



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr H Hein**

**v**

**London Underground Limited**

**Heard at:** London Central  
**On:** 14 – 17 October 2019

**Before:** Employment Judge Hodgson  
Mr S Williams  
Ms V Chavda

## **Representation**

**For the Claimant:** Mr S Coster,  
**For the Respondent:** Ms J Shepherd, counsel

## **JUDGMENT**

**The allegation that the respondent has breached the sex equality clause by falling to pay the claimant at the same rate of pay as his comparators fails and is dismissed.**

## **REASONS**

### **Introduction**

- 1.1 On 28 January 2018, the claimant filed a claim alleging breach of the equality clause in relation to pay. In addition, he alleged indirect discrimination. The claim of indirect discrimination was struck out on 28 September 2019.

## **The Issues**

- 2.1 The only claim now before the tribunal is a claim of equal pay. The claimant alleges that he performed like work with comparator A and comparator B. He claims they received a higher salary and that the equality clause operates to increase his salary to that of the salary received by his comparators.

## **Evidence**

- 3.1 The claimant, Mr Holger Hein, and his partner, Mr Stephen Coster (who is also an employee of the respondent) gave evidence.
- 3.2 For the respondent, we heard from Mr Graham Lee, who at the material time was the senior HR business Partner, and Mr Terry Deller, who was the employee relations lead.
- 3.3 We received a bundle of documents, and some additional documents during the course of the hearing.
- 3.4 The respondent filed an initial skeleton argument and a chronology.
- 3.5 The respondent served further and better particulars, as ordered by the tribunal.
- 3.6 Both parties relied on written submissions. With the consent of the tribunal, the claimant filed further written submissions, after oral submissions were completed.

## **Concessions/Applications**

- 4.1 At the commencement of the hearing, we noted that there were deficiencies in the respondent's pleaded case. We ordered the respondent to provide further and better particulars concerning the material fact defence and any justification defence. The further and better particulars were filed on day two. The claimant accepted it could be relied on. They supplemented the respondent's response, but it was agreed that there was no need for any formal amendment.
- 4.2 The claimant initially indicated that he had complaints concerning matters in 2008. However, it was clear that these had not been pleaded and that he had relied on two comparators, comparator A and comparator B,<sup>1</sup> in relation to his role as from 2013. The respondent conceded those comparators and the claimant performed like work. It was accepted no other comparators were relied on for the like work claim. Therefore, we confirmed, if the claimant wished to expand his claim, he would need to

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<sup>1</sup> The specific identity of the two comparators is not relevant, and they have been referred to as A and B throughout.

apply to amend. It was also noted that, as regards any material factor defence, the addition of other comparators on the same administration grade (ADCO) would neither materially affect the way in which the claimant advanced his case, nor the way in which the respondent advanced the defence. Therefore, if the material factor defence were to succeed, it would in all likelihood be a defence to any other way in which the claim could be put as a claim of like work. The claimant elected to proceed relying on the two comparators in relation to his role from 2013 onwards.

- 4.3 We should note that the parties gave written submissions and supplemented them orally. Both the respondent's and the claimant's oral submissions were completed. We asked Mr Coster to explain a number of statistical assertions, as their provenance was unclear.
- 4.4 Mr Coster has presented this case in a helpful, thoughtful, and reasonable manner. He has, at all times, sought to justify, by reference to the available evidence, all assertions. In doing so, he has had to deal with a huge amount of data and other evidence in the context of legal principles which even the most experienced lawyer would find challenging. We would wish him to note that, in our view, he did all he reasonably could have done to advance Mr Hein's case.
- 4.5 During the course of our questions, after his oral submissions, Mr Coster did become upset, as he could not readily identify the basis for a number of his statistical conclusions. He was, unfortunately, unable to complete his answers to our questions, and we agreed with Mr Hein that he could provide any supplementary answers in writing the following morning. However, we were satisfied that all the evidence had been presented, and the claimant had presented his submissions, both orally and in writing. We adjourned to consider our decision in chambers. We did receive further written submissions; we have taken those into account in reaching our conclusions.

## **The Facts**

### **Background**

- 5.1 The claimant applied to join London Underground Ltd as a centurion administrative assistant (grade ADCO) in 2007. At that time, the pay range was £21,179 – £30,747. He was appointed and he started as an administrator on 7 January 2008, based at Seven Sisters, as a train operations manager's administrator assistant. He sought to negotiate a higher rate of pay before appointment but was unsuccessful. The work involved a variety of administrative and HR tasks. He was responsible for managing staff leave, training, and weekly rostering.
- 5.2 In 2009/2010 the claimant received his performance award, having received an "exceeded" rating in his appraisal. The increase was £188

and was given on 1 July 2010. Otherwise, the claimant's pay has risen only by the cost of living increases applicable to all staff.

- 5.3 Around 2010/2011, the claimant began to feel that he was taken for granted and not treated fairly. In 2012, during the Olympic Games, he secured a secondment, with higher pay, to another department. Despite receiving a grading of "exceeded" for the period of secondment, he did not receive any performance-related pay, but he did not challenge this at the time. When he returned to his normal role, a second administrator was appointed whom the claimant trained.
- 5.4 In October 2013, an administrator position became available in the revenue control department. The claimant was first on the nomination list and was offered the job. He moved on 3 November 2013. This involved neither a promotion, nor an increase in salary.
- 5.5 The claimant describes his performance and development reviews as haphazard, until the current revenue control manager, Mr Gary Rogers, took control, sometime after his move to revenue control. The claimant says that his "drive and commitment to maintain a high level of work were undermined by [his] low self-esteem due to the lack of recognition and reward and recognising [his] pay was significantly lower than [his] two other colleagues."
- 5.6 The claimant raised his concerns, informally, by email on or around 23 February 2017. He wanted an explanation for the difference in pay between himself and his colleagues. He found the answer he received unsatisfactory. He took a formal complaint to the performance manager Mr Steve Charlik. This led to a meeting. The claimant was still not satisfied. This led to a formal appeal. On 24 July 2017 the appeal was rejected. The claimant found the respondent's answers unsatisfactory and decided to pursue a claim for equal pay in the employment tribunal. That claim was filed on 28 January 2018.
- 5.7 The claimant remained in revenue control until the end of July 2018. Thereafter, there was a reorganisation. The claimant now works in the operational coverage team dealing with all revenue control, albeit his job remains essentially the same.

#### The comparators

- 5.8 The claimant relies on two female comparators. We refer to them as comparator A and comparator B. In addition, the respondent has given us details of a male who worked in the same role, who has been referred to throughout as comparator C, albeit he is not a comparator relied on by the claimant. He is relied on by the respondent for evidential purposes.
- 5.9 The respondent accepts that the claimant's work, and the work of the claimant's comparators, is like work. Essentially, they do the same job. Neither the claimant, nor the respondent, have asserted that the other

administrators on the ADCO grade undertake like work. However, the respondent's submissions were to the effect that it is not advancing any argument that they are not doing like work. The case has proceeded, on both sides, on the basis that all those ADCO administrators are performing the same work and are relevant for the purposes of any statistical comparison. The reality is that the administrator roles within that grade were interchangeable. There is no suggestion by either side that there was any basis for arguing that their roles were not like work.

- 5.10 It is necessary to consider the position of each the comparators. Mr Lee, who at the material time was a senior HR business partner, gave evidence, which is, essentially, unchallenged.
- 5.11 Comparator A was employed on 20 May 1996 and had 21 years continuous service at the date the claimant filed his claim. She was initially part of the operational team. Her starting salary was £19,613. She transferred to the ADCO pay grade, as an administrator, on 24 July 2001. She took up the role of revenue control manager's assistance around 2010/2011.
- 5.12 There is salary information for Comparator A, which has been put together via a combination of SAP<sup>2</sup> records which go back to 2003 and manual records before that.
- 5.13 The percentage increases in salary she received during the course of her employment were all within the agreed salary scales, as recorded in the various implementation notices disclosed. The records show that each year, with the exception of 2011, Comparator A received the negotiated pay award. In 2011, she received a pay rise of 5%, when the negotiated pay award was 6%. A summary of the jobs performed by Comparator A during her career at LUL is as follows: 20.05.1996 to 29.11.2003, admin/tech Victoria GSM; 30.11.2003 to 02.04.2005, admin – station planning SP&DT, operations resourcing; 3.4.2005 to 13.11.2010 – administration - GSM's assistant Victoria group; 14.11/2010 TO 21.7.2018 – administrator in revenue support; 22.07.2018 to date, administration - coverage administrator, establishment planning/Kings Cross.
- 5.14 The respondent does not hold full written records for comparator A, but has consulted with her in order to obtain a full history.
- 5.15 On the commencement of employment, she received the standard rate for a customer service assistance. She worked for two years as a CSA and then went for an interview to become a Ticket Office Clerk. She went through the required training and worked at Victoria. Completion of this resulted in her receiving a salary increase. Her salary in 1998 was £19,613, increasing to £19,803 in October 1998. After one year, Comparator A went for an interview for the role of Station Supervisor. She was successful and went through the training programme. She completed

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<sup>2</sup> SAP is the name the respondent gives to its storage system.

this and worked as a Station Assistant Multi-Functional (SSMF) (station supervisor ticket office clerk) at West Hampstead. She was responsible for managing a small team and running the station. This included security checks, public announcements, opening and closing the station, keeping to safety procedures (which sometimes included going down the track to put out fires or dealing with fights on the station). She also worked on one of the ticket office windows issuing tickets and helping staff with their paperwork and any issues with customers, money handling and banking. She regularly attended training to retain her station supervisor licence and ticket office licence. She worked shifts, nights and weekends and was paid a higher salary to reflect the additional responsibilities in this more senior role. Her salary in 1999 is recorded as £24,698, increasing to £24,940 in October 1999.

- 5.16 Comparator A then became ill and was unable to carry out her normal role. As a result, she was placed into TfL's redeployment pool and, with the assistance of TfL, looked for alternative work. In or around 2000-2001, Comparator A successfully redeployed into a role on grade AG1 (Admin) based at Victoria. She therefore transferred from an operational into an administrative role. As this transfer occurred via the redeployment process, Comparator A had protection of her existing earnings for a five-year period – reflecting her length of service at the time and in line with normal policy. In 2000 she was earning £25,938, increasing to £26,976 in 2001.
- 5.17 Following her transfer to AG1, she carried out a secondment in resourcing. This did not attract any salary increase. Her secondments lasted for about three years.
- 5.18 In or around 2010/2011, comparator A recalls that TfL restructured the administration department and she was placed at risk of redundancy. As part of the redeployment process, comparator A was transferred to the revenue department. Comparator A transferred into the revenue controllers' department on to the same salary as her AG1 role at Victoria. In 2010, she was earning a salary of £34,047.
- 5.19 In 2012, Comparator A was diagnosed with a long-term medical condition and, with the assistance of occupational health and her line manager, arrangements were put in place to assist her, which included working from home two days a week. In 2012 her salary was £37,250.
- 5.20 At the time claimant filed his equal pay claim, in January 2018, comparator A's salary had increased to £42,614, which was within the agreed salary scale of £29,516 to £42,614 as recorded in the Implementation Notice issued on 28 March 2017.
- 5.21 Comparator B has been employed by the respondent since 14 April 1998. She had 19 years' continuous service with the respondent at the time the claimant issued his proceedings. Her current role is coverage administrator, establishment planning/King's Cross, and this job title came

about as part of the internal re-organisation of administrative roles in July 2018.

- 5.22 Comparator B joined the respondent on 14 April 1998 as a station assistant, reporting to the group station manager. She was allocated a role on the Jubilee Line Extension. She was offered a salary of £15,788, provided she successfully completed her training. The salary range for the role at the time was either £15,364 - £22,304 or £15,048 - £21,845. Her starting salary was therefore within (either) given range, but toward the bottom of it.
- 5.23 In October 1998, comparator B was offered a secondment opportunity to the revenue control department as an administrative assistant, for a 12-month period, commencing on 12 October 1998. She performed the role of an AG1 (Admin grade). Comparator B remained on her existing rate of pay of £15,788.
- 5.24 When comparator B was promoted to senior support administrator within the chief engineer's group on 22 February 1999, her salary increased to £16,904, as she entered grade ADC0. The negotiated salary range for ADC0 grade at the time was £15,364 - £22,304, so again, she was placed toward the bottom of the salary range for the grade at the time.
- 5.25 In May 2000, comparator B successfully applied for a senior personnel assistant role with a group company, Infracore BCV Limited. She started the role on 12 June 2000 on a salary of £17,428. The negotiated salary range for ADC0 at the time was £16,135 - £23,423.
- 5.26 In May 2002, comparator B undertook a development secondment to IBCV Learning Development. She worked as a support manager, on a salary of £21,837. As the secondment was for a role in a higher grade, band F, comparator B received a higher duty allowance, albeit this was not consolidated into her salary.
- 5.27 There is then a gap in the paperwork from August 2002 until she entered revenue control in January 2008.
- 5.28 Mr Lee's research into this matter has confirmed the following: from 30/11/2003 – 26/08/2006 – she was a GSM assistant (salary started at £24,567 which was within the ADC0 range of £18,053 - £26,209) and by 2006 had increased to £27,629 (which was within the ADC0 range of £20,151 to £29,255); from 27/08/2006 – 30/09/2006 – she was in performance management support (her salary remained at £27,629 – within the salary range for ADC0 of £20,151 to £29,255); from 1/10/2006 – 17/03/2007 – GSM Assistant (salary remained at £27,629 (within the salary range for ADC0 of £20,151 to £29,255); from 18/03/2007 – 17/02/2008 – she was in revenue support (her salary was increased to £29,038 from 1 April 2007 (within the salary range for ADC0 of £21,179 - £30,747).

- 5.29 On 18 February 2008, comparator B became a revenue control manager's assistant working within the respondent's revenue control department. Comparator B's salary on starting work in the revenue control department was £29,038. This was within the agreed salary scale for ADC0 of £21,179 to £30,747.
- 5.30 The respondent holds salary information for Comparator B on SAP, and this goes as far back as 2003, and each year with the exception of 2011, Comparator B received the negotiated pay award. In 2011, she received a pay rise of 5%, when the negotiated pay award was 6%.
- 5.31 At the time of filing the claimant's equal pay claim in January 2018, comparator B's salary had increased to £40,776, within the agreed salary scale of £29,516 to £42,614.

### Comparator C

- 5.32 As noted, comparator C is advanced by the respondent to demonstrate his position for illustrative purposes, and he is not relied on by the claimant. It is the respondent's case that he is relevant to the material factor defence.
- 5.33 Comparator C is a male revenue control manager's assistant had 29 years' continuous service at the date the claimant issued his claim.
- 5.34 Comparator C began working for the respondent in May 1998. Correspondence from 15 December 1997 explains the merger of terms and conditions between London Transport and London Underground. He was given the option of transferring to merged terms on the ADC0 grade on a salary of £16,302, within the range of £14,904 - £21,636.
- 5.35 Comparator C began working as a revenue control manager's Assistant in 2003, earning £23,146. The ADC0 salary range at the time was £18,053 - £26,209.
- 5.36 At the time the claimant brought this claim, comparator C's salary was £40,323.
- 5.37 Comparator C's salary has always been within the negotiated salary range for AG1 grade. As set out in the Implementation Notices at pages 173 to 195 of the bundle.

### Performance-related pay

- 5.38 In addition to the annual negotiated increase to the salary range for the ADC0, for many years, ADC0 has been eligible to participate in the respondent's performance-related pay policy. The current performance-related pay principles and guidelines are at page 559 of the bundle. Performance-related pay is a consolidated increase to base salary and is applied where an employee has demonstrated he or she has achieved the



relevant objectives. It forms part of the base salary for any subsequent cost of living increases.

- 5.39 ADC0 employees are eligible to receive performance-related pay. They receive the enhanced performance-related pay award for performance ratings of 4 (“demonstrated high standard of performance and behaviours in most areas and role model standard in others”) or 5 (“consistently demonstrated role model standard performance and behaviours in all areas”) should they achieve them. Normally, the general negotiated increase is effective from 1 April, and the additional increase for performance is effective as of 1 July. There can be delays depending on timing and outcome of pay negotiations with the unions.
- 5.40 An individual’s base pay can be increased up to the maximum of their applicable pay range only. Thereafter any award, or the portion of the award that is above the pay range maximum, is given as a one-off cash sum payment which is not consolidated into base pay.
- 5.41 The evidence we received indicated that the maximum performance-related pay which could be applied for the purpose of increasing the base salary was 0.5% per annum.
- 5.42 The gap between lower and upper band for the claimant grade was at around £9,000 in 2008 and is currently nearer £13,000. When the claimant issued proceedings, his salary was £29,749. A performance-related pay increase of 0.5% would give an additional £148. We can round that up to £150, for the purposes of this calculation. Given a differential of £13,000, and assuming PRP increase each year, it would take 86 years to bridge the gap. We have noted that this ignores any compounding effect of year-on-year increases. However, any such compounding effect would be entirely obliterated by the inevitable widening of the gap caused by any simple percentage increase to both lower and upper levels. It follows it would take more than 86 years.

#### Incremental increases

- 5.43 For many employers, when there is a pay grade band, it is common for there to be advancement through the pay scale, linked to length of employment. However, there is no such system used by the respondent in relation to this pay grade (we have not received evidence for any other pay grades). In order to move through a pay grade, it is necessary to secure advancement by performance-related pay increments. Any other adjustments, when within a band, are discretionary and there is little evidence of discretion being used. It follows that it is possible to stay at the bottom of the scale, by receiving cost of living increases, throughout the administrator's employment.

#### The claimant's position

- 5.44 In 2009, the claimant received the negotiated pay increase of 1.5%.

- 5.45 In 2010, the claimant received a general pay increase of 4% and an additional performance-related pay payment on 1 July 2010, amounting to 0.8% increase in salary. This is the only occasion when the claimant's performance warranted a performance-related pay award.
- 5.46 In 2011, the claimant received a general pay increase of 5%, which was above the negotiated general pay increase of 4.20%.
- 5.47 In 2012, the claimant received the general pay increase of 4.2%.
- 5.48 In 2013 the claimant received the general pay increase amounting to 3.7%.
- 5.49 On 3 November 2013, the claimant secured a new role as a revenue control manager's assistant working within the respondent's revenue control department. The claimant's salary on starting work in the revenue control department was £26,882.00. No pay increase was awarded on commencing this role. This was within the agreed salary scale of £26,608 to £38,628.
- 5.50 The claimant continued to receive the negotiated pay increase in the year 2014 (3.20 %), 2015 (1% plus £500), 2016 (1.3% and 2017 (3.2%).
- 5.51 At the time of filing his equal pay claim in January 2018, the claimant's salary had increased to £29,749, within the agreed salary scale of £29,516 to £42,614.
- 5.52 The claimant's salary has always been within the negotiated salary range for ADC0 grade.
- 5.53 We have, as necessary, considered further detail of the evidence and its relevance to statistical findings in our conclusions below.

### Policies

- 5.54 The salary policies are set out in the salary administration handbook. Paragraph 5.2.1 provides starting salaries shall be within the appropriate salary scale, but determined by reference to a number of points including: the individual's match to relevant skill, knowledge, experience, and behavioural profile; the individual's current salary and benefits package; the external market rate; the salaries of existing job holders in similar jobs; and equality impact. The policy is the starting salary should not exceed 90% of the maximum salary for the range.
- 5.55 Paragraph 5.3.6 deals with operational staff transfer into ADCO and provides they should only be transferred with salary protection of up to 80% of the maximum salary for the grade.

5.56 Paragraph 6.4 deals with those who transfer to ADCO as a result of displacement or due to medical redeployment. Staff who have three or more years of service and who are redeployed for medical reasons have a protected salary up to 100%. The period of protection will not exceed the length of service and in any event is up to a maximum 9 years. The policy works by allowing 100% of the maximum salary in the new position. Any sum in excess of the maximum for the grade is paid as a lump sum for up to 5 years with a diminishing lump sum between 6 and 9 years, if the person has the requisite continuous period of employment. The position is the same for those displaced by, for example, redundancy.

### **The law**

6.1 Section 65 of the Equality Act 2010 provides:

**(1) For the purposes of this Chapter, A's work is equal to that of B if it is—**

- (a) like B's work,**
- (b) rated as equivalent to B's work, or**
- (c) of equal value to B's work.**

**(2) A's work is like B's work if—**

- (a) A's work and B's work are the same or broadly similar, and**
- (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.**

**(3) ...**

6.2 Section 66 of the Equality Act 2010 provides:

**(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.**

**(2) A sex equality clause is a provision that has the following effect—**

**(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;**

**(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.**

**(3) ...**

6.3 Section 69 of the Equality Act 2010 provides for a defence of material factor:

**(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person**

shows that the difference is because of a material factor reliance on which—

- (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
- (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

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

...

- (5) 'Relevant matter' has the meaning given in section 67.
- (6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.

- 6.4 When like work, is established, an equality clause will operate unless the employer can demonstrate that the variation in contract terms is due to a material factor other than sex. Underhill P summarised the developed law as it was under s 1(3) of the EPA 1970 at para 19 in **Newcastle Upon Tyne NHS Hospitals Trust v Armstrong & Ors** UKEAT/0069/09:

...it is necessary for a tribunal first to identify the employer's "explanation" for the differential complained of (a preferable phrase to the conventional but clumsy terminology of a "material factor" to which the differential is "due") and then to consider whether that explanation involves sex discrimination, applying the well-known principles which underlie both the relevant UK legislation and the jurisprudence of the European Court of Justice.

- 6.5 The first question is whether the factor on which the claimant places reliance puts the claimant to a 'particular disadvantage'. In **Ministry of Defence v Armstrong** [2004] IRLR 672, Cox J found discrimination in pay can be established without the need to adopt a 'formulaic' approach such as is found in indirect discrimination. What is important was whether there is a causal link between the claimant's sex and the difference in pay, and in answering that question it is appropriate to look at the issues broadly and in a non-technical sense. In **Bainbridge v Redcar and Cleveland Borough Council (No 1)** [2008] EWCA Civ 885, CA) the approach in **MOD v Armstrong** was again approved and said to follow and endorse the principle that 'it is open to a court or tribunal to find indirect sex discrimination when the circumstances are such that they recognise it' (per Mummery LJ at para 46).
- 6.6 **Bainbridge** confirmed that when a tribunal is looking at the cause of a pay disparity, it should concern itself with the underlying cause, rather than the immediate reason (per Mummery LJ at para 103). If the historical explanation involves practices that in the past incorporated discrimination against women, objective justification is required in the present.
- 6.7 It is for the employer to identify the factor it says justifies the difference in pay, and it must show that it is not a sham or a pretence. The factor must be both causative of the difference in pay and material (in the sense of

being significant and relevant: **Rainey v Greater Glasgow Health Board** [1987] AC 224).

- 6.8 It is for the claimant to show that the facts are such as to indicate potential indirect discrimination. This may involve the identification of a rule or practice operated by the employer which impacts disproportionately on the claimant and other women, or, in the absence of anything that can be identified as a discrete rule or condition for which the employer is responsible, statistical evidence which shows the same disproportionate impact.
- 6.9 It is always important to distinguish between direct and indirect discrimination because direct discrimination can never be justified and indirect discrimination can be justified.
- 6.10 The law concerning justification has been summarised by Underhill P (as he was) in **Bury MBC v Hamilton** [2011] IRLR 358 as follows:
- The first kind of indirect discrimination occurs where the employer 'applies' a 'provision criterion or practice' (or 'PCP' in the jargon) which puts or would put women at a particular disadvantage when compared with men—or, as it is often put, has a 'disparate adverse impact': that is the formulation adopted in the relevant EU legislation and now incorporated also in the UK statutes;
  - The second kind of indirect discrimination was first recognised in the decision of the European Court of Justice in **Enderby v Frenchay Health Authority** [1994] ICR 112. In cases of the Enderby type, indirect discrimination is found where two groups of employees doing work of equal value receive different pay and there is a sufficiently substantial disparity in the gender break-down of the two groups Mr Cavanagh referred to indirect discrimination of the Enderby type as 'tainting by numbers'. (at para 16)
- 6.11 In **The Audit Commission v Haq** UKEAT/0123/10 (18 March 2011, unreported), Underhill P confirmed Enderby-type discrimination allows discrimination to be inferred even in circumstances where no 'provision, criterion or practice' having a discriminatory impact as between men and women can be identified.
- 6.12 **Enderby** type in direct discrimination arises where nature and extent of the disparity is such as to justify the inference that it must nevertheless be the result of past discrimination (direct or indirect).
- 6.13 In **McNeil v Commissioners for HM Revenue & Customs** [2018] IRLR 398, Simler J, president of the EAT, referred to the Supreme Court decisions in **Essop v Home Office (UK Border Agency)**; **Naeem v Secretary of State for Justice** [2017] UKSC 27, [2017] IRLR 558 (see L [312.01]) as having established, for the purposes of unlawful indirect discrimination under s 19 of the Equality Act 2010, that it is irrelevant if the reason why the 'provision, criterion or practice' puts the disadvantaged group to disadvantage is not related to the protected characteristic in question. To the extent that the line of authority based on **Armstrong v**

**Newcastle upon Tyne NHS Hospital Trust** [2006] IRLR 124, CA, has been understood as holding that it is open to a respondent to rebut a finding made of particular disadvantage by showing that the underlying reason for the particular disadvantage was not itself related to the protected characteristic in issue, it is inconsistent with the ratio of **Essop/Naeem** and can no longer be regarded as good law. It follows a respondent may not be able to rebut a finding of particular disadvantage for s 69 purposes by showing that the underlying reason for the disadvantage was not itself related to the protected characteristic (i.e. sex) in issue. However, we do not need to consider this in detail as no argument before us turns on it.

- 6.14 The test for objective justification found in s 69 of the EqA 2010 requires an employer to show that the factor on which he relies is 'a proportionate means of achieving a legitimate aim'.
- 6.15 Proportionality involves a balancing of competing exercise between the business needs and the discriminatory effect which the factor occasions
- 6.16 After **Bilka-Kaufhaus GmbH v Weber von Hartz**: C-170/84, [1986] IRLR 317, ECJ it is established that for the purposes of Community law, the employer seeking to advance objective justification must show that the variation is both 'appropriate' and 'necessary'. 'The justification given must be based on a legitimate objective. The means chosen to achieve that objective must be appropriate and necessary for that purpose.' (**Cadman v Health and Safety Executive** C-17/05, [2008] IRLR 965, ECJ at para 33.) A test of proportionality must be met, in the sense that the grounds put forward by the employer to explain the inequality must correspond to a real need of the undertaking, be appropriate to achieving the objectives pursued and necessary to that end. In the words of Lord Nicholls in **Barry v Midland Bank** [1999] IRLR 581, 587:

**In other words, the ground relied upon as justification must be of sufficient importance for a national court to regard this as overriding the disparate impact of the difference in treatment, either in whole or in part. The more serious the disparate impact on women, or men as the case may be, the more cogent must be the objective justification. There seems to be no particular criteria to which the national court should have regard when assessing the weight of the justification relied upon.**

- 6.17 A post-hoc rationalisation of measures taken can be the basis of a defence under s 69 of the EqA 2010. It is enough if, at the time of the hearing, objective justification can be shown to exist.

## **Conclusions**

- 7.1 It is necessary to consider how the claimant puts this case.

- 7.2 It is first necessary to establish that the claimant's work is equal to that of a comparator. The two comparators relied on are comparator A and comparator B. Comparator B was the claimant's predecessor. Comparator A is another individual who at the material time was performing the same role as the comparator. Like work is admitted. The claimant has not sought to argue that all the administrators with an ADCO grade also perform like work. However, nor has he sought to limit his analysis of the available evidence to the two named comparators. The reality is that both the claimant and the respondent have, implicitly, assumed that all the ADCO administrators are comparable and are relevant for the purposes of statistical analysis. If we were not to take that broader view, we would look narrowly at the two comparators named and consider the question of taint of discrimination in relation to them. This would prevent any wider statistical analysis which may lead to the type of inference envisaged by **Enderby** and related cases.
- 7.3 Given that equal work is established by reference to the comparators, as they undertook like work, section 66 Equality Act 2010 operates to imply an equality clause. It is the claimant's case that the term relating to pay in his contract is less favourable than the term relating to pay in each of his comparators' contracts. The claimant is entitled to the benefit of that equality clause unless the respondent can establish a defence. Section 69 provides that the sex equality clause which modifies the terms of the claimant's contract has no effect in relation to the difference between the claimant's terms and the comparator's terms, if the employer shows that the difference is because of a material factor. However, this is subject to exceptions. First, the material factor must not involve treating the claimant less favourably than the respondent treats the comparator. Second, if the claimant can show, as a result of the factor, that the claimant and persons of the same sex doing work equal to the claimant are put at a particular disadvantage when compared to persons of the opposite sex, it is necessary for the respondent to demonstrate that the factor is a proportionate means of achieving a legitimate aim. The first exception is generally understood as a taint of direct discrimination. The second exception is generally understood to be the taint of indirect discrimination. However, the exact language of indirect discrimination, as it appears in section 19 is not transferred into section 69. The concept of indirect discrimination has to be considered having regard to case law as it is developed in equal pay claims. It is not necessary to establish a provision criterion of practice<sup>3</sup>, albeit identifying a relevant PCP may be one way of seeking to show the taint of discrimination.
- 7.4 The claimant has not sought to argue in this case that there is the taint of direct discrimination. His argument centred around indirect discrimination. In relation to indirect discrimination, the claimant cites and relies on four PCPs. However, it is not strictly necessary in equal pay claims to establish any PCP. It is well recognised that cases such as **Enderby** make it plain that where there is relevant statistical evidence which could

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<sup>3</sup> We will refer to this as a PCP for brevity.

lead to an inference of past indirect or direct discrimination, that may be enough to call on the respondent to justify the factor relied on. It follows the claimant can rely on statistical evidence, even if he cannot make out potential indirect discrimination as a result of the PCP's asserted.

- 7.5 We should note that the claimant's second set of written submissions appears to indicate that the respondent should not be entitled to rely upon the statistical evidence of the ADCO administrators generally. If we were to accede to that request, the claimant's potential for alleging the taint of discrimination would be materially reduced. It would also be entirely inconsistent with the way in which both parties advanced their respective cases.
- 7.6 It follows that when considering the material factor defence, it is necessary to establish what is said to be the material factor. However, there is a stage before this which in most cases is obvious, but sometimes must be made explicit. It must be established what is the difference which falls to be explained by the material factor. In this case the contractual term in question is the claimant's pay, as compared to each comparator's pay. It is his case that his pay should be the same as the comparators' pay. It is the difference in that pay which must be explained by the material factor.
- 7.7 It is, therefore, necessary to identify what is the factor relied on. In this case, the factor is not a single factor; it is the operation of a number of factors which, ultimately, determine the rate of pay of the claimant and his comparators. The material factors relied on are particularly set out in the respondent's further and better particulars, as ordered by the tribunal on day one. Those further and better particulars are largely concerned with the detail of the claimant's argument, and the detail of the influences on the pay of the claimant and pay of the comparators. It is necessary to extract from those particulars the principal factors relied on. We identified them as follows:
- 7.7.1 factor 1: point of entry on the pay scale when becoming an administrator;
  - 7.7.2 factor 2: length of service; and
  - 7.7.3 factor 3: the influence of performance-related pay.
- 7.8 It is the respondent's case that these factors are genuine and material and it is the application of them which fully explains the differential in pay. The reality is that the claimant does not challenge the respondent's basic position. He does not assert that the factors do not exist. He does not assert that they are not genuine. He does not assert that they are not material, albeit it is his case that the length of service and the operation of performance related pay do nothing, or virtually nothing, to narrow any gap in pay caused by the point of entry. It is the point of entry that is the most important factor.



- 7.9 It is the claimant's case that there is the taint of discrimination. In order to make that good, he first relies on four PCPs as follows:<sup>4</sup>
- 7.9.1 applying a policy where internal transferees from operational roles into administration roles were awarded a salary that was up to 80% of the salary maximum for the grade;
  - 7.9.2 protecting the salaries of employees that were medically redeployed into operational administration for a period of between 3 and 9 years;
  - 7.9.3 placing external recruits into operational administration at the bottom of the ADCO pay scale; and
  - 7.9.4 applying a performance-related pay system which did not allow for incremental progression through the scale over a period of time, thus preserving the difference between external recruits and internal transferees.
- 7.10 In addition, the claimant has sought to argue, particularly in his first submissions, that there is statistical evidence from which discrimination could be inferred which either supports, or is additional, to the PCPs identified.
- 7.11 Finally, it is the respondent's case, to the extent the PCPs are made out, and more generally in support of the alleged material factor, or that the underlying policies, which led to the pay differential, are each objectively justified as being a proportionate means of achieving a legitimate aim.
- 7.12 It is necessary for us to consider each of these elements in turn.
- 7.13 We should first consider each of the factors relied on.
- 7.14 We first factor relied on is the point of entry on pay scale. It is clear that there is a pay scale which is applied to all. It is possible for an individual to progress through a pay scale. However, the main way in which progression occurs is through performance-related pay. As we have noted in our finding of fact, equalisation through performance-related pay would take in the region of 80 years. It follows that if one individual starts at the bottom of the pay scale, and another starts near the top, that difference is likely to be perpetuated.
- 7.15 Whilst the principal matter relied on is the start point, it should be noted the start point is determined by other policies. These include pay protection in relation to those who transfer from internal operational posts. These subdivide into three groups: those who voluntarily transfer, who may have up to 80% of their salary protected; those who transferred as a result of displacement (e.g., redundancy), who may have 100% of their salary safeguarded, up to the maximum the grade and subject to additional payments of up to 9 years; and those who transfer by reason of disability who have similar protection to those who are displaced.

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<sup>4</sup> We have not adopted his exact wording, but instead, for clarity, we have recorded the way in which each has been advanced before us.

- 7.16 What is clear, is that the starting point is a very significant factor in explaining pay differential. It should be noted that many equal pay cases involve a consideration of the effect of a policy whereby a person progresses through a pay scale over a number of years as a result of length of service. The respondent policy is the antithesis. Mere length of service does not lead to any upward progression through the pay scale.
- 7.17 The second factor relied on is length of service. This is far less important. However, length of service has two main effects. Firstly, indirectly, as a result of PRP, an individual may progress partly through the pay scale. Second, there will be greater opportunities for discretionary pay awards, albeit the effect is indirect, as length of service merely facilitates the possibility of other factors having an effect those factors could be occasional awards which are neither PRP related nor cost of living increases, or the individual may have greater opportunity to acquire work at a higher level which may lead to protected pay on transfer, but length of service has no direct effect. There is no direct relationship between length of service and pay. It is possible for an individual to start at the lower end of the pay grade, receive no performance-related pay, and to stay, effectively, at the bottom of the grade.
- 7.18 The third factor is the influence of performance-related pay. As noted, performance-related pay can lead to an individual progressing through the pay scale, albeit the effect is small, and it takes a number of years. Over a period of 25 years, the effect of performance-related pay, if awarded every year, would be to move an individual approximately 1/4 of the way up the scale. Albeit, the effect may be limited because the cost of living increments have historically been greater than the performance-related pay increases.
- 7.19 There can be no doubt that each factor relied on is genuine and material. As noted, the existence and application of each is not in dispute.
- 7.20 It is necessary to consider whether those factors identified explain the difference between the claimant's pay and the comparator's pay. The causal link must be established. If the causal link is not established, whilst the factors relied on may be genuine, they would not explain the difference in pay. It is therefore necessary to look at the detail. Put another way, we must ask whether the material factors identified explain the claimant's current salary. We must ask whether the material factors identified explain the comparators' salaries.

#### The claimant's salary

- 7.21 The claimant entered the pay scale at the bottom. Since then, he has had one performance-related increase. In one year, he received marginally more than the cost of living increase. He has received no discretionary increases, for example as a result of any temporary promotions. He did not enter as an internal transferee, and so never had a higher salary that

could be preserved. He did not transfer, as a result of displacement, with a higher salary. He did not transfer, as result of disability, with a higher salary that could be protected. As the claimant observes, the operation of performance-related pay is marginal and its effect is slow. It follows that he has stayed near the bottom of the grade and his pay has gradually increased almost entirely in accordance with the cost of living raises. His salary position is fully explained having regard to the factors identified.

Comparator A's position

- 7.22 We have received clear evidence demonstrating comparator A's pay over the period of employment. Whilst we accept that the position is not absolutely complete for both comparator A and comparator B, we do not consider there to be any material deficiencies in the evidence.
- 7.23 Comparator A has a longer period of employment. She started work on 20 May 1996. As she was operational, her initial salary was £19,613. In 1999, she gained a promotion and began work as a station assistant multifunctional. There appears to be a correspondingly large increase in her salary to £24,698. The additional responsibilities as an operational member of staff, together with the shift work, explain the increase. By October 1999, her rate of pay was £24,940. She then became ill and was unable to carry out her normal role. She was placed in the redeployment pool. This means that the policy which would allow protection of her salary applied. She looked for and secured alternative work in administration. She transferred from an operational to an administrative role. She had protection of earnings for a full 5-year period which reflected her service at the time and was in line with normal policy. The records show that her salary in 2001 was £26,976. When she transferred on or around 24 July 2001 there was a deduction in her actual salary of £2,616, so that her salary was reduced to the top of the relevant administration band applicable at the time, which was £24,360. (The band itself at that time was from £16,780-£24,360). The balance of her salary could be paid as a lump sum and that was protected for 5 years. However, she went in at the top of the band. It appears that she then remained at the top of the band. There was a restructuring in 2010/2011 and she transferred to the revenue department. As she was a displaced employee she was entitled to maintain her salary. In 2010 she was earning a salary of £34,047. In 2012 she was diagnosed with a medical condition, and she was allowed to work at home for 2 days but her salary remained at £37,250. In January 2018, her salary remained at £42,614. Her salary is at that level because she worked in an operational capacity, and when she transferred, she was entitled to seek protection of her salary. That protection was granted in accordance with the policy at the time. In fact, she took a pay cut, albeit that the balance was protected for 5 years. Since then she has remained at the top of the pay grade. Her salary is fully explained by the factors relied on, which are both genuine and material. The most important factor in comparator A's case was the position in which she entered the grade. She entered at the top of the grade because she had secured a salary, in an operational capacity, at a

level above that of the applicable maximum in the administration grade. She therefore benefited from the available salary protection.

Comparator B's position

- 7.24 Comparator B was employed by the respondent on 14 April 1998. She was also, originally, employed in an operational capacity, as a station assistant. Her initial salary was £15,788, on successful completion of training. On promotion to senior support administrator in 1999, her salary went up to £16,904. It follows that she entered grade ADCO towards the bottom of the applicable band at the time (£15,364 – £22,304).
- 7.25 In May 2000, comparator B successfully applied for a senior personal assistant role with another group company, Infraco BCV limited. Her salary on 12 June 2000 was £17,428 (the ADCO scale was £16,135 – £23,423). In May 2002, comparator B undertook a development secondment to IBCV Learning Development. She worked as a support manager, on the salary of £21,837. The secondment was to a role in a higher grade, band F. Comparator B received a higher duty allowance, albeit it was not consolidated into a salary.
- 7.26 The position is less clear then between 2002 and 2008.
- 7.27 The best evidence we have demonstrates that from 30 November 2003 – 26 August 2006 the claimant was a GSM assistant with a starting salary £24,567 (the ADCO range at that time was 18,053 – £26,209). It appears this was the largest increase as against the ADCO scale. From 27 August 2006 – 30 September 2006, she was in performance management support. Her salary remained at £27,629 as against an ADCO range of £20,151 – £29,225. From 18 March 2007 to 17 February 2008 she was in revenue support. Her salary was increased to £29,038 from 1 April 2007 (the ADCO range was £21,179 – £30,747).
- 7.28 It is possible to compare the position, therefore, in 2003 to 2006 to the later position in 2018. At a salary of £24,567 in a band range of 18,053 – £26,209 this represents approximately 94% of the total available band. The band range was £8,156 and her position in the band was £6514 – approximately 80%.
- 7.29 By 2018, comparator B had a salary of £40,776 within a band range of £29,156-£42,614. The band range was £13,098. Her absolute percentage was around 95%. She was at £10,560 above the minimum band, putting her at 80% of the band. Put another way, the percentage difference did not change materially from the salary obtained 2003/2006 until 2018. It follows that it was securing the salary in the GSM assistant role which moved her to the upper end of the band and thereafter on various transfers, that pay was preserved. We have little detail about that increase, but on the balance of probability it was related to the new position; thereafter, it was the operation of the protection of salary on internal transfers that explains the difference.

- 7.30 From 2003, when comparator B received the GSM salary increase, except for 2011, comparator B received the negotiated pay award. In 2011 she received 1% less than the negotiated award.
- 7.31 It follows that her salary is explained by the factors which have been identified. Those factors are both material and genuine.
- 7.32 It follows that the respondent has established that, as compared to comparators, that there is a material factor defence. That defence must succeed if it is not tainted by discrimination.
- 7.33 There is no argument that there is direct discrimination.
- 7.34 It is therefore necessary to consider what can be termed, generally, indirect discrimination. It is to that we now turn.

The alleged taint of discrimination

- 7.35 Before considering the operation of the various PCPs, it is necessary to stand back and to take an overview.
- 7.36 It is clear that the pay achievable in an operational capacity exceeds the pay, even at the top end of the scale, for the administrative roles within the ADCO band.
- 7.37 The statistics demonstrate, unsurprisingly, that the ADCO roles are disproportionately occupied by women. The operational roles are disproportionately occupied by men. Moreover, of the direct entrants into administration, the majority are women. The position is slightly more complicated when it comes to transfers from operational roles to administrative roles, and we will come to all the relevant statistics.
- 7.38 We must bear in mind that this is a case of like work where it is alleged that men are disadvantaged.
- 7.39 It is clear that it would be possible for a person in administration to identify a comparator in an operational capacity. There has been no attempt to do so in this case. Moreover, such a case is unlikely to be one of like work. Almost inevitably, it would have to be an equal value claim. And there may well be factors, such as shift work, and extra responsibility, which would militate against a finding of equal value. It is important that we bear in mind that this is not an equal value claim. Even if it were, it may be difficult for a man undertaking administration to bring the case, as if there is disadvantage, the majority affected appear to be women. It follows that a possible assertion that there is some discrimination arising in relation to the pay of operational workers, predominantly men, as opposed to administration workers, predominantly women, based on an equal value claim, and based on an **Enderby** type discrimination, does not arise in this

case. Part of the claimant's complaint is that individuals come in at a higher level from the operational grades. He clearly believes this leads to unfairness. But we cannot expand the enquiry in this case, which concerns like work within the administrator's grade, to a more general consideration of whether the differential between operational salaries and administration salaries demonstrate discrimination, which itself would need justification. Put simply, the respondent is not required, in this case, to justify the difference between the salaries for those who work in an operational role, and the salaries of those who work in administration.

7.40 It is with that in mind that we consider the PCPs. As regards any discriminatory effect of the PCPs, the evidence we have received is limited. The reality is that the claimant relies, to the extent he relies on anything, on the statistical evidence. He does not seek to demonstrate a direct causal link between any specific PCP and any specific disadvantage. We must remind ourselves that we must first consider if there is an adverse effect on men; does it appear men are put at a particular disadvantage. There must be some basis to establish that the PCP causes disadvantage to men. If we cannot establish that, then the question is whether the statistics demonstrate some form of disparity from which historical direct or indirect discrimination can be inferred, such as to require a justification of the policy from the respondent.

7.41 With those points in mind we turn to the PCPs. First, we consider whether there is any direct causal argument established.

*PCP 1: applying a policy where internal transferees from operational roles into administration roles were awarded a salary that was up to 80% of the salary maximum for the grade.*

7.42 It is clear that there was a policy which provided for limited protection for internal transferees. The possibility of internal transfer is equally open to both men and women who work in an operational capacity. Taking advantage of that policy was not in any sense dependent on being a man or a woman and so there is no direct argument that men are put at any form of disadvantage. It may be more women or more men choose to take advantage, but it is clearly a choice and one where there is no disadvantage based on sex.

*PCP 2: protecting the salaries of employees that were medically redeployed into operational administration for a period of between 3 and 9 years.*

7.43 There is no suggestion at all that the protection offered on medical transfer provided any disadvantage to men. The protection was open equally to both men and women.

*PCP 3: placing external recruits into operational administration at the bottom of the ADCO pay scale.*

7.44 This PCP is only partly made out. It is accepted that, in general, the respondent would seek to obtain the best commercial deal available. This will depend on the number of recruits, starting salary of those recruits, and the difficulty of filling the roles. There may be occasions, in order to secure a particular individual's appointment, it would be necessary to negotiate. Indeed, the claimant sought to negotiate, but was unsuccessful. The claimant can point to no evidence to establish how this caused disadvantage to men when compared to women.

*PCP 4: applying a performance-related pay system which did not allow for incremental progression through the scale over a period of time, thus preserving the difference between external recruits and internal transferees.*

7.45 The performance-related pay system applied equally to both men and women. As we have noted, performance-related pay did not allow for significant progression through the scale, even over an extended period. However, there is no basis for saying that the comparators chosen materially benefited from the scheme as compared to the claimant. On the face of it, performance-related pay was equally open to both men and women and depended on performance and not on sex. To the extent that it affected salary, and it is the claimant's case that the effect was marginal, the effect as between men and women would be no different. It may be possible to argue that women would be more likely to take breaks, as a result of childbirth or childcare. Therefore, if there were a difference it is more likely that it would be women who would suffer any disadvantage, and not men.

7.46 It follows that if there is to be any discrimination inferred at all, it is necessary to look at the relevant statistics and to consider whether the statistics could lead to an inference of discrimination which would call for justification. It is to those available statistics that we now turn.

### Statistics

7.47 We have evidence of internal transfers into the ADCO grade from 2012 - 2018, a 6-year period. There are only 22 transfers during that time there being 12 females and 10 males. This needs to be put in the context of the total number employed. As at 31 March 2016, there were 27,687 people in permanent or fixed term contract roles. The overall gender split was 77% men and 23% women.

7.48 However, it is clear that in ADCO roles, the majority of employees were women we have data from 7 December 2017, when the total number of women was 276 as against 102 men. At the same time, in the key operational roles there were 2034 women as against 7245 men. The greatest difference related to train operators, where there were 479 women and 2882 men.

7.49 For ease of calculation, we can assume that the approximate operational role split 75/25 men to women; it can be seen that more women have

taken advantage of internal transfers and therefore have benefited from salary protection of up to 80%. However, in any one year, it appears that approximately 4 people are transferring as against a total operational population of over 9,000. That is around 0.04% of the total operatives. The numbers are so low that it is clear we must be very cautious about drawing any specific inferences based on any apparent trends. It may be possible to argue that marginally more women take advantage.

- 7.50 It is possible that women are more prepared to accept the cut in salary because they may prefer a work life balance facilitated by set hours. It may be that men transfer, but do so within the operational grades, and not as frequently to administration. We do not have strong evidence.
- 7.51 It is possible to look at the statistics slightly differently. It is clear that more women, overall, work in administration. Of the total population of 102 males (assuming a constant number from 2016), 10 of them came by transfer, approximately 10% of men have benefited. On the other hand, if 12 women came into a total population of 276, only 4% of them have benefited. Put that way, men cannot be seen to be disadvantaged. As a proportion of the total population of ADCO staff, they gain a small advantage. As a proportion of the operational staff the numbers are too low to have any statistical reliability.
- 7.52 The statistics do not, in our view, suggest any form of direct or indirect discrimination. The reality is that there is a choice and some individuals take advantage.
- 7.53 The second argument revolves around protecting salaries of those who are medically redeployed. This is provided for in policy 6.4.1. We have statistics for a 6-year period from 2002 to 2012; 15 women transferred into administration and 12 men. It appears that each took advantage of the full one hundred percent protection. Over that 6-year period that represents around 5% of the total females in ADCO as compared to nearly 12% of men. As a percentage of the population of ADCO, it is the men who have benefited marginally.
- 7.54 It would of course follow that a smaller percentage of men who were operatives transfer into the ADCO grade than women. The reasons for that are unclear. Perhaps most importantly the statistical example is tiny. This is 27 people out of an operational population of over 9,000 (approximately 0.3%). The sample is too small to be statistically significant. Moreover, of those individuals who transfer because of disability, they may also transfer within the operational grades.
- 7.55 There is no basis for inferring any form of discrimination.
- 7.56 The third matter relied on is the starting position. Again, we have firm statistics for the period from 2012 the 2018.



- 7.57 The salary handbook at paragraph 5.2.1 provides a starting salary must be determined by reference to a number of points, as we have set out above. We are concerned with the external recruits. Over that period there were 78 female recruits against 29 male recruits, a total of 107 which, as a snapshot, is approximately one third of the total number employed in 2016. The average starting salary for men was in fact slightly greater at £29,823 as compared to women at £29,277. This is indicative, as it assumes an even spread of appointments over the various relevant pay bands. It is clear that some individuals exceeded the guidelines of 90%. The highest was 96.74%, in that case a woman. Of those who exceed the 80% scale, 4 were men and 8 were women, a total of 12, with a 1/3 to 2/3 split. Approximately three quarters of all employees recruited were and a quarter were men. Therefore, it appears that proportionally, there was no significant difference between the women who were appointed on the highest salaries as against the men. If anything, the men did slightly better. The statistics demonstrate that there was a range of starting salaries. It demonstrates that a number of women were able to secure starting salaries at the highest levels in excess of 80%, of those above 90% two were men and two women, a slight advantage to men, albeit this sample is too small to be statistically significant.
- 7.58 As regards the overall starting salary, it appears men did slightly better. There is nothing in the statistics which would indicate that women had any advantage over men, or that men were disadvantaged as against women starters.
- 7.59 The fourth point relied on is performance-related pay. We have no statistics on how many men achieved performance-related pay compared to how many women. The only statistical evidence we have can be gleaned from the positions of the claimant, and comparators A, B, and C (as advanced by the respondent).
- 7.60 The claimant received 1 performance-related pay increase on 7 July 2008. He exceeded the cost of living award in 2011. This was over a 10-year period leading up to his claim.
- 7.61 Leading up to his claim, comparator A had been employed for 21 years; as she achieved the top end of the scale on transfer from operations, it appears that performance-related pay was of no relevance.
- 7.62 The claimant's predecessor, comparator B, was employed for 19 years at the time the claimant presented his claim. For the reasons we have already given, it is clear that performance-related pay had little or no effect after 2003. It appears that she received performance-related pay in 2003, 2004, and 2009. It appears that she received performance-related pay on more occasions of the claimant.
- 7.63 Comparator C had the longest service; he began work in 1988 and had 29 years of service when the claimant commenced his claim. In 2003, he began work as a revenue control manager's assistant earning £23,146

against an ADCO range of £18,053 – £26,209 at the time the claimant brought his claim he had a salary of £40,323. It is clear that comparator C received multiple performance awards including 2004, 2005, 2006, 2007, 2008, 2009, 2013, 2014, and 2015.

- 7.64 There is nothing to suggest that the treatment of performance-related pay in any sense favoured women. First, as to the overall effect on salary, the position is marginal. Second, there is no evidence that women are more likely to receive performance-related pay than men.
- 7.65 As there is no apparent direct discrimination or a taint of what can be termed, generally, indirect discrimination, justification is not called for. Lest we be wrong, we will examine the justification arguments. Has the respondent justified the various factors it relies on? When considering this, we note that it is for the tribunal to understand the needs of the business. We must identify the aim. Thereafter, we need to consider, having regard whether the means adopted first achieve the aims and second are proportionate. In considering proportionality, it is necessary to balance any discriminatory effect against the reasonable needs of the business. That assessment is for the tribunal.
- 7.66 By far the most important factor relied on is the point of entry for external recruits. The respondent's aim is to ensure that it recruits individuals to match the relevant skills, knowledge, experience, and behavioural profile required to perform the role. It pays a rate that is affordable and sustainable by providing a salary and benefits package which can secure the relevant calibre of individual. There is flexibility and normally that flexibility will not exceed 90% of the maximum. There is no specific challenge to this rationale by the claimant. The aim of ensuring appropriately qualified staff are obtained and retained is clearly legitimate. The means employed is to offer a salary which is sufficiently attractive, but which keeps down costs for the respondent. In addition, flexibility is provided for. It is clear that the means is a way of achieving the aim, in that individuals are appointed and retained. There is no clear discriminatory effect. The statistical evidence suggests that men and women are treated remarkably similarly. The claimant's argument that others who come into the administration role from elsewhere are paid more, does not lead to a finding that the way in which external recruits are secured is not proportionate. The policy is clearly justified.
- 7.67 The second factor relied on is length of service. As noted, length of service does not in itself affect salary. This is not a case where salary increases as a result of length of service. In those cases, it is frequently argued that women are disadvantaged as they will tend to take career breaks more often than men and so take longer to reach the top of the scale. In this case, effectively, it does not matter. The only way in which length of service can affect an individual is by allowing greater time for the other factors to take effect, such as PRP, or securing other higher paying roles. It follows there is no specific aim to consider. Length of service is

not relied on a means of achieving an aim. There is nothing that requires justification.

- 7.68 The third factor relied on by the respondent, is the influence of performance-related pay. To the extent there is an aim, it is to encourage and reward exceptional performance. Although the rewards are small, it is nevertheless a means of rewarding performance. It does lead to a marginal increase in salary, and ultimately that increase is subject to further increases for cost of living. There is no evidence which suggests that it has a discriminatory effect. It follows that there is no basis on which we could find that it was not proportionate, as there is no discriminatory effect that is to be balanced against the business need. It applies equally to men and women. Any discriminatory effect is so negligible that it is clearly proportionate.
- 7.69 The other matters relied on by the claimant revolve around pay protection. This subdivides into those who transfer voluntarily, who may have up to 80% of their salary protected, and those who are displaced either by reason of disability or redundancy. They may have one hundred percent of their salary protected. We do not consider it necessary for the respondent to justify these policies. They are not on the face of it tainted by any form of discrimination. There is no evidence of direct or indirect discrimination whether as an operation of Enderby principles or otherwise.
- 7.70 If there were a need for justification, the position is in our view clear.
- 7.71 As regards those transferring in, the aim is to allow individuals who are in operational roles a different career path, and to make it attractive. This would retain expertise within the business and provide an opportunity to employees. The means adopted is to protect a proportion of an individual's salary. It is clear that that encourages a number of people to transfer, albeit the numbers are very small. There is no clear discriminatory effect and as such, there is no basis for arguing that it is not a proportionate means of achieving the aim. Any difference in take up is likely to be a genuine choice. More women may prefer the pay cut in return for a different work life balance, but there is no disadvantage to men, as they can equally make the same choice.
- 7.72 As regards those who transfer, either by reason of displacement through redundancy or disability, the aim is clearly one of retention. In the case of disability, the policy could be part of the reasonable adjustments employed for disabled people (even if it may be more generous than required). It will help fulfil any obligation to provide reasonable adjustments. It softens the financial blow for individuals used to a particular salary. We have no doubt that the means employed, namely salary protection, facilitates the aim of retention. There is no specific evidence of any discriminatory effect. It is therefore difficult to undertake a balancing exercise, as there is no identifiable discrimination. There is no basis for us to find it is not proportionate.

- 7.73 We should summarise position. It is agreed the comparators undertook like work. The claimant has shown a difference in salary between himself and his comparators. As regards his comparators, the respondent has demonstrated factors explaining difference in pay. Those factors are material. We have found that they are genuine and that they truly show the reason for the difference. We have considered whether there is a taint of discrimination. Direct discrimination is not alleged. We have considered whether discrimination can be established using PCPs, and we found it cannot. We also considered whether we should infer some form of discrimination, either direct or indirect, by applying the statistical evidence. This is commonly known as an Enderby approach. We have considered the statistics carefully, and we can find no basis for inferring discrimination. It follows that the respondent is not called upon to justify the material factors relied on. In any event, we have considered those material factors and for the reasons we have given we have found that the respondent has justified the various material factors relied on.
- 7.74 It follows that the equal pay claim must fail.

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Employment Judge Hodgson

Dated:. 20 December 2019

Sent to the parties on:

20 December 2019

For the Tribunal Office