

Discrimination law and pay systems

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by

Incomes Data Research

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This report has been prepared by Incomes Data Research for the Office of Manpower Economics.

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Introduction

This report is intended to explain how the law of discrimination and equal pay impacts on public sector pay, with particular reference to the pay systems overseen by the pay review bodies. In particular:

- it shows how discrimination law may be used to challenge pay systems and their application, acknowledging the specific duty of public sector employers in this regard;
- the report explains the gender pay gap reporting requirements and their relevance and otherwise to equal pay;
- it outlines the difference between a discrimination claim and an equal pay claim, including the circumstances in which each can arise;
- the report explains how equal pay law works, with reference to the current state of case law and particular attention to the material factor defence and how it operates;
- finally, the report includes examination of the range of relevant themes that emerge from the pay systems covered by the review bodies, with a particular look at potential discrimination, the characteristics likely to be affected and whether claims are likely to relate to discrimination or equal pay.

Discrimination law in the UK is set out primarily in the Equality Act 2010, which applies across England, Wales and Scotland. In Northern Ireland the situation is slightly different. Equality is a devolved issue in Northern Ireland and the legislation is spread across a number of different sets of Regulations. With the exception of Fair Employment, however, which deals with religious and political belief discrimination, the substance of the law in Northern Ireland is no different from that of Great Britain. Nevertheless the large number of relatively small differences in the law mean that this report should not be used as a reliable source on Northern Ireland equality law.

One of the major oddities of UK discrimination law is the rather artificial division between an equal pay claim and a discrimination claim. As we explain in chapter 1, the main vehicle for a complaint about discrimination between men and women in their terms and conditions of employment is an equal pay claim whereas for any of the other protected characteristics the claim must be one of direct or indirect discrimination. There is considerable overlap between

the two kinds of claim but there is no doubt that an equal pay claim is the more technical of the two. When it comes to issues around pay there is also vastly more case law concerning equal pay than discrimination claims.

This report is therefore built around the structure of an equal pay claim, with a series of diversions to look at discrimination claims when the subject matter lends itself to that. Equality is a huge subject and this report is therefore selective in looking at those areas likely to be of most relevance for those responsible for pay systems in the public sector. It is not therefore a complete guide to the law of discrimination and equal pay. While the authors hope this report will help those working in or with the pay review bodies it is of course the case that proper legal advice should be taken when specific issues arise.

Discrimination and the Pay Review Bodies

Discrimination law in the UK is primarily an individual claim brought by an employee against his or her employer. This will be so even where the discrimination arises from the operation of a pay system overseen by a pay review body.

It is possible that a recommendation made by a pay review body could be challenged under the Equality Act. Section 29(6) of the Equality Act provides that a person must not 'in the exercise of a public function' do anything that amounts to discrimination. It is difficult to imagine, however, what a pay review body could do that would in itself amount to discrimination against an employee. It is more realistic to imagine recommendations which would, if implemented, create a risk that individual employers could discriminate in their implementation of them. In that case liability for the discrimination would still rest with the individual employer. The appropriate government department might also find itself open to judicial review if it adopted recommendations that had the clear potential to lead to discrimination.

Public authorities are under a statutory duty to promote equality. This duty is found in s.149 of the Equality Act and provides that in the exercise of its functions a public body must have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct contrary to the Act
- advance equality of opportunity between persons who share a protected characteristic and those who do not share it;
- foster good relations between persons who share a protected characteristic and persons who do not share it.

The duty applies to all of the protected characteristics except for marriage and civil partnership.

A public authority which fails to ensure that these factors are considered when making its decisions leaves itself open to judicial review. Pay review bodies are not listed specifically in the Act as bodies to which this duty applies – but their sponsoring government departments are certainly covered. S.149 also specifies that any person who is not a public authority but who ‘exercises public functions’ must also have regard to these three factors when doing so.

Whether the functions of a pay review body would count as ‘public’ either for the purposes of the duty to promote equality or for the purposes of s.29(6) is open to some doubt. They are after all essentially concerned with the pay of certain public sector employees and the relationship between employer and employee is generally regarded as a matter of private rather than public law. On balance it is the government department rather than the pay review body that is likely to be the target of any legal action. This means that it is important for government to ensure that the recommendations made by the pay review bodies are informed by the principles underlying the Equality Act and the need to avoid unlawful discrimination. This report is aimed at going some way towards addressing that need.

Recent developments

The most dramatic change in the discrimination law landscape in recent years has been the abolition of employment tribunal fees. These were introduced in 2013 and involved individuals pursuing a claim for discrimination or equal pay having to pay a total of £1,200 in

fees. This was seen to reduce significantly the number of claims being brought and in 2017¹ the Supreme Court ruled that the fees were unlawful as they effectively denied individuals access to justice. The Order which introduced the fees was quashed with the result that the fee system was immediately abolished.

As a result, we have seen a significant ‘bounce back’ in the number of tribunal cases being brought – with some suggestion that the number of individual claims has actually doubled². Employment Tribunal statistics should be handled with care as they can be distorted by multiple cases where individual claims are brought as part of a single dispute that happens to involve a large number of employees (this is a particular feature of equal pay cases).

Nevertheless, the upward trend in the number of claims is clear and, as a result, employers face an increased risk of having their pay practices challenged in an Employment Tribunal.

The biggest legislative development of recent years has been the introduction of a requirement for employers with 250 employees or more to publish annual figures setting out the extent of their gender pay gap. This is discussed on page 11 but it should be emphasised that the existence of a gender pay gap – even a significant one – in relation to a particular employer does not mean that there is any unlawful discrimination taking place. The very broad measures that must be published do not take into account the kind of work that is being done and they cannot be used to determine whether an employer is providing equal pay for equal work.

The Equality Act 2010 generates a considerable volume of case law. Most of this can be regarded as illustrating the law rather than actually changing it. Nevertheless, the past five years have seen a number of important developments which are explained in the body of this

¹ R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716008/tribunal-grc-statistics-q4-201718.pdf

report. Those already familiar with the principles of equality law may therefore wish to focus on the following:

- A hugely significant ruling from the Supreme Court on the meaning of indirect discrimination – **Essop & ors v Home Office** (page 18)
- A clear finding from the EAT that indirect discrimination in an equal pay claim can be established by the use of statistics alone, without the need for additional evidence of discrimination – **McNeil and others v Commissioners for HM Revenue and Customs (EAT 27 February 2018)** (page 56)
- Two cases on the issue of pension reform in the public sector (affecting firefighters and the judiciary) and the extent to which transitional provisions were discriminatory on the grounds of age – **Sargeant and others v London Fire and Emergency Planning Authority** (page 69) and **The Lord Chancellor and Secretary of State for Justice and another v McCloud and others** (page 70)
- An important case from the Court of Session on the requirements for a valid job evaluation study – **Armstrong & ors v Glasgow City Council** (page 40)
- A useful EAT decision on the use of market forces in defending an equal pay claim – **Bradley v Royal Holloway and Bedford New College, University of London** (page 67)
- An EAT decision making it clear that the operation of the equality clause is not affected by the fact that the comparator subsequently moves on from the employment in question – **Reading Borough Council v James and ors** (page 21)
- More clarity from the Supreme Court on the extent to which equal pay comparisons can be made across different workplaces – **Dumfries and Galloway Council v North and ors** (page 28)
- A controversial decision from the Court of Appeal on the justification of direct age discrimination in redundancy payments – **Lockwood v Department for Work and Pensions** (page 51).

Equal pay litigation is notorious for proceeding at an extremely slow pace. As a result, many of the recent decisions discussed in this report are actually concerned with a period before the application of the Equality Act 2010. They have been included in this report because they are considered to be of equal application to the new law. However, it is worth noting that the next few years should start to see equal pay claims being brought specifically under the terms of the Equality Act 2010. These cases may highlight differences between the new regime and the old which have previously gone unnoticed.

The scope of discrimination law

The Equality Act 2010 brought together a range of existing discrimination law under a single statute. It is framed around nine ‘protected characteristics’ namely:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion and belief
- Sex
- Sexual orientation

The Act makes discrimination in relation to a protected characteristic unlawful in a range of areas including employment, education and the provision of goods and services. This report focuses on discrimination in employment, although it also considers the extent to which the work of the statutory review bodies may be covered by the Act as an ‘exercise of a public function’³

In terms of employment, the Act applies across most of the sectors covered by the pay review bodies – with some limited exceptions. All those employed in the health service, the civil service and in prisons will quite straightforwardly come within the ambit of the Equality Act in exactly the same way as employees in the rest of the public sector.

Teachers (and other members of staff) employed in community schools, voluntary controlled schools, community special schools and maintained nursery schools are employed by the

³ See Equality Act 2010, S.29(6)

relevant local authority⁴. While for most practical purposes the role of the employer is delegated to the governing body (see for example the School Staffing (England) Regulations 2009), liability for any discrimination under the Equality Act will still rest with the local authority. Those working in academies will be employed by the academy trust itself.

Police officers are also covered by the Equality Act. While police officers are technically office holders rather than employees (which means for example that they do not qualify for unfair dismissal rights), the Act deems them to be employees of the relevant chief constable or police authority as appropriate⁵.

As for the armed forces, they are covered by the Equality Act, but not in relation to every protected characteristic. A member of the armed forces can make an equal pay claim in which case all references in the Equality Act 2010 to an employee's contract of employment will be taken as references to the service person's terms of service. However, there is no right to claim age or disability discrimination and there are exceptions relating to combat effectiveness when it comes to sex and gender reassignment discrimination⁶. The other protected characteristics apply as normal.

Before making an equal pay or discrimination complaint, however, service personnel must first make a service complaint which is not withdrawn⁷.

The gender pay gap and equal pay

March 2017 saw public sector employers with 250 or more employees being obliged for the first time to publish details of their 'gender pay gaps' – this mirrors the obligation placed on large private sector employers, although the mechanism through which the obligation was imposed is different.

⁴ Education Act 2002, S.35(2)

⁵ S.42 Equality Act

⁶ Schedule 9(4) Equality Act

⁷ Ss.121 & 127(6) Equality Act

Public sector organisations have a duty to promote equality and the elimination of unlawful discrimination based on the protected characteristics set out in the Equality Act. The Government may also issue regulations requiring public sector bodies to take specific equality measures and this was the mechanism used to introduce gender pay gap reporting.

Under the **Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017**, a large public sector employer must publish annually:

- The percentage difference between the mean hourly rate of men and women employed by the organisation
- The percentage difference between the median hourly rate of men and women employed by the organisation
- The percentage of men and women in the organisation who receive bonus pay
- The percentage difference between the mean bonus pay paid to men and women in the organisation
- The percentage difference between the median bonus pay paid to men and women in the organisation
- The percentage of men and women employed in each of the four pay quartiles (lowest, lower middle, upper middle and highest) arranged in order of mean hourly rate.

The figures published must be based on the situation as at the ‘snapshot date’ which falls on 31 March each year – and published within 12 months. This means that the figures published at the end of March 2017 were based on the situation in place on 31 March 2016.

There is no provision for official oversight or checking of the figures, but the main point for the purposes of this report is that while gender pay gaps may be partly explained by discrimination, the specific data required by the reporting regulations does not allow for any indication of the presence or otherwise of discrimination, as we explain in more detail below.

Of relevance to this report is the fact that under Reg 2(3) an employee of an English local authority at a maintained school is to be treated as an employee of the governing body of that school. Most maintained schools will not, however, have 250 or more employees and will not have to report their gender pay gaps. This means that the majority of teachers covered by the pay review body will not be represented in the gender pay gap figures published by local authorities.

The publication of gender pay gap information has prompted a great deal of public debate about the relative pay of men and women and there has been discussion of extending a similar duty to other protected characteristics such as race.

But however useful the public debate may be, it has little to do with the subject of this report which is equality and discrimination.

The Equality Act imposes no requirement on employers in relation to the average pay of men and women. A large gender pay gap is not in itself evidence of discrimination because it does not involve comparing like with like. Ultimately discrimination claims are concerned with the treatment of individuals rather than the measurement of average outcomes.

An employer with a large gender pay gap may be acting in perfect compliance with the Equality Act if men and women doing equal work are being paid and treated equally. Similarly, an employer with no gender pay gap at all could still be operating a discriminatory pay system because men and women doing equal work are not being equally rewarded.

The figures that must be published provide no mechanism for extracting data which will compare the pay of those doing equal work. What is more, since they provide only a snapshot of the gaps between rates of pay applicable on a specified day, they give no indication of how individuals progress up a pay scale. The larger an employer and the more varied its employee base, the harder it is to draw useful conclusions from its gender pay gap.

1. Equal pay and discrimination

The obligation to pay men and women equally for doing equal work was set out by a UN body – the International Labour Organisation – in the Equal Remuneration Convention of 1951⁸ and then enshrined in the Treaty of Rome in 1957⁹.

However, the principle did not find its way onto the UK statute books until the Equal Pay Act 1970 – and even that only came into force in 1975. It was concerned solely with discrimination in the terms and conditions on which men and women are employed. It operated by implying an ‘equality clause’ into all contracts of employment and Equal Pay claims are, in essence, claims alleging that the equality clause has been breached. In that sense they are contractual claims and we will see that this affects the way in which equal pay claims operate.

By the time the Act was due to come into force, however, the Government felt that to properly address sex discrimination it was necessary to go further and deal with the way in which men and women are treated. The Sex Discrimination Act 1975 therefore introduced the concepts of direct and indirect discrimination and victimisation (sexual harassment came much later). Crucially it did this in addition to the provisions of the Equal Pay Act and created a divided regime.

If an employee wants to bring a claim alleging sex discrimination in the terms and conditions on which he or she is employed, then (subject to one exception that will be discussed later) he or she must bring an equal pay claim. If he or she is complaining of the opportunities that the employer affords them for promotion, or the arrangements made for offering a job in the first place, then the claim must be for direct or indirect discrimination.

That this distinction is essentially an historical anomaly is illustrated by the fact that it was not retained in the case of race discrimination when the Race Relations Act 1976 was passed, or in any of the subsequent extensions of discrimination law.

⁸ No. 100

⁹ Article 119, now found in Article 157 of the Treaty on the Functioning of the European Union

The rather odd consequence is that if someone alleges that their pay is the result of sex discrimination, then an equal pay claim must be brought. If someone alleges that their pay is the result of age discrimination, however, then the claim is one of direct or indirect discrimination, operating in the same way as a claim based on any other less favourable treatment.

When it comes to discrimination in pay systems, therefore, it is important to bear in mind that the mechanism by which discrimination can be challenged will vary depending on the basis of any alleged discrimination. Where sex discrimination is alleged, then the first question will be to determine whether any challenge would have to come via an equal pay claim or a discrimination claim.

The distinction between a case requiring an equal pay claim and one requiring a discrimination claim will not always be easy to draw. Broadly, however an equal pay claim is a complaint about an actual term of the contract of employment. A sex discrimination claim is about treatment, which will usually be a specific act or decision taken by the employer in relation to the employee.

Example:

Jennifer is a teacher who believes that she should be paid the same as Tom, a teacher in the same department, but with more experience than she has. She believes that men tend to have longer experience than women and that the difference in pay between them is discriminatory. She can bring an equal pay claim arguing that she is entitled to equality of terms with Tom.

The next year Jennifer and Tom both apply for a promotion to Head of Department. Tom is given the post and the pay rise that comes with it. Jennifer is annoyed that the post was given to Tom and points out that four out of five promotions in the past two years have been given to men, even though women outnumber men 2:1 in the workforce as a whole. Jennifer is no longer doing equal work with Tom and cannot

challenge his higher rate of pay through an equal pay claim. However she can claim that the decision to promote him rather than her was an act of direct or indirect sex discrimination.

Where other protected characteristics are engaged, this distinction does not exist. In such circumstances, an equal pay claim is not available, and any discrimination must be challenged as being an act of direct or indirect discrimination in its own right.

Example:

Max is a 23 year-old teacher who is paid less than his 42 year-old colleague Sarah. He believes that this is age discrimination because younger teachers are less likely to have had the time to progress up the pay scale. To challenge his pay, he could bring a direct or indirect discrimination claim under the Equality Act.

As we shall see from what follows, while the technical claim that must be brought may differ, there are unifying principles underlying equal pay claims and discrimination claims. We should first of all, therefore, consider two key concepts in the Equality Act: direct and indirect discrimination.

2. Direct and indirect discrimination

As we have seen, an equal pay claim is only available when the comparison being drawn is between the contractual terms of an employee and someone of the opposite sex. In a case involving any of the other protected characteristics (with the partial exception of pregnancy and maternity, see page 22) the claim that must be brought is one of direct or indirect discrimination.

***Direct discrimination** involves the employer treating an employee less favourably than it treats or would treat another employee because of a protected characteristic¹⁰.*

The essence of direct discrimination is that the protected characteristic is the ‘reason why’ the employee is treated less favourably. In the design of a pay structure itself this is unlikely to be a common scenario, although it may well crop up in the context of age and redundancy or pension entitlement.

Direct discrimination may well occur however when decisions are made about an individual employee. A decision not to promote someone may be based on age or someone may be given a poor performance rating because they are perceived to have a mental health issue. In such cases a direct discrimination claim alleging race or disability discrimination could be brought and the question would be why the employee was not promoted or given a poor performance rating.

One way of approaching the question is to ask how someone of a different ethnic origin, or who was not disabled would have been treated in the same circumstances. To this extent it is a comparative exercise, but the comparison is a tool for the Tribunal to use rather than a formal part of the process as we find in an equal pay claim. There may of course be a real comparator who is treated more favourably and if the comparator’s circumstances really are indistinguishable from the employee’s then that will be strong evidence that the protected characteristic is the reason for the treatment. Indeed, if the only difference between the

¹⁰ Section 13, Equality Act 2010

employee and the comparator is race, for example, then what other explanation for the difference in treatment could there be?

More often, however, the comparison made in a direct discrimination claim is a hypothetical one – ‘how would another employee have been treated in the same situation?’. In this respect the reason for the treatment and the way in which a comparator would have been treated are two sides of the same coin.

Indirect discrimination occurs when there is no difference in treatment, but people who share a protected characteristic are placed at a particular disadvantage as a result of a ‘provision criterion or practice’ (PCP) which the employer cannot show to be a ‘proportionate means of achieving a legitimate aim’.

Take a recent example. In **Essop & ors v Home Office**¹¹ Mr Essop was an immigration officer who had been employed by the Home Office since 1995. In order to progress to the grade of Higher Executive Officer or Grade 7 he had to pass a Core Skills Assessment (CSA). This was a generic test aimed at civil servants in general, rather than one focussed on his particular role. He failed the test and was unable to progress further.

In 2010 the Home Office commissioned a report into the impact of the CSA. It found that Black and Minority Ethnic (BME) and older employees were significantly less likely to pass the test than white or younger employees. The BME pass rate was just 40 per cent of the pass rate of white employees and the pass rate of employees aged 35 or over was 37 per cent of the pass rate of those below that age.

There was no doubt that this was a significant difference, but there was no evidence of the explanation for the difference in pass rates. The Supreme Court held that this could be indirect discrimination even without knowing why the pass rates for BME and older employees were so much lower.

¹¹ [2017] IRLR 558, Supreme Court

Whereas direct discrimination is concerned with the reason for a difference in treatment, indirect discrimination is concerned with the fact of a particular disadvantage. The fact that all employees were obliged to sit the same test and were judged by the same standard did not alter the fact that, in practice, the test caused a particular disadvantage to many/some BME and older employees.

It was also true, of course, that many BME people passed the test and many white people failed it. This did not matter. Indirect discrimination is concerned with the statistical impact of a provision criterion or practice. Indeed, if the effect of a PCP coincided exactly with the question of whether or not someone had a protected characteristic then that would almost certainly be direct rather than indirect discrimination.¹²

It is important not to lose sight of the fact that there will be no indirect discrimination if the employer shows that the PCP in question is a 'proportionate means of achieving a legitimate aim'. This is often referred to as the defence of justification. But it would be more accurate to say that a lack of justification is an element of indirect discrimination. Lady Hale, giving the leading judgement in *Essop*, emphasised that there should be no shame or stigma involved in justifying a PCP that has a potentially discriminatory impact. There is no indirect discrimination if what the employer has done is a proportionate means of achieving a legitimate aim. In *Essop* the Supreme Court sent the case back to the Tribunal to consider this issue. The question for the Tribunal will be whether the test is an effective way of selecting those suitable for promotion and whether there was any alternative means of selection available which did not have the disproportionate impact that this particular test was shown to have. The issue of justification – which is also relevant in equal pay cases and cases of direct age discrimination – is considered on page 47.

There is a slightly different definition of indirect discrimination in the context of an equal pay claim where the employer is relying on a material factor defence – see page 44.

¹² See *James v Eastleigh Borough Council* [1990] IRLR 288, House of Lords

3. The equality clause

The term 'equal pay' is misleading in that an equal pay claim may relate to terms and conditions of employment that are not concerned with remuneration in the strict sense. This is why the Equality Act attempted a rebranding exercise, referring to 'equality of terms' rather than 'equal pay'. Almost a decade on, however, the Equality Act's terminology has yet to catch on and this guide will continue to refer to equal pay claims.

A reminder that an equal pay claim is concerned with contractual entitlement rather than unfair or unequal treatment is found in the central mechanism by which an equal pay claim operates: the equality clause.¹³

Under s.66 of the Equality Act, contracts of employment are deemed to include an equality clause. This is a clause that operates when comparing the pay of the claimant (A) with that of their valid chosen comparator (B).

This clause operates in two ways:

- If a term in A's contract is less favourable than a corresponding term in B's contract, then the equality clause modifies A's contract so that it is not less favourable
- If A does not have a term corresponding to a term in B's contract then the equality clause modifies A's contract so as to include such a term

An equal pay claim is therefore, at heart, a claim that the employer is acting in breach of the equality clause. The contractual nature of an equal pay claim can be seen in the remedies available or unavailable (discussed in the final section), in particular the lack of any injury to feelings award and the scope for claiming back pay.

¹³ The Equality Act technically refers to a 'sex equality clause' because it also refers to a 'maternity equality clause'. This report deals with pregnancy and maternity on page 23 and so uses the term equality clause in line with most of the case law decided under the Equality Act.

Once the equality clause has modified an employee's contract that creates an ongoing right to be paid at the rate on which the comparator was employed – even if the comparator leaves or is no longer employed on equal work. In **Reading Borough Council v James & ors**¹⁴ the employees claimed equal pay with two colleagues who, during the period covered by the claim, had either been promoted or assimilated into a new role. The EAT held that equality clause took effect when the comparators were employed on equal work and 'crystallised' at that point. The effect of the clause was to increase the employees' contractual entitlement and once that change had been made it remained in place unless new terms were agreed. The fact that the comparators subsequently moved on, did not have the effect of reversing the operation of the equality clause.

¹⁴ Employment Appeal Tribunal, 7 June 2018

Occupational pensions: the Sex Equality Rule

It was established by the European Court of Justice in **Barber v Guardian Royal Exchange Assurance Group**¹⁵ that an occupational pension was a form of deferred pay and covered by what is now Article 157 of the Treaty on the Functioning of the European Union. As well as a sex equality clause, therefore, the Equality Act requires every occupational pension scheme to have a rule written into it which requires the equal treatment of comparable men and women in relation to the terms on which they are permitted to join the scheme and on the way in which the scheme operates in relation to its members¹⁶. Because the decision in Barber was accepted by the ECJ as representing a major departure from the position as it was previously understood the Court took the highly unusual step of ruling that the equality rule on the treatment of pension scheme members would only apply from the date of its decision – 17 May 1990. Section 67(10) therefore provides that the sex equality rule only applies from that date when it comes to the treatment of pension scheme members.

Any claim in relation to sex discrimination in the operation of an occupational pension scheme essentially proceeds in the same way as an equal pay claim, save that instead of referring to a breach of the sex equality clause, the case would be based on a breach of the equality rule.

Maternity and equal pay

Pregnancy and maternity is a protected characteristic in its own right under the Equality Act. Less favourable treatment of someone based on pregnancy or the consequences of it (including pregnancy-related illness and absence on maternity leave) is therefore dealt with through a direct discrimination claim. The fact that pregnancy is a temporary condition means that it was not considered suitable for an indirect discrimination claim and so pregnancy and maternity is the only protected characteristic for which no claim of indirect discrimination can be brought. Since only women become pregnant, however, a provision criterion or practice which puts those who are pregnant or have recently given birth at a particular disadvantage might well be regarded as indirect sex discrimination.

¹⁵ [1990] ECR I-1889

¹⁶ S.67

When it comes to contractual terms it is accepted that a woman on maternity leave does not have the right to be paid the same as a man or woman who is still at work or a man (or women) on sick leave¹⁷. So, an employer is free to pay the statutory minimum entitlement for maternity leave plus whatever contractual enhancement may be agreed.

However, there are particular protections given in respect of the pay of an employee on maternity leave. These are given effect by the implication of a maternity equality clause when it comes to direct pay and a maternity equality rule when it comes to pension entitlement¹⁸. The exact operation of these provisions is extremely complicated but their broad effect can be summarised as follows:

- The calculation of maternity pay must take into account any pay increase which takes effect (or would have taken effect) during maternity leave
- On returning to work from maternity leave an employee must receive any pay increase that would have been paid to her had she not been on maternity leave

A 'term by term' approach

It is important that the equality clause operates to modify individual terms of an employee's contract. The question is not whether the two employees enjoy equality in terms of the overall pay and benefits they receive. If the comparator is paid more than the claimant, it is no defence for the employer to argue that the difference is balanced out by the claimant's more generous holiday or sickness benefits¹⁹.

This is not always an easy line to draw.

¹⁷ *Gillespie v Northern Ireland Health and Social Services Board* [1996] ICR 498, European Court of Justice

¹⁸ Ss.73 and 75 Equality Act

¹⁹ *Hayward v Cammell Laird Shipbuilders Ltd (No 2)* [1988] IRLR 257, House of Lords

In **Degnan v Redcar and Cleveland Borough Council**²⁰ the Court of Appeal held that it was right to treat an hourly rate, a bonus and an attendance allowance as all forming part of the same term covering the pay due for the work done. Otherwise, through a careful choice of comparator the women could claim equal pay in relation to one group of men who were paid the highest attendance allowance and another group of men who were paid the highest bonus and end up being better paid than any of them

In contrast, in **Brownhill v St Helens & Knowsley Hospital NHS Trust**²¹ the Court of Appeal did not find it objectionable that the result of a successful equal pay claim in which the employees claimed in respect of unsocial hours shift premiums would result in their overall pay being higher than that of their comparators. The elements of pay identified in Degnan went together to make up the package that the employees received for working normally. In this case the allowance was a separate term that provided an enhanced rate for work done at unsocial hours.

²⁰ [2005] IRLR 615

²¹ [2011] IRLR 815, Court of Appeal

4. The comparator

Comparison is an inherent part of discrimination law, whether we are looking at the treatment of an individual in a direct discrimination case or at the particular disadvantage suffered by a group in a claim of indirect discrimination.

It is only in an equal pay claim, however, that there is a need to actually specify a comparator. Section 64(1) applies the equal pay provisions where a person (A) is employed on work that is equal to the work that a 'comparator of the opposite sex' (B) does. It is clear that B must be a real person rather than a hypothetical person. If the argument is about how a comparator of the opposite sex would be paid, then the correct claim is one of direct discrimination.

This is possible because of section 71 of the Equality Act which was intended to close a potential loophole. Suppose an employer ensures that there are no comparators available for a particular level of work and uses that fact to suppress pay. Imagine a cleaning company where all the cleaners are women and the only men employed are at a managerial grade. The cleaners cannot find an appropriate comparator and so they cannot bring an equal pay claim.

Under s.71, however, an employee can claim direct sex discrimination in relation to a term of his or her contract when there is no appropriate comparator on more favourable terms.

The full extent of this exception is perhaps not yet fully appreciated. It could be argued that it effectively allows for a hypothetical comparator. If the employer *would have paid* a male cleaner more, then the lower pay of the female cleaners will amount to direct discrimination and they could claim accordingly. The claim would not be an equal pay claim, however, but a claim for direct discrimination.

The question of equal work is dealt with on page 34. In this section we are going to look at the other qualities that B must have in order to be a valid comparator.

Three points about the comparator need to be stressed:

- Firstly, the comparator must be of the opposite sex. An equal pay claim is a claim about sex discrimination. It is not available for employees to challenge the basic fairness of their pay nor to claim discrimination on grounds other than sex.
- Secondly, the chosen comparator does not have to be a representative one. Suppose a female teacher claims equal pay with a male teacher. It would not matter if the comparator she chooses happens to be the most highly paid teacher in the school. Nor does it matter if there are many male teachers who are paid substantially less than the female teacher. Those factors may have a bearing on the reason for the difference in pay and whether there is any taint of direct or indirect discrimination. But they do not prevent the comparison from being made.
- Thirdly, the comparator must be in the same employment as the employee making the claim (see below) - but does not have to be employed at the same time. This is spelt out in S.64(2) of the Equality Act. But while this clearly covers those employed before the claimant, it is not clear that it covers those employed after the claimant has left. This issue is dealt with under 'predecessors and successors' below.

Same employment

Section 79 provides that B must, apart from doing equal work with A, be in the 'same employment'.

That means that A and B must be employed by the same employer and work at the 'same establishment'. Alternatively A and B could work at different establishments where 'common terms' apply.

Finally, there is a complication arising from EU law. Under the Treaty, the European Court of Justice has held that a comparison can be made where the pay disparity has a 'single source' even if A and B actually have different employers. This is highly relevant in the public sector.

We need therefore to look at the meaning of the terms 'same establishment', 'common terms' and 'single source'.

Same establishment

There is no clear definition of an establishment, but it seems to mean roughly the same thing as ‘place of work’²². Obviously if two employees work for the same employer at the same workplace, be that a school, hospital or prison then they will be working in the same establishment.

It is also clear that employees working at different schools, hospitals or prisons will not be employed in the same establishment.

There may well be grey areas where, for example, a school has an annex in a different part of town or the various departments in a hospital are spread out over a wide area. In those cases however the case tends to turn on whether or not common terms and conditions apply across the different locations. If they do, then it does not matter whether or not they are technically the same establishment. If they do not, then it seems highly unlikely that they are – and the question will then be whether there is a ‘single source’ for the pay inequality.

Common terms

The point behind the requirement for common terms to apply when the employee and the comparator are employed at different establishments is to exclude cases in which the pay is set independently and is peculiar to the establishments in question. Where however there is an overarching framework of terms and conditions, it is appropriate to compare the pay of two employees working within that to ensure that there is no discrimination.

In **British Coal Corporation v Smith**²³ the issue was whether canteen workers and cleaners could claim equal pay with surface mineworkers employed at a range of different pits. The House of Lords held that they could. Common terms and conditions were held to apply across

²² City of Edinburgh Council v Wilkinson [2012] IRLR 202, Court of Session

²³ [1996] IRLR 404, House of Lords

the different establishments because they were governed by nationally negotiated collective agreements – even though this allowed for variations between different pits.

The question that was asked in *Smith* was not whether canteen workers and surface mineworkers shared common terms (the fact that they didn't was what prompted the claim) but whether surface mineworkers at the establishment employing the comparators shared common terms with the surface mineworkers employed at the establishments where the claimants worked.

This obviously raises the issue of whether a claimant can cite a comparator at a different establishment when there are no employees of that description at the claimant's establishment. In this case, said Lord Slynn, the question was whether employees of that description would be employed on common terms if they were employed at the claimant's establishment.

In ***Dumfries and Galloway Council v North and ors***²⁴ the Supreme Court considered the case of classroom assistants seeking to compare themselves with manual workers. All were employed by the same council but there were no manual workers employed at the school where the claimants worked. The EAT held that this meant that there could be no claim, because there could be no common terms if there was no reasonable prospect of such employees ever being employed in a school. However the Supreme Court held that it did not even need to be feasible that employees such as the comparator could ever be employed at the claimants' establishment. The same employment test was simply there to filter out claims where what really made the difference between the comparator and the claimant was the geography of their location rather than the employer's assessment of how they should be paid.

Suppose therefore a prison officer employed at a prison in Northumberland claims equal pay with a prison officer employed in central London. As they are covered by the same pay system

²⁴ [2013] UKSC 45, Supreme Court

it is highly likely that common terms and conditions will be held to apply at the two prisons. In any event there would be little doubt that the London-based officer would be paid in accordance with the system in Northumberland if he or she was moved north. A comparison between the two could therefore be made even though they are employed in very different workplaces. Of course, that difference in location may well be the reason for any difference in pay and give the employer a material factor defence (see below). But that would not prevent the comparison from being made in the first place.

Single source

In the UK, pay has traditionally been seen as a matter between an individual employer and its employees. In other parts of Europe, pay structures that straddle whole sectors are much more common. In its approach to equal pay, the European Court of Justice has tended to look at who can be held responsible for discriminatory outcomes in pay systems rather than focus on the practices of individual employers. As a result it has held that comparisons between employees at completely different employers can be made if the difference in pay can be said to be attributable to a 'single source'²⁵.

Civil Service employment – the Crown as a 'single source'?

An obvious question following on from the EU concept of a 'single source' is whether civil servants employed by different Government departments can be compared for the purposes of an equal pay claim. Can the Director in one Department claim equal pay with her counterpart in a wholly different department on the basis that the ultimate source of the pay of both is the Crown (or the Treasury)?

In **Robertson v Department for Environment Food and Rural Affairs**²⁶ the Court of Appeal held that male civil servants in DEFRA could not bring equal pay claims comparing themselves with female civil servants in the Department for Transport and the Regions. Applying the ECJ

²⁵ See *Lawrence & ors v Regent Office Care* [2003] ICR 1092, European Court of Justice

²⁶ [2005] IRLR 363, Court of Appeal

decision in *Lawrence*, the Court held that the focus had to be on the body responsible for making decisions on pay, rather than the ultimate source of the decision-making power.

In that case it was relevant that the formal power to control the pay and conditions of civil servants had been delegated to individual departments through an administrative order. As a result, each individual department was responsible for negotiating and agreeing the pay of civil servants subject only to the terms of the Management Code and the overall budgetary control of the Treasury. Neither the Treasury nor the Cabinet Office was involved in any pay negotiations and there was no coordination of pay bargaining between different departments.

A question that has not yet been addressed by the Courts is whether, when it comes to the senior civil service, the existence of a single pay system overseen by the statutory pay review body means that cross-departmental comparisons are possible. It could certainly be argued that many of the factors relied upon in *Robertson* do not apply. Individual departments are not free to pursue their own pay structures when it comes to senior civil servants and the role of the pay review body means that there is a considerable degree of cross-departmental coordination when it comes to pay. There is a strong argument to be made that a senior civil servant would be permitted to bring an equal pay claim citing a colleague in a different government department as a comparator.

That does not mean that such a claim would succeed. Where the difference in pay is the result of local decision-making then that may be the basis of a material factor defence (see below). To overcome this, the claimant would have to show that the flexibility given to individual departments within the framework of the overall pay system had a discriminatory effect. A female permanent secretary citing a male permanent secretary in a different department as a comparator would therefore need to show that, on average, female permanent secretaries were paid less than their male counterparts. Good quality data about the relative pay of men and women across the senior civil service would therefore give a good indication of the extent of any risk of successful equal pay claims in this area.

Predecessors and successors

Does the requirement that the comparator is in the 'same employment' as the employee mean that they both need to be employed at the same time? The Equality Act is not clear on the subject. Section 64(2) says that the work done by the comparator does not need to be done 'contemporaneously' with the work done by the employee. Is that wide enough to cover a comparator who had actually left employment before the employee was recruited? Would it apply to a comparator who was not recruited until after the employee had left?

The explanatory notes say that S.64 is intended to clarify, but not widen, the category of comparator that may be cited and stresses that the comparator must be a real person and not a hypothetical one.

This points clearly in the direction of allowing an employee to cite a predecessor in the role, but not a successor. Indeed the European Court of Justice has made it clear that an equal pay claim may be brought by an employee on the basis that she is employed at a lower rate than her predecessor in the role. In **Macarthy's Ltd v Smith**²⁷, Mrs Smith was paid £50 per week in her position and claimed equal pay when she discovered that her predecessor had been paid £60 per week. The European Court of Justice held that she was entitled to bring her claim. But while the possibility of comparisons with predecessors is long established, it appears that a claim based on a successor is regarded as too hypothetical. In **Walton Centre for Neurology and Neurosurgery NHS Trust v Bewley**²⁸ the employee was a senior health care assistant who claimed equal pay with a number of employees whose job was rated as equivalent to hers under a job evaluation.

The issue was back pay. The comparators she had chosen were recruited once the job evaluation was complete, but she claimed that prior to that her work must have been of equal value to those comparators, even though they weren't actually employed at the time. The Employment Appeal Tribunal held that this was too hypothetical a comparison. In the period

²⁷ [1980] IRLR 210, European Court of Justice

²⁸ [2008] IRLR 588, Employment Appeal Tribunal

before the job evaluation the comparators did not exist, in the sense that they had not been recruited and their pay had not been determined. How they would have been paid in that period was a matter of speculation, whereas a comparator with a predecessor was a concrete comparison with what someone was actually paid.

To an extent, of course, this is an artificial distinction and one that would not be a problem in a discrimination claim where hypothetical comparators are perfectly acceptable. If an employer recruits a replacement for an employee at a higher rate of pay there is no difficulty in arguing that that constitutes direct discrimination based on race, age or whatever other protected characteristic may be in issue. It is only when it comes to an equal pay claim that the need for a 'real' comparator would prevent such a claim. Under the Equality Act, Ms Bewley would have been able to bring a direct sex discrimination claim though this would involve persuading the Tribunal that her successor was indeed paid more because he was a man.

There may of course be many reasons why successors and predecessors may be paid differently. There may be differences in the qualifications or experience of the individuals concerned. There may also have been changes in the resources available that affect what the employer can afford to offer. The ability to make the comparison in no way indicates that a claim will succeed and each case will turn on its own evidence.

The key fact to bear in mind is that the use of comparisons in equal pay cases is rigidly controlled, whereas for discrimination claims the comparison is merely the tool that helps the Tribunal determine the reason behind the treatment being complained about.

5. Equal work

The central principle at the heart of equal pay legislation, both nationally and internationally, is *equal pay for equal work*.

There is no requirement that an employer should *on average* pay men and women the same. The obligation is to ensure equal pay between individual men and women doing equal work.

Under the Equality Act there are three ways in which work can be held to be equal. They are:

- Where two employees are essentially doing the same job – **‘like work’**
- Where two employees are doing different jobs but a job evaluation study has assessed them and categorised them as equivalent – **‘work rated as equivalent’** and
- Where two employees are doing different jobs and no job evaluation study has been conducted, but an assessment of the work carried out by the Tribunal concludes that their work is of equal value – **‘work of equal value’**

An equal pay claim is an all or nothing claim. If two jobs are not equal then no claim can succeed – even if the gap in pay is disproportionate. Suppose a job evaluation rates one job as deserving a slightly higher grade than another, but the higher-rated job is paid at double the rate of the lower paid job. An employee on the lower grade could not bring a claim on the basis that the higher rate paid to the grade above is disproportionate to the difference between the roles.

The same rule does not quite apply if the claim is that the pay system discriminates on the basis of one of the other protected characteristics. If it could be shown that employees on the lower grade were significantly more likely to be from a particular ethnic background, for example, then that could form the basis of an indirect discrimination claim and the employer would be called upon to show that the difference in pay is a proportionate means of achieving a legitimate aim (see the discussion of indirect discrimination above).

Where the protected characteristic at issue is sex, however, such a claim is not possible. Nor is there any room for a claim that the employee should actually get paid more than her comparator because her work is more valuable.²⁹

It is worth looking in detail at each of the three kinds of equal work.

Like work

Under s.65 of the Equality Act, two people are engaged in 'like work' if:

- They do work of the same or a broadly similar nature and
- There is no important difference in the tasks they actually perform.

The focus is on the work done by the employees rather than the work they are contractually employed to do. An employee's job description may be an important piece of evidence, but it is not definitive. If an employee is in practice doing the same job as her comparator then that will suffice even if, formally, she is employed to do less onerous work.

In **Kenny v Minister for Justice, Equality and Law Reform**³⁰ a claim was brought by women employed as clerical workers by An Garda Síochána (the Irish national police). They worked alongside a number of police officers also doing clerical work, but on a different pay grade. The police officers were mainly men and the clerical workers were almost all women.

The case is discussed in more detail in relation to the issue of justification but in the course of its decision the European Court of Justice did look at what constituted 'like work' and said that in judging whether the clerical staff were doing broadly similar work to the police officers the Irish court would need to take a number of factors into account:

- the particular professional training that the police officers had and whether that affected the nature of the work they did
- any additional tasks given to the police officers (such as liaising with Interpol)

²⁹ *Evesham v North Hertfordshire Health Authority* [2000] IRLR 257, Court of Appeal

³⁰ [2013] IRLR 463, European Court of Justice

- the fact that the police officers could be required to return to the field if needed for operational reasons

It might seem more sensible to regard issues such as professional training and qualifications to be considered as part of the employer's material factor defence rather than part of the question as to whether employees are engaged on like work – but the ECJ was clearly of the view that such issues were relevant to both questions. There is, it seems, something of a blurred line between the two.

Whether the work is broadly similar is only the first half of the test under the Equality Act. The next question is whether there are differences of 'practical importance' in the work that is being done. The Equality Act specifies that regard needs to be had to the nature and extent of the differences and the frequency with which the differences occur in practice. In *Kenny*, therefore, the fact that some clerical workers could also be called upon to do operational police work would need to be taken into account, but so would the frequency with which that actually happened.

Again, there is a blurred line between the scope of 'like work' and the material factor defence. A difference between two roles may mean that the roles are not comparable or may be regarded as a material factor justifying a difference in pay between two otherwise comparable jobs.

Work rated as equivalent

The prevalence of job evaluation in the public sector means that claims based on 'like work' are rare. The bulk of the equal pay claims that we have seen in the last decade have been based on work that has been rated as equivalent.

Section 65 provides that two jobs will be rated as equivalent if a job evaluation study gives an equal value to the two jobs *in terms of the demands made on the worker*³¹.

Section 80 defines a job evaluation study as one undertaken with a view to evaluating the jobs done by some or all of the workforce ‘in terms of the demands made on a person by reference to factors such as effort, skill and decision making’.

A valid JES must be thorough and detailed. It must be sufficiently detailed to allow the identification of a particular employee at a particular point in a particular salary grade³². It must also be analytical in nature. Job evaluations based on a sense of what ‘feels fair’ will not be sufficient³³. Beyond that though there is no standard form in which a JES must be set out. In practice, in the public sector, major pay restructuring has usually been accompanied by detailed job evaluations which have fuelled a significant rise in equal pay claims in recent years. ‘Agenda for Change’ in the NHS and ‘single status’ in local government have in particular led to tens if not hundreds of thousands of equal pay claims. Many of those were straightforwardly based on the relevant JES and related to continuing inequality. Others related to a period before the JE was actually conducted. For example, it was held in the case of *Bainbridge v Redcar and Cleveland Borough Council (No 2)*³⁴ that work could only be rated as equivalent from the time the JES itself was completed. Periods prior to the JES had to be dealt with as equal value claims – with the subsequent JES results acting as very good evidence that the jobs in question were of equal value.

Where a job evaluation study has been conducted, then its results are conclusive as to whether two jobs are equal. This means that it can not only be used as the basis of an equal

³¹ S.65 also states that if the JES assigns different values to the demands made on men and women, then the jobs will be deemed to be equivalent if the JES would have assigned them equal value were it not for that fact.

³² *Department for Environment, Food and Rural Affairs v Robertson* [2004] ICR 1289, EAT

³³ *Bromley v H & J Quick Ltd* [1988] IRLR 249, Court of Appeal

³⁴ [2007] IRLR 494. EAT

pay claim, but can also be used as a defence to an equal pay claim. If an employee claims equal pay with a comparator, but the employer can show that the two employees are doing jobs that have been given a different grading under the JES then that will defeat the claim.

Indeed, most of the case law on job evaluation involves employees arguing that a job evaluation scheme is invalid with the employer seeking to rely on it.

For two jobs to be rated as equivalent under a JES, it is not necessary that they be given exactly the same score. In **Springboard Sunderland Trust v Robson**³⁵ two jobs were scored under a JES at 410 points and 428 points. Under the rules of the pay scheme this meant that they were or should have both been placed within the same grade and it was held that they had therefore been rated as equivalent.

However, in **Home Office v Bailey & ors**³⁶ the two claimants had been given lower overall scores than their comparators in a JES with the result that they were placed in different grades. The Tribunal took the view that the calculation of the final scores was not a mathematically precise exercise and so had to be viewed with a degree of tolerance. It held that the scores were close enough that the employees had established that they were employed on equal work. The EAT overturned this finding. The crucial difference between this case and *Springboard Sunderland* was that here the employer had not completed the pay restructuring to the point of putting the employees into pay bands or grades. All that had been done was to allocate individual scores. It followed that the employees had not in fact been rated as equivalent with their chosen comparators because their job had not been given the same value.

³⁵ [1992] IRLR 261, EAT

³⁶ [2005] IRLR 757

It has been held that a JES does not have retroactive effect³⁷. This means that a JES conducted in January 2019 which rates two jobs as equivalent does not of itself give rise to a right to back pay for those doing the lower-paid job. However, that does not mean that no claim for back pay may be made. The lower-paid employee can bring an equal value claim for the period before the JES was conducted. Unless things have changed, the fact that the JES rated the two jobs as equivalent gives a pretty good indication that an equal value claim is likely to succeed, although it is by no means a foregone conclusion. A JES may rate two jobs as equivalent for the purposes of a pay banding exercise even if, in other terms, they are not of exactly equal value.

Equal value

In the absence of a valid JES, an employee may still pursue an equal pay claim in relation to a comparator doing a different job by showing that the two jobs are of equal value. Section 65 says that work is of equal value if it is equal in terms of the demands made on the employee 'by reference to factors such as skill, effort and decision making'. These are of course the same terms used to describe work rated as equivalent. However, the Tribunal deciding an equal value claim is considering the relative value of the claimant and their comparator's work rather than that of whole sections of the workforce. There is no need to come up with a pay structure, just a yes or no answer to the question of whether the work is equal.

As originally introduced, the process of determining equal value was very slow and cumbersome, with the Tribunal being obliged (except in limited cases) to appoint an independent expert to compile a report on the value of the work under consideration. The process often took years, just to establish that the work was equal – and before there had been any consideration of the employer's material factor defence.

³⁷ Redcar and Cleveland Borough Councils v Bainbridge and others [2008] IRLR 776, Court of Appeal

The procedure was overhauled in 2004³⁸ with the result that there is now a three-stage process.

Stage 1: The Tribunal conducts a case management hearing to determine what information is required for the claim to be dealt with and whether an independent expert should be appointed. The Tribunal may opt to decide the issue of equal value itself, without appointing an expert. The employer may also put forward a material factor defence at this stage and if that is accepted by the Tribunal the claim will be dismissed without the issue of equal value being determined

Stage 2: If an independent expert is appointed then a second hearing will be held to resolve any disputed facts about the work in question. The expert will then be free to conduct the evaluation and prepare a report. If no expert has been appointed then the procedure moves straight to stage 3.

Stage 3: At this stage a hearing will be held to determine the question of equal value. This will usually involve the Tribunal admitting the independent expert's report, although it is worth noting that either party can challenge its conclusions. If no expert has been appointed the Tribunal will consider the evidence and reach its own conclusion on the issue.

The report of an independent expert is obviously important, but it is not conclusive. It is a piece of evidence for the Tribunal to consider, but the Tribunal may choose to reject its conclusions. In this way it is unlike a JES which, provided it has been properly carried out is a conclusive answer to the question of whether or not work is equal.

A valid JES

A job evaluation study may be the basis of an equal pay claim, but it is just as likely to be the basis of a defence against one where the employee is making a claim based on equal value. A valid JES can not only show that two jobs are equal, it can also show that they are not. The

³⁸ The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004

Equality Act provides³⁹ that where a valid JES has rated two jobs differently, then a Tribunal cannot rule that they are of equal value unless 'it has reasonable grounds for suspecting' that the evaluation was in some way based on sex or is 'otherwise unreliable'.

In these circumstances the burden is on the employer to demonstrate that the JES is valid. This may involve calling expert evidence as to the methodology applied to persuade the Tribunal of its validity. In **Armstrong and others v Glasgow City Council**⁴⁰ the Tribunal was struck by the novel and untested way in which the job evaluation had been carried out. The employer first of all assessed work profiles and used this assessment to create job families and grade profiles. It was only then that the actual work being done by employees was assessed and given its own score which then corresponded to a separate element in their pay. The employees argued that the grade profiles themselves should have been based on the work actually done, rather than being merely a theoretical exercise. The Tribunal was frustrated that neither side had called expert evidence to allow them to assess whether or not this methodology was appropriate but decided in the end that there were no grounds to rule that the study was unsuitable.

The Court of Session held that the Tribunal had been wrong to expect the claimants to bring expert evidence to undermine the JES. The burden was on the employer to show that it was a valid exercise which properly assessed the work being done by employees in terms of the demands made upon them. If on the basis of the evidence presented to it the Tribunal could not be satisfied that the methodology used was appropriate, then the employer had failed to show that the scheme was valid. It was clear that there were also grounds for suspecting that the scheme was not suitable. As a result, the Court ruled that the issue of equal value should be determined on the basis that there was no valid JES in place.

³⁹ S.131 (5) and (6)

⁴⁰ [2017] CSIH 56, Court of Session

6. The material factor defence

In an equal pay claim there is no obligation on the claimant to show the reason for the difference in pay or that the employer has acted with discriminatory intent. Once a valid comparator has been identified who is employed on equal work with the claimant then the default position is that the equal pay claim will succeed.

However, S.69 of the Equality Act says that the sex equality clause will not apply if the employer shows that the difference in pay is due to a material factor which does not involve direct or indirect sex discrimination against the claimant.

The section specifies that a factor will not be material unless it represents a 'material difference' between the claimant's case and the comparator's. In practice of course, if the material factor does not represent a real difference between the claimant and the comparator then it is difficult to see how it could genuinely be the reason for the difference in pay. This means that all that is really needed is for the employer to show that the reason they are putting forward really is the reason for the difference in pay.

The crucial point to emphasise here is that, in the absence of discrimination, the employer does not have to show that the difference in pay is reasonable or justified. The Equality Act is concerned with equal pay, not fair pay. In **Strathclyde Regional Council v Wallace**⁴¹ for example, a group of women teachers brought equal pay claims citing a number of men as comparators. Each of the men held the position of principal teacher and while none of the claimants had been appointed to that role they were in practice undertaking the same duties. The Tribunal upheld the claim on the basis that the claimants were doing the same work as their comparators. The employer argued that the difference in pay was due to budget constraints and a promotion structure established by statute, but the Tribunal held that the material factor defence was not established. The Tribunal held that the promotion structure did not necessarily prevent the claimants from being promoted and, looking at the overall

⁴¹ [1998] IRLR 146, Court of Session

size of the council's education budget, found that the material factor defence was not made out.

However, the Court of Session held that the Tribunal had in effect been asking whether the difference in pay was justifiable – and that was not the right test. A material factor was not the same as a justified one. The factors relied on by the employer were genuinely the reason for the difference in pay and so the material factor defence had been established.

The result would have been completely different if the material factors relied upon by the employer had involved direct or indirect discrimination. As it was there were 134 teachers who were said to be doing the work of principal teachers without being promoted to that position. Of those, 81 were men and 53 were women. It was therefore accepted that there was no indirect discrimination against women. Had it been the case that women were much more likely than men to be left behind in this way then the employer would indeed have had to show that the material factors relied upon amounted to a proportionate means of achieving a legitimate aim. The Tribunal's criticism of the employer would then have been completely valid and it is likely that the cases would have succeeded.

In **Glasgow City Council v Marshall**⁴² the employees were 'instructors' at special schools who compared themselves with teachers – who were better paid. The Tribunal found that teachers and instructors were doing the same work and upheld the latter's equal pay claim. The employer had argued that the reason for the difference in pay was that teachers and instructors had their pay determined by two different, nationally negotiated pay scales. The Tribunal had rejected this defence because the employer had not put forward what it regarded as a good and sufficient reason for the disparity in pay. The House of Lords held that this was the wrong approach. There was no question that the difference in bargaining structures was the genuine reason for the difference in pay. There was no obligation on the employer to show that it was a *good* or *sufficient* reason. The only question was whether it was tainted by sex discrimination and there had been no suggestion of that. Lord Nichols of

⁴² [2000] IRLR 272, House of Lords

Birkenhead said that in relation to the material factor defence the employer had to show four things:

1. That the explanation is genuine, not a sham or pretence
2. That the difference in pay is genuinely due to this reason
3. That the reason is not the difference in sex (whether as a result of direct or indirect discrimination)
4. That the difference is a significant and relevant difference between the woman's case and the man's case

An employer who could show that there was no sex discrimination in the setting of pay was not obliged to justify any pay disparity.

Piggy-back claims

The operation of the equality clause has some surprising consequences. One of these is the possibility of so-called piggy-back claims.

Many equal pay claims involve large groups of workers who are predominantly of one sex. Suppose a group of school catering assistants claim equal pay with council manual workers. Most of the claimants will be women – but it is unlikely that all of them are. Those men employed as catering assistants cannot claim equal pay with male manual workers because there is no difference in sex. Nor can they claim equal pay with female manual workers because the pay systems that resulted in the difference in pay did not involve discrimination against men.

They can, however, claim equal pay with the women catering assistants who do not currently earn more than them – but who are entitled under the equality clause to be paid the same as the manual workers. In effect they claim equal pay – based on 'like work' with female catering assistants not on the basis of what they are currently paid, but on what they are entitled to be paid in accordance with the equality clause. The fact that only the female employees are

entitled to claim equal pay with the manual workers cannot form the basis of a ‘material factor’ defence because that factor is in itself based on the difference in sex.

What is more, those riding piggy-back on the equal pay claims of others do not need to wait for their colleagues to succeed in order to bring their own claim. Since the equality clause was, in theory, always in place for their female workers, their male colleagues have always been entitled to be paid on the same basis.⁴³ Where large-scale equal pay cases based on job evaluation or equal value are brought, therefore, they are usually accompanied by a number of ‘piggy-back’ like work cases whose result simply follows the outcome of the main litigation.

Tainted by discrimination

The material factor relied on by the employer need not be a fair or reasonable one – but it is clear that it must be free of the taint of sex discrimination. Obviously, an employer cannot justify paying a man more than a woman by saying ‘men are better at this sort of work’ – that would involve direct sex discrimination. But matters are not always so obvious.

In **Enderby v Frenchay Health Authority**⁴⁴ speech therapists were claiming equal pay with pharmacists and clinical psychologists. The employers, while denying that the jobs were equal, argued that in any event the difference in pay was due to the material factor of the separate bargaining structures determining pay for the roles in question. The European Court of Justice was impressed by the fact that speech therapists were overwhelmingly women whereas those doing the comparator jobs were overwhelmingly men. It held that this was enough to place a burden on the employer to show that the differences in pay were objectively justified.

⁴³ *Hartlepool Borough Council v Llewellyn & ors; Middlesbrough Borough Council v Matthews & ors; South Tyneside Borough Council v McAvoy & ors; Middlesbrough Borough Council v Ashcroft & ors* [2009] IRLR 796, Employment Appeal Tribunal

⁴⁴ [1993] IRLR 591, European Court of Justice

This is a slightly wider view of what constitutes indirect discrimination than we find in cases not concerned with equal pay. There is no formal need for a ‘provision criterion or practice’ to be identified. Section 69 of the Equality Act says that an employer will have to show that the material factor is a ‘proportionate means of achieving a legitimate aim’ if the material factor puts people of the same sex as the claimant at a particular disadvantage to those of the opposite sex engaged on equal work.

One of the features of the extensive litigation that arose in the wake of the move to single status in local government was that men and women on very different terms and conditions were found to be doing equal work. Employers often sought to explain the difference in pay by showing that the bargaining history of the two groups of workers was very different. On close examination, however, it was clear that the differences in pay had their roots in discriminatory assumptions about how traditionally male and traditionally female roles should be rewarded. When the roles were first bargained for it was not unknown for both the employer and the union to take specific account of whether the workers involved were male or female and were therefore either working to support a family or to earn extra housekeeping money. Such distinctions were of course no longer in the minds of the parties – but it usually meant that the collective bargaining history could not be relied upon as a material factor because it was tainted with discrimination.

TUPE as a material factor

A common concern for employers in the public sector is the disparity caused when one group of workers is transferred under TUPE⁴⁵ from a different employer. There then arises a situation in which two sets of workers are side-by-side doing the same job, but on different terms and conditions. The provisions of TUPE make it difficult, if not impossible, for an employer to harmonise the two sets of conditions without ‘levelling up’ in relation to each individual term. But it intuitively feels as though having two workers being paid differently for the same job creates an equal pay problem.

⁴⁵ Transfer of Undertakings (Protection of Employment) Regulations 2006

The answer however is simply to ask what is the reason for the difference in pay. If the employer can show that the reason one employee is getting paid more than another is that the higher-paid employee has terms and conditions agreed with a previous employer and transferred under TUPE then that should be sufficient to defeat an equal pay claim.

It has even been held that there is no obligation on an employer in those circumstances to 'close the gap' over time by restricting pay increases for the higher-paid group until the lower-paid group catches up. In **Skills Development Scotland Co Ltd v Buchanan and another**⁴⁶ the two employees and their chosen comparator were customer service managers who had initially been employed by different employers before first being transferred first to Scottish Enterprise and then eventually to Skills Development Scotland. The case focussed on how they had been paid by Scottish Enterprise, although the effect of TUPE was that Skills Development Scotland was liable for that.

When they were first working for the same employer, in 2002, the two employees were paid around £33,000 each and their male comparator was earning just under £43,000. He received two contractual increments in 2003, but after 2004 all three employees were subject to annual pay reviews based on cost of living and performance. By 2008, when the claims were brought, the two employees were on salaries of roughly £42,500 while their comparator was earning just under £55,000.

The Employment Tribunal accepted that TUPE was the reason for the difference in pay prior to 2004, but not afterwards. Thereafter the pay increases awarded to the employees were at the employer's discretion. The employer could have frozen the comparator's pay but had chosen not to do so and instead perpetuated the inequality.

The EAT overturned this decision. The fact that the employer could have done something about the difference in pay was irrelevant. The question was whether the TUPE transfer was the cause of it. The EAT held that applying a general pay increase for all employees did not

⁴⁶ Employment Appeal Tribunal 25 May 2011

break the chain of causation between the operation of TUPE and the difference in pay. In the absence of any evidence of direct or indirect discrimination the equal pay claims could not succeed.

If an employer were to seek to erode pay differentials caused by TUPE this could be problematic. A pay increase for the lower-paid employees would be straightforward but holding back the pay of potential comparators might have contractual implications. The EAT in Buchanan took the view that the comparator's contract could entitle him to the same general pay review as given to other employees and for any employee the implied terms of the contract might well limit the employer's ability to 'hold back' an employee's pay until lower-paid employees had caught up through cost of living pay reviews.

Justification in an equal pay case

If the material factor relied upon by the employer is found to cause women (or men) a particular disadvantage, then the employer will only be able to rely on it if it can show that it is a 'proportionate means of achieving a legitimate aim'. This is a phrase that occurs several times in the Equality Act. It is also the test of justification in straightforward indirect discrimination cases, direct discrimination cases based on age and in cases relating to disability⁴⁷.

This test, however, needs to be viewed alongside the test applying under EU law. This is best set out in the European Court of Justice decision of **Bilka-Kaufhaus GmbH v Weber Von Hartz**⁴⁸. In that case, which was concerned with part-time workers being excluded from the benefits of a pension scheme, the ECJ held that the question of justification was a matter for the national court but that the key questions were:

- Whether the measures chosen by the employer correspond to a real need on the part of the undertaking

⁴⁷ See s.15 Equality Act (not discussed in this report).

⁴⁸ [1986] IRLR 317, European Court of Justice

- Whether the measures were appropriate with a view to achieving the objectives pursued and
- Whether they are necessary to that end.

This clearly sets the bar quite high. The test of necessity in particular seems to be a strenuous one and in practice the test applied by the courts is whether the measure is reasonably necessary⁴⁹. What this seems to mean in practice is that the Tribunal will – assuming the employer is pursuing a legitimate aim – ask whether that aim could have been achieved by other less discriminatory means. Essentially what is involved is an exercise in weighing up the employer’s business need on the one hand and the discriminatory impact of the measure on the other.

Pay protection and transitional provisions

Failing to pay equal pay for equal work is unlawful and the operation of the equality clause means that the employee who has lost out is entitled to an immediate remedy – including back pay where appropriate. If a JES reveals that two roles that were previously rewarded differently are in fact equal, therefore, then that creates an urgent problem for an employer. The law does not give the employer a period of time in which to move towards equality, rather the entitlement of employees to equal pay begins immediately.

The obvious step is to level up the pay of the disadvantaged group – but this is not always viable. In the public sector, job evaluation exercises often affect thousands of employees and the budgetary considerations of increasing pay can be huge. In any event, the JES has often concluded that the advantaged group is being overpaid in terms of the value of the work done and so what is needed is a levelling down of the overpaid role. That creates problems of its own, however. Trade unions are unlikely to agree to a significant pay cut for their members and imposing one carries considerable legal risk as employees may have to be dismissed and reengaged for the new terms to take effect.

⁴⁹ See *Homer v Chief Constable of West Yorkshire Police* [2012] 601, Supreme Court per Lady Hale at para 22.

One answer is pay protection. This is a period of red circling during which the advantaged group has their pay frozen for a time or at least has any cut in pay phased in over stages. The intention is to create a soft landing for those whose pay is being cut and to minimise the disruption that could be caused by an industrial dispute.

But a period of pay protection is also a period that perpetuates unequal pay. The JES has established that two roles are equal, and the employer is still not paying them equally. However, the reason for the difference in pay is that a new pay structure is being introduced over a period of time – that reason for the difference is capable of being a material factor explaining the difference.

It is not wholly free of the taint of sex discrimination, however, because generally, the lower-paid groups are mainly women and the and the higher-paid group are mainly men. That raises the same inference of indirect discrimination as we find in the Enderby case and so the question moves to whether the employer can show that its pay protection measures are objectively justified.

In the cases involving Redcar and Cleveland and Middlesbrough borough councils⁵⁰ the Court of Appeal stressed that this is a high hurdle for the employer to clear – especially if it should have been obvious to the employer that the old pay system was discriminatory. Deliberately choosing to prolong the discrimination is a difficult course of action to justify.

There will of course be sympathy with the position that an employee should be protected from the adverse effects of a job evaluation. But as was held by the Court of Session in **Glasgow City Council v Unison claimants and others**⁵¹, what needs to be justified is not the

⁵⁰ Redcar and Cleveland Borough Council v Bainbridge and others (No.1); Surtees and others v Middlesbrough Borough Council; Redcar and Cleveland Borough Council v Bainbridge and others (No 2) [2008] IRLR 776, Court of Appeal

⁵¹ [2017] IRLR 739, Court of Session

pay protection measures in themselves but the decision to exclude the underpaid employees from them. A balancing exercise needs to be carried out between the needs of the employer and the impact of continuing discrimination on those employees. Another way of putting this is to ask whether, given that pay protection is a legitimate aim, excluding those employees from the benefits of that protection is a reasonably necessary way of achieving that aim.

Justifying age discrimination

At this point it is worth considering the circumstances in which conduct that would otherwise amount to direct age discrimination will be held not to do so because it is 'a proportionate means of achieving a legitimate aim'. Normally in a case of direct discrimination – where one person is treated less favourably than another because of a protected characteristic – there is no defence of justification. Outside the limited number of jobs for which having a protected characteristic might be considered an occupational requirement⁵² an employer can get nowhere arguing that its less favourable treatment is objectively justified.

The position is different in respect of age. This is not the place for a philosophical discussion of why that might be – save that special provision was made in the Equal Treatment Framework Directive⁵³ for justification of less favourable treatment on the grounds of age where that is justified by 'legitimate employment policy, labour market and vocational training objectives'.⁵⁴

The issue is important in the context of pay systems because age is frequently part of the calculation when it comes to pensions, retirement and dismissal for redundancy.

⁵² See Part 1 of Schedule 9 to the Equality Act 2010. The usual example given is a requirement that a warden of a shelter for female victims of domestic violence should be a woman.

⁵³ Council Directive 2000/78/EC

⁵⁴ Article 6.1

For example, in **Woodcock v Cumbria Primary Care Trust**⁵⁵ the employee was a senior NHS executive who was found temporary project work when his post was made redundant. The aim was for him to find another permanent role within the NHS, but it eventually became clear that none could be found and the employer began the process of consulting him over a dismissal for redundancy. Usually that involved at least one formal consultation meeting before notice was given, but this employee was entitled to 12 months' notice. The employer realised that if notice were not given soon then he would still be in employment at the age of 50. That would mean that he would qualify for an enhanced pension and increase the cost of his redundancy by some £500,000. As there were delays in organising the consultation meeting the employer took the decision to issue notice before the meeting took place. This was clearly less favourable treatment because of age, but the Court of Appeal held that it was justified. There was a genuine redundancy and Mr Woodcock had not legitimate expectation that he would still be employed long enough after his role ended to enjoy the windfall of enhanced pension entitlement.

In **Lockwood v Department for Work and Pensions**⁵⁶ the Court of Appeal held that age discrimination inherent in the Civil Service Compensation Scheme was justified. The employee had begun work as an administrative officer at the age of 18 and was made redundant 8 years later under a voluntary redundancy scheme with a severance payment of £10,849. Under the terms of scheme, had she been 35 years old but in the same job and with the same length of service she would have been entitled to an additional sum of £17,691.

This rather stark example of age discrimination was held by the Court of Appeal to be justified. There was statistical evidence that older workers were more likely to have a mortgage to pay and children to support. Taken together with the evidence that they were also likely to remain unemployed for longer after being made redundant the Court of Appeal held that the Tribunal was entitled to find that the difference in redundancy payments was proportionate. The Court

⁵⁵ [2012] IRLR 491, Court of Appeal

⁵⁶ [2013] IRLR 941, Court of Appeal

made it clear that what mattered in justification was the evidence lying behind the policy at issue, rather than the individual circumstances of the employee.

7. Length of service

The use of an employee's length of service in determining pay has been a longstanding feature of most pay systems. It has the advantage of full transparency and objectivity. No-one can complain that decisions about their pay are motivated by discrimination if their rate is determined simply on the basis of how long they have been doing the job.

On the other hand, the longer the pay scale, the more likely it is that indirectly discriminatory factors might come into play. A long pay scale rewards a long and stable career with no breaks or changes in direction. It also means that current levels of pay are a reflection of past patterns of recruitment. If, in the past, recruitment was biased in favour of white men, then current rates of pay are likely to benefit white men.

This potential for indirect discrimination is just one reason why long pay scales have fallen out of favour in recent years. Separate from the question of whether or not they are desirable, however, is whether they are open to legal challenge. In this section we look at how the potential for discrimination inherent in long pay scales has been dealt with by the courts.

Equal pay

We need to remember that sex discrimination in the context of pay needs to be seen through the mechanism of an equal pay claim. Suppose that Zoe is doing the same job as Jack, but Zoe discovers that Jack is actually being paid more than she is. Zoe can bring an equal pay claim and the fact that she is doing the same job as her comparator will mean that the employer will have to show that any difference in pay is because of a 'material factor'.

Length of service will certainly be a material factor and so if the employer can show that this is genuinely the reason for the difference in pay then the claim will fail. If however, Zoe can show that women doing her role are placed at a particular disadvantage compared with men doing that role then the employer will have to show that relying on length of service to determine pay is a 'proportionate means of achieving a legitimate aim'⁵⁷.

⁵⁷ Equality Act 2010, S.69

That at least is the position under the Equality Act. It is complicated somewhat by the intervention of the European Court of Justice. The **Danfoss** case⁵⁸ concerned the pay of Danish clerical workers. Women were on average paid less than men employed on the same grade. One factor affecting pay was seniority. The ECJ held that while other factors, such as an ability to work unsocial hours, would have to be justified by the employer if they could be shown to have a discriminatory impact, there was no need for the employer to justify using seniority as a criterion in determining pay. The court's view was that seniority went 'hand in hand with experience' and that experience 'generally places a worker in a better position to carry out his [sic] duties'. In other words, pay based on service was so obviously a sensible idea that there was no need for the employer to provide specific justification for relying on it.

This assumption was challenged in **Cadman v Health and Safety Executive**⁵⁹, Ms Cadman was a band 2 principal inspector earning between £4,000 and £9,000 less than the four colleagues that she identified as comparators. Each comparator was in the same band as her and were doing work that had been rated as equivalent under a valid job evaluation study. The comparators were paid more than her however, because they had longer service. While steps had been taken over the years to allow high performers to reach the top of the pay grade more quickly, pay progression was still essentially based on a single pay increment awarded annually. Length of service was a key determinant of pay.

It was common ground before the Tribunal that on average women had shorter service than men. There were 17 female band 2 inspectors and their average length of service was 4.4 years. In contrast there were 119 male band 2 inspectors and their average length of service was 16.3 years.

⁵⁸ HANDELS-OG KONTORFUNKTIONAERERNES FORBUND I DANMARK v. DANSK ARBEJDSGIVERFORENING (acting for Danfoss) - [1989] IRLR 532

⁵⁹ [2006] IRLR 969, European Court of Justice

The issue was whether the *Danfoss* case really meant that the employer could rely on length of service as the reason for the difference in pay without having to justify it. The question was referred to the European Court of Justice which held that there was a presumption that length of service was a justified reason for a difference in pay. If however, the employee could provide evidence raising ‘serious doubts’ about whether the normal rule (that length of service enabled the employee to do the job better) did not apply to the particular job in question, then the burden would be placed on the employer to prove otherwise.

The effect of the ECJ’s decision was then considered by the Court of Appeal in the related case of **Wilson v Health and Safety Executive**⁶⁰. That case was concerned with facts very similar to those in *Cadman* with the slight difference that it concerned band 3, rather than band 2 inspectors. The Court of Appeal was of the view that the burden on the employee to raise ‘serious doubts’ about the appropriateness of length of service as a criterion in determining pay was not an onerous one. All that was needed was some basis for inferring that the use of length of service was disproportionate. This was simply a sensible evidential requirement and did not amount to requiring the employee to prove that the service criterion was disproportionate. As a result the equal pay claim in that case succeeded as it was found that a pay scale under which employees took 10 years to progress from the bottom to the top was not justified.

It must be remembered that the need to justify a difference in pay only arises where the reason for the difference is discriminatory. Length of service may have a tendency towards being a discriminatory criterion – but this cannot be taken for granted. In *Cadman* and *Wilson* there was no doubt about it because the differences in length of service were so stark. The job of health and safety inspector had been a male preserve for many years and at the time of the claim women had only just started to make inroads into the profession. In each case those bringing a claim will bear the burden of proving that reliance on length of service is tainted by discrimination. That will often involve a statistical analysis, but the statistics must

⁶⁰ [2010] IRLR 59, Court of Appeal

show significant or consistent patterns of pay differences in order to establish that the criterion of length of service puts women at a particular disadvantage⁶¹.

Subject to that, there is clearly a risk that a pay system that is reliant on length of service may be subject to challenge in an equal pay claim. If such a challenge is brought then the starting point is likely to be that length of service is an acceptable basis for differences in pay. The question will be whether length of service remains an appropriate basis for determining pay given the context of the specific job, or the length of the pay scale in question.

It may, for example, seem perfectly sensible to suggest that an employee who has been doing a job for five years will, on average, be performing more effectively than someone who has been doing the job for three. On the other hand, there is likely to come a point in any job where additional service does not in fact lead to additional skills or improved performance. When we see pay scales with more than 10 annual increments, for example, there is likely to be a question mark over whether such increases are likely to reflect improvements in job performance. The employer will therefore have to show what the reason for such a long pay scale is – and that it is, in the circumstances, justified.

Age discrimination

Where age is the issue there is no need to identify specific comparators doing the same or equal work. Any claim would be one of indirect discrimination which requires the application of a 'provision criterion or practice' (PCP) which puts people in the same age group as the claimant at a substantial disadvantage. Indirect discrimination will be established unless the employer shows that PCP is a 'proportionate means of achieving a legitimate aim'.⁶²

A pay system that places emphasis on length of service carries an obvious risk of age discrimination. It seems intuitively likely that – on average – those with longer service will be

⁶¹ See *McNeil and others v Commissioners for HM Revenue and Customs* (EAT 27 February 2018)

⁶² Equality Act 2010, S.19

older than those with only short service. The longer the pay spine, the more likely it is that statistics will bear this out.

The Equality Act 2010, however, includes specific provisions relating to age discrimination and benefits based on length of service. Schedule 9, Para 10 says that it is not age discrimination to subject someone to a disadvantage on the grounds that they have shorter service than another person. Where, however, the person at a disadvantage has at least 5 years' service with the employer then the exception only applies if the employer reasonably believes that the disadvantage 'fulfils a business need'. Importantly this exception does not apply in relation to termination payments⁶³

The consequence of this is that an employee in the first five years of his or her employment cannot claim that any pay or benefit based on length of service amounts to indirect discrimination based on age. Where the employee has more than five years' service such a claim is possible but instead of the normal test of whether the discriminatory criterion is a 'proportionate means of achieving a legitimate aim', the test will be whether the employer reasonably believes that relying on length of service 'fulfils a business need'. This would certainly, on the face of it, seem to be an easier test to meet as there is no additional test of proportionality in which the employer's need is weighed against the discriminatory impact on the employee.

Other protected characteristics

The potential for pay based on length of service to be discriminatory is not confined to sex and age. Employers who have been making efforts in recent years to improve the diversity of sections of their workforce are likely to find that employees from previously underrepresented groups are more likely to be recent recruits. In **Naeem v Secretary of State for Justice**⁶⁴ Mr Naeem was an Imam employed as a prison chaplain. Prior to 2002 Muslim chaplains were only engaged on a sessional basis because there was not sufficient demand

⁶³ Equality Act 2010, Schedule 9, para 10 (7)

⁶⁴ [2017] IRLR 558, Supreme Court

for their services. The pay scale for prison chaplains was based on length of service and when Mr Naeem began at the bottom of the pay scale in 2004, it would have taken 17 years for a prison chaplain to progress from the bottom to the top.

He brought an indirect discrimination claim in 2011 based on the fact that the pay scheme operated to the particular disadvantage of Muslims – their service was shorter and so their pay was lower.

The Supreme Court upheld the Tribunal's finding that the pay scheme did give rise to the potential for discrimination. But Mr Naeem lost his claim. The Supreme Court held that the Tribunal had been entitled to find that the pay scheme was a 'proportionate means of achieving a legitimate aim'.

Crucial to the Tribunal's finding was that the system was in the process of reform – shifting from one based entirely on length of service to one which also brought in elements of assessed performance. At the time of the claim, the objective had been to move to a position where no more than six years of service were needed to progress to the top of the pay grade, subject to the employee's performance in the role. Progress had, however, been hampered by government pay restraint.

Accepting that a very long pay scale was difficult to justify, Lady Hale (now President of the Supreme Court) said "But we are here concerned with a system which is in transition. The question was not whether the original pay scheme could be justified but whether the steps being taken to move towards the new system were proportionate." On balance the Tribunal had been entitled to find that the continued reliance on length of service while seeking to shorten the pay scale was justified.

Conclusion

It is clear that while pay based on length of service has the potential to be discriminatory, the courts at both a national and European level have accepted that it is legitimate for employers

to reward the extra experience that comes with longer service. Indeed, in the case of age discrimination, this is expressly written into the Equality Act.

Where, however, progression through a pay scale takes more than 5 years, careful thought should be given as to why pay is structured in this way. Is it really the case that an employee's competence in the role is likely to continue to increase? If not, what is the justification for continuing to increase pay? It may be that other business needs are served, such as improving the retention of staff or rewarding their continued loyalty. If so then consideration should be given to whether such benefits outweigh any discriminatory impact. This requires a careful analysis of the extent of any such discrimination, which is something that should be kept under review.

8. Performance-related pay

There is no question that the performance of an employee can be a genuine reason for paying a higher rate of pay. Few would argue that it would be wrong to pay A more than B if it could be demonstrated that A was the more competent and effective of the two.

This does not mean however that there can be no equal pay claim brought where the difference in pay has resulted from the assessment of performance rather than the assessment of the job itself.

Example:

Alisha was recruited as an English teacher three years ago at a salary of £26,000 and she has since progressed to a salary of £32,000. Her colleague David was recruited at the same time in the same department but has consistently scored higher than Alisha in performance assessments and is now on the maximum for his grade of £37,645.

Alisha can bring an equal pay claim citing David as the comparator, but the employer will argue that the difference in performance is a material factor explaining the difference in pay. The employer will have to persuade the Tribunal that Alisha is not being treated less favourably than David because she is a woman. It may do this by pointing out that Alisha's pay progression is about average and there is no reason to believe that she is being held back – and by explaining the basis on which David's performance has been considered exceptional.

Assuming that the Tribunal accepts that there is no direct discrimination Alisha could only succeed if she shows that performance-related pay puts women at a particular disadvantage. This would involve looking at the time it takes women to progress through the pay scale compared to men. If there was a clear pattern of the system favouring men, then the question would be whether the employer could show that it was nevertheless a proportionate means of achieving a legitimate aim. Rewarding performance is certainly a legitimate aim, but the Tribunal is not likely to be easily persuaded that it is proportionate to continue the system as it is if it clearly results in women being given lower performance ratings on average.

Where the progression of an employee through the pay system is based on the decision of a manager then there is a risk that unconscious bias will influence that decision-making process. To avoid any appearance of bias it is accepted good practice to ensure that performance is assessed on the basis of clear and objective criteria. Indeed, an opaque system of determining pay where employers are unable to explain how decisions relating to pay are made may in itself lead to inferences of discrimination being drawn by an Employment Tribunal.

Where pay progression depends on the assessment of performance, the employer will need to have a clear pay policy setting out the criteria by which performance will be assessed and the methodology used in that assessment. It would also be wise to monitor outcomes across the organisation to ensure that there is no indirect discrimination in the operation of the pay system.

The same holds true for pay systems that allow for special payments aimed at exceptional performance. There is nothing inherently objectional in such payments, but an employer should monitor their use to ensure that there is no pattern of such payments being more frequently awarded to employees sharing a particular characteristic.

Pregnancy and maternity

It is direct discrimination to treat an employee less favourably on the grounds of pregnancy or maternity. This includes treating a woman less favourably because she has taken maternity leave⁶⁵. This creates a challenge in pay systems based on performance, because these usually involve assessing an employee's work over the previous year. What if for most or all of that year the employee was absent on maternity leave?

There is no easy answer to this. It is the employer's responsibility to administer the system in such a way as to ensure that employees who take maternity leave are not disadvantaged. This

⁶⁵ Section 18, Equality Act

may involve making positive assumptions about what the employee's performance would have been had she not been pregnant or away on leave.

This may involve more favourable treatment of a woman who has taken maternity leave than a man (or woman) who has not been absent or been absent for some other reason. This should not be a problem as the Equality Act allows for the more favourable treatment of women in connection with pregnancy and maternity⁶⁶.

Additional payments

As well as allowing for individual performance in a role to be acknowledged, a pay system may also make provision for additional payments when employees are prepared to take on additional duties and responsibilities. Whether such additional payments need to be justified by the employer depends essentially on whether they can be shown to have a discriminatory impact.

For example, a police officer may receive an additional allowance for being a dog handler, with the extra responsibility that brings for taking care of an animal. There is no reason to think that this has any discriminatory impact between men and women. It may be the case that officers from particular ethnic backgrounds feel less able to take on the role. However even if there is a small discriminatory impact, it is clear that the additional payment does relate to an additional responsibility. It is highly unlikely that a Tribunal would have any problem with such an arrangement unless the allowance was wholly out of proportion with the work involved.

A more obvious discriminatory impact could arise in the case of additional payments made in respect of working unsocial hours. In **Blackburn & another v Chief Constable of West Midlands Police**⁶⁷ two women police officers had been excused the normal requirement to work unsocial hours because of their childcare responsibilities. As a result, however, they had

⁶⁶ Section 13(6) Equality Act

⁶⁷ [2009] IRLR 135, Court of Appeal

also lost a 'special priority payment'. Provision for such payments had been negotiated with the Police Negotiating Board. They were intended to allow local forces to react to local circumstances and provide additional payments to frontline officers facing particularly demanding conditions, bearing higher responsibilities or where there were particular issues with recruitment and retention.

In the West Midlands force the decision was taken to focus on officers who were able to work on what was described as a 24/7 basis. In reality, that meant officers whose published, rostered working patterns generally involved working at least four hours between midnight and 6.00am in a given week.

The women police officers argued that they were entitled to equal pay with their colleagues who were being given the special priority payments. They argued that the reason for the difference in pay – the fact that their comparators regularly worked unsocial hours – was tainted by discrimination in the sense that women were disproportionately more likely to be prevented from working on that basis. The Tribunal upheld the claim on the basis that the Force could have afforded to ensure that the relatively small number of women prevented from working those hours also received the extra payment or chosen a less discriminatory basis on which to allocate the special priority payment.

The Court of Appeal overturned that decision. The Court ruled that the West Midlands force had been entitled to focus on 24/7 working when allocating its special priority payments. The fact that other forces had taken a different approach was neither here nor there. Nor did it matter that the employer could have chosen to pay the women the additional allowance even though they did not meet the criteria for it. The question was whether the decision to make a payment to those who worked on a 24/7 basis was a proportionate means of achieving the legitimate aim of rewarding such work. Put in those terms the answer was clear and the claims failed.

Additional payments will therefore be legitimate provided they genuinely accord with the employer's legitimate business objectives. They also have the advantage of transparency in

that they are allocated on the basis of clear and objective criteria with little or no room for unconscious bias to creep into management decision-making.

9. Market forces

One of the reasons frequently put forward for differences in pay is the operation of market forces. In the private sector, some jobs may command a higher salary than others even though, viewed objectively, the work itself has no extra value. There is less scope for this in relation to the pay systems covered by the pay review bodies where much more focus is placed on the work itself. Nevertheless, the difficulties experienced in finding suitably qualified professionals to fill roles is certainly a factor affecting recommendations made by those bodies in a number of sectors.

The operation of market forces may be formally recognised in a pay system. For example, we may find:

- higher rates of pay, or special payments for locations where there are difficulties in recruiting/retaining suitably qualified employees and/or
- higher rates of pay or additional payments in roles where it has proved difficult to recruit or retain suitably qualified employees.

Such factors will only be accounted for, presumably, when there is considerable objective evidence of the problems they are seeking to address. Formally recognising market forces in this way is therefore unlikely to present a significant discrimination risk. Even if evidence of discriminatory impact is found (some locations may have fewer members of particular ethnic minorities, for example, or it may be argued that caring responsibilities may mean that women are less able to relocate to take advantage of higher rates of pay), the differences are likely to be modest and proportionate to the need identified by the body in question.

Market forces may, however, have a less formal impact on pay when a local employer has discretion as to where on the grading structure to place a new recruit. Here the parameters are less formally drawn and the risk of discrimination is clearer.

Example: Sarah has worked her way up the ranks of the civil service and has just been promoted to the level of Deputy Director on a salary of £66,000. This represents an increase of 10% on her previous salary of £60,000. She is concerned to discover,

however that she is working alongside David who is doing exactly the same job as her, but has told her that he is earning £75,000. He tells her that this matches the salary he was being paid in the private sector when he was recruited three months ago and that he would not have agreed to join the civil service for any less.

Would Sarah have an equal pay claim?

It may well be that Sarah and David are doing equal work, so the focus would then shift to the reason for the difference in pay. The employer would say that the difference is the result of negotiation and the fact that David would not have agreed to work for Sarah's salary. It needs to be stressed that the question of whether this approach is fair or reasonable is not the point. What matters is whether or not it genuinely explains the difference in pay and whether or not it is discriminatory. If there is no discrimination in the difference, then the employer is not even under an obligation to close the gap over time.

In **Secretary of State for Justice v Bowling**⁶⁸, for example the employer recruited a man and a woman to similar posts at about the same time but placed the man higher up the pay scale because of his greater skill and experience. The Tribunal accepted this explanation for the difference in pay for the first year after recruitment but held that after that time the woman had gained enough experience to 'catch up' with the man. The EAT overturned the decision on the basis that the situation at the time of recruitment was still the reason for the difference in pay. From that point both employees had progressed up the incremental scale and the difference in pay was still due to the initial decision as to where on the grade each would start.

In our example, David seems to be clear on the point that he would not have accepted a lower salary, so the reason for the difference is likely to be genuine. If the employer had simply assumed that David would not work for less, then that might draw the reason for the

⁶⁸ Employment Appeal Tribunal, 29 November 2011

difference into question. If there was no rationale for David's starting salary, nor any documentation relating to how it was decided, then the employer might well struggle to establish a material factor defence.

Assuming the genuine reason is established however, the next question will be whether the difference is tainted by sex discrimination. Direct discrimination seems unlikely. The employer would not, presumably, have refused to match the salary of a woman in exactly the same position as David. The more difficult question is whether the difference is tainted by indirect discrimination.

It seems intuitively possible that those who have achieved a senior level in the private sector are more likely to be men than women. It could also be true that in a given profession, women are more likely to follow a public-sector career and work their way up the career ladder. Perhaps it might also be suggested that men are more likely than women to refuse an opening salary offer from an employer and negotiate an improvement.

A tribunal hearing an equal pay claim would look at the statistical evidence to see if any of these hypotheses are made out. It could look at the overall pay of men and women in Sarah's grade and see how sharp the difference is. It might also consider the pool of employees recruited externally and consider how many were men and how many were women and compare that with the pool of those promoted internally. It could also look at the starting salaries of those recruited and promoted and see what gender differences emerge. There is no one fixed approach to this and the right test will vary depending on the numbers involved and the significance of any differences that emerge.

For a real-life example of the use of market forces in defending an equal pay claim we can look at the case of **Bradley v Royal Holloway and Bedford New College, University of London**⁶⁹ in which a female college professor claimed equal pay with two male colleagues. The Tribunal found that the reason for the difference in pay came down to a specific retention

⁶⁹ Employment Appeal Tribunal, 30 April 2014

payment made to the male professors. Each had been approached by rival universities and the employer had used the additional payments to persuade them to stay. The claimant argued that men were more likely to be given retention payments as they were more mobile and able to accept offers of employment from rivals. However, the Tribunal found that there was no actual evidence to support this and only a small statistical sample of such payments to draw upon. The EAT upheld the finding that the employer had established a material factor defence.

So in our example Sarah could bring an equal pay claim, but success would be far from assured. On the other hand the employer might find the experience of having its decisions on pay picked apart by an Employment Tribunal to be a rather uncomfortable one. The more opaque the employer's decision-making the more difficulty it would find itself in when defending the claim.

It is worth noting that a similar approach would be adopted if the claim was based on another protected characteristic such as race. Sarah might for example be arguing that a 'provision criterion or practice' under which the starting salaries of those promoted internally do not match the salaries of those recruited externally places those who share her ethnic origin at a substantial disadvantage. A public sector employer would be expected to carry out extensive equality monitoring and so evidence of any disparate impact in the application of the pay system should be obtainable.

10. Age discrimination and pensions

A pension is, almost by definition, a benefit that discriminates on the grounds of age. While the Equality Act does apply to the terms of occupational pension schemes⁷⁰ there are wide-ranging exceptions in the case of age discrimination⁷¹ that allow age-based rules in relation to admission to a scheme, actuarial calculations, and age-related contributions and benefits.

That does not mean, however, that age discrimination is irrelevant when it comes to occupational pensions. In **Sargeant and others v London Fire and Emergency Planning Authority**⁷² members of the Firefighters Pension Scheme (FPS) brought complaints relating to the introduction of a new, less generous, scheme in 2015. The complaints were not based on the fact that the new pension scheme was less generous than the old one, but on the way in which the transition was handled. A decision was taken to protect those members of the scheme who were nearest to retirement from the less generous aspects of the new scheme. Specifically:

- those born on or before 1 April 1967 were given full protection
- those born between April 1967 and April 1971 were given tapered protection but
- those born after April 1971 were given no protection at all and were simply required to transfer to the new scheme from April 2015

Claims were brought by unprotected firefighters who were aged 44 or below when the new scheme was introduced.

There was no dispute that their treatment amounted to less favourable treatment on the grounds of age. Since the case was about their treatment in terms of their transfer to the new scheme – rather than the rules of the scheme itself – their cases were not covered by the

⁷⁰ Section 61

⁷¹ The Equality Act (Age Exceptions for Pension Schemes) Order 2010

⁷² [2018] IRLR 302, Employment Appeal Tribunal

2010 Exceptions for Pension Schemes Order. The question therefore was whether their treatment was a proportionate means of achieving a legitimate aim.

The Tribunal held that the transitional provisions were justified. They had been decided on by the Home Office acting on social policy grounds with the aim of protecting those closest to retirement who had a legitimate expectation that their entitlements would not change so late in their careers. The Tribunal held that the state had a wide margin of discretion in choosing its social policy objectives – more so than a private employer – and that this aim should be respected. As to proportionality, the Tribunal held that a ‘line had to be drawn at some point’.

The EAT held that the Tribunal was entitled to find that there were legitimate aims behind the transitional provisions. On the question of proportionality, however, it had taken the wrong approach. The Tribunal had failed to grapple with the central claim of the claimants that the effect on them of being denied the protection of the transitional provisions was catastrophic and disproportionate. In reaching that conclusion the EAT went so far as to say that it was a mistake to simply apply the standards as set out by the European Court of Justice which accepted a wide margin of discretion for Governments in the application of social policy decisions. The Equality Act set a higher standard and the Tribunal had to reach its own view of whether the measures were a proportionate means of achieving a legitimate aim. The case was sent back to the Tribunal to reconsider the point.

The firefighters’ case was heard in parallel with a case involving judicial pensions – **The Lord Chancellor and Secretary of State for Justice and another v McCloud and others**⁷³. In that case the Judicial Pension Scheme was replaced by the New Judicial Pension Scheme and – as with the firefighters – a decision was taken to protect those closest to retirement and a similar range of transitional measures were introduced (albeit based on the higher retirement age applicable to the judiciary).

⁷³ [2018] IRLR 284, Employment Appeal Tribunal

The Tribunal in this case, however, held that the discrimination was not a proportionate means of achieving a legitimate aim. The Tribunal's view was that the aim pursued by the Government – to protect those closest to retirement – was no more than a decision to protect a particular age group which could not in itself be a legitimate aim; it was merely an assertion of an intention to discriminate. Furthermore, judges forced to transfer to the new scheme without protection suffered an extremely adverse impact on their pension entitlement which was not proportionate to any legitimate social policy aim that there may have been.

The EAT dismissed the Lord Chancellor's appeal. The Tribunal had been wrong to find that there was no legitimate aim for the transitional provisions. It had failed to have regard to the extensive evidence surrounding the decision taken by Government, including the moral and political considerations affecting the decision. In particular it was legitimate for the Government to want to ensure consistency across the public sector for the way in which new pension arrangements were implemented. However, the finding of a legitimate aim was 'only the beginning of the story'. The Tribunal had been entitled to find that the transitional measures were not a proportionate means of achieving a legitimate aim. One important factor was what was described (by judges) as the unique nature of the judiciary. A successful barrister accepting a judicial appointment is not permitted to simply return to private practice afterwards. Those who had entered into a judicial career had done so in the expectation of a particular level of pension and even though the transitional provisions had a legitimate aim, it was clear from the Tribunal's finding that this was outweighed by their severe impact on the younger judges.

The fact that the EAT upheld a finding that the transitional pension provisions in the case of the judiciary were not justified by no means guarantees that the Tribunal looking at the firefighters' case will reach the same conclusion. This is so even though the transitional provisions themselves are essentially the same for both groups. The question of justification is one for the Tribunal to decide based on the facts of the particular case. An appeal can only be brought on a point of law – if the Tribunal applies the wrong test. It is perfectly possible therefore that two tribunals can take a different view of the same situation – and both be right (or at least upheld on appeal). At the time of writing, however, the question of

justification is still being litigated and it is unlikely that either decision of the EAT will prove to be the last word on the matter.

11. Remedies

An equal pay claim is a claim for breach of the equality clause. A discrimination claim, by contrast is regarded as a statutory tort (a tort being a legal wrong that is not a breach of contract).

An equal pay claim can be brought in either the normal civil courts or in the Employment Tribunal. In practice cases are brought in the Tribunal, and indeed the civil courts have the power to direct cases to the Tribunal if it is felt that they can be more conveniently dealt with there.

If an equal pay claim is brought in the Employment Tribunal and is successful, then the main remedy is an award of damages for breach of the equality clause – essentially arrears of pay. The Tribunal will have to determine when the equality clause took effect and calculate damages accordingly. The relevant date might be when a job evaluation study came into effect or when the named comparator was either recruited, started work which was equal to that of the claimant or first started being paid more.

The amount of back pay that can be awarded in an equal pay claim is limited. The Equality Act originally specified that no more than two years' worth of back pay could be recovered, but this was held to be contrary to the principle of equivalence under EU law⁷⁴ and S.132 now provides for six years of back pay in England and Wales and five years in Scotland. In Northern Ireland the limit on back pay is also set at six years. These limits align with the limitation periods for breach of contract claims.

In a discrimination claim there is no limit on the amount of compensation that can be awarded (either in cash terms, or in terms of the period covered by the award). The successful claimant is entitled to recover full compensation for any losses suffered as a result of the discrimination. In a case centred on pay, this too would cover back pay – but it would also include an element for injury to feelings.

⁷⁴ *Levez v TH Jennings (Harlow Pools) Ltd* [1999] IRLR 36, European Court of Justice

It appears that in an equal pay claim there can be no award for injury to feelings⁷⁵ although the question of whether this principle complies with EU law has not really been tested. In a discrimination claim, however, awards for injury to feelings are almost invariably awarded. Guidelines for the level of injury to feelings awards were laid down by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police**⁷⁶ and since that case they have been updated annually in line with inflation by the President of Employment Tribunals. In 2018 the bands for injury to feelings awards (graded according to the seriousness of the case) were as follows:

- Lower band: £900 to £8,600
- Middle band: £8,600 to £25,700
- Upper band: £25,700 to £42,900

Awards for injury to feelings in the upper band are generally reserved for cases of serious and prolonged harassment. There is no data to indicate where on this scale a discriminatory pay arrangement would sit.

Other than this judge-imposed cap on injury to feelings awards, there is no limit to the amount for compensation that can be awarded in a discrimination claim. There is therefore no limit on backpay if the employee succeeds in showing that his or her pay has been discriminatory for an extended period of time. There is also scope for compensating an employee for future loss of earnings. This contrasts with an equal pay claim in which the employee's future pay is protected through the continued operation of the equality clause if he or she remains with the employer.

Equal pay audits

⁷⁵ *Degnan v Redcar and Cleveland Borough Council* [2005] IRLR 504, Employment Appeal Tribunal

⁷⁶ [2002] EWCA 1871

Gender pay gap reporting falls far short of the standard of analysis that would be expected in a genuine equal pay audit. There are circumstances in which an employer may be compelled to carry out such an audit, but the nature of equal pay claims means that this will almost never happen in practice.

The Equality Act 2010 (Equal Pay Audits) Regulations 2014 apply to claims presented on or after 1st October 2014 where the Tribunal finds that there has been an equal pay breach. Unless an exception applies the Tribunal must then order the employer to carry out an equal pay audit. The Tribunal's order will set a timetable for the audit (the employer must be given at least three months) and specify which employees must be included in the audit and the period of time that must be covered.

The employer will then be obliged to examine the pay of the male and female employees covered by the audit and identify the reasons for any differences in their pay. The audit should also identify any potential equal pay breach and the reasons for that and set out the employer's plan for avoiding equal pay breaches in the future.

Although an order for an equal pay audit is now the default outcome for a successful equal pay claim, there are a variety of circumstances in which one will not be ordered. New businesses and those with fewer than 10 employees are excluded. Nor will an audit be ordered if one has already been conducted in the last three years or if the action that needs to be taken to avoid equal pay breaches is already clear; there is no reason to think that there may be other equal pay breaches or 'the disadvantages of an audit would outweigh its benefits'.

The reality is that an equal pay claim will almost never reach the stage at which the Tribunal has to consider whether or not to order an audit. Equal pay claims are not in practice decided at a single hearing. Usually there are a series of preliminary hearings to decide particular issues, such as whether the comparator is employed on equal work, whether the employer has established a material factor for the difference in pay and whether the material factor is justified notwithstanding any potential indirect discrimination. When these issues have been

decided the parties almost invariably understand what the outcome of the case will be and settle matters accordingly. It is almost never necessary for the Tribunal to actually make a determination as to whether or not there has been an equal pay breach. In 2016/17 there were 17,646⁷⁷ equal pay claims disposed of by the employment tribunal. The official statistics report that 0.06% were 'successful at hearing' – the stage at which an equal pay audit would be ordered. That represents just 11 individual cases – and it may well be that all 11 were concerned with just one employer.

It is clear that Tribunal-ordered equal pay audits are not going to be an important feature of the equal pay landscape, now or in the future.

⁷⁷ <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-october-to-december-2017>

