

IN THE MATTER OF THE GENDER EQUALITY LAW, 2011

COMPLAINTS NO. **GET/1601 -1604**

STEPHEN CUTHBERT ATHERLEY
PETER ANDREW FOSTER
MARLON DANE THOMAS HODGSON
RICARDO HUGH PATRICK LASHLEY
Complainants

and

HM CAYMAN ISLANDS PRISON SERVICE
Respondent

DETERMINATION

Members of the Tribunal:

Sheridan Brooks-Hurst –Chairperson
Karie Bergstrom – Member
Nick Dunne – Member
Tammy Ebanks- Member

Representations:

The Complainants- Mr Guy Dilliway-Parry of Priestleys Attorneys at Law
The Respondent - Ms Claire Allen of the Attorney General’s Chambers

Hearing held on 5th and 6th October, 2016

Introduction

- 1 Mr Stephen Cuthbert Atherley, Mr Peter Andrew Foster, Mr Marlon Dane Thomas Hodgson and Mr Ricardo Hugh Patrick Lashley (“the Complainants”) are all employed by HM Cayman Islands Prison Service (“the Respondent”) as Custodial Managers. Each of them is male.
- 2 The Complainants have brought a Complaint under the Gender Equality Law 2011 alleging that their employer, the Respondent has discriminated against them in relation to their remuneration on the basis that they have been unequally remunerated for work of equal value when compared against a female Custodial Manager, Nina White (“Ms White”).
- 3 The parties have agreed the following wording for the Complaint:

“That a woman, namely Ms White, being unequally remunerated, above the level of her co-workers, for work that is of equal value to the parties’ employer, namely H M Cayman Islands Prison Service, the Respondent in these proceedings, contrary to section 8 of the Gender Equality Law, 2011 (“the Law”) which states:

“8. (1) An employer shall not pay unequal remuneration to men and women performing work of equal value to the employer.

(2) The burden of proof to establish that equal remuneration has been paid rests on the employer.”

4 It is clear from the above agreed Complaint that the parties have agreed that the woman in this case, Ms White, was being unequally remunerated for work that was of equal value to the common employer, the Respondent. Although both the Complainants and Ms White were employed as Custodial Managers, the Complainants were paid at Grade J point 4, whereas Ms White was placed two points higher within the salary band at Grade J point 6. That amounted in real terms to a difference of approximately 1.7% or CI\$1,068 per annum.

5 In addition, the Complainants further complain that because of the salary scale on which Ms White was placed, this meant that she received enhanced pension contributions of approximately CI\$130.00 per annum and they also complain that she also received a motor car upkeep allowance (“MCUA”) (\$360.00 per annum), which further served to increase the differential between the parties as those additional benefits were not provided to the Complainants.

6 It was agreed between the parties that the question for determination by the Tribunal was:

“Has the Respondent employer, HM Cayman Islands Prison Service, discriminated against the Complainants by paying unequal remuneration to them, as men, when compared to the remuneration of their co-worker, a woman (Ms White) for work of equal value to the employer?”

7 In order to make this Determination it was also agreed between the parties that the test which the Tribunal should apply in determining whether the Respondent had, on balance of probabilities, discharged its burden of proof pursuant to section 8(2) of the Law was as follows:

“The Respondent must:

- i. identify those factors which it alleges to have caused the disparity;
- ii. prove that these factors are genuine; and

iii. prove that they were causally relevant to the disparity in pay complained of.”

8 In the Skeleton Argument presented on behalf of the Respondent, it was argued that the unequal remuneration between the Complainants and Ms White resulted from the following factors:

- a. The interview panel and Ms. Dinspel-Powell’s assessments of Ms White’s experience, qualifications and interview answers as they related to the position she had been offered;
- b. Remuneration that it was expected Ms. White would be able to receive in the UK, taking into account the cost of living in the Cayman Islands;
- c. Austerity measures which meant that the Complainants’ remuneration had not been able to be increased to fall in line with what could be offered to new employees; and
- d. The eligibility criteria for a MCUA as set out in the Regulations when compared to the required use of personal motor vehicles for official duties by Ms White and the Complainants.”

9 In the course of hearing this Complaint, the Tribunal heard oral evidence from the following witnesses on behalf of the Respondent:

- a. Neil Lavis, Director of Prisons;
- b. Katherine Dinspel-Powell, Deputy Chief Officer, Corrections and Rehabilitation Division, Ministry of Home Affairs;
- c. Raquel Solomon, Human Resources and Information Manager, HM Cayman Islands Prison Service.

10 The Complainants evidence was set out in an Affidavit sworn by Marlon Hodgson dated 12 August 2016 and was not challenged by the Respondent. Accordingly, Mr Hodgson (and indeed the other Complainants) did not give oral evidence.

The Facts

11 On 29th November, 2013; 6th December, 2013; and 13th December, 2013 the Respondent advertised in the Caymanian Compass for “Custodial Manager”, which position was previously known as “Unit Manager”.

12 The vacant positions were for (a) Head of Offender Management and (b) Head of Training and Detail.

- 13 It is unclear whether the advertisement was also placed overseas, as Ms Solomon in her evidence indicated that she did not do so, although Mr Lavis in his evidence stated that the advertisements were placed “internationally”. However, it is clear that the position was advertised internally and locally.
- 14 There was a discrepancy between the evidence of Mr Lavis and Ms Solomon as regards the number of applicants for the position. Mr Lavis has stated that there were 10 applicants for the position most of whom were current employees of the Respondent, whereas Ms Solomon stated that there were 12 applicants.
- 15 In any event, a shortlist was then compiled and an interview panel selected consisting of Mr Lavis, two Deputy Directors of the Respondent (the Deputy Director- Operations and the Deputy Director- Rehabilitation) and Ms Solomon. The shortlisted candidates were interviewed in person or by video link, depending on their location, on Tuesday 21st January, 2014.
- 16 This interview panel selected two persons for the positions, one female (Ms White) and one male (Mr Hansen).
- 17 At the time of selection, Ms White was employed as a barista in a coffee shop (having recently left the UK Prison Service) and Mr Hansen was employed with the Respondent, with whom he continues to be employed. Ms White has since left employment with the Respondent.
- 18 At the time of selection, Ms White and Mr Hansen were given the choice as to which of the available positions he/she would like to fill. The majority of the Tribunal concluded from the offering of this choice to the two candidates that this meant that they must each have been regarded as similarly qualified, similarly experienced and each able to fill either of the vacant positions and that the two vacant posts were of equal value to the Respondent.
- 19 Ms White chose to fill the Head of Offender Management position, although she had stated in an email to Ms Solomon dated 19th February, 2014 that she “had replied to Neil [Lavis] saying that I would be happy in either role although I don’t have any experience in Offender Management.” She was placed 2 points higher (Grade J Point 6) on the salary scale than Mr Hansen who was eventually placed on the same point as the Complainants (Grade J Point 4) although Ms Solomon’s evidence was that she had initially recommended him to be placed at Grade J Point 1.
- 20 There was no evidence presented to the Tribunal that any female had previously filled the position of Unit Manager/Custodial Manager at the Respondent’s premises.
- 21 It is not disputed that the work which Ms White was doing as a Unit Manager/Custodial Manager, was of equal value to that of her male co-employees.

The Evidence

- 22 Although they were not required to provide oral evidence at the Hearing, the Complainants each initially submitted almost identical Statements to the Tribunal, the content of which was distilled into a representative Affidavit of Mr Marlon Dane Thomas Hodgson, (“Mr Hodgson”) of the Complainants, deposed to on 12th August, 2016.
- 23 In that Affidavit Mr Hodgson states that he is currently employed as the Custodial Manager –Head of Security at the Respondent’s premises and that he commenced employment there on 2nd March, 1987.
- 24 This means that Mr Hodgson has been employed with the Respondent for almost 30 years.
- 25 In his Affidavit, he states that he initially commenced employment at the Respondent’s premises as a Junior Prison Officer, and that over the course of his almost 30 years of service he has been promoted through the ranks to his current position. Mr Hodgson's uncontested evidence was that his co-complainants had followed a similar career path having joined the Respondent at approximately the same time, and accordingly each had approximately 30 years’ experience working for the Respondent.
- 26 Mr Hodgson also states that during his employment with the Respondent he has participated in numerous training courses, both on island and overseas.
- 27 He then goes on to list the start dates and current positions for each of the co-complainants as follows:
- i. Stephen Atherley – commenced employment on 28th June, 1987 and currently holds the position of Custodial Manager - Head of Operations;
 - ii. Peter Foster – commenced employment on 29th March, 1985 and currently holds the position of Custodial Manager - Head of Offender Management; and
 - iii. Ricardo Lashley – commenced employment on 28th June 1987 and currently holds the position of Custodial Manager – Head of Residence Services.
- 28 Mr Hodgson then goes on to illustrate the several stages which the Complainants “had to pass to become Custodial Managers” such as Junior Officer – Senior Officer – Lead Officer – Custodial Manager. He explains that although due to reforms within the organization some of these positions have merged and/or changed, when the Complainants were initially employed they received 12 weeks of initial training, and in order to obtain each promotion that they obtained they had to “successfully pass an interview and a written scenario-based test with the exception of the promotion

from Line Officer to Senior Officer which occurred automatically when the positions merged.”

- 29 He states that each of the Complainants were promoted to Custodial Manager positions in or around 2006 which would mean that at the time that Ms White (and Mr Hansen) were recruited to the two vacant Custodial Manager positions the Complainants had been in that position for approximately 7 years. The Tribunal was satisfied that the Complainants all had significant experience of working for the Respondent and more particularly of working as Custodial Managers.
- 30 He also sheds some light on the qualification and experience of Steve Hansen. He states that Mr Hansen joined the Respondent from the UK in 2000 and that at the time when he applied for the Custodial Manager position he had over 26 years of experience within the prison sector, 15 of which were accrued in the UK prior to 2000 and the remainder being acquired working for the Respondent.
- 31 Mr Hodgson has attached appendices from the UK Prison Service Pay Review Body’s Fifteenth Report on England and Wales 2016 which details current and recommended pay level for prison service employees in the UK.
- 32 He submits that it is clear from this document that the pay scales for the UK are considerably lower than those offered in the Cayman Islands. In the absence of any evidence to the contrary, the Tribunal accepts that those pay scales are accurate.
- 33 Mr Lavis was the first witness to provide oral evidence to the Tribunal. He testified that prior to taking up his position as Director of the Respondent that he worked in the UK Prison Service as Governor of Swansea Prison.
- 34 He confirmed that he was part of the Interview Panel interviewing for the 2 Custodial Manager positions and that once the positions were offered to Mr Hansen and Ms White that he told them that they could choose which position they each wanted as the other Custodial Managers’ positions would remain in place for the next 12 months although in October, 2014 all of the positions would be “up for grabs”.
- 35 Mr Lavis stated that it has always been his policy to allow Custodial Managers to choose which of the positions in that category they feel most suited to them, and he felt that it was only fair that he do the same with Mr Hansen and Ms White.
- 36 When cross examined as regards the basis for Ms White being paid on a salary scale of Grade J Point 6 whilst all of the Complainants, and Mr Hansen were on Grade J Point 4, he indicated that his involvement in this aspect of the matter was minimal as although he was responsible for placing them in the job, this did not include deciding the salary which would be allocated to them.
- 37 Mr Lavis states that he had familiarized himself with the Public Service Management Law (2013 Revision) and the Public Servant’s Code of Conduct contained therein. He agreed that section 5(2)(g) applies to all public servants whereby one has to

“disclose and take reasonable steps to avoid any conflict of interest (real or apparent) with his duties as a public servant, and must not use his official position for personal or familial gain;”.

- 38 He also testified that he had familiarized himself with the Public Service Management Law’s Personnel Regulations (2013 Revision). Section 27 (1)(b) of the Regulations stress that when establishing an interview panel, the appointing officer shall ensure that the panel consists of persons who “have no conflict of interest” and “are able to act in an independent and unbiased manner in relation to the appointment concerned.”
- 39 He stated that he had known Ms White for a significant period of time before he came to work in the Cayman Islands and that she had been a member of his staff in the United Kingdom from 2000 until 2004. He also testified that she is a close friend of his wife and a family friend. He testified that when he went to HMP Eastwood Park in 2000 she was friends with his wife, and they had been since 2001 when he started his relationship with his current wife.
- 40 He testified that he had informed the other members of the interview panel that Ms White was a family friend and that they did not see this as a conflict of interest which would prevent him from sitting on a panel to interview her. Ms Solomon recalled that Mr Lavis had declared his friendship with Ms White to the other members of the interview panel. Ms Dinspel-Powell also confirmed that he had informed the Ministry of his friendship with Ms White prior to the interview. She stated that the Ministry wasn’t concerned with a material conflict because it was a panel of four persons and given the experience of the persons on the panel any possible conflicts would be balanced out because they would know who would be a good fit for the positions.
- 41 In the circumstances the Tribunal found it difficult to understand why, if these various disclosures of the Director’s prior relationship with Ms White had been made, this had not been noted in the interview notes or elsewhere and further why it had not been referred to in either of the two affidavits sworn by Mr Lavis on 24th February, 2016 (1st Affidavit) and 20th July, 2016 (2nd Affidavit) for the purpose of these proceedings.
- 42 In fact it appears that the relationship was not disclosed in these proceedings until a letter from the Attorney General’s Chambers dated 4th August, 2016 in response to a query by Counsel for the Complainants.
- 43 Against this background, the majority of the Tribunal has struggled with the credibility of Mr Lavis, particularly when coupled with a failure to disclose in either of his affidavits that prior to the interview, he had escorted Ms White on a visit to the Prison. Although Mr Lavis did agree with Counsel during his cross examination that he should have noted his declaration of his friendship with Ms White in the Interview Notes, and also he should have included it in the affidavit evidence submitted on his behalf, the majority of the Tribunal were not satisfied with his account of why these matters had been initially omitted. It was also notable that Mr

Lavis had not mentioned that his wife, who was a close friend of Ms White, was at the time working as a Consultant for the Ministry of Home Affairs.

- 44 As regards the setting of Ms White's pay Mr Lavis' evidence was that his involvement in this aspect of the recruitment was minimal, although he recalled that when Ms Solomon asked him if he would put Ms White just below the mid-point on the salary scale and Mr Hansen below that, he had agreed. He stated that he thought this was fair but that he knew that he would not be making the decision and he expected that there would be further research by the Human Resources Department on this issue.
- 45 He also testified that he was aware of the fact that prior to her application for the position that Ms White was working in a coffee shop, but denied that he was aware of where the Complainants were on the salary scale as he had assumed that they were at the top of the salary scale given the length of time that they were employed with the Respondent.
- 46 As regards the Complainants' paths to their positions as Custodial Managers, Mr Lavis testified that he was not aware of the path which they took and he only outlined the path which Ms White would have had to have taken because he was asked. Although he was aware of the fact that Mr Hansen had been with the Respondent for approximately 15 years.
- 47 He also reiterated that he was aware of the fact that Ms White's previous experience in the Custodial Manager's position had initially been on a temporary basis, and that she had left the UK Prison Service two months after she received her substantive promotion to the position.
- 48 He also agreed that the factors which he was providing to explain Ms White's salary was basically after the fact justification for the salary and other benefits paid to Ms White.
- 49 Although he referred to the UK Qualification Handbook SFJ Awards Level 3 NVQ Diploma in Custodial Care as well, a copy of which was provided for the Tribunal in the materials provided, he admitted in evidence that he had not provided a copy of this handbook to Ms Solomon nor had he provided a copy to the Ministry.
- 50 In cross-examination he confirmed that although he had intended there to be a review of the Custodial Managers' positions in October 2014 that this did not happen.
- 51 Ms Dinspel-Powell also gave oral evidence on oath to the Tribunal to the effect that there were disparities in pay across Government between established staff and new recruits as a result of the need to offer competitive salaries to attract the necessary qualified and experienced personnel and due to successive austerity measures which have included freezes on increments and the inability to offer performance based pay for well over a decade.

- 52 She also stated in her affidavit that there were previously two other Principal Officers (now called Custodial Managers) at the Respondent who were being paid more than the Complainants, both of whom were male with one being paid at Grade J Point 5 and another being paid at Grade J Point 7. No further information was provided on these two employees other than that one is no longer employed with the Respondent and the other continues to be paid at Grade J Point 5.
- 53 Ms Dinspel-Powell also confirmed that there are no longer any female Custodial Managers at the Respondent following the conclusion of Ms White's employment with the Respondent.
- 54 Ms Dinspel-Powell confirms in her affidavit that when Ms White was employed at the Prison that the Respondent's Human Resources Manager provided a rationale for offering her Grade J Point 6, which included the pay which Ms White could have expected to receive in the UK and her qualifications.
- 55 She further states that the rationale provided was considered fair and reasonable in light of her (Ms White's) qualifications and experience and the current cost of living at that time.
- 56 She did not state whether Ms Solomon's rationale presented to the Ministry included anything to do with the austerity measures. On the basis of her Affidavit it appears that the salary was agreed to on the basis of what was believed to be Ms White's experience and qualifications together with what she could expect to receive in a comparable role in the UK.
- 57 Ms Dinspel-Powell summed up the basis for the pay rate given to Ms White as follows:
- "11. At no time did the Ministry consider anything to do with Ms White's sex, marital status or gender in agreeing to her proposed pay rate. **The Ministry's decision was based upon Ms White's training, experience and previous pay in the UK.**" (Emphasis added)
- 58 Ms Dinspel-Powell did not expressly mention the austerity measures as having been a reason which had a bearing on the setting of Ms White's pay or state that this was a reason for the disparity in pay between Ms White and the Complainants, although she did outline certain effects which Government's austerity measures may have in certain situations.
- 59 In paragraph 12 of her Affidavit she states that "At no time has the sex, marital status, or gender of the complainant impacted upon decision making about their pay. The complainant's pay has not been increased due to budgetary and policy constraints" thereby explaining that the reason why the Complainant's pay has not been increased is due to budgetary and policy constraint. The majority of the Tribunal did not consider that this was genuine.

- 60 In Ms Solomon's evidence she confirmed that due to austerity measures all recruitment to fill new and vacant positions was required to be approved by the Deputy Governor under the terms of the Cabinet Recruitment Moratorium.
- 61 According to her evidence, having made an application to the Deputy Governor's Office to fill two Custodial Manager positions, she received permission to proceed with the recruitment on 25th October, 2014; which should in fact have been 25th October 2013 not 2014.
- 62 She also confirms the constitution of the Interview Panel of which she was a member and states that one of the applicants shortlisted by the Panel was Ms White. She also states that when shown the shortlisted candidates, Mr Lavis informed her of his wife's relationship with Ms White and that he knew her. She states that she recalls asking him if he was going to recuse himself and him responding by asking her if she thought that he should recuse himself. As a result of this she asked whether he could be objective to which he replied that he could be objective, so she then indicated to him that there was no need for him to recuse himself.
- 63 She also notes that none of the applicants met all of the criteria noted in the job description, although the interview panel gave a Q1 rating to the top 5 candidates which rating meant that although they did not meet all of the criteria listed in the job description, they were perceived by the Interview Panel "as capable of performing the role".
- 64 She also accepted that at the time that the interviews were conducted none of the incumbent Custodial Managers met "the essential qualifications" noted in the job description.
- 65 She also states that she recalls Mr Lavis, during the discussions after the interviews were conducted, stating "I want to be particularly careful that there is no perception of bias on my part as it relates to Ms. White" and that Deputy Director Ms Caesar made a statement, and Deputy Director Greaves agreed, that there was no bias "as we had all selected her unanimously as the best candidate."
- 66 Ms Solomon states that of those who were qualified, Ms White scored significantly better in her interview scores than the next nearest candidate.
- 67 A copy of the interview scores was attached to the Second Affidavit of Mr Lavis and shows that Ms White scored 22.13 points whilst another candidate, who was not identified, scored 19.75 and Mr Hansen scored 19.13, the third highest score.
- 68 As the jobs were offered to Ms White and Mr Hansen (not the unidentified candidate who scored the second highest score) it does not appear that the scoring on the interview was the only criteria used for the selection of the successful candidates. In fact Ms Solomon goes on in her statement to confirm that "Following discussions surrounding the organizational needs and the Government's policy of

giving Caymanian and Permanent Residents fair opportunity for employment, Mr Steven Hansen was unanimously recommended to fill the second position.”

69 Ms Solomon also points out that she submitted the Panel Report and Individual Interview Notes to the Chief Officer Eric Bush at the Ministry of Home Affairs, on 29th January, 2014 and that Mr Bush approved the recommendation “without issue” on 31st January, 2014.

70 She goes on to state that after Mr Bush had approved the proposed employees she drafted a conditional offer of employment to Ms White and that in doing so :

“12. a. I researched what Ms White could have expected to earn in the UK Prison Service. I asked Mr Lavis whether he knew the current pay rates in the UK Prison Service. He said that he did not know what they were, but he gave me contact details of someone at the UK Prison Services or NOMS, I cannot recall which, to call and ask. The person I spoke to provided me with detail of the current UK pay rate in a telephone call. I cannot recall the exact figure that I was told, but I do recall that I put the figure into Google to convert it to Cayman Dollars. I am aware of the pay rates that the Complainants have put into evidence. Whilst I cannot recall the exact rate I was told, these rates seem lower than what I thought at the time. I did not take any tax rate in the UK into account.

b. I evaluated Ms White’s CV for experience and qualifications and gave consideration to her interview answers.

c. I also took into account local issues, such as cost of living.”

71 Based on a redacted email dated 11th March, 2014 sent at 11:37am from Ms Solomon to Mr Bush it appears that there was an issue subsequently raised relating to Ms White’s remuneration as in that email, which is headed “Justification for Conditional Offers” Ms Solomon states:

“Hi Eric,

Ms Sharon asked me to provide information regarding the above subject.

1. (redacted)
2. Nina White – Before writing Nina’s offer, I looked at NOMs website and others in the UK to find the average salary of a person with Nina’s experience in this post. The offer of (redacted) is below what they indicated as fair offer however considering cost of living, lack of increase over the past 5 years in the UK and relocation costs, Neil and I thought that this was fair.

Hope this helps.

Raquel”

72 It is clear that in this email Ms Solomon was seeking to explain the basis on which the remuneration included in the conditional offer to Ms White was arrived at.

73 The majority of the Tribunal concluded that what was likely to be causing the Ministry of Home Affairs some concern was that it was clear that the jobs being offered to Ms White (a female) and Mr Hansen (a male) were of equal value to the employer, and yet Ms White was being placed on a salary scale of Grade J, Point 6 whilst Mr Hansen was being offered a very similar position and was being placed on a salary scale of Grade J Point 4, notwithstanding that there appear to have been no significant differences in their experience, and qualifications and only a comparatively small difference in their respective scores with the Interview Panel.

74 The Tribunal noted that Ms White had only two months' substantive experience as a Custodial Manager as having been confirmed in the position after one year of temporarily acting in the post, she voluntarily left the position two months after her confirmation. Furthermore, the salaries that were in fact available to a Custodial Manager in the United Kingdom, even utilizing the London weighted figure, were substantially lower than that which was in fact offered to Ms White in the Cayman Islands. That led the Tribunal to conclude that there was some difficulty in explaining Ms White's salary on the basis of comparable pay from the United Kingdom. Furthermore, it was impossible to reconcile Ms Solomon's evidence that she had checked the comparable salaries in the UK by telephone with an employee at the UK Prison Service with the fact that there was no record of such a call made (Ms Solomon having described herself as a notetaker and produced her notes from the relevant period) and the lack of any obvious relationship between the UK salary scales and what was offered to Ms White in the Cayman Islands.

75 It is also clear from Ms Solomon's witness statement the factors which she took into account in deciding and recommending that Ms White should be placed on Point 6 as, having quoted the factors listed as (a)– (c) in paragraph 70 above, she concludes as follows:

“13. Taking the above factors into account I came to the decision that Point 6 seemed appropriate. There is no formal test or matrix for determining pay, I was therefore trying to apply the above factors to a discretionary decision.”

She also goes on to state

“15. In my role in determining the pay to offer Ms White I did not take into account what the other Custodial Managers were being paid. In my view the decision about pay to offer to a new employee is personal to

their particular circumstances and not contingent on what others are being paid.

16. In my role in determining the pay to offer Ms. White I did not take into account her sex or the sex of the Complainants.”

76 Ms Solomon then states that having had a discussion with Deputy Director Ms Caesar to the effect that there would not be a prison vehicle readily available for Ms White’s long term use due to the demand on the vehicle fleet, they discussed that they should offer Ms White a vehicle allowance so that she could perform her role which would require her to travel off-site such as to see potential employers for the Release on Temporary License Programme, to establish a network who would take prisoners, along with making spot checks on prisoners once in release on temporary licence placements and also for the visiting of partner agencies such as the Department of Children and Family Services and Department of Community Rehabilitation.

77 However, no evidence was provided to the Tribunal that Ms White had a private vehicle whilst she was employed with the Respondent, less still, that she was required to use it in the course of her employment with the Respondent.

78 The majority of the Tribunal also considered that the credibility of the evidence provided by Ms Solomon was affected by certain email correspondence which she had with Ms White, a person whom she indicates that she had not met prior to the interview being conducted.

79 Some examples of these emails, the content of which caused the majority of the Tribunal concern are set out below:

“ From: Nina White
Sent: Wednesday, February 19, 2014 3:21pm
To: Solomon, Raquel
Subject: Re future roles
Attachments: image001.jpg.html

Hi Raquel

I have replied to Neil saying that I would be happy in either role **although I don’t have any experience in Offender Management** (emphasis added). I do have experience in detailing and a little bit of training so yes I do have an interest in this area! I’m not sure where (redacted)’s skills lay so didn’t want to appear fussy because I am willing to give both roles a go! My comfort area would definitely be detail/training and especially as there is an urgent need to fulfil training it sounds like I’d be able to get stuck into it straight away. Neil was going to see what (redacted) gave as a preference but you are welcome to share this response with him if it helps in the decision!!

Look forward to hearing from you guys soon. I'm getting anxious to book my flight!! LOL.

Kind regards

Nina”

- 80 This email appears to be in response to an email which had been sent to Ms White by Ms Solomon which email stated as follows:

“From: Raquel.Solomon@gov.ky
To: Nin.
CC: Neil.Lavis@gov.ky
Subject: RE: Re future roles
Date: Wed, 19 Feb 2014 19:44:27 +0000

Hi Nina

Hope this email finds you well. I've got Neil throwing his weight around to get your offer signed so I can send it to you for your immediate and unadulterated acceptance!!!! LOL.

But as it relates to our options I've also told Neil that I'm not above doing a little begging to get you to come and work with me. I am really a great person to work with no matter what he says about me!

Seriously, do you have an leanings toward training? That is the urgent need we have and even if you don't want to stick with it for the long-term, if you are willing to work on it for the next 6 months, that would be appreciated. But if you have no love for training and development, I completely understand. As a former practitioner in that field, I wouldn't opt for that either.

Let me know.”

- 81 Another curious set of emails between Ms Solomon and Ms White took place on 13th March, 2014 which would have been 2 days after Ms Solomon's email to the Ministry headed “Justification for Conditional Offers” (see para 71 above). In this series of emails Ms Solomon writes as follows:

“From: Raquel.Solomon.gov.ky
To: ninawhite@
CC: Neil.Lavis@gov.ky
Subject: Conditionial Offer

Date: Thu, 13 Mar 2014 15:31:00 + 0000

Hi Nina,

My profuse apologies for taking so long to get this to you but there was quite a bit of discussion about your offer. Neil and I tried to secure the best deal for you.

See attached the conditional offer for the post of Custodial Manager.

Obviously, the start dates may be a bit off considering when the offer was written and when you are actually receiving it.

I'll accept scanned copies of the required documents until you arrive.

The medical is important. As soon as I get your acceptance and the documents, I will send your contract.

Let me know if you have any questions.

Regards,

Raquel"

82 To which Ms White responds as follows:

"From: Nina White [mailto:
Sent: Thursday, March 13, 2014 1:27pm
To: Solomon, Raquel
Subject: RE: Conditional Offer

Hi Raquel

Re: Condition Offer for Custodial Manager, HMCIPS

Many thanks for the information enclosed in the email sent to me today with the details of my conditional offer.

I would like to accept the offer and find everything to be very acceptable to me.

Please find attached a scanned copy of my latest CRB/police check that I had in place to work in the UK Prison Service, my birth certificate and confirmation of my appointment to Custodial Manager in the UK Prison Service. Please advise what other certificates you require to support my application.

I look forward to hearing how I progress with my medical, will I be sent a form that needs completing?

Also how I progress with arranging shipping. Once this is in place I see no reason to delay my journey over to you and would like to think that April 14th is achievable.

I look forward to hearing from you.

Kind regards

Nina White”

The Law

83 Part 2 of the Law, entitled Protection Against Gender Discrimination, contains section 3 which provides as follows;

“3. (1) For the purposes of this Law, a person discriminates against another person on grounds specified in subsection (2) if the first-mentioned person makes, on any of the grounds specified in subsection (2), **any distinction, exclusion or preference the intent or effect of which is to nullify or impair equality of opportunity or treatment in any employment or occupation.**

(2) The grounds referred to in subsection (1) are –

- (a) sex, marital status or pregnancy; or
- (b) any characteristic based on gender which appertains generally or is generally imputed to persons of a particular sex or marital status or pregnant state.

(3) Any act, practice or policy that directly or indirectly results in discrimination against a person on any ground specified in subsection (2), is an act of discrimination regardless of whether the person responsible for the act, practice or policy intended to discriminate. (Emphasis added)

84 As stated previously section 8 of the Law provides as follows:

“8. (1) An employer shall not pay unequal remuneration to men and women performing work of equal value for such employer.

(2) The burden of proof to establish that equal remuneration has been paid rests with the employer.’

85 Section 2 of the Law defines “equal remuneration” as follows:

“equal remuneration” means a rate or a scale of remuneration that has been established without differentiation based on the ground of sex, marital status or pregnancy.”

86 In this regard it should be noted that at no time during these proceedings did the Respondent argue that it was not paying unequal remuneration to men and women performing work of equal value to it (the Employer) insofar as Ms White and the Complainants were concerned.

87 The parties also agreed the test which the Tribunal should use in exercising its functions under the Law and presented an Agreed Question for the Tribunal which is worded as follows:

“Has the Respondent employer, HM Cayman Islands Prison Service, discriminated against the Complainants by paying unequal remuneration to them, as men, when compared to the remuneration of their co-worker, a woman (Ms White) for work of equal value to the employer?”

88 In seeking to determine this issue, the Tribunal must bear in mind the content of section 3 of the Law which explains what constitutes discrimination under the Law.

89 In this regard it should also be noted that although the UK authorities dealing with the prevention of gender discrimination cases are helpful, the Cayman Islands’ legislation is phrased in different terms to some of UK legislation dealing with this issue.

90 The Tribunal was taken to the House of Lords case of Strathclyde Regional Council and Others vs Wallace and Others (1998) L.C.R 205. The headnote of that case explains that the Applicants who were a group of unpromoted women teachers, employed by the Respondent councils brought claims for equal pay under the Equal Pay Act 1970 on the basis that they did like work to a principal teacher but were paid at a lower rate. Each of the applicants selected a male comparator who was a principal teacher employed by one of the councils and claimed equality of pay with such comparator.

91 The Industrial Tribunal and the Employment Appeals Tribunal held that a defence under section 1 (3) of the Act that the difference in pay were “genuinely due to a material factor which is not the difference of sex” had not been established because the councils had failed to justify the reasons for the disparity.

92 On appeal by the councils, the Second Division of the Court of Session allowed the appeal on the grounds, inter alia, that the difference in the treatment of the applicants from their male comparators was not due to the ground of sex but was due to a combination of the councils’ system of promotion coupled with financial constraints which amounted to a genuine material factor.

- 93 The Applicants then further appealed and their appeal was dismissed on the basis that the object of section 1 of the Equal Pay Act 1970 was to eliminate sex discrimination in pay, not to achieve fair wages; that accordingly if a difference in pay was explained by genuine factors not tainted by discrimination that was sufficient to raise a valid defence under section 1 (3); that in such a case there was no further burden on the employer to “justify” anything; and that it followed that in the circumstances the applicants’ claims failed.
- 94 In the current case, the parties agreed that the test to be applied by the Tribunal was as follows:
- “The Respondent must:
- i. identify those factors which it alleges to have caused the disparity;
 - ii. prove that these factors are genuine; and
 - iii. prove that they are causally relevant to the disparity in pay complained of.
- 95 Having observed the demeanour of the witnesses and also having reviewed the documentary evidence provided by both the Complainants and the Respondent, the majority of the Tribunal is of the view that the Respondent has failed to discharge the evidential burden placed upon it pursuant to section 8(2) of the Law.
- 96 The Respondent’s position is that the difference in pay between the Complainant and Ms White was based on:
- a. The interview panel and Ms Dinspel-Powell’s assessments of Ms White’s experience, qualification and interview answers as they related to the position she had been offered;
 - b. Remuneration that it was expected Ms White would be able to receive in the UK, taking into account the cost of living in the Cayman Islands; and
 - c. Austerity measures which meant that the Complainants’ remuneration had not been able to be increased to fall in line with what could be offered to new employees
 - d. The eligibility criteria for a MCUA as set out in the Regulations when compared to the required use of personal motor vehicles for official duties by Ms. White and the Complainants.
- 97 However, the majority of the Tribunal concluded that these reasons were not established as genuine based on the evidence given, the lack of real differential in experience between Ms White and the Complainants (and indeed Mr Hansen), the lack of any discernible relationship between the salaries that were in fact on offer in the United Kingdom and that which was offered in the Cayman Islands and the absence of any reference to the austerity measures having been made in the course of the recruitment exercise.

Conclusion

- 98 **Based on the totality of the evidence presented by the Respondent to the Tribunal, the majority of the members were not satisfied that the factors presented were genuine.**
- 99 **The Tribunal by a majority therefore finds that the Respondent has not discharged the burden of proof placed upon it pursuant to section 8 of the Law and accordingly the Complaints are substantiated.**
- 100 **The Tribunal would invite Counsel representing the respective parties to make any submissions which they may have on the issues of costs and quantum of damages within 14 days after the release of the Determination.**

Dated this 3rd day of November, 2016

Released on 9th November, 2016.

The Gender Equality Tribunal

SHERIDAN BROOKS-HURST, CHAIRPERSON

KARIE BERGSTROM, MEMBER

NICK DUNNE, MEMBER

TAMMY EBANKS, MEMBER