741/022

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100178/2016

Held in Glasgow on 26 and 27 July 2016

Employment Judge: Frances Eccles
Members: Nena Elliot
Ephraim Borowski

Mr David Snell
28 Leglen Wood Road
Glasgow
G21 3PJ

Claimant
Represented by:
Ms A Gumbs - Counsel

Network Rail Infrastructure Limited
151 St Vincent Street
Glasgow
G2 5NW

Respondent
Represented by:
Mr K Gibson - Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that (i) the claimant was unlawfully discriminated against by the respondents in terms of Section 19 of the Equality Act 2010 in relation to his sex by the application of the respondents' Family Friendly Policy during periods of shared parental leave; (ii) the respondents shall pay to the claimant an award of **£6,000** for injury to feelings; (iii) the respondents shall pay to the claimant an award of **£16,129.68** as future loss; (iv) the respondents shall pay to the claimant an award of **£1,753.87** as pension loss; (v) the respondents shall pay the claimant an increase on his award for future loss of **£2,779.44** for failure to comply with the ACAS Code of Practice 2015; (vi) the respondents shall pay to the claimant interest of **£458.04**; (vii) the respondents shall pay the claimant his Tribunal fees of **£1,200** & (viii) the claim of direct sex discrimination having been withdrawn shall be dismissed.

REASONS

BACKGROUND

1 The claim was presented on 28 January 2016. The claimant complained that the amount of shared parental pay received by fathers when compared with mothers in terms of the respondents' Family Friendly Policy amounted to direct and indirect sex discrimination. The particular disadvantage identified by the claimant was that fathers received statutory pay during periods of shared parental leave and not the enhanced pay offered to mothers. The claim was resisted and in their response received on 23 March 2016 the respondents denied having discriminated against the claimant. They challenged the comparator identified by the claimant. The respondents submitted that the appropriate comparator was a female partner as opposed to a mother or primary carer. They submitted that if their Family Friendly Policy put the claimant at a disadvantage because of his sex, which was denied, it could be objectively justified as a proportionate means of achieving a legitimate aim. The legitimate aim was identified by the respondents as the recruitment and retention of women in a male dominated workforce.

2 By letter dated 15 July 2016 the respondents notified the Tribunal that they had decided not to contest the claim of indirect discrimination. On the understanding that the claimant was not proceeding with his claim of direct discrimination they applied for the Hearing to deal with remedy only. The claimant did not object to the above application and at the start of the Hearing the claim of direct discrimination was withdrawn and a Judgment issued orally declaring that the claimant had been indirectly discriminated against by the respondents in relation to his sex by the application of the Family Friendly Policy during periods of shared parental leave and dismissing the claim of direct discrimination.

3 At the Hearing the claimant was represented by Ms A Gumbs, Counsel. The respondents were represented by Mr K Gibson, Counsel. The Tribunal

heard evidence from the claimant and Mr Iain Grossart, Signalling Design Manager for the respondents. The parties provided the Tribunal with a Joint Bundle, a chronology of events and, in advance of making their submissions, a written statement of their agreed position.

FINDINGS IN FACT

4 In relation to the issue of remedy the Tribunal found the following material facts to be admitted or proved; the claimant is employed by the respondents as a Signalling Principles Designer. He has been employed by the respondents since 31 March 2008. The claimant's rate of pay is £811.65 per week. His net rate of pay is £579.05. His wife's rate of pay is £618.23 per week. The respondents are a large employer with in excess of 30,000 employees. They have internal and external HR support. The external support is referred to as HR Direct.

5 On 31 August 2015 the claimant made an application for 12 weeks of shared parental leave (P12) under the respondents' Family Friendly Policy Version 6.1 issued on 5 April 2015 (P7). The claimant and his wife were due to become parents by birth on 2 January 2016. In terms of the respondents' Family Friendly Policy (@P7/58), shared parental leave is defined as "*A period of up to 52 weeks of leave to be shared between mothers/primary adopters/first surrogate parents and their partners.* ***The 52 week period is reduced to 50 weeks when the 2 weeks compulsory maternity leave is taken and when the 2 weeks adoption/surrogacy leave is taken***". The claimant satisfied the eligibility provisions in the respondent's Family Friendly Policy (Section 6.2.1 @P7/73-74) for pay during periods of shared parental leave. Shared parental pay is not payable in terms of the respondents' Family Friendly Policy (@P7/74) after 52 weeks from the date the child is born or placed.

6 Section 6.1.4 of the respondents' Family Friendly Policy (P7/73) provides that during shared parental leave an employee's "*terms and conditions of employment (for example, holiday entitlement, pension rights, travel facilities)* ***except*** *remuneration, continue during your shared parental leave period as if you are still at work*". As regards remuneration during periods of

shared parental leave, the respondents' Family Friendly Policy provides (@P7/74-5);

> *6.2.2 Amount of shared parental pay*
>
> ***Childbirth** - by excluding the 2 weeks of compulsory maternity pay immediately after childbirth, parents are able to share up to 37 weeks of shared parental pay.*
>
> ***Adoption & Surrogacy** - The primary adopter and first surrogate parent must be paid at least 2 weeks statutory adoption and surrogacy pay. Parents are able to share up to 37 weeks of shared parental pay.*
>
> *The 37 week entitlement will be reduced further for each week of statutory maternity, adoption and surrogacy pay or maternity allowance paid.*
>
> *You are only able to claim shared parental pay on the weeks that you are absent from work due to shared parental leave. If you work for another employer(s), you may not claim shared parental pay from Network Rail unless you are also absent from those other employer(s).*
>
> *"6.2.2.1 For mothers, primary adopters, and first surrogate parents.*
>
> *If you fulfil the requirements for shared parental pay as at section 6.2.1 above you will be eligible for the following payments:*
>
> - *a maximum of 26 weeks shared parental pay paid at full pay inclusive of statutory shared parental pay. (Any Network Rail maternity, adoption or surrogacy pay you have received will be counted towards your company shared parental pay entitlement).*
> - *up to a further 13 weeks' shared parental pay paid at the rate of statutory shared parental pay.*
> - *up to a further 13 weeks leave **unpaid.***

6.2.2.2 For partners, secondary adopters and secondary surrogate parents

If you fulfil the requirements for shared parental pay at section 6.2.1 above you will be eligible for the following payments:

- *a maximum of 39 weeks' shared parental pay paid at the rate of statutory shared parental pay.*
- *Up to a further 13 weeks leave* ***unpaid.***"

7 In his application for shared parental leave (P12) the claimant indicated that his wife intended to take 27 weeks of shared parental leave and he intended to take 12 weeks from 4 April to 27 June 2016. The claimant indicated that he did not intend the above dates to be binding. It was the claimant's intention to vary his application under the Family Friendly Policy (P7) by extending the period of leave by up to 24 weeks. In terms of the respondents' Family Friendly Policy (P7 @ paragraph 6.1.2) employees are entitled to make up to three applications to vary their period of shared parental leave.

8 By letter dated 15 September 2015 (P13) the claimant was advised that he and his wife were entitled to fifty two weeks of shared parental leave "*made up of 26 weeks "ordinary" shared parental leave, followed by 26 weeks "additional" shared parental leave*". The claimant was advised that for 12 weeks he would receive the standard statutory rate of shared parental pay applicable at the time or at a rate equivalent to 90% of his average weekly earnings if the above figure was less than the standard rate. The weekly standard statutory rate applicable at the time was £139.58. The claimant's weekly rate of pay at the applicable time was £811.65. As regards pension contributions, the claimant was advised that during his period of shared parental leave he would be opted out of the respondents' pension scheme and a flat rate of £4.83 per week would be paid.

9 By letter dated 22 September 2015 (P14) the claimant submitted a grievance to his Manager, Iain Grossart, in the following terms:-

"In line with Network Rail's Individual Grievance Policy and Procedure, I wish to raise a formal grievance in relation to Network Rail's Family Friendly Policy and Procedures, - Section 6.2.2 – Amount of shared parental pay.

Under this policy, payments to mothers on Shared Parental Leave will be at significantly different rates to fathers. i.e. 26 weeks full pay and 13 weeks statutory compared with 39 weeks statutory for fathers. This was confirmed in the response I received from HR, dated 15 September 2015, to my application for Shared Parental Leave submitted on 31 August 2015. As a result of this I believe that I am being discriminated against because of my sex, a personal characteristic under The Equality Act 2010.

Network Rail's policy is contrary to the guidance in the Government's Department for Business Innovation & Skills' 'Employers' Technical Guide to Shared Parental Leave and Pay'

> *92: Will employers be forced to provide occupational pay for men and women on shared parental leave?*
>
> *No. It will be entirely at the discretion of employers whether they wish to offer occupational parental schemes for men and women taking shared parental leave. The way in which employers respond to these changes will therefore vary across different employers based on their individual business plans.*
>
> *There is no legal requirement for companies to create occupational parental leave schemes. However, a maternity scheme can only be offered to a woman on maternity leave. If an occupational scheme is offered to a mother on shared parental leave, it could constitute sex discrimination if such an occupational scheme were not offered to fathers/a mother's partner.*

It is also contrary to the guidance given in acas' 'Shared Parental Leave and Pay – a good practice guide for Employers and employees'

Some organisations offer enhanced maternity rights, giving mothers maternity pay above the statutory minimum, for example 26 weeks' full pay. Organisations may wish to "mirror" their maternity enhancements in any Shared Parental Leave policy. There is no established statutory requirement to mirror occupational maternity schemes when a Shared Parental Leave Scheme is established. The important thing is that within a Shared Parental Leave scheme, men and women are treated equally and paid at the same rate in the same circumstances.

I hope Network Rail will recognise that paying mothers and fathers at different rates whilst on Shared Parental Leave is unfair and discriminatory. I request that any Shared Parental Leave I take is paid at the same rate mothers would receive under Network Rail's Family Friendly Policy."

Iain Grossart acknowledged receipt of the claimant's grievance verbally and passed it to the respondents' HR department by uploading it onto their HR system. The claimant's grievance (P14) was lodged in accordance with the respondents' Individual Grievance Policy and Procedure Version 2.0 dated July 2011 (P10) In terms of the respondents' Grievance Policy (@page P94-96 of P10) the Formal Stages are as follows:-

"4. Formal Stages

4.1 Step 1 – Grievance Hearing

4.1.1 If the matter has not been resolved informally, or if the employee considers the problem too serious for an informal approach, he/she must put their grievance in writing, stating what their complaint is and the reasons for it. This must then be sent to their immediate supervisor/manager (or their senior

manager, if the grievance concerns the behaviour or actions of the employee's line manager). An acknowledgement confirming the receipt of the formal grievance will be sent to the employee within 3 working days of submission of the grievance.

4.1.2 The hearing will be held as soon as possible and a date agreed for the hearing within 7 working days of the submission of the grievance. The immediate supervision/manager (or their manager if the grievance concerns the employee's line manager) will invite the employee to attend a hearing to discuss the matter and inform them of their right to be represented (see section 3 above). In the event that the managers identified above do not have the authority to resolve the grievance they will identify an alternative manager who has such authority.

4.1.3 At the hearing the employee will have the opportunity to fully outline the nature of their grievance, including any suggestions he/she may wish to make regarding how it could be resolved.

4.1.4 The employee and their representative can call other people as witnesses during the grievance hearing and they will be given the opportunity to raise points about any information provided by witnesses and ask them questions.

4.1.5 Where either management or the employee intends to call relevant witnesses, they should give advance notice that they intend to do this. If the witness is a Network Rail employee, the appropriate manager should be informed so that arrangements can be made for them to be released from duty with pay to enable them to attend.

4.1.6 Where the witness is unable to attend in person, consideration should be given to re-arranging the hearing date, or, where

appropriate, using other means of communication e.g. telephone conference, video link or written witness statement.

4.1.7 At the conclusion of the hearing, the response and written record from the meeting, together with the right of appeal will be confirmed in writing by the manager, within 8 calendar days. If it is not possible to confirm the response within 8 calendar days, the employee and their representative will be advised as to the reasons for the delay

4.2 Step 2 – Appeal.

4.2.1 If the employee feels that their grievance has not been resolved to their satisfaction he/she can appeal against the outcome decision.

4.2.2 To do so, the employee must write to the hearing manager within 10 calendar days of the date of the letter notifying them of the decision to appeal. The reason for the appeal must be stated clearly. An appeal can be made either by the employee or, if they so wish, by their representative.

4.2.3 An appropriate independent more senior manager will be appointed to hear the appeal. In determining the appropriateness of the senior manager, due consideration will be given to the nature, complexity and gravity of the grievance and that the manager has the authority to hear and resolve the appeal in these circumstances.

4.2.4 The senior manager appointed will invite the employee to attend the appeal hearing to discuss the matter and again inform them of their right to be represented (see section 3 above).

4.2.5 The written record of the hearing will be made and a copy provided to the employee within a reasonable time and before any appeal hearing takes place.

4.2.6 At the conclusion of the appeal hearing, the response and written record from the meeting will be confirmed in writing by the manager, within 8 calendar days. If it is not possible to confirm the response within 8 calendar days, the employee and their representative will be advised as to the reasons for the delay. This represents the final stage in the Individual Grievance Procedure.

4.3 Timescales and Postponed Meetings

4.3.1 There should be commitment from all parties concerned to make sure that the grievance is dealt with without unreasonable delay. If the employee's nominated representative is not available on the date on which the grievance hearing is arranged, then a new, mutually convenient date will be arranged".

11 The respondents did not send the claimant an acknowledgement of his grievance (P14) within 3 working days of its submission. The respondents did not agree a date for a hearing within 7 working days of the claimant submitting his grievance (P14). The claimant was stressed and unhappy about the lack of progress in relation to his grievance (P14). On 2 October 2015 he raised the subject with Iain Grossart who was unable to provide him with an update. Iain Grossart had no previous experience of the respondents' Grievance Procedure (P10). He had received no training in the respondents' Family Friendly Policy (P7) or of discrimination and diversity issues generally. He did not consider himself to be an appropriate person to consider the claimant's grievance (P14) in particular given that it was concerned with a national policy over which he had no authority. On or about 5 October 2015 Iain Grossart was informed by the respondents' HR department that they had been expecting a challenge to their policy on shared parental leave. Iain Grossart informed HR Direct that he did not feel that he was an appropriate person to hear the claimant's grievance (P14). He was advised by HR Direct that he was not the most appropriate person and that he would be contacted again in due course. Iain Grossart advised

the claimant of his discussions with HR Direct. The claimant agreed that Iain Grossart was not an appropriate person to hear his grievance (P14). The claimant sought a further update from Iain Grossart on 8 October 2015. Iain Grossart was unable to provide the claimant with an update. The claimant raised his concerns with Iain Grossart on 13 and 14 October 2015 about the lack of progress with his grievance (P14). On 16 October 2015 the claimant provided Iain Grossart with evidence to support his grievance (P14). Iain Grossart contacted HR Direct again on 20 October 2015 regarding his suitability to resolve the claimant's grievance (P14).

12 Towards the end of October 2015 the claimant's wife became ill and was admitted to hospital for 6 days. The claimant and his wife both felt anxious about the clack of progress made by the respondents in considering the claimant's grievance. They felt stressed about being unable to finalise their child care arrangements. On 23 October 2015 the claimant sent an e mail to Iain Grossart in the following terms:-

> *"According to Network Rail's Individual Grievance Policy and Procedure, Section 4.1.1, I should have had the date of a hearing confirmed by Thursday 01 October 2015 (8 working days from submission).*
>
> *The Acas Code of Practice on Discipline and Grievance states that a grievance hearing should be scheduled without 'unreasonable delay'. Network Rail has committed to dealing with any complaint under the Equality, Diversity and Inclusion Policy 'seriously' and 'promptly' (section 2.3 of said policy).*
>
> *I still have no hearing date confirmed 3 weeks after it should have been is anything but prompt and does not indicate to me that Network Rail is taking my complaint seriously.*
>
> *Network Rail is putting me, and more importantly my wife (and therefore our unborn child), under a considerable amount of stress as we cannot finalise the care arrangements for our new baby. The*

baby is due in around 10 weeks and we would like to have this issue resolved before he/she arrives.

Can I request that Network Rail's Individual Grievance Policy and Procedure and Equality, Diversity and Inclusion Policy are complied with and a hearing date agreed ASAP."

13 The claimant continued to seek updates from Iain Grossart until 28 October 2015 when he was informed by letter (P16) that Iain Grossart had arranged a grievance hearing to take place on 5 November 2015 which he would chair. The claimant was informed of his right to be represented at the hearing by a fellow employee, lay trade union representative or official employed by a trade union.

14 The grievance hearing took place on 5 November 2015. It was chaired by Iain Grossart. Alan King, Signalling Design Group Manager attended as a note taker for the respondents. At the hearing the claimant, referring to his letter of 22 September 2015 (P14), highlighted what he considered to be discrepancies between the respondents' Family Friendly Policy (P7) and the intended purpose of the respondents' Equality, Diversity and Inclusion Policy, government guidelines and applicable legislation. The claimant referred Iain Grossart to information he had obtained about the policy of other companies in relation to shared parental leave. At the close of the meeting it was agreed that a response to the claimant's grievance (P14) would be forthcoming by 13 November 2015 in line with the respondents' Grievance procedure (P10).

15 The respondents prepared a note of the meeting (P17) which was provided to the claimant. The note (P17) recorded the hearing as having concluded as follows; "*As this was discussed on 5th November, please can a response be forthcoming by Friday 13th November in line with the Grievance Procedure policy*". The claimant did not receive a response from Iain Grossart to his grievance within 8 calendar days of the hearing. Iain Grossart had sought advice from the respondent's HR department who in turn sought advice from the respondents' legal representatives. Iain Grossart did not intend to make a decision in relation to the claimant's

grievance (P14) until he had received advice from the respondents' HR department. Iain Grossart contacted the claimant by e-mail dated 11 November 2015 (P117A) to confirm that he was still awaiting "*guidance from senior subject matter experts*" who had been asked to investigate his grievance (P14) and would be unable to provide a response within eight days of their meeting. Iain Grossart further informed the claimant that he had no indication when guidance would be provided and reassured him that as soon as he had received it he would reconvene the hearing. The claimant raised his concerns about the time taken to respond to his grievance (P14) with Iain Grossart on 27 November 2015 and on the same day by e-mail (P117A) sought an explanation as follows;

> "*I know from our discussion today that there is no visibility on when a decision on my grievance will be available. It was obviously disappointing to hear this as it is now over 3 weeks since the hearing and nearly 10 weeks since I submitted my grievance.*
>
> *As you able to clarify the reason for the delay as per the Individual Grievance Policy & Procedure, section 4.1.7?*
>
> *I am mindful of the timescales for lodging a claim with the Employment Tribunal for 'Sex Discrimination'. If I feel that a decision will not be available within a suitable timeframe to protect my rights then I will contact ACAS for 'Early Conciliation' without further correspondence.*"

16 On receipt of advice from the respondents' HR department, Iain Grossart prepared a Grievance Report dated 5 January 2016 (P18) in which he identified the following as "*Key points from Investigation*";

> "*The law requires NR to pay statutory shared parental leave pay (SSPLP), currently £139.58, whilst employees share parental leave with the mother of their child, and our policy meets that requirement.*

NR currently pays 6 months enhanced and 3 months statutory pay to mothers in an effort to retain female employees in a male dominated industry.

There can only be one mother, so the other person who shares the leave with the mother, is considered separately and/or as having a different status. Our policy states that the qualifying person sharing the parental leave is entitled to SSPLP (regardless of their gender).

Therefore for there to be sex discrimination we would need to pay women, a different rate of pay, to a man, whilst they were sharing parental leave with the mother. And we don't do that. This is because the legal comparator for David, would be a woman sharing parental leave, not the mother.

As to David's assertion that many other public companies pay enhanced rates to both men and women, the following guidance was received;

Every employer is legally required to uphold the law, and we have met the legal requirement with our current pay policy for shared parental leave, and our unions have agreed that this policy was reasonable, because we could and would not have rolled it out without their agreement. However if another employer wishes to pay more than the statutory minimum, or provide other enhanced benefits, it is at their discretion, and not something that NR have any control over.

NR enquired with their outside solicitors what the approach being taken with other employers that they represent. The response was that the majority of employers that they represent have followed the same approach as NR. Due to client confidentiality the names and details of these employers was not provided.

The delay in hearing this grievance and delivering the outcome has been down to the protracted timescales of obtaining the legal advice from the internal NR legal team and outside sources. Some

misinformation from HR Direct as to whom the hearing manager should be also introduced several weeks delay."

17 In his report (P18), Iain Grossart identified as "*points of contention*" the following;

> *"The only point of contention is that paying mothers full pay for 6 months is discrimination against fathers based on their sex. David believes that the NR Policy unfairly discriminates against him on the basis of his sex. NR feels that it complies with its legal requirements.*
>
> *David does not feel that the points highlighted in the two guidance documents mentioned in his initial grievance letter have been addressed. NR feels that its current policy complies with the law regarding statutory parental leave pay".*

18. Based on the advice received from the respondents' HR department, Iain Grossart decided that he could not uphold the claimant's grievance and could take no further action. Based on advice from the respondents' HR department he recorded in his report (P18) that; "*The NR HR leads have already been briefed regarding the NR position on Shared Parental Leave and the associated NR Policy. NR feels that the current policy meets its legal requirements with regards to shared parental leave*".

19. Iain Grossart informed the claimant that he wished to reconvene the grievance hearing. The hearing was scheduled to take place on 6 January 2016. The claimant's wife was due to be admitted to hospital on 6 January 2016. Her blood pressure was causing concern and she was to be induced. The reconvened grievance hearing was re-scheduled to take place on 5 January 2016. Iain Grossart wanted to inform the claimant of his decision in person. Alan King attended the meeting as a note taker for the respondents. The claimant was provided with a copy of Iain Grossart's report (P18). Iain Grossart apologised for the length of time taken from the initial hearing. He informed the claimant of his decision no to uphold his grievance. The claimant expressed

disappointment at the outcome of his grievance and that he still felt as if he was being discriminated against. The claimant informed Iain Grossart that he intended to appeal against his decision and at the same time, due to pressing timescales, start Employment Tribunal proceedings. He confirmed having already been in contact with ACAS and that had received a pre claim certificate. The claimant highlighted the length of time taken by the respondents to consider his grievance and failure to comply with their own Grievance Procedure. Iain Grossart accepted that he had not acknowledged the claimant's grievance in writing. He informed the claimant that HR Direct had stated that the Manager hearing his grievance should be someone with authority to affect the respondents' Family Friendly Policy but had failed to identify a suitable person and it was later clarified that he would hear the claimant's grievance. He stated that confusion over who should hear the claimant's grievance had introduced a severe delay into the process. The claimant questioned why it had been necessary to reconvene the grievance hearing. Iain Grossart did not accept that the hearing had concluded on 5 November 2015. He stated that it was only adjourned to allow him to request information from the respondents' HR and legal departments. He stated that the claimant had been advised by him of the delay and that the hearing could not be reconvened until he had been provided with the above information. The claimant disagreed with Iain Grossart's understanding of how the grievance meeting on 5 November 2015 had ended.

20. In response to the claimant questioning the delay in dealing with his grievance, Iain Grossart stated that a hearing had been arranged as soon as incorrect information about the appointment of a manager to hear his grievance had been clarified. He explained that the delay in reconvening the hearing was caused by the wait for information from the respondents' HR and legal departments with the festive period and booked holidays causing further delay. The claimant expressed concern about whether the grievance had been handled fairly. He expressed the view that Iain Grossart had no authority over the drafting of the

respondents' policy on shared parental leave and as a Manager with responsibility for only eight people in a company of 30,000 employees he was not the correct person to make an informed ruling on his grievance. Iain Grossart explained that as the claimant's line Manager he was authorised to hear and decide his grievance. Iain Grossart confirmed that the respondents had checked with their outside solicitors about the approach being taken by other employers and organisations that they represent and had been advised that the majority were following a similar approach to that of the respondents. Iain Grossart was unable to identify the employers concerned as their identity had not been disclosed to him for reasons of client confidentiality. The claimant questioned the accuracy of the information provided about other employers on the grounds that he had been unable to find any evidence of other companies adopting the same approach as the respondents. After meeting with Iain Grossart, the claimant went directly to the hospital to which he wife had been admitted.

21. The respondents prepared a record of Iain Grossart's meeting with the claimant on 5 January 2016 (P19). It was copied to the claimant (P19). The claimant's child was born on 6 January 2016. Iain Grossart informed the claimant by letter dated 8 January 2016 (P20) that his grievance had not been upheld. In his letter (P20), Iain Grossart advised the claimant that based on his review of the relevant evidence and taking into account all the points made by the claimant at the hearing his findings were;

> *"With regards to whether the Network Rail Family Friendly Policy on Shared Parental Leave unfairly discriminates against male employees, I have found that there is no discrimination, as Network Rail would pay the same rate of pay to a female partner of the mother".*

Iain Grossart concluded his letter (P20) by informing the claimant that his appeal against the above decision should be submitted in writing, stating his

grounds of appeal in full, within ten calendar days of the date of his letter (P20) dated 8 January 2016.

22. At the time of receiving Iain Grossart's letter (P20), the claimant's wife was in hospital seriously ill. The claimant was very anxious about his wife's health and his new baby. He felt stressed and under pressure about having to submit his appeal to the respondents by 18 January 2016. The claimant was uncertain whether he had the time or energy to prepare his appeal. He decided that it was important to challenge the respondents' decision and the manner in which they had dealt with his grievance. By letter dated 13 January 2016 (P21) the claimant submitted an appeal in writing (P21) to Iain Grossart in the following terms;

> "***Re: Formal Grievance outcome 83795***
>
> *In line with Network Rail's Individual Grievance Policy and Procedure, Section 4.2, I would like to appeal against the decision dated 08 January 2016.*
>
> *My appeal is based both on the grievance decision and the grievance process.*
>
> *There are 6 key commitments contained within Network Rails grievance policy, only one of which has been honoured (and that only partially).*
>
> *4.1.1*
>
> *Acknowledgement confirming the receipt of the formal grievance will be sent to the employee within 3 working days of submission of the grievance.*
>
> - *I did not receive an acknowledgement. Iain Grossart did let me know that that my grievance letter had been uploaded to the HR Direct system.*
>
> *4.1.2*

A date agreed for the hearing within 7 working days of the submission of the grievance.

- *It took 27 working days to agree a date for the hearing.*

In the event that the managers identified above do not have the authority to resolve the grievance they will identify an alternative manager who has such authority.

- *In my opinion, the grievance manager did not have the authority to resolve the grievance. For a complaint against company-wide policy, was someone with responsibility for 7 members of staff in a company of 30,000 appropriate? The decision may have been made officially by Iain Grossart, but it is obvious from his emails and discussions that he is just following the Direction given to him by Penny Hunt.*

4.1.7

At the conclusion of the hearing, the response and written record from the meeting, together with the right of appeal will be confirmed in writing by the manager, within 8 calendar days.

- *It took 61 calendar days to receive the outcome of the grievance.*

If it is not possible to confirm the response within 8 calendar days, the employee and their representative will be advised as to the reasons for the delay.

- *Apart from the update 6 days after the grievance hearing, there has been no communication as to when I could expect the outcome.*

4.3.1

There should be commitment from all parties concerned to make sure that the grievance is dealt with without unreasonable delay.

- *It is clear from the timescales above that Network Rail has not ensured that the grievance was dealt without unreasonable delay*

- *Due to the time Network Rail has taken to deal with the grievance, I had no option but to raise a case with ACAS to protect my position in relation to a possible Employment Tribunal claim. The case with ACAS was raised and closed before I even heard the outcome of the grievance.*

Having reviewed the outcome letter and grievance report I am disappointed to have waited 105 days and then to find that the 2 points I raised in my original grievance letter have not been addressed at all.

- *Guidance from Department of Business Innovation and Skills*
- *Guidance from ACAS*

Network Rail's family Friendly Policy in relation to the amount of Shared Parental Pay is not compliant with the section 13(1) of the Equality Act 2010. The purpose of Shared Parental Leave is childcare alone. It is not to protect the health and safety of the mother arising from the biological condition of pregnancy.

From the ACAS website, 'Shared Parental Leave will enable eligible mothers, fathers, partners and adopters to choose how to share time off work after their child is born or placed for adoption.'

The correct comparator for a man taking Shared Parental Leave in order to care for a child is a woman taking Shared Parental leave in order to care for a child. There is no material difference between a father taking Shared Parental Leave and mother taking Shared Parental Leave. Therefore there should be no difference in the amount of pay received for this.

Network Rail's position that they pay mothers more than fathers to retain them in a male dominated environment. One of the reasons for 'motherhood penalty' in the workforce is the assumption that mothers who give birth are the primary care givers. The Shared Parental Leave legislation was to help combat this type of discrimination in the

workplace. Network Rail's Family Friendly Policy reinforces this stereotype and undoes the work of the legislation.

I have spoken with many people and reviewed a number of Shared Parental Leave and Pay policies of other companies. All have implemented the legislation such that mothers and fathers are paid at the same rate, whether that be statutory or enhanced. I have not found any that has implemented it in the same way Network Rail have (i.e. paying mothers at an enhanced rate whilst paying fathers / partners at statutory only). I find it hard to believe Network Rail's solicitors assertion that the majority of their clients have followed the same approach as Network Rail. No proof to back up this assertion was offered. Iain Grossart stated that he has not seen any of these companies' policies and he does not think that Penny Hunt has seen them either. It is not clear from the 'Grievance Investigation Report' if the majority of companies pay fathers / partners at the statutory rate whilst paying mothers an enhanced rate or if they are simply confirming that that majority pay fathers at the statutory rate. Iain Grossart was not aware of the exact nature of the communication between Network Rail and the solicitors. He relied on information presented to him from Penny Hunt.

I have found that the majority of companies have introduced statutory Shared Parental Pay for mothers and fathers / partners. Interestingly, the following companies have introduced enhanced Shared Parental Pay for mothers and fathers / partners.

UK Government
Scottish Government
Virgin Trains

It is my understanding that Network Rail's Shared Parental Leave and Pay policy has not been formally agreed with the unions so was surprised to see Network Rail state that is has.

As the ACAS 'Early Conciliation process has already been completed I have to make an application to the Employment Tribunal before 01 February 2016. If it appears that the appeal is not moving quickly enough or the process continues to be unfair, I will do so.

It should not be necessary to take my case to an Employment Tribunal just to get a fair hearing but I will if that is required as this issue is important enough for me personally.

Our baby was born on 06 January and I will be on leave until 25 January 2016. I will make myself available though to get things resolved and so will be checking emails regularly and be contactable on the mobile."

23. The claimant presented a claim to the Employment Tribunal on 28 January 2016. On 3 February 2016 the claimant made an application for a variation of his application for shared parental leave (P22). In terms of his application (P22) the claimant sought 11 weeks of shared parental leave from 1 August to 17 October 2016. It was the claimant's intention to vary his application by extending the period of leave to up to 24 weeks. The claimant had received no confirmation of the status of his application by 22 February 2016 when he made a request for an update in writing (P23).

24. The claimant attended an appeal hearing in relation to his grievance on 23 February 2016 before David Toner, Programme Manager. Mags McNeil attended the meeting as note taker for the respondents. The claimant attended the hearing with a trade union representative, Alasdair McBeth. The hearing was adjourned to allow David Toner to seek clarification from HR and to allow HR to obtain legal advice. The respondents produced a written record of the meeting (P25). The hearing was reconvened to 11 March 2016. At the reconvened hearing David Toner referred to advice he had received from the respondents' HR department. The meeting ended with David Toner informing the claimant of his decision to reject his appeal on the basis of the information provided by all parties and in particular the legal advice he

had received. The respondents produced a written record of the reconvened hearing (P26). The outcome of the appeal hearing was not confirmed in writing to the claimant within 8 calendar days of the appeal hearing.

25. David Toner confirmed his decision to the claimant in writing by letter dated 5 April 2016 (P27). He gave his reasons for rejecting the claimant's appeal as follows;

> *"The reason for this conclusion is that your comparator, in terms of the policy, would be a female partner of a mother. A female partner of a mother would be treated in the same way as you. Your entitlement to Shared Parental Pay is calculated on the basis that you are a "partner". The sex of the partner is not a factor in determining what pay the partner receives.*
>
> *The Shared Parental Pay provisions of the Family Friendly Policy apply to all employees who elect to take Shared Parental Leave. If a Mother notifies us that she does not wish to take maternity leave and instead elects to take Shared Parental Leave she will receive the same, but no more, pay as she would have done had she continued her maternity leave. A male primary adopter or first surrogate parent would be treated in the same way. A female partner would be treated in the same way as you.*
>
> *I acknowledged during our first meeting that this matter had taken longer than I would have liked to have been concluded. I apologise for any inconvenience or upset this has caused you. As I am sure you will appreciate this is a complex matter and has required extensive investigation and analysis of advice which has not been straightforward."*

The respondents have introduced new arrangements for paying employees absent from work on shared parental leave. It was uploaded onto the respondents' intranet on 1 July 2016. In terms of the respondents' new arrangements, a mother's pay during periods of

shared parental leave is the same as that received by a father taking shared parental leave. They are both entitled to statutory shared parental pay.

26. The claimant intends to take Shared Parental Leave from 1 August 2016 for a period of up to 24 weeks. It is the respondents' intention to pay the claimant the equivalent of statutory shared parental pay during his absence from work on shared parental leave.

SUBMISSIONS

CLAIMANT'S SUBMISSIONS

27. Ms Gumbs for the claimant began by addressing the issue of intention to discriminate in Section 124 (4) of the Equality Act 2010. Referring to the case of **JH Walker Ltd v Hussain & others 1996 IRLR 11**, Ms Gumbs submitted that the Tribunal was entitled to conclude that the respondents had applied their Family Friendly Policy (P7) with the intention of discriminating against the claimant. In the case of **Hussain** (*supra*) submitted Ms Gumbs the EAT sets out (@ paragraphs 39 & 40) the test to be applied when the Tribunal is considering the question of intention to discriminate. In this case it was foreseeable, submitted Ms Gumbs that by paying partners less than mothers during periods of shared parental leave the claimant would inevitably be disadvantaged as a man applying for shared parental leave. It follows, submitted Ms Gumbs that the Tribunal may, having issued a declaration of indirect discrimination, order the respondents to pay compensation to the claimant.

28. Turning to the various heads of loss, Ms Gumbs submitted that when quantifying compensation for injury to feelings the Tribunal should have regard to the length of time taken to deal with the claimant's grievance and how this affected him and his wife, in particular the stress and uncertainty caused to them at a time of great uncertainty. The claimant and his wife were stressed about being unable to make child care plans and the claimant was anxious about the delay in resolving his grievance. Iain Grossart had accepted the claimant would regularly ask him for updates. The Tribunal

should also take into account that the claimant's wife was in hospital when the claimant had to write to Iain Grossart for an update. The claimant was anxious to make the necessary arrangements to support his wife. The claimant felt distracted from supporting his wife at such an important time. At the time of the appeal the claimant's wife was again in hospital and very ill. The claimant had to deal with the appeal process at that time. Inevitably, the actions of the respondents placed a strain on the claimant's working relationship and it was fortunate submitted Ms Gumbs that the claimant and Iain Grossart were both able to deal with the matter in a mature and sensible manner.

29. Taking into account the circumstances of the case, Ms Gumbs submitted that the claimant should receive a net award of around £7,300. This was not a one off incident and the claimant had been robbed of the enjoyment of looking forward to the birth of his child. Ms Gumbs submitted that uplifts should be applied to the above sum of 10% in terms of the ruling in **Simmons v Castle Practice Note 2013 1 WLR 1239** and to take account of inflation on the **Vento** bands. Ms Gumbs drew to the Tribunal's attention the conflicting authorities of **De Souza v Vinci Construction Ltd 2015 ICR 1034** and **Beckford v London Borough of Southwark 2016 IRLR 178** on the question of whether the 10% uplift applies to awards made by an Employment Tribunal. Ms Gumbs submitted that pending the outcome of proceedings before the Court of Appeal in the case of **The Sash Window Workshop Ltd v King 2015 IRLR 348** the Tribunal should apply the ruling in **Beckford** (*supra*) and the more recent EAT decision in **Olayemi v Athena Medical Centre & another UKEAT/0140/15** and apply an uplift of 10% to any award for injury to feelings.

30. As regards financial loss Ms Gumbs explained that the claimant had taken into account his wife's income when assessing the sum claimed and which reflects the position he would have been in had he taken shared parental leave for 24 weeks when originally intended and been paid the same enhanced rate as a mother in terms of the respondents' Family Friendly Policy (P7). The financial loss now sought by the claimant is future loss which Ms Gumbs submitted he is entitled to recover from the respondents.

The claimant has delayed taking shared parental leave for financial reasons submitted Ms Gumbs and it is understood in terms of the agreed statement between the parties that he will be paid at the lower rate, the respondents arguing that their new policy is now in place.

31. In addition, submitted Ms Gumbs, the claimant seeks an uplift of 25% to reflect the fact that the respondents failed to comply with the ACAS Code of Practice. There has been unreasonable delay submitted Ms Gumbs. Iain Grossart was unable to give a good reason as to why it took so long to complete the grievance procedure. It took five weeks to invite the claimant to a hearing. It took seven weeks between the first and second hearing. The outcome of the grievance was fifteen weeks' late. The appeal took place after the claimant had submitted a claim to the Employment Tribunal. The respondents apologised on 5 January 2016 for the delay. There was however a further delay after that. The respondents have an internal HR department and 35,000 employees submitted Ms Gumbs. It is to the respondents' shame that they could not deal with the matter more quickly in particular given the difficult time for the claimant. An uplift is appropriate in these circumstances submitted Ms Gumbs of 25%. The claimant also seeks reimbursement of his Tribunal fees of £1,200 and interest in the usual terms on any awards made in his favour. Ms Gumbs did not accept the respondents, having changed their policy to "level down" the entitlement of a mother on shared parental leave, could now rely on that policy to argue that the claimant was not entitled to any future loss as he is taking shared parental leave after the new policy is said to have been introduced.

RESPONDENTS' SUBMISSIONS

32. Mr Gibson for the respondents submitted that the respondents accept there was a delay in the respondents' grievance and Iain Grossart had described the situation as embarrassing. Mr Gibson submitted that the reason for the delay was caused by doubt over who should hear the claimant's grievance and that delay after 5 January 2016 was due to Iain Grossart seeking information from others to help him reach a decision. The Tribunal should accept, submitted Mr Gibson, that the issue raised by the grievance was not

clear cut and required analysis from expert advisers. While it was unclear submitted Mr Gibson whether the claimant was advancing the position, there could be no suggestion that delay was motivated by a desire on the part of the respondents to time bar a potential claim and any such a suggestion should be rejected by the Tribunal.

33. In relation to the claimant varying his request for shared parental leave, Mr Gibson submitted that there are no pleadings in his ET1 to support the position that he intends to take 24 weeks of shared parental leave which in any event will be covered by the terms of the respondents' new Policy. It is accepted submitted the claimant that the respondents have uploaded a new Policy and it is accepted that it incorporates different terms which "level down" the mother's entitlement to that of her partner. It may be that the claimant has a complaint regarding the above actions by the respondents submitted Mr Gibson but that will have to involve new proceedings and is not a concern of the present Tribunal.

34. As regards the remedy sought by the claimant, Mr Gibson submitted, it has not been established that the respondents intended to discriminate against the claimant. The Tribunal has heard no evidence from the author of the Policy and there is a lack of evidence regarding intention for the Tribunal to able to make such a finding. The evidential burden in relation to the issue of intention is neutral submitted Mr Gibson referring to page 11 of **Hussain** (*supra*) and when comparing the old provisions with Section 124 of the Equality Act 2010.

35. Mr Gibson referred the Tribunal to the relevant statutory provisions and submitted that the Tribunal should make an award based upon the law of delict. In relation to any pecuniary loss, Mr Gibson submitted the claimant cannot rely upon loss of income suffered by his wife. He referred to the authorities of **Allan v Barclay 1864 2M 873** and **Robertson –v- Turnbull 1982 SC HL 1** in support of the above position. Mr Gibson submitted in the circumstances there has been no pecuniary loss. Any adverse circumstances arising out of the claimant's inability to take shared parental

leave at the enhanced rate of pay may impact upon any personal injury he has suffered submitted Mr Gibson but cannot amount to a pecuniary loss.

36. As regards future loss, Mr Gibson submitted that while the claimant is entitled in principle to this head of claim, any shared parental leave taken from 1 August 2016 onwards will be under the respondents' new Policy and in terms of which there will be no loss recoverable.

37. The respondents accept that an award to compensate the claimant for injury to feelings in this case is appropriate. Mr Gibson submitted that in all the circumstances the Tribunal should consider awarding compensation in the region of £3,000. As regards any uplift to the above award, Mr Gibson submitted that **Simmons v Castle** (*supra*) is not applicable in Scotland as the statutory provisions relating to costs – principally changes to the civil costs regime and which the uplift in **Simmons v Castle** is intended to compensate - do not extend to Scotland. Likewise, submitted Mr Gibson, any **Heil v Rankin 2001 QB 272**, uplift sought by the claimant to reflect inflation should be treated by the Tribunal as guidance only and not as a rule of law.

38. As regards uplift to any award to reflect the respondents' failure to comply with the ACAS Code of Practice, the Tribunal should remind itself submitted Mr Gibson that the uplift does not apply to any alleged breach of an internal procedure but only the relevant Code of Practice. In these circumstances, Mr Gibson suggested that uplift closer to 10% would be appropriate. The respondents do not contest the claimant's entitlement to recover his Tribunal fees.

DISCUSSION & DELIBERATIONS

39. The Hearing was to determine remedy only. In terms of Section 124 (2) of the Equality Act 2010, where a Tribunal upholds a claim of discrimination it may;

"(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation."

40. By the time of the Hearing it was no longer in dispute that the claimant was indirectly discriminated against by the respondents in relation to his sex by the application of their Family Friendly Policy (P7) which put the claimant at a particular disadvantage as a man when compared with women during periods of shared parental leave. On the joint application of the parties a declaration to the above effect was made by the Tribunal. At the same time, the claim of direct discrimination, having been withdrawn, was dismissed by the Tribunal.

41. In terms of Section 124 (4) of the Equality Act 2010 where the Tribunal finds that there has been a contravention of Section 19, but is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant, it must not make an order that the respondents pay compensation unless it first considers whether to make a declaration or recommendation under Section 124 (2) (a) and (c) above.

42. As regards the issue of intention to indirectly discriminate by the respondents, the Tribunal had regard to the guidance of Lord Justice Mummery in the case of **J H Walker Ltd v Hussain 1996 IRLR 291**. In the above case, which was concerned with indirect race discrimination, Lord Justice Mummery stated that the relevant intention would be present if, at the time the act complained of was done, the respondent (a) wanted to bring about the state of affairs which constitutes the prohibited result of unfavourable treatment on racial grounds and (b) knew that the prohibited result would follow from his acts. In the present case, the Tribunal did not understand it to be in dispute that the respondents drafted their Family Friendly Policy (P7) in such a way that fathers as partners would be paid less than mothers and knew that as a consequence the claimant as a man would be paid less than a woman during periods of shared parental leave. It was the respondents' position that they could justify such differentials in pay between men and women on the grounds that they sought to recruit and retain women in a male dominated workforce. The respondents did not lead

any evidence to show that they did not intend to indirectly discriminate against men under their Family Friendly Policy (P7). They did not lead evidence to show that the pay provisions of the Family Friendly Policy (P7) did not indirectly discriminate against the claimant as a man. In all of the circumstances, the Tribunal could not be satisfied that the Family Friendly Policy (P7) was not applied with the intention of discriminating against the claimant. The Tribunal did not accept Mr Gibson's submission that the lack of evidence to show intention should be sufficient to persuade the Tribunal that there was no intention on the part of the respondents to discriminate against the claimant.

43. As referred to above, a Judgment was in any event issued at the start of the Hearing declaring that the claimant was unlawfully discriminated against by the respondents in terms of their Family Friendly Policy (P7). Before making an order that the respondents pay the claimant compensation, the Tribunal also considered whether to make a recommendation. The Tribunal had regard however to the ruling in **Prestcold Ltd v Irvine 1981 ICR 777** that Tribunals should avoid making recommendations as to the payment of wages. The claimant sought loss of wages during shared parental leave and in these circumstances the Tribunal concluded that an award of compensation, as opposed to a recommendation that the respondents pay the claimant the same as a mother during his period of shared parental leave, was the appropriate remedy.

44. Until 1 August 2016 when the claimant is due to start a period of shared parental leave he has not suffered any financial loss having attended work and been paid in full. The Tribunal did not understand it to be in dispute that in principle the claimant was entitled to recover future loss. The basis on which the respondents sought to challenge the claimant's entitlement to recover compensation for future loss was their implementation of a new Family Friendly Policy in terms of which mothers and their partners are both paid the equivalent of statutory shared parental leave pay and their intention to pay the claimant at the above rate during any period of shared parental leave taken from 1 August 2016 onwards. The Tribunal was satisfied that the claimant intends to take at least 24 weeks of shared parental leave. The

claimant applied for shared parental leave under Version 6.1 of the Family Friendly Policy (P7) the terms of which were before the Tribunal. There was no suggestion that he had applied for shared parental leave under the new Policy. From the evidence before it, the Tribunal was unable to make any findings as to how the new Policy applies, if at all, to periods of shared parental leave requested under Version 6.1 of the Family Friendly Policy (P7). The Tribunal was unable to make any findings from the parties' agreed position that the new Policy was "uploaded" on 1 July 2016 as to how the new Policy applies to outstanding applications under Version 6.1 of the Family Friendly Policy (P7). The Tribunal was not provided with evidence of any termination, transitional or provisions generally on which the respondents are entitled to rely to apply the new Policy to applications made for shared parental leave under Version 6.1 of the Family Friendly Policy (P7). While it was the respondents' position that they intend to pay the claimant the equivalent of statutory shared parental pay, there was no evidence before the Tribunal to show that this was in accordance with their new Policy in terms of applications made under Version 6.1 of the Family Friendly Policy (P7). Iain Grossart when asked about the new Policy was only able to give evidence that he "assumed" a new Policy was in force and "would not be aware" of whether shared parental leave requested under the "old Policy" was taken under the "old Policy". He "assumed" that the "new Policy" would apply. In these circumstances, the Tribunal concluded that the claimant was entitled to compensation for the financial loss he will suffer as a result of the discriminatory terms of the Family Friendly Policy (P7) under which he applied for the shared parental leave he intends to take.

45. The Tribunal agreed with the respondents that the loss of income suffered by his wife from taking maternity leave on statutory maternity pay should not be a relevant consideration when calculating the claimant's loss. The Tribunal has calculated the claimant's future loss by deducting from his weekly rate of pay of £811.65 the sum that the respondents intend to pay him of £139.58 resulting in a weekly loss of £672.07. The above figures are gross of any liability for tax. The claimant's loss for 24 weeks of shared parental leave will therefore total £16,129.68 (24 weeks x £672.07). The

Tribunal was also satisfied that the claimant should be awarded a sum for loss of pension contributions during the 24 weeks of shared parental leave which it has calculated to be £1,461.56 based on a contractual pension contribution of 9.78% totaling £1,577.48 less the sum the respondents intend to pay the claimant of £115.92 (24 weeks x £4.83).

46. The respondents challenged the claimant's right to seek compensation for a period extending to 24 weeks' of shared parental leave. It was their position that having only sought to recover compensation for a period of 12 weeks in his ET1 he was prevented from seeking any additional compensation. The Tribunal did not agree with the respondents that remedy and assessment of loss should be limited in this way. By the time of the Hearing, the claimant intended to take 24 weeks of shared parental leave. He sought to recover the losses he will incur as a result of the respondents applying the terms of their Family Friendly Policy (P7) which the Tribunal has declared to be indirectly discriminatory. The Tribunal has calculated the claimant's loss on the evidence before it and does not agree with the respondents that an award of compensation must be limited to an earlier assessment by the claimant of anticipated loss.

47. It was not in dispute that the claimant was entitled to an award for injury to feelings. The Tribunal was satisfied that the claimant has suffered injury to feelings caused by the respondents' unlawful discrimination. The respondents' policy regarding differentials in pay for mothers and fathers during shared parental leave caused him stress. It made him angry and upset. He felt unable to plan for the birth of his child. This caused him more upset and stress. The claimant was distracted by the respondents' failure to respond to his grievance about the level of pay he would receive during shared parental leave. He was unable to give his wife his full attention and support her while she was ill. This caused him anxiety. While the respondents' failure to respond to the claimant's grievance about the rate of pay for shared parental leave lasted for a number of months there was no evidence however of the claimant having to seek medical advice and the Tribunal is satisfied that the claimant's feelings of upset and stress at the manner in which he has been treated will reduce overtime. In all the

circumstances the Tribunal was satisfied that the claimant should be awarded compensation for injury to feelings of £5,000. When deciding on the above award, the Tribunal had regard to the general principles that apply to awards for injury to feelings and the bands identified the case of **Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318** as revised in **Da'Bell v NSPCC 2010 IRLR 19**.

48. The award of £5,000 has been calculated to reflect "*today's money*", the description used by Mr Justice Underhill for assessing quantum in the case of **Bullimore v Pothecary Witham Weld 2011 IRLR 18**. The impact of inflation on the **Vento** bands has therefore been accounted for by the Tribunal when making the award. As regards an uplift of 10% in terms of **Simmons v Castle** (*supra*), the Tribunal was not persuaded that the circumstances which led to the above ruling apply to awards in Scotland. The civil costs regime in England and Wales was changed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This followed the Report by Sir Rupert Jackson on Civil Litigation Costs which included a recommendation that the level of damages for personal injuries should be increased by 10%. Neither the above Report nor the 2012 Act apply to Scotland. Section 124(6) of the Equality Act 2010 provides that the amount of compensation which may be awarded to a claimant corresponds to the amount which could be awarded in Scotland by a Sherriff under Section 119 of the Equality Act 2010. In these circumstances, the Tribunal was not persuaded that it would be appropriate to uplift the award made to the claimant in this case by 10% in terms of the ruling in **Simmons v Castle** (*supra*).

49. The claimant also sought an increase on his award to reflect the respondents' failure to comply with the ACAS Code of Practice on Disciplinary & Grievance Procedures 2015 ("Code of Practice 2015"). Section 207A(2) of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that; "*If, in the case of proceedings to which this Section applies, it appears to the employment tribunal that (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies; (b) the employer has failed to comply with that Code in relation to*

that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent". It was not in dispute that the claim concerned a matter to which the Code of Practice 2015 applies. The Tribunal was satisfied that the respondents failed to comply with the Code of Practice 2015 in relation to that matter. In terms of the Code of Practice 2015 (paragraph 33) employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received. Decisions following such a meeting (paragraph 40) should be communicated to the employee in writing, without unreasonable delay. Similarly, Appeals (paragraph 42) should be heard without unreasonable delay. In the above respects, it appeared to the Tribunal that the respondents were in breach of the Code of Practice. The respondents did not dispute that there had been delays during the grievance process. Iain Grossart agreed that they were "*embarrassing*". The respondents submitted that given the matter raised by the grievance and in particular the complexity of the issues that the delays in responding to the claimant's grievance were not unreasonable. The Tribunal, having considered the size of the respondents and the resources available to them to respond to grievances of the type brought by the claimant was not persuaded that this was the case. In particular, there was no satisfactory explanation provided as to why the process was delayed by the appointment of Iain Grossart to hear the grievance or why his response was delayed in circumstances where the respondents were aware from the outset that the claimant was challenging the pay provisions of their Family Friendly Policy (P7) and had been anticipating such a challenge. The claimant contacted the respondents at regular intervals during the grievance procedure. He provided them with the information they required to respond to his grievance and complied with the timescales applicable to him during a period when he was under personal pressure due to his wife's pregnancy and ill health.

50. The Tribunal was satisfied that the claimant was entitled to conclude that after his meeting with Iain Grossart on 5 November 2015 he would receive

notification of the outcome of his grievance without the requirement to hold a further meeting. The notes of their meeting (P17) were consistent with his understanding. The respondents' own Grievance Policy (P10) does not require a further meeting at which the respondents inform the employee of the outcome of their grievance. The further meeting on 5 January 2016 caused further and unnecessary delay. While it was unclear whether the claimant was maintaining the position, for the avoidance of doubt, the Tribunal did not find from the evidence before it that the respondents deliberately delayed the grievance procedure to cause proceedings brought by the claimant to be time barred. In all of the circumstances however and in particular given the unreasonable delay on the part of the respondents in responding to the claimant's grievance the Tribunal considered it just an equitable to increase the awards made to the claimant for financial loss and injury to feelings by 20%. The increase in award for injury to feelings of £5,000 is therefore £1,000. The total award for injury to feelings is therefore £6,000 (£5,000 +£1,000). As regards future loss, the Tribunal has applied the uplift to the claimant's net wages of £579.05 per week. The uplift to the claimant's future loss is therefore £2,779.44 (20% of 24 weeks x £579.05 = £13,897.20). The uplift to the loss of pension is £292.31 (20% of £1,461.56). The total sum awarded for loss of pension is therefore £1,753.87 (£1,461.56 + 292.31).

51. The Tribunal was satisfied that the awards made to the claimant should include interest terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The applicable rate of interest to be applied to awards is 8%. For the award for injury to feelings, interest has been calculated from 15 September 2015 being the date on which the claimant was informed by the respondents of what they intend to pay him as a father taking shared parental leave under their Family Friendly Policy (P7), amounting to indirect discrimination relating to sex, to the date of the Tribunal's Judgment. The award of interest to 29 August 2016 is therefore £458.04 (£1.32 x 347 days). No interest has been included for the award made to compensate the claimant for future loss.

52. It was no in dispute that the respondents should be ordered to repay the claimant his Tribunal fees which total £1,200.

Fenella Eccles
Employment Judge

20 August 2016.
Date of Judgment
29 AUG 2016

Entered in register and copied to parties