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Preferential pay protection: does UK law provide poorer protection to those discriminated against on grounds of protected characteristics other than gender?

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Preferential Pay Protection: Does UK law provide poorer protection to those discriminated against on grounds of protected characteristics other than gender?

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Abstract

UK law treats equal pay claims based on gender (brought under the equal pay provisions of Part 5 Chapter 3 of the Equality Act 2010) differently from equal pay claims based on other protected characteristics of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sexual orientation (brought under the general discrimination provisions in Chapter 2 of that Act). This article considers the impact of the differences on each group of claimants. It concludes that the separate system of equal pay for the protected characteristic of sex ignores other inequalities of pay and that the inconsistent way the UK treats these issues leads to inequality amongst disadvantaged groups. It recommends that the UK should take a more consistent approach to pay gaps.

Keywords

Equal pay, pay gaps, protected characteristics, transparency, remedies

Introduction

In the UK, a claimant who wishes to claim equal pay on grounds of sex must usually make a claim under Part 5 chapter 3 of the Equality Act 2010 (2010 Act). A claimant who wishes to claim equal pay on the ground of one of the other protected characteristics¹ has to use the provisions of either sections 13 or 19 in Chapter 2 of the 2010 Act which are the general provisions prohibiting direct and indirect discrimination.² This article argues that the separate gender pay provisions mean that gender is advantaged over other protected characteristics when it comes to equal pay. The article compares each type of claim to determine which is most effective in achieving equal pay and equality in terms of employment. The article examines the

issue in relation to direct and indirect discrimination, the comparator, burden of proof, employer's defence, enforcement and transparency. The term "pay" should be read to include terms of employment as the provisions are generally the same. Where there is a difference this will be indicated.

Pay gaps

Society has acknowledged, since the 1950's, that women tend to be paid less than men for work of equal value. Statistics collated over the years and considered below confirm that this is the case.

The average gender pay gap in Europe was 16.1% in 2014³ and 20% in 2016.⁴ There also remains a significant pay gap between men and women in full time work in the UK. The median gender pay gap for full time workers was 9.4% in 2016 and 9.1% in 2017.⁵ The gender pay gap remains a matter of concern for the European Union (EU) and the European Commission (EC) has acknowledged that existing legislation had done little to close the gap.⁶ In 2017 the EC published an analysis of the results of their consultation "Equality between Men and Women in the EU" concluding that "over the last year's gender pay gaps had been plateauing"⁷

Transparency in gender pay in the UK has been promoted by the introduction, in 2015, of pay audits as a remedy in equal pay cases and the recent introduction of compulsory gender pay gap reporting for public sector employers⁸ and employers with 250 or more employees⁹ which has produced a flurry of contentious pay gap reports and generated a great deal of media attention. Notable examples include Apple with a median pay gap of 24%, Ryanair with a median gender pay gap of 72% and JP Morgan with a median gender pay gap of 54%¹⁰

The pay gap resulting from other protected characteristics has received much less media coverage. The European Parliament has noted that pay inequality due to other protected characteristics such as race, ethnicity, sexual orientation or religion must not be tolerated¹¹ but until recent years, statistics confirming the extent of these pay gaps were not so readily available. The UK Annual Survey of Hours and Earnings (ASHE) does not collect data relevant to protected characteristics other than sex and the information available from the Labour Force Survey (LFS) on this topic is fragmented. However other research indicates that there are significant pay gaps in relation to other protected

characteristics. In 2009, an Equality and Human Rights Commission (EHRC) report¹² confirmed shortcomings in the research and statistics available and found that there were substantial pay gaps for most major ethnic minority groups and, in respect of religion, that there were adverse pay gaps for Muslim men and Sikh men compared to non-Muslim and non-Sikh men. It also found that disabled men had a pay gap of 11% compared to non-disabled men and disabled women of 22% compared to non-disabled women.¹³ The Equality and Human Rights Commission (EHRC) looked at the issue in their report in 2015 entitled “is Britain fairer?”,¹⁴ In that report the EHRC identified that the pay gap between all black, Asian and minority ethnic workers with degrees compared to white graduates was 10.3%. The worst affected were black graduates who earned on average 23.1% less than their white counterparts. Black workers with A levels earned 11.4% less than their white peers. White workers were paid around 50 pence per hour more than the combined average for ethnic minorities.¹⁵ Analysis carried out for the Trade Union Congress based on figures from the 2014 and 2015 Office of National Statistics (ONS) survey showed a race pay gap at all levels of the workforce¹⁶. A pay audit carried out for London Metropolitan police discovered an ethnicity pay gap of up to 37% in some of London’s public services.¹⁷

Finally, in 2017 two important pieces of research carried out on behalf of the EHRC published reports concerning pay gaps relating to disability¹⁸ and ethnicity¹⁹. This research confirmed an overall disability gap of 13% for men and 7% for women. The gap was particularly large for those suffering from mental health conditions and there was a strong relationship with ethnicity.²⁰ The ethnicity gap varied from zero in the case of Chinese and Indian men compared to white men to 26% for Bangladeshi men who were born in the UK and 48 % for Bangladeshi immigrant men.²¹ The report concluded that “Broadly speaking in the period 1993 -2014 there has been very little narrowing of ethnic pay gaps and for some groups they have actually increased, particularly among men.”²²

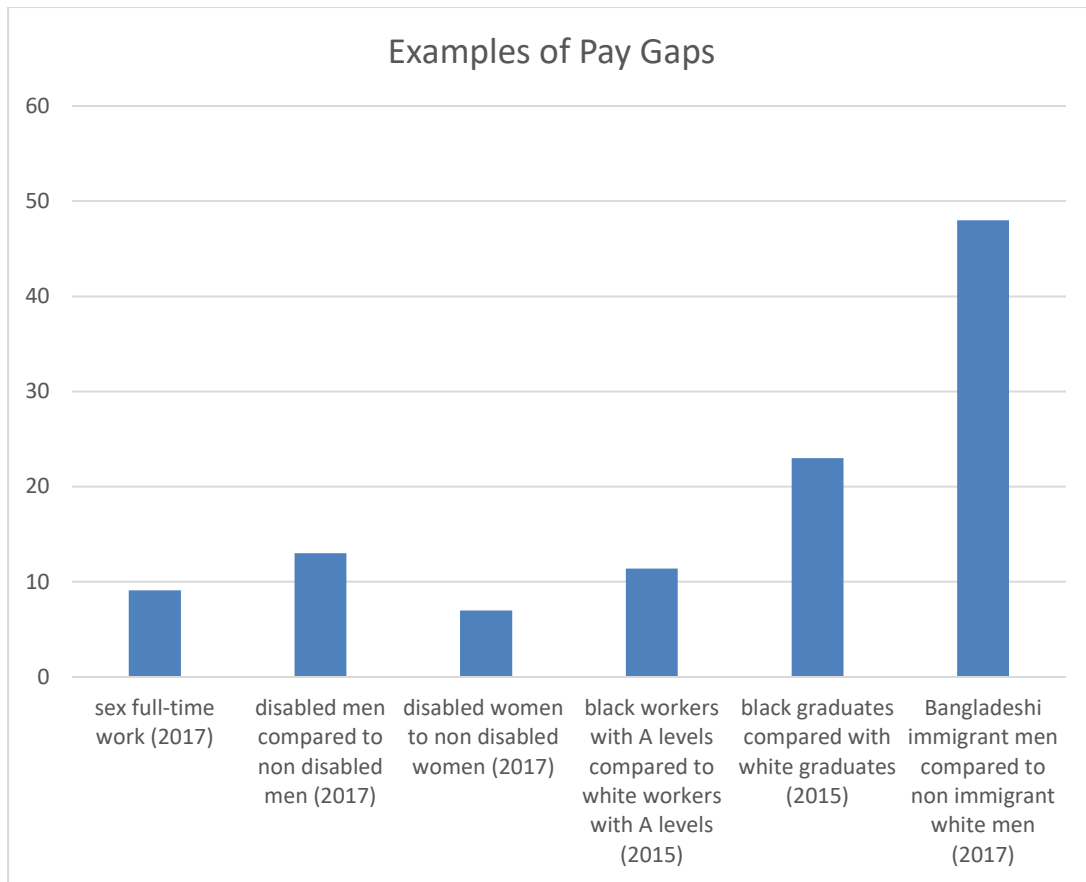


Figure 1 Examples of Pay Gaps drawn from the literature. M. Downie

From the available data, there is a strong indication that protected characteristics other than sex also result in poorer pay. Moreover the pay gap in respect of some protected characteristics is potentially greater than the gender pay gap. There is therefore a need for continuous, systematic data collection in respect of pay gaps relating to all protected characteristics so that the full extent of the problem can be monitored. It is also important that UK legislation provides an equivalent standard of protection for all protected characteristics.

Separate system for gender pay claims

Historically gender equal pay has been a discrete topic of discrimination law whereas there has been no separate provision for equal pay for any other protected characteristic. This is principally due to the way in which EU and UK anti-discrimination law developed. It is not proposed to describe the relevant EU Treaties and Directives in detail here however a very brief account follows in order to set the comparison in legal and political context.

The Treaty of Rome 1957 was concerned with creating a common market and customs union rather than with general principles of equality and therefore approached equality issues from an economic perspective rather than from a fundamental rights viewpoint. Whilst there was a general prohibition against discrimination on grounds of nationality,²³ there was no equivalent prohibition relating to sex (or indeed any other ground). There was however a provision requiring equal pay between the sexes²⁴ which later developed to encompass all aspects and conditions of remuneration including equal job classification systems.²⁵ Meanwhile, the general principle of equal treatment expanded to include protected characteristics other than nationality.²⁶ As the other protected characteristics became included in the general anti-discrimination provisions, only sex continued to have separate provision for equal pay whereas the other protected characteristics did not. The Charter of Fundamental Rights of the European Union (CFREU) replicates this approach including equal pay on the ground of sex in Article 23 and general anti-discrimination provisions for all protected characteristics in Article 21.

UK domestic discrimination law followed this template with the Equal Pay Act 1970 governing equal pay claims based on sex and the general discrimination law governed by separate legislation such as the Sex Discrimination Act 1975, Race Relations Act 1976 and the Disability Discrimination Act 1995. When all UK antidiscrimination legislation was consolidated in the 2010 Act the new legislation was founded on the same framework and gender pay claims remain the only type of pay claim to have separate legislative provisions.

UK Equality law

Gender pay claims are subject to the provisions of Part 5, chapter 3 of the 2010 Act. They cannot be brought under the general discrimination provisions section 13 (direct discrimination) or section 19 (indirect discrimination) unless the claim is not to do with a contractual term e.g. where there is not yet a contract of employment but the pay offered is less favourable and the reason is the sex of the applicant or where a suitable comparator under the chapter 3 equal pay provisions cannot be found.²⁷

Section 39 of the Act applies to all claims of discrimination in respect of the other protected characteristics. It provides that an employer must not discriminate in employment terms (including pay) or the terms of employment. If the claimant is paid

less because of a protected characteristic this will be unlawful direct discrimination (section 13) which cannot be justified²⁸ except in the case of age.²⁹ The use of the words “because of” in the definition of direct discrimination means that the definition includes discrimination by association and by perception.³⁰ The only defences available to an employer³¹ in a case of direct discrimination are that the reason is not a protected characteristic or that there is an occupational requirement under Schedule 9 of the 2010 Act. Therefore if the employer who has paid an English claimant less than a Scottish person doing the same job can prove that this was (for example) because of market forces at the time of recruitment rather than race, the claim will fail unless the market forces are themselves discriminatory

Where it is the practice to pay a particular job at a lower rate of pay and it can be established that this affects those sharing a protected characteristic this may amount to indirect discrimination.

Gender pay claims under Part 5, chapter 3 of the 2010 Act rely on a sex equality clause. Under the sex equality clause, a claimant must identify an appropriate comparator who is a person of the opposite sex working for the same or an associated employer doing work which is “like work, work rated as equivalent or work of equal value³². If an appropriate comparator is identified and is receiving better pay and conditions the onus shifts to the employer to show that the difference is due to a material difference other than sex.³³ If he cannot do so then the terms of her contract which are less favourable should be modified to be no less favourable to the complainant. If the comparator has a term which benefits him and she does not, her terms will be modified to include that term.”³⁴

At first sight, the provisions relating to a gender pay claim seem very different to those based on the other protected characteristics. These differences need to be considered in more depth to find out which procedure is more advantageous to a claimant.

The distinction between direct and indirect discrimination

Baroness Hale explains the purpose of the distinction and difference between direct and indirect discrimination (in relation to race):

“The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people

on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origin.”³⁵

In direct discrimination claims motive is irrelevant.³⁶ If the reason for the less favourable treatment is the protected characteristic then there has been unlawful discrimination. There is no justification defence for direct discrimination. Indirect discrimination occurs when the employer imposes a provision criterion or practice which applies to those sharing the protected characteristic and those who do not however the effect is that those who share the protected characteristic are put at a disadvantage. Indirect discrimination can be justified only if the employer proves a legitimate aim **and** that the means chosen to achieve it is a proportionate and necessary means of achieving it.³⁷ An objective balance must be struck between the discriminatory effect of the measure and the needs of the employer.³⁸

It is not clear why there is no mention of direct or indirect discrimination in gender equal pay legislation and it may be that it is simply because gender equal pay provisions were introduced to solve the particular problem of employers deliberately paying women less i.e. direct discrimination and indirect discrimination was an afterthought. In practice, an example of “direct” sex discrimination is where an employer pays a woman less than a man doing the same job because she is a woman. More complex disparities in pay occur where prima facie non-discriminatory pay arrangements result in a disproportionate number of women being paid poorly in comparison to men. In such situations the pay arrangements may be indirectly discriminatory. It is therefore important that both types of discrimination are included in the protection because otherwise there would be no remedy where the inequality was due to discriminatory pay scales, historical inequality or the fact that certain categories of work tend to be done by one sex or another.

Neither EU nor UK legislation mentions direct or indirect discrimination in relation to gender pay claims nevertheless the Court of Justice of the European Union (CJEU) has introduced the concepts into equal pay jurisprudence. The CJEU held ³⁹ that where significant statistics disclose an appreciable difference in pay between two jobs of equal

value, one of which is carried out almost exclusively by women and the other predominantly by men, the employer is required to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex. It is for the national court to determine, if necessary by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between the jobs in question. This was an approach which differed from that originally taken by the UK courts. When considering a difference in pay which was due to competitive tendering and historic inequalities in the labour market, the House of Lords effectively held that direct discrimination had occurred but stated that the Equal Pay Act 1970 must be interpreted in its amended form without bringing in the distinction between “so-called “direct” and “indirect” discrimination”.⁴⁰ More recently, the UK Court of Appeal ⁴¹ has followed the approach of the CJEU and recognised that these concepts apply in equal pay cases as well as general discrimination cases and they have imported them into the material factor defence in order to justify their position on the burden of proof (discussed below).

The comparator

The use of a comparator is a central concept of EU and UK discrimination law and the identification of the correct comparator is crucial to the claimant’s success. Gender equal pay claims require the comparator to be of the opposite sex, employed by the same or an associated employer and doing equal work to that of the claimant. ⁴²

In gender pay claims, employees of another employer can be used as a comparator provided the pay and terms of employment emanate from a single source and there is one body responsible for the inequality who could restore equality.⁴³ This applies whether or not the claimant could be required to work at the same workplace as the comparator.⁴⁴ It is the terms and conditions at each establishment which must be common, not those between the claimant and the comparator.⁴⁵ Therefore female workers working for a council as administrators, technical and clerical workers in libraries, schools, hostels and the social work department were able to compare with manual workers because, although not working at the same establishment, they were in the same service, the pay came from the same source and the different establishments

observed broadly the same terms and conditions for each group of workers.⁴⁶ This approach allows a wide choice of comparators which is flexible enough to include those working at different establishments,⁴⁷ at different locations,⁴⁸ for separate local authorities,⁴⁹ different companies and different Limited Liability Partnerships (LLPs).⁵⁰

It is still possible however for an employer to avoid a situation where a comparator can be used by outsourcing the work done by the potential comparator as demonstrated in *Lawrence*⁵¹

Another essential attribute of the gender pay comparator is the similarity of the work he does compared to that of the claimant. Work is regarded as “equal” if it is (a) like work, (b) work rated as equivalent or (c) work of equal value to the claimant. Like work is defined as work which is “the same or broadly similar to that of the claimant” and “such differences as there are between their work are not of practical importance in relation to the terms of their work.”⁵²

The courts have taken a broad brush approach to the comparison⁵³ which means that minor differences such as slight local variations in national collective agreements will not prevent the comparator from being used.⁵⁴ In deciding whether differences are of practical importance, regard must be had to the frequency with which differences between their work occur in practice, and the nature and extent of the differences.⁵⁵

Despite the different wording, the phrase “like work” is the equivalent of the comparator in a direct discrimination claim under section 13 (see below). Factors which may result in a finding that work is not “like work” include: different duties⁵⁶, amount of work required⁵⁷, additional responsibilities⁵⁸, different skills or qualifications⁵⁹ flexibility required of the employee⁶⁰ or antisocial hours.⁶¹ All of these factors might amount to a material difference in claims under section 13.

In gender equal pay claims, the claimant may use a comparator who is doing work rated as equivalent or work of equal value. Work will be rated as equivalent if a job evaluation study gives an equal value to the claimant’s job and the comparator’s job in terms of the demands made on a worker, (or would give an equal value were the evaluation not made on a sex-specific system). It allows a comparison to be made even where there is no comparator doing like work. The work of equal value comparison

can be used whether or not the work of the claimant is like work and cannot be rated as equivalent to the comparator's work (e.g. because the employer refuses to allow a job evaluation study to be carried out) but can nevertheless be regarded as equal in terms of the demands made by reference to factors such as effort, skill and decision-making.⁶² A comparator may be appropriate even though the work done is completely different therefore a support worker can compare to a groundsman or refuse worker⁶³, a cook to a park maintenance worker⁶⁴ etc. More than one comparator may be used⁶⁵ although the tribunal should not allow abuse of the procedure by allowing the claimants to "cast their net too wide."⁶⁶ This can be particularly helpful to the claimant when a term by term comparison has to be carried out. The fact that there exists a comparator who receives the same pay as the claimant is not fatal to the claim as the claimant may still rely on a comparator of her choice.⁶⁷

In order for a claimant to pursue a gender pay claim, an actual comparator must usually be found who fits these criteria. Prior to the 2010 Act it was not possible to use a successor as a comparator⁶⁸ however the comparator may now be a previous employee or a future employee.⁶⁹ The 2010 Act now provides that, if an actual comparator cannot be found, it is then possible to make a claim for direct (but not indirect) sex discrimination under section 13 which would allow use of a hypothetical comparator (see below).⁷⁰ It could therefore be argued that *if* a person of the opposite sex working for the employer and in materially the same circumstances *would* receive better pay or other terms and conditions then there has been discrimination if the reason for the discrimination is sex. If there is no actual comparator the claimant making a gender equal pay claim is therefore limited to a direct discrimination claim using a hypothetical comparator doing like work and this is a disadvantage compared to other protected characteristics.

In non sex claims, the comparator in direct discrimination (except in cases of disability) is someone who does not have the protected characteristic but whose circumstances are otherwise not materially different.⁷¹

The nature of the comparator was considered in *Bullock v Alice Ottley*⁷² when the claimant was forced to retire at age 60 because teaching, domestic and administrative staff retired at 60 whereas gardeners and maintenance staff working for the same employer retired at 65. The Employment Appeal Tribunal upheld the decision of the

Employment Tribunal that she could not compare herself to those employees because their circumstances were materially different from hers. The gardeners and maintenance men required special skills which were quite different from those employed by the applicant therefore it was not a like for like comparison. Similarly in *Greenland v Secretary of State for Justice*⁷³ retired judges serving as members of the parole board were paid a higher fee than non-judicial members chairing oral hearings. The retired judges were all white and the appellant was the only black member of the non-judicial panel. The Employment Appeal Tribunal upheld the Employment Tribunal's decision that there was a material difference in comparators since judicial members had more responsibility as they were required to chair oral hearings of prisoners sentenced to life imprisonment. In *Wakeman v Quick Corpn*,⁷⁴ locally recruited managers working for a financial institution could not compare to highly paid Japanese managers working for the same employer since the Japanese managers were highly paid because they were "secondees" and their circumstances were therefore materially different.

If we use chapter 3 terminology (see below), this case law suggests that the comparator in a claim of direct discrimination under section 13 would usually have to be doing "like work" and the claimant would not be able to use comparators who were doing "work rated as equivalent" and "work of equal value" because their circumstances (i.e. their role or job description) would be materially different. The claimant will find it difficult to compare to someone in a different role or carrying out materially different duties. In race discrimination claims, for example, the claimant would have to compare himself to someone of a different race who was doing a similar job to him and was similarly qualified.

If there is no suitable comparator, a hypothetical comparator can be used in claims of direct **and** indirect discrimination,⁷⁵ and *if* a person doing like work who did not share the protected characteristic *would* receive better pay or other terms and conditions then there has been unlawful discrimination. It would be possible to lead evidence about former incumbents of the role etc. to support an argument on this basis however even using a hypothetical comparator the comparator would usually still have to be doing similar work.⁷⁶

Typically, where a claim is based on protected characteristics other than sex the only way in which a claimant can make a claim comparing himself to someone doing

different work is to bring an indirect discrimination claim under section 19. This would be the closest equivalent to a chapter 3 “work of equal value” claim (see below). In *Bullock v Alice Ottley*⁷⁷ it was accepted that this type of claim would be competent but her claim was unsuccessful because, although the provision was *prima facie* indirectly discriminatory, the employer was able to justify it on the ground that there was a real and genuine need for the provision because of the difficulty in recruiting staff like the comparator and the need to retain them as long as possible.

It may also be difficult to use a comparator working for an associated employer because, although neither section explicitly states this, the wording of section 13 and section 19, implies that the claimant and the comparator work for the same employer. In most cases it would be difficult to make a comparison with someone who was working for an associated employer rather than the same employer as this would be regarded as a material difference. There is no case law on this point, however, it is submitted that when the terms and pay emanate from the same source and a single body is responsible for any inequality, then the fact that the employer is different should not be regarded as material and if so then, in this respect, the pool of available comparators is as wide as for chapter 3 claims. If this were not so then this would be a major disadvantage to claimants compared to gender equal pay claimants.

The availability of work rated as equivalent and work of equal value claims confers an important advantage over other protected characteristic claims which are restricted to a comparator who (in chapter 3 language) falls within the category of “like” work. In a situation such as that encountered in the *Greenland* case above a gender pay claimant might also fail to establish a comparator since the retired judges had more responsibility. In a situation similar to the *Ottley* case discussed above, a gender pay claimant would find it possible to use a comparator in a different role of job description whether or not the pay claim was direct or indirect.

The burden of proof and the employer’s defence

The operation of the burden of proof can often be the deciding factor in an equal pay/equality claim, however the interaction between the burden of proof and the

employer's defence has proved problematic in both equal pay and indirect discrimination claims.

The relevant European Directives provide that where a claimant proves facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.⁷⁸ and section 136 of the 2010 Act implements this provision in the UK and applies to both general discrimination claims and gender pay claims: Section 136 states:

“S136 (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision”

The interpretation of this section and its predecessors has been the subject of judicial debate particularly in relation to indirect discrimination where it interacts with s 19 and section 69 of the 2010 Act.

In gender pay claims, the employer has a specific defence under section 69 of the 2010 Act which states that:

“(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—
(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

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

Section 69 (6) also provides that “For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.”

The issue here is whether the employer need only prove that the factor was not sex tainted to succeed in a defence or whether he must also provide objective justification.

The approach taken by the UK courts has in the past differed from that of the CJEU. The two step process which national courts should follow in deciding whether the material factor defence is made out was described by the CJEU in *Enderby*:

“First, does the applicant show that a group which is predominantly female is treated less favourably than a group doing like work or work of equal value, of whom a majority are men? If so, then the burden shifts to the employer to show that the difference is ‘objectively justified’ on a non-discriminatory basis, i.e., that it is ‘genuinely due to a factor other than the difference of sex.’ This burden is not necessarily discharged by proving that there was no unlawful discrimination within the statutory definition”.⁷⁹

This is relatively straightforward in direct discrimination but when unequal pay is attributed to factors such as market forces, the employer must show that the factor is gender neutral.⁸⁰

Where the source of unequal pay is the use of pay scales where basic pay might be equal but bonus payments and supplements are used which indirectly discriminate against women, the situation is more complex. In theory the burden remains on the claimant but the claimant need not do much to discharge it before the burden shifts to the employer to justify the criterion as the CJEU has established a general rule that the criterion of mobility and training are disadvantageous to women and can only be justified as not on grounds of sex if they are of importance to the specific tasks entrusted to that employee⁸¹ On the other hand, the long service criterion “does not need special justification because It is linked to experience which the employer might wish to reward”.⁸² However if the claimant can raise “serious doubts” that the criterion is appropriate (e.g. that it was disproportionate) to attain the objective of rewarding experience by showing that there is evidence from which it could be established that the general rule does not apply the burden remains on the employer to justify the criterion. This did not amount to a switch in the burden of proof. The burden remained on the employer it was merely “a sensible evidential requirement” to ensure that the complaint had some prospect of success.⁸³

The CJEU approved these earlier judgments in *Brunnhofer*⁸⁴ confirming that:

” In principle the burden of proving the existence of sex discrimination lies with the worker ... However ... the burden of proof may shift when this is necessary to avoid depriving workers who appear to be the victims of sex discrimination of any effective means of enforcing the principle of equal pay.”⁸⁵

“In particular, when an undertaking applies a system of pay with a mechanism for applying individual supplements which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than for men.”⁸⁶

Therefore if the female claimant can show that the criterion results in a significant statistical disparity between the women’s pay and the comparator group of men, the burden will shift to the employer to justify it

The UK House of Lords did not allow the burden to shift so easily to the employer. It stressed that the need for objective justification arose **only** where the reason for the disparity advanced by the employer was sex tainted.⁸⁷ Where the employer’s defence was that the differences were due to the difference in pay scales and qualifications and that this amounted to a significant and relevant difference other than sex. The House of Lords looked at the intention of Parliament and the purpose of the Act⁸⁸ and held that “The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man’s contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a “material” factor, that is, a significant and relevant factor. Third, that the reason is not “the difference of sex.” This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within

section 1(2) (c), may be a “material” difference, that is, a significant and relevant difference, between the woman's case and the man's case.”⁸⁹

The approach taken by the UK courts in these cases meant that in sex pay claims where unequal pay is attributable to pay scales or criterion, the employer can avoid the need to prove objective justification if he can show that the pay practice is not sex tainted.⁹⁰

This approach is unhelpful since the burden should remain firmly on the employer to justify the difference in treatment between the comparators. It should not be the complainant's task to prove that the reason is sex related otherwise there is a danger that historical differences in pay scales will not be addressed and jobs traditionally done by women will continue to be under paid.

The UK Supreme Court has not yet reconsidered the matter however the *Brunnhofer* case has been approved by the CJEU in *Nikoloudi v Organismos Tilepikinonion Ellados* (OTE) AE⁹¹ and by the UK Employment Appeal Tribunal.⁹²

A factor is not material unless it is a material difference between the complainant's case and the comparator's.⁹³ In other words, the material difference relied upon by the employer must actually be relevant in the complainant's case. Examples of factors which have been regarded by the UK courts as a material factor other than sex are similar to those deemed to be legitimate aims described above and include, working antisocial hours,⁹⁴ rewarding long service,⁹⁵ retention bonuses,⁹⁶ productivity bonuses,⁹⁷ customary geographical variations,⁹⁸ market forces,⁹⁹ grading schemes¹⁰⁰ and ring fencing¹⁰¹ (although failure to phase out red circling or ring fencing after a reasonable period might result in the defence failing).¹⁰² The approach taken to this defence and the types of factor which will be relevant under this section are similar to those factors which apply in section 19 indirect discrimination cases.

The burden of proof in direct discrimination claims is also a 2 stage process.¹⁰³ Firstly the claimant is required to prove facts from which the tribunal could conclude (in the absence of an adequate explanation) that the respondent had or was to be treated as having committed the unlawful act of discrimination. Once the claimant does this, the burden then shifts to the respondent who then needs to prove he did not commit or was not to be treated as having committed the discriminatory act. The mere fact of less favourable pay will not be sufficient. Before the burden of proof shifts to the employer

the claimant must prove (on a balance of probabilities) that there was less favourable treatment and that the reason for the less favourable treatment was the protected characteristic.¹⁰⁴ The employer's defence in direct discrimination is limited to denial that there was less favourable treatment and/or denial that the reason for treatment was a protected characteristic because, except where the protected characteristic is age, direct discrimination cannot be justified.¹⁰⁵

Pay scales, bonuses or supplements which result in employees who share a particular protected characteristic being paid less than others who do not are likely to amount to indirect discrimination under section 19 of the 2010 Act. In the case of indirect discrimination, a similar problem arises to that described above in relation to gender pay claims, in that it has not always been clear how much the claimant has to prove before the burden shifts to the employer to justify a criterion.

The claimant must prove there is a provision, criterion or practice (PCP) being applied, identify the correct pool of comparators/comparator who do not share the protected characteristic; prove the claimant belongs to the pool of people who share the protected characteristic; prove that the PCP is being applied to both pools and that the pool to which they belong is being disadvantaged by the application of the PCP and prove that they personally are suffering that disadvantage. Only once the claimant has proved all these facts does the burden shift to the employer who must then disprove them or show that the PCP was a proportionate means to achieving a legitimate aim.

Once again there has been a tension between the attitude of the European Court of justice and the UK courts to the burden of proof. In *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*,¹⁰⁶ the CJEU reiterated that where the claimant established "facts from which it might be presumed that there have been direct or indirect discrimination it was for the respondent to prove that there had been no breach of that principle" and that it is for the national courts to decide in accordance with the rules and practices of national law, the facts from which it might be presumed that there had been direct or indirect discrimination. The Court of Appeal, however, had required the claimant to prove not only disparate effect but that the reason for the disparate effect was the protected characteristic.¹⁰⁷ The UK Supreme Court has recently overruled the Court of Appeal¹⁰⁸ and applied the view of the CJEU that a claimant who claims indirect discrimination need only establish that he is a member of a disadvantaged group

for the burden of proof to shift to the respondent. He need not also show *why* the relevant PCP has disadvantaged him as an individual.¹⁰⁹ The application of this doctrine to a race pay claim can be seen in *Naeem v Secretary of State for Justice*¹¹⁰ Whereas prison chaplains had been a long time feature of prison life, Muslim chaplains/Imams had only been introduced in 2002 and length of service was a factor in calculating pay. Therefore the average pay of an Imam was less than the average pay of a chaplain. The Court of Appeal held that it was not enough to show that the length of service criterion had a disparate impact on Muslim chaplains, it was also necessary to show that the reason for that disparate impact was something peculiar to the protected characteristic in question (race or religion) The Supreme Court disagreed stating that there was no requirement that the claimant show why the PCP puts one group at a disadvantage when compared with others. It is enough that it does. Whereas direct discrimination requires a causal link between the less favourable treatment and the protected characteristic, indirect discrimination does not. Indirect discrimination “requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual.”¹¹¹ Further “the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although some time it will be)”¹¹² and “there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage.”¹¹³

The employer’s defence in an indirect discrimination claim is that the PCP can be objectively justified as a proportionate means of achieving a legitimate aim. In determining whether this is so, a three stage test must be applied. Firstly, is the objective sufficiently important to justify limiting a fundamental right? is the measure rationally connected to the objective? and finally are the means chosen no more than is necessary to accomplish the objective?¹¹⁴

In *Naeem* above the Supreme Court pointed out that provided the correct legal test was applied the appeal courts would not interfere with the Employment Tribunal’s decision that the PCP of length of service was justified since this was a finding of fact.

Efficiency and maximisation of profits may be considered a legitimate aim,¹¹⁵ however in the UK, the pursuit of profit has not always been seen as proportionate when it results in inequality particularly in the case of a public sector employer.¹¹⁶ The need to reduce

costs¹¹⁷ and make decisions about allocation of resources¹¹⁸ has been accepted as justification for discriminatory provisions in age discrimination cases. The need to pay more to attract suitable candidates for a particular task may also be a proportionate means of achieving a legitimate aim, for example in *Greenland v Secretary of State for Justice*¹¹⁹ the tribunal was entitled to conclude that payment of increased fees to attract retired judges in order to reduce a backlog of oral hearings which only they could hear, was a proportionate means of achieving a legitimate aim.

It can be seen therefore that in protected characteristics other than sex, although there is no equivalent of a section 69 defence, the burden of proof provision of section 136 still applies and a similar outcome has been reached by a different route. In relation to the burden of proof therefore, gender pay claims and pay claims based on other protected characteristics have similar issues.

Enforcement

Discriminatory pay gaps will only be eliminated if the right to equal pay is able to be effectively enforced. This can be achieved either by imposing strict penalties on employers who do not meet their legal obligations or by shaming them into compliance.

Whilst equal pay claims of all types fall within the jurisdiction of the Employment Tribunal, gender pay claims are based on an equality clause implied into every contract of employment and an action for breach of contract can also be pursued in the civil courts.¹²⁰ This is a significant advantage since the time limits for pursuing such a claim are much longer than for a claim at tribunal (5 years in Scotland and 6 in England and Wales). There is no upper limit to the compensation which the court can award. Litigation in the courts is however prohibitively costly. Although there is the potential to obtain an award of costs against the unsuccessful party this is unlikely to meet the expense of bringing the claim.

Even where a claim is made to the Employment Tribunal there are important differences in the remedies available. In both types of claim the remedies of declaration, recommendation and compensation are available and no qualifying period of service is required to make a claim. In gender pay claims there is a longer time limit for bringing a tribunal claim - the claim must be made within 6 months of the date of termination of employment¹²¹ whereas pay claims relating to other protected characteristics must be brought within 3 months of the act complained of.¹²² There is also provision for the

contract of employment to be changed – the claimant’s contractual terms will be improved where they are less favourable than the comparator’s and where more favourable than the comparator’s that term will be left.¹²³ This may well mean that the claimant ends up in a better position than the comparator.¹²⁴ For example where the claimant has a better rate of pay than the comparator she will nevertheless be able to compare her contract on a term by term basis and if she has to work unsocial hours compared to the comparator that term will be considered unfavourable and will have to be improved.¹²⁵ The comparator will then be able to make a leapfrogging /piggyback claim using the claimant as a comparator.

In other pay claims a holistic approach is taken to the contract and therefore if poorer pay is compensated by better hours there may be no possibility of making a claim because the claimant may not have suffered a disadvantage.

The claimant in a gender pay claim can also claim up to 6 years arrears in England and Wales and 5 years in Scotland. This is because the remedy is the same for breach of contract and in Scotland the right to claim for contractual breach prescribes after 5 years.

At first sight it appears that there are two areas in which the remedies for other pay claims are better than for gender pay claims. The first of these is that there is no upper limit to compensation in a general discrimination claim, however compensation will only provide recompense for actual loss.¹²⁶ The amount awarded must be fair just and reasonable in the circumstances of the particular case. Guidance issued by the Court of Appeal¹²⁷ and updated by the Employment Appeal Tribunal¹²⁸ suggests that there are three bands of compensation for injured feelings:

- The top band for the most serious cases - between £18,000 and £30,000 (Only exceptionally should an award exceed £30,000.);
- The middle band for serious cases which do not merit being in the top band - £6,000 up to £18,000 and
- The lowest band for less serious cases such as a one off occurrence up to £6,000.

The average award for injury to feelings in race discrimination cases in 2013 was £5,730¹²⁹ but rose in 2014 to £7364¹³⁰ and to £7917 in 2015.¹³¹

A remedy available to gender pay claimants which is not available in pay claims involving other protected characteristics, is the pay audit. On the 1st of October 2014, the Equality Act 2010 (Equal Pay Audits) Regulations 2014 came into force. These Regulations provide that where an employer loses an equal pay claim the tribunal shall (unless an exemption applies)¹³² make an order for a pay audit to be carried out and the results published by the employer. The penalty for non-compliance with a pay audit order is a fine not exceeding £5000. Although these regulations are likely to prove a real deterrent to employers whose pay systems are unequal, this would have been even more effective if the penalty which can be imposed was higher.

Although there is no provision for compensation for hurt feelings, the remedies for gender pay claims are generally more effective than those for other protected characteristics due to the possibility of claiming breach of contract in the civil courts, the longer time limit for lodging a tribunal claim and the deterrent effect of pay audits for employers who lose gender equal pay claims.

Transparency

The effectiveness of naming and shaming as a deterrent is not new to employment law. It can be seen in relation to the national minimum wage. Pay transparency is an important means of closing the pay gap and one of the most important developments in gender pay has been the introduction of various measures to make public individual employer's attitude to the gender pay gap.

Section 77 of the 2010 Act makes any clause which purports to prevent or restrict employees from making relevant disclosures about their work terms void and unenforceable. The person who makes such a disclosure is also protected from victimisation. This makes it much easier for gender equal pay claimants to find the information they need in order identify a comparator and progress their claim.

Even greater transparency was introduced by the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 which applies to public sector employers with 250 or more employees and the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 which applies to private and voluntary sector employers who employ 250 or more people to publish pay gap information annually. A failure to do so may result in civil enforcement or a fine not exceeding point 5 on the standard scale.¹³³ This

requirement came into force in April 2017. These Regulations force affected employers to disclose the mean gender pay gap in hourly pay, the median gender pay gap in hourly pay, the mean bonus gender pay gap, the median bonus gender pay gap the proportion of males and females receiving a bonus and the proportion of males and females in each pay quartile. They must publish this information on their own website and on the government's gender pay gap reporting website.¹³⁴

Although the impact would be more momentous if smaller employers were included and a more substantial penalty introduced for failure to do so, the first reports gave rise to heated debate. As a result gender pay became the focus of public and media attention and many large companies have vowed to investigate their pay gaps and take remedial action.

Conclusion

Historically, statistics have been more readily available for the gender pay gap than for other pay gaps but recent research confirms that there are significant pay gaps in relation to protected characteristics other than gender.

Although the legislative provisions in respect of gender pay claims and pay claims based on other protected characteristics at first sight seem different, the underlying principles are identical and they are interpreted by the courts in a way which gives very similar results especially in relation to the burden of proof and the employer's defence however the separate focus on gender pay as a separate category of discrimination confers several important advantages on gender pay claimants.

Despite the fact that gender pay claimants cannot use a hypothetical comparator in indirect discrimination claims, they generally have a wider choice of comparators available to them.

The remedies available in other protected characteristics pay claims can include compensation for hurt feelings but in many other respects the remedies for gender pay claims are superior. The main advantages being the longer time limit to make a claim, the holistic approach taken to the comparison and the possibility of a claim in the civil courts.

Perhaps the most important inequality is the way the current law is structured is that it allows for much more transparency in relation to gender pay claims than other pay claims. The rendering of contractual terms preventing disclosure of pay and terms for use in an equal pay claim void and the protection from victimisation offered to the discloser allow the claimant to collect evidence to support her claim and to find an appropriate comparator thereby improving the chance of a successful claim. The recent introduction of the pay audit remedy and the pay disclosure provisions are likely to encourage employers (particularly public sector and large employers) to overhaul their pay arrangements, reducing direct and indirect pay discrimination rather than face public disapproval.

The current separate scheme results in an anti-discrimination law which causes inequality between the protected characteristics. If it is necessary to have a separate system for pay claims based on one protected characteristic then it is necessary to do so for all protected characteristics. A consistent legislative regime based on sound theoretical principle should be applied to all equality pay claims taking the best from each system to ensure a level playing field.

¹ That is age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sexual orientation.

² In the case of disability discrimination also discrimination arising from disability (Equality Act 2010 s 15) and failure to make reasonable adjustments (Equality Act 2010 s.20).

³ Eurostat 2014.

⁴ Eurostat 2016.

⁵ Office for National Statistics, 'Annual Survey of Hours and Earnings: 2017 provisional and revised results. 2017.

⁶ Commission Recommendation on strengthening the principle of equal pay between men and women through transparency (2014/124/EU).

⁷ Commission 2017 Report on equality between women and men in the EU at p 53.

⁸ Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 SI 2017/353, which came into force on 31 March 2017.

⁹ Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 SI 2017/172 came into force 6 April 2018.

¹⁰ <https://www.theguardian.com/society/2018/apr/05/the-uk-companies-reporting-the-biggest-gender-pay-gaps> accessed 10/4/18.

¹¹ 24th May 2012 the European Parliament resolution (2011/2285(INI) with recommendations to the Commission on application of the principle of Equal Pay for male and female workers for equal work or work of equal value para 9.

¹² Hilary Metcalf “Pay gaps across the equality strands: a review” EHRC Research report 14 Spring 2009.

¹³ The evidence on respect of age and sexual orientation was less clear.

¹⁴ Is Britain Fairer: The State of Equality and Human Rights in Britain 2015 Equality and Human Rights Commission 41.

¹⁵ Is Britain Fairer: The State of Equality and Human Rights in Britain 2015 Equality and Human Rights Commission 41.

¹⁶ Labour market disadvantage of ethnic minority British graduates: university choice, parental background or neighbourhood? Zwysen, W. and Longhi, S. Jan 2016.

¹⁷ <https://www.london.gov.uk/about-us/governance-and-spending/spending-money-wisely/ethnicity-pay-gap-report-2017>.

¹⁸ Equality and Human Rights Commission Research report 107 | Pay gaps research The Disability Pay Gap Simonetta Longhi Institute for Social and Economic Research, University of Essex Aug 2017.

¹⁹ Equality and Human Rights Commission Research report 107 | Pay gaps research The Ethnicity Pay Gap Simonetta Longhi Institute for Social and Economic Research, University of Essex Aug 2017.

²⁰ Equality and Human Rights Commission Research report 107 | Pay gaps research The Disability Pay Gap Simonetta Longhi Institute for Social and Economic Research, University of Essex Aug 2017 .

²¹ Equality and Human Rights Commission Research report 107 | Pay gaps research The Ethnicity Pay Gap Simonetta Longhi Institute for Social and Economic Research, University of Essex Aug 2017 at 8.

²² Equality and Human Rights Commission Research report 107 | Pay gaps research The Ethnicity Pay Gap Simonetta Longhi Institute for Social and Economic Research, University of Essex Aug 2017 at 8.

²³ Article 48(2)EEC.

²⁴ Article 119 of the Treaty of Rome which provided that “each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied”. Now Article 157 TFEU.

²⁵ Article 1 Equal Pay Directive 75/117/EEC.

²⁶ Article 19 of the Treaty on the Functioning of the European Union (TFEU) allows the Council, with the consent of the Parliament, to take action to combat discrimination based on protected characteristics such as sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Equal Treatment Directive 1976 (76/207/EEC) includes a general protection against sex discrimination. And the current Directive is the Recast Equal Treatment Directive (2006/54/EC) which consolidates most of the previous Directives relating to sex discrimination.

²⁷ Equality Act 2010 section 71.

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- ²⁸ *Moyhing v Barts & London NHS Trust* [2006] I.R.L.R 860.
- ²⁹ Equality Act 2010 section (13)(2).
- ³⁰ Equality Act 200 section 13.
- ³¹ Unless the act falls within the occupational reason of Schedule 9 to the Equality Act 2010.
- ³² Equality Act 2010 Section 65.
- ³³ Equality Act 2010 Section 69.
- ³⁴ Equality Act 2010 Section 66(2.)
- ³⁵ *R (on the application of E) v Governing Body of JFS and others* [2009] UKSC15 at 56-57.
- ³⁶ *Ministry of Defence v Jeremiah* [1980] QB 87.
- ³⁷ *Bilka-Kauf-Haus Gmb H v Weber von Hartz* (Case 170/84) 110, 37; *Brunnhofner v Bank der Osterreichischen Postsparkasse AG*; *Nikoloudi v Organismos Tilepikinonion Ellados (OTE) AE* (C196/02).
- ³⁸ *MacCulloch v ICI* [2008] I.C.R. 1334.
- ³⁹ *Enderby v Frenchay HA* [1994] 1CMLR at 19.
- ⁴⁰ *Ratcliffe v North Yorkshire County Council* [1995] I.C.R 883 HL Lord Slynn at 839.
- ⁴¹ *Gibson v Sheffield County Council* [2010] I.C.R. 708.
- ⁴² Equality Act 2010 s 65(2).
- ⁴³ *Lawrence v Regent Office Care Ltd* (C-320/00); [2002] E.C.R. I-7325.
- ⁴⁴ *North v Dumfries and Galloway Council* [2013] UKSC45.
- ⁴⁵ *Leverton v Clwyd County Council* [1989] I.C.R.33.
- ⁴⁶ *City of Edinburgh Council v Wilkinson* [2010] IRLR 756.
- ⁴⁷ *North v Dumfries and Galloway Council* [2013] UKSC 45.
- ⁴⁸ *Edinburgh City Council v Wilkinson* [2012] I.R.L.R. 202.
- ⁴⁹ *South Ayrshire Council v Morton* [2002] I.C.R. 956.
- ⁵⁰ *Glasgow City Council v Fox Cross claimants* [2014] CSIH.
- ⁵¹ (C-320/00); [2002] E.C.R. I-7325.
- ⁵² Equality Act s65 (1).
- ⁵³ *British Coal Corporation v Smith* [1996] I.R.L.R 404 HL Lord Slynn at 408.
- ⁵⁴ *British Coal Corporation v Smith* [1996] I.R.L.R 404HL.
- ⁵⁵ Equality Act 2010 section 65(3).
- ⁵⁶ *North v Dumfries and Galloway Council* [2013] 4 All E.R. 413.
- ⁵⁷ *Sita (UK) Ltd v Hope* UKEAT 0787/04.
- ⁵⁸ *Waddington v Leicester Council for Voluntary Service* [1977] I.C.R. 266.
- ⁵⁹ *Falconer v Campbell Computer Services Ltd* UKEAT 250045/04.

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- ⁶⁰ *Chief Constable of West Midlands Police v Blackburn and Manley* UKEAT/007/07.
- ⁶¹ *Dugdale and Ors v Kraft Foods Ltd* 1977 I.C.R. 48.
- ⁶² Equality Act section 65(6).
- ⁶³ *North v Dumfries and Galloway Council* [2013] 4 All E.R. 413.
- ⁶⁴ *Cooksey (GMB Claimants) v Trafford BC* 2012Eq L.R. 744.
- ⁶⁵ *Leverton v Clywd County Council* [1989] I.R.L.R. 28.
- ⁶⁶ *Leverton v Clywd County Council* [1989] I.R.L.R. 28 Lord Bridges at 33.
- ⁶⁷ *Pickstone v Freemans Plc* [1989] AC 66.
- ⁶⁸ *Walton Centre for Neurology & Neuro Surgery NHS Trust v Bewley* [2008] I.C.R. 1047.
- ⁶⁹ Equality Act 2010 section 64(2).
- ⁷⁰ Equality Act 2010 section 71.
- ⁷¹ *Loxley v Department of Work and Pensions* [2014] I.C.R. 1257.
- ⁷² [1993] I.C.R 138.
- ⁷³ UKEAT/0323/14/DA.
- ⁷⁴ [1999]I.R.L.R 424.
- ⁷⁵ Sections 13(1) and 19(2) Equality Act 2010; *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] I.C.R. 337; *Balamoody v UK Central Council for Nursing and Midwifery* [2002] I.C.R. 646.
- ⁷⁶ *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] I.C.R. 337; Equality Act 2010 s 23.
- ⁷⁷ [1993] I.C.R 138.
- ⁷⁸ Burden of Proof in Cases of Discrimination based on Sex Directive 1997 (97/80/EC); Article 8 Directive 2000/43 (the Race Directive) and Article 10 Directive 2000/78 (the Framework Directive).
- ⁷⁹ Now section 13 Equality Act 2010 (direct discrimination).
- ⁸⁰ *Enderby v. Frenchay Health Authority (Case C-127/92)* [1994] I.C.R. 112.
- ⁸¹ *Handels-og KontofunktionAE Rernes Forbund I Danmark v Dansk Arbejdsgiverforening*: [1989] E.C.R.3199; [1991] 1 C.M.L.R. 8.
- ⁸² *Handels-og KontofunktionAE Rernes Forbund I Danmark v Dansk Arbejdsgiverforening*: [1989] E.C.R.3199; [1991] 1 C.M.L.R. 8.
- ⁸³ *Cadman v HSE (case C-17/05)* [2007] 1 CMLR 16 and *Wilson v HSE* [2010] 1CMLR 24.

⁸⁴ *Brunnhofner v Bank der Osterreichischen Postsparkasse AG* [2013] 3CMLR 9. At para 51-54. Endnotes 85 and 86 below are the footnotes referred to by the European Court in this case.

⁸⁵ *Enderby v Frenchay Health Authority and Another* Case C-127/92; [1993] E.C.R. 1-5535; [1994] C.M.L.R. 8 para [14].

⁸⁶ *Handels-og Kontofunktion AE Rernes Forbund I Danmark v Dansk Arbejdsgiverforening*: [1989] E.C.R.3199; [1991] 1 C.M.L.R. 8 para [16].

⁸⁷ *Strathclyde Regional Council v Wallace*, [1998] WLR259.

⁸⁸ *Glasgow City Council v Marshall* [2000] 1 W.L.R. 333. Lord Nicholls at 339.

⁸⁹ [2000] 1 W.L.R. 333 Lord Nicholls at 339.

⁹⁰ *Gibson v Sheffield County Council* [2010] I.C.R. 708; *Bury MBC v Hamilton and City of Sunderland v Brennan* [1998] 1 W.L.R. 259.

⁹¹ (C196/02); [2005] ECR I-1789.

⁹² *Sharp v Caledonia Group Services Ltd* [2006] I.C.R. 218.

⁹³ Occasionally these factors also mean that the comparator is not doing work of equal value.

⁹⁴ *Blackburn and another v Chief Constable of West Midland Police* [2009] I.R.L.R. 135.

⁹⁵ *Navy, Army and Air Force Institutes v Varley* [1976] I.R.L.R. 408.

⁹⁶ *Professor C Bradely v Bedford New College University of London* UKEAT/0459/13/SM.

⁹⁷ *Hartlepool BC v Dolphin* [2009] I.R.L.R. 168.

⁹⁸ *Navy, Army and Air Force Institutes v Varley* [1977] I.C.R. 11; 1976 I.R.L.R. 408 EAT.

⁹⁹ *Rainey v Greater Glasgow Health Board* [1987] A.C. 224.

¹⁰⁰ *National Vulcan Engineering Insurance Group Ltd v Wade* [1978] ICR 800, [1978 I.R.L.R. 225 CA.

¹⁰¹ *Bainbridge v Redcar and Cleveland Borough Council* [2008] EWCA Civ 885.

¹⁰² *Outlook Supplies Ltd v Parry* [1978] I.R.L.R. 12 EAT.

¹⁰³ *Igen v Wong* [2005] ICR 931; *Hewage v Grampian Health Board* 2013 S.L.T. 1191.

¹⁰⁴ *Bahl v Law Society* [2004] EWCA Civ 1070.

¹⁰⁵ *Moyhing v St Barts* [2006] I.R.L.R. 860.

¹⁰⁶ *C-83/14* at 497.

¹⁰⁷ *Naeem v Secretary of State for Justice* [2015] EWCA Civ 1264; *Home Office (UK Border Agency) v Essop and Ors* [2015] EWCA Civ 609.

¹⁰⁸ *Essop and Others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice* [2017] 1 WLR 1343.

¹⁰⁹ *Essop and Others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice* [2017] 1 WLR 1343.

¹¹⁰ *Essop and Others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice* [2017] 1 WLR 1343.

¹¹¹ *Essop and Others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice* [2017] 1 WLR 1343 at 25

¹¹² *Essop and Others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice* [2017] 1 WLR 1343 at 26.

¹¹³ *Essop and Others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice* [2017] UKSC27 at 27.

¹¹⁴ *R (on the application of Elias) v Secretary of State for Defence* [2006] I.R.L.R. 934, CA

¹¹⁵ *Enderby v Frenchay Health Authority (Case C-127/92)* [1994] I.C.R. 112

¹¹⁶ In the case of protected characteristics it would be difficult to see what this could be but in the case of disability or age this could be productivity/ efficiency and in the case of age rewarding loyalty of long serving members of the work force.

¹¹⁷ *Edie v HLC Insurance* UKEAT 0153/14/DM.

¹¹⁸ *HM Land Registry v Benson* [2012] I.R.L.R. 37.

¹¹⁹ UKEAT/0323/14/DA.

¹²⁰ *Abdulla v Birmingham City Council* [2010] EWHC 3303 (QB), [2011] I.R.L.R. 309.

¹²¹ 2010 Act s 129.

¹²² 2010 Act s 123.

¹²³ Equality Act 2010 section 60(2).

¹²⁴ *Hayward v Camel Laird Shipbuilders Ltd* 1988 I.C.R. 464.

¹²⁵ *Brownbill v St Helens and Knowsley Teaching Hospitals NHS Trust* [2011] EWCA Civ 903; *Jamstalldhetombudsmannen v Orebro Lans Landsting* (C-236/98) [2000] E.C.R. I-2189, *Brunnhofner v Bank der Osterreichischen Postsparkasse AG* (C-381/99) [2001] E.C.R. I-4961; *Elsner-Lakeberg v Land Nordrhein-Westfalen* (C-285/02) [2004] E.C.R. I-5861 and *Stadt Lengerich v Helmig* (C-399/92) [1994] E.C.R. I-5727 .

¹²⁶ Equality Act 2010 Section 119.

¹²⁷ *Vento v Chief Constable of West Yorkshire Police* [2001]EWCA Civ 1871 Lord Justice Mummery at para 65.

¹²⁸ *Da'Bell v NSPCC* [2009] UKEAT 0227.

¹²⁹ Equal Opportunities Review 249 2013 Sue Johnstone Compensation Awards 2013 Part 1.

¹³⁰ Equal Opportunities Review 259 Sue Johnstone Compensation Awards 2014 Part 1.

¹³¹ Equal Opportunities Review 270 Compensation Awards 2015.

¹³² The exemptions are: (a) the information is already available from an audit which has been completed by the respondent in the previous 3 years;(b) it is clear without an audit whether any action is required to avoid equal pay breaches occurring or continuing;(c) the breach which the tribunal has found gives no reason to think that there may be other breaches; or (d) the disadvantages of an audit would outweigh its benefits. Micro businesses and new businesses are also subject to a 10 year exemption period during which an audit order cannot be made against them. A micro business is one with fewer

than 10 employees and new businesses are those which are 12 months old or less at the date of lodging the complaint.

¹³³ Section 147 of the Small Business, Enterprise and Employment Act 2015 requires the Secretary of State to publish regulations under section 78 of the Equality Act 2010 within 12 months.

¹³⁴ <https://genderpaygap.campaign.gov.uk/>.