

Neutral Citation Number: [2025] EAT 170

Case No: EA-2024-000342-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 November 2025

Before:

ANDREW BURNS KC
DEPUTY JUDGE OF THE HIGH COURT

Between :

MRS A PERKINS

Appellant

- and -

MARSTON (HOLDINGS) LIMITED

Respondent

Emma Darlow Stearn (Free Representation Unit) for the Appellant
Lydia Seymour and Elizabeth Grace (instructed by Napthens LLP) for the Respondent

Hearing date: 4 & 5 November 2025

JUDGMENT

SUMMARY

EQUAL PAY

The Claimant claims that the Respondent breached the equality clause in her contract as she was paid less than three male comparators who did work of equal value. This appeal concerns the correct approach to the material factor defence in s.69 of the Equality Act 2010. The Claimant challenged the ET's factual findings that there were three material factors which accounted for the pay difference between her and her comparators. The EAT held that there was no higher threshold of cogency or particularisation required to prove a material factor and the ET's findings were not perverse.

The Claimant argued that two of the material factors were tainted by sex and required to be justified as a proportionate means of achieving a legitimate aim. She challenged the ET's conclusion that the Respondent did not need to justify those material factors because she did not share the particular disadvantage that applied to other women. The EAT found that the ET had erred in its approach to particular disadvantage by impermissibly enquiring into the reason why there was a particular disadvantage. The EAT held that there was no need for the Claimant to prove the reason why a material factor works to the disadvantage of women or to her as it is enough that it does work to their disadvantage. The matter was remitted to the ET.

The Respondent's cross appeal challenged the findings (in the alternative) that the material factors were not a proportionate means of achieving the legitimate aims of the Respondent because there were less discriminatory ways of achieving those aims. The EAT allowed the cross appeal as a critical and thorough evaluation is required and yet the ET did not analyse what part of the pay gap was proportionate, did not take account of the impact on staff retention and the loss of certification and did not assess proportionate or disproportionate impact using the pool of employees to whom the material factors applied.

ANDREW BURNS KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. Mrs Perkins, the Claimant, claims that Marston Holdings, the Respondent, breached the equality clause in her contract as she was paid less than three male comparators who did work of equal value. This appeal concerns the correct approach to the material factor defence in section 69 of the Equality Act 2010.

2. In her appeal the Claimant challenges the Employment Tribunal’s (“ET”) factual findings that there were three material factors which accounted for the pay difference between her and her comparators. She says that two of the material factors were tainted by sex and required to be justified as a proportionate means of achieving a legitimate aim. She challenges the ET’s conclusion that the Respondent did not need to justify those material factors because she did not share the particular disadvantage that applied to other women.

3. The ET found in the alternative that the material factors were to achieve a legitimate aim but that (if it had decided that there was potential indirect discrimination) they were not a proportionate means of achieving those aims. The Respondent cross-appeals the ET’s conclusion that there were less discriminatory ways of achieving those aims.

Factual Background

4. The ET found that the Claimant was employed by the Respondent (or its predecessor) from 2005. The Respondent is a market leading enforcement business with contracts for the enforcement of debts, judgments, tax liabilities, penalties and eviction orders. The Respondent’s national clients included HMCTS, HMRC and Highways England. The Claimant’s three male comparators were Divisional Enforcement Directors within that part of the Respondent’s business. They managed enforcement agents collecting debts for these national clients. These roles had previously been called Regional Enforcement Managers and were referred to as DEDs or REMs.

5. From 2013 the Respondent also moved into enforcement for local authorities collecting unpaid council tax, business rates, child maintenance and motoring penalties. That was the part of the business in which the Claimant was employed. By 2016 she was an Operations Performance and Analytical Manager responsible for managing some of the Respondent's enforcement agents who collected debts for local authorities. By the time of her redundancy in May 2022 her role was called Head of Enforcement – Local Taxation (“HoELT”). She claimed her roles were of equal value to the DEDs/REMs.

6. Most local authority debts were collected by enforcement agents through payment plans whereas the national clients' debts were collected by enforcement agents going to each debtor's property and collecting lump sums, part payments or by seizing goods from their premises.

7. REMs/DEDs were responsible for regional teams each of about 100 self-employed enforcement agents (referred to as “EAs”). The REMs/DEDs were responsible for delivering national contracts in accordance with challenging Key Performance Indicators (“KPIs”) agreed with each national client. Enforcement agents would visit debtors' homes and persuade them to discharge their debts and would occasionally execute eviction warrants with the aid of a locksmith. EAs were paid on commission when a debtor had paid either in part or in full. Most of them earned between £35,000 and £75,000 but a handful of the best could earn six figure sums. About 90% of EAs were men, but some of the most effective were women. There was a high turnover of EAs as they could swap to work for a rival enforcement business so one of the key roles of REMs/DEDs was to encourage retention of high-performing agents. By 2021 the DEDs were paid £91,800 and were Grade 3 in the Respondent's loose grading structure.

8. The Respondent recruited its REMs/DEDs from their successful EAs and they all retained certification as EAs as they occasionally had to work in the field. The REMs/DEDs reported to Mr Burton, the National Enforcement Director as did the Claimant from June 2021. Before that she had reported to Mrs Alessi the National Enforcement Director for the local authority part of the business.

9. From 2021 the Claimant managed the Respondent's Enforcement Services Team who entered into payment plans and monitored compliance with local authority debtors and referred cases to about 120 self-employed enforcement agents. They were not paid by commission but through various flat fees. They could seize a debtor's goods after obtaining a magistrates' court liability order which resulted in debtors paying in instalments. These agents were referred to by the ET as "enforcement officers" or "EOs" to differentiate them from the commission-based enforcement agents or EAs on national contracts. The Respondent had to perform to KPIs contained in the local authority contracts, but they were not as demanding as those under the national contracts. Staff retention rates in the Claimant's team were high with a relatively stable workforce.

10. The Claimant had never been an enforcement agent or officer herself. By 2021 she was a Grade 3 role and was paid £51,500 which was comparable to the Respondent's Head of Decision Support, who was a man. She was always office based. The Respondent also employed a Head of Client (Ms Ashworth) and a Head of Data Analytics. The Respondent benchmarked the Claimant's pay against such roles and not against the REMs/DEDs.

11. Mr Burton was responsible for remuneration of the REMs/DEDs. The Respondent's pay-setting rationale was opaque and generally undocumented. Until 2019 the REMs/DEDs' pay varied considerably and was increased on an ad hoc basis. Until her redundancy in 2017 the highest paid REM was a woman based outside of London. However in 2019 Mr Burton increased all their salaries to £90,000 in response to a credible suggestion that competitors were offering better pay for two of REMs/DEDs to move to them. The increase was to dissuade the Respondent's REMs/DEDs from resigning to move to a competitor, return to being an enforcement agent or set up an enforcement business of their own.

The ET Proceedings

12. The ET judgment followed a stage 1 equal value hearing held between 24 and 27 October

2023 before Employment Judge Horne and members. In a claim form lodged on 3 November 2023 the Claimant claimed equal pay from an ‘arrears day’ agreed to be 1 November 2016. The October hearing was listed to consider whether the Respondent had a material factor defence and so for the purposes of the hearing it was assumed that the comparators did equal value work.

13. The Claimant contended before the ET that any of the material factors on which the Respondent relied put the Claimant and other women doing work equal to hers at a particular disadvantage. She said this was obvious from the statistics as the REMs/DEDs were predominantly men and the only HoELT - the Claimant - was a woman. Alternatively, she contended that market forces disadvantaged women. She said as the Respondent recruited REMs/DEDs from a pool of successful EAs that disadvantaged women, because the vast majority of EAs were men. The Respondent contended that, if it was required to justify any material factor, it would contend that the factor was a proportionate means of achieving the aims of:

- (a) business efficiency and
- (b) recruitment and retention of REMs and DEDs.

14. At paragraph 14 of its reasons, the ET set out in its list of issues the alleged material factors and the issues which it had to decide:

“14.1. Was the difference in pay between the claimant and the comparators because of one or more of the following factors?

- (a) Competition and expectation
- (b) Certification requirements
- (c) Experience/management/coaching
- (d) Retention of enforcement agents
- (e) Client relationships
- (f) Market forces – including:
 - (i) The need to avoid losing the comparators to competitors;
 - (ii) The need to incentivise the comparators to become and remain REMs and DEDs
- (g) Travel requirements in the form of frequent short journeys that the comparators made to locations in their region where enforcement agents did their work.

14.2. If so, was that factor material?

14.3. Was the factor excluded from section 69 of EqA on the ground that it was also a factor relating to equal value in relation to factors such as effort, skill and decision-making?

14.4. Did reliance on that material factor involve treating the claimant less favourably than the comparators because of her sex?

14.5. As a result of that material factor were the claimant and other women doing work equal to hers put at a particular disadvantage when compared with men doing work equal to hers, either:

- a. By inference, because of the high proportion of men in the REM/DED role and the fact that the HoELT role was uniquely held by a woman; or
- b. As a result of REMs and DEDs being recruited from a pool of successful EAs?

14.6. If so, was reliance on the material factor a means of achieving the aim of:

- a. Business efficiency and/or
- b. Recruitment and retention of REMs and DEDs?

14.7. Were those aims legitimate?

14.8. Was reliance on the material factor proportionate?"

15. The ET heard evidence from Mr Burton, Mrs Alessi and the Claimant. The Respondent also relied on a witness statement from Mr Avery (a REM/DED) but as he did not give oral evidence the ET said it was unable to place significant weight on his evidence, unless it was supported by other more reliable evidence. The ET recalled the Claimant to give further oral evidence to explain the disadvantage to women that was caused by reliance on factors underpinned by Mr Burton's requirement that DEDs/REMs should be recruited from a pool of successful EAs. It also recalled Mr Burton and Mrs Alessi for the Claimant's clarified case to be put to them.

The ET Judgment

16. The ET found that the Respondent had discharged their burden of proof in relation to three material factors which were not directly discriminatory. At paragraph 138 of its reasons the ET said:

“138. Before determining the remaining issues, it is worth taking stock. The effect of our findings so far is that the difference in pay between the claimant and her comparators was entirely because of the combination of the following factors, none of which were directly discriminatory:

- 138.1. Competition and expectation (a partial factor)
- 138.2. Market forces (the most influential factor)
- 138.3. Recruitment and (to a lesser extent) retention of EAs”

17. In relation to each of those the ET made the following factual findings extracted from its reasons:

“Factor (a) - Competition and expectation

112. We found that the difference between the claimant’s pay and the REMs’/DEDs’ pay was partly because of the commercial pressures that existed under the national contracts.

113. There was a material difference here between the claimant’s circumstances and those of her comparators. In some respects, the commercial environments were the same: the HoELT and REM/DED were all responsible for ensuring delivery against KPIs, which were monitored and performance data shared with competitors, with the potential to affect work allocation. But the KPIs for the REMs/DEDs were more pressing. A target of achieving a defined number of PIFs within 90 days or 12 months is different in nature to a target of maintaining an average payover, with collection periods of up to 3 years being tolerated.

114. This factor was relevant to pay. As Mr Lynch later found in the grievance appeal outcome, the added pressure under the national contracts demanded an increased level of skill, effort and decision-making.

115. Relying on this factor did not involve treating the claimant less favourably than the comparators because she is a woman.

116. Had this been the only factor, the claimant’s case would have succeeded in part, because the difference in pay was not wholly because of this factor.

...

Factor (d) – Retention of EAs

124. We found that the difference in pay was partly because of the ability of an REM and DED to maintain relationships with EAs. Mr Burton believed that this ability was acquired through the REMs/DEDs having themselves gained experience of front-line EA work. By itself, this factor could only explain part of the difference. We have in mind here the greater responsibility of AEMs for maintaining personal contact with the EAs.

125. There was a material difference in circumstances between the claimant and her comparators. The labour market for EAs was more competitive than the labour market for EOs doing local authority work. Turnover was higher amongst EAs. This meant that Mr Burton gave greater recognition to the ability to retain agents than Mrs Alessi did.

126. The difference was relevant to pay. In an environment of high agent turnover, the ability to retain EAs had an obvious economic value.

127. Reliance on experience as an asset in retaining EAs did not involve treating the claimant less favourably than the REMs/DEDs because she is a woman.

...

Factor (f) – Market forces

130. The difference in pay was because of market forces. This was the single most influential factor. It fully explained the difference, to the extent that it was not already explained by the other factors. Mr Burton was genuinely concerned that, if he did not pay his REMs and DEDs highly enough, he might lose them to a competitor. It also weighed on his mind that a DED compared his salary to what he could be earning as an EA.

131. By comparison with Mr Burton, Mrs Alessi was not as concerned that the claimant would leave to work for a competitor. Her main consideration was to “benchmark” the claimant’s salary with the other “Head of...” roles. This made the claimant’s circumstances materially different from those of her comparators.

132. The difference was relevant to pay. Salaries are one of the main levers that an employer can pull in order to retain their staff in a competitive job market.

133. Allowing salaries to be dictated by the market did not, in itself, involve treating the claimant less favourably than the respondent treated the REMs and DEDs because she is a woman.”

18. The ET found that the Claimant had not established that these three material factors were indirectly discriminatory. It first rejected the Claimant’s *Enderby* discrimination claim saying:

“Can discrimination be inferred from statistics?”

135. The difference in terms was therefore because of material factors that were not directly discriminatory. We must now decide whether the respondent is required to justify its reliance on those factors objectively.

136. First, we considered whether there was statistical evidence from which we could infer that the disparate pay arrangements must have resulted from some kind of sex discrimination.

137. The claimant has not, in our view, proved that the disparity by itself supports that inference. This is for three reasons:

137.1. The claimant has not proved how many men and how many women occupied “Head of...” roles at Rossendales, or did work equal to hers. All we know is that there was at least one man (Head of Decision Support) and two women (the claimant and Head of Client) occupying those roles at Rossendales. We cannot find, on the evidence before us, that the sex balance of people was “considerably” different, in the meaning of Seymour-Smith, to that within Mr Burton’s team during the relevant period.

137.2. The sample size is very small, meaning that the numbers are less likely to be statistically significant. Although the DEDs were all men, there were only four of them. There was only one person in the claimant’s role (and we do not know how

many other people did work equal to hers).

137.3. When looking at the sex breakdown amongst the comparator group, it is artificial to concentrate on the DEDs and ignore the earlier REMs. With the exception of Mr Hayes, the change in role title from REM to DED did not have any effect at all on their pay. Once the REMs were included, the men still outnumbered the sole woman, but, significantly, she was the highest-paid of all of all the REMs.”

19. The ET next noted that the Claimant did not suggest that reliance on ‘Competition and expectation’ was indirectly discriminatory (paragraph 139 of its reasons) and said in paragraph 140:

“We therefore need to consider any disadvantage caused by the remaining factors.”

20. The ET dealt with indirect discrimination in relation to the two remaining factors saying:

“141. The two basic market forces are supply and demand. Supply of potential REMs and DEDs was limited because the respondent selected them exclusively from a pool of successful EAs. Demand across the industry for the respondent’s REMs and DEDs was increased, partly because of the perceived potential of people with their experience and contacts to recruit and retain EAs. This made them targets for poaching by competitors.

142. Underlying both these market forces was the fact that REMs and DEDs all had a background of being successful EAs. If the effect of an EA background on the labour market put women (including the claimant) at a disadvantage, the respondent would be required to justify its reliance on that factor.

143. The claimant says that reliance on these market forces put her, and other women doing work equal to hers, at a particular disadvantage. Her argument is based on the demographic of EAs in the industry. EAs are 90% men.

144. We assumed, for the purposes of this argument, that the EA labour market is male-dominated because of a widely-held belief that the work carries the risk of physical confrontation. We also assumed (without making a finding) that this constituted a particular disadvantage to women.

145. In our view, this is not enough to require the respondent to justify its reliance on the factor objectively. This is because the claimant did not share the disadvantage with the group. Whilst the claimant was statistically less likely than a man to have been an EA, she (unlike the disadvantaged group) had not been deterred from being an EA for any reason. If there was a group of female would-be REMs and DEDs who missed out on eligibility because they had been put off being an enforcement agent, the claimant was not one of them. Her route to being a senior operational enforcement manager was not shaped by any real or perceived barrier to working as an EA. Her management career at Rossendales naturally evolved from a deskbased, analytical role.

146. The respondent is not, therefore, required to show that reliance on market forces, or ability to recruit and retain EAs, was a proportionate means of achieving a legitimate aim.

147. This means that the material factor defence succeeds. The equality clause in the

claimant's contract had no effect on the difference between her pay and that of her comparators.

148. The complaint of breach of the equality clause therefore fails.”

21. The ET went on to discuss justification in the alternative and that is subject of the cross appeal. The ET found that in relying on the material factor of market forces to recruit and retain REMs/DEDs and to improve business efficiency was a legitimate aim. It then turned to proportionality and said:

“157. We must therefore decide whether reliance on market forces was proportionate. We must balance the group disadvantage against the respondent's needs and the importance of the aim.

158. On one side of the scales is the group disadvantage caused by reliance, as a determinant of pay, on the supply of and demand for people with a successful EA background. The scale of the group disadvantage is hard to assess. We put aside, for a moment, the need for the disadvantage to be shared by the claimant with the group. We would, at least, need to assess the degree to which reliance on these market forces adversely affected women doing work equal to the claimant's work. One of the difficulties in this case is that we know very little about how many women were adversely affected in this way. This is because we do not know the breakdown of people who held “Head of” roles, or did any other work that was equal to that of the claimant.

159. Nevertheless, we have concluded that the respondent has failed to prove that reliance on market forces was proportionate. It could have achieved the aims of recruitment, retention and business efficiency relatively easily without the need for such a large gap in pay between the claimant and the REMs and DEDs. All Mr Burton needed to do was to recruit REMs and DEDs from a wider pool. The facts did not demonstrate to us, objectively, that it was reasonably necessary for an REM or DED to have been an EA at all. From our outsider's perspective, what we think Mr Burton needed was somebody, from whatever background, who could learn and understand the legal and commercial environment in which EAs worked, command the confidence of EAs, sell the organisation to new recruits, build a rapport with them, line-manage the AEMs, supervise EAs occasionally on house visits, and provide operational information to the Client Account Managers as and when necessary. The claimant demonstrated that she had those skills, despite not having been an EA herself.

160. It therefore follows that, had the respondent been required to satisfy section 69(1)(b) of EqA, the respondent would have failed to discharge that burden.”

The Appeal and Cross Appeal

22. By a Notice of Appeal dated 21 April 2024 the Claimant appealed on five grounds. These grounds were directed to a full hearing by order of Deputy High Court Judge Bowers KC dated 8

August 2024. The first ground was that the ET erred in its approach to whether the material factors were indirectly discriminatory as the Claimant shared the disadvantage of not having experience as an enforcement agent (the pool from which the higher paid REMs/DEDs was recruited). Grounds 2 to 4 were attacks on the finding of facts in relation to the three material factors. Ms Darlow Stearn, appearing for the Claimant, made clear that Ground 5 was not a self-standing ground, but merely supported Grounds 2 to 4 and she made no separate submissions upon it.

23. The Respondent served a detailed Answer which essentially relied on the reasons of the ET. It raised five grounds of cross-appeal in relation to the finding that there was no justification for relying on market forces as a material factor. Summarising these grounds the Respondent said it was an error not to identify with clarity which material factors and what pay gap need to be justified and an error to find disproportionate effect when the ET said it was unable to assess the scale of the group disadvantage and without the ET carrying out a detailed analysis of the less discriminatory means. It also alleged procedural unfairness in not putting the alternative means found by the ET to the Respondent's witness for comment.

Legal Principles

24. Section 66 of the Equality Act 2010 imposes an equality clause in a contract of employment. That clause operates in circumstances where 'A' and 'B' are doing like work, work rated as equivalent or work of equal value under section 65. In those circumstances, if any of the contractual terms of A are less favourable than a corresponding term of B, A's term is modified so it is not less favourable. It is most often used by women to seek equal pay with their male colleagues. Section 69 provides a defence. It provides:

- (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.

...

(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.

25. The classic explanation of the working of this provision was given by Lord Nicholls in **Glasgow City Council v Marshall** [2000] 1 WLR 333 at 339 (when it was in the Equal Pay Act 1970). He said:

“The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a “material” factor, that is, a significant and relevant factor. Third, that the reason is not “the difference of sex.” This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within section 1(2)(c) , may be a “material” difference, that is, a significant and relevant difference, between the woman's case and the man's case.”

26. That passage was relied on two decades later by the Court of Appeal in **Co-operative Group v Walker** [2020] ICR 1450 as setting out the proper approach to section 69.

Proving the Material Factor

27. To prove the elements of a material factor an employer must satisfy an employment tribunal on the evidence. It cannot rely on general assertion. In **BMC Software Ltd v Shaikh** [2019] ICR 1050 Underhill LJ held that the burden of proof “is on the employer to prove (by sufficiently cogent and particularised evidence) that the factor relied on explains the difference in pay complained of”.

That was in the context of a case where the employer “had not advanced any particularised explanation of the factor relied upon, let alone any evidence specifically supporting such an explanation, and had relied on a general assertion; the Tribunal did not believe that that was good enough.”

28. **BMC Software** held that an employment tribunal should require an employer who is seeking to justify a pay disparity based on a material factor such as merit or market forces to explain with particularity what those factors mean, how they were assessed and how they apply in the circumstances of the case. If the employer has a chaotic or non-transparent pay system it will be harder to persuade a tribunal that the material factor was genuine and was the cause of the pay disparity.

29. As Lord Nicholls made clear, it is not sufficient for an employer to show that a material factor is not directly discriminatory. If the material factor relied on is indirectly tainted by sex discrimination, then it does not prevent the equality clause taking effect.

Shifting burden of proof

30. The next stage involves a little complexity as there is a shifting burden of proof. As Underhill LJ noted in **McNeil v Revenue and Customs Commissioners** [2020] ICR 515 once the employer has proved a material factor and that it is not directly discriminatory, the burden shifts to the claimant. At paragraph 18 he said:

“It is then for A [i.e. the Claimant] to prove that any such factor puts her, and other women doing equal work with her, at a particular disadvantage compared with men; but if she does so the burden of proving that the factor is a proportionate means of achieving a legitimate aim—for short, that it is justified—is on the employer.”

Indirect discrimination tainting the material factor

31. Indirect discrimination involves a particular disadvantage being suffered by a group. It is approached the same way under s.69(2) as in s.19 of the Equality Act 2010. As Underhill LJ says in **McNeil** at paragraph 15:

“The definitions of indirect discrimination in both section 19 and section 69(2) are concerned with group disadvantage. The essential comparison is between the positions of the men within the relevant pool, viewed as a group, and the women in the pool, likewise viewed as a group. The requirement that the claimant herself should suffer the same disadvantage is additional, and merely ensures that she should not be entitled to complain of a disadvantage to which she is not herself subject. The relevant pool for the purpose of the comparison is all (properly comparable) employees doing equal work to whom the factor in question applies.”

32. Although s.69(2) uses different language to describe the indirect discrimination test from s.19, they should be interpreted as the same essential test. Thus “factor” in s.69(2) must be understood to be to the same as a “provision, criterion or practice” (or “PCP”) in s.19 in order to preserve coherence (paragraph 14 of McNeil).

33. There are different ways in which a claimant can discharge the burden of showing potential indirect discrimination under either s.69(2) or s.19, which an employer then needs to justify. The approach was summarised by Choudhury J in Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] IRLR 729 at paragraph 56 where he said:

“In summary, when considering whether there is group disadvantage in a claim of indirect discrimination, tribunals should bear in mind that particular disadvantage can be established in one of several ways, including the following:

- a. There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected in limine;
- b. Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;
- c. The disadvantage may be inherent in the PCP in question; and/or
- d. The disadvantage may be established having regard to matters, such as the childcare disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is taken.”

34. This approach is consistent with Bainbridge v Redcar and Cleveland Borough Council

[2009] ICR 133 in which the Court of Appeal held that there are various ways in which a court or tribunal might be satisfied that a pay differential is *prima facie* discriminatory. One way is to follow closely the words of s.69(2) and show that the employer's material factor operates so that the claimant and persons of the same sex doing work equal to her are put at a particular disadvantage when compared with persons of the opposite sex doing equal work. Another is known as '*Enderby* indirect discrimination' derived from the European Court of Justice's judgment in **Enderby v Frenchay Health Authority** (Case C-127/92) [1994] ICR 112 where significant statistics show an appreciable difference in pay between two jobs of equal value, one of which is carried out mostly by women and the other mostly by men. This was neatly described by Elias P in **Coventry City Council v Nicholls** [2009] IRLR 345 at paragraph 10:

'if a group who are predominantly male are paid more than a group who are largely female and yet employed on equal work, the difference in pay will generally have to be justified'

35. As **Bainbridge** held at paragraph 46:

"Thus the court [in *Enderby*] held that there will be some situations in which *prima facie* indirect discrimination will be found, even though it is not possible to identify a requirement or barrier or provision, criterion or practice which is having a disparate adverse impact on women. So, in the context of an equal pay claim, the ways in which indirect discrimination can be proved are not limited to the method described in section 1(2)(b) of the 1975 Act. It is open to a court or tribunal to find indirect sex discrimination when the circumstances are such that they recognise it. This principle was followed and endorsed by the Employment Appeal Tribunal (Cox J presiding) in *Ministry of Defence v Armstrong* [2004] IRLR 672. Cox J said, at para 42, that tribunals should not apply a formulaic approach to issues of sex discrimination; what matters is whether the tribunal is satisfied in any particular case that the evidence discloses a pay difference which is related to the difference of sex."

36. The **Bainbridge** endorsement of **Armstrong** is a reminder that in applying s.69(2) the fundamental question is whether the material cause of the pay difference between the Claimant and her comparators is tainted by sex-related factors. A formalistic approach to the operation of s.69(2) should be avoided and a pragmatic approach taken focusing on substance rather than form. If there is some evidence of the material factor resulting in some disadvantage to women and to the claimant,

then the burden passes to the employer to justify the reliance on the material factor.

37. When a claimant is proving potential indirect discrimination in the application of the material factor it is not necessary to explore why the factor operates to the particular disadvantage of women, it is enough that it does. In **Essop v Home Office; Naeem v Secretary of State for Justice** [2017] ICR 640 the Supreme Court held that once it has been established that a PCP (or in s.69(2) terms, a material factor) places people with relevant protected characteristics at a particular disadvantage compared with others, that is sufficient to require objective justification by a respondent of its use of the PCP. It is irrelevant why the material factor puts that group at a particular disadvantage or whether the reason why is itself related to sex. The only required causal link is between the material factor and the particular disadvantage.

Justification of the material factor

38. The test for justification is also the same in s.69(1)(b) and s.19. As explained in **Chief Constable of West Yorkshire Police v Homer** [2012] ICR 704 a material factor is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. It can include a real need on the part of the employer's business. As Mummery LJ explained in **R (Elias) v Secretary of State for Defence** [2006] IRLR 934 at paragraph 151:

‘... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.’

39. He went on at paragraph 165 to commend a three-stage test for determining proportionality:
- a. Is the objective sufficiently important to justify limiting a fundamental right?
 - b. Is the measure rationally connected to the objective?
 - c. Are the means chosen no more than is necessary to accomplish the objective?

40. The Court of Appeal held in **Hardy & Hansons plc v Lax** [2005] IRLR 726 at paragraphs 31-32 that it is not enough that a reasonable employer might think the criterion justified. An

employment tribunal itself has to carry out a critical and thorough evaluation and weigh the real needs of the undertaking against the discriminatory effects of the requirement.

Appeal Ground 1 – did the ET err in finding that the Claimant did not suffer from any particular disadvantage?

41. The ET first held that the Claimant failed on the evidence to show any **Enderby** indirect discrimination across the workforce, therefore the issue for the ET was whether the two material factors involved any indirect discrimination and whether any such disadvantage was shared by the Claimant. The ET correctly directed itself that it is necessary for the Claimant herself to suffer the same disadvantage as the group disadvantage as a result of the material factor.

42. Assessing whether a material factor is tainted by indirect discrimination involves the same approach as in s.19 (see **McNeil**) and that it is irrelevant why the material factor indirectly discriminates against women, only that it does (see **Essop**).

43. Ms Seymour and Ms Grace for the Respondent submitted in their written argument that the tests of indirect discrimination in sections 19 and 69(2) of the Equality Act 2010 were similar, but not identical. In oral argument they focussed more closely upon the textual differences between the two sections. Ms Seymour submitted that as s.69(2) required the Claimant to show that she “and persons of the same sex doing work equal to [hers] are put at a particular disadvantage” a material factor could only be tainted by indirect sex discrimination when the Claimant worked alongside actual female co-workers doing equal work. Unless the Claimant could prove that actual “persons of the same sex doing [equal work]” were put at a particular disadvantage she could not shift the burden to the employer. Ms Seymour also submitted that the omission of ‘put or would put’ wording from s.69(2) (which she said was a key part of the width of indirect discrimination in s.19) was consistent with the requirement for an actual direct comparator in equality of terms whereas a hypothetical comparator is sufficient for indirect discrimination. The Respondent’s conclusion was that the

wording of s.69(2) was written in restricted terms and was not the wide and flexible test suggested by the Claimant.

44. However the Respondent also accepted that s.69(2) was apt to cover **Enderby** indirect discrimination even where no material factor can be identified even though, on a strict reading of its words, that appears to be a requirement of the subsection. It was common ground before me that s.69(2) encompasses an alternative means by which a claimant can establish a difference in pay which falls to be justified as summarised in **Coventry City Council v Nicholls**.

45. Ms Darlow Stearn for the Claimant pointed out that this is consistent with the approach to s.69 taken by Underhill LJ in **McNeil** at p.523. He drew the distinction between:

- a. “barrier discrimination” where a material factor putting women at a disadvantage results from something identifiably done by the employer; and
- b. “*Enderby* indirect discrimination” where there is no PCP or material factor, but there is nevertheless a significant disparity between the pay of a predominantly female group of employees and a predominantly male group doing work of equal value.

He held that both types of indirect discrimination are intended to be covered by both the domestic legislation and the Directive 2006/54/EC (the Equal Treatment Directive) which it implemented (and to which we must still have regard as part of retained EU law).

46. It is also common ground that the justification test under s.69(1)(b) is materially identical to that in s.19. It is highly unlikely for Parliament in enacting s.69(1) and (2) to intend for the equal pay indirect discrimination test to work identically to other indirect discrimination in the ‘justification’ part of the test, but more restrictively in the ‘particular disadvantage’ part of the test.

47. For those reasons, I do not accept the Respondent’s submission that s.69 should be construed differently and more restrictively than s.19. This is contrary to **McNeil** and the endorsement in **Bainbridge** of the pragmatic approach of **Armstrong**. It is not necessary for a claimant to identify

“persons of the same sex doing work equal to hers” as a precondition of showing that a material factor is indirectly discriminatory. That would be to place a formulaic hurdle that many claimants would find impractical to overcome and would be a barrier to a woman who had no female co-workers doing like or equal work and to a woman employed in a very large organisation where a complete and accurate identification by her of all the women in the pool would be impractical. Section 69 involves a broader question than the precise words of the statute, as *Bainbridge* held in relation to its predecessor provision in the Equal Pay Act 1970.

48. I also reject the Respondent’s submission that having found there was no **Enderby** indirect discrimination among any of the people doing work of equal value to the Claimant, that should have been the end of the enquiry. **Dobson** and **Bainbridge** show that there are various ways in which a claimant can show that she is indirectly discriminated against by a material factor and the ET was not confined to a strict statistical analysis of the workers doing equal work.

49. There is no appeal from the ET’s finding in paragraph 137 that the Claimant failed to prove that the pay disparity “by itself” supports that inference. It considered whether there was evidence of the statistical impact of the pay disparity in the workforce, but at that stage it was not considering whether any of the material factors put the Claimant to a disadvantage or were tainted by sex.

50. No particular disadvantage was alleged by the Claimant in relation to the first material factor: “Competition and expectation” (which was shorthand for the differing levels of pressure caused by the different KPIs applicable to the Claimant and her comparators). The ET correctly recognised that this was not a complete answer to the claim and the next issue was whether there was disadvantage caused by the remaining factors: “Market forces” and “Recruitment and retention of EAs”.

51. I discussed with the parties whether the ET had, confusingly, elided both these two material factors under the single heading “market forces”. On reflection I consider that it was a typographical error and the ET has substituted “market forces” for “material factors” in these paragraphs. The ET said at paragraph 142 that “underlying both these market forces [meaning material factors] was the fact that REMs and DEDs all had a background of being successful EAs”. The ET had already found

that EAs were 90% men. It had noted “Mr Burton’s requirement that DEDs and REMs should be recruited from a pool of successful EAs” in paragraph 18 and permitted more evidence to be adduced to address that point.

52. Having found that both material factors were affected by the 90% male population of EAs, the ET might have gone on to examine the pool containing the Claimant and the REMs/DEDs to identify whether women and the Claimant were put to a particular disadvantage by those material factors. The ET did not do so. Instead it conducted an investigation of why the pool of EAs (and therefore REMs/DEDs) was mostly male. This was not necessary or permissible. **Essop** is clear that the ‘reason why’ is irrelevant to whether *prima facie* indirect discrimination had been shown.

53. The ET’s assumption that the EA labour market was male dominated because of a widely held belief that the work carries the risk of physical confrontation was not a necessary or relevant assumption to make. The ‘reason why’ is not what constitutes a particular disadvantage to women. The ET’s findings of fact at paragraphs 86 to 90 confirm that the ET was enquiring into why there was disparity in the pool. The ET said that the Claimant’s speculation was not supported by evidence. However there was no need for the Claimant to prove the ‘reason why’ any material factor works to the disadvantage of women or to her. It is enough that it does work to the disadvantage of women. This was an error of law on the part of the ET in its consideration of particular disadvantage.

54. That error of law infects the ET’s conclusion that the Claimant was not disadvantaged by the factor because it held that she (unlike the disadvantaged group) had not been deterred from being an EA for any reason. That again was to enquire about the ‘reason why’ and not whether the material factors of market forces and recruitment/retention of EAs worked to her disadvantage.

55. It was therefore an error of law for the ET to conclude that the Respondent was not required to show that reliance on market forces and/or recruitment and retention of EAs to pay men more than women was a proportionate means of achieving a legitimate aim.

56. The ET should have assessed whether the fact that the Claimant was not a former EA (coupled with the fact that EAs were 90% male) put her to the same disadvantage as women generally

(applying the pragmatic and non-formulaic approach in the authorities). The ET should have asked whether the two material factors were tainted by sex-related factors. It should have had in mind the words of Mummery LJ in **Bainbridge** “objective justification is necessary where there is evidence of a sexual element in the employer’s reason for the pay disparity”.

57. It may be that the 90% male population which the ET found underlies the two material factors coupled with the opaque pay system in which the Claimant was paid a fraction of the pay of the REMs/DEDs could be enough for the ET to conclude that they are sex-tainted factors. I remind myself approach of **Jafri v Lincoln College** [2014] IRLR 544 and that I should be robust and not timorous. However, both parties agree that if the ET was in error in its approach, the answer remains fact sensitive and this is not a case in which there is only one possible answer that any reasonable tribunal could reach. In those circumstances I need to remit the question to the ET.

58. On those grounds I allow the appeal on Ground 1 and remit to the ET the question of whether the two material factors were tainted by sex and/or put the Claimant at a particular disadvantage compared to the mainly or wholly male REMs/DEDs.

Appeal Grounds 2-4 – did the ET err by concluding that the Respondent discharged its burden of proof in proving the three material factors

59. The ET heard the evidence and made findings of fact about what factors caused the pay disparity. It rejected the Respondent’s evidence on all but three. The Claimant summarised her three grounds of appeal by saying that the Respondent had failed to adduce sufficiently “cogent and particularised” evidence, as is required by **BMC Software** at paragraph 18.

60. Ms Darlow Stearn also relied on **Bainbridge** at paragraph 75 which said that the “onus of proof under [s.69(1)] is on the employer and it is a heavy one” and referred me to the Equal Pay Statutory Code of Practice at paragraph 78. She rightly said that a tribunal must look at market forces as a material factor with care as it can sometimes be caused by the stereotypes of a man being paid more because he asked for more or a woman being willing to work for less.

61. I do not read Underhill LJ as imposing some higher or more onerous evidential standard in **BMC Software**. That and the reference to a “heavy onus” in **Bainbridge** reflect the fact that this is a rebuttable presumption and an employer must call evidence which is sufficiently cogent and sufficiently particularised to rebut that presumption. All evidence in a court or tribunal needs to be sufficiently cogent to prove a factual issue and all factual issues need to be properly particularised so that the parties and tribunal know what is in dispute.

62. The cogency of evidence needed depends on the seriousness of the pay disparity. **Barry v Midland Bank** [1999] IRLR 581 at 587 held that “...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.” In this case the ET found the evidence sufficiently cogent.

63. In reality this is an appeal against that finding of fact and in order for it to be an error of law, the Claimant would need to show that no reasonable tribunal could have found that the three material factors were the combined cause of the pay disparity. Perversity was not pleaded in the Notice of Appeal. Ms Darlow Stearn did not press the point that the ET reached perverse factual findings and she was right not to do so.

64. The ET had clear evidence before it on which it could reach the finding (in paragraph 112) that the difference between the Claimant’s pay and the REMs’/DEDs’ pay was partly because of the commercial pressures that existed under the national contracts. This was supported by the evidence that the KPIs for the REMs/DEDs were more pressing than those for the HoELT as their KPIs involved a “target of achieving a defined number of PIFs within 90 days or 12 months” which was different in nature to a target of “maintaining an average payover, with collection periods of up to 3 years being tolerated”. The Claimant criticises the finding of fact on the basis that the ET found at paragraph 70 that the comparators did not do much travel and found that forced entry (paragraph 30) and client contact (paragraph 80) was rare and there was no difference between the roles in terms of managing and coaching (paragraph 123). However those parts of the evidence were directed to

different material factors which the ET rejected and were not matters which were relevant to the KPI pressure which founded the Competition and Expectation material factor.

65. The ET took account of the opaque pay rationale and scrutinised Mr Burton’s evidence about market forces as explained in paragraphs 61 and 62. The ET accepted Mr Burton’s evidence that Mr Avery approached Mr Burton in 2019 to say that a competitor had offered him and Mr Hayes about £50,000 more money and his current earnings were no more than he could earn as an EA. The ET accepted Mr Burton’s evidence that he agreed to increase the pay of the DEDs to £90,000 for that reason. The Claimant says that this is not corroborated in Mr Avery’s witness statement, but he was not called and the ET placed less weight on his evidence. The ET did note that there was no staff change form and that any document would only have said “exceptional pay increase”. The ET heard live evidence about market forces and reached a finding that cannot be said to be perverse. The ET decided that the evidence was sufficiently cogent to persuade it.

66. Ms Darlow Stearn referred me to the ET’s findings at paragraph 124-125 and says that there was insufficient evidence for the Recruitment and Retention of EAs as a material factor. However, the ET had evidence from Ms Alessi that retention was more of a problem for the DEDs where attrition and EA turnover was higher and less problematic for the Claimant where a lot of EAs had a length of service of 15 years. The ET accepted at paragraph 75 that the DEDs needed to maintain the personal relationship to assist EA retention. This was a permissible finding.

67. Ms Darlow Stearn did not press Ground 5 as a separate ground of appeal relying on it only to support the attacks on the findings of fact under Grounds 2 to 4. In my judgment the ET reached permissible findings of fact. Although employers must of course bear in mind that they need to adduce cogent and convincing evidence to show a material factor to explain a pay disparity, if an ET accepts the employer’s evidence, its findings can only be overturned on the well-known threshold in **Yeboah v Crofton** [2002] IRLR 634 (that an overwhelming case is made out that the tribunal reached a decision which no reasonable tribunal could reach on a proper appreciation of the evidence and the law). For those reasons I dismiss Grounds 2 to 5.

Cross Appeal

68. The Respondent cross appealed on a number of grounds relating to the ET’s finding that had the Claimant shown that the material factors were tainted with sex discrimination, reliance on them could not be justified as they were disproportionate means of achieving the Respondent’s legitimate aims. Ms Seymour’s initial point was that a cross appeal may have been unnecessary as if the question of indirect discrimination was remitted to be considered afresh, then it only was sensible to remit the question of justification to the same ET. The ET could then apply the justification test in the context of whatever indirect discrimination was found to taint the material factors. There was some force in that submission, but I considered the cross appeal on the grounds as pleaded.

Cross Appeal - Grounds 2, 4 and 5

69. Ms Seymour submitted under Ground 2 that the ET erred in reaching a conclusion on proportionality in circumstances in which it could not assess the scale of group disadvantage and had “put aside” the need for disadvantage to be shared by the Claimant. Under linked Ground 4 she said that the ET erred in applying the wrong test for proportionality, an inadequate level of analysis or reached a perverse conclusion not supported by evidence. Ground 5 was that the ET erred in failing to consider or analyse the part of the Respondent’s legitimate aim which related to retention of DEDs/REMs when it was considering proportionality.

70. Ms Seymour relied on **Hardy & Hansons** on the assessment of justification. She correctly submitted that a critical and thorough evaluation is required and must be demonstrated in the reasoning of the ET where it makes judgments upon systems of work, their feasibility and the economic impact in a competitive world, which the restrictions impose upon the employer’s freedom of action.

71. In assessing proportionality the ET uses imprecise language suggesting that change could be achieved ‘relatively easily’ and does not analyse what part of the £40,000 pay gap is referred to when saying “such a large pay gap”. This suggests that the ET considered that some pay gap was

proportionate, but it cannot be ascertained from the ET reasons what part. I agree that the ET needed at least to touch upon whether the removal of the requirement for REMs/DEDs to have been EAs would in fact have resulted in a wider group of applicants for the roles. It should have considered the impact that would have on reducing REMs/DEDs salaries when the ET had already found as a fact in paragraph 156 that reducing their pay risked losing them to competitors. That risk is not analysed nor the impact on the loss of EA certificates as the ET found that was still a need for some travel and some visits (paragraph 71).

72. The ET did not assess what part of the pay difference was due to Competition and Expectation - the factor that did not need to be justified. The ET then appears to categorise the scale of the disadvantage in a more complicated way (encompassing the **Essop** “reason why”) and I accept that this may have tainted its overall approach to proportionality. It also seemed to conclude that the relevant pool for assessing proportionate or disproportionate impact may have contained other senior employees of the Respondent who held “Head of” roles. The focus of justification should be on those to whom the material factors applied - the advantaged and disadvantaged group: here the HoELT and REMs/DEDs. For these reasons I allow the cross appeal.

Cross Appeal - Grounds 1 and 6

73. Ground 1 is that the ET erred in considering justification without having first set out the material factors that the Respondent had to justify and identify the size of the pay gap which needed to be justified. Ground 6 largely overlaps with this Ground 1 in reiterating that the ET had to consider proportionality by identifying which part of the pay gap needed to be justified.

74. Ms Seymour says the ET confused which material factors (assumed to be indirectly discriminatory for the purpose of the counterfactual) were being considered. There is some force in this criticism due to the typographical error where the ET uses the term “market forces”. I accept it could be read as justifying only one of the two material factors by using that expression. However I think it must have meant “material factors” rather than “market forces”. In any event, read as a whole,

it is clear enough that the ET identified the two factors to be justified as market forces and recruitment/retention of EAs. The ET identified the disadvantage which arose from those factors. Between them they provided most of the cause of the disparity in pay between the Claimant (£51,500 in December 2021) and the male comparators (£91,800 in December 2021). The ET's reasons therefore indicate the factors to be justified and set out the very substantial £40,000 difference in their pay which those factors had largely caused.

75. The Allonby test balances the Respondent's reasonable need to rely upon the two factors and the discriminatory effect on the disadvantaged class. The Respondent says that the "Reasons do not engage with either of these issues and there is nothing in them to suggest that the ET carried out this analysis". I do not agree. The ET noted the "large gap in pay between the Claimant and the REMs and DEDs" and therefore had in mind the discriminatory effect. It weighed the Respondent's reasonable need and found as a fact that it could have achieved the aims of recruitment, retention and business efficiency relatively easily without the discriminatory effect. It rejected the evidence that it was reasonably necessary for an REM/DED to have been an EA and thus carried out the Allonby balancing exercise correctly. I do not allow the cross appeal on this ground.

Cross Appeal - Ground 3

76. Nor would I have allowed the cross appeal on the grounds of procedural unfairness by the ET. The Respondent suggests that Mr Burton was not given a proper opportunity to comment and give evidence about whether he needed to recruit REMs/DEDs who had an EA background. The ET recorded Mr Burton's evidence that he did. We have the ET's notes of evidence and although there is nothing in those notes which shows Mr Burton being asked specifically about this, he addressed the overall question of his approach to recruitment.

77. As a matter of fairness, a tribunal must raise any allegations of discriminatory conduct with the parties so that they have an opportunity to rebut or explain it. Failure to raise possible findings with the parties during closing submissions is not invariably an error of law (Judge v Crown Leisure

[2005] IRLR 823 at paragraphs 20 and 21) and the overall question on appeal is whether an injustice has been done. This was one element of the proportionality finding and not the main allegation. I accept that if the key aspect of a case or a vital part of a tribunal's consideration is not explored with the parties during a hearing, then it may be unjust for a tribunal to rely upon that in its judgment. The ET heard Mr Burton's evidence and as an industrial jury decided that there was a less discriminatory way to achieve the legitimate aims of the Respondent. The ET rejected his evidence at paragraph 159. It held that somebody, from whatever background could learn and understand the legal and commercial environment in which EAs worked, command their confidence, sell the organisation to new recruits, build a rapport, line-manage and supervise them occasionally on house visits. The ET noted that the Claimant demonstrated that she had those skills, despite not having been an EA herself.

78. It may have been prudent and best practice to explore such a sub-issue which the Respondent submits is not the approach of the wider market. However, it is not an error of law to fail to put every detail of a case to a witness and there was no overall injustice in the ET considering the issue in this way.

79. For these reasons I allow the Appeal on Ground 1 only and the Cross Appeal on Grounds 2, 4 and 5. I invited written submissions from the parties on the terms of the remission to the ET. Both parties preferred remission to the same tribunal, but they point out that one of the members of the tribunal has retired and so the same panel is not possible. I therefore direct that the two issues (as set out in paragraph 58 and whether the two material factors (if tainted by sex discrimination) were a proportionate means of achieving the two proposed legitimate aims) be remitted to a fresh tribunal as established by the Regional Judge. That could appropriately be a judge sitting alone as many findings of fact have been made by the ET and that narrows the scope of further evidence.