no dissatisfaction with his performance. Rather, Mr Pennycook's evidence was that "the company could not find a role big enough for his skills at the end of the rescue phase".

59. I would wish to have heard argument on how the fact that Mr Folland was given notice in January 2015 affects any comparison between him and Mrs Walker as at February 2015 for the purpose of an equal pay claim. On the face of things, it would appear that Mr Folland was an employee who had been given notice, essentially because he was being paid more than was really justified by his role in the company, and was due to leave within a few months. I find it hard to see how such an employee can be a valid comparator for the purpose of sections 64 to 70 of the 2010 Act.

60. The other comparator relied on was Mr Asher. As at February 2015, but not before, Mrs Walker's contract had to be treated as including a sex equality clause which had the effect under section 66 of modifying her contract so that it was no less favourable to her than Mr Asher's was to him -- in other words, to provide for equal pay; but section 69 provided that this would have no effect if the Co-op could show that the difference in pay was "because of a material factor". As is clear from *Glasgow City Council v Marshall* [2000] 1 WLR 333, there are two issues here: the first is causation (the employer must prove that the reason for the difference is not "difference of sex"); the second is materiality (the employer must prove that the factor relied upon is "significant and relevant"). Proof of these matters is sufficient for the defence of material factor to succeed. The employer is not required to prove that the pay disparity is justified.

61. In the present case the ET found that the difference in pay was "justified" as at February 2014, but that "the historical explanations for the pay differential given at the time the pay was set were no longer material at the time of the Hay job evaluation study". As I have sought to explain, the issue of "justification" or even of "material factor" did not arise as at February 2014. Nevertheless it is clear in my judgment that in saying that the historical explanations "were no longer material" by February 2015, what the ET meant was that the differential could no longer be justified. That, however, was answering the wrong question.

62. It is not apparent that the ET ever asked itself what was the reason for the pay differential between Mrs Walker and Mr Asher as at February 2015. If it had done so, however, the only possible answer on the facts found would have been that it was (at least) because of market forces. The ET had found that in February 2014, when executive salaries were set, Mr Asher "was paid at the high market rate for top general counsel"; and that this had nothing to do with sex discrimination. There was nothing to suggest that this had ceased to be a reason why he was paid more one year later. To dismiss this explanation as "historical" misses the point. What matters is that it was indeed the explanation for the pay difference.

63. On the footing that he was a relevant comparator, the same analysis applies in the case of Mr Folland. The reasons why he was paid more than Mrs Walker were because, when his salary was set, he was viewed as performing a vital role in ensuring the

survival of the Co-op, to which he brought considerable executive experience, and because it was thought that if he were to leave, that could have brought down the company. These reasons likewise had nothing to do with sex discrimination. They remained the reasons why he was paid as much as he was a year later, although it had been recognised that by then they had lost much of their force: the solution was that Mr Folland would leave the company.

64. Accordingly the equal pay claim must fail. I have nothing to add on the direct discrimination claim.

Lord Justice Phillips:

65. I agree that the appeal should be dismissed for the reasons given by Bean LJ. I also agree with Males LJ's observations as to the proper approach to an equal pay claim.