THE INDUSTRIAL TRIBUNALS

CASE REFS: 1128/15
1130/15

CLAIMANTS: **1. Paulina Paczkowska (Nee Czaplo)**
2. Agnieszka Anna Golygowska

RESPONDENT: **Avoca Handweavers (NI) Limited**

DECISION

The unanimous decision of the tribunal is that the respondent has failed to establish a material factor defence to explain the disparity in pay of the claimants and has not rebutted the presumption of sex discrimination. The claimants therefore succeed in their equal pay claim and are entitled to a rate of pay equal to that paid to Radek Widoniak from May 2013.

Constitution of Tribunal:

Employment Judge: **Employment Judge Greene**

Members: **Ms L May**
Mr C McIlwaine

Appearances:

The claimants were represented by Ms S Bradley, of counsel, instructed by the Equality Commission for NI.

The respondent was represented by Mr N Phillips, of counsel, instructed by Worthingtons Solicitors.

SOURCES OF EVIDENCE

1. The tribunal heard evidence from the claimants and, on behalf of the respondent, from Nicole Brennan O'Dwyer, Nicola Kerr-Small and Dennis Ryan. The tribunal also received three bundles of documents amounting to 405 pages and a bundle with legal authorities.

THE CLAIM AND DEFENCE

2. The claimants claimed that the respondent was in breach of the Equal Pay Act (Northern Ireland) 1970 resulting in a financial loss to them. The respondent denied the claimants' claims and asserted that it had a complete defence to any claim under the Equal Pay Act by virtue of the "material factor" defence.

3. **THE ISSUES**

The agreed issues were as follows:-

Legal Issues

(1) Can the claimant establish that she has a right to equal pay under;

(a) Section 1 of the Equal Pay Act (Northern Ireland) 1970?

(b) Article 119 of the Treaty of Rome, now Article 141 of the European Union Treaty?

(c) Article 4 of the Recast Directive 2006/54/EC?

Insofar as the pleaded claims rely on breach of the Equal Pay Act (Northern Ireland) 1970 application is made to amend to include breach of Article 119 of the Treaty of Rome, now Article 141 of the European Union Treaty and Article 4 of the Recast Directive 2006/54/EC.

(2) Has the respondent a defence under Section 1(3) of the Equal Pay Act (Northern Ireland) 1970?

(a) Is the reason relied upon for the disparity in pay, market forces, a genuine reason?

(b) are market forces the reason for the disparity?

(c) is the market forces' defence tainted with direct sex discrimination?

FACTUAL ISSUES

(1) What is the reason for the pay disparity between the claimants and their comparator?

(2) Who set the rate of pay for Mr Widoniak and for the claimants?

(3) What were the market factors used in setting rates of pay?

(4) Were the market factors genuinely taken into account when setting the rates of pay?

(5) Were market forces applied in 2007 when setting the rate of pay for Katarzyna Okrzesik or Eugene Blagoci who undertook barista duties?

(6) Was any review of the market forces' reasons carried out between 2007 and 11 June 2015?

(7) What market forces were applicable at the date of lodgement of the IT1 on 11 June 2015?

(8) Does the post of barista, for which the respondent alleges it pays a premium for specialist skills, really require those skills?

(9) Can the respondent distinguish between the pay attributable to the value of the job and that attributable to market pressures?

(10) Do the alleged market factors justify all the pay differential between the claimants and their comparator?

(11) If the claimants succeed in their claims from what date should their contracts be modified?

The parties proposed and the tribunal accepted, that the tribunal would deal with the liability issue only because if the claimants succeed, their loss is simply a matter of a mathematical calculation.

FINDINGS OF FACT

4. (1) The first claimant, Paulina Paczkowska, was born on 25 April 1983. She began working with the respondent on 19 April 2011 as floor staff-cum-barista. She did barista duties alongside Radek Widoniak from May 2013. Between May 2012 and 2013, according to her grievance, she did barista duties intermittently.

(2) The second claimant, Agnieszka Anna Golygowska, was born on 26 June 1984. She began working for the respondent on 21 April 2012 as a barista-cum-floor staff employee.

(3) The respondent is a limited liability company which engages in the sale of household goods and soft furnishings as well as operating a coffee shop and food-hall in premises in the centre of Belfast. The respondent is part of a larger group which has been trading as a hand-weaving business since 1723. It has a number of stores in the Republic of Ireland and opened a store in Belfast in 2007.

(4) When the respondent established itself in Belfast in October 2007, it employed a number of people, including a floor staff-cum-barista person called Mr Radek Widoniak. At the beginning the business was very busy. The employees, including Radek Widoniak, were employed on the minimum wage. However in February 2008 Mr Widoniak received an increase of pay from £5.50 to £7.50 per hour. Within one month of appointment in October 2007 Radek Widoniak changed his job to that of waiter. He only worked as a barista to cover for the absence of another employee, Eugene Blagoci.

(5) The respondent, in the course of the hearing, advanced a number of reasons for the increase of wages paid to Radek Widoniak which were;-

(a) that at the start the business was very busy and the respondent needed to retain Radek Widoniak, whom it regarded as a strong employee, and it did not wish to lose his services. There was not, however, any evidence before the tribunal that Radek Widoniak was about to leave his employment with the respondent or was seeking employment elsewhere or was being "head-hunted" by a third party or was dissatisfied in his employment. In fact the evidence before the tribunal, in an email of 24 January 2008, indicated that he was very happy in his job with the respondent.

(b) that Radek Widoniak had a greater length of service. The respondent, having pleaded this as one of the reasons for the disparity in pay between Mr Widoniak and the claimants, right up to and including the lodging of its response, subsequently abandoned this as a material factor at a Case Management Discussion on 7 December 2015.

(c) that the respondent was having regard to the rates of pay that were applicable in the Republic of Ireland, which were higher than those payable in Northern Ireland. However most of the members of staff, on the respondent's own evidence, were employed initially on minimum wage so this reason does not seem to explain the disparity either.

(d) that Radek Widoniak had asked for a wage increase and he received it.

(6) The respondent also argued during the hearing that the claimants could not receive a higher rate of pay because the financial situation of the respondent company would not justify that. However when Radek Widoniak received his initial pay rise the financial situation of the company was even worse than when the claimants were employed, but it was paid.

(7) In 2008, according to the respondent, the recession hit business in general and caused it to apply a 5% cut in wages across the group at all grades with the exception of those on minimum wage. The pay cut was coupled, according to the respondent, with a pay freeze until 2010 when small increases were given to a number of staff.

(8) Mr Radek Widoniak started in the respondent company on minimum wage in October 2007. In February 2008, some four months later, he received a £2 per hour increase (36.36%) bringing his pay to an hourly rate of £7.50. At the beginning of 2009, like all other employees, he suffered a 5% cut in his pay bringing his hourly rate to £7.13. In the first quarter of 2010 Mr Widoniak received a pay increase of 50p per hour (7.01%) bringing his pay to £7.63 per hour. In the last quarter of 2011 Mr Widoniak received another pay rise of 62p per hour (8.13%) bringing his pay to an hourly rate of £8.25. In 2015 he benefitted from a 2.5% increase in salary, that was applied across the group at all grades, bringing his rate of pay to £8.46 per hour.

(9) Mrs Pauline Paczkowska (nee Czaplo), the first-named claimant, began working for the respondent on 19 April 2011. She was employed at the

minimum wage, then applicable, of £5.93 per hour. In the final quarter of 2011 she received a 2.53% increase in pay, by reason of a rise in the national minimum wage, to £6.08 per hour. In the last quarter of 2012, following a further increase of the minimum wage (1.81%), her wages went up to £6.19 per hour. In August 2013 following a request by her, her wages were increased by 7.11% to £6.63 per hour. In April 2015, following the 2.5% increase across all grades within the group, her wages went up to £6.79 per hour and she has remained on that wage since.

(10) Miss Agnieszka Anna Golygowska, the second-named claimant, began working with the respondent on 21 April 2012. She was employed on minimum wage of £6.08. In the last quarter of 2012, following a 1.81% increase in the national minimum wage, her hourly rate was increased to £6.19. In October 2013 her hourly rate was increased by 62p (9.98%) to £6.81, following a request from her for an increase in her salary. In April 2015 she also benefited from the 2.5% increase to all staff thereby giving her an hourly rate of pay of £6.98 at which rate she has remained since.

(11) The respondent has conceded that the claimants and Radek Widoniak, certainly from May 2013, were all doing like work as floor staff-cum-baristas. The respondent further accepted that there was a disparity in pay as between Radek Widoniak and the claimants. The respondent also stated that both the claimants and Radek Widoniak were strong employees.

(12) The respondent also refers to pay increases which were given in 2007 to Alisa Friel and Nicola Small. However both individuals had been promoted to higher grades and the respondent has conceded that this resulted in higher rates of pay. Their situations are not of any relevance in these claims.

(13) The respondent also referred to other employees Eugene Blagoci and Kasia Okrzesik who were employed from December 2007 on the minimum wage. They did barista duties with Radek Widoniak from February 2008. Eugene Blagoci left the respondent's employment in September 2009. Throughout his period of employment he was employed on the minimum wage. In 2012 Kasia Okrzesik was promoted to supervisor and got a pay rise by reason of her promotion. She left the respondent's employment in May 2013. Their situations are therefore not relevant to these claims.

(14) The respondent concedes that it does not have a structured pay scheme within the business. It appears the financial controller, from the group as a whole, sets out certain rates of pay or increases or reductions that are applied across the group but there is a degree of discretion which resides with managers of local establishments to deal with or to implement the rates as they think appropriate. Pay increases, the tribunal was told, are usually at the discretion of the manager.

(15) In April 2015 the respondent applied a 2.5% increase across the group to restore some of the losses suffered by its employees by reason of the recession. The respondent's pay freeze had ceased in 2010. On 18 December 2014 the second claimant, (Mrs Paczkowska), lodged a grievance in relation to her wages, citing the disparity between her wages

and those of Radek Widoniak. The second claimant (Ms Agnieszka Golygowska) lodged a grievance on the same date for the same reason.

(16) On 20 May 2015 the claimants met with the respondent's representative in relation to their grievances. At the grievance meeting the respondent accepted that both claimants were doing exactly the same duties as Radek Widoniak. On 3 June 2015 the respondent replied to the claimants, dismissing their grievances, and stated that the disparity in wages as between the claimants and Radek Widoniak was due to length of service and market factors, not gender.

(17) The claimants lodged their claims under the Equal Pay Act (Northern Ireland) 1970 on 17 July 2015.

THE LAW

5. (1) Section 1 of the Equal Pay Act (NI) 1970, in so far as it is relevant to this claim, provides:-

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

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

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

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

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

(3) An equality clause falling within Section 1(2)(a), (b) or (c) shall not operate in relation to a variation between a woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor –

(a) in the case of an equality clause falling within Section 1(2)(a) or (b) must be a material difference between the woman's case and the man's; and

(b) in the case of an equality clause falling within section 1(2)(c), may be such a material difference (Section 1 Equal Pay Act (Northern Ireland) 1970).

(2) Once a woman has proved that she is employed on like work, ... , then an equality clause will operate in her favour unless the employer can demonstrate that the variation in contract terms is due to a material factor other than sex. ... In effect therefore, proof of like work, ... requires an explanation of some kind from an employer if he wishes to avoid the operation of the equality clause ... . In **Glasgow City Council –v- Marshall [2000] IRLR 272 HL**, Lord Nicholls put the matter in the following terms (at paragraph 18):

> '[A] Rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman doing like work ... to that of a man, is being paid or treated less favourably than the man. The variation between their contract and the man's contract is presumed to be the difference of sex.'

(Harvey on Industrial Relations and Employment Law K Section 8 [502]).

(3) The burden then passes to the respondent to establish its defence under [Section 1(3) Equal Pay Act (Northern Ireland) 1970]. Thus, it has been clear, the trigger for the employer having to prove his case under the 'material factor' defence is not disparate impact as between men and women, nor the identification of a 'provision, criterion or practice' that has such effect. All that is needed is proof of a difference in pay and the establishing of equal work between claimant and comparator. When the burden passes, it gives rise to a three stage process; again, per Lord Nicholls:

> '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 .... a "material' difference", that is, a significant and relevant difference between the woman's case and the man's case'.

(Harvey on Industrial Relations and Employment Law K, 8 [503]).

(4) ... , an employer faced with an equal pay claim will have a defence if he can show that the variation between the woman's and the man's contract had nothing to do with the difference of sex between them (i.e. was not direct

discrimination), or (in circumstances where the woman claimant can show there is apparent indirect discrimination affecting her and others of her sex doing work equal to her work) that he is justified in relying on the factor as a proportionate means of achieving a legitimate end ... (Harvey on Industrial Relations and Employment Law K8 [506]).

(5) In the decision of the Northern Ireland Court of Appeal in **Fearnon & Others – v- Smurfitt Corrugated Cases Lurgan (Ltd) [2008] NICA45** a "red-circling case Kerr LCJ observed at paragraph 12 of the decision:

> "...
>
> To qualify as a contemporaneous genuine material factor accounting for the discrepancy in salary, the reasons for it at the time that the difference in earnings is challenged must be examined. Otherwise, it would be possible for an unscrupulous employer to allow a difference in earnings to persist while knowing that the initial reason for it no longer obtained.
>
> [13] It is to be remembered that the onus of establishing that there is such a genuine material factor rests on the employer throughout. The formulation used by the tribunal that the continued existence of red-circling does not "make the case for" the appellants suggests that it had considered that they were required to show that the once genuine factor had transformed into something that no longer qualified for that description. We are satisfied that this approach would not be correct. It is for the respondent to show that the mooted factor retains the essential attributes of genuineness and materiality.
>
> [14] These considerations are reflected and exemplified in the later case of **Outlook Supplies v Parry [1978] 2 All ER 707**. At page 711, Phillips J said: -
>
> > "We wish to draw attention to the following matters:
> >
> > (i) we stress the point that cases arising under s 1(3) can never be solved by rule of thumb, or by attaching a label, such as saying 'This is a "red circle" case'. It is necessary to look at all the circumstances;
> >
> > (ii) the 'protection' of wages, even when done for good reason, gives rise to much misunderstanding and upset, which increases as time goes on, and it is accordingly desirable that where possible such arrangements should be phased out;
> >
> > (iii) for the same reason joint consultation is desirable where it is intended to introduce such a practice or, if it has been introduced, to continue it;
> >
> > (iv) in such cases, when determining whether the employer has discharged the onus on him under s1(3), it is

relevant for the industrial tribunal to take into account the length of time which has elapsed since the 'protection' was introduced, and whether the employers have acted in accordance with current notions of good industrial practice in their attitude to the continuation of the practice."

[15] It was therefore incumbent on the tribunal to examine not only the motive for the introduction of red-circling, but also the reasons that it had been continued. It is wrong to assume that because it was right to institute the system, that it will remain right to maintain it indefinitely.

[16] No evidence appears to have been proffered to the tribunal to justify the continuation of the red-circling. Apart from recording the employers' claim that the reasons justifying the difference in pay in 1994 continued to apply, the tribunal makes no reference whatever to the issue. No examination of why the employers considered that it was necessary to prolong the arrangement took place. No discussion of whether the preservation of the red-circling accorded with 'current notions of good industrial practice' was undertaken. There was no inquiry as to whether it would have been possible to phase out the difference in pay levels or why adjustments could not be made to the respective rates of increase in earnings so as to equalise the salaries paid to the appellants and their comparator. The tribunal appears to have accepted without demur the unvarnished claim that the reasons for the red-circling continued to apply, unsupported as it was by any evidence. Given that, as we have said, the onus of establishing this central tenet of the respondents' case rested on the employers, we cannot accept that this was a correct approach. ..."

(6) It is necessary, but not sufficient, to prove a material difference between the woman's case and the man's. It must also be shown in the second place that the discrimination was due to that material difference ... (Harvey on Industrial Relations and Employment Law K8 [510]).

(7) In **Benveniste –v- University of Southampton [1989] ICR617 t**he headnote records the decision of the Court of Appeal where it states:-

"*Held* – allowing the appeal, that since there was no relevant distinction between the applicant and her comparators on the basis of skills or experience by which a grading system was being operated and since she was paid less solely because she had been appointed at a time of financial constraint, the term in her contract relating to her salary fell within Section 1(2)(a)(i) of the Act as being less favourable than similar terms in the contracts of those comparators who were paid more; that although such a variation was due to a material factor, namely the financial constraint, which distinguished her case from that of her comparators, such distinction evaporated after 1981 when the constraint no longer applied so that thereafter the employers could not rely on Section 1(3)(a); and that accordingly the applicant had since 1982 been treated contrary to the Act and the matter would be

remitted to the Industrial Tribunal for determination as to the appropriate remedy (post, pp626C-F 627C, 628b, C-D)".

APPLICATION OF THE LAW AND FINDINGS OF FACT TO THE ISSUES

6. (1) The respondent has conceded that the claimants did like work to Mr Radek Widoniak.

(2) The tribunal is satisfied that Mr Radek Widoniak is a proper comparator as he was doing the same duties as the claimants at least from May 2013 and he was an employee for the duration of the claimants' employment with the respondent. Indeed all three remain employees of the respondent.

(3) The respondent has conceded that there was a disparity in pay received between Mr Radek Widoniak and the claimants in that the former was paid a significantly higher hourly rate than the claimants.

(4) The claimants alleged that the disparity in pay is because of their sex and therefore seek to have the equality clause under Section 1 of the Equal Pay Act (Northern Ireland) 1970 engaged so as to vary their contract to the same rate of pay as Mr Radek Widoniak received and to be paid sums due to them on foot of the equality clause since at least May 2013 by reason of this discrepancy.

(5) The respondent alleges that the disparity in pay is due to material factors which is not the difference in sex and therefore they can successfully rely on the statutory defence under Section 1(3) of the Equal Pay Act (Northern Ireland) 1970 and therefore submit that the claimants' claims should be dismissed.

(6) The tribunal reminds itself that the purpose of the equal pay law is not to ensure employees are paid equally for equal work but to ensure the elimination of discrimination on the ground of sex. Therefore if there is not any discrimination on the ground of sex there is not a valid equal pay claim.

(7) From May 2013, at least, the claimants enjoyed less favourable terms than Radek Widoniak in relation to pay for doing like work.

(8) The tribunal is satisfied that the rebuttable presumption of the difference in pay between Radek Widoniak and the claimants by reason of sex arises in this particular claim.

(9) The tribunal follows the approach set out by Lord Nicholls in **Glasgow City Council –v- Marshall [2000] IRLR 272**.

(10) The respondent, through its then solicitor, stated on 3 June 2015, in the outcome letter of the claimants' grievance; in its response of 17 July 2015; and up until the Case Management Discussion on 7 December 2015 that the reason for the disparity in treatment was material factors which were twofold:-

(i) length of service; and

(ii) the global recession post 2007.

At the Case Management Discussion on 7 December 2015 the respondent abandoned length of service as a reason. That was an appropriate concession.

(11) The respondent, in furtherance of its material factor defence, has advanced a number of reasons or explanations for the disparity in pay in the course of its conduct of these claims. There were:

(i) that Radek Widoniak was a strong employee and the respondent did not wish to lose him as the business was very busy in its early days;

(ii) that Radek Widoniak had experience as a barista;

(iii) that Radek Widoniak asked for a wage increase;

(iv) that the respondent was able to pay Radek Widoniak a salary increase in February 2008 but was not able to award a comparable rate of pay to the claimants due to the financial situation of the respondent company arising from the global recession.

(12) There has not been any challenge to Radek Widoniak being a strong employee but the respondent accepted that the claimants were also strong employees. Therefore that quality of Radek Widoniak as a barista does not explain the disparity in rates of pay.

(13) There was not any evidence before the tribunal that there was any danger of Radek Widoniak leaving the respondent's employment. Indeed there is evidence in an e-mail of 24 January 2008 that Radek was happy and content with his employment with the respondent.

(14) Therefore the first reason, advanced by the respondent, to explain the disparity in pay is not supported by the evidence.

(15) In relation to the experience of Radek Widoniak as a barista, he was engaged as a barista and changed within a month to a job as waiter and up to 24 January 2008 he only worked for the respondent as a barista to cover for Eugene Blagoci when he was off work. There was not any evidence before the tribunal about Radek's experience as a barista prior to his employment with the respondent in October 2007. In addition Radek Widoniak got his wage increase after four months' employment as a waiter, occasionally covering barista duties. Indeed, according to one of the respondent's witnesses, Nicola Kerr-Small, Radek Widoniak only got the wage increase in February 2008 after he had moved from barista duties to waiter's duties. Radek Widoniak's experience as a barista, therefore, does not explain the disparity in wage levels either.

(16) The respondent sought to suggest that the payment to Radek Widoniak was possible as there was money available yet the claimants could not be paid, at

a later date, a comparable wage to Radek Widoniak as money was not available. In fact the evidence from the respondent's chief financial officer was that the financial position of the company was better from 2013 onwards in that the respondent company made profits in the year ending 31 January 2013 and 31 January 2015 and broke even in the year ending 31 January 2014 whereas in the years 2007-2009 it did not make a profit and incurred a considerable deficit. This explanation therefore does not explain the disparity in rates of pay.

(17) When the first claimant was engaged in 19 April 2011 and the second claimant on 21 April 2012 the respondent says that it could not pay higher rates of pay because of the economic factors then prevalent in the respondent company i.e. that there was a pay freeze in operation within the company and they were seeking to keep costs down. But the pay freeze ended in 2010. In 2011 and 2012 the claimants received pay increases of around 1.8% by reason of increases in the minimum wage. Radek Widoniak got a wage increase in 2010 and 2011 of 7.01% and 8.13% respectively.

(18) The tribunal is persuaded that both claimants were doing the same duties as Radek Widoniak from May 2013. The tribunal rejects the first claimant's assertion that she was doing the same duties as Radek Widoniak from May 2012. While it is possible that she did some barista duties from time to time between May 2012 and May 2013, in her grievance she alleged that she was doing the same duties as Mr Widoniak from May 2013. The tribunal believes that the account in the grievance is more likely to be correct as it was made nearer the time and without any claim to an industrial tribunal having been made.

(19) From May 2013 the claimants were doing like work to Radek Widoniak. Therefore an equality clause operates in their favour unless the respondent demonstrates that the variation in contract terms is due to a material factor other than sex.

Material factor defence

(20) Following the decision in **Glasgow City Council v Marshall [2000] IRLR 272 HL** Lord Nicholls indicated that once the burden passed to the employer, a three-stage process became operational:-

(a) that the proper explanation or reason is genuine and not a sham or pretence.

In the course of defending this case on paper and at hearing, the respondent has advanced a number of different reasons to demonstrate the material factor defence. As has been set out above, none of those explanations stands up to analysis and therefore the tribunal cannot be satisfied that any of the reasons advanced by the respondent are genuine.

(b) Second that the less favourable treatment is due to this reason.

As the respondent has failed to satisfy the tribunal that any of the reasons advanced, as its material factor defence, are in fact genuine, then it follows

that it cannot likewise persuade the tribunal that the less favourable treatment arises from a genuine material factor.

(c) Third, that the reason is not the 'difference of sex'.

As the respondent has failed to provide a genuine reason for the less favourable treatment that amounts to a material factor defence or show that the treatment arises therefrom, then the respondent has not rebutted the presumption that the reason for the difference in treatment as between the claimants and Radek Widoniak is the difference in sex.

(21) As the Northern Ireland Court of Appeal has stated in **Fearnon and Others v Smurfit Corrugated Cases Lurgan Limited [2008] NICA 45** to qualify as a contemporaneous genuine material factor accounting for the discrepancy in salary, the reasons for it at the time that the difference in earnings is challenged must be examined. The pertinent date for considering the comparison between that which is paid to the claimants and which is paid to Radek Widoniak is May 2013. The respondent has not advanced any persuasive arguments as to why the discrepancy in payment was necessary from May 2013 onwards. In so concluding the tribunal was mindful that the onus of establishing that there is such a genuine material factor rests upon the employer throughout. The respondent has failed to show that from May 2013 there was material factor that retained the essential attributes of genuineness and materiality.

(22) There was not any evidence from 2013 onwards that there was a risk that Radek Widoniak would leave or that the respondent was having difficulties retaining strong baristas or that the claimants were not competent baristas or that the respondent could not afford to pay the claimants a comparable rate of pay.

(23) Accordingly the tribunal it is not persuaded that the respondent has established a material factor defence, therefore the presumption of sex as the explanation has not been rebutted and therefore the claimants have established their equal pay claim.

(24) The claimants are entitled to equal pay from May 2013.

Amendment

(25) In view of the tribunal's conclusions, it is not necessary to consider an application to amend the claim to include a claim for breach of Article 119 of the Treaty of Rome now Article 141 of the European Union Treaty and Article 4 of the Recast Directive 2006/54/EC.

Employment Judge:

Date and place of hearing: 7, 8, 9 and 10 June 2016, Belfast.

Date decision recorded in register and issued to parties: