

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

VCAT REFERENCE NO. H405/2018

CATCHWORDS

Discrimination in employment, *Equal Opportunity Act 2010*; sections 8, 18, 125; *Victorian Civil and Administrative Tribunal Act 1998* section 76 and Item 18 of Schedule 1; age; gender; denial of a benefit; access to negotiate a salary.

APPLICANT	Christine Tsikos
RESPONDENT	Austin Health
WHERE HELD	Melbourne
BEFORE	Senior Member S.M. Burdon-Smith
HEARING TYPE	Hearing
DATE OF HEARING	10, 11, 12 March 2020
DATE OF ORDER AND WRITTEN REASONS	9 December 2020
CITATION	Tsikos v Austin Health (Human Rights) [2020] VCAT 1387

ORDER

The application is dismissed.



S.M. Burdon-Smith
Senior Member



APPEARANCES:

For applicant	S. Burt of Counsel G. Romeo, instructing lawyer
For respondent	N. Harrington of Counsel D. Hartnett, instructing lawyer

REASONS

NATURE OF THE APPLICATION

- 1 This proceeding is brought under the *Equal Opportunity Act 2010* (**EO Act**). The applicant claims that she has been directly discriminated against in her employment on the basis of her age and gender.
- 2 Christine Tsikos (**the applicant**) claims that she has been treated unfavourably by Austin Health (**the respondent**). The unfavourable treatment complained of is that she was denied or limited access to be able to negotiate her salary in comparison with a colleague who reports to her and is paid a significantly higher salary than her. The claim is that a significant reason for this treatment is her age and gender.

BACKGROUND

- 3 The applicant commenced her employment with the respondent in January 2009 as an Orthotist/Prosthetist. From 12 July 2011, she was appointed to the position of Manager, Orthotics and Prosthetics Department of the respondent's health service. She remains in that role. Her classification is Grade 4 Orthotist/Prosthetist.
- 4 The applicant's claims extend from her appointment in 2011 until the present time.
- 5 The substance of this claim relates to events outside the 12-month period preceding the application.

PRELIMINARY QUESTION

- 6 The respondent has given appropriate notice of its objection to the inclusion in the application of any alleged contraventions occurring prior to 7 November 2017.
- 7 It relies on Item 18 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (**VCAT Act**) which provides that -

The Tribunal may make an order under section 76 summarily dismissing an application under the **Equal Opportunity Act 2010** in respect of an alleged contravention of Part 4, 6 or 7 of that Act if the alleged contravention occurred more than 12 months before the application was made.
- 8 The respondent says in its Points of Defence that the consideration of any issue before that time causes an injustice to the respondent where the conduct relied upon the applicant was not raised as a breach, and because several relevant staff members are no longer employed by the respondent.
- 9 The respondent did not press for a decision on this point at the commencement of the hearing and reserved its right to raise it during the hearing and again in its final submissions. Given that the evidence pertaining to the submission and the claim were intermingled, and that the

Tribunal had allocated resources to proceed with this matter over three days, this approach was accepted.

- 10 I accept the reasoning provided in previous decisions of this Tribunal and the Courts that the time limit provided in Item 18 affords the Tribunal the ability to refuse to entertain a claim outside of 12 months, and that it has been exercised generally to ensure that a respondent is not unfairly impacted by the delay in commencing the proceeding.
- 11 Matters which the Tribunal might consider in the exercise of its discretion are the availability of evidence and witnesses, and the interconnectedness of the complaints.
- 12 I formed the view that the applicant's claim arising in 2018 could proceed and that the antecedent events were so connected in the applicant's history of events that application should proceed as a whole.
- 13 The delay in bringing these proceedings is a matter which was taken into account in the assessment of the evidence.

EO ACT AND THIS PROCEEDING

- 14 Section 8 of the EO Act defines direct discrimination as occurring if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.
- 15 An attribute is described in section 6 of the EO Act and includes age and gender.
- 16 Under section 8(2) of the EO Act in determining whether a person directly discriminates it is irrelevant:
 - (a) whether or not that person is aware of the discrimination or considers the treatment to be unfavourable;
 - (b) whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.
- 17 Section 18 of the EO Act prescribes the circumstances when discrimination in employment is illegal and provides:

Discrimination against employees

An employer must not discriminate against an employee—

- (a) by denying or limiting access by the employee to opportunities for promotion, transfer or training or to any other benefits connected with the employment; or
- (b) by dismissing the employee or otherwise terminating his or her employment; or
- (c) by denying the employee access to a guidance program, an apprenticeship training program or other occupational training or retraining program; or
- (d) by subjecting the employee to any other detriment.

- 18 Section 125 of the EO Act sets out VCAT's powers in this proceeding, relevantly:

125 What may the Tribunal decide?

After hearing the evidence and representations that the parties to an application desire to adduce or make, the Tribunal may—

- (a) find that a person has contravened a provision of Part 4, 6 or 7 and make any one or more of the following orders— ...
 - (ii) an order that the person pay to the applicant, within a specified period, an amount the Tribunal thinks fit to compensate the applicant for loss, damage or injury suffered in consequence of the contravention ...
- 19 The civil standard of proof applies in this case. Consequently, the applicant bears the burden of satisfying the Tribunal on the balance of probabilities of each event and element necessary to satisfy her claim.

Employment

- 20 The applicant's employment by the respondent is not contested.

Attributes

- 21 The protected attributes of age and sex are not contested.

Discrimination

- 22 To succeed the applicant must satisfy the Tribunal that the circumstances described by her fall within the categories of discrimination in section 18 of the EO Act and are prohibited. That is, that if discrimination occurred it was because of the applicant's gender or age.
- 23 The conduct complained of is the denial of the opportunity to negotiate. Her claim is that from 2011 she sought to negotiate an equitable financial arrangement for herself in comparison to her colleague Mr Spalding but was blocked from doing so. As a consequence, she claims that she was denied or limited access to a benefit connected with her employment. It is this conduct by the respondent the applicant claims to be the discrimination - the unfavourable treatment. She claims that a substantial reason for the discrimination occurring was her age and gender, and it is therefore prohibited under the EO Act. The resultant detriment is claimed to be the loss of remuneration which she would have received if treated on an equal footing to Mr Spalding.

AGREED FACTS

- 24 The applicant was employed as a Grade 3 Clinician in the respondent's Orthotics and Prosthetics Department (**the Department**) in 2009. On 12 July 2011, she was appointed as manager of that Department at the age of 31.

- 25 During her employment the applicant has been paid according to the Enterprise Bargaining Agreement (**EBA**) relevant to her sector. There was a period during which this did not occur, but it was rectified.
- 26 During the period covered by the complaint, there were a number of clinicians in the Department managed by the applicant who received salaries which exceed the EBA. One, Mr Spalding, consistently received a higher salary than the applicant for the entire period of her employment. Each of these clinicians is male. The applicant is a female.
- 27 Mr Spalding was employed by the respondent as a Senior Clinician prior to the appointment of the applicant. He was employed on a six-month probationary basis initially and converted to full time on 1 September 2010.
- 28 At the time of his employment, Mr Spalding's remuneration was agreed on the basis that he would raise revenue of \$220,000.00 for the Orthotics and Prosthetics Private Service entity of the respondent. His subsequent full-time appointment was on the same basis.
- 29 In 2015 when the private arm of the clinic was discontinued, Mr Spalding continued as a Senior Clinician on the same terms and conditions as when originally engaged. There was no longer any separate reporting attached to his revenue contribution.
- 30 Mr Spalding was paid in excess of the EBA for his position description. Both parties agree that this was and is considered reasonable in light of his particular expertise and his ability to attract a similar or higher salary in the private sector. The applicant does not and has not suggested that Mr Spalding should not receive his current salary.
- 31 Mr Spalding's duties as a Senior Clinician in the Department are predominantly to see clients - the clinical function. There is an associated administrative load, and teaching and mentoring. He has on occasion acted in the position of Manager of the Department in the absence of the applicant.
- 32 The applicant has managed 14 employees during her period as Manager. Of those 14, 10 were male. No less than four of them were paid above the EBA or at a classification higher than their role for the term of their employment. Each of those four were male. (The applicant claims that there were six.)
- 33 When the applicant was on leave, Mr Spalding acted in her position. He was paid at his salary which was higher than the applicant's when acting in her role.
- 34 All employees in the Department report directly to the applicant, including Mr Spalding.

EVIDENCE IN RELATION TO ATTEMPTS TO NEGOTIATE

First Attempt to negotiate

Applicant's evidence

- 35 The applicant states in her witness statement that it was only after appointment to the management role that she became aware that Mr Spalding was being paid approximately \$39,674.00 more than her despite her being his manager. She says that she became aware of four other employees classified at a higher classification than their performed roles at that time.
- 36 On appointment, the applicant states that she was wrongly classified. She approached her then manager Anne Scycz with a request that it be rectified. To the applicant's knowledge no action was taken by Ms Scycz.
- 37 The applicant states that on 12 August 2011 she raised the issue again, this time with her new manager, the Director of the Sub Acute Clinical Service Unit, JoAnne Moorfoot. The request was made by email. An email response from Ms Moorfoot states –
- Hi Christina,
- I am happy to discuss the classification with you. We do need to ensure that you are paid appropriately according to the award. We need to check that actual EFT and work from there.
- However you need to understand that funds to cover increase in salary must come from within your current budget. This will mean that we will need to reconfigure some of the staffing costs within O&P.
- We have been asked to look at identifying further cost savings within everyone's budget. Things are only getting grimmer I am afraid. I am going to ask you to coincide how you might come up with some ongoing savings in your area. eg. Reclassifying a vacant position to a lower grade, reducing fulltime positions to part time if possible (if a vacancy provides the opportunity), not backfilling leave etc. I will be having discussions with all managers.
- I will ask Lynn to set up a time for me for the classification discussion and with Don and I for the budget savings.
- 38 Following this, the applicant says that she had a meeting with Ms Moorfoot where she enquired whether she would be paid at a higher level commensurate with her skill and experience and that Ms Moorfoot refused to engage in this conversation.
- 39 An email dated 12 September 2011 from the applicant to Ms Moorfoot was tendered where the applicant says that since her appointment she had been in charge of 9-14 full-time professionals which under the relevant award would be equivalent to a classification at Grade 3 Chief Orthotist/Prosthetist (CO6) requesting that it be rectified. The applicant

received notification from Human Resources dated 10 November 2011 that the classification had been amended and backdated.

Respondent's evidence

Ms Moorfoot

- 40 Ms Moorfoot stated that she had some difficulty recalling with any precision events so long ago as 2011.
- 41 In relation to the applicant's statement that she had discussed the applicant's salary in a meeting, she had no recollection. She said that as she had only recently commenced her employment, she was certain that she would not have been comfortable recommending pay rises without having had sufficient time to assess potentially relevant issues such as the relevant employee's performance.¹
- 42 Ms Moorfoot said that her response to the email relating to the requested pay rise for a female employee dated 15 March 2012 is not related to that employee's sex or gender and that that is not something to which she had any regard.²
- 43 In relation to the salaries of identified male employees including Mr Spalding, Ms Moorfoot stated that her recollection is that each person's salary was based upon the particular circumstances of the employee and that Mr Spalding's salary was an anomaly as it was so far above the EBA classification.³ Ms Moorfoot was aware from discussions generally that his role had a revenue raising component.

Second to fourth attempts

Applicant's evidence

- 44 The applicant said that between 2011 and 2014, she had attempted on numerous occasions to raise the issue of her remuneration with Ms Moorfoot. Her recollection of comments made to her were words to the following effect
- a "Christina, you're such a young manager";
 - b "You're doing so well for yourself as a young manager"; and
 - c "You're still so green".
- 45 On 15 March 2012, the applicant's evidence is that she made a request to Ms Moorfoot for an increase in salary for another female employee with similar experience to Mr Spalding. She submitted the email from Ms Moorfoot which gave the following reasons for a deferral of the decision

¹ Applicant's witness statement [8].

² Ibid [9].

³ Ibid [10].

until Ms Moorfoot could raise the issue with Ms Scycz. The reasons given were -

- a it might set a precedent that could not be supported;
 - b that Ms Moorfoot had concerns about any expectation raised for over award payments to employees made by the applicant;
 - c that it was Ms Moorfoot's understanding that there was only one other employee with an over award payment; and
 - d that Mr Spalding's role and employment contract are quite unique.
- 46 The applicant submitted position statements for herself and Mr Spalding to the Tribunal to demonstrate the commonalities of each. She acknowledged that Mr Spalding performs more clinical duties and consequently has a greater direct revenue raising role than she does. She indicated that in her role she has the overall responsibility for managing the Department to attain maximum revenue. In her view, she has the skills and experience to enable her to supervise the members of the team.

Ms Moorfoot

- 47 Ms Moorfoot denied saying that the applicant was a "young manager" and said in her statement and evidence at the hearing that she referred to her as a "new manager" in discussions between 2011 and 2014. Her statement is that she meant that the applicant had not been in the role long and that Ms Moorfoot was surprised that she was seeking a pay rise above the EBA rate and that -

I said words to the effect that "we are an awards based classification structure". I was also aware that some staff were above award but my default position was to classification structure under the award/agreement. I was not, at that time, prepared to consider an above EA salary for Ms Tsikos given the pay classification and structure. That approach had nothing to do with her gender/sex. It was that she was a relatively new manager and paid in accordance with her classification. There was no reason to lift her remuneration.⁴

- 48 She states further -

I was particularly surprised at this request for greater remuneration in circumstances where Ms Tsikos was fairly new to the role and her Department was at that time performing poorly... It was my opinion at that time that Ms Tsikos performance in no way justified an above EA salary. In any event, while she raised the possibility of a salary increase with me, Ms Tsikos did not, at any stage, present a case as to why she should receive an above EA salary.⁵

⁴ JoAnne Moorfoot's witness statement [10].

⁵ Ibid [11].

49 At paragraph 13, Ms Moorfoot states -

... I recall at that time (5 years ago) that I was stunned she was seeking a pay rise. I never considered Ms Tsikos to be a standout manager or a high performer. In my mind, there was no basis for her to be paid above the EA. I saw no basis to reclassify her to a higher classification under the EA such as to justify a pay increase.

50 At paragraph 14, Ms Moorfoot states -

At the time I said to Ms Tsikos words to the effect: "you will need to go into the private sector if you want an increase as they are not an awards based structure". At no stage did Ms Tsikos present a case explaining to me why she should receive a pay increase above the EA rate.

51 Under cross-examination, Ms Moorfoot said that she blocked Ms Tsikos from talking about a pay rise each time she raised it, that she did not know the revenue targets of Mr Spalding or Ms Tsikos, that she never discussed the merits of Ms Tsikos have her salary increased, but that had she discussed it she would have refused because of the budgetary constraints; that revenue in 2012 under Ms Tsikos increased from previous management's reason for Mr Spalding's high salary was to prevent him from going to the private sector, indicated that she couldn't recall the discussions but that she could recall particular words.

Fifth Attempt

Applicant's evidence

52 In May of 2015, there was a meeting between the applicant, Ms Moorfoot and her direct line manger Debbie Munro. The applicant's evidence is that she brought up the issue for renegotiating her remuneration specifically in relation to the remuneration received by Mr Spalding. Her evidence is that at that meeting she raised -

- a all of the employees who receive remuneration above that provided for in the classification of their roles are male;
- b that they had all been given the opportunity to negotiate remuneration above the EBA classification relative to their employment;
- c that they were still employed and continued to be paid above EBA rates applying to their employment;
- d that Mr Spalding was paid more than her despite being classified at a lower level and reporting to her; and
- e that Mr Spalding continued to be paid at a higher level even when acting in her ongoing position.

53 The applicant's evidence is that Ms Munro and Ms Moorfoot declined to respond and that Ms Moorfoot said words to the effect that the applicant

was “motivated by money” and if that is the case, she “might wish to seek other employment”.

- 54 Following this meeting in a private conversation with Ms Munro, the applicant’s evidence is that Ms Munro said that that the discussion might provide “grounds to question the equity of her employment” but that Ms Munro felt blindsided by the introduction of the subject as the meeting was about the Department restructure and salary savings.
- 55 The applicant’s evidence is that Ms Munro was her manager until mid-2017, and no further opportunities to discuss the issue were given.
- 56 On 27 May 2015, the applicant was informed by Dino Lando from the Human Resources Department in response to her request for information, that Mr Spalding’s employment contract did not have a sales target.
- 57 During a period of absence from the role, the applicant was informed that her classification had to Orthotist/Prosthetist Grade 4 Year 4. During the implementation of the 2016-2020 Enterprise Agreement. Her remuneration remained stable by the applicant’s evidence is that she felt humiliated in light of her previous issues with the respondent regarding the CQ6 classification.
- 58 Other members of the Department were also reclassified. Notably John Paras and Martin French. The applicant says that they were classified appropriately for their duties and experience but were remunerated at their previous salary level which was \$25-28000.00 above the minimum prescribed by the EBA.
- 59 Ms Tsikos responded to Ms Moorfoot’s comments about her performance by providing performance review of the relevant period which was marked as expected.
- 60 Ms Tsikos confirmed that she never sought reduction of employees’ salaries but sought to be afforded the same opportunities.

Ms Moorfoot

- 61 Ms Moorfoot’s evidence of the May 2104 discussions was that Ms Tsikos raised with her that Mr Spalding’s salary was significantly above the EBA. Ms Munro, Divisional Director, was also present in the meeting. She recalled that they had discussed the issue at the time and were both concerned about Mr Spalding’s above EBA salary. Ms Moorfoot said that she was aware that he was paid well above the EBA and understood it to be because he had specific high-level clinical skills and his role had a revenue raising component arising out of those skills. Her understanding was that he was able to negotiate a higher salary because of the likely salary he would otherwise attract in the private sector. However, Ms Moorfoot said that she considered it to be excessive in the setting of the Austin Health and the EBA classification structure. She recalled asking Ms Tsikos if she would be willing to include Mr Spalding in the restructure that was being

implemented at the time. The conversation ranged around the fact that his role could be redefined, and his salary might then reduce. She said that they discussed that this might deal with the payment in excess of the EBA classification rate. Her recollection was that they discussed that they could not simply reduce his salary. Ms Moorfoot said that Ms Tsikos said she was not in favour of any restructure where Mr Spalding's role and/or salary would change.

- 62 Ms Moorfoot said that she raised the issue of Mr Spalding's remuneration with Ms Tsikos on a number of occasions over the years and that Ms Tsikos defended the remuneration paid to Mr Spalding and those technicians in the Department who were paid above the EBA with words to the effect of "we make money from him" and "we need someone of that skill level".
- 63 Ms Moorfoot states that Ms Tsikos did not at any time raise with her the fact that she considered the men in her work area were paid more because they were men.
- 64 Ms Moorfoot denied that any decision to not increase Ms Tsikos' remuneration was taken by her or to her knowledge any manager having regard to Ms Tsikos' sex or gender.

Ms Munro

- 65 At paragraph 6 of her witness statement, Ms Munro says that she recalls being surprised by Ms Tsikos requesting a pay rise as the purpose of the meeting was to discuss a proposed restructure of the team. She states that she did comment afterwards that she had been blindsided by the request as it had come out of the blue.
- 66 Ms Munro states that she does not recall any discussion with Ms Tsikos where she said to her that Mr Spalding was a male employee and that this was the basis of his over EBA payment. She states -

I considered that Mr Spalding had negotiated a greater remuneration than the standard EA remuneration because of his revenue raising element of his employment contract⁶.
- 67 Her recollection is that ultimately a recommendation was made and supported by Ms Tsikos, to maintain the current classifications whilst those staff remained at the hospital. This was done because of the critical role that each of them played in the function of the department.
- 68 Her recollection is that at that time in 2015 and in the context of the restructure, there was never a discussion about any employees' salary being unfair or discriminatory in nature because the person was a male employee.

⁶ Debbie Munro's witness statement [10].

Sixth attempt

Applicant's evidence

- 69 The applicant submitted a letter dated 26 June 2018 directed to the respondent outlining her endeavours to negotiate raising the issue that Mr Spalding's remuneration was 47% higher than his classification provided for in the Health Professionals Agreement.
- 70 The applicant said that it is her understanding that Mr Spalding was and continues to be classified at a lower level than the applicant under the 2016 EBA but receives a gross salary significantly above her own. He has an above award percentage of .4707. To her knowledge, neither Mr Spalding nor Mr French's salaries have been adjusted to fix the pay disparity. They have consistently received pay increases on top of their above award salaries.
- 71 In essence, the applicant said that had she had an opportunity to negotiate she would have been in a position to warrant an above award payment because she is confident that she would be able to attract a higher salary in the private sector, as would many other employees in her Department.

Jess O'Donnell, Manager Human Resources.

- 72 Ms O'Donnell most relevantly said that during the term that Ms Tsikos was manager, there have been 14 employees under her direct management and that only four of those employees received payments above the base rate of remuneration contained in the EBA for the position each of them was engaged to perform.
- 73 In response the applicant said that there were six members of her team that were either paid above the EBA classification rate or paid at a classification higher than that which they performed.

UNCONSCIOUS BIAS

- 74 The applicant invited evidence from Dr Wheelan, a private Psychologist. Dr Wheelan has a practical and academic interest in the area of unconscious bias. Her written statement was tendered to support the applicant's contention that the respondent may not have discriminated at a conscious level.
- 75 Dr Wheelan wrote that –
- people prefer women to behave like stereotypical women, and men to behave like stereotypical men. When women display traits or behaviours that are more stereotypically masculine, they are likely to be penalized and evaluated more negatively.
- 76 In addition, she said that when applying the principles to the current case it could be suggested that when the applicant attempted to negotiate her classification she was accused of being "motivated by money" and "that the same claim would be less likely to be levelled at a male employee."

DISCUSSION AND FINDINGS

- 77 The evidence in relation to the applicant's remuneration is not disputed. She has been paid significantly less than Mr Spalding for the duration of her appointment.
- 78 I accept that the evidence of the applicant that she and Mr Spalding have some equivalent qualifications and experience and at times share duties and roles. I find that the applicant's role has a management and administrative component greater than Mr Spalding's and that there is a clinical component to each.
- 79 I make no finding as to the respective clinical skills of the applicant and the respondent other than that they have similar qualifications.
- 80 I accept the evidence provided by the applicant and the respondent that Mr Spalding was first appointed on a revenue raising basis. I find that he was retained at the same level of remuneration when the requirement to raise revenue was no longer relevant. The importance of Mr Spalding's contribution to the work of the Department in both skills and revenue raising is not contested. I accept the evidence of both parties that Mr Spalding receives a remuneration in excess of the EBA for his classification.
- 81 Whilst invited to make a finding in relation to the appropriateness of the applicant's remuneration, I make no finding other than that it is as agreed by the parties to be consistent with the EBA for her classification, role and skills. The task of the Tribunal is not to determine whether the applicant should be paid above the EBA to match Mr Spalding. The task is to determine whether the applicant was denied access to the opportunity to negotiate this benefit for reasons prohibited by the EO Act.
- 82 I accept the evidence of the applicant that there were no less than four employees who received remuneration above the relevant EBA or who were classified at a level above the relevant EBA.

The first attempt

- 83 I accept the evidence of the applicant that she raised the issue of the disparity between her salary and that of Mr Stirling with Ms Moorfoot in 2014 and that Ms Moorfoot responded as provided in paragraph 35 of her witness statement.
- 84 It is my view that standing alone this transaction was not complete. Ms Moorfoot said that in her view a favorable response would be unlikely, but she did not stop, limit or prevent the applicant from pursuing her concerns further. None of the stated reasons indicate the consideration of age or sex which would give rise to the claim of prohibited discrimination.

The second to fifth attempts

- 85 I accept the applicant's evidence that she raised the issue of pay disparity with Mr Spalding with Ms Moorfoot on several occasions between 2011 and 2015 and that the discussions did not progress.
- 86 The meeting with Ms Moorfoot and Ms Munro is recalled by all participants. Both Ms Moorfoot and Ms Munro confirm that the applicant raised the topic of her salary in comparison with Mr Spalding's in the meeting. I accept their evidence that it was raised in a meeting which was scheduled to discuss the Department budget, and that they felt and displayed irritation with the applicant.
- 87 Ms Moorfoot's evidence that she had had discussions with the applicant about measures to regularize Mr Spalding's salary is accepted although her recollection of it occurring in the meeting with Ms Munro and the applicant is not consistent with the applicant and Ms Munro's evidence.
- 88 I find that it is likely that Ms Moorfoot used the words "young manager" at some point in conversation with the applicant but not necessarily in discussions about the wage disparity with Mr Spalding.
- 89 Ms Moorfoot's evidence demonstrated that she had been dismissive when the applicant asked about her pay, and had suggested that the applicant should seek employment in the private sector to get a higher salary.
- 90 I accept Ms Munro's evidence of the meeting that she was not aware of any further attempts to negotiate or overtures from the applicant after that meeting.
- 91 I accept the evidence of the applicant that she felt her efforts to attain a benefit which had been bestowed on an older male who performs a similar job with attributes close to her own were not given proper consideration and that her efforts had been stifled and that she did not raise the issue again until 2018 for that reason.
- 92 I accept the evidence of the respondent's witnesses that they were never aware or made aware of any claim or concern that the wage disparity issue was perceived to be related to age or gender.

GENERAL

- 93 To succeed in this claim, the applicant must satisfy the Tribunal that she has received unfavourable treatment. She relies on what she characterises as Mr Spalding's favorable treatment.
- 94 From the evidence, I am satisfied that Mr Spalding receives an above EBA salary. I find that its basis is in part due to an historical formula based on revenue raising and the most particular skills brought to the Department by Mr Spalding. The respondent and the applicant have had opportunities to review this and have elected to maintain the salary.

- 95 To claim that she was unfavourably denied the opportunity to negotiate her salary, the applicant might be expected to show that Mr Spalding or others in her Department have had the opportunity to negotiate salaries above the EBA.
- 96 The applicant provided evidence of only one employee who negotiated a salary higher than the EBA – Mr Young. Mr Young was recruited by the applicant. He resigned before his salary increase was implemented.
- 97 It is open to me to conclude that at the time Mr Spalding was employed, he had some engagement in the salary setting process. No evidence was led in relation to any post-engagement negotiations. Indeed, the evidence submitted by Ms Munro and the applicant indicated that the salary discussions occurred at the level of the applicant and her managers to the exclusion of the affected employees.
- 98 Therefore, it has been established that Mr Spalding has a salary higher than the applicant, but there is insufficient evidence to demonstrate that he has had an opportunity to negotiate it or its retention. The consequence is that the applicant's claim that she has been denied or limited in her ability to negotiate her salary is barely made out. She has not demonstrated that she has received unfavourable treatment in regard to the treatment received by Mr Spalding. Her claim may remain in relation to Mr Young.
- 99 Should that not be correct, the applicant is then required to satisfy the Tribunal that she has in fact been refused or limited in accessing the benefit of negotiating her salary.
- 100 The applicant was discouraged from making further attempts to negotiate her salary by her manager's dismissal of her attempts to negotiate. Of that I am satisfied. It is not enough. It is necessary to show that the acts of the respondent amounted to denial or limitation of her access to negotiating her salary.
- 101 Ms Moorfoot's evidence is that she felt the applicant's requests were inappropriate in the existing climate of budget reform, not timely, nor raised through the appropriate process and in her opinion would not be successful because the applicant could not substantiate her claim of equal standing with Mr Spalding. She conceded that she did not encourage or support the attempted discussions.
- 102 Ms Munro's evidence is that there was a climate of budget constraints and that the applicant was a part of that process. In her view, there was little capacity to increase salaries in that climate. The applicant was given the opportunity to reconfigure the Department funding over time through attrition or through reclassification of positions.
- 103 The applicant did not raise the issue with any degree of formality until her complaint in 2018 on which this application is based. The applicant did not put the respondent to the test – and therefore has little evidence of the

nature of the rejection of her attempts to negotiate, nor the reason for the rejection.

- 104 Were I to accept the applicant's evidence at its highest and find that that the alleged conduct by Ms Moorfoot and Ms Munro on behalf of the respondent amounts to a denial or limitation of access to a benefit, or the subjection of the applicant to a detriment – then the issue of a reason becomes relevant.
- 105 What evidence has the applicant provided to demonstrate that the conduct of the respondent related substantially to her age or sex? Firstly, the comments reported to have been made by Ms Moorfoot – that the applicant was a “young” manager, and then the evidence of Dr Wheelan.
- 106 Firstly, Ms Moorfoot may have made comments in relation to the applicant's youth. However, that on its own it is not sufficient to satisfy the burden of proof here – that it is more likely than not that the respondent breached section 18 of the EO Act because the applicant was “young”.
- 107 Dr Wheelan's evidence was about general matters. She was not in a position to comment on the effect of unconscious bias in this case. The applicant submits that she was subjected to unconscious bias by the respondent who favoured the men in her department over herself when it came to negotiating salary parity or over award payments. The applicant says that unconscious bias directed the unfavourable treatment. The evidence did not support this conclusion.

CONCLUSION

108 I find -

- a the applicant has failed to prove on the balance of probabilities that she was denied or limited from negotiating her salary and receiving payment for her work equivalent to her male counterpart Mr Spalding (or any other male); and
 - b even if that occurred the applicant has not shown that it was on the basis of her age or sex.
- 109 The applicant did not demonstrate -
- a That being unable to negotiate her salary was “unfavourable treatment”. She raised this in the context of being denied the opportunity but not providing adequate evidence of the opportunity existing amongst the other employees.
 - b That she was denied or limited from negotiating her salary. The applicant was able to demonstrate that the respondent did not encourage and informally disregarded the attempts to negotiate. She did not demonstrate with sufficient strength or particularity a denial or limitation of the attempts.

- c That any treatment which might be considered unfavourable was on the basis of her protected attributes of age or sex.

110 For the above reasons, the application is dismissed.



S.M. Burdon-Smith
Senior Member

