

Dissertation

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'A dissertation submitted to the University of Central Lancashire in part satisfaction of the requirements for the degree of LLM in the Lancashire Law School'

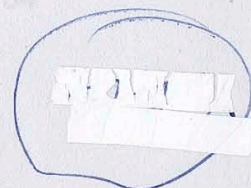
Declaration:

No portion of work referred to in the dissertation has been submitted in support of an application for another degree or qualification of this or any other University or institute of learning.

Year of presentation – 2008

Candidate - Beverley Cullen

Work Rated as Equivalent



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especially since there has been a national increase in equal pay claims, and, a number of recent legal cases involving LAs that have been decided in relation to the interpretation of EqPA issues. One such case has included an action against a union acting for their members in negotiations with LAs on the settlement of EqPA cases. The decision in the case of *Allen & Others v GMB* was only given by the Court of Appeal (CA) on 16th July 2008¹ and this has left LA in a difficult position as to how to deal with EqPA claims without leaving themselves open to further financial exposure and/or further litigation. In spite of this, a recent article by Trevor Phillips² (see later) suggested that the Act was irrelevant in the current climate.

There are a number of methodologies that can be adopted in undertaking this research. As the focus of the research will involve examining the objective of primary and secondary sources of law, an appropriate research method is to use the black letter approach in order to answer the question: what is the meaning and scope of the relevant legal provisions?³

¹ [2008] EWCA Civ 810
² The Guardian 16 January 2008
³ Page 50 Sellar & Mason

Introduction

The Local Authority Context

The author of the dissertation is employed as a solicitor in the Legal Department of a local authority and has had the conduct of equal pay claims on behalf of that local authority. The topic of the Equal Pay Act 1970 (the EqPA) and its impact on local authorities (LAs) is worthy of research especially since there has been a national increase in equal pay claims, and, a number of recent legal cases involving LAs that have been decided in relation to the interpretation of EqPA issues. One such case has included an action against a union acting for their members in negotiations with LAs on the settlement of EqPA cases. The decision in the case of *Allen & Others v GMB* was only given by the Court of Appeal (CA) on 16th July 2008¹ and this has left LA in a difficult position as to how to deal with EqPA claims without leaving themselves open to further financial exposure and/or further litigation. In spite of this, a recent article by Trevor Phillips² (see later) suggested that the Act was irrelevant in the current climate.

There are a number of methodologies that can be adopted in undertaking this research. As the focus of the research will involve examining the objective of primary and secondary sources of law, an appropriate research method is to use the black letter approach 'in order to answer the question: what is the meaning and scope of the relevant legal provisions?'³

¹ [2008] EWCA Civ 810

² The Guardian 15 January 2008

³ Page 50 Salter & Mason

The EqPA and the Equal Pay Directive have been examined together with recent case law; although this area is very fluid at present so the case law referred to is up-to-date at the time of carrying out this research.

To supplement the black letter methodology a socio-legal approach has been utilised by the sending of questionnaires to a sample of LAs to obtain empirical data as to the impact of the Act upon LAs (example attached at Appendix 1). A summary of the responses is attached at Appendix 2.

The background to the impact of EqPA claims upon LAs lies in the National Joint Council (NJC) Agreement of 1997 which amongst other issues recommended that each local authority undertook a grading review in line with equal pay legislation. The 2004 NJC agreement established a time-frame for all LAs to have undertaken and put into operation equal pay reviews by 31 March 2007⁴.

Research undertaken by the Local Government Employers, reported in the Times in January 2008, indicated that only 47% of councils in England and Wales had 'completed pay reviews and/or implemented the outcomes'⁵. A further 40% had reviews underway with various anticipated dates of completion. The estimated cost to local government for the back pay liability alone has been estimated at £3bn⁶. The estimated cost of implementing job evaluation is between £500m - £700m⁷

⁴ Unblocking the Route to Equal Pay in Local Government page 2

⁵ The Times 2 January 2008

⁶ Unblocking the Route to Equal Pay in Local Government page 5

⁷ Ibid

The current increase and impact of equal pay claims on LAs has not gone unnoticed by commentators as it has been written that equal pay litigation is likely to be a 'hot area for the public sector for the next few years'⁸ and 'considerable sums of money have changed hands by way of compensation and settlement sums'⁹ It was reported in February 2008 that the Government will provide further support to councils to enable them to meet their equal pay obligations after already allocating £500million of equal pay capitalisation directions to 46 authorities in England.

This has clear implications for LAs in respect of funding any settlements, implementing a pay and grading structure and dealing with issues of pay protection. As at January 2008 the total liability for LAs of undertaking pay reviews was estimated at £2.8bn. In addition there is the cost of back pay, the on-going funding of any pay increases and making financial provision for pay protection for staff whose salaries are reduced as a result of the equal pay review. Indirectly there is an issue for society as a whole as the funding of these claims will have to come from the public purse and there are potential social costs in terms of possible reductions in the provision of public services to fund any settlement of equal pay claims and the cost of implementing the new pay agreements.

A wider issue for LAs is the impact on industrial relations generally. Reports in the press have highlighted the negative reactions to council staff to the

⁸ S Wright Pay and Dismay The Lawyer January 2007

⁹ Ibid

outcome of equal pay reviews. For example, it was reported that some staff at Preston City Council walked out when receiving the information about how the pay review impacted upon them – the highest salary reduction reported as being £7,000¹⁰; In Birmingham 12% of employees face a pay cut¹¹ with some claiming the reduction in pay will be up to £18,000 per year¹² and 38% of staff at Rochdale Council will lose out following their pay and grading review. The impact has been similar all over the country, even in Scotland, where Argyll & Bute Council staff were balloted on taking industrial action in respect of a new pay and grading structure that could result in pay cuts of up to £15,000 - £16,000¹³ and East Lothian employees were asked to vote on industrial action on their pay and grading review¹⁴. The reductions in salary refer to the implementation of the Single Status pay and grading review within LAs where the result has been that some professional and higher graded administration posts have had their pay level reduced.

The Equality and Human Rights Commission Concerns

Trevor Phillips, Chair of the Equality and Human Rights Commission (EHRC) warned in a news article¹⁵ in January 2008 that the EqPA had 'reached its sell-by date' and should be replaced with more modern legislation to allow woman to get a 'fair deal' quickly. Phillips compared the effect of the EqPA to

¹⁰ Lancashire Evening Post 29th February 2008

¹¹ Personnel Today 10th December 2007

¹² BBC News – 5th February 2008

¹³ Unison 1st February 2008

¹⁴ The Scotsman 25th January 2008

¹⁵ The Guardian 15 January 2008

a BBC adaptation of Bleak House¹⁶ that involved a legal case that had been on-going for a number of generations, 'a long-running legal dispute, menacing lawyers and, most important, a slow, arcane legal system. A system that has failed the most important people in all of this - the victims of injustice'¹⁷

His concern arose from the number of equal pay claims in the Employment Tribunal¹⁸ (ET) system, the vast majority of which relate to women workers in LAs. The timing of the article was to coincide with the Court of Appeal hearing of the 'potentially precedent-setting'¹⁹ case of *Redcar & Cleveland Borough Council & Others*²⁰ that had been on-going for four years. The EHRC's role in the case was as an 'intervener' rather than representing the individual claimants.

The thrust of Phillips article is that the EqPA and the Tribunal system cannot cope with the growing number of individual ET Equal Pay cases and, accordingly, 'representative actions' should be introduced which he argues would reduce the number of claims and also provide speedier remedies for the claimants. Representative actions would involve legal action by a body such as the EHRC or a trade union on behalf of a group of individuals with identical claims. Phillips claims that such actions would reduce equal pay claims from 150,000 to a 'more manageable' 11,000. The EHRC estimated the number of cases in 2007/08 to rise by 300% to around 150,000 cases.

¹⁶ A novel by Charles Dickens first published in 1853

¹⁷ The Guardian 15 January 2008

¹⁸ The Employment Tribunals are judicial bodies established to resolve disputes between employers and employees over employment rights

¹⁹ The Guardian 15 January 2008

²⁰ [2008] EWCA Civ 885 – The judgment was not promulgated until 29 July 2008

Phillips' disquiet about the increasing number of Equal Pay cases in the Tribunal system is borne out by statistics published by the Employment Tribunal Service²¹ (ETS) which show that the number of Equal Pay cases accepted by ETS in 2004/05 increased from 8,229 to 17,268 in 2005/06 an increase of 110%. There was a further increase in 2006/07 to 44,013 a rise of 155%.²² This figure was confirmed by Jeanne Spinks²³, who stated "the significant reason for the increase in ET cases in 2006-07 is a 155 per cent increase in equal pay claims"²⁴.

The latest figures from The Tribunal Service for 2007/08 show that ET claims were 42% higher than expected overall²⁵. These latest statistics however do not give a breakdown of the type of cases.

European and Domestic Law

The EqPA was enacted in 1970 but did not come in to effect until December 1975. Barbara Castle, the Secretary of State for Employment and Productivity, stated the EqPA was 'a basic act of justice.....another historical advance in our struggle against discrimination'²⁶ and that the purpose of the

²¹ The Employment Tribunal Service transferred into the Tribunals Service with effect from 2 April 2006 under the auspices of the Department for Constitutional Affairs from the Department for Trade and Industry as a result of Sir Andrew Leggatt's Report 'Tribunals for Users: One System, One Service' published in 2001

²² Employment Tribunal and EAT Statistics (GB) 1 April 2006 to March 2007

²³ Jeanne Spinks is the Chief Operating Officer of the Tribunals Service which administers employment tribunals

²⁴ Employment Tribunal and EAT Statistics (GB) 1 April 2006 to March 2007

²⁵ The Tribunals Service – Annual Report & Accounts 2007/08 – 'Reforming Improving Delivering'

²⁶ As quoted in Equal Pay and the Law by Aileen McColgan

EqPA was 'to eradicate discrimination in pay in specific identifiable situations by prescribing equally specific remedies'²⁷

The preamble of the EqPA 1970 states its aim as being 'to prevent discrimination as regards terms and conditions of employment between men and women'.²⁸

The EqPA was introduced by the then Labour Government in response to campaigns by women such as women teachers and female civil servants but it was a three week strike at Fords in Dagenham in 1968 that 'hastened the government to bring in the EqPA'²⁹ Although some commentators believe it was the Labour Party's intention to join the European Economic Community that was the reason why it included 'the right to equal pay for equal work' in its election manifesto in 1964³⁰

The EqPA encompasses the requirements of the Article 141 (previously Article 119) of the European Community Treaty which provides that 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.

The Equal Pay Directive³¹ developed this principle further with 'the elimination of all discrimination on grounds of sex with regard to all aspects and

²⁷ Ibid

²⁸ A Guide to the Equal Pay Act by the Department for Employment stated that the purpose of the Equal Pay Act was to eliminate discrimination between women and men in the same employment in pay and other terms and conditions of their contracts of employment such as piecework, output and bonus payments, holidays and sick leave

²⁹ The Fight for Equal Pay 40 Years On – The Observer 1 June 2008

³⁰ An Historical Introduction to the Campaign for Equal Pay – Mary Davis

³¹ Council Directive 75/117/EEC

conditions of remuneration” According to research undertaken by Ellina the origins of equal pay in Europe ‘date back to the 1919 International Labour Organisation (ILO) Constitution’³² and the 1970s Gender Directives ‘finds its roots in the 1951 ILO Equal Remuneration Convention as it referred to work of ‘equal value’

The EqPA implies an ‘equality clause’ into the employment contracts of every woman who undertakes ‘like work’ with a man (or vice versa). The clause operates to give the same term or condition to a woman employed in ‘like work’ as a man where the woman is subject to a less favourable term or condition.

For the purposes of an initiating an EqPA claim an individual (a ‘Claimant’) has to establish four basic requirements: identify a ‘comparator’ of a different sex, that the comparator receives more pay; that the work of the comparator and the claimant is undertaking like work which is rated as equivalent or work of equal value and that the claimant and the comparator are employed in the same employment.

Work ‘rated as equivalent’ relates to cases where men and women who have had their jobs rated the same under an analytical job evaluation scheme (JES) but where the woman receives lower pay. Equal value claims are where the man and women are doing completely different jobs, but where the

³² Page 33 Promoting Women’s Rights – Chrystalla A Ellina

woman is paid less for work which is considered to be of equal value to the man's in terms of its demands

The problem for LAs is that it has been the male dominated roles that have attracted bonus payments as opposed to the female roles which have been the basis for most of the equal pay claims; it was reported in Cumbria that the settlement of claims there involved thousands of mainly female cleaners, care workers and cooks³³; in Bury 1600 cleaners, care workers and dinner ladies are taking action against the Council over claims it pays men more³⁴ and in Cardiff mainly female staff have not been eligible for bonus payments which have been given to men in jobs of equal value.³⁵ The settlement of the claims related to staff including 'dinner ladies and clerical workers who were underpaid for many years in comparison to workers in other council jobs like binmen'.³⁶

Article 141 of the EC Treaty (Equal Pay for Equal Work) was referred to in the introduction to this research and it enshrines one of the fundamental principles of the European Community, namely that women and men should receive equal pay for equal work. 'Pay' is defined in Article 141 as

the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly in respect of his employment from his employer.

The Article goes on to define equal pay without discrimination based on sex as being

³⁷ The Equality and Human Rights Commission was established by the Equality Act 2006 and from 1 October 2017, it took over the role and functions of the Commission for Racial Equality, the Commission for Equality and Human Rights (CEHR) and the Equal Opportunities Commission (EOC).

³³ Lakeland Echo 18 March 2008

³⁴ Manchester Evening News 30th July 2008

³⁵ South Wales Echo 14 June 2008

³⁶ Ibid

Chapter 2 - The Legal Context

European Law

According to the EHRC³⁷ the impact of European Union (EU) law on equal pay 'cannot be exaggerated' as the Commission states that 'most of the progressive developments in equal pay law in the last 25 years have come from EU law'³⁸

The European Communities Act (ECA)1972 provided that:

'all such rights powers, liabilities, obligations, and restrictions created or arising by or under the Treaties' including 'all such remedies and procedures' are 'without further enactment to be given legal effect or used in the United Kingdom'. This European provision has the effect of incorporating directly effective EU law into domestic law (see later).

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³⁷ The Equalities and Human Rights Commission was established by the Equality Act 2006 and from 1 October 2007, it took over the role and functions of the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC)

³⁸ <http://www.eoc-law.org.uk> – 3 January 2008

³⁹ Treaty of Rome Article 141 paragraph 2

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job⁴⁰

Due to the effect of the ECA, Article 141 is directly enforceable in UK courts and Tribunals, but it has to be brought via a UK statute e.g. the EqPA 1970. There had been some question over whether the Article conferred 'directly effective and justiciable rights upon individuals'⁴¹ but this was addressed by the European Court of Justice (ECJ) in the case of *Gabrielle Defrenne v Sabena*⁴². The case involved a 40 year old air stewardess who was forced to change her job for one on lower pay because of her age – a policy that didn't apply to men of the same age. The ECJ held that the Article had direct effect and gave rights to individuals that they could cite against private individuals and their Member States.

Equal Pay Directive

Article 119 was based upon the earlier International Labour Organisation standards but due to its 'narrowness and the relatively tenuous foundations of EU law'⁴³ the provisions had very little effect and in the decade following the treaty 'Member States made very little effort to implement the equal pay principle'⁴⁴ and thus the Equal Pay Directive (EPD) was enacted to 'facilitate the practical application of the principle of equal pay outlined in Article 141'⁴⁵

⁴⁰ Ibid

⁴¹ Page 22 Transforming Europe – Cowles, Caporaso, Risse & Risse-Kappen

⁴² *Gabrielle Derenne v Societe anonyme belge de navigation Sabena* 1976 European Court Reports 455

⁴³ Page 22 Transforming Europe

⁴⁴ Ibid

⁴⁵ Equal Opportunities Commission <http://www.eoc-law.org.uk> [last accessed on 3 January 2008]

The EPD, Council Directive 75/117/EEC of 10 February 1975, builds upon the principle in Article 141 and extends its application to job classification systems used for determining pay in that such systems must be based on the same criteria for both men and women and must exclude any discrimination on the grounds of sex.⁴⁶ The EPD also provides that there should be no provision in legislation, regulations, administrative provisions, wage scales, collective agreements or individual contracts of employment which is contrary to the principle of equal pay.⁴⁷ It also affords protection to employees from dismissal due to pursuing a complaint or legal proceedings for equal pay.⁴⁸

Burden of Proof Directive

The Burden of Proof Directive (BPD) was first proposed in 1988 but did not gain Council's approval due to opposition by the British Government⁴⁹; the Council Directive 97/80/EC on the Burden of Proof in Sex Discrimination cases was eventually adopted on 15th December 1997 and extended to the UK with effect from 22nd July 2001.

Prior to the implementation of this Directive the burden of proof in sex discrimination cases lay with claimants, who had difficulty in proving their case as 'relevant documents were usually in the employer's possession'⁵⁰ and they were 'hampered by a lack of resources, expertise and information'⁵¹

⁴⁶ Article 1 Council Directive 75/117/EEC - 10 February 1975

⁴⁷ Articles 3 & 4 *ibid*

⁴⁸ Article 5 *ibid*

⁴⁹ Page 52 *Promoting Women's Rights: The Politics of Gender in the European Union*, Chrystalia A Ellina

⁵⁰ *Ibid*

⁵¹ Page 420 *EU Employment Law from Rome to Amsterdam and Beyond*. Jeff Kenner

The BPD applies to situations covered by the Equal Treatment Directive and states that where an individual establishes before a court or tribunal facts from which it may be presumed that there has been direct or indirect discrimination, 'it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.⁵²

Clearly this is an issue for LAs seeking to defend equal pay claims in the ET as once a claimant has raised the presumption of sex discrimination in relation to pay it is a matter for LAs to rebut that presumption. This will continue to be a costly exercise for LAs as additional resources are needed to manage the claims and to meet the cost of instructing external counsel. 88% of respondents to the research questionnaire indicated that they had received from 8 to 3,500 equal pay claims. A further issue for LAs is finding the evidence to rebut the presumption, for example, in some LAs the payment of bonuses to (predominantly) male employees has not been regularly scrutinised to demonstrate that it is related to productivity or as a market supplement (i.e. a recruitment and retention allowance in those areas of work where recruitment rates are low). This lack of historical data can only lead to an ET coming to the inevitable decision that the bonus payments are discriminatory on the grounds of gender.

⁵² Council Directive 97/80/EC- 15 December 1997

European Commission Code of Practice on Equal Pay

The European Commission has also a Code of Practice⁵³ which provides a source of good practice⁵⁴ for employers; it is not binding in law but is taken into account by tribunals in considering whether there has been unlawful discrimination.

Domestic Law

Discrimination in employment on the grounds of a person's gender would usually be a contravention of the Sex Discrimination Act 1975 (SDA) however the SDA does not apply to 'benefits consisting of the payment of money when the provision of those benefits is regulated by the woman's contract of employment'⁵⁵ As stated in the Introduction, the domestic law relating to gender differences in pay is the EqPA 1970. The aim of the EqPA is as stated in its preamble⁵⁶. According to Bowers the main intention of the Act was to eliminate low pay that had been given to women for centuries and was the first 'legal embodiment of the equal pay principle which became the TUC policy in 1888, the subject of a Royal Commission in 1944-46 and ILO policy for decades'.⁵⁷

High numbers of women had entered what were historically traditional male labour markets during the First World War and the end of the War marked the

⁵³ Available from eqop@cec.eu.int

⁵⁴ The Codes purpose is 'to provide concrete advice for employers and collective bargaining partners....to ensure that the principle of equality between women and men performing work of equal value is applied to all aspects of pay'

⁵⁵ Section 6(6) Sex Discrimination Act 1975

⁵⁶ See introduction

⁵⁷ Page 116 – Practical Approach to Employment Law – John Bowers

first government inquiry⁵⁸ which resulted in the Sex Discrimination (Removal) Act 1919. This act sought to remove barriers for women to certain professions, such as solicitors, universities and the civil service. Ironically, in the 1920s some LAs initiated equal pay for men and women undertaking equal work⁵⁹ but the principle was held to be ultra vires.⁶⁰ Lord Atkinson stated that the systems of payment were unlawful and inspired by 'eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes'⁶¹ The case is considered by Loughlin⁶² as being a 'cause célèbre' of the political period as the House of Lords agreed with the District Auditor's decision to surcharge the council members for acting outside their powers in giving equal pay to both men and women at a higher level than the average rates for the area.

Nothing further seems to have happened as regards equal pay until after the Second World War. After a succession of strikes over equal pay in the 1960s in 1968 the Labour Government, through the Secretary of State for Employment and Productivity Barbara Castle, gave a commitment to introduce legislative provisions⁶³.

⁵⁸ Report on the War Cabinet Committee on Women in Industry Cmd 135 1918

⁵⁹ P 573 Labour Law - Deakin and Morris

⁶⁰ Ultra vires is a legal concept meaning 'beyond the powers'; a local authority can only do what it is empowered to do by statute.

⁶¹ Page 194 Roberts v Hopwood [1925] AC 578

⁶² Page 163 Public Law & Political Theory

⁶³ The urgent need for equal pay legislation in the 1970s, per Bowers, was because women made up 40% of the workforce and over half of women aged between 16 and 59 were in work

Equal Pay Act and Its Relationship With Article 141

The EqPA in essence encompasses the provisions of Article 141 although there are some differences. Under Article 141 pay includes non contractual benefits, e.g. travel concessions, claims for which should be brought under the Sex Discrimination Act 1975 (SDA) rather than the EqPA; however the EqPA applies to non-pay contractual terms such as contractual holiday entitlements whereas Article 141 does not.

The EqPA has been amended by later legislation which will be considered in greater detail in later chapters. Namely, the Employment Act 2002, Equal Pay (Question and Replies) Order 2003⁶⁴, EqPA 1970 (Amendment) Regulations 2003⁶⁵, EqPA 1970 (Amendment) Regulations 2004⁶⁶, and the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004⁶⁷. The Act was also amended by the Occupational Pension Schemes (Equal Treatment) (Amendment) Regulations 2005⁶⁸ which included amendments as regards pregnancy and maternity leave; these regulations are not considered as part of this research.

EOC Code of Practice on Equal Pay

The Equal Opportunities Commission (now the CEHR) has a code of practice on Equal Pay which was originally produced in 1997 and expanded and

⁶⁴ Statutory Instrument 2003/722

⁶⁵ Statutory Instrument 2003/1656

⁶⁶ Statutory Instrument 2004/2352

⁶⁷ Statutory Instrument 2004/2351

⁶⁸ Statutory Instrument 2005/1923

rewritten in 2003⁶⁹; its status is similar to the European Code in that the Code is not binding, but it is open for an Employment Tribunal to take it into account when considering an employer's failure to act on the code's provisions. It is admissible in evidence in proceedings under the SDA and the EqPA.

Gender Equality Duty

As the research focuses on LAs it would be remiss not to mention the gender equality duty that came into force in April 2007. Under the Equality Act 2006 a public authority, in carrying out its functions, has a general statutory duty to have due regard to the need

(a) to eliminate unlawful discrimination and harassment, and

(b) to promote equality of opportunity between men and women.⁷⁰

A new section is inserted into the Sex Discrimination Act to the above effect⁷¹

The author has not, to date, seen any references being made to the gender equality duty in any equal pay claims but has seen the duty referred to in judicial review litigation.

Future Legislation

The BPD, together with other Directives⁷² are to be repealed with effect from 15 August 2009 by the Directive of the European Parliament and of the Council on the Implementation of The Principle of Equal Opportunities and

⁶⁹ Code of Practice Equal Pay Order 2003 – SI 2003/2865

⁷⁰ Section 84 Equality Act 2006

⁷¹ Section 76A SDA 1975

⁷² Namely the Equal Pay Directive, the Equal Treatment Directive and the Directive on Equal Treatment in Occupational Social Security Schemes

Equal Treatment of Men and Women in Matters of Employment and Occupation (the 2006 Directive).⁷³ The 2006 Directive intends to consolidate and update the four main directives on gender equality; its principal objective being 'to achieve more clarity and transparency of equal treatment legislation'⁷⁴ and to 'update existing secondary legislation, bringing it in line with recent judgments of the European Court of Justice which have clarified and further developed the concept of equality'⁷⁵. Therefore any legal uncertainties that have existed prior to the Directive should be resolved. The 2006 Directive equal pay provisions are based on the provisions of the EPD⁷⁶ 'according to which equal or equivalent work must be paid the same; a job classification system used for determining pay must be based on the same criteria for both men and women and drawn up so as to exclude any discrimination on grounds of sex'⁷⁷

As regards the BPD, the burden of proof remains the same but the 2006 Directive extends the rules on the burden of proof to occupational social security schemes.

At the Domestic level too there are proposed changes. The Government issued a consultation paper in June 2007⁷⁸ and its proposals relating to equal pay include bringing the equal pay provisions within a Single Equality Bill retaining the current differences between claims relating to contractual and

⁷³ Directive 2006/54/EC – 5 July 2006

⁷⁴ Page 2 Commission Staff Working Paper

⁷⁵ Ibid

⁷⁶ Directive 75/117/EEC

⁷⁷ Directive 2006/54/EC

⁷⁸ 'Discrimination Law Review – A Framework for fairness: Proposals for a Single Equality Bill for Great Britain'

non-contractual issues⁷⁹, include settled principles of equal pay which have arisen from legal judgments⁸⁰, retain the requirement for an actual comparator⁸¹ (see chapter 3) and consider how equal pay legislation could be simplified or make it easier to work in practice⁸². However a later paper⁸³ published by the Government's Equalities Office was not as explicit and contains limited references to equal pay⁸⁴.

The introduction of the 2006 Directive will have little impact upon LAs given that it consolidates the existing provisions. Similarly, if the domestic law changes reflect the proposals in the 2008 document they will have no impact on LAs apart from the representative actions which may make it cheaper to defend a smaller number of cases, the effect of any decisions will potentially have a wider impact unless the actions are restricted to general principles. This will mean that full consideration of individual cases will have to be undertaken in any event. There is also a potential impact upon industrial relations from the union perspective if a case is litigated by another body such as the EHRC.

⁷⁹ Paragraph 3.9 (a) Discrimination Law Review

⁸⁰ Paragraph 3.9 (b) Discrimination Law Review

⁸¹ Paragraph 3.9 (d) Discrimination Law Review

⁸² Paragraph 3.9 (c) Discrimination Law Review

⁸³ 'Framework for the Future – The Equality Bill' June 2008

⁸⁴ The 2008 proposals refer to evaluating equal pay job evaluation audits, banning secrecy clauses about pay and considering representative actions for discrimination cases – though its not clear if the latter includes equal pay cases

Chapter 3 - The Comparator Issue

To establish a claim under the EqPA a claimant is required to identify a comparator of the opposite sex who is receiving a higher rate of pay for doing the same job or like work. Identifying a comparator can be problematic for claimants as pay is generally viewed as a confidential matter between each individual employee and their employer, although there are ways that a claimant can obtain information such as using the questionnaire procedure (see below) or making an application request for information under the Freedom of Information Act 2000 (FOIA).

The EqPA, unlike other areas of anti discrimination law, does not allow the use of hypothetical comparators in order to prevent an 'employer from treating an employee less favourably on discriminatory grounds, than it treats or would treat other persons'⁸⁵. For an equal pay claim an actual comparator must be identified so, in theory, a claimant must identify her comparator at the outset or her claim will fail. However, it is not uncommon in practice, for claimants to cite a list of job titles rather than name one individual comparator so it is left to the LA to identify the comparator. This approach is contrary to the usual legal disclosure provisions in other jurisdictions that prevent parties going on a 'fishing expedition' to obtain unknown information.

⁸⁵ P394 Tolley's Discrimination in Employment Handbook

The Questionnaire Procedure

Section 42 of the Employment Act 2002 (EA) amended the EqPA by introducing a questionnaire procedure for employees to ask questions of an employer. Under section 7B of the EqPA an employee can serve a statutory questionnaire⁸⁶ on her employer at any time prior to an ET claim being presented or within 21 days if the claim has already been presented; although non compliance with this procedure does not prevent an EqPA claim being pursued. The advantage of this procedure for the claimant is that if the employer responds to the questionnaire it will provide additional information in support of her claim e.g. if the employer confirms that a comparator is paid more than the female claimant.

The employer has eight weeks from the date of service of the questionnaire to provide a response. The employer cannot be compelled to provide a response but if an employer 'deliberately and without reasonable excuse'⁸⁷ fails to reply within the requisite period or the reply is 'evasive or equivocal'⁸⁸ an adverse inference can be drawn by a tribunal that an employer has modified or contravened a term included due to the equality clause incorporated into the contract of employment⁸⁹. Any question can be asked and some solicitor representatives have even used the procedure to ask about the role of the union, with a view to issuing legal proceedings against the union. However it is open to an employer to decline to answer questions that would reveal

⁸⁶ The Equal pay (Questions and Replies) Order 2003 SI 722

⁸⁷ Section 7B(4)(a) Equal Pay Act

⁸⁸ Section 7B(4)(b) Equal Pay Act

⁸⁹ Section 7B(6) Equal Pay Act

'personal data'⁹⁰ about an individual employee that would breach the Data Protection Act 1998, although this practice may only postpone the providing of such information until a case management discussion hearing, when the tribunal can use case management orders requiring the employer to supply comparator information for up to six years preceding the date of the claim.

The purpose of the questionnaire is to assist employees in obtaining information from their employer to try to establish if there is a difference in pay and the reason for it so as to enable any disputes to be resolved in the workplace⁹¹. However, given the increase in the number of equal pay claims in the ETS, this appears to be over ambitious and unrealistic. A copy of the questionnaire is attached at Appendix 3.

Although there is some evidence of the questionnaire procedure being used pre-claim in EqPA claims brought against LAs⁹² this has not prevented the mass litigation that has caused concern for the Chair of the CEHR. It is submitted that the questionnaire procedure is inappropriate for use in multiple claims as it imposes a disproportionate burden on LAs both in administrative and financial terms.

Some employees' representatives make applications for comparator information under the FOIA which provides a general right of access to information held by public authorities⁹³. Personal data is exempt from

⁹⁰ Section 1(1) Data Protection Act

⁹¹ Per the introduction to the questionnaire procedure

⁹² From writers own knowledge

⁹³ Section 1 Freedom of Information Act 2000 –

disclosure where it relates to the person requesting the disclosure⁹⁴ and where the disclosure would breach any of the Data Protection Principles in the DPA⁹⁵. One claimant solicitor used the FOIA in 2005 to request information from a local authority about those job roles that attracted bonus payments and used that information in 2007 to cite as comparators in equal pay claims⁹⁶.

Whether to respond to a questionnaire is a dilemma for LAs, as if they do not supply the information requested they run the risk of an adverse inference being drawn by a tribunal; but if information is supplied it can assist the claimant in identifying her comparator⁹⁷. The practice of ETs accepting the citing of a comparator 'role' rather than a named individual appears to go beyond the legislation and is perhaps a step towards the use of the 'hypothetical comparator' referred to in other anti discrimination legislation.

Two cases in Scotland, *Amey Services Ltd v Cardigan* and *City of Edinburgh v Marr*⁹⁸ were appealed to the Employment Appeal Tribunal (EAT) because the ET ordered the employer to disclose its defence in circumstances where neither the comparators nor the basis of the claim equal pay claims had been established⁹⁹. If the respondent did not comply with the orders they were at

These requests are outside of the statutory questionnaire procedure as responses are due no later than the 20th working day following the date of receipt of the request under section 10 FOIA

⁹⁴ Ibid Section 40

⁹⁵ The Information Commissioners Office has produced guidance on the issues to consider when information is requested regarding public authority employees.

⁹⁶ From author's own knowledge

⁹⁷ A typical claimant questionnaire has contained 45 detailed questions including questions ranging from information about job descriptions, comparator information and to discussions with the unions about equal pay

⁹⁸ *Amey Services Ltd v Cardigan & Others* and *City of Edinburgh Council v Marr & Others* Appeal Nos UKEATS/0082/006/MT & UKEATS/0083/06/MT

⁹⁹ The case management orders included questions relating to whether the employer would plead that any difference in pay between the claimant and her male comparator was due to a genuine material factor and if so what was the difference and why would it justify any difference in pay.

risk of the response being struck out; the orders were very onerous on the respondents and extended beyond the intention of both the European and Domestic legislation. Fortunately this was recognised by the EAT as Lady Smith, sitting alone, commented that 'at the heart of any woman's equal pay claim lies the need to identify a male comparator'¹⁰⁰ and 'It is not for the respondent or for the Tribunal to do so'¹⁰¹. The EAT upheld the appeal by the employer on the basis that the employer cannot be asked to address the issue of a genuine material factor¹⁰² (GMF) defence until the claimants have presented a prima facie case by at least identifying a comparator.

Same Employer

Under the EqPA a female claimant can compare the terms and conditions of her employment with those of a man in the same employment as long as he is employed on like work, work rated as equivalent or undertaking work of equal value to her. The term 'same employment' has two aspects, the woman has to be employed by the same, or associated employer¹⁰³ at the same establishment as her comparator or at an different establishment covered by common terms and conditions.

This latter aspect is challenging for those LAs that provide an education service as under the School Standards and Framework Act 1998 (SSFA) and latterly the Schools Staffing (England) Regulations 2003 (the 2003

¹⁰⁰ Ibid Paragraph 8

¹⁰¹ Ibid Paragraph 9

¹⁰² Genuine Material Factor defences are considered in a later chapter

¹⁰³ Section 1 (6) (c) Equal Pay Act

Regulations) the statutory arrangements for the appointment of non-teaching staff is within the remit of the individual school governing body and not the local authority.¹⁰⁴ These latter legislative provisions were relied upon by a LA in the case of *South Tyneside Metropolitan Borough Council v Anderson*¹⁰⁵ to challenge an ET's decision that a learning support assistant in a school could compare herself to a street cleaner employed by the local authority.

However EAT rejected the LA's arguments and decided the issue on the application of s1 (6)¹⁰⁶ of the EqPA and found that the learning support assistant and her comparator were both employed by the LA under common terms and conditions, and that the discretion vested in the school governors was 'illusory'¹⁰⁷.

The LA had sought to rely on the case of *British Coal Corp v Smith*¹⁰⁸ where the women claimants were cleaners and canteen workers, who were citing as their comparators male employees at over 47 sites owned by the British Coal Corporation¹⁰⁹. The ET found that even though there were some local variations, that each of the four categories of worker were in the same

¹⁰⁴ Schedule 16 s 20(1) of the SSFA provided that where 'the governing body desire the appointment of a person to work in a non-teaching post at the school, they may recommend a person to the local education authority for appointment to the post'

¹⁰⁵ [2007] EWCA Civ 654

¹⁰⁶ Section 1(6) Equal Pay Act provides that 'men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes'.

¹⁰⁷ Ibid

¹⁰⁸ [1996] 3 AER 97

¹⁰⁹ It was accepted that the women could compare themselves to the comparators employed at their own collieries but their comparison with male employees at the other collieries were challenged

employment as their colleagues of the same description at different mines. The decision was appealed and finally when the House of Lords considered the case they agreed with the tribunal. The EAT in *Anderson*¹¹⁰ stated that *British Coal v Smith*¹¹¹ was an example of case 'where common terms and conditions can be found without the need for showing that the terms derived from the same collective agreement'¹¹² and distinguished the case.

The impact of this decision on LAs is that it increases the number of potential EqPA claims as some local authority areas have hundreds of community schools. There is also the issue of funding the equal pay claims for schools as the schools have their own delegated budgets devolved to them by the local authority¹¹³.

However where a claimant is employed at a voluntary aided school and the comparator employed by the local authority, her claim will fail as her employer is the governing body of the school and not the LA. This issue was considered by the EAT at the same time as the *South Tyneside*¹¹⁴ case in *Dolphin v Hartlepool Borough Council*¹¹⁵. The ET found that the comparators were not employed by the same employer nor employed in the same service as the claimants. The EAT upheld the tribunal's decision on the basis that there was no single body responsible for the difference in pay. This argument has been

¹¹⁰ [2007] EWCA Civ 654

¹¹¹ [1996] 3 AER 97

¹¹² Paragraph 15 *South Tyneside Metropolitan Borough Council v Anderson* [2007] EWCA Civ 654

¹¹³ The Schools Standards and Framework Act 1998 Sections 49-50

¹¹⁴ *South Tyneside v Anderson* [2007] EWCA Civ 654

¹¹⁵ *Dolphin & Others v Hartlepool Borough Council & Others* [2006] UKEAT/O559/05/LA

used to defend equal pay cases as LA legal departments also undertake legal work for voluntary aided schools.

In *Robertson v DEFRA*¹¹⁶ the claimants attempted to compare themselves with members of another government department on the basis that they all worked for the Civil Service but it was held that they did not work at the same establishment and were not subject to the same terms and conditions as each Department negotiated its own terms and conditions of employment.

Mummery LJ¹¹⁷ stated that 'the single source to whom the inequality of pay is attributed under Article 141 is not necessarily the employer of both the applicants and of the comparators'¹¹⁸

Past or Future Comparator

It has been established that an actual, rather than hypothetical, comparator has to exist but the comparator does not necessarily have to be employed at the time the claimant presents her claim to the ET.

It was established in *Macarthy's Limited v Smith*¹¹⁹ that a claimant can compare herself with a male comparator who has worked within the same establishment or service without the need for them to be in contemporaneous

¹¹⁶ [2005] IRLR 363

¹¹⁷ *Ibid* Paragraph 23

¹¹⁸ According to Steele Mummery LJ was influenced by a lack of a deliberate attempt to avoid the effect of the equal pay legislation in the Robertson case; Steele goes on to consider that it would be very difficult for any court to distinguish between employers who attempt to avoid the effects of equal pay and those employers who devise different pay and negotiating systems legitimately. Steele I 'Tracing the Single Source: Choice of Comparators in Equal Pay Claims.' ILJ 2005.34 (338)

¹¹⁹ [1980] ICR 672

employment. The claimant was employed as a warehouse manageress and brought an equal pay claim as her predecessor was a man who earned £10 a week more. The claimant took up the post four months after the man had left. The respondent argued that the EqPA did not apply to cases of successive employment so the case was referred to the ECJ who decided that it was permissible for a claimant to cite a comparator who had been her predecessor provided they undertook equal work.¹²⁰

The EAT held in the case of *Diocese of Hallam Trustee v Connaughton*¹²¹ that a claimant can also rely upon a successor as a male comparator. In this case the male successor was employed immediately after the claimant on higher pay. This decision appears to be contrary to the principle that in equal pay cases there is no hypothetical comparator. However the decision in *Hallam* has recently been considered by the EAT¹²² to be 'fundamentally defective' and 'not an authority to be relied upon in any way'¹²³.

In *Walton Centre for Neurology & Neurosurgery NHS Trust v Bewley*¹²⁴ the claimant presented a claim to the ET based upon a JES effective from 1 October 2004. For the period after that date she claimed that her job and her male comparators were rated as equivalent under the JES whilst her claim

¹²⁰ 'The principle that men and women should receive equal pay for equal work, enshrined in article 119 of the EC treaty, is not confined to situations in which men and women are contemporaneously doing equal work for the same employer. The principle of equal pay enshrined in article 119 applies to the case where it is established that, having regard to the nature of her services, a woman has received less pay than a man who was employed prior to the woman's period of employment and who did equal work for the employer' - *Macarthys Ltd v Smith* [1980] EUECJ R-129/79

¹²¹ [1996] ICR 860

¹²² *Walton Centre for Neurology & Neurosurgery NHS Trust v Bewley* [2008] UKEAT 0564/07

¹²³ *Ibid* per Elias J

¹²⁴ *Ibid*

prior to the 1 October claimed that her work was of equal value to that of her comparators. However of her three comparators only one had been employed prior to October 2004 and then for only six months. The issue was whether she could make the comparison extending back for the full six years from the date of her claim or whether she was barred from claiming for the earlier period when the comparator was not employed. The ET judge felt bound by the decision in *Hallam* where the EAT had decided the case relying upon a passage from *Macarthy's Ltd v Smith*¹²⁵ which it took to be from the decision of the ECJ¹²⁶. However, the passage was actually from the submission by the Commission; and the ECJ had rejected the argument for a hypothetical comparator.

The EAT in considering the appeal in *Bewley*, whilst not ruling out a more flexible approach by the ECJ regarding comparators in the future, took the view that *Hallam*¹²⁷ was wrongly decided *per incuriam* and that the comparison with a successor could not be pursued.

This decision is a positive one for LAs as it limits the extent and nature of comparison by a female claimant to a male successor and limits the amount of any possible back pay. This is particularly useful decision for those areas of work where there is a high turnover of staff.

¹²⁵ [1980] ICR 672

¹²⁶ The passage quoted in *Hallam* was that 'neither article 119 of the Treaty nor article 1 of the Directive specify any requirement of an actual comparator of the opposite sex. Questions of proof which might arise would not appear to be insuperable. The fundamental aim of the abolition of sex discrimination would be damaged if a woman always had to find a male comparator'

¹²⁷ [1996] ICR 860

It is reassuring for LAs to know that the CA will not interfere in first instance decisions of tribunals provided the reasons are substantiated; the decision assists LAs when considering those cases involving employees at schools where their comparator is employed at another. It is important for LAs to ensure that job descriptions accurately reflect the duties that staff are undertaking. It also perhaps redresses the balance in the employer's favour, as was highlighted earlier the tribunal's approach to disclosure of information appears to be weighted in favour of the employee.

Work Rated as Equivalent

The second ground on which a claim for equal pay may be made is where the claimant and her comparator are undertaking work rated as equivalent under a JES is governed by Section 1(4) of the EqPA. Namely where their jobs

'have been given an equal in terms of the demand made on a worker under various headings (for instance effort, skill, decision) on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading.'¹³⁰

The recent CA case of *Redcar & Cleveland Borough Council v Bainbridge & Others*¹³¹ concerned comparators where the court held that a female claimant bringing a claim under s1(2)(b) of the EqPA was able to rely on a male comparator who was placed in a lower grade than she was in a job evaluation study but who in fact received more pay. Although the LA argued that where the male comparator was placed in a lower grade the claimant was not employed on work 'rated as equivalent' with him the court gave s1(2) (b) a

¹³⁰ S 1(5) Equal Pay Act 1970

¹³¹ *Redcar & Cleveland Borough Council v Bainbridge & Others* [2007] EWCA Civ 929

purposive construction. The effect of this decision is that it widens the choice of comparator for women employed in LAs.¹³²

Work of Equal Value

This third ground for a claim for equal pay was established in 1983 following the ruling of the European Court of Justice in a EC Commission case¹³³ as Section 1 (5) of the EqPA meant that a women could only have her work rated as equivalent with a mans if both their jobs had been given an equal value under a JES but such a study could not be carried out unless the employer consented.

The Commission of the European Community took the view that the state of the UK law did not accord with the government's obligation to implement article 119 and the Commission applied to the ECJ for a declaration that the UK had not 'adopted measures enabling women to obtain equal pay for equal work in circumstances where there had been no job evaluation study' The EqPA was amended by the introduction of the 1983 Equal Pay (Amendment) Regulations 1983¹³⁴ which established a procedure for equal value claims and led to the creation of specific procedures for dealing with those claims in ETs under The Employment Tribunal (Constitution and Rules of Procedure)

¹³² so if the lower grade male earns higher pay overall than the comparator who is rated as equivalent to the claimant, the claimant will choose the lower graded comparator as this will give her a higher value claim.

¹³³ The Commission of the European Communities v united Kingdom of great Britain and Northern Ireland case 61/82 [1982] ICR 578

¹³⁴ SI 1983/1794

Regulations 2004.¹³⁵ Equal Pay cases are also meant to be heard by specialist Employment Judges.¹³⁶

Rules of Procedure for Equal value Claims

The Employment Tribunals (Equal Value) Rules of Procedure¹³⁷, provide for the appointment of an independent expert to compare the value of two different jobs. The Rules define an 'independent expert' as being a member of the panel of independent experts mentioned in section 2A(4) of the EqPA which is a 'reference to a person who is for the time being designated by the Advisory Conciliation and Arbitration Service'¹³⁸. Neither party can call an expert or put in evidence of an expert's report without the permission of the tribunal.

The Rules set out an indicative timescales for dealing with Equal value claims of 25 weeks¹³⁹ or to 37 weeks¹⁴⁰. The timescales run from the presentation of the claim to the tribunal's determination of the equal value issue, so the overall length of the case may be much longer as was evidenced by the long running equal pay cases in the North East.

The Rules also set out the standard orders that the Employment Judge has the power to make in equal pay cases including the disclosure of information

¹³⁵ The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004.

¹³⁶ Ibid Regulation 8(5)

¹³⁷ Ibid - Schedule 6

¹³⁸ Section 2A(4) Equal Pay Act 1970

¹³⁹ This timescale applies where independent expert evidence is not required

¹⁴⁰ The longer timescale applies if the case involves expert evidence

to all parties and the independent expert, as appropriate. The Rules provide for an stage 1 equal value hearing to be held; this is an initial hearing where the Tribunal, inter alia, can determine whether the issue of whether the claimant's job and her comparator's job are of equal value requires an independent expert's report or whether the Tribunal itself can reach that decision. If the Tribunal's view is that an independent expert's report is required the case will proceed to a stage 2 equal value hearing if not, the case will be listed for a full hearing.

At the stage 2 equal value hearing the Tribunal will determine any relevant facts that cannot be agreed between the parties and also prescribes what issues the experts report will cover and the date by which the report will be completed. There are also rules regarding the use of expert evidence and the duties and powers of the independent expert.

Disparate Adverse Effect

An employer may have an argument that where the female claimant forms part of a mixed gender group there is no disparate adverse effect on the claimant and thus the prima facie case of indirect discrimination has not been established. As stated earlier the claimant has to show that there is a difference in pay between herself and her male comparator. In *Tyne & Wear Passenger Transport Executive v Best*¹⁴¹ the ET found that the employer had indirectly discriminated against the female employees under the EqPA. The female employees formed a small group of females who had been employed

¹⁴¹ *Tyne & wear Passenger Transport Executive v Best & Fulton* - Appeal No. UKEAT/0627/05 - Judgment delivered on 21 December 2006

employer to another by preserving to a great extent the employee's 'statutory and contractual employment rights'¹⁴⁵ which the employee enjoyed before the transfer.

LAs' contract out a number of services to private contractors and the impact of equal pay claims can be a thorny issue for the contractual arrangements particularly when there is a change of contractor. In the case of *Lawrence v Regent Office Care Ltd*¹⁴⁶ the ECJ considered whether LA dinner ladies who had transferred to a private organisation could compare themselves to the local authority employees who had been rated as equivalent to them prior to a TUPE transfer. The ECJ considered the EPD and Article 141 and held that there was an absence of a single source which could put right the discrimination as the ladies were no longer employed by the local authority.¹⁴⁷ The dinner ladies were unable to cite the local authority employees as their comparators.

The judgment in the *Lawrence* case was seen to be of 'considerable importance'¹⁴⁸ as the 'implications of the ruling for equality laws are considerable'¹⁴⁹ and leaves the issue of how to 'solve the difficult and as yet unsatisfactorily resolved problem of achieving cross-sectoral pay equality for

¹⁴⁵ Page 519 Blackstone's Employment Law Practice 2008

¹⁴⁶ *Lawrence v Regent Office Care Ltd* Case C- 320/00 [2002] IRLR 822

¹⁴⁷ The judgment stated that if differences in pay arise as between undertakings or establishments, in which the respective employers are separately responsible for the terms and conditions of employment within their own undertaking or establishment, they cannot possibly be held individually accountable for any differences in the terms and conditions between those undertakings. *Lawrence v Regent Office Care Ltd* Case C- 320/00 [2002] IRLR 822

¹⁴⁸ Barrett G. 'Shall I compare thee to...?' On Article 141 and *Lawrence* ILJ 2006 35 (93)

¹⁴⁹ *Ibid*

the benefit of predominantly female sectors of the labour market¹⁵⁰ According to Barrett¹⁵¹ the decision went beyond the issue of comparators where there has been a transfer of undertaking but had wider implications for comparators in all the different heads of anti-discrimination laws¹⁵².

A similar decision was reached by the CA in the case of *Armstrong v Newcastle upon Tyne Hospital Trust*¹⁵³ which concerned the claims of female domestic workers who were employed at a number of hospitals within the Trust who compared themselves with male portering staff employed at the Trusts hospitals. Both categories of workers had been employed at the hospitals and both earned bonus schemes until the process of compulsory competitive tendering had lead to the domestic services being contracted out in 1998 resulted in the loss of the female staff bonus payments. When the service was brought back in house the female staff brought equal pay claims on the basis that their work was of equal value to that of the porters following their return to the employment of the Trust. The EAT had found that there was no single source of employment that created the disparity.¹⁵⁴ The CA dismissed the appeal by the claimants on the grounds the Trust had not been responsible for establishing the terms of employment of those employees whose employment had begun prior to 1998 even though it had some involvement in harmonising terms and conditions.

¹⁵⁰ Ibid

¹⁵¹ Ibid

¹⁵² Barrett also argues that had the transferred employees relied upon the Acquired Rights Directive there should be no reason why 'a Treaty- ordained obligation to equal pay should not..... be capable of moving to the acquiring enterprise' under the Directive.

¹⁵³ [2005] EWCA Civ 1608

¹⁵⁴ Per Lady Justice Arden paragraph 10 'to constitute a single source for the purpose of article 141, it is not enough for theclaimants to show that they have the same employer as the comparators. They must show that that employer was also the body responsible for setting the terms of both groups of employees'

In the 2003 case of *Salgado v Guiseppe*¹⁵⁵ the EAT considered the extent to

If a female claimant cites a male comparator who was the subject of a TUPE transfer and is on protected terms and conditions the employer has a potential genuine material factor defence¹⁵⁵. This is important to LAs where employees on highways work, for example, have transferred in-house from the private sector on higher bonuses etc than existing employees. LAs have pleaded that comparators are on protected TUPE terms in response to equal pay claims¹⁵⁶.

NHS. The EAT had to consider two issues (1) what was the time limit for

A recent House of Lords case, *Powerhouse Retail v Burroughs*,¹⁵⁷ considered the meaning and effect of the statutory time limit and the bringing of claims under the EqPA where there had been a TUPE¹⁵⁸ transfer and where the claim relates to the operation of the equality clause on an occupational pension scheme. The case related to the electricity industry but its impact was wide ranging across all sectors including local government. The House of Lords decided that where there had been a TUPE transfer the six months statutory time limit under the EqPA began to run, for the purposes of a claim brought against a transferor, from the date of the transfer and not from the termination of the employee's employment with the transferee¹⁵⁹ The claimants claims were out of time as they had presented their claims more than six months after the TUPE transfer.

¹⁵⁵ King's College London v Clark [2003] Appeal No. EAT/1049/02

¹⁵⁶ Authors own knowledge

¹⁵⁷ Powerhouse Retail Ltd & Others v Burroughs & Others [2006] UKHL 13

¹⁵⁸ The case referred to the earlier 1981 TUPE Regulations – SI 1981/1794

¹⁵⁹ 'The best way of achieving the purpose of the time limit is to link it as closely as possible to the liability which is the subject of the claim.' Paragraph 28 Lord Hope Powerhouse Retail Ltd & Others v Burroughs & Others [2006] UKHL 13

In the 2008 case of *Sodexo v Guttridge*¹⁶⁰ the EAT considered the extent to which liabilities under the EqPA transfer under TUPE. The female claimants were cleaners/domestics who had previously been employed by an NHS Trust but who had transferred to Sodexo, a private sector contractor, in 2001. In 2006 they brought Equal Pay claims on the basis of their jobs being of equal value with male employees and as they were claiming six years back pay the claims covered a period when they were still in the employment of the NHS. The EAT had to consider two issues (1) what was the time limit for bringing an equal pay claim in respect of pay paid by the former employer and (2) if the former employer was in breach of the EqPA is there an on-going contractual right for the former employee to be paid at the higher rate after the transfer? The employers relied upon section 2ZA of the EqPA¹⁶¹ and also the decision in *Powerhouse*¹⁶² to argue that the claims, in so far as they applied to a period before the transfer, were out of time as they should have been brought within six months of the transfer. The EAT held that as the employees did not bring their claims until five years after the transfer the claims for back pay prior to the transfer were out of time.

The EAT also held that since under the TUPE Regulations all liabilities transfer to the new employer it would be possible for a claimant to cite a male employee who had never transferred to the new employer as her comparator in an equal pay claim. This was on the proviso that the claimants could show that the former employer had been in breach of the equality clause prior to the

¹⁶⁰ EAT 31 July 2008

¹⁶¹ Under Section 2ZA(3) the qualifying date is the date falling six months after the last day on which the woman was employed in the employment

¹⁶² *Powerhouse Retail Ltd & Others v Burroughs & Others* [2006] UKHL 13

transfer so the claimants' entitlement to the higher rate pay they should have been earning would continue after the transfer. This decision has significant implications for those LAs transferring staff in-house from, for example, NHS trusts for the provision of care, as taking on employees under TUPE could leave LAs liable for unwittingly continuing unequal pay practices undertaken by the NHS.

This also has implications for contractual arrangements as many providers are unwilling to take on the risk of TUPE staff already without indemnities from LAs. This issue was identified in the questionnaire responses received, as a rise in the cost of residential and home care costs will become too expensive to sustain indefinitely and catering provision to schools will become unaffordable. Where services were tendered to the private sector the contracts had to now include indemnities to cover the possibility of the costs of equal pay and as a result procurement exercises were unsuccessful because, it was assumed, commercial contractors refused to carry the risk of equal pay claims¹⁶³.

¹⁶³ It should be noted that the questionnaire responses were obtained prior to the Sodexo decision.

Chapter Four - Employer's Defences

Once a claimant has established that she has an equal pay claim and that she has cited a correct comparator (see Chapter 3) it is then open to the employer to suggest a defence to the claim. There are a number of ways the employer can try to establish a defence to an equal pay claim.

The Jobs Have Already Been Evaluated

For equal value claims where the work of the claimant and the comparator has already been subjected to a JES and been given different values and, there are no reasonable grounds to suggest that the study itself was discriminatory on the grounds of sex, the employer should be able to put forward a defence to any such claim. The scheme has to comply with section 1(5) of the Equal Pay Act¹⁶⁴

The burden of proof as to the study being prima facie discriminatory lies with the employee who would have to challenge the scheme on the basis that it applied different criteria/scoring methods to women and men i.e. that it was inherently discriminatory¹⁶⁵.

However it can be seen from the earlier statistics that less than 50% of LAs had undertaken pay reviews¹⁶⁶. Indeed 63% of the LAs who responded to the questionnaires confirmed that they were not compliant with the 2004 NJC agreement as a pay review had not been undertaken and put into operation

¹⁶⁴ See Chapter 3

¹⁶⁵ This would likely involve the use of expert evidence referred to in Chapter 2.

¹⁶⁶ The Times 2 January 2008

by 31 March 2007; although 38 % of respondents stated that the anticipated completion date for the pay review would be April 2009. As the pay reviews are dependant upon a job evaluation process having taken place it seems unlikely that having undertaken a job evaluation study will give rise to a legitimate defence to many claims. An employer cannot rely on a job evaluation study to defend claims retrospectively because that would be tantamount to tailoring the outcome to justify the pay levels and would be unfair on the employees.

Job Evaluation Scheme – Which Scheme To Use?

For LAs the issue of which JES to use has been a contentious issue and is of concern for the staff employed. The unions locally recognise the National Joint Council (NJC) Job Evaluation Scheme¹⁶⁷; Unison instruct their negotiators to promote use of the scheme 'wherever possible'¹⁶⁸. The NJC scheme tends in practice to be advantageous to front line staff especially those that provide a personal service. The other well known scheme is the Hay JES which has traditionally been used for higher graded managerial staff and includes a higher weighting for technical skills which should be more favourable to professional staff such as accountants, lawyers and surveyors. However over recent years it is has generally been the higher paid staff who have had a pay reduction after JES has been implemented whilst the lower paid female dominated roles have gained. This presents recruitment difficulties for LAs but is a potential problem for the unions who represent all

¹⁶⁷ Authors own knowledge

¹⁶⁸ Unison guidance to local government branches - Single Status, Job Evaluation And Pay And Grading Reviews, Guidance On Negotiating Settlements

grades as to whether to agree with the use of two JES and, if they do, at which point should the two schemes abut. Unison's view is very clear that the NJC scheme is the preferred scheme¹⁶⁹ but in law there is nothing to prohibit an employer using two different job evaluation schemes providing both schemes are compliant with s 1(5) of the Equal Pay Act. The unions advise their negotiators to resist the implementation of two schemes¹⁷⁰ because further discrimination and equal pay claims could result which could put the union at risk of being accused of discrimination¹⁷¹.

Genuine Material Factor Defence

An employer can defend a EqPA claim if there is a Genuine Material Factor (GMF) defence i.e. specific circumstances that justify the disparity in pay that are not tainted by a difference in gender as defined by section 1(3) Equal pay Act:

'An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor-

(a) in the case of an equality clause falling within subsection (2)(a) or (b) above, must be a material difference between the woman's case and the man's; and

(b) in the case of an equality clause falling within subsection (2)(c) above may be such a material difference.'¹⁷²

¹⁶⁹ Unison guidance explicitly states that 'the trade unions remain firmly convinced that the NJC job evaluation scheme is the best scheme to use in England and Wales to ensure equal pay outcomes'

¹⁷⁰ Ibid

¹⁷¹ See Chapter 5

¹⁷² Section 1(3) Equal Pay Act

The burden is on the employer to make out the GMF defence on the balance of probabilities.

The first issue to be determined is whether there is a difference in pay between the claimant and her comparator. If there is, is the difference due to sex discrimination or some other factor? A GMF defence was pleaded by Cumbria County Council in equal pay claims made by female caterers, cleaners and carers in respect of a productivity scheme paid to male road workers and groundsmen¹⁷³. The tribunal found that the bonuses were paid as of right to the men and were not connected to productivity as the scheme was originally designed to do; the authority's GMF defence failed apart from where it applied to the category of carers as the tribunal accepted that that category of work was not amenable to a productivity related bonus.

The tribunal also rejected a market forces defence submitted by Cumbria. Market forces relates to the 'going rate' for the job in the labour market as a whole, for example if the local authority pay grade for an electrician did not attract any job applicants the payment of a recruitment and retention allowance could be a GMF defence and could be a justification for a differential in pay even if it has an adverse effect on women provided the market itself does not operate on sexist principles¹⁷⁴. Cumbria appealed the tribunal decision and there were cross appeals by the claimants on mainly the

¹⁷³ Conjoined appeals in cases of Cumbria County Council v Dow & Others; Joss & Others v Cumbria County Council; Cumbria County Council v (1) Elliott & Others & (2) Joss & Others; Joss & Others v Cumbria County Council; Cumbria County Council v (1) Joss & Others (2) Elliott & Others [2008] IRLR 91.

¹⁷⁴ Enderby v Frenchay Health Authority [1994] ICR 112

success of the GMF defence as regards the carers and on some procedural issues.

As the female workers were paid less than the male workers a prima facie case of indirect discrimination was made out, thus the burden of proof passed to Cumbria to rebut the presumption and to show that the difference in pay was not tainted by sex.

The EAT, using the judgment of Lord Nicholls in *Glasgow City Council v Marshall*¹⁷⁵, identified a number of factors that the employer would have to satisfy the ET on in order to discharge the burden of proof. The first is that the explanation given by the employer is genuine and not a sham or a pretence; secondly that the less favourable treatment is due to the reason; thirdly that the reason is not 'the difference of sex'; and finally that the factor relied upon is or may be a 'material difference'.¹⁷⁶ The decision went on to say that if the employer satisfied the tribunal that there was no sex discrimination then there was no obligation to proceed to the fourth stage i.e. to justify the pay disparity.

The EAT also observed that where pay arrangements 'reflected historical sexist assumptions about what jobs and rates of pay are appropriate for men and women it will be a rare case in practice where the employer is able to establish that the pay structure is not sex tainted'.¹⁷⁷ Interestingly the female workers had been subject to a bonus scheme themselves until 1988 when the

¹⁷⁵ [2000] ICR 196

¹⁷⁶ Per Lord Nicholls 'a significant and relevant difference, between the woman's case and the man's case.

¹⁷⁷ [2008] IRLR 91 Elias J Paragraph 18

scheme was bought out by the local authority¹⁷⁸. The EAT found that the Tribunal's reasoning on the issue of the whether carers could be subjected to a similar scheme was a legitimate factor but as Cumbria could not rely on the productivity scheme as being a genuine scheme then it was irrelevant and the appeal as to the carers was successful.

The EAT's decision was to remit the issue of the market forces argument to be considered by a freshly constituted tribunal as there were procedural defects in the way the evidence was considered by the original tribunal. The EAT also stated that there was insufficient evidence in the hearing as to what the 'market rate' actually was even though the Council's witnesses in the tribunal referred to the removal of the bonuses as being 'commercial suicide' and 'commercial madness'¹⁷⁹. This is an issue to be borne in mind for local authorities intending to use a market rates argument as a tribunal will need to gather empirical evidence that the rate of pay represents a true market rate and is not a 'sham'.

The case of *Chief Constable of West Midlands Police v Blackburn & Manley*¹⁸⁰ involved female police officers who earned less than their male comparators for like work. This was accepted but the reason given was that the men worked shifts and received a special allowance for working nights. The women did not work nights because it was incompatible with their child care responsibilities. The tribunal held that it was a legitimate objective to

¹⁷⁸ this in retrospect must appear to be somewhat a 'faux pas' now by Cumbria (and any other authority that has removed bonus schemes for only female dominated roles)

¹⁷⁹ Paragraph 101 Ibid

¹⁸⁰ *The Chief Constable of West Midlands v (1) Blackburn & (2) Manley* [2007] EAT/0007/07MAA

reward night work but that the Chief Constable could have paid the claimants as though they had done night work even though they had not¹⁸¹.

The Chief Constable appealed the decision on the basis that the tribunal had concluded that rewarding night time working was a legitimate aim and it was not open to the tribunal to substitute the Chief Constable's aim with the aim of another scheme used by another force (Sussex) and it had misdirected itself on the approach to proportionality. The EAT decided that the tribunal had misunderstood the nature of the justification defence and had erred in concluding that the differential was not reasonably justified.¹⁸²

Thus it follows that if LAs were to pay a modest sum for unsocial hours working e.g. night care cover at supported living schemes, even where female workers cannot comply because of child care commitments, it is likely that would be considered to be a proportionate means of achieving a legitimate aim.¹⁸³

In *Grundy v British Airways*¹⁸⁴, the CA decided that the tribunal did not err in focussing on the disadvantaged group when deciding if a difference in pay had a disparate adverse impact on women and so must be justified by the employer. The claimant was a member of support cabin crew who was undertaking like work as cabin crew but did not receive increments. The ratio

¹⁸¹ The tribunal felt that the expenditure in doing so would not be significant but would have redressed the discrimination.

¹⁸² Ibid per Elias J 'Nothing in the Equal Pay Act requires an employer to deem that women have done what they have not done. The payment of money to compensate for the economic disadvantages suffered by those who have child care responsibilities is not what the Equal Pay Act requires. Nor is the assessment of the employer's ability to pay sums of this kind a task which Parliament could conceivably have expected tribunals to do' *The Chief Constable of West Midlands v (1) Blackburn & (2) Manley* [2007] EAT/0007/07MAA

¹⁸³ That is not the end of the matter however as it is likely the case will be appealed.

¹⁸⁴ *Grundy v British Airways PLC* [2007] EWCA Civ 1020

of women to men was greater than it was for cabin crew but as there was a greater number of cabin crew members than support crew members the impact upon the women was smaller in absolute numbers. The tribunal had found that the pay differential was a policy, criterion or practice that was to the detriment of a greater proportion of women than men and had found that it was not justified. The EAT however said that the focus had to be on the larger advantaged group rather than the smaller disadvantaged group and that there was no disparate impact. The CA however disagreed and held that the tribunal had not erred in law and that many of the equal pay cases were fact sensitive and allowed the appeal by the cabin crew.

As regards GMF defences to EqPA claims, 75% of respondents to the research questionnaire indicated they had a GMF defence to over 40% of the claims. The GMF reasons given were that there was a non gender reason for the pay differential and any productivity or attendance payments could be objectively justified. One respondent's GMF related to pay protection that had been applied from April 2005 on the grounds that the protection was not implemented to deliberately perpetuate unequal pay¹⁸⁵. Other defences included a market forces defence and the implementation of collective agreements¹⁸⁶.

¹⁸⁵ It should be noted that the questionnaire responses were provided prior to the decision in the Bainbridge case [2008] EWCA Civ 885 which was promulgated in July 2008.

¹⁸⁶ It should be noted that this response was provided prior to the decision in Allen v GMB [2008] EWCA Civ 810 which was promulgated in July 2008

Chapter 5 Remedies and Implications

Remedies

If a breach of the Equal Pay Act has been proven a claimant is entitled to a remedy from the tribunal. 'The primary remedy for a claimant still employed by the respondent is the enforcement of the equality clause'¹⁸⁷ She will be entitled to the increased pay and improved contractual terms as her comparator under section 1 (1) Equal Pay Act.¹⁸⁸ She will also be entitled to back pay together with interest to address the historical disparity¹⁸⁹.

There is no award for injury to feelings or other non-economic losses or exemplary damages in equal pay cases due to the contractual nature of the claim.¹⁹⁰ This is another difference between the Equal Pay Act and other types of discrimination cases where in the latter cases the amount unlimited compensation is awarded which can be substantial depending upon the extent and degree of the discrimination. A claimant can also receive an injury to feelings award up to £25,000 in accordance with the *Vento* guidelines¹⁹¹

¹⁸⁷ Page 415 Tolleys Discrimination in Employment Handbook

¹⁸⁸ Section 1(5) Equal Pay Act 1970 provides if the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

¹⁸⁹ The time limits relating to equal pay claims were dealt with briefly in Chapter 2 when it was shown that the period to which back pay applies is up to six years from the date of the presentation of the equal pay claim to the employment tribunal

¹⁹⁰ Per the *Newcastle upon Tyne Council v Allan* [2005] ICR

¹⁹¹ The case of *Chief Constable of West Yorkshire v Vento (No.2)* [2002] IRLR 177 established three bands of injury to feelings awards

Male Contingent Claims

Male employees have also lodged EqPA claims naming female comparators who have been successful in equal pay claims or where their claims have been settled by LAs¹⁹². An issue for LAs is what claim, if any, do these men have and what compensation, if successful, should they be entitled to. The claims are known as male contingent claims (MCC) as the claims of the men are dependent upon the outcome of the women's claims. The issue was considered by the Newcastle upon Tyne ET in 2007 where the tribunal's judgment noted the issue was 'one of very considerable importance'¹⁹³ and 'there are very many MCC across nearly all of these Local Authority equal pay multiple claims..... within this region'¹⁹⁴.

The tribunal considered whether the MCC should be entitled to the same amount of back pay as their female comparators. However, given that the female employees' claims had been settled without any finding of fact by the ET as to whether a breach of the equality clause had occurred, the primary claim of the male employees was a claim under section 6(6) of the SDA as it amounted to sex discrimination¹⁹⁵.

The ET's decision was that the MCC were entitled to an equality clause with their female comparators from the date upon which the female comparators presented their claims to the tribunal; which has financial implications for LAs

¹⁹² Authors own knowledge

¹⁹³ Paragraph 2.5 of the decision in the conjoined cases of *Abbott & Others v South Tyneside MBC; Llewellyn v Hartlepool Borough Council; Matthews v Middlesbrough Borough Council*. Reserved judgment 7/11/07

¹⁹⁴ *Ibid*

¹⁹⁵ The men claimed that the decision not to offer them a settlement of their claims amounted to sex discrimination under 6(2)(a) or 6(2)(b) as being a refusal or deliberate omission to give the men access to 'any other benefits' or that it was a 'detriment'.

as, depending on the number of contingent claims, it increases the liability for claims.

The MCC were not entitled to the comparators' arrears of pay accruing prior to that date. Part of the basis for this view was that there was no evidence of sex discrimination between the female claimant and the MCC until the female claimant presents her claim to the tribunal and is successful in her claim against her comparator¹⁹⁶ ..

However if an appeal against the decision is allowed it would appear to have the effect of allowing claims by either gender contingent upon the success of a claim by the opposite gender. Where will the line be drawn? There must be a point where the disparity is redressed otherwise, apart from time limit issues; contingent claims could go on indefinitely.

As regards the decision by South Tyneside not to offer the men a settlement of their claims the tribunal accepted that the initial decision to settle claims was made on a non-specific gender basis, but as there was no clear reason as to why only five out of a possible one hundred and forty of the men's claims were settled the tribunal decided that the MCC were subjected to a detriment¹⁹⁷ by not offering them the chance to settle their claims.

The decision has been appealed and is due to be heard in March 2009.

However this leaves matters somewhat open ended for those LAs seeking to

¹⁹⁶ The MCC cannot have a claim of sex discrimination against the female's comparator as they are both men

¹⁹⁷ Contrary to section 6(2) of the Sex Discrimination Act 1975

settle MCC. In reality LAs would be foolish to settle any case prior to an appeal being heard but in settlement negotiations claimant solicitors specifically ask if MCCs are going to be excluded from any settlement discussions¹⁹⁸ presumably with future sex discrimination claims in mind.

Job Evaluation Scheme – Retrospective Effect?

The basis of a claimant establishing a EqPA claim was discussed earlier¹⁹⁹. The issue in the *Bainbridge*²⁰⁰ case was whether the claimant would be entitled to back pay for a claim based on a 'work rated as equivalent' period pre-dating the implementation of the JES. The ET, EAT and CA all found that a JES does not have retrospective effect. Though a JES might show that the jobs were of equal value prior to the JES and in those circumstances it may be that a JES could be relied upon to support an equal value claim covering a period pre-dating its implementation. There would be greater financial liability for LAs in such cases as the period for back pay could go back the full six years.

In the *Bainbridge* case some claimants were successful in establishing equal value claims but then tried to pursue other claims citing other comparators for the same period as their work had been rated as equivalent under a JES. The council argued *res judicata*²⁰¹ however the CA held that the claims could proceed as the second claim was based on an equivalent rating under a JES

¹⁹⁸ Authors own knowledge

¹⁹⁹ See Chapter 3

²⁰⁰ *Redcar & Cleveland Borough Council v Bainbridge & Others* [2007] EWCA Civ 929

²⁰¹ *Res judicata* is a legal term that prevents the same claim being raised again between the parties to the litigation.

rather than a claim for equal value. This has implications for LAs in defending claims or intending to settle claims to ensure that all claims are included in any settlement agreement. In practice the claims lodged by represented claimants are pleaded in the alternative including equal value claims so it is important for LAs to plead a defence to both types of claim or if cases are settled to ensure that any compromise agreement settles all possible equal pay claims of whatever nature.

Pay Protection

The judgments in the conjoined appeals to the court of appeal of *Redcar & Cleveland Borough Council v Bainbridge* and *Surtees & Others v Middlesbrough Borough Council*²⁰²; were promulgated on 27 July 2008. The EHRC was permitted to intervene in the appeal in order to make submissions on the application and interpretation of the issue of 'sex discrimination' as it applied to pay and the management of changes in pay structures by means of pay protection. The Commissions submissions total 53 pages²⁰³ but in essence they related to public policy considerations²⁰⁴.

The long and complex judgment related to the issues of pay protection arrangements (PPA) for those staff whose pay was reduced after a JES was implemented where mainly female roles (e.g. catering and care) were rated as

²⁰² [2008] EWCA Civ 885 Case No:2006/2558,2007/0829,2007/2005

²⁰³ Initial submissions were dated 4 January 2008 and further submissions were made on 21 January 2008

²⁰⁴ Paragraph 72 of the submissions stated that it was important to strike 'the appropriate fair balance between the competing policy considerations (i) upholding the right to equal pay and ensuring that any limitations placed on that right are proportionate to legitimate aims, while (ii) not discouraging employers from undertaking job evaluation at all, lest they uncover indirect discrimination and be required immediately to equalise pay' Written Submissions of the Commission for Equality & Human Rights dated 4 January 2008

equivalent to various jobs performed by male employees (road workers, refuse collection and gardening). Even though the female workers would now receive a higher rate for their jobs (and possible backpay if they had issued claims) the consequences of implementing the new pay structure for the male employees would be a pay reduction unless PPA were put into place.²⁰⁵ The issue was whether the PPA perpetuated the earlier indirect discrimination against the female employees and, if so, could it be justified. The EAT decision from 2006²⁰⁶ upheld the ET's decision that where the pay disparity that existed before the new pay and grading system was introduced was itself discriminatory, the red-circling arrangements that preserved the unequal pay would also be discriminatory, unless the Councils could demonstrate that excluding the female workers from also receiving pay protection was justified as a proportionate means of achieving a legitimate aim. As far as the *Bainbridge* case was concerned the facts showed that the male employees had a contractual right to their old enhanced rates of pay and if the Council had reduced their pay without agreement the result would have been industrial unrest and hardship to the men; thus the only way agreement could be reached was by offering some form of pay protection to the men.

On the other hand as one of the principal purposes of the Single Status agreement was the elimination of past discriminatory pay practices the Council should have applied their minds to the fact that the women would be discriminated against under the new scheme if they did not receive pay

²⁰⁵ Author's note – pay protection arrangements tend to mirror similar protection arrangements that occur on the redeployment of staff, say in a redundancy situation, which permit three years pay protection on a sliding scale.

²⁰⁶ *Redcar & Cleveland Borough Council v Bainbridge & Others* [2007] IRLR 91

protection. There was no evidence before the Tribunal that the Council had even estimated the cost of including the female employees in the PPA or had tried to avoid or minimise the discrimination. The EAT therefore upheld the Tribunal's decision that the Council had not justified the failure to pay the women at the same rate as the men on protected pay rate.

However, the EAT reached a different decision when it considered the *Surtees*²⁰⁷ case, eight months later, when it found, on similar facts to *Bainbridge* that pay protection by red-circling was justified. The only material differences between the two cases was that by the time the new pay arrangements took effect Redcar & Cleveland had conceded liability for equal pay claims whereas Middlesbrough had not. The Council appealed the *Bainbridge* decision whereas the claimants appealed the decision in *Surtees*.

The CA upheld the decision of the EAT in *Bainbridge* but rejected the EAT's decision in *Surtees*. In giving its judgment the Court of Appeal gave some limited hope for LAs in the decision²⁰⁸. However the CA did not state which circumstances would amount to objective justification and whether the reason of cost amount to such a reason. It is submitted that if a LA can show that it has considered paying pay protection to women but it has discounted it because of the costs or the impact on service provision then that may amount

²⁰⁷ *Middlesbrough Borough Council v Surtees & Others* [2007] IRLR 869

²⁰⁸ [2008] EWCA Civ 885 Paragraph 175 Mummery LJ stated 'We accept that a large public employer might be able to demonstrate that the constraints on its finances were so pressing that it could do no other than it did and it was justified that in putting the need to cushion the men's pay protection ahead of the need to bring women up to parity with the men. But we do not accept that the result should be a foregone conclusion. The employer must be put to proof that what he had done was objectively justified in the individual case.'

to objective justification. However this presupposes that there would be an acceptance that LAs finances are finite.

The positive news for LAs arising from the decision was that were there had been non compliance with the statutory grievance procedure²⁰⁹ no uplift would apply provided circumstances existed where any uplift would be unjust.²¹⁰

Claims for Arrears

Prior to 2003 the period for the arrears for equal pay cases was two years prior to the date of the claim. The ECJ ruled in a Northern Ireland case²¹¹ that the two year time limit was contrary to Article 141 and that the limitation period of two years struck 'at the very essence of the rights conferred by the Community legal order' and as such 'was to render any action by individuals relying on Community law impossible in practice'²¹² The time limits were amended by the EqPA 1970 (Amendment) Regulations 2003.²¹³ The Regulations also amended the period for which arrears would be awarded thus in a standard case it is the date falling six years before the day on which proceedings were instituted²¹⁴.

The changes to the qualifying date has implications for LAs, given the number of claims, as a claimant is entitled to six years back pay plus compensation up until the pay review is implemented. The potential liability in losing or settling

²⁰⁹ See Chapter 3

²¹⁰ In the Redcar case the particular circumstances involved a 'no win no fee' lawyer and the failure of mediation meant that there was no real prospect of settling any of the grievances.

²¹¹ Magorrian and Cunningham v Eastern Health and Social Services Board per Deakin & Morris

²¹² Ibid page 691

²¹³ EqPA 1970 (Amendment) Regulations 2003 - Statutory Instrument 2003 No 1656

²¹⁴ Ibid Regulation 5

equal pay claims were estimated by the respondents to the questionnaire as ranging from £30,000 to £26m.

The source of funding the cost of settling or losing the claims were cited in the responses as being from financial reserves (63%) and efficiency savings (12.5%). Other methods quoted were borrowing from central government and the capitalisation of assets. It is submitted that the impact of the equal pay claims goes beyond local government as it impacts on services.

The Union Perspective

LAs rely on good working relationships with the unions as part of local collective bargaining machinery to consult on any reorganisations or other changes that can affect the workforce as a whole or individual members.

In the North East a union's actions were considered to be discriminatory under section 12 SDA²¹⁵ because of the outcome of their negotiations in EqPA claims. Female union members brought claims against the union under section 77 of the SDA which relates to the validity and revision of contracts²¹⁶.

The EAT has held that if the claimants are not entitled to the benefits of a collective agreement then those parts of the collective agreements should be

²¹⁵ Section 12 of the SDA makes it unlawful for 'an organisation of workers' to discriminate against a women who is a member of the organisation '(a) in the way it affords he access to any benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or (b) by depriving her of membership, to varying the terms on which she is a member or (c) by subjecting her to any other detriment'

²¹⁶ Section 77 states that A term of contract is void where (a) its inclusion renders the making of the contract unlawful by virtue of this Act; (b) it is included in furtherance of an act rendered unlawful by this Act; (c) it provides for the doing of an act rendered unlawful by this Act'

struck out²¹⁷. There has been complex litigation involving unions defending their actions as representatives of female claimants in EqPA claims including a case on the timing of the hearing of GMF defence as a preliminary issue where the claimants seek to amend their claim to challenge the validity of JES²¹⁸

In the 2008 case of *Allen and Others v GMB*²¹⁹ legal action was taken against the union alleging that it had adopted a policy to the detriment of certain women members which amounted to indirect sex discrimination. The case concerned Middlesbrough Borough Council, who against the background of implementing the national agreement of having single status, were in negotiation with unions at local level to agree the pay rates and pay scales to eradicate 'historical inequalities'.

The union had to balance the competing interests of preserving job security for members generally, achieving compensation women who had been paid less historically than male comparators, and negotiating pay protection for those, predominantly male, members whose pay would be reduced in the new pay structure. The union gave priority to obtaining pay protection. The outcome was that one category of women claimants received 25% of the full value of equal pay claims whilst another category received none at all. The women's claim was that the unions approach amounted to direct and indirect sex discrimination.

²¹⁷ *Unison v Brennan* [2008] IRLR 492

²¹⁸ *Sunderland City Council v (1) Brennan & Others (2) Unison (3) GMB* [2008] UKEAT 0219

²¹⁹ [2008] EWCA Civ 810

The ET rejected the women's claim for direct discrimination but found there was indirect discrimination and victimisation on the part of the union. Although the tribunal accepted that the aims of the union in trying to protect jobs etc was a legitimate aim the ET's conclusion was that in agreeing to a low back pay agreement in order to provide more money for pay protection the union had engaged in a potentially discriminatory practice as the majority of those affected were women.

As regards justification, the major issue for the ET was the way the back pay offer had been communicated to the membership ('misselling and manipulation as found by the ET'²²⁰) and the delay by the union in issuing proceedings and as such it was not a proportionate means of achieving a legitimate aim. The victimisation flowed from the fact that most of the disgruntled women who should have received some or more back pay signed up with a non union solicitor on a 'no win, no fee' basis and were 'portrayed to other union members and the Council as self-centred money-grabbers'²²¹ The EAT came to a different conclusion as regards justification²²² but the CA agreed with the original ET decision and the case was remitted to the ET for a remedies hearing.

It remains to be seen whether there may be further litigation on the point. But given that LAs, and other areas of the public sector, have a lot to lose in terms

²²⁰ Ibid paragraph 26

²²¹ Ibid paragraph 7.77

²²² The EAT stated that 'the fact that the objective might be achieved by using unlawful, even dishonest practices does not necessarily mean that the means are disproportionate once it is accepted that the aim itself is legitimate'

of increased costs to the public purse it is submitted that more legal proceedings cannot be ruled out.

In a recent known example²²³ a union attempted to agree terms on a contractual issue by negotiation with a LA employer but refused to sign a collective agreement. This was prior to the CA decision and it is submitted that the case could effect future negotiations at local level, as if the unions are more reluctant to sign collective agreements, then there is little point in the LA negotiating with them. The point was reiterated in a recent court of appeal case where objective justification was considered:

'There may be many reasons why, in the give and take of collective bargaining, one group of employees does worse than another. But one of the important messages sent out by the Equal Pay Act has been that attention must be paid by negotiators to the possibility that such differentials will have a disparate impact on employees of one gender'²²⁴

In *Shepherd & Others v North Yorkshire County Council*²²⁵ legal proceedings were instituted against the local authority on the grounds that it had aided, abetted, counselled and procured trade unions to commit breaches of section 12 of the Sex Discrimination Act 1975. The breach was an alleged failure by the unions in the representation of their members in the Single Status Agreement. The employment tribunal dismissed the claim as having no reason prospect of success and although the claimants presented different arguments to the Employment Appeal Tribunal their appeal was dismissed.

²²³ Anonymous case known to author

²²⁴ Sedley LJ Paragraph 11 *British Airways PLC v Grundy* [2008] EWCA Civ 875

²²⁵ UKEAT/0526/05 21 December 2005

ACAS

Even the Advisory Conciliation and Arbitration Service (ACAS) have found itself embroiled in legal proceedings over its role in brokering settlement agreements in equal pay cases. Again the litigation involved the North East²²⁶ and involved claimants represented by both the union and a 'no win no fee' solicitor. The actions of a conciliation officer were challenged as not complying with the officer's statutory duties under section 18 of the Employment Tribunals Act 1996 and/or section 77(4) of the Sex Discrimination Act 1975 and that the ACAS officer was acting in bad faith. Although the employment tribunal made some criticisms of ACAS they rejected the allegations as did the EAT²²⁷.

The above decisions have consequences for LAs in attempting to settle EqPA claims. LAs have adopted a formula based on an employee's length of service, the number of years employed and their pay rates, to devise a matrix of payments to employees who may have a legitimate claim. Those negotiations involved employees, the unions and ACAS attending open days where the employees had the opportunity to sign compromise agreements and receive a set amount to settle their claims up to the implementation of the pay and grading review. The unions, due to the impact of litigation, advised their members not to accept any payments. In later negotiations the unions

²²⁶ Redcar & Cleveland Borough Council v Bainbridge and EHRC as intervener and Surtees & others v Middlesbrough Borough Council and EHRC as intervener [2008] EWCA Civ 885 Case No:2006/2558,2007/0829,2007/2005

²²⁷ Clarke & Others v Redcar & Cleveland Borough Council; Wilson & others v Stockton-on-Tees Borough Council; ACAS as Intervener. UKEAT/040705;UKEAT/0580/05;UKEAT/0621/05;UKEAT/0622/05 & UKEAT/0623/05 Judgment 22/02/06

have been clear in wanting to achieve no worse terms of settlement than the private solicitors²²⁸.

From the earlier chapters the EqPA has had a significant impact upon local authorities over the last few years. The cost of EqPA claims to local authorities are considerable both in terms of finance, whether it be funding the litigation, the future cost of pay and grading reviews and settling the EqPA claims, or in terms of future industrial relations.

As outlined in the Introduction to this research the purpose of the Equal Pay Act is to prevent discrimination as regards terms and conditions of employment between men and women. It is submitted that the Act has not achieved that aim as after over 30 years there is still a gender gap in pay of 17%²²⁹ and there is currently the mass EqPA litigation against public authorities including LAs and the NHS.

The effect of the EqPA on LAs has been to undermine collective bargaining machinery and unions are caught between a rock and a hard place²³⁰ as they try to obtain the best outcome for all their members with the possibility that the Union itself could be held to be discriminatory. The CA decided in *Allen v GMB*²³¹ that the remedies hearing in the case may raise even more difficult issues than are customarily found in an indirect discrimination case against an employer so further implications are likely to arise from that decision and it is estimated that thousands of union claims will be affected by that case alone. In the equal pay arena, everything has a knock on effect. A

²²⁸ Facts about former solicitors' proposed claim 2012.

²²⁹ Page 11 London Research Centre for Employment 2013 - Gender of Employment Income on

²²⁸ From authors own knowledge

Conclusions

As can be seen from the earlier chapters the EqPA has had a significant impact upon local authorities over the last few years. The cost of EqPA claims to local authorities are considerable both in terms of finance, whether it be funding the litigation, the future cost of pay and grading reviews and settling the EqPA claims, or in terms of future industrial relations.

As outlined in the introduction to this research the purpose of the Equal Pay Act is 'to prevent discrimination as regards terms and conditions of employment between men and women'. It is submitted that the Act has not achieved that aim as after over 30 years there is still a gender gap in pay of 17%²²⁹ and there is currently the mass EqPA litigation against public authorities including LAs and the NHS.

The effect of the EqPA on LAs has been to undermine collective bargaining machinery and unions are 'caught between a rock and a hard place'²³⁰ as they try to obtain the best outcome for all their members with the possibility that the union itself could be held to be discriminatory. The CA confirmed in *Allen v GMB*²³¹ that the remedies hearing in the case 'may raise even more difficult issues than are customarily found in an indirect discrimination case against an employer' so further implications are likely to arise from that decision and it estimated that thousands of union claims will be affected by that case alone. 'In the equal pay crisis, everything has a knock-on effect. A

²²⁹ Facts about Women and Men in Great Britain 2006.

²³⁰ Page 9 Local Government Chronicle 6 March 2008 – Summer of Discontent Looms on Equal Pay

²³¹ [2008]EWCA Civ 810

major concern raised at the LGE summit was 'a fear of the end of collective bargaining'²³². Although the cessation of collective bargaining may appear to be an extreme consequence of the EqPA litigation there has been a marked reluctance to enter into collective agreements by unions²³³.

New Laws for Old

As highlighted in Chapter 2 new legislation is being introduced both at the European and Domestic level. The introduction of the 2006 Directive²³⁴ which consolidates the existing Directives²³⁵ is to be welcomed, but as was explained earlier, the Directive will have very little impact on the way EqPA cases are dealt with. Similarly the proposed changes by the Government to the EqPA amount to no more than marginal changes and it is difficult to see what practical effect the changes will have. The Government itself appears to be undecided as to what changes are appropriate as its June 2008 suggestions²³⁶ for change appear to be a watered down version of the original proposals that were published a year earlier²³⁷. It may be that the Government has realised that replacing or amending the EqPA is no easy task.

²³² Tash Shifrin 'Less Equal Than Others' Public Finance 15 February 2008

²³³ From authors own knowledge

²³⁴ Directive of the European Parliament and of the Council on the Implementation of The Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation

²³⁵ See Chapter 2

²³⁶ 'Framework for the Future – The Equality Bill' June 2008

²³⁷ Discrimination Law Review – A Framework for fairness: Proposals for a Single Equality Bill for Great Britain'

It is argued that the EqPA has not achieved the equality that underpins the purpose of the legislation. Barrett stated that the decision in Lawrence failed to resolve the issue of how to 'solve the difficult and as yet unsatisfactorily resolved problem of achieving cross-sectoral pay equality for the benefit of predominantly female sectors of the labour market'²³⁸ and Fredman has referred to the ECJs 'inability to see beyond the formal boundaries of the employing enterprise rendered equal pay law impotent'²³⁹; she also refers to the 'myopic' focus on the individual employer. It is submitted that this a major failing of the EqPA and the European Directives as even if the proposed legislation to remove the secrecy regarding pay in private organisations does become law this will fall far short of the openness that has occurred in local government that has allowed the personal injury 'claims culture' to pervade LA equal pay arrangements.

Representative Actions – A Panacea?

According to Trevor Phillips the EqPA is past its sell by date²⁴⁰ and he indicates that representative actions are the cure-all to the mass litigation in equal pay cases. It is suggested that Trevor Phillips is being very short sighted in his views as although representative actions may hasten the mechanics of getting EqPA claims more rapidly through the ET system, it is argued that they will not resolve the wider issue of the gender pay gap as they deal with the effect and not the cause of the pay disparity.

²³⁸ Barrett G. 'Shall I compare thee to...?' On Article 141 and Lawrence ILJ 2006 35 (93)

²³⁹ Fredman S European Developments – Marginalising Equal Pay Laws ILJ 2004.33 (281)

²⁴⁰ See Chapter 1 - Introduction

Any amendments to the EqPA will probably be too late for LA as, one would hope that once the pay and grading reviews are implemented any discriminatory pay practices should be eradicated. Fredman has argued that the EqPA 'reinforces a faults-based model of social rights'²⁴¹ as a successful claim relies on there being a single source of the pay disparity. It is this approach to equal pay that has generated a pay disparity between local government and the private sector and made the provision of local authority services 'too expensive to sustain indefinitely'²⁴² and 'unaffordable'²⁴³

Why should it be acceptable for LAs have to pay more than the market rate for some roles because of the impact of EqPA provisions? Ultimately the cost of funding equal pay claims and new pay grades will have an impact upon the council tax payer as the money from LAs financial reserves or efficiency savings could have been allocated elsewhere to front line services.

The Future

Given the mass litigation and judicial decisions referred to in this research is the Equal Pay Act fit for purpose as regards local authorities? Phillips comments were made in January 2008 because the decision of the CA in the Redcar²⁴⁴ case was due. However the decision has now been promulgated and LAs are in more of a disarray as it 'has thrown town hall wage structures

²⁴¹ Fredman S Women at work: The Broken Promise of Flexicurity ILJ 2004.33 (299)

²⁴² Response to research questionnaire

²⁴³ Ibid

²⁴⁴ Redcar & Cleveland Borough Council v Bainbridge and EHRC as intervener and Surtees & others v Middlesbrough Borough Council and EHRC as intervener Redcar & Cleveland Borough Council v Bainbridge and EHRC as intervener and Surtees & others v Middlesbrough Borough Council and EHRC as intervener [2008] EWCA Civ 885 Case Nos :2006/2558, 2007/0829, 2007/2005

into chaos²⁴⁵ It is submitted that the EqPA merely represents the 'bare bones' of the law and therefore the issues raised in the caselaw were never even considered at the time of its enactment and needed to be tested in the courts. It is argued that now the time has come to radically revise equality legislation not only the EqPA but the European law, and for the law to move away from being employer centred to having a cross sector market focus.

In a recent article on reforming equal pay Fredman argues that it is now time to impose positive duties on employers 'to take positive steps to identify the inequalities and then to remove them'²⁴⁶ However any radical change in the law will require a commitment from a government where women hold only 19.3% of the positions in Parliament²⁴⁷ and where, it is estimated, it will take 200 years for women to be equally represented.

²⁴⁵ Women Council workers win equal pay ruling – Public Finance 1 August 2008.

²⁴⁶ Fredman S 'Reforming Equal Pay Laws' ILJ [2008] Vol.37 No.3 Pages 193-218

²⁴⁷ 'Sex and Power 2008' Equality and Human Rights Commission – published September 2008

APPENDIX 1

This questionnaire has been formulated for a research project entitled 'Equal Pay Legislation: It's Fitness for Purpose as regards Local Authorities'. Your input is valuable in gathering empirical data for the project.

The names of individual Authorities will not be disclosed in the research report; the questionnaire responses will not be annexed to the project report and will be destroyed afterwards.

1. Name of Authority
2. Was your Authority compliant with the 2004 NJC agreement in that a pay review was undertaken and put into operation by 31 March 2007? Yes
No
3. (a) If no to Q2, when is the completion date anticipated?
(b) What difficulties or issues have prevented the pay review being undertaken?
.....
.....
.....
4. Has your Authority completed its pay review? Yes No
5. Has the pay-line been determined? Yes No
6. If yes, has there been agreement with the unions on its implementation and application? Yes No
7. If no, how have you implemented the new pay structure? (e.g. dismissal and re-engagement of employees)
.....
.....
8. Has there been any industrial action in respect of the new pay structure? Yes No
9. If yes please specify the nature and duration of any industrial action.....
.....

.....
.....

10. Does the new pay structure increase the overall cost of wages? Yes
No

11. If so, by approximately how much per annum? £.....

12. How is the increase going to be funded?

- From financial reserves
- From efficiency savings
- Increase in council tax
- Other (please specify)

13. Has your Authority received any employment tribunal claims for equal pay?

Yes No

14. If yes, approximately how many have been received?.....

15. Do/did you have a Genuine Material Factor (GMF) defence to any of the claims?

Yes No

16. If Yes, what % of the overall number of claims you have a GMF defence to?

17. If yes, what is/was the nature of the defence?.....

.....
.....
.....

18. If no GMF defence, have you settled (or intend to settle) any or all the claims?

Yes No

19. (a) what % of the claims without GMF defence have you settled (or intend to settle)

(b) what % of the claims with a GMF defence have you settled (or intend to settle)

20. Please estimate your Authority's potential financial liability in settling or losing the EqPA claims. £

21. How will your Authority finance the cost of this liability?

- From financial reserves
- From efficiency savings
- Increase in council tax
- Other (please specify)

22. Are there any other actual or potential impacts arising from any equal pay claims or pay review? (e.g. future increased costs of contracting arrangements due to TUPE)

.....
.....
.....

Thank for your completing this questionnaire.

Appendix 2

Summary of Questionnaire Responses

Response Rate

The response rate was very disappointing. Notwithstanding that there was a guarantee of confidentiality regarding the identity of the councils that responded a number of authorities were not prepared to divulge what they considered to be 'sensitive' information. Curiously some authorities would not commit their answers to paper because of any future Freedom of Information requests that may be made and they would have to disclose; yet others responded by stating that the information should be requested under the Freedom of Information Act.

The response rate to the questionnaires was approximately 30%. The questionnaire was also sent to another area's Special Interest Group which, again had a low return rate, but added a different dimension to the responses as those authorities were involved in the early litigation.

Nevertheless, as the responses were from a cross section of the type of authorities, i.e. County Councils, District Councils and Unitary Authorities, who were at various stages in the implementation of *Single Status* it is submitted that the research still has some value as the sample has the characteristics of the population.

An analysis of the responses received was undertaken with the results detailed below.

Single Status Implementation

63% of the local authorities who responded confirmed that they weren't compliant with the 2004 NJC agreement in that a pay review had not been undertaken and put into operation by 31 March 2007 although 38 % of respondents stated that the anticipated completion date for the pay review would be April 2009. This begs the issue as to when the other respondents would be in a position to comply with the terms of the agreement.

Respondents were asked what the barriers were to the implementation of the agreement by 31 March 2007, and the reasons given for non compliance with the NJC scheme were varied though in general the main reason was the lack of agreement with the Trade Unions and the need, in some areas, for Trade Union ballots to be undertaken. Other reasons given were the scale and complexity of the task, the fact that the JES selected was complex and it took time to develop and test any local conventions under the scheme prior to implementation and also that the review was resource intensive. The responses also indicated that the on-going litigation delayed any progress. One informal response received was that 'in 1997 ten years seemed a long way off'.

However, 75% of respondents at the time of responding, had completed their pay reviews whilst only 63% had devised the pay line. Of those who had completed their pay review 50% had an agreement with the unions on implementation and application. 100% of the respondents confirmed that there had been no industrial action.

One authority confirmed that they had to dismiss and re-engage the workforce in 2005 and had varied contractual terms by agreement in 2008.

As to the costs of implementing Single Status 63% of the respondents confirmed that the agreement would increase the overall cost of wages ranging from £250,000 to £3million per annum; 25% of the respondents stated the impact on the annual wages bill was unknown. This then raises the issue as to where the extra funding will come from; 38 % of respondents confirmed that the additional sums would be financed from council reserves and the same number stated some of the funding will be made from efficiency savings. Other sources of funding included reductions in spending were due to renegotiating terms and conditions.

Equal Pay Claims

The questionnaire focus then changed from the impact of implementing Single Status to the impact of equal pay litigation. 88% of the respondents had received equal pay claims the number received ranging from 8 claims to 3500 although 75% indicated they believed they had a genuine material factor defence to over 40% of the claims.

The genuine material factor reasons stated were that there was a non gender reason for the pay differential and any productivity or attendance payments could be objectively justified. One respondent's GMF related to pay protection

that had been applied from April 2005 on the grounds that the protection was not implemented to deliberately perpetuate unequal pay. It should be noted that the responses were provided prior to the decision in the *Bainbridge*²⁴⁸ case promulgated in July 2008. Other defences stated included a market forces defence and the implementation of collective agreements. Again this response was given prior to the Court of Appeal decision in *Allen & Others v GMB*²⁴⁹. The other defences given were that the voluntary aided school comparators cited were not in same service or employment as the authority employees or that the claims were out of time of the six month time limit.

As to the future of the claims over 50% of respondents indicated that they have settled or intend to settle their equal pay claims. As with the implementation of Single Status the equal pay claims carry a cost and the potential liability in losing or settling the claims were estimated by the respondents ranged from £30,000 to £26m.

The source of funding the cost of settling or losing the claims were cited as being from financial reserves (63%) and efficiency savings (12.5%)

Other methods quoted were borrowing from central government and the capitalisation of assets.

A question was asked about the less obvious implications of equal pay exercise; the responses included a rise in the cost of residential and home care costs that will become too expensive to sustain indefinitely together with the catering provision to schools will become unaffordable.

²⁴⁸ [2008] EWCA Civ 885

²⁴⁹ [2008] EWCA Civ 810 12/07/08

Appendix 3

Also where services were tendered to the private sector the contracts had now to include indemnities to cover the possibility of the costs of equal pay and as a result the procurement exercises were unsuccessful because, it is assumed, commercial contractors refused to carry the risk of equal pay claims.

The Complainant's questions (A question form to be completed by the person with an equal pay complaint)

Part 3: The Respondent's reply (A reply form to be completed by the employer)

Part 4: Guidance Notes

Part 5: Glossary

What is the purpose of the equal pay questionnaire?

The Equal Pay Act 1970 requires equal pay between men and women where they are employed on equal work. The Act applies equally to men and women but does not give anyone the right to claim equal pay with another person of the same sex. In this questionnaire the term "equal work" is used to describe work that is the same or broadly similar (known as "like work"); work that has been rated as equivalent under a job evaluation study; or work of equal value. The concept of "equal pay" includes both pay and other terms and conditions of the contract of employment. Further information on the scope and interpretation of equal pay legislation is provided in Part 4.

This questionnaire is intended to help individuals who believe they may not have received equal pay to obtain information from their employers to find out whether this is the case and, if so, why. The information should help to establish key facts early on and make it easier to resolve any disputes in the workplace. If the complainant decides to take a case to an employment tribunal, the information should enable the complaint to be presented in the most effective way and the proceedings should be that much simpler because the matters in dispute have been identified in advance.

Throughout the questionnaire the person who thinks they may have an equal pay case is called the **complainant** and the employer is called the **respondent**.

Under Section 7B of the Equal Pay Act 1970 a person is entitled in writing to his or her employer asking for information that will help establish whether he or she has received equal pay and, if not, what the reasons are. The standard questionnaire has been devised so that the complainant can send questions to the respondent. The matching reply form gives the respondent an opportunity to say whether they agreed with the complainant and, if not, they can set out the reasons why. Although questions and replies can be circulated by other means the use of the questionnaire will help ensure that relevant questions are asked.

How to complete the questionnaire

Appendix 3

Equal Pay Act 1970: The Questionnaire

This booklet is in four parts:

Part 1: Introduction

Part 2: The Complainant's questions (*A question form to be completed by the person with an equal pay complaint*).

Part 3: The Respondent's reply (*A reply form to be completed by the employer*).

Part 4: Guidance Notes

Part 1: Introduction

What is the purpose of the equal pay questionnaire?

The Equal Pay Act 1970 requires equal pay between men and women where they are employed on equal work. The Act applies equally to men and women but does not give anyone the right to claim equal pay with another person of the same sex. In this questionnaire the term "equal work" is used to describe work that is the same or broadly similar (known as "like work"); work that has been rated as equivalent under a job evaluation study; or work of equal value. The concept of "equal pay" includes both pay and other terms and conditions of the contract of employment. Further information on the scope and interpretation of equal pay legislation is provided in Part 4.

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Under Section 7B of the Equal Pay Act 1970 a person is entitled to write to his or her employer asking for information that will help establish whether he or she has received equal pay and, if not, what the reasons are. The standard questionnaire has been devised so that the complainant can send questions to the respondent. The matching reply form gives the respondent an opportunity to say whether they agree with the complainant and if not, they can set out the reasons why. Although questions and replies can be conducted by letter, the use of the questionnaire will help ensure that relevant questions are asked.

How to complete the questionnaire

Complainants should complete Part 2. We recognise that not all equal pay cases are the same and that not all questions may be relevant to your circumstances, so space is provided for additional questions. The questionnaire can be sent to the respondent either before a complaint is made to an employment tribunal or within 21 days of making such a complaint (for further details see paragraph 8, page 13).

Respondents should complete Part 3. Although completion of the questionnaire is not compulsory, you should be aware that an employment tribunal may draw any such inference as is just and equitable from a failure, without a reasonable excuse, to reply within **8 weeks**, or from an evasive or equivocal reply.

Both complainants and respondents should read this booklet thoroughly before completion and keep a copy of the completed questionnaire. Guidance notes for completing the questionnaire are set out alongside the questions in both Parts 2 and 3. Further guidance is set out in Part 4 which also explains the main provisions of the Equal Pay Act 1970 and answers frequently asked questions.

Where can I go for advice or to find further information?

If you require help or advice about completing or responding to this questionnaire, please see the end of this booklet for details of organisations that can help. Guidance can also be found on the Equality and Human Rights Commission (EHRC) website: www.equalityhumanrights.com.

Part 2: The Complainant's Questions to the Respondent

Note:

Please read guidance in Part 4 before completing questionnaire. You may find it helpful to prepare what you want to say on a separate piece of paper.

If you do not have enough space on the questionnaire continue on an additional piece of paper, which should be attached to the questionnaire and sent to the respondent.

Enter the name of the person to be questioned (the respondent)

To

Enter the respondent's address

of

Enter your name (you are the complainant)

1.

Enter your address

of

I believe, for the following reasons, that I may not have received equal pay in accordance with the Equal Pay Act 1970:

Please give a short summary of the reason(s) that cause you to believe that you may not have received equal pay.

To claim equal pay you should have reason to believe that a comparator of the opposite sex is being treated more favourably for doing the same or similar work, work rated as equivalent, or work of equal value.

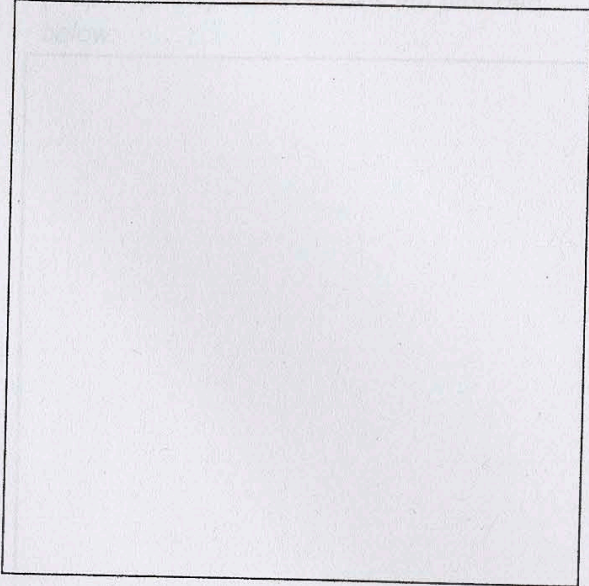
You may find it helpful to complete this summary after you have completed the rest of your questions and are clear who your comparators are and what your claim is about.

2 (a) I am claiming equal pay with the following comparator(s):

Please give the name(s), or, if not known, the job title(s), of the person or persons in comparison with whom equal pay is being claimed. These are referred to as your comparators. Please provide details of their work location and job titles to help the respondent to identify them.

In order to bring a claim you must choose an actual comparator of the opposite sex who is treated more favourably and is shown to be employed in the same or similar work, work rated as equivalent, or work of equal value. The comparator must be employed by your employer or an associated employer. You can compare yourself with a group of workers; a predecessor; or a successor in your job.

Below:



note that the pay comparison is made in relation to each element of a pay and benefits package, rather than by looking at each pay and benefits package 'in the round'.

2 (b) Do you agree that I have received less pay than my comparator(s)?

(If appropriate) further details are provided below:

Under equal pay legislation, the concept of "pay" includes both pay and other terms and conditions of the contract of employment.

You may wish to itemize what element(s) of your pay and benefits package you feel are not equal to that of your comparator. For example, a lower weekly salary, annual salary, bonus payments, less holidays etc.

You may also wish to indicate over what time period you think your comparator has received more favourable terms than you.

You should note that the pay comparison is made in relation to each element of a pay and benefits package, rather than by looking at each pay and benefits package "in the round".

A large, empty rectangular box with a thin black border, intended for the respondent to provide further details if they agree that they have received less pay than their comparator(s).

2 (b) Do you agree that I have received less pay than my comparator(s)?

(If appropriate) further details are provided below:

Under equal pay legislation, the concept of "pay" includes both pay and other terms and conditions of the contract of employment.

You may wish to itemize what element(s) of your pay and benefits package you feel are not equal to that of your comparator. For example, a lower weekly salary, annual salary, bonus payments, less holidays etc.

You may also wish to indicate over what time period you think your comparator has received more favourable terms than you.

You should note that the pay comparison is made in relation to each element of a pay and benefits package, rather than by looking at each pay and benefits package "in the round".

(This area is for providing further details if appropriate.)

2 (c)

If you agree that I have received less pay, please explain the reasons for this difference.

In this questionnaire the term "equal work" is used to describe work that is the same or broadly similar (known as "like work"); work rated as equivalent under a job evaluation study; or work of equal value. See Part 4 (paragraph 1) for further details of what is meant by these expressions.

3. The Equal Pay Act requires equal pay between men and women where they are employed on equal work, which comprises like work, work rated as equivalent, or work of equal value.

3 (a) Do you agree that my work is equal to that of my comparator(s)?

3 (b) If you do not think I am doing equal work, please give your reasons.

benefits package of you and your comparator(s) (e.g. basic pay, benefits such as company car, private health insurance and occupational pension).

whether your employer thinks there are significant differences between your duties and those of your comparator(s).

details of the duties (e.g. job description and person specification) of your post and the posts of your comparator(s).

whether the organisation has an equal opportunities policy and what steps have been taken to implement the EEOC's Code of Practice on Equal Pay?

4. Any other relevant questions you may want to ask (you may wish to use a separate piece of paper):

Question 4 provides you (the complainant) with the opportunity to ask any other relevant questions you think may be important. For example, you may want to know:

- details of how pay is determined for you and your comparator(s) within the organisation e.g. details of pay schemes, job grading systems or how skills and experience are reflected in the pay system;
- information relating to the pay and benefits package of you and your comparator(s) e.g. basic pay, benefits such as company car, private health insurance and occupational pension.
- whether your employer thinks there are significant differences between your duties and those of your comparator(s);
- details of the duties (e.g. job description and person specification) of your post and the post(s) of your comparator(s);
- whether the organisation has an equal opportunities policy and what steps have been taken to implement the EHRC's Code of Practice on Equal Pay?

A large rectangular box intended for the complainant to write their questions. The box is currently empty.

5. Please send your reply to the following address if different from my home address on page 2.

Insert the address you want the reply to be sent to if different from your home address on page 2.

--

The questionnaire must be signed and dated. If it is to be signed on behalf of (rather than by) the complainant the person signing should:

- describe himself/herself e.g. 'solicitor acting for (name of complainant)'; and
- give business address (or home address, if appropriate).

Signed

--

Address (if appropriate)

--

Date

--

How to serve the papers

We strongly advise you to keep a copy of the completed questionnaire in a safe place.

Send the person to be questioned the **whole** of this document either to their usual last known residence or place of business or if you know they are acting through a solicitor, to that address.

If your questions are directed to a limited company or other corporate body or a trade union or employers' association, you should send the papers to the secretary or clerk at the registered or principal office. You should be able to find out where this is by enquiring at your public library. However, if you are unable to do so you will have to send the papers to the place where you think it is most likely they will reach the secretary or clerk. It is your responsibility to see that they receive them.

You can deliver the papers in person or send them by post.

If you send them by post, we advise you to use the recorded delivery service (*this will provide you with evidence of delivery*).

By virtue of section 7B of the Equal Pay Act, this questionnaire and any reply are (subject to the provisions of the section) admissible in proceedings under the Act and a tribunal may draw any such inference as is just and equitable from a failure without reasonable excuse to reply within 8 weeks or from an evasive or equivocal reply, including an inference that the person questioned has discriminated unlawfully.

Part 3: The Respondent's Reply

Note:

Please read guidance in Part 4 before completing the reply. You may wish to prepare what you want to say on a separate piece of paper.

If you do not have enough space on the reply form for what you want to say, continue on an additional piece of paper, which should be attached to the reply form and sent to the complainant.

Enter the name of the questioner (the complainant)

To

Enter the complainant's address

of

Enter your name (you are the respondent)

1.

Enter your organisation's name and address

of

Complete as appropriate

I acknowledge receipt of the questionnaire signed by you and dated

which was served on me on (date)

2. Set out below are the complainant's questions and my response to them:

Do you agree that the complainant has not received equal pay in accordance with the Equal Pay Act 1970?

2 (a)

Please tick relevant box.

If you **do not agree** with the complainant's statement, you should explain why you disagree.

To answer the question you will need to know:

What is included within the concept of equal pay;

in what situations the Act makes unequal pay unlawful; and

what defence the Act provides to an employer.

See Part 4 for further information.

Yes FORMCHECKBOX

No FORMCHECKBOX Please give your reasons below:

Please tick relevant box.

If you **agree**, you should explain the reasons for any difference in pay.

If you do **not agree** you should explain why you

2 (b) Do you agree that the complainant has received less pay than his or her comparator(s)?

Yes FORMCHECKBOX Please explain the reasons for any difference below.
No FORMCHECKBOX Please explain why you do not agree below.

disagree.

The concept of "equal pay" includes both pay and other terms and conditions of the contract of employment.

If the complainant and her or his comparator are doing "equal work", it is up to the employer to show that the difference in pay is genuinely due to a factor other than the difference in sex.

Part 4 includes further information about the employer's defence and material factors.

If you think the defence of a genuine material factor applies, please provide details of any such factors and an explanation about why you think the defence applies.

If the complainant has identified particular elements of their pay package (e.g. not receiving a bonus or a company car) that they think are unequal, you should also address these specific elements in your response.

Do you agree that the complainant is doing equal work to that of his or her comparator(s)?

YES

NO

2 (c) Do you agree that the complainant is doing work equal to that of his or her comparator(s)?

Please tick relevant box.

If you **do not agree** that the complainant's work is equal to that of his or comparator(s), you should explain why you disagree.

In this questionnaire the term "equal work" comprises like work, work rated as equivalent under a job evaluation study and work of equal value.

We advise you to look at the guidance notes in Part 4.

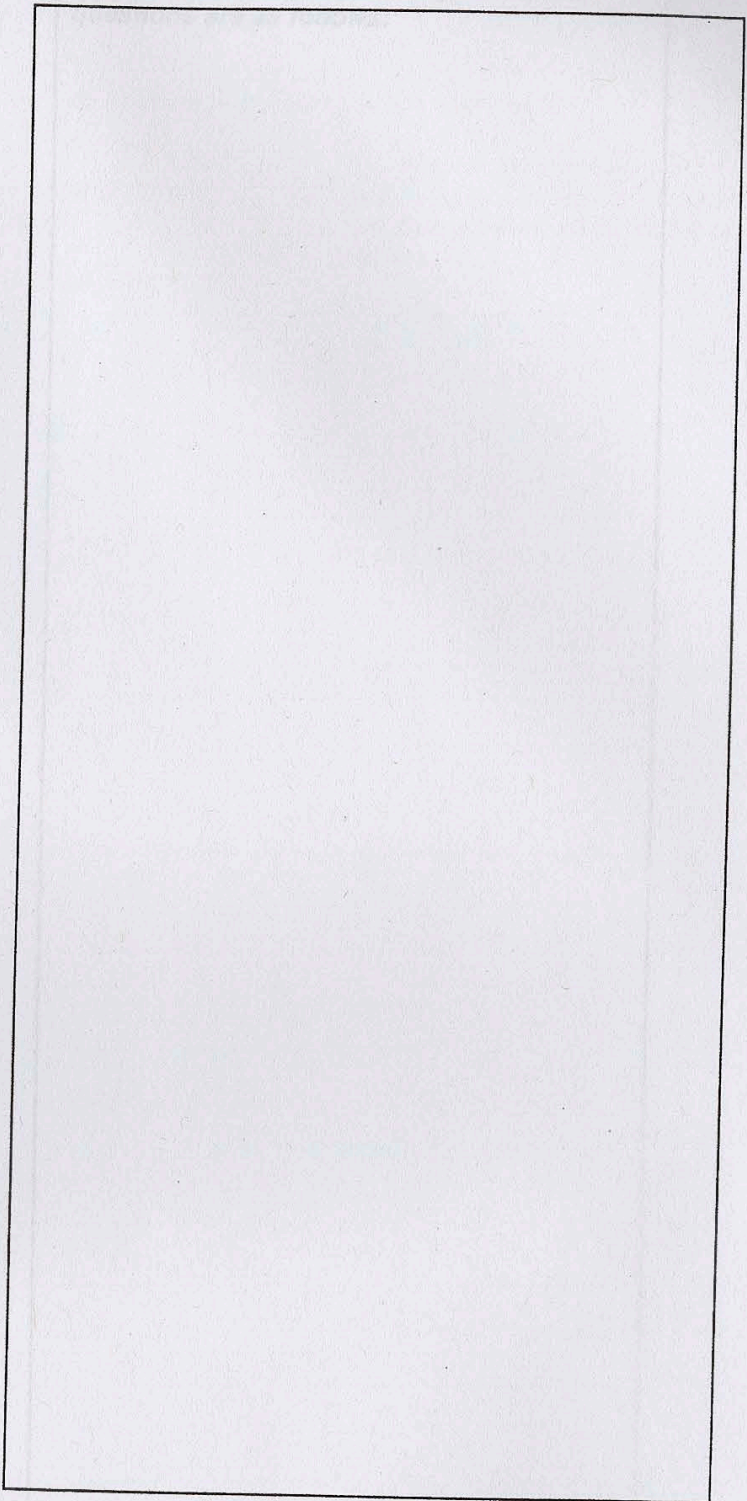
Yes FORMCHECKBOX

No FORMCHECKBOX The reasons are:

210 If you require any replies to your further

Reply to the questions in paragraph 4 of the comparison questionnaire can be entered here.

Please see Part 4 for guidance on how to reply to requests for information that may be confidential.



2 (d) *(If appropriate) My replies to your further questions are as follows:*

Replies to the questions in paragraph 4 of the complainant's questionnaire can be entered here.

Please see Part 4 for guidance on how to reply to requests for information that may be confidential.

Delete the whole of this sentence if you have answered all the questions in the complainant's questionnaire

3. I have deleted (in whole or in part) the paragraphs numberedabove

since I am unable

FORMCHECK BOX

to reply to the corresponding questions of the questionnaire for the reasons given in the box below.

since I am unwilling

FORMCHECK BOX

If you are unable or unwilling to answer some or all of the questions please tick the appropriate box and give your reasons for not answering them.

The reply form must be signed and dated. If it is to be signed on behalf of (rather than by) the respondent the person signing should:

Signed

Address (if appropriate)

Date

- describe himself/herself e.g. 'solicitor acting for (name of respondent)' or 'personnel manager of (name of firm, government department etc)'; and
- give business address (or home address if appropriate).

--	--

Please note:

You (the respondent) do not have to reply to the complainant's questions. However, if you deliberately, and without reasonable excuse, do not reply within 8 weeks, or reply in an evasive or ambiguous way, your position may be adversely affected should the complainant bring proceedings. The tribunal can draw any inference that it considers just and equitable from an equivocal response or deliberate failure to respond. For example, it may conclude that a respondent did not provide a proper explanation for a difference in pay because there was no genuine reason for this difference.

How to serve the reply form on the complainant

If you wish to reply to the questionnaire, you should do so within **8 weeks**.

You should retain, and keep in a safe place, the questions sent to you and a copy of your reply.

You can serve the reply either by delivering it in person to the complainant or by sending it by post.

If you send it by post, we advise you to use the recorded delivery service (this will provide you with evidence of delivery).

You should send the reply form to the address indicated in paragraph 5 of the complainant's questionnaire.

Guidance Notes – Please read carefully

These guidance notes explain the main provisions of the Equal Pay Act 1970 and answer frequently asked questions but you are advised to read the *Guide to the Equal Pay Act* published by the Women and Equality Unit for more detailed information about the Act. Further information can also be found on the EHRC website: www.equalityhumanrights.com, and in the various leaflets published by the EHRC. See the end of the booklet for information on how to obtain copies of the leaflets and the Guide.

1. The scope of the Equal Pay Act 1970

The purpose of the Equal Pay Act is to eliminate discrimination as regards pay and other terms and conditions between men and women in the same employment when they are employed to do:

- **like work** – work of the same or a broadly similar nature;

- **work rated as equivalent** – that is, in jobs which a job evaluation study of part or all of their employer's workforce has shown to have an equal value;
- **work of equal value** – that is, in jobs which are equal in value in terms of the demands made on them under headings such as effort, skill and decision-making.

2. What is covered under equal pay?

For the purposes of the Equal Pay Act the concept of pay includes both pay and other terms and conditions of contracts such as piecework, output and bonus payments, holidays and sick leave. European law has extended the concept to include redundancy payments, travel concessions, employers' pension contributions and occupational pension benefits. This means that there may still be a breach of the principle of equal pay where a man and a woman receive the same basic rate of pay, but other benefits (such as a company car, private health care etc) are not provided on an equal basis. The Equal Pay Act applies to pay or benefits provided by the contract of employment. The Sex Discrimination Act covers non-contractual arrangements including the allocation of benefits such as access to a workplace nursery or travel concessions.

3. What is a comparator?

In order to bring a claim, a complainant must choose an actual comparator of the opposite sex who is treated more favourably and is shown to be employed on "like work", "work rated as equivalent", or "work of equal value". The comparator must be employed by the complainant's employer or an associated employer. The Equal Pay Act refers to the "same employment" and this term has to be interpreted in the light of European law and you may wish to seek advice on interpretation of the law by domestic courts and European Court of Justice. A complainant can compare themselves with a predecessor or successor in their job.

4. The employer's defence

If a complainant is receiving unequal pay with a comparator who is doing equal work, the employer has to show that the difference in pay is genuinely due to a material factor other than the difference in sex. It is for the employer to show that such a factor exists and is the real reason for the difference. For example, in some circumstances the operation of market forces may justify a difference in pay, such as the need to recruit for particular jobs or the need to retain employees occupying particular jobs. The employer must also show that **all** of the difference of pay is genuinely attributable to that factor. If the employer relies upon a material factor that applies independently of a worker's sex, but in fact is potentially indirectly discriminatory because it affects a greater proportion of one sex than the other, the employer must also show that the factor is objectively justified. This means showing that the difference is necessary in order to achieve a legitimate objective of the business and that its adverse effects are not out of proportion to the objective.

5. What if the employer is asked to identify confidential information?

Employers are expected to answer the questionnaire as fully as possible. However sometimes they may be asked to provide information that is confidential to another person. For example, the complainant might ask for exact details of a colleague's pay package or appraisal review. If the information is confidential, and that colleague does not want it to be disclosed, the employer will need to consider how much

information can be given. It is likely that in many cases employers will be able to answer detailed questions in general terms whilst still preserving the anonymity and confidence of their workers. For example, they could describe groupings on a pay scale, or confirm that a comparator's pay is above a certain rate. Where more than one comparator is named, information could be provided in an anonymized way. If only one comparator is named, employers could provide some of the information being sought in a generalised fashion – for example by explaining more fully how the pay system operates. Much of the information requested will not be confidential. For example, it could include details of pay schemes and job grading systems, job descriptions, or how skills and experience are reflected in the employer's pay system.

The questionnaire does not alter the common law duty of confidence that all employers have towards their employees. Certain information about individuals is protected by the common law of confidence and the Data Protection Act 1998. Where information is confidential, an employer would only be able to disclose the information if he had the consent of the individual in question, where he had a legal obligation to do so, or where there was a strong public interest requirement. For advice on specific issues relating to data protection an employer may wish to refer to the Information Commissioner.

In some cases employers may not feel able to disclose specific information that they believe is confidential. If the case proceeds to a tribunal complaint, tribunals may order disclosure of relevant information if they believe it is in the interests of justice to do so.

6. What happens if the respondent does not reply or replies evasively?

The respondent is not compelled to reply to the complainant's questions. However, if the respondent deliberately, and without reasonable excuse, does not reply within 8 weeks, or replies in an evasive or ambiguous way, the tribunal may take this into account and the respondent's position may be adversely affected should the complainant bring proceedings. The tribunal can draw any inference that it considers just and equitable from an equivocal response or deliberate failure to respond. For example, it may conclude that the respondent did not provide a proper explanation for a difference in pay because there was no genuine reason for this difference.

There may be circumstances where the respondent is unable or unwilling to respond to a question. For example, an employer may not feel able to provide confidential information relating to the comparator in response to the questionnaire if the comparator did not want such information disclosed. The tribunal cannot draw any inferences if the respondent has a reasonable excuse for failing to respond. Paragraph 3 of the response gives the respondent the opportunity to explain why he or she has chosen not to reply to a particular question. If an employer does not feel able to provide information in response to the questionnaire, the reason for any refusal should be clearly outlined in the questionnaire. It is important that the explanation for any refusal is both genuine and clear.

7. What happens if the questionnaire reveals an equal pay problem?

In the first instance, it is likely to be in all parties' interests to try to resolve the problem within the workplace. Many employers have their own internal grievance procedure that the complainant might use to seek resolution of their complaint. If the complainant is a member of a trade union they may wish to seek advice from their trade union representative. The information gained from the questionnaire can be

used as a basis of discussion between the employer and worker and should help to resolve any difficulties. Failing this the information can be used as evidence in employment tribunal proceedings. If both sides agree that there is an equal pay problem, the employer will have to take action to ensure that there is no discrimination in terms and conditions.

8. Applying to Employment Tribunal

The majority of problems in the workplace are resolved through discussion with your employer or manager. However, if all else fails you might want to consider applying to the Employment Tribunal. Please note that the equal pay legislation contains strict time limits within which you must bring a claim. You can make an application at any time while you are doing the job to which the claim relates, or within six months of leaving that job. In order to be admissible in any ensuing employment tribunal proceedings, the complainant's questionnaire must be served on the respondent either:

- before a complaint is made to an employment tribunal, or
- within 21 days after making such a complaint to a tribunal.

However, where the complainant has made a complaint to the tribunal and the period of 21 days has expired, a questionnaire may still be served provided the leave of the tribunal is obtained. This may be done by sending a written application to the Secretary of the Tribunal, stating the names of the complainant and the respondent and setting out the grounds of the application. However, every effort should be made to serve the questionnaire within the period of 21 days as the leave of the tribunal to serve the questionnaire after expiry of the period will not necessarily be obtained.

9. Use of the questions and replies in employment tribunal proceedings

If you decide to make (*or have already made*) a complaint to an employment tribunal about equal pay and if you intend to use your questions and the reply (*if any*) as evidence in the proceedings, you are advised to send copies of your questions and any reply to the Secretary of the Tribunals before the date of the hearing. This should be done as soon as the documents are available. If they are available at the time you submit your complaint to a tribunal, send the copies with your complaint to the Secretary of the Tribunal.

10. Protection against victimisation

The Sex Discrimination Act protects complainants from being victimised for making a complaint in good faith about equal pay or for giving evidence about such a complaint.

11. Where can I find further information about employment tribunals?

You can call the Employment Tribunals Service enquiry line on 0845 7959 775, minicom 0845 7573 722 or go to the ET website on www.employmenttribunals.gov.uk.

12. Where can I find help in trying to resolve any dispute?

Acas can assist both parties to try to resolve disputed claims and is willing to help in situations where a worker feels they have grounds to complain either before or after an application has been made to an Employment Tribunal. You can call Acas enquiry line on 08457 474747 and their offices are listed in Yellow Pages or can be found at www.acas.org.uk.

13. Where can I find further information and advice?

Detailed information on equal pay legislation is provided in the *Guide to the Equal Pay Act 1970* published by the Government Equalities Office (see below for contact details).

The EHRC website www.equalityhumanrights.com includes advice specifically for complainants. In addition, advice for employers on good equal pay practice is provided in the EHRC's *Code of Practice on Equal Pay*. The EHRC has also produced an Equal Pay Kit that will make it easier for employers who want to undertake a pay review to ensure that their pay system is fair; the kit can be found on their website. The EHRC also publish a range of leaflets that can also be found on their website.

Employers can also obtain information on equal pay through Equality Direct on 0845 600 3444 or www.equalitydirect.org.uk. Complainants may wish to seek advice from their trade union representative.

If you require help or advice about completing or responding to this questionnaire, please contact the EHRC who can also advise on the Sex Discrimination Act:

Equality and Human Rights Commission
Arndale House
The Arndale Centre
MANCHESTER
M4 3AQ

Telephone: 0161 829 8100 (non helpline calls only)

Fax: 01925 884 000

Website: www.equalityhumanrights.com

Further copies of this questionnaire (including a Welsh language version), the *Guide to the Equal Pay Act 1970* and the *Guide to the Sex Discrimination Act 1975* can be obtained from the Government Equalities Office at www.equalities.gov.uk under sex discrimination legislation.

Government Equalities Office

Telephone: 020 7944 4400

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