The Equal Pay Act 1970 - An Act Suitable for the 21st Century?

An analysis of the origins and aetiology of the Equal Pay Act 1970, its subsequent amendment and judicial interpretation and an assessment of whether this Act may still fulfil a relevant function and purpose in the 21st century.

by

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ABSTRACT

That inequality of pay between the sexes persists today, primarily as a result of structural inequality and particularly occupational segmentation, provides the starting point for an examination and analysis of the Equal Pay Act 1970. Its historical origins and aetiology are traced and its development and interpretation are critically examined to provide a conclusion as to its current interpretative status, relevance and effectiveness.

The thesis is founded on two critical themes. Firstly, it is argued that insofar as reducing inequality in pay is concerned, legislation can only have a partial effect and commentators claiming that the Act has failed to achieve its purpose omit to take into consideration certain sociological and cultural factors which have effects which cannot be struck at legitimately within the compass of such a legislative instrument. It is contended that proponents who argue for a widening of the scope of equal pay legislation with the purpose of eliminating structural inequality conflate two constructs; legislation aimed at achieving 'fair wages' and legislation aimed at eliminating sex discrimination in pay and that it inappropriate to attempt, jurisprudentially, to achieve the former *via* the latter.

The second critical theme develops the thesis that the open textured nature of the domestic Act has, with limited need for amendment, been able to be interpreted flexibly, thereby striking effectively at subtle forms of pay inequality not contemplated by policy makers or the legislature until long after enactment, thus it

remains an effective instrument, not a failed measure requiring repeal and replacement.

What links the two critical themes is that equal pay law is currently at a crossroads following textual omissions and lack of express clarity in two recent judgments of the European Court of Justice, which if interpreted literally by domestic tribunals and courts, have the potential to distort the purpose of the Equal Pay Act transforming it from an instrument for removing pay discrimination attributable to sex (insofar as legislative intervention ever could) into an instrument of social engineering in the hands of claimants seeking 'fair wages' in the absence of any sex discrimination; no matter how laudable such a social aim, it is contended that would be an inappropriate jurisprudential consequence.

CONTENTS

CHAPTER 1. WOMEN IN THE LABOUR MARKET

1.1 Introduction

This chapter both identifies the extent of the problem of differential earnings between men and women and attempts to set the scene for the remainder of the thesis. In the first part of the chapter, the nature of the perceived problem of pay inequality, or, more accurately, the earnings gap and occupational segregation experienced by women in today's labour market is identified. The second section considers the complex area of socio-cultural core values and attitudes to gender which have their basis in the interrelationship between the economic system and family structure which illustrates that the role which can be played by legislation in effecting change in such a complex socio-cultural context is necessarily limited. It is argued that the causes of the earnings gap are multi-factorial, and that whilst legislation can be a powerful means of generating change where there is gross and obvious inequality by proscribing certain practices, that it is a weak instrument for effecting attitudinal change of the sort likely to lead to difference in outcome, once a certain level or plateau is reached. The introductory chapter concludes with an historical overview of the employment of women in Great Britain; it does not purport to be comprehensive or indeed illustrate subtleties between Scotland and England and Wales, but rather, it aims to provide the backdrop both as to how and why there developed a growing perception after World War II that there was a social need for legislation and reform and the countervailing pressure or tendency inherent in the core cultural ideology as to the primary focus of the female gender role.

1.2 The Earnings Gap

In 2003, it was estimated that women, working full-time, earned 82 pence for every pound earned by men.[1] Such a statistic, however, requires some disaggregation. Figure 1 illustrates full time hourly and weekly earnings for men by industry sector in 2003.

[1] Leslie *et al* *' Equal Pay'* The Law Society, London, 2003 page 1

Figure 1. [2]
Earnings by Industry Sector 2003

	Full-time hourly earnings			Full-time weekly earnings		
	Women	Men	Pay gap	Women	Men	Pay gap
A Agriculture, hunting and forestry	6.90	7.34	6%	272.0	350.4	22%
D Manufacturing	9.40	11.91	21%	365.2	496.4	26%
within which:						
DA Food products, beverages and tobacco	8.40	10.65	21%	341.5	458.4	26%
DB Textiles and textile products	6.75	9.58	30%	263.1	407.5	35%
DE Pulp, paper and paper products; publishing and printing	11.06	13.39	17%	416.0	543.2	23%
DJ Basic metals and metal products	7.99	10.38	23%	309.4	450.3	31%
DL Electrical and optical equipment	8.42	12.90	35%	332.3	521.0	36%
DM Transport equipment	10.44	13.18	21%	404.3	538.1	25%
E Electricity, gas and water supply	10.42	14.17	26%	399.0	568.9	30%
F Construction	9.61	11.17	14%	367.3	498.5	26%
G Wholesale and retail trade; repair of motor vehicles, motorcycles, personal and household goods	8.26	10.86	24%	316.8	453.7	30%
H Hotels and restaurants	6.61	8.13	19%	262.5	343.0	23%
I Transport, storage and communication	10.31	10.90	5%	404.6	474.9	15%
J Banking, insurance and pension provision	12.55	21.81	42%	451.6	788.1	43%
K Real estate, renting and business activities	11.52	15.34	25%	432.9	614.3	30%
L Public administration and defence; compulsory social security	10.15	12.70	20%	384.2	499.2	23%
M Education	12.64	14.09	10%	442.2	520.1	15%
N Health and social work	10.17	14.22	28%	390.2	565.8	31%
O Other community, social and personal activities	10.17	--	--	385.7	564.9	32%

-- estimate not available.

Figure 1 illustrates the wide and disparate range of the gap, relative to industry sector but which across all industries, in 2003, averaged 18%, having narrowed from 30% in 1970.

[2] Source: New Earnings Survey 2003, Office for National Statistics

According to the Equal Pay Task Force which was set up by the Equal Opportunities Commission ("EOC") in 2000, at the current rate of progress, it would take another 42 years to achieve parity of pay.[3] Predictably, women in part-time employment fare less well than their full time counterparts and, on average, earn 60% of the average male wage.[4] In 2000, the Cabinet Office estimated that what they called the 'female forfeit' for a non-graduate woman with no children and qualifications at the English GCSE level, was £241,000 over her lifetime and that women with two children, on average, suffer an 18% reduction in potential lifetime earnings and women with three children lose 30% in comparison with childless women.[5] The Equal Pay Task Force estimated that pay discrimination accounted for up to 50% of the pay gap with family responsibilities and 'occupational segregation' accounting for the remainder.[6]

The concept of occupational segregation refers to the fact that women tend to be concentrated within a narrower range of occupations than men; for example, 60% of women work in just 10 out of 77 occupations, many of which are low paid, routine, unskilled and traditionally associated as being 'women's work' such as cleaning, catering and certain jobs within the 'personal services' and 'caring' sectors.[7] Occupational stratification and imbalance is not confined to the unskilled and semi-skilled sectors of the economy, a fact which led one eminent American sociologist to identify essentially middle class or white collar occupations such as teaching along with social work, nursing and librarianship as "semi professions", the consequence being that occupations perceived as being composed of many more females than males or the "feminising" of an occupation tended to be associated with the dual consequences of low status and low pay.[8]

Part-time working, a feature of a highly segregated labour market, has a tendency to accentuate the pay gap. In 2000, the New Earnings Survey illustrated that 80% of part time workers were women, a high proportion of whose wages were below the National Insurance Lower Earnings Limit (LEL), and that one in six female employees, many of whom were part time, in the 24 to 54 age group, earned below the LEL compared to one

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[3] Leslie *op cit* page xii
[4] *Ibid* page 1
[5] *'Women's Income Over a Lifetime'* Cabinet Office Women's Unit London 2000
[6] *'Just Pay'* Report of the Equal Pay Task Force, EOC London 2001
[7] Grimshaw, D & Rubery J., *'The Gender Pay Gap: A Research Review'* EOC London 2001
[8] Etzioni, A. (ed.), *'The Semi Professions and their Organisation'* The Free Press, New York 1969

in a hundred male employees. In the same year, the Low Pay Commission calculated that over two thirds of the recipients of the national minimum wage were women, two thirds of whom were also part-time workers. It is estimated that approximately 44% of all women work part time and earn on average 74% of the earnings of women working full time.[9] In this thesis, it is the persistence of the earnings gap associated with occupational segmentation and structural or systemic inequality that is of particular concern in the consideration of the effectiveness of legislative measures.

The foregoing provides a snapshot only of the nature and extent of the earnings gap but does little to explain why the gap exists to the extent that it still does. It is trite to say that the causes of inequality of pay are rooted in the past, but care must be taken not simply to consider past labour practices absent the socio-cultural aspects of gender which become inextricably associated with work as an economic function and the family as the unit of production which have served to define the gender role of the female. The problem is that gender role and perceptions of 'appropriate' gender roles, form part of a society's core value structure, transmitted by a process of cultural reproduction and reinforce occupational segmentation. They frequently prove very resistant to change, at least, in the short term. In the next subsection, aspects of this relationship are considered.

1.3 The relationship between cultural attitudes on gender and the economic and family structure

To understand some of the persistent inequality which remains in respect of women in the workforce today, it is necessary to consider how core cultural values and attitudes in respect of gender roles affect, and are affected by, the socio-historical relationship between the family, the productive process and the economy. All three, historically, might be seen as having passed through stages.[10]

1. The family as the unit of production in an agrarian and subsistence economy; sex roles may have been segregated, but were complementary;

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[9] *Op cit* New Earnings Survey 2003

[10] The role of women, in the workforce, from an historical perspective is dealt with in more detail in this chapter, in subsection 1.4; the purpose here is to provide a very basic sociological, conceptual and theoretical underpinning to the historical material which is to follow.

2. Movement from the land and an agrarian economy to towns resulting in disruption to the family and productive process, by industrial capitalism in the 'Industrial Revolution';
3. The post capitalist phase, where the unity of the family is maintained, not predominantly as a unit of production but as a unit of consumption.

It is contended that these changes in economic orientation not only have produced important changes affecting the role of the family, in general, but the role, and perceptions of the role, of the adult female, in particular.

With the Industrial Revolution[11], the economic function of the family reduced. The movement to the towns and the growth of the factory system of mass production, with the emphasis on the accumulation of capital, changed the agrarian family structure. The extended kinship network necessary for that form of productive process to the more mobile, small nuclear unit recognised today, and reflected the nature of the demand for labour under capitalism. With increasing state intervention through education and social welfare, the role of the woman altered radically. The changes in the division of labour required under capitalism, put production firmly and squarely into the hands of men, leaving reproduction and childcare to the women; thus, the stage was set for the process which is typified by the family today; production is separated from reproduction and consumption. The net result of this change in family function under capitalism was to alienate the woman from the productive process and to restrict her role to producing and maintaining the present and future elements essential to the labour demands of the economy. The social norm and cultural ideology with regard to appropriate gender role became that women need not be drawn into the labour force while there was a surplus of men, except into particular, sex-specific forms of employment, based largely on the extension of the nurturing and servile role. When state education for the masses was introduced, transmission of this cultural norm became evidenced in the sex-segregated curriculum, which developed in the 19th century and was powerfully reinforced well into the second half of the 20th century and arguably persists informally, to some extent, today:

> "The roots of segregation lie in the time when domestic chores and home carpentry were the province of

[11] Generally taken to refer to the period 1760 to 1830; see, for example, Ashton T. S., *'The Industrial Revolution 1760 -1830'* Oxford University Press, London 1968

servants and hired labour. When state education for the working classes was no longer seen as a threat to the ruling classes, it was virtually inevitable that that it should seem appropriate for working class girls to be taught domestic skills in order to gain employment as servants. As secondary education for the working class developed the Board of Education under Morant extolled the virtues of cookery and domestic tasks in the female curriculum and the 1905 Regulations for Secondary Schools insisted on practical housewifery for girls and wood and metalwork for boys. Thus as with the academic sex-segregated curriculum for the upper classes, so there evolved a vocational and sex-segregated curriculum for the working class.

The part played by the general intellectual climate in the nation cannot be ignored and this was translated into a popular ideology, drawing heavily on the evolutionary ideas of Herbert Spencer. Although his ideas on the education of women were exceedingly complex, they were translated in their popular form into the notion that education caused damage to women's mental and physical health and thus the education of women could actually harm the race and possibly even lead to *"race suicide"*...the strength and pervasiveness of these ideas aided the process of differentiating the mass education of boys and girls which became officially embodied in the second Haddow Report 1931 and was carried forward past the 1994 Act by the Norwood, Crowther and Newsom Reports.

The problem of curriculum differentiation...is still with us...although many commentators treat the issue as if it was something new and pay scant attention to how it developed. It is only when an historical perspective is applied, and the residual strength of historical features is understood that one can begin to assess the validity of other explanations offered for the continued existence of curricular differentiation...The pervasiveness of traditions which have had over a century to consolidate while at the same time adapting in order to survive, will not easily be displaced..." [12]

Perhaps it is too easily forgotten just how recent was the norm of the sex-differentiated curriculum, in the education systems of England and Wales and Scotland, and which, whilst it affected all female pupils, tended to impact differentially and more harshly on children from working class families, further limiting academic and employment

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[12] Marsh, L. R., *'Issue Papers in Equality of Opportunity for the Sexes in Education: No1 Gender and Education – an Introduction to the Problem'* Scottish Consultative Committee on the Curriculum Edinburgh 1990 page 12*ff.*

aspirations.[13] Arguably, sex differentiation persists today, albeit to a lesser extent and reinforced only informally when young people make subject choices in secondary school, in preparation for the world of work, whether or not preceded by a period of tertiary education. Whilst sex stereotypical choices may have reduced over the last 25 years, their residual presence persists[14] bolstered by informal socialisation pressures and often in spite of expensive and expansive curriculum and other programmes designed to reduce sex stereotypical choices.[15] It is the education system and school in particular that prepares the next generation for the world of work and indeed is one of the primary agents of socialisation shaping attitudes and aspirations towards work and thus may presage future changes in workforce and labour market disposition, acting as a barometer of what may, 5 to 10 years hence, show up in the New Earnings Survey. The persistence of socio-historical legacy is still present, in its informal manifestations, at the level of the school. That is something the most elegantly crafted legislative measures are unlikely to impact upon, at least to any significant degree, such as would show up in the labour market statistics

In the post-capitalist family context, production is separated from consumption, with a central role played by women being that of consumer; the nuclear family in its privatised form provides that mass market for the products of the economic process based on duplication of needs and wants. The modern family is judged by what it consumes which, in turn, is a measure whereby we assess relative affluence and status. The separation of the roles of production and consumption which reached a peak in the post war years alienated women further from the production process.

If the foregoing provides an overview of how historically, changes in family structure and the role of women in it have been driven by an economic imperative, values related to them can only be transmitted through an ideology incorporated into (and reinforced by) what sociologists would describe as the core cultural value system. The dominant political and economic philosophy therefore leads to a set of prescriptions necessary to

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[13] *Ibid* pages 14 -18.

[14] As can be ascertained by the Scottish Executive statistics on public examination results broken down by subject and sex and which, for example, show at the 3 Higher attainment level, that biology is still predominantly a 'girls subject' whilst physics remains a 'boys subject'. In the 'practical subjects', the modern equivalents of woodworking and metalworking, namely the technical subjects within the CDT syllabi, remain the preserve of boys and home economics still remains the preserve of girls.

[15] For example, the Women into Science and Engineering (WISE) project.

maintain a stable social system and these dominant values are culturally reproduced and transmitted through the family, the school (a particularly powerful medium of socialisation), the media and the other agencies of socialisation. From these sources, individuals are presented with a predominantly consensual view of 'what is right' and 'what ought to be'. In absorbing any cultural ideology, we tend to do it on a 'taken for granted' basis; the ideology is thus self-perpetuating and incorporates circular justification.

Perceptions of gender appropriateness are core cultural values shaped by the economic system; they have a stability (leading to their persistence) because conformity has been induced and reinforced by the agencies of socialisation. Minor defections from the cultural norm may be permissible, even if considered idiosyncratic, but are unlikely to induce what the sociologists term 'moral panic', but mass deviation from the dominant cultural ideology would be interpreted as symptomatic of impending chaos or a threat to social order. That is not to say that core cultural values do not change, they do, and usually in an evolutionary and inter-generational manner that can seem indescribably slow and inevitably involves lag; more rapid change is seldom induced without the catalyst of chaos or catastrophe, such as through war, or the imposition of a new ideological system absent consent. Complex attitudinal values such as those relating to gender are undoubtedly resistant to change. Whereas simple behaviours may be changed through the operation of law, such as, for example, was induced by the requirement to wear seat belts in cars, with the lagging attitudinal component that it was a 'good thing' catching up over time, the law is a weak tool when it involves complex behavioural and attitudinal change.

The residual power of the cultural legacy and the normative lag relating to women and work should not be underestimated. It is contended that it is naïve to judge the effectiveness of a statutory measure simply in terms of numerical outcomes or target measures, and then assume appropriate drafting of some new legislative measure will suddenly, after almost 30 years, close that part of the equal pay gap which may be ascribed to the products of socialisation and cultural reproduction and the socio-historical context wherein such cultural norms were developed. The matter of the employment of women is addressed, firstly considering the main features to World War II, then considering the post-war period to the enactment of the Equal Pay Act 1970.

1.4 The Historical Context and the Employment of Women

As alluded to in the previous sub-section, traditionally the primary role of women in western societies has consisted in the creation and maintenance of the physical and moral environment within which the family could function as a social and economic unit. This productive effort usually took the form of supplying personal services for other members of the family unit, and helping with the cultivation of any land owned or rented by it. In agrarian society, a significant proportion of women were also economically active either wholly or partly outside the home. For married women, such external activity typically involved the preparation and marketing of surplus agricultural produce or helping the family as a whole in the manufacture of woollen cloth. Occasionally, the wives of labourers or small tenant farmers also engaged in paid agricultural labour at times of peak demand, such as the harvesting of grain or fruit-picking. For unmarried women or widows, these activities were not infrequently full-time in nature, although the main source of outside employment for single women was probably domestic service in the homes of the well-to-do and in inns and taverns.[16]

Women appeared to have an extensive involvement in trade and in traditional crafts such as printing and tailoring from medieval times through to the end of the seventeenth century.[17] However, women's lack of educational opportunity[18] and access to capital, together with the increasing complexity of commerce and industry, had brought about their virtual exclusion from both of these spheres of activity by the start of the nineteenth century, certainly in England.

The effect of the Agrarian and Industrial Revolutions was that agricultural labour became progressively less important as a source of female employment during the nineteenth century, although the demand for it by no means entirely disappeared. Domestic service on the other hand grew in importance, especially with the emergence of the newly

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[16]See Creighton, W, B., '*Working Women and the Law*' Mansell, London 1979 p. 1.
[17]*Ibid* pages 173 and 219
[18] It should be noted that in Scotland, unlike England and Wales, females had, like the sons of the poor, access to education in the Parochial Schools but unlike the sons of the poor, who were able, as a result of the Education Act of 1696, to progress to university, female children were not. The notion that the children of the rich and poor might be educated side by side was in fact presaged a century earlier by John Knox in the *'First Book of Discipline'*.

affluent middle class of the Victorian era.

The major growth area was in the manufacturing industries in general, and in the textile industry in particular. At first, these new industries offered limited employment opportunities for women, largely because factory work was not considered suitable on physical and moral grounds. In course of time, changing social attitudes and economic necessity combined to erode these barriers, and, from 1820 onwards, women entered factory employment on an ever-increasing scale. Because they came to the industrial labour market at a later stage than men, women were at an immediate competitive disadvantage. Men who were engaged in skilled, relatively well-paid employment, not unnaturally, wanted to maintain their advantage. One of their principal weapons was the maintenance of strict craft rules concerning apprenticeship. Occasionally, such rules expressly excluded women from a given trade or craft. More often, they achieved the same effect by requiring a period of apprenticeship longer than most women were willing or able to undertake, due to the fact that female employment was then generally regarded as a short-term expedient pending marriage and childbirth.

These restrictions may have caused women to seek less skilled, lower-paid work where they were competing with children and juveniles rather than adult males. In the 1840's and 1850's, in order to ensure that women remained uncompetitive, there was active support for the imposition of statutory restrictions upon the hours and conditions of employment of women in the textile trades, thereby, it was hoped, reducing their attractiveness as employees. It also included the negotiation of less favourable terms and conditions of employment for women as a matter of general principle, and, more particularly, in those few situations where they were in direct competition with men.

In Scotland, in 1844, women's work was shown to be heavily concentrated in the textile manufacturing areas wherein...

> "...women were on average paid less than 'the lowest class of labourer' and received only half the rate of agricultural day labourers or a third of the wage of artisans..."[19]

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[19] Levitt, I., and Smout, C., *'The State of the Scottish Working Class in 1843; A statistical and spatial enquiry based on data from the Poor Law Commission Report in 1844'*, Scottish Academic Press, Edinburgh 1979

To some extent, one might have thought that the low wages paid to women might have increased rather than diminished their attractiveness as employees, but presumably the expectation was that craft rules, plus statutory restrictions on hours of work, plus a relatively short working-life, would be a greater disadvantage than the competitive advantage of their lower rates, in addition to socio-cultural notions of appropriate gender roles. There were, of course, many other reasons why employees and employers alike supported such legal restrictions in the mid-1800s, and why women's work tended to be undervalued in relation to that of men.

As the nineteenth century progressed, commerce, retailing, banking, and government service at both local and national levels offered further opportunities for employment felt to be suitable for women. However, once again, women entered the market late, and found that their job opportunities were effectively restricted to the lower range of earnings, skill and responsibility. The expectation that employment was a temporary expedient was given added impetus in certain of these occupations by the operation of the 'marriage bar' which meant either an outright refusal to employ married women or an insistence that single women should resign when they got married. Married women were subject to a series of incapacities and disabilities which by the start of the nineteenth century had reduced them to a status little better than that of chattels of their husbands. To all intents and purposes, they could not own or acquire property in their own right, and in the law of delict and of contract, they were treated as mere appendages to their husbands. These disabilities gave rise to some doubts as to their capacity even to enter into binding contracts of employment without the consent of their husbands and as to whether or not they had any rights to the fruits of their labour independently of their husbands.[20]

By the turn of the century, agricultural labour had all but disappeared as a source of full-time employment for women, although it was still common to find the wives and daughters of farmers playing an active role in the day-to-day running of smaller family farms. Ancillary trades such as food processing were becoming increasingly important and there was still seasonal work such as fruit or hop picking. Domestic service remained a major source of female employment, and did so until after the end of the World War I.

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[20] Creighton *op. cit.* p.15

Manufacturing industries in general, and textiles and light engineering in particular, offered employment to significant numbers of working-class women, whilst the lower middle class sought employment in the retail trades, nursing, and clerical grades in commerce and the public service. It was still quite usual for middle and upper class women not to work, although an increasing number were entering the teaching profession. The common feature of virtually all women's employment was that it remained unskilled, badly paid, and terminated on marriage or the birth of a first child. Even the small minority who were engaged in relatively skilled, well-paid work were still disadvantaged compared with their male counterpart in terms and conditions of employment and promotion prospects and, in the public sector in particular, were subject to the marriage bar.

(a) The effect of war on women in the labour market

The advent of war, in 1914, had a major impact upon the employment patterns of women. Women undertook many occupations that had formerly been exclusively the preserve of men, notably in the engineering and transport industries. Relaxations in statutory restrictions on the hours and conditions of employment of women also meant that they could work longer hours than had been permissible previously, and also, at all times of day and night. For reasons of economic necessity and patriotism, many women entered employment for the first time or returned to the labour market even though they had young families at home. By July 1918, there were 1.59 million more women in the four main occupational groups - clerical, commercial, agricultural and industrial - than there had been in July 1914. Some 400,000 of this increase could be accounted for by a shift away from domestic service and the fashion-related textile trades, but this still left an absolute increase of over one million new recruits or re-entrants to the labour market over the four-year period[21].

When the trade unions agreed to the relaxation of craft restrictions in 1915, they had insisted upon an assurance that the restrictions would be reinstated on the cessation of hostilities. This undertaking was duly honoured with the passing of the Restoration of Pre-War Practices Act in 1919. To some extent, this Act marked a missed opportunity to

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[21] Creighton *op. cit.* p.4

effect a long-term re-structuring of the labour market, but the unions were concerned at the threat that the weakening of traditional craft rules posed to the job security of their male members.

The size of the female labour pool was further increased by the fact that the long periods of economic recession of the inter-war years caused many married women to work to supplement the family budget, and, indeed, it was quite common for these earnings to be the sole means of support for families at times of high male unemployment.

World War II provided a further stimulus for change. By this time, domestic service largely had disappeared as a source of employment for members of either sex. Women again did many jobs normally done by men with considerable success. Statutory restrictions on over-time and shift working were relaxed, and, as in 1914-18, there was a marked increase in the size of the female work force. Once again, pre-war restrictive practices were restored soon after the end of the war, and traditional occupational and earnings patterns remained essentially unaltered. However, the marriage bar in the public service was removed in 1946, and had largely disappeared elsewhere by that time also.

Not all of the many women who had entered the labour market during the wars could have been absorbed on a long-term basis even had they so wished. In practice, the great majority simply returned not unwillingly to the ranks of the economically inactive. But there were now significantly more women who had no choice but to remain economically active, for example, war widows, wives whose marriages had not survived the strain of separation, women with disabled husbands or other male relatives to support, and the large number of women whose prospects of marriage were diminished by the slaughter of a large proportion of the unmarried male population during the war.

(b) Women's work in the post World War II era to the mid 1970's

The growth in the relative importance of women in the labour force has, in the main, been a post World War II phenomenon, with the percentage of women in the occupied population rising from 30.8 in 1951 to 36.6 in 1971. This represents an absolute increase of some 2.2 million women accounting for almost the whole of the growth in the labour force over the period. Within this overall increase, the most rapid growth came from the

employment of married women which increased from 38.2 per cent of the female occupied population in 1951 to 63.1 per cent in 1971. The growth in absolute numbers does, to some extent, over-emphasise the presence of women since much of the increase in female employment was due to the increase in numbers working part-time, with relatively little change in the numbers working full-time. [22] In 1971, 5.5 million women worked full-time and 2.8 million worked part-time.[23]

By the 1970's, women's work was largely concentrated in the service and white-collar sectors, and in a small group of manufacturing industries, which included food, drink and tobacco, light engineering, and clothing and textiles. In the manufacturing industries and other manual employment, women's work tended to be either wholly unskilled or at best semi-skilled, whilst, in the service sector, they were usually clerks, typists, technicians or shop assistants.[24] Thus it can be seen that women, typically, did different jobs from men illustrative of occupational gender segregation. Occupational segregation can be of two types; horizontal segregation exists where women are in different occupations from men and vertical segregation exists where women, while in the same occupation predominantly fill the lower grades or hold less prestigious positions. The extent of horizontal segregation can be shown by the fact that according to one commentator, by 1971, over half of all men were still in occupations where they outnumbered women by at least nine to one and 77 per cent worked in occupations which were at least 70 per cent male. [25] Hakim also observes that vertical segregation has proved more difficult to establish; it is, however, more amenable to explanation, at least in part, by women's movement in and out of the labour force as a result of child bearing and child rearing, with this lack of continuity reducing the scope for advancement.

An extensive range of explanations, arguably often little more than excuses, have, at one time or another, been put forward both as explanations for and in support of reduced pay for women. and such explanations and excuses serve to reinforce gender stereotypical attitudes and indeed behaviour. Prominent among these have been the supposed differing abilities and physical characteristics of men and women; women's higher rates of

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[22] Department of Employment Gazette, *Part-time Women Workers 1950-1972*, November 1973
[23] Department of Employment Gazette, 1971]
[24] Department of Employment Gazette July 1979 pp. 720-3
[25] Hakim, C., *'Key Issues in Women's Work: Female Heterogeneity and the Polarisation of Women's Employment'* London Atlantic Highlands, New Jersey 1996. See also, Hakim. C., *'The Myth of Rising Female Employment'* (1993) 7 Work, Employment and Society 97.

absenteeism and greater labour turnover; women's lack of relevant qualifications; their unavailability for promotion; the existence of statutory restrictions on the employment of women, such as for example on night shift work; family responsibilities and the lack of trade union organisation. Whilst it is outwith the scope of this introductory chapter to give detailed consideration to each of the foregoing, they merit brief consideration, not least because some at least persist in the popular imagination today.

In respect of differing physical characteristics, the Atkin Committee[26] had, in 1919, suggested that a woman working without undue strain could produce four-fifths of a man's output, with a majority of the Royal Commission feeling that improvements in the general health of women and a closer matching of the job to the individual were likely to have reduced the margin; it is notable that the finding is expressed in the language of F. W. Taylor's 'scientific management' philosophy, which was the popular management theory of the day, and heralding the advent of what came to be known as the time and motion study. [27] The general belief, still prevalent today, is that there are certain jobs which are more suited to members of one sex rather than the other, most usually cited are those involving a great deal of physical strength or a high degree of manual dexterity, the latter being epitomised as a female trait, but experience in Eastern Europe and elsewhere, indicates that there were many fewer such jobs than is generally supposed, and that many women were capable of doing what is commonly thought of as 'men's' work, and *vice versa*.[28] Leaving aside the question of physical strength, the differences between males and females in respect of visual/spatial ability (males superior) and verbal/linguistic ability (females superior) is still not satisfactorily explained today, and by the 1960's and early 1970's, a vigorous debate ensued (redolent of the intelligence 'nature or nurture' debate of the 1930's to the 1950's) as to whether such sex differences were caused by cultural conditioning and the socialisation process or whether the answer was to be found in biological explanations. In respect of the latter approach, the notion that spatial ability was carried on the X-linked recessive gene or was attributable to hemispheric brain lateralisation becoming dominant.[29]

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[26] The Report of the War Cabinet Committee on the Employment of Women in Industry is considered further in Chapter 3.

[27] See Taylor, F. W., *"Scientific Management'* Harper & Row, New York 1911

[28] See for example Ch. 2 D.E. Manpower Paper No. 10, *'Women and Work - Sex Differences and Society'*, 1974

[29] See for example Maxwell, J. W., Croake, J. W., & Biddle, A. P., *'Sex Differences in the Comprehension of Spatial Orientation'* Journal of Psychology 1975, 91; Mischel, W., *'A Social Learning View of Sex*

It is, of course, trite to say, as many commentators do, that even where there may exist genuine differences between the aptitudes of the sexes, these could most appropriately be taken into account in the context of the workplace through processes of self-selection and commonsense considerations of competence and that any such differences did not justify a general undervaluing of women's work as against that of men, much less the work of an individual who has the ability and the inclination to do 'men's work', but that is to some extent at least to miss the point. The sex differences, which *per se* may be neutral, have acquired sex-stereotypical connotations which historically have been accorded relative value independently of the workplace. Importantly, their impact on the labour market is culturally reproduced in the form of a self fulfilling prophesy by the next generation of secondary school pupils making subject choices entailing, when as school leavers they enter the labour market, they only incrementally improve on the sex stereotypical career choices of their parents. Once freedom of choice and legal restriction is removed, beyond a certain point, the trend towards a labour market devoid of sex stereotyping and occupational segregation is likely to be incremental and inter-generational as stereotypes lose their potency and relevant role models become more numerous.

It is accurate to state that, as a generality, absenteeism rates were generally higher among women than men.[30] This may have had some marginal effect upon the perceived value of a female employee in some instances, but it would hardly justify a wholesale devaluation of working women. There is no reason to think that the higher levels of absenteeism were due to any inherent physiological or psychological difference between the sexes. It is likely that much of the difference can be accounted for by women requiring to take time off at times of family crisis, particularly involving children. Other factors may play a significant part also, for example, the part-time nature of so much of women's work, the age-structure of the female workforce, and the fact that so many women do boring, badly-paid work with consequent low levels of job-motivation.

Much the same is true of labour-turnover. Labour-turnover in the 1960's and 1970's was

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Differences in Behaviour' in Maccoby, E, E., *'The Development of Sex Differences'* Stanford University Press, California 1966; Ounsted, C., and Taylor, D. C., (Eds.) *'Gender Differences: Their Ontogeny and Significance'* Churchill, London, 1966 ; Warber, D. P., *'Sex Differences in Mental Abilities, Hemispheric Lateralisation and Rate of Physical Growth at Adolescence'* Developmental Psychology, 1977, 13; Wilson, G., *'The Sociobiology of Sex Differences'* Bulletin of the British Psychological Society, 1979, 32.

[30] Department of Employment *New Earnings* Survey 1970 p.13

higher for women in virtually all occupational groupings.[31] These patterns can again be partly explained by the nature of the work that women do, and by the fact that so many of them effectively do two jobs, if child care and family responsibilities are taken into account. This is borne out by the fact that turnover drops and stability rises with age, to the point that mature, married women are a conspicuously stable workforce.[32]

In the post-war years, one of the main reasons advanced in justifying sex-based pay differentials was that men ought to be paid more because of their greater family responsibilities (as opposed to primary childcare responsibilities, which fell to the women). The argument was that men usually have wives or partners, children, dependant relatives, mortgages etc. to support, and their needs were accordingly greater, hence their need for a 'family wage'. The argument has a somewhat illogical ring to it, as it was never seriously suggested that bachelors, or married men without children, should be paid less than family men for the same work. The 'family needs' or 'family wage' argument also ignored the fact that there have always been many women who have to support themselves and their dependants and few would argue that the actual needs of such women were less than those of similarly placed men; the argument patently owes more to misconceived sex stereotyping, than logic, however, this argument was still raised as an objection to the implementation of the equal pay principle in 1970.[33]

In respect of arguments focussing on training, qualifications and availability for promotion of those young persons entering employment in 1973, 49.3% of boys took up apprenticeships or employment leading to a recognised professional qualification whereas the corresponding figure for girls was 8.4% and no less than 58.2% of girls took up clerical appointments. This again is indicative of the segmentation of the labour market. In the case of persons holding an academic or professional qualification recognised as being of at least first degree level, it was estimated that the total stock of highly qualified males in 1971 stood at 1,060,000 compared with 352,000 females.[34] These figures reflect those available for work, rather than those qualified but economically inactive (for whatever reason) and require to be treated with some caution as they mask some

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[31] Department of Employment *New Earnings Survey* 1970 Table 152
[32] Hunt, A., '*A survey of women's employment*' Vols1-2 London 1968, Table 22a Vol.2
[33] See Mr Ronald Bell at H.C. Debs. Vol. 795, col. 966 (9 February 1970.)
[34] Department of Employment '*Employment Prospects for the Highly Qualified*', Manpower Paper, No. 8, HMSO, 1974.

important differences between higher education patterns in England and Wales and Scotland. Hutchison and McPherson[35] illustrated the particular Scottish interrelationship between social class, gender and entry into higher education in the post war years. They showed that, in the 1960's, middle class women were displacing working class males in Scottish universities; this occurred because, firstly, there was pressure on the non-science course places, Scottish universities expanded arts and social science faculties disproportionately relative to science, engineering and technology which tended to attract more males and as a result available places taken by, or more likely to be taken by, women and particularly middle class women, expanded at a greater pace than the places taken by or likely to be taken by males. Secondly, within the non-science area the pressure on places from middle class females was acute and as they were (on average) better qualified than working class males, the latter were squeezed out. This led Gray, McPherson and Raffe to conclude, following a massive research study of three quarters of all Scottish schoolchildren between secondary school entry in 1948 and secondary leavers at 1976, that while[36]...

> "...[e]ducational expansion may be valued for the intrinsic benefits of the extra education for individuals and society ...there is no evidence that it has changed social class relativities in educational attainment in post-was Scotland"

It is very significant that by the mid 70's, the problems of social class access to higher education (with its correlation with differential attainment by social class at the level of the school) had not, relative to middle class access, changed, particularly since in the post war years the relationship between deprivation and underachievement was well known and had been the subject of numerous interventionist strategies.[37] The foregoing illustrates that working class girls in the post-war years suffered what might be seen as a 'double whammy' disadvantage by virtue of social class position and disadvantage by virtue of their sex and the problems associated with sex stereotyping, narrowing their options in respect of career choice. Arguably, this relationship is often overlooked by commentators, such as McColgan[38], who, whilst recognising the multiple inequalities in

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[35] Hutchison, D., & McPherson, A., *'Competing Inequalities'* Sociology, 1976 Vol 10 (1)
[36] Gray, J., McPherson, A. F., & Raffe, D., *'Reconstructions of Secondary Education – Theory, Myth and Practice Since the War'* RKP, London 1983 page 227.
[37] See for example Hasley, A. H., Heath, A.F., & Ridge, J. M., *'Origins and Destinations'* Clarendon Press, Oxford 1980
[38] McColgan, A., *'Just Wages for Women'* Clarendon Press, Oxford 1997

the context of race and gender tend to give primacy to gender when examining occupational segregation and virtually ignore the component of inequality and disadvantage induced by social class. It is also worth noting that cultural conformity itself tends to be closely related to social class, with higher levels of stereotypical conformity being inversely associated with social class position.[39] At the simplest level, the affluent and socially secure may more easily allow themselves to be untrammelled by social mores and stereotypical perceptions and conventions, including those relating to gender appropriateness, their social class position essentially permitting greater a higher level of non-conformity.

For those women who did not enter higher or even further education, it follows that lack of qualifications and training had a depressive effect upon their earnings and also helped to keep them segregated in their own labour market; early pregnancy and in pre-contraceptive pill days, failure to control fertility, meant that substantial numbers of working class women, in particular, failed to enter any form of tertiary education, thus swelling the ranks of the un- and under-qualified. A high proportion of women were employed in jobs such as cleaning, cooking and the making of clothes - all extensions of domestic tasks which the gender stereotype articulates with the assumption that because women often exercise such skills at home, they are somehow intrinsic to womanhood and did not need to be learned in the same way as typically male skills and hence are ascribed less value, monetarily and socially.

There is a weak argument which equates some reduction in the value of women as employees as a result of the existence of statutory restrictions on their employment. Whilst there might have been some slight increase in costs through the keeping of registers, applying for exemption orders etc., such costs could not be said, significantly, at least in any objective way to reduce the value of women's work to an employer. Lack of flexibility due to restrictions on such things as shift-working might have been a rather more substantial factor, although this was probably more apparent than real, as was evidenced by the comparative ease of exemption under the 1961 Factories Act, and the fact that most men, and virtually all women, worked fewer than the forty-eight hours

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[39] See for example Chinoy, E., *'Society'* Chapter 18 *'Conformity and Social Control'* Random House, New York 1967 and Maccoby, E. E., Newcomb, T. M., and Hartley, E. L, *'Readings in Social Psychology'* particularly Chapters 5, 6, 9and 13.

permitted under Part VI of the 1961 Act.

An equally unconvincing argument is sometimes advanced that women were supposed to be reluctant to join trade unions, and to make bad members when they did join. In consequence, they lacked collective strength, were unable to compete on equal terms in the labour market and, because they lacked an effective voice within the union movement, they were unable to enlist the support of men in the fight against discrimination. This seems a somewhat over simplistic and indeed stereotypical view. As McColgan[40] points out, if full-time female workers only are considered, the female union membership rate broadly equates with that of men. It would appear that much of the apparent disparity in membership rate can either be ascribed to, or, at the very least, is associated with part-time working. Further, if union membership by occupational group is analysed, it becomes apparent that women in some occupational categories, primarily white collar and blue collar jobs, are, in fact, more likely to be union members than their male counterparts.[41] Further, it should be noted that in the post-war years up to the 1970's, there was a substantial increase in female membership, particularly in the public sector.[42]

As the foregoing illustrates, in the post-war period up to the mid 1970's, women experienced a significant level of occupational segregation. Their earnings remained significantly lower than those of men in all occupational categories, whether measured on a weekly or hourly basis[43]. The great majority of women in the labour market fell into the lower paid categories.[44] Figure 1 illustrates that the earnings gap persists today, albeit the gap has lessened. However, such bald statements of fact do little to shed light on the very complex interrelationship of the variables that have led to and have perpetuated such outcomes.

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[40] McColgan *op cit* page 72*ff*

[41] For example *'Social Trends'* 1995 HMSO London Table 4.22 illustrates that for women in 1994 trade union membership in the category 'professional' union membership for women stood at 56.4% and for men at 38.4%; for the 'associate professional and technical, clerical and secretarial' union membership for women stood at 52.9% and for men at 33.6%. According to McColgan *ibid* this is illustrative of a long term trend.

[42] Ministry of Labour/Department of Employment Gazette 1952, 1962 and November 1976.

[43] Department of Employment Gazette, March 1977, pages 240-1.

[44] See for example the Department of Employment Gazettes for the relevant period.

1.5 Conclusion

This chapter has sought to identify the nature of the earnings gap and set the scene for the detailed assessment of the Equal Pay Act which follows. It has attempted to show the complex relationship between economy and the process of production and the family and how this contributes to defining the role of women. The importance of the socio-historical context has been stressed and the way in which core cultural values are transmitted and reproduced by the agencies of socialisation has been illustrated. That legislation may be a powerful agent of social change is not denied but the complexity of effecting change in such an area has been indicated. It is contended that any assessment of the effectiveness of the Equal Pay Act cannot be divorced from the socio-historical context which has formed and shaped attitudes as to gender role and still impacts, in this socially stratified class based society, on the choices made by young people which will to a great extent determine their place in the labour market of the future. It is argued that the residual power of this should neither be underestimated nor without more, be characterised in simplistic fashion as a failure of the Act.

Notwithstanding the foregoing, it is important to note that legislation in support of equality of employment rights may be characterised as having one of three aims or objectives. The first may be said to effect and ensure equality of opportunity; in this respect the Sex Discrimination Act 1975 is an example of this category. The second may be said to have the objective of securing equality of result; it is into this category that the Equal Pay Act 1970 falls. The third type has the objective of modifying the world of work based on the recognition of differences between men and women, into which category would fall legislation concerning pregnant workers or part-time workers. In terms of this simple typology, it is with the second of these, namely the equality of outcome, that this thesis is concerned and therefore focus inevitably will be on measurable results; the difficulty lies in identifying those attributable to the Act and, given failure to close the earnings gap in its entirety, the extent to which failure for that is attributable to deficiencies in the relevant legislation, and, in particular, the Equal Pay Act.

The second chapter traces the development of the equal pay legislation in Great Britain, considering firstly the historical position to 1970, and thereafter, what might be called the modern position, that is from 1970 and the enactment of the Equal Pay Act onwards.

CHAPTER 2. DEVELOPMENTS IN LEGISLATION CONCERNING WOMENS' PAY IN GREAT BRITAIN FROM THE 19TH CENTURY TO 1970

2.1 Introduction

The preceding chapter identified, firstly, the problem of the current earnings gap in the labour market and the systemic inequality derived from occupational segmentation and considered some of the reasons why these persist some 30 years after the Equal Pay Act came into force.

The effectiveness of any legislative measure can only be analysed properly in the context of why it was enacted, in the form it was enacted, and with respect to the mischief (or mischiefs) it sought to remedy at that time; its subsequent success or failure can be measured by the extent to which it has been able to cope with changing circumstances. A useful surrogate measure of that must be the extent to which it has required amendment. As with all social legislation, an understanding of the socio-historical context and its development is necessary to evaluate the instrument and a necessary basis for considering its current and future usefulness, when societal and other conditions have changed.

In this chapter, an historical overview is undertaken, covering (primarily) the period from 1800 until the enactment of the Equal Pay Act in 1970; it is selective, as this thesis is not fundamentally concerned with the historical or sociological development of equal pay legislation; it is included because without some understanding of context, the risk is that any analysis and evaluation of the Act can only be partial and incomplete.

2.2 The development of statutory provisions to 1970

Women appear to have been liable to wage discrimination from the earliest times. In England some of the early wage-fixing measures like the Statute of Labourers of 1351[45] and the Statute of Artificers of 1562[46] were silent on the point, but others expressly provided for lower rates of pay for women, either generally, or in certain specific

[45] 25 Edw. 3, c.1
[46] 5 Eliz. 1, c.4

occupations[47] Magistrates' assessments under legislation such as the Statute of Artificers were ambivalent; sometimes, they did not distinguish between the sexes; on other occasions, they did, invariably to women's disadvantage. Precise figures are hard to come by, but Clark[48] estimated that women's earnings in the seventeenth and eighteenth centuries were usually about half of those of men.

While the textile trades were still based on 'cottage industry', payment was usually by the piece and the sex of the person doing the work was irrelevant. But, where there was some division into 'men's work' and women's work', the rates for the latter were generally lower and Creighton makes special mention of the silk trade in this context.[49] This trade was capitalised from early in the industrial revolution and production became concentrated in factories before any other part of the textile industry. These factories were concentrated in Spitalfields, Coventry and Macclesfield. For a variety of reasons, the wages of Spitalfields' workers[50] came to be regulated by law in 1773 by *"an Act to empower the Magistrates therein mentioned to settle and regulate the Wages of Persons employed in the Silk Manufacture within their respective jurisdictions"* [51] which provided for the same statutory rates to be paid to men and women. In 1811, an employer refused to pay equal rates to one of his journeywomen and the resultant controversy led to the passing of a further Act which made it clear that women were indeed entitled to the same rates as men.[52] The Spitalfields' Acts were dispensed with in 1824 as part of the general repeal of the old wage-fixing legislation, and unequal pay quickly became the norm in this trade as elsewhere.[53] Nevertheless, the Acts do mark a limited attempt to eliminate unequal pay by statutory regulation in England almost 200 years before a universal attempt was made and have no equivalent in Scotland. In considering what she calls the *"dead hand of nineteenth-century industrial structure"* and its subsequent effect in Scotland, Mitchison (1972)[54] states:

> "It is one reason for the low economic status of women in Scotland. Scottish industries have either provided reasonably paid jobs for men and a lot of

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[47] See for example 23 Hen. 6, c.12 and 11 Hen. 7, c.22, s.1.
[48] Clark, A., *The Working Life of Women in the Seventeenth Century'* Routeledge, London 1992 pp. 59-66.
[49] Creighton, W. B., *op. cit* p.82*ff*
[50] See Sholl, S., *'A Short Historical Account of the Silk Manufacture in England'* London, 1811 cited in J.H. Clapham, J. H. *'The Spitalfields Acts 1773-1825' The Economic Journal* 1916 Vol 26 p. 459
[51] 13 Geo. 3, c.8. See also the Act of 1792, 32 Geo. 3, c.44.
[52] 51 Geo. 3, c.7.
[53] See the Regulation of Wages in the Silk Manufacture Repeal Act 1824. 5 Geo. 4, c.66.
[54] Mitchison, R., *'Scotland from 1830'* in Dunnett, A, M., *'Scotland'* Andre Deutsch, London 1972, p. 96

them, or very badly paid jobs for women: there has been little in between. In any case Scotland in the 18th and 19th centuries had been a society based uncritically on masculine conceptions. The crucial Veto Act of the General Assembly, the first blow in the quarrel that culminated in the Disruption, giving the right of vetoing presentations to the male heads of households, was a natural manifestation of this. The movement for women's civil rights found relatively little support in Scotland...The more half-hearted efforts for economic equality have met even less."

In the 1850's, the more radical sections of the press carried articles condemning women's underpayment[55] and by the 1870's the matter was being discussed by the Trades Union Congress ("TUC"). In 1882 and 1887, the TUC unanimously passed a motion to the effect that:

> "...in the opinion of this Congress it is desirable, in the interests of both men and women, that in trades where women do the same work as men, they shall receive the same payment".[56]

The question of equal pay was an issue in the matchgirls' strike of 1888, but the issue was not pursued. Congress reiterated its support for the principle of equal pay for equal work on more than forty occasions in the next three-quarters of a century, but generally it remained little more than an aspiration. It was not until 1963 that Congress passed a resolution which called for legislative intervention in relation to equal pay.[57] The context of these TUC resolutions is important; women's underpayment and undervalue was seen as a problem for male workers, not female ones insofar as women's availability at lower rates of pay meant men became vulnerable to displacement. According to McColgan,[58] it was this fear that, in 1894-95, led the Association of Engineering Workers to insist on equal pay and which motivated some of the early proponents of equal pay in the Civil Service. For example, in 1921, the mover and seconder of a motion for equality of pay in the Civil Service spoke of *"the dangers of undercutting ...women degrading men's wages, and, above all...a most bitter and uncomfortable sex war"* and of the possibility that, without such equality, the Civil Service would follow the trend in teaching (where

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[55] McColgan *op cit* p. 84 and references cited therein.
[56] Creighton *op cit* p. 90.
[57] TUC Report, 1963 pp. 456-9.
[58] McColgan *op cit* p. 85.

women were paid less for the same work) and thereby become a female profession.[59]

The matter of pay equality was pioneered in the public sector; the House of Commons passed a motion supporting the principle of equal pay first in 1920, whilst private sector intervention was not considered until the 1940's. The question of equal pay in the public sector was examined by at least three Royal Commissions[60] and three Governmental Committees[61] and was the subject of innumerable parliamentary questions, adjournment debates, and even two votes of confidence in the House of Commons (Prime Ministers Baldwin and Churchill).[62] Most of this material is now of purely historical interest, but both the Atkin Committee and the Asquith Commission did consider some of the broader implications of the claim for equal pay for equal work.[63]

The clerical and administrative branches of the civil service were the subject of a Royal Commission in 1914 and, in the Report, it was recommended, by a majority, that where the character and conditions of work performed by women approximated in identity with the character and conditions of the work performed by men, equal payment should be paid to both sexes. Notwithstanding the restoration of pre-war restrictive practices on 19 March 1915, the government made a pledge to all industrial workers, contained in a memorandum on Acceleration of Output on Government Work, known as the Treasury Agreement, that all women who undertook work previously done by men should receive the full male wage.

Of all the commissions and committees to consider equal pay, the Atkin Committee was probably the most far reaching. It owed its origins to a London Transport equal pay dispute in 1918, although its terms of reference were subsequently extended beyond the confines of the original dispute. It was this Committee's analysis of the nature and causes

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[59] 145 HC Debs. (5th August 1921), cols 1894 and 1902

[60] The Royal Commission on the Civil Service (MacDonnell Commission), 1912-16, Cmd. 7338, chapter 10. The Royal Commission on the Civil Service (Tomlin Commission), 1929-31, Cmd. 3909. and The Royal Commission on Equal Pay (Asquith Commission), Cmnd. 6937.)

[61] The Women's Employment Committee, London, 1918. Cd. 9239; Report of the War Cabinet Committee on the Employment of Women in Industry, (Atkin Committee), London, 1919. Cmd. 135; and the Anderson Committee on the Pay etc. of State Servants 1923

[62] See H.C. Debs. Vol. 310, cols. 2441-2566 (6 April 1936) and H.C. Debs. Vol. 398, cols. 1452-7 and 1480-1524 (29 March 1944) and H.C. Debs. Vol. 398, cols. 1578-1656 (30 March 1944)

[63] See further Creighton, *op.cit.* page 80-98.

of unequal pay that was both interesting and, in some respects, the most far-sighted of all government committees or commissions, before or after both world wars.[64] The Committee felt that there were three kinds of situation to be considered in relation to equal pay; firstly, where members of one sex only were employed *"by reason of sex qualifications or disqualifications"*; secondly, where both men and women were employed but with a clear division between *"men's work"* and *"women's work"*; and thirdly, where:

> "... both women and men are normally employed without distinct demarcation of their respective work or division of their respective duties, the work and duties being either indiscriminately performed by both men and women or sometimes by men and sometimes by women, or some work and duties being allotted to men and some to women with a sphere of common work and duties which may be large or small according to the circumstances of the occupation and its degree of organisation ...." [65]

The Committee considered the concept of equal pay to be irrelevant to the first of these situations, but to have some applicability in the other two. Insofar as equal pay meant the monetary rate for the job, regardless of the sex of the employee, the Committee felt that its implementation could not be countenanced at that time. A majority did, however, favour the adoption of the principle of equal pay for equal work in the sense of *"equal pay in proportion to efficient output"*. This view was of most direct relevance in situations where pay was by the piece, but it was envisaged that the same principle should apply in relation to time rates, and that, notwithstanding the obvious practical difficulties, the relative value of the work done by men and women should be agreed between employers and unions. This perpetuated the myth that there is an inherent difference in the value of the work performed by the two sexes, but, at least the Committee were prepared to countenance the possibility of equal pay where it could be shown that an inequality between the work of the two sexes did not exist.

One of the members of the Committee, Beatrice Webb, dissented vigorously from the analysis and conclusions of her colleagues. She felt that they had committed the cardinal

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[64] Report, Cmd. 135, para. 213
[65] *Ibid* para 209 page 184

sin of looking at the wages and conditions of women without reference to those of men, and that this was:

> "...to assume, perhaps inadvertently, that industry is normally a function of the male, and that women, like non-adults, are only to be permitted to work for wages at special hours, for special rates of wages, under special supervision and subject to special restrictions by the Legislature."[66]

Instead, Mrs Webb proceeded upon the assumption that:

> "...our task is to examine the principles upon which wages and other conditions of employment have hitherto been determined with a view to deciding whether these principles affect differently men and women; whether such difference is justifiable in the interests of both of them, and of the progress and well-being of industry, and whether any new principle is called for on which the relation between them can be based."[67]

She rejected the idea of equal pay for equal work as a basis for the future relationship between the wages of men and women because she felt that it was ambiguous and too easily evaded. She chose to rely instead on the twin concepts of a national minimum wage and the rate for the job. In her opinion, the two had to go together because, once a national minimum was established, it would soon become unusual to find anyone actually working for that wage. It would then be necessary to bargain up from that platform, and since men were traditionally in a stronger bargaining position than women, differentials would quickly reappear unless there was general adherence to the principle of the 'rate for the job'. This approach was thought to have the additional advantage of helping to raise living standards, rationalise the employment market, stimulate technological progress, and encourage trade union organisation.

Mrs Webb did not accept that the adoption of these principles would cause women to be concentrated in the lower-paid sectors of the labour market to a greater extent than was already the case. She did, however, concede that it was impossible to predict the likely consequences precisely, mainly because no one was sure whether differences in efficiency or net productivity were due to differences of sex. If they were, then, she said:

> "...there would tend to be, with uniform rates, a general segregation by sex, most men gravitating to the

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[66] Cmnd 125.Part I page 257
[67] *Ibid* page 257

> occupational grades in which they were superior to women, and most women to those in which they were superior to men, but with exceptions on both sides for individuals who had peculiar tastes or aptitudes or who were above or below the common run of their sex."[68]

She felt that there was no reason in principle why the rate for the job should lead to a significant decrease in the total amount of employment available, although she did agree that there might have to be some redistribution within that aggregate. If any lay-offs did prove necessary, the prevailing principle should be that the least efficient should go first. If the burden of such unemployment did fall more heavily on women than on men, this would not necessarily be bad, since women tended to be less burdened by unemployment than men. This last statement comes strangely from one who dissented from her colleagues because they had assumed that 'industry is normally a function of the male', but it should not be allowed to obscure the fact that Mrs Webb's analysis of the problems of women in the labour market was far ahead of her time.

In 1918, the Representation of the People Act first gave women the vote, but applied only to those over thirty who were university graduates, householders, or wives of householders. The following year the Sex Disqualification (Removal) Act provided that a women should not be disqualified by sex or marriage from the exercise of any public function or from holding any civil or judicial office or post or from entering or carrying on any profession or vocation. However, it did not cover typical paid employment and was largely ineffective[69]. Notwithstanding that, in 1920, London County Council became the first local authority to apply the principle of equal pay to its senior women officers.

Following the influx of women into industry again, during the Second World War, the issue of equal pay again came into prominence and the government appointed another Royal Commission following a Government defeat during the Committee Stage of the Education Bill.[70] Its terms of reference required it:

> "...to examine the existing relationship between the remuneration of men and women in the public service, in industry and in other fields of employment; to consider the social, economic and financial implications of the

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[68] *Ibid* page 298.
[69] Creighton, *op. cit.*, pp. 66-76 .
[70] See H.C. Debs. Vol. 398, cols. 1356-90 (28 March 1944).

claim of equal pay for equal work; and to report".

The Report of the Commission is a most unimpressive document.[71] The terms of reference were unsatisfactory for a number of reasons, not least because the Commission was not empowered to make recommendations and because it was committed to a narrow definition of equal pay. The Commission compounded these initial difficulties by taking a restrictive view of its remit, and by becoming enmeshed in an attempt to quantify overlapping areas where men and women could be said to be doing equal work. There is no reference to whether there should be some kind of appropriate legal framework to operate an equal pay policy, or to whether a national minimum wage would be of relevance.[72]

The Commission found the explanation for unequal pay to be the legal restrictions on the employment of women, natural factors such as physical endowments, adaptability, absenteeism and welfare costs and social attitudes towards female employment and pressure from male employees. It was found that there were important differences in the consequences of equal pay according to the sector of employment. In the Civil Service, at that time, female non-industrial employees, other than those engaged in a professional capacity, were entitled to the same pay as males only at the minimum of the scale on entry to any class. At the maximum of the scale, the differential could not exceed 20% but an absolute limit kept the effective margin below this level. On the one hand, there was the aggregation principle whereby men and women were employed on the same duties side by side and, on the other hand, the principle of segregation whereby they were employed in separate branches with separate lines of advancement, a particular form of internal labour market which amounted to the reservation of certain posts to men and others to women. There the Commission found that there was no reason to suppose that equal pay would effect a change in recruitment policy designed to restrict the employment of women, nor would such an alteration have a marked effect on recruitment. The effects would only be adverse if the common rate was set too low to keep this sector competitive with other sectors with respect to rates of pay. The results would be similar in the case of local government. Within teaching, however, there was

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[71] Royal Commission on Equal Pay, 1944-46 (Chairman, Sir Cyril Asquith), *Report*, Cmnd 6937, October 1946.

[72] The Commission's findings are discussed by E.H. Phelps Brown, *'Equal Pay for Equal Work'*, Economic Journal, Vol. LIX, September 1949.

recognition that there might be an adverse effect in terms of the male labour supply function. In industry, among manual occupations, the Commission found that few women received equal pay, and, where they did, there tended to be either very few women employed or very few men (as in some textile and clothing occupational groups). There, the Commission found that there were difficulties which did not exist in the non-manual public sector. For instance, there were problems in defining comparable work, in determining how female efficiency compared with that of males and some opposition in union quarters. Furthermore, the Commission was inclined to accept the thesis put forward by Professor J.R. Hicks that there might be an inverse relationship between equal pay and equal opportunity such that:

> "...the probable consequence of a large scale application of equal time rates would be 'not merely that the process of penetration would be checked, but much (perhaps most) of the ground gained could not be held', since in general ... at equal pay for men and women a man will always be preferred". [73]

In the case of piece-rates, the Commission was of the view that common base-rates would not be detrimental to women since there would still be allowance for differential performances between the sexes. The explanation of these differences, crudely between the public (predominantly non-manual) sector and the private (predominantly manual) sector, was they felt to be found in the nature of competition; the public sector being cushioned against competitive forces, at least, directly, whilst in the case of the private sector, there is always the fear of undercutting if equal pay was to be granted.

The one positive accomplishment of the Commission was to indicate that it was not averse to the introduction of equal pay in teaching and in the public sector, although it was not over-enthusiastic at such a prospect.[74] A majority was opposed to its introduction in the private sector, largely because of probable adverse effects upon the demand for female labour, and because existing differentials reflected real differences in efficiency. A minority, consisting of three of the four women on the Commission, signed a separate Memorandum of Dissent in which they came out strongly in support of the principle of the rate for the job on a fairly broad definition. The Report of the Commission was

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[73] Report, Cmnd 6937 para 430.
[74] Report, Cmd. 6937, para. 433.

published in November 1946[75] and, in June of the following year, the Chancellor of the Exchequer, Mr Hugh Dalton, informed the House of Commons that:

> "As a broad affirmation of a general principle the Government accept, as regards their own employees, the justice of the claim that there should be no difference in payment for the same work in respect of sex. But such acceptance leaves unsettled many difficult questions of interpretation. It also leaves open the very important practical question of when effect should be given to this principle, and over what range of cases. The Government are definitely of the opinion that this principle cannot be applied at the present time. In making proposals to Parliament for incurring additional expenditure and for extending the social services, the Government must be the judge of priorities."[76]

As had occurred in the period prior to World War I and during the period between the two world wars, the issue of equal pay in the Civil Service was raised yet again at regular intervals in both Houses of Parliament after World War II[77] always with a singular lack of success. In 1954, three days before Mr Douglas Houghton's Private Member's Bill on equal pay was due to receive its Second Reading, the Chancellor of the Exchequer, Mr Butler, announced in his budget speech that he intended to enter into talks with the Staff Side of the Whitley Council with a view to introducing equal pay by instalments for the non-manual civil service[78]. On 25 January 1955, it was announced that agreement had been reached, and that *"the existing women's scales would be increased by seven annual instalments so that, on the payment of the seventh instalment women's scales would become identical with men's scales."* [79] Although the question of equal pay was within the terms of reference of the Royal Commission on the Civil Service 1953-5, as Mr Butler's statement preceded publication of their Report, in consequence they did not feel bound to discuss the matter[80] and full equality was not achieved until 1961.

Throughout the 50's, similar developments occurred in the nationalised industries, the

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[75] H.C. Debs. Vol. 438, col. 1069 (11 June 1947).
[76] H.C. Debs Vol 438, col 1069 (11 June 1947).
[77] See for example H.C. debs. Vol. 497, cols. 1786-94 (13 March 1952) and H.L. Debs. Vol. 180, cols. 353-69 and 373-89 (17 February 1953).
[78] H.C. Debs. Vol. 526, col. 211 (6 April 1954).
[79] H.C.Debs,Vol. 536, cols. 31-4 (25 January 1955).
[80] Cmd. 9613, para. 32.

health service, teaching[81] and local government.[82] Although in the manual field, there were some examples of equal payment, sometimes as a carry-over from wartime experience, as when equal pay was granted to bus conductresses and differentials between male and female rates narrowed in some industries, equal pay was still the exception.

By the early 1960s, the main groups not benefiting from equal pay, in the sense of equal pay for the same work, were manual workers and workers, whether manual or white-collar, in private industry. The TUC called upon the Government in 1961 to ratify ILO convention No. 100 (1951) on equal pay and, in 1963, it said that it thought legislation would be necessary to secure compliance with the convention in Britain. [83]

When the Labour Party took office in 1964, it was committed to legislation on equal pay, indeed the government had been elected on the promise of equal pay for all.[84] Almost immediately, the General Council of the TUC brought pressure to bear upon the Government to fulfil its election pledge. In June 1965, the Minister of Labour announced the setting up of an Inter-Departmental Committee to examine the issue, with special reference to its incomes policy implications.[85] The Committee reported to the Minister the same autumn, although its findings were never published.[86] There the matter rested until after the General Election of 1966, after which the Government began a series of meetings with the TUC and CBI, which lasted for almost two years. The Government gave yet another assurance of immediate action during the Committee Stage of the Prices and Incomes Bill in 1968.[87] In the same year, the Ford sewing-machinists' went on strike, in part about equal pay. This acted as a timely reminder to both employers and trade unions of the importance of the female workforce.[88]

Eventually, in January of 1970, Barbara Castle (Secretary of State for Employment and

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[81] In Scotland equal pay for teachers in the public sector was accorded in 1953
[82] See C.A. Larsen, *'Equal Pay for Women in the United Kingdom'* (1971) 103 *Int. Lab. Rev.*
[83] Meehan, E. M., *'Womens' Rights at Work; Campaigns and Policy in Britain and the United States'* Macmillan, Basingstoke 1985 pp. 37-8
[84] McColgan *op. cit.* p 86
[85] H.C. Debs. Vol. 714, cols. 3-4 (14 June 1965)
[86] H.C. Debs. Vol. 724, cols. 24-5 (7 February 1966)
[87] H.C. Debs. Vol. 767, cols. 479-522 (26 June 1968)
[88] See the report of the Court of Enquiry under Sir Jack Scamp into a dispute concerning sewing machinists employed by the Ford Motor Co. Ltd. 1968. Cmnd. 3749

Productivity) introduced the Equal Pay Bill (No. 2) in the House of Commons.[89] The House appeared unanimous in its support for the legislation; even Margaret Thatcher, the champion of the free market and non-interventionism congratulated Barbara Castle on introducing the Bill and argued that market forces were not sufficient to ensure equitable pay for women and concluded for the opposition by stating:

> "So many people have supported the idea of equal pay for so long that one wonders at the continuing inequality of payment between men and women. I believe that the Bill will lead to better pay for many jobs, and I support it as another step in the equal pay process." [90]

The Bill received its Second Reading two weeks later[91] and passed through its remaining Parliamentary stages in time to receive the Royal Assent before the dissolution of Parliament on 29 May 1970. It was scheduled to come into effect on 29th December 1975, giving employers some five and a half years to prepare for the extra wage costs – estimated to be as much as 18% of the then annual wage bill in the clothing sector and up to 32% in individual firms.[92]

The Act set out bases of comparison much closer to the 'same work' end of the spectrum than to the 'equal value' end. The reasons advanced for so doing displayed a concern with the potential intrusiveness of this type of law into the processes of collective bargaining. Equal value claims were seen as requiring a national system of job evaluation, with legislation prescribing a model scheme of job evaluation. Such a method of fixing wages would be "completely contrary to all established practices of collective bargaining in this country".[93] Although it was never made clear why claims on the basis of equal value could not be commenced until a national system of job evaluation had been carried out, the Government probably underestimated the strength of the other pressures in the industrial relations system at this time in favour of greater use of job evaluation.[94] Nevertheless, it was probably correct to perceive that there would be opposition, especially among union negotiators, to legislation which gave a primary role in setting pay rates to job evaluation. The TUC adopted the difficult, if not impossible, position of

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[89] H.C. Debs. Vol. 794, cols. 1553 (28 January 1970). The Equal Pay Bill (No. 1) had been introduced by Christopher Norwood M.P. in July 1968 and December 1969 but did not receive a second reading.
[90] H.C. Debs. Vol. 795, cols 1019,1923 and 1027 (9 Jan 1970)
[91] H.C. Debs. Vol. 795, cols. 913-1038 (9 February 1970)
[92] H.C. Debs. Vol. 795, cols. 924 (9 February 1970)
[93] H.C., Standing Committee H, cols. 264-6, March 10, 1970 [Mr H. Walker Government spokesman]
[94] Bain, G. S., (ed.) *'Industrial Relations in Britain'* Central Office of Information, London 1983 pp. 79-80

being in favour of equal value but highly suspicious of job evaluation exercises.[95] An even more important reason in the Ministry's eyes for not legislating for equal pay for work of equal value was that such legislation:

> "...would have involved the evaluation of men's work as well as women's work and, consequently, created the danger of upsetting the pay differentials between male workers". [96]

This quotation from a civil servant closely involved in policy formation on equal pay, demonstrates both the Ministry's limited commitment to removing inconsistencies from pay structures (arbitrary inequalities among the pay of men alone or, indeed, women alone were not to be the subject of legislation) and implicitly indicates how far away from the Ministry's mind at this time was legislation in favour of equal opportunities in employment and against job segregation.

Progress in implementing equal pay in Britain was also to be effected by the use of incomes policy. Under Stage II of the policy, any remaining differential between men's and women's rates could be reduced by up to one-third by the end of 1973, outside the pay limit if necessary. But increases over the norm were only permissible where pay settlements within the limit did not have the effect of widening the existing relativity between men's and women's rates. Presumably, it was on account of this provision that the Government chose not to enforce the 90% maximum requirement regarding female wage rates relative to those of males at the end of 1973. Under Stage III of the incomes policy, the equal pay provision was reinforced by allowing the parties to reduce any remaining differential by up to one half, again outside the pay limit if necessary. The Pay Board reported that, of settlements under Stages II and III which included improvements outside the pay limits, the most striking improvements continued to be movements towards equal pay.

Whilst the legislation of the European Economic Community had some influence on the decision to legislate on equal pay, it had less influence on the particular form of the 1970 Act. Although the UK was not at the time a member of the EEC, it was clear to those

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[95] *TUC Report 1970*, pp. 210-11
[96] Cited in Larsen, *op. cit.*, p. 3

involved in developing policy on equal pay that the intermittent negotiations between the UK and the Member States that had been conducted during the 1960s might be revived and lead, sooner rather than later, to British membership; indeed, in 1967, Government departments had been asked to review the implications of the Treaty of Rome for equal pay.[97] That British membership of the Community would require legislation on equal pay was used in cabinet as an additional argument in favour of British legislation when, in September 1969, the Labour Government finally committed itself to immediate enactment.[98]

At this time, Article 119 was perceived, wrongly as it eventually turned out, as embodying a very narrow conception of the principle of equal pay, namely equal pay for the same work, in contrast to the broader conception of the principle, which the TUC urged upon the Government, of equal pay for work of equal value and which was contained in ILO Convention 100. The Government however saw itself as steering a course between these two conceptions rejecting the former as *"too restrictive"* and the latter as *"too vague."*[99]

2.3 Conclusion

This chapter has considered the key developments in legislation in respect of equal pay, primarily from the beginning of the 19th century to the passing of the Equal Pay Act on the 29th May 1970. It illustrates that whilst the earliest legislative provisions in respect of wage fixing occurred in the 14th to 17th centuries, it was not until the 19th century that the issue of equal pay in any modern form was on the policy agendas of either government or the TUC; what is evident is that when it was addressed, it was primarily in the economic context of the effect on men, and, in particular, the damaging result that a two tier labour supply, where women were the cheaper source of labour, could have on men, leading to their displacement. That the first significant initiatives should take place in the public sector is not perhaps surprising, in that economic competitiveness was not a major consideration; that its introduction in respect of pay in the Civil Service, albeit partial, in 1921, was in no small measure driven by a fear that to fail to do so would lead to the

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[97] Meehan, *op. cit.*, p. 65
[98] Castle, B. *The Castle Diaries 1964-70* House of Stratus Ripon 1984 p. 705
[99] *Ibid* p. 705

'feminising' of the occupation (noting that this was what had occurred with teaching)[100] is significant particularly since after feminisation of an occupation has occurred and social attitudes and stereotypes coalesced, the cycle of cultural reproduction is difficult to break and becomes a virtual self-fulfilling prophesy.

The next chapter continues with this analysis of legislative development, by focussing on the period from enactment of the Equal Pay Act on 29th May 1970 to its implementation on 29th December 1975.

[100] Thereby echoing Etzioni's sociological construct and analysis of the 'semi-profession' almost 50 years later.

CHAPTER 3 DEVELOPMENTS IN LEGISLATION CONCERNING WOMENS' PAY IN GREAT BRITAIN FROM 1970 -1975

3.1 Introduction

In this chapter, the three important events of the 1970's with respect to equal pay are considered. Firstly, the Equal Pay Act 1970, in its originally enacted form and secondly, substantially re-drafted in the form of amendment prior to its implementation in 1975 by the Sex Discrimination Act 1975[101] and thirdly, the accession of the UK to the European Economic Community by virtue of the European Communities Act 1972. For the purpose of a cohesive narrative, matters concerning the accession are not considered in temporal sequence, but rather in the last subsection of this chapter. Complex matters of European law are not considered in any detail in this chapter, notwithstanding its importance to the way in which equal pay law developed in Great Britain in this period. The perception at the time of enactment of the Equal Pay Act was that EC law was narrower than the domestic provision, therefore there were few concerns regarding the impact of Europe at the time of joining, insofar as the principle of supremacy of EC law was concerned. However, by 1975, and the introduction of the Equal Pay Directive,[102] matters were to change radically, thus requiring a second set of amendments to the domestic Act. In order to understand the nature of these changes, it is necessary to consider the development of equal pay law in the context of European law itself and this is done in the next chapter.

3.2 The Equal Pay Act 1970 in unamended form

The unamended Act of 1970[103] and the reasons for the delay in implementation are not considered in any detail; the Act never came into force in that form, primarily for the economic reasons outlined in the previous chapter.

As stated in the introduction, the perception at the time was that the Act, as enacted, was wider in application than European law as interpreted in terms of Article 119. This is best

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[101] See now, Schedule 1 of the Sex Discrimination Act 1975 and the Equal Pay Act Schedule 16, Part IV. para 13.
[102] Directive 75/117/EEC.
[103] See Appendix I.

illustrated by considering the words of Professor C D Drake, the annotator of the unamended statute for Current Law; he stated:

> "By comparing "like work" and "work rated as equivalent" the ambit of the Act is wider than Article 119, Treaty of Rome, which only covers "*un même travail*".[104] In **Perego v. Marzotto** (1965) CMLR 139, an Italian Court, construing Article 119, held that considerations of qualitative and quantitative performance, i.e. the value of the performance obtained, must be disregarded. The present Act prevents the employer from justifying unequal treatment between the sexes on differences between the overall value of the work of each sex. Thus, he cannot justify unequal treatment on the grounds that women have a lower output, are absent more than men, suffer minor illnesses, marry young, have babies, refuse overtime, decline responsibility, etc. But differentials taking account of factors unrelated to sex are unaffected by the Act, e.g. a length of service bonus claimable by men and women."

This perceived narrowness of European provision had consistently been emphasised by Barbara Castle who stated *"We intend to make equal pay for equal work a reality"*[105] and *inter alia* in criticising Article 119 as being too narrow in scope, stated that her aim was to *"eradicate discrimination in pay in specific identifiable situations by prescribing equally specific remedies"* and this she said would do *"all that can be done in legislation, and goes far beyond anything in the law of other major countries."*[106] Within a short time, that was shown not to be the case.

In the following subsection, the 1975 version of the Act is addressed in two ways, firstly, by reference to the amendments made to the 1970 Act and, secondly by considering in some detail the provisions of the Sex Discrimination Act 1975 which are relevant to equal pay.

3.3 The Equal Pay Act in 1975

The Home Secretary, Roy Jenkins in introducing the amendments to the 1970 Act during the Second Reading Debate in the House of Commons stated:

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[104] Translated as 'the same work'.
[105] H.C. Debs. Vol.795 col. 914 (9 Feb 1970).
[106] H.C. Debs. Vol.795 col. 915-916 (9 Feb 1970).

> "The amendments to the Equal Pay Act are mainly clarificatory, although that may not be immediately apparent on reading them. They are designed to ensure that complaints under the Act are, as is generally assumed, limited to contractual matters. We must ensure that the broad structure of the 1970 Act, which is known to industry and which is due to come into full operation at the end of the year is preserved."[107]

Essentially, the amendments meant that the bases of complaint of like work and work rated as equivalent remained but in recast form[108] and, importantly, the concept of an 'equality clause' was also introduced, to operate as a 'deeming' provision, which as a matter of law would effect a change to the woman's[109] contract, when 'like work' or 'work rated equivalent' was established.

Section 1(1) of the amended Act provides:

> (1) 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.

When an equality clause operates, the woman's contract is thus varied so as to become not less favourable than the man's; she is entitled to be treated not less favourably than him, but that does not mean that she is necessarily entitled to identical terms of employment. The equality clause operates to modify the corresponding term in the woman's contract, or to insert a corresponding term where none existed before; it is not a matter of seeing that her contract is, on the whole, no less favourable, but rather of taking her contract, term by term, and modifying it in any instance in which it is less favourable.

A contrary approach, by which particular less favourable terms in the woman's contract could be seen as balanced by other terms to her advantage, was rejected by the House of Lords in **Hayward v. Cammell Laird Shipbuilders Ltd (No 2)** [1988] ICR 464 HL. Miss Hayward, a canteen cook, was found to be employed on work of equal value[110] to

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[107] Hansard Volume 889 col. 516 (26 March 1975).
[108] See Appendix II for amended text.
[109] The wording here simply follows that of the Act; it may of course equally be applied to a man, claiming equal pay with a more highly paid woman.
[110] Although this case post dates the implementation of the Equal Pay (Amendment) Regulations 1983 [SI 1983. No. 1794] that has no impact on or relevance to the point at issue.

that of male comparators who were painters, thermal insulation engineers and joiners, in circumstances where the employers had not pleaded that there was a genuine material difference which justified the variation in pay. The employment tribunal considered how the equality clause should be implemented. The tribunal determined that the term 'pay' should be construed in accordance with the wide definition given to it in relation to Article 119 with the consequence that equal pay meant terms and conditions which, considered as a whole, were not less favourable. The employers contended that whilst Miss Hayward did not enjoy the same basic wage and overtime rates as her male comparators, she benefited from superior sickness benefit, paid meal breaks and extra holidays. The employers contended that men and women were entitled to equality on a broad basis, i.e. that the reference to 'any' terms in section 1(2)(c) meant any term concerned with pay and that the words 'of a similar kind' meant that when the tribunal looked at terms in a contract under which a man was employed, those terms are terms concerning pay. In contrast, the contention on behalf of the employee was that if a particular term was less favourable, it should be modified having regard to the fact that the section made no reference to considering terms on a collective basis. In this regard, the Employment Appeal Tribunal held that the employment tribunal must look at the overall package. This approach was endorsed by the Court of Appeal, who felt that in an era when many employees receive part of their remuneration in the form of benefits, frequently of considerable value, to distinguish between payments in cash and payments in kind would be to introduce an artificial and unrealistic distinction.

The House of Lords decided three issues. Firstly, in the context of section 1(2)(c)(i) which states that:

> "if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable..."

their Lordships stated that the natural meaning of the word 'term' *". . . is a distinct provision or part of the contract which has sufficient content to make it possible to compare it from the point of view of the benefits it confers with similar provisions or part in another contract."* [111] Secondly, the difficulty in approaching the construction of

[111] At page 472B-C

section 1(2)(c)(i) in the way suggested by the Court of Appeal in England, where 'pay' was given a wide meaning and terms relating to pay were amalgamated for comparison purposes, was that this left section 1(2)(c)(ii) operating in a very curious way. Section 1(2)(c)(ii) provides that:

> "if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term"

Every contract of employment has some reference to pay in the broad sense of the term as used by the Court of Appeal. Thus section 1(2)(c)(ii) would never be relevant in relation to remuneration or other benefits since they would all be regarded as a term relating to 'pay' and in this way become terms present in both the man's and the woman's contract. Lord Mackay said:[112]

> "It is, I think, impossible to believe that Parliament envisaged a contract with no provision for pay at all and therefore if the respondents' construction is adopted, part (ii) in each of the subsections could apply only to other benefits. This seems a most unlikely construction when one notices that the introductory words of sub-section (2), which apply to parts (i) and (ii), speak of terms (whether concerned with pay or not)".

Thirdly, the construction preferred by the House of Lords was also consistent with section 3(4) of the Act as originally enacted which made provision for collective agreements to be amended both to extend to both men and women any provision applying specifically to men only, and also to eliminate any resulting duplication in the provisions of the agreement in such a way as not to make the terms and conditions agreed for men, or those agreed for women, less favourable in any respect than they would have been without the amendments.

The **Hayward** approach was followed by the European Court of Justice in its decision in **Jämställdhetsombudsmannen v. Örebo Läns Landsting** C-236/98 [2000] ECR I-2189 ECJ, where it was held that an inconvenient hours supplement was not to be taken into account in calculating the salary used as the basis for a pay comparison. Accordingly, a midwife who received a supplementary payment because of the hours she had to work

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[112] At page 472D.

could maintain a claim against a comparable male whose salary was higher, but who received no such supplement. The foregoing means that an employee can claim equality on a particular term (in particular, basic pay), even if she in fact receives better treatment on some other term or terms, (e.g. longer holidays); this means that equal pay works on a term-by-term basis, not on an overall package approach. Although this may be questionable on grounds of economics, it is explained by the European Court of Justice as being based primarily on the need for transparency in, and enforceability of, the laws of equal pay.

When an equality clause does operate to modify the contract, the variation takes effect in the same way as any other variation of contract agreed by the parties. In other words, the contract as varied remains in force unless and until further varied by agreement or by operation of law. In particular, where a woman gains a benefit by the operation of the equality clause, she does not have to continue to satisfy the conditions of the Act in order to retain that benefit. For example, if a woman is paid less than a man employed on like work and her wages are increased by virtue of the operation of the equality clause, if the man leaves that employment, and even if there is no longer any other comparable male employee, the woman's wages do not automatically revert to their previous level, but remain at the level achieved by the equality clause. This was illustrated in **Sorbie v. Trust House Forte Hotels Ltd** [1977] ICR 55 EAT where waitresses were paid 85p per hour, and the only waiter was paid 97.5p per hour. The tribunal found that they were engaged on like work and that the waitresses were entitled to 97.5p per hour. The waiter was then promoted to 'banqueting supervisor' whereupon, said the tribunal, the waitresses reverted to 85p per hour. No, said the Employment Appeal Tribunal, they remained at 97.5p unless and until the contract was again varied by agreement or by operation of law. Neither had occurred here.

The range of who may be a permitted or valid comparator has, as will be shown later[113], expanded in scope since the Act's inception although an actual as opposed to a hypothetical comparator is still central to the operation of the Act. Similarly, once like work has been established in respect of a comparator, the operation of the comparator's pay scale is irrelevant. This was established by the Court of Appeal in **Evesham v.**

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[113] Chapter 6.

North Hertfordshire Health Authority and another *sub nom* Enderby v. Frenchay Health Authority (No. 2) [2000] ICR 612 CA. The facts are that the claimant, a speech therapist, successfully compared herself to a clinical psychologist. Both employees were on pay scales, which they advanced along incrementally on the basis of one point for each year of service. It was accepted that the claimant should have been on the same scale as her comparator, but not that she should be on a higher point in the scale for having longer service. The Court of Appeal held that there is no requirement, either in the obligation to modify terms in the claimant's contract or the obligation to include a term found in the comparator's contract, that the employer must modify a term or include a term so that the term in the claimant's contract becomes more favourable than the term in the comparator's contract. The comparison was between the claimant's terms and the comparator's, it was an individual comparison, not a general one, she was thus only entitled to be paid the same as her comparator, not more. The lesson therefore must be to select a comparator with care, and preferably someone who is far advanced up any incremental pay scale.

3.4 The effect of the Sex Discrimination Act 1975

The Sex Discrimination Act came into force on the same date as the Equal Pay Act.[114] The 1975 Act is arranged in eight parts: Part I provides various definitions of discrimination to which the 1975 Act applies; Parts II to V identify unlawful acts of discrimination both inside and outside the employment field, and provide general exceptions; the remaining Parts (VI to VIII) deal with the powers and duties of the Equal Opportunities Commission and the enforcement of the 1975 Act. The Sex Discrimination Act applies to all complaints about non-contractual matters, however, complaints about contractual terms relating to payment (other than those contained in a job offer) cannot be made under the 1975 Act, even if the Equal Pay Act 1970 cannot apply because there is no existing comparator. Although conceptually distinct, the Sex Discrimination Act is important as regards the operation of the 1970 Act.

In **Shields v. E. Coomes (Holdings) Ltd.** [1978] ICR 1159 CA,[115] the Court of Appeal said that, so far as possible, the two Acts should be construed together so as to produce a

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[114] On the 29th December 1975.
[115] At page 1178.

harmonious result. In the words of Lord Justice Bridge (as he then was), at page 1178:[116]

> "What is abundantly clear is that both Acts should be construed and applied as a harmonious whole and in such a way that the broad principles which underlie the whole scheme of legislation are not frustrated by a narrow interpretation or restrictive application of particular provisions."

The Court of Appeal in **Shields** also sought to review the whole area of equal pay and sex discrimination law. In particular, Lord Denning said,[117] in relation to the Equal Pay Act 1970 and the Sex Discrimination Act 1975:

> "They must be taken together. But the task of construing them is the putting together a jigsaw puzzle..."

Lord Justice Orr said:[118]

> "[The Acts] form in effect two parts of a single code directed against sex discrimination both in the field of employment and in other fields, and designed to fulfil the obligations in those respects of the United Kingdom under article 119 of the EEC Treaty....."

It should be noted that nowhere in the Equal Pay Act is there a reference to, far less a definition of indirect discrimination, only the Sex Discrimination Act contained a definition of indirect discrimination and were the Acts not read as a single code, it would be difficult to contend that imputing its presence would fall within the category of a purposive interpretation.[119]

In addition, the Equal Pay Act contains no provision protecting a claimant who seeks equal pay from victimisation. However, unlike indirect discrimination, the Sex Discrimination Act expressly extends to such a claimant. Section 4(1) of the Sex Discrimination Act 1975 makes it unlawful discrimination for an employer to treat a person less favourably than he treats or would treat other persons in circumstances where the 'victimised' person has done a 'protected act', namely:

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[116] See also **Clay Cross (Quarry Services) Ltd. v. Fletcher** [1979] ICR 1 CA at pages 6, 9, 12; **Jenkins v. Kingsgate (Clothing Productions) Ltd.** [1981] ICR 715 EAT at pages 724-725.
[117] at page 1168 F – G.
[118] at page 1174 A – D.
[119] The consequences of this are considered at Chapter 8.

(*a*) brought proceedings against the discriminator or any other person under the Equal Pay Act; or

(*b*) given evidence or information in connection with proceedings against the discriminator or any other person under either Act; or

(*c*) otherwise done anything in relation to the discriminator or any other person under or by reference to either Act; or

(*d*) made allegations that the discriminator or any other person has committed an act which contravenes either Act.

It is not necessary for the allegation to refer specifically to either Act and, furthermore, protection is given under section 4(2) even where the allegation made is false, provided that such allegation was made in good faith. Protection extends to cases where the discriminator knows or suspects that the person victimised intends to do a 'protected act'. The operation of that provision is best understood by reference to a case brought under the Race Relations Act 1976.

In **Aziz v. Trinity Street Taxis Ltd and others** [1988] ICR 534 CA, the Court of Appeal said that in order to establish a claim of discrimination by victimisation, the complainant must show the following:

(i) that he or she has committed a protected act;

(ii) that the treatment applied by the discriminator to the complainant was less favourable in comparison with treatment applied (or which would have been applied) by the discriminator to persons who had not committed the relevant protected act;

(iii) that the discriminator so treated the complainant by reason of the commission of one of the protected acts.

In **Aziz**, the Court of Appeal held that each of the sub-sections of section 2(1) of the Race Relations Act 1976, which is in the same terms as the Sex Discrimination Act, *"...contemplates a motive which is consciously connected with the race relations legislation"*. This requirement of conscious motivation was however, subsequently rejected by the House of Lords, in **Nagarajan v. London Regional Transport** [2001] AC 502 HL, which held that the proper question is whether the complainant was less favourably treated because he or she had done a protected act. The test is one of causal

connection, and is the same as the test for direct discrimination, the motivation and intention of the discriminator are not therefore relevant.

In **Chief Constable of West Yorkshire Police v. Khan** [2001] ICR 1065 HL, the House of Lords also rejected the 'but for' approach to the phrase 'by reason that' which it seemed to take in **Nagarajan**. Lord Nicholls said that it is not causative. Lord Hoffman said that it was. Lord Hutton concurred with both Lord Nicholls and Lord Hoffman and Lord Scott said that the phrase was one of not strict causation. Lords Nicholls, Hoffman and Scott drew support from **Cornelius v. University College of Swansea** [1987] IRLR 141 CA which drew the distinction between the bringing of proceedings and the existence of them.

It is unfortunate that their Lordships were unable to articulate their position with one voice but the position adopted by Lord Nicholls probably reflects the correct interpretative approach which is that the discriminator must treat the person victimised less favourably than he treats or would treat others in those circumstances. There must be a comparison with others who have not done the protected act; in order to determine whether there has been less favourable treatment. In other words, the treatment of someone who has made a complaint of race discrimination should be compared with the treatment of someone who has not made any complaint at all, rather than with someone who has made a similar complaint about a non-discrimination issue.

3.5 Accession to the European Economic Community

The United Kingdom acceded to the Treaty of Rome from January 1, 1973. Section 2(1) of the European Communities Act 1972 states that:

> "All such rights, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly...."

Although it was enacted before the United Kingdom acceded to the Treaty of Rome, the Equal Pay Act had been treated by the Government as fulfilling the United Kingdom's

obligations under Article 119 and the Equal Pay Directive. However, it has had to be amended on a number of occasions since the United Kingdom joined the Community with the express purpose of bringing its provisions into line with Community law. Notably in **Pickstone and others v. Freemans plc** [1988] ICR 697 HL, the House of Lords held that provisions which were inserted into the Act for this reason must be given a meaning which accords with their declared purpose and is consistent with the United Kingdom's Community obligations, even if that involved some departure from a strict and literal construction of the words used. It was therefore permissible to read words into the Act to bring it into conformity with Article 119 and the Equal Pay Directive and since Article 119 has direct effect, it takes precedence over anything in the Act of 1970 which is inconsistent with it.[120]

In the years following accession, there is little doubt that the courts and tribunals had some difficulty determining the scope of European provision and the articulation of the domestic provision with it and indeed with *dicta* from the supreme Courts.[121] For example, in **Arnold v. Beecham Group Ltd** [1982] ICR 744 EAT, the Employment Appeal Tribunal concluded that Community law is:

> "...even more limited than the law as stated by the House of Lords in the **O'Brien** case', because Article 1 of the Directive refers to the case where 'a job classification system is used for determining pay.'"

The Employment Appeal Tribunal, adopting a very literal approach, took 'is used' to mean is 'actually used' in the process of determining the pay grades for those particular employees and upon which results their pay was subsequently based.

Even the principle that that the doctrine of supremacy required any provision of UK law to be disapplied if in conflict with, or less extensive than, the provisions of European Community law, as laid down in Article 119 caused problems, as did the issue of retrospectivity. The House of Lords has stated on a number of occasions that the duty of the national courts to interpret national legislation in accordance with Community law is confined to national laws which were specifically introduced in order to implement a

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[120] See, for example, **Garland v. British Rail Engineering Ltd** [1982] ICR 420 HL. In relation to equal pay, see, in particular, **O'Brien v. Sim-Chem** [1980] ICR 573 HL.
[121] Considered in greater detail in Chapter 5.

Community obligation.[122] But the European Court of Justice developed a different stance in a series of cases[123] holding that the duty extended to any national legislation which is concerned with the subject matter of a Community obligation, whether enacted before or after that obligation came into being. The Court also made it clear in **Marleasing SA v. La Comercial Internacional de Alimentacion SA** C-106/89 [1990] ECR I-4135 ECJ that the national court is only required to construe national legislation in conformity with Community law if it is possible to do so.

Marleasing was applied by the House of Lords in **Webb v. EMO Air Cargo Limited** [1993] ICR 175 HL, a case concerning the proper interpretation of the Sex Discrimination Act, Lord Keith said:

> "... it is for the United Kingdom court to construe domestic legislation in any field covered by a Community directive so as to accord with the interpretation of the directive as laid down by the European Court, if that can be done without distorting the meaning of the domestic legislation".

When formulating a claim for equal pay, the UK legislation should always be the first port of call for any applicant, with Article 119, only being invoked if domestic law operates as a bar to the claim or imposes an illegitimate restriction on the scope of the claimant's rights under EC law.[124] However, even that apparently simple principle caused significant problems insofar as for a period the Employment Appeal Tribunal in Scotland took the view that applicants had 'free-standing' rights under EC law discrete from domestic provision.[125]

The presumed scope of EC provision in respect of equal pay, for a period, also appeared to become equated with a wider social goal of 'fair wages' leading to attempts to widen

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[122] See **Duke v. GEC Reliance Limited** [1988] ICR 339 HL and **Finnegan v. Clowney Youth Training Programme Limited** [1990] ICR 462 HL.

[123] See **Von Colson and Kamann v. Land Nordrhein-Westfalin** C-14/83 [1984] ECR 1891, paragraph 26 on page 1909, **Johnston v. Chief Constable of RUC** C-222/84 [1986] ECR 1663 at paragraph 53 on page 1690, **Marleasing SA v. La Comercial Internacional de Alimentacion SA** C – 106/89 [1990] ECR I-4135 at paragraph 8 on page 4147 A-G and para 8 Court on page 4159, **Teodoro Wagner Miret v. Fondo de Guarantis Salariac** [1993] ECR I-6911 para 20 on page I-6932and **Paulo Faccini Dori v. Recreb SRC** [1994] ECR I-3347 para 26 on page I-3357

[124] See **Blaik v. The Post Office** [1994] IRLR 280 EAT

[125] This issue is dealt with in detail in Chapter 5

the scope of section 1(3) of the Equal Pay Act. Lord Templeman, in **Pickstone v. Freeman plc** [1988] ICR 697 HL, stated that:[126]

> "This provision (Section 1(3)) gives effect to Community law which applies the principle of equal pay only for the purpose of eliminating discrimination on the grounds of sex."

A year later, Lord Templeman again reiterated the principle in **Leverton v. Clwyd County Council** [1989] ICR 33 HL:[127]

> "But even if work of equal value were established Mrs Leverton is not entitled to equality of salary unless the difference in salary is attributable to sex discrimination, conscious or unconscious. Article 119 and the Equal Pay Directive and the Act of 1970 are directed to the elimination of sex discrimination and not to the elimination of wage differences."

As recently as 1999, the House of Lords still found it necessary to reiterate that point.[128] It is important to note that the focus of both EC law and domestic provision in respect of equal pay is wage difference based on sex discrimination, this apparently simple point being one which is often overlooked by applicants whose mission is to achieve re-grading or what they perceive as fair wages.[129]

3.6 Conclusion

This chapter has considered the events between 1970 and 1975 which generated the most significant advances in equal pay provision in Great Britain; it firstly examined the text of the unamended Act and the reason why domestic provision was considered at that time to be far wider in scope than European law as provided for by Article 119 of the Treaty of Rome. It then considered how the delayed domestic provision required to be redrafted and amended by the Sex Discrimination Act 1975 before coming in to force, and, in particular, the way in which the scope of the newly introduced 'equality clause' came to

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[126] at page 715H - 716A.
[127] at 66H - 67A.
[128] See **Glasgow City Council v. Marshall** 2000 SC 67 at 72 D-G *per* Lord Nicholls
[129] This reached a peak in the 1990's in Scotland when various groups of Council employees in 9 separate 'class actions' sought to rely on the Equal Pay Act and Article 119 to achieve what internal re-grading appeals had not; in none of these actions was it averred that the pay scales concerned were sex discriminatory. Two of these cases (**Strathclyde Regional Council v. Wallace** 1998 SC 72 and **Glasgow City Council v. Marshall** 2000 SC 67) reached the House of Lords and have provided the most authoritative exposition of the scope of section 1(3) of the Equal Pay Act to date. See also, Chapter 12.

be judicially applied. The impact of the United Kingdom's accession in 1972 was also considered in the context of the articulation of the domestic provision with the Article 119 and the ways in which the courts and domestic tribunals approached the requirement to conform to the doctrine of supremacy and how complex issues of scope and construction arose soon after accession.

By 1975, any notion that UK legislation was broader in scope than EC law was clearly wrong; domestic provision was now significantly narrower than European law requiring, *inter alia*, the 1983 amendment[130] to incorporate an equal value provision into the Act. But this was not the only area of development of EC law which was to have very significant impact on domestic law; probably the two most significant areas of impact have been in respect of the more extended definition of pay accorded by European law and indirect discrimination and as a result these two issues are afforded separate chapters.[131] Other developments, such as scope of comparison, whilst of significance will be dealt with as they arise in the relevant chapters.

The complex issues which arose after the Act was brought into force in 1975 with regard to the construction of domestic provision in conformance with what was required by Europe cannot properly be understood without a looking in some detail both at the terms of the European legislative provisions and the jurisprudence of the European Court of Justice as it has given interpretative meaning to them. The next chapter therefore focuses purely on the development of European equal pay provisions, before returning in Chapter 5 to the peculiar difficulties of the articulation of British domestic law with that of Europe.

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[130] Equal Pay (Amendment Regulations) 1983 [SI 1983 No. 1794].
[131] Chapters 7 and 8 respectively.

CHAPTER 4. EUROPEAN LAW AND EUROPEAN EQUAL PAY PROVISION

4.1 Introduction

Consideration of the basic constructs of European law, such as the institutions of the European Community (now the European Union), the legislative-making processes, the rôle of the Court in implementation of the legislative provisions (treaty articles and directives) and concepts such as direct applicability, direct effect, vertical and horizontal effect, and purposive interpretation are not considered in this chapter or indeed anywhere in this thesis. These are all admirably covered in breadth and depth in a host of textbooks on the subject.[132]

This chapter considers the origin and development of what became known as the 'Equal Pay Principle' primarily through Article 119 of the Treaty of Rome and the Equal Pay Directive[133] and their judicial interpretation by the European Court of Justice. In the second major section of the chapter, the development of indirect discrimination in European law is analysed *inter alia* because no such provision was built in to or made explicit in the Article or Directive. Necessarily inherent in any discussion of indirect discrimination is the nature of the employer's defence of 'justification' and the section concludes with an analysis of the scope of three such justificatory defences, namely collective bargaining provisions, market forces and qualifications and training.[134]

4.2 Development of the 'equal pay principle'

What has become known as the 'equal pay principle' was first formally set down in Article 427 of the Treaty of Versailles in 1919. At the same time, it was built in as the 7th Principle in the constitution of the International Labour Organisation (ILO) which was also established under the Treaty of Versailles.

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[132] For example Craig, P. and de Burca, G., 'EU *Law: Texts, Cases and Materials'* Oxford University Press, Oxford 1999.
[133] Directive 75/117/EEC.
[134] Whilst these are not the only grounds, they are those which have given rise to both the most case law and the greatest discussions on scope.

Equal treatment of men and women in employment has also been proclaimed, with significant variations in wording, by Article 23(2) of the Universal Declaration of Human Rights, Article 4(3) of the Social and Cultural Rights; the European Social Charter (ratified by UK on July 11, 1962), ILO Convention No. 100, 1951 (Equal Remuneration for Men and Women for Work of Equal Value) and Recommendation No. 90 of the ILO. However of all the foregoing, undoubtedly it has been Article 119 of the Treaty of Rome which has had the most significant impact in practice.

(a) Article 119 of the Treaty of Rome 1957

The Treaty of Rome was signed in 1957; full implementation of the industrial common market occurred on 1 January 1967. The original membership of the Common Market comprised six nations, namely, France, Germany, Italy, Belgium, the Netherlands and Luxembourg; this increased to nine in the early 1970s with the inclusion of Britain, Ireland and Denmark and, in the 1980s, twelve and with the accession of Greece, Spain and Portugal, fifteen. Expansion in numbers to twenty five took place on 1st May 2004 with further expansion contemplated thereafter.

From the outset, the signatories could have adopted the principle contained in Article 2(1) of Convention No.100 of the International Labour Organisation dated 29 June 1951.[135] Its terms had been part of the ILO Constitution since 1919 and provided that men and women workers should be paid *"equal remuneration ... for work of equal value"*. The 1956 *travaux preparatoires* of the Treaty of Rome referred to *"equal pay for equal work or for work of equal value"* but the commitment to equal value was controversial and was omitted from the final version of Article 119.[136] Instead, the signatories initially adopted the more restricted concept of *"equal pay for equal work"* while in other respects (such as in respect of the definition of 'pay') following the ILO Convention. The Editor of the Common Market Law Reports[137] pointed out that the authentic English text of Article 119 had been translated from the original languages of the EEC Treaty and the translators did not, in doing so, pay any regard to the English authentic text of the ILO Convention.[138]

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[135] Convention on Equal Remuneration, United Nations Treaty Series, Vol 165, 303.
[136] Hoskyns, C., *'Integrating Gender: Women, Law and Politics in the European Union'* Verso, London 1996 p.56-7.
[137] [1976] 2 CMLR at 114.
[138] This linguistic issue is considered further later in this Chapter.

Article 119 of the Treaty of Rome provided as follows:

> "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.
>
> For the purpose of this Article, 'pay' means 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.
>
> Equal pay without discrimination based on sex means:
>
> (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 job."

The text in the original French stated:

> "Chaque État membre assure au cours de la première étape, et maintient par la suite, l'application du principe de l'égalité des rémunérations entre les travailleurs masculins et les travailleurs féminins pour un même travail.
>
> Par rémunération, il faut entendre, au sens du présent article, le salaire ou traitement ordinaire de base ou minimum, et tous autres avantages payés directement ou indirectement, en espèces ou en nature, par l'employeur au travailleur en raison de l'emploi de ce dernier.
>
> L'égalité de rémunération, sans discrimination fondée sur le sexe, implique:
>
> (a) que la rémunération accordée pour un même travail payé à la tâche soit établie sur la base d'une même unité de mesure,
>
> (b) que la rémunération accordée pour un travail payé au temps soit la même pour un même poste de travail."

It will be noted that in paragraph 1 of Article 119 in English, the term 'equal work' is used and at indent (a) the term the 'same work' is used whereas, in French, there is no distinction and '*même travail*' is used in both paragraph 1 and indent (a). It is arguable that these concepts are not the same linguistically, in that 'equal, as derived from the Latin '*aequalis*', connotes that which is identical in amount, magnitude, number, value or intensity etc. but need not be identical in respect of form, i.e. the adjective requires qualification. For example, a £1 coin by weight may be equal to three 50p pieces, by value it is only equal to two 50p pieces. 'Equal', it can be argued, can be distinguished

from that which is the same, which connotes that which is identical, in an unqualified manner.

Article 119 must be seen in context; it was not included out of any serious attempt to establish equality of the sexes in the states of Western Europe, rather, it was inspired by the desire to ensure equal competition between states in the Common Market. One aspect of this was the guarantee that women would not be paid at lower rates than men in the member states so as to avoid any state gaining a competitive economic advantage over others. At the time the EC Treaty was being drafted, there were two radically opposed conceptions of the relationship between social policy and the establishment and functioning of the Common Market.

The French view was that the harmonisation of the 'social costs' of production was necessary in order to make sure that businesses competed on a fair and equal basis once the barriers to the free movement of persons and capital were removed. At the time of the negotiations, there were important differences in the scope and content of the social legislation in force in the states concerned. France, in particular, had on her statute book a number of rules which favoured workers which consequently were expensive for employers. For example, legislation of 1957 mandated equal pay for men and women. Workers in France also had longer paid holidays than in the other states, normally a minimum of 24 days. In addition, they were entitled to overtime pay after fewer hours of work at basic rates than elsewhere. All this meant that the French feared that the indirect costs of production of goods in France would make French goods uncompetitive in the Common Market and would damage French industry. Accordingly, they sought to persuade the other negotiating States that social costs should be equalised throughout the Common Market. However, Germany took a very different line, arguing that the harmonisation of indirect or social costs would inevitably follow from the setting up of the Common Market. The Germans were also strongly committed to a minimum level of government interference in the area of wages and prices. A compromise was ultimately reached and this is the reason why the two differing viewpoints are both reflected in the Treaty's social policy provisions. In particular, the French delegation succeeded in persuading the others to accept two specific provisions, which would protect French industry from the kind of social dumping of which it was afraid. These are Article 119 on

equal pay for men and women[139] and Article 119a which provides that the Member States will *"endeavour to maintain the existing equivalence between paid holiday schemes."* [140]

Article 119 was thus an unusual type of treaty provision, on the one hand, it represented a social ideal and an instrument at least indirectly with which to harmonise social policy, on the other hand, it stated a complete legal obligation, a social and economic end in its own right. At face value, its limitations are patent, standing out as it did, as the only provision in the first chapter of the Treaty Title on Social Policy that placed an express obligation on Member States to ensure by the first stage,[141] and subsequently thereafter, maintain the principle that men and women should receive equal pay for equal work in a context where there was no inherent capacity to issue directives to compel Member States to pass necessary implementing legislation. Even the obligation inherent within Article 119 had to be read as a *non sequitur* because the most striking feature of the social policy of the Treaty of Rome was not what it contained but rather, what was absent. For example, there was no specific action programme and no binding timetable for the adoption of certain matters; there was no common social policy to accompany the common policies in the fields of, for example, commerce, agriculture or transport.[142] Social policy was not even listed as one of the activities of the Community in Article 3, which referred only obliquely to the establishment of a European Social Fund to improve employment opportunities and to encourage labour mobility. Most noticeable of all was the absence of any direct or explicit means of adopting binding labour laws in the form of directives or regulations for the specified purpose of fulfilling the objectives in Article 117. Measures that impinged on social policy as a consequence of market functioning could be adopted under Article 100[143] or the provisions on the free movement of services, Article 54(3)g[144] or through recourse to the general purpose clause in Article 235.[145]

Article 100 provided:

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[139] See Forman, *'The Equal Pay Principle under Community Law'* (1982) 1 LIEI 17.
[140] Similarly, the Third Protocol on 'Certain Provisions Relating to France', which was annexed to the EC Treaty, provided that the Commission could authorise France to take protective measures where the establishment of the Common Market did not result, by the end of the first stage, in the basic number of hours beyond which overtime was paid, and the average rate of additional payment for overtime in industry, corresponding to the average in France in 1956; see Forman, *ibid.*
[141] 31st December 1962.
[142] Articles 3(b) (d) and (e), respectively.
[143] Subsequently Article 94.
[144] Subsequently Article 44(3)g.
[145] Subsequently Article 308.

"The Council shall, by a unanimous decision, on a proposal of the Commission, issue directives for the approximation of such legislative and administrative provisions of Member States as directly affect the establishment or operation of the Common Market. The Assembly and the Economic and Social Committee shall be consulted in the case of directives the implementation of which would involve amending legislation in one or more Member States."

Article 235 provided:

> "Where action by the Community appears necessary to achieve one of the objectives of the Community, within the framework of the Common Market, and where this Treaty has not provided for the necessary powers of action, the Council shall adopt the appropriate provisions by a unanimous decision, after consulting the Assembly."

In the immediate aftermath of the Treaty of Rome, there seemed to be little immediate prospect of the area being tested before the Court. Kahn-Freund, writing in 1960, reflected the prevailing mood when he stated that[146]:

> "Article 119 is very cautiously formulated. The principle of equal pay for equal work does not *ipso facto* become part of the legal systems of the members, and the council has not been given power to issue regulations enacting it into law. The Member States have gone no further than to accept an obligation to each other and to the Community to transform their systems of wage rates so as to ensure application of the principle in the course of the first stage of the transitional period. Article 119 does not, therefore, confer any rights or impose any obligations on any individual based on the principle of equality. It does no more than to create an obligation binding the Member States in international law."

In July 1960, the Commission issued a recommendation to the Governments of Member States as to the form equal pay should take in practice.[147] In December of the following year, the various Governments agreed on a number of measures intended to facilitate implementation of Article 119, including a timetable for the elimination of all existing

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[146]Kahn-Freund, O., *'Labour Law and Social Security'* in Stein, E., and Nicholson, T., (eds.) *'American Enterprise in the European Common Market: A Legal Profile'* Vol 1 University of Michigan Press, Ann Arbor, 1960 297-458 at 329.
[147] *EEC Bulletin* July 1960, p. 46.

differentials by the end of 1964.[148] This timetable was not adhered to[149] with the consequence that by the end of the decade, equal pay, even in the fairly limited sense envisaged by Article 119, was still some way off despite some overall improvement in the period after 1965.[150]

The Presidents and Premiers of Member States declared, in December 1969 and October 1972, "*...that they attribute the same importance to energetic proceedings in the field of social policy as to the realisation of the economic and financial union*" and, in May 1972, a special report on the employment of women in the EC was presented to the Commission by the French sociologist Evelyne Sullerot.[151] This report concluded that there was still widespread sex discrimination in all Member States, both in terms of remuneration and general employment practices.[152] It was recognised that Article 119 had an important part to play in eliminating the specific problem of unequal pay, but by far the most effective approach to the problem as a whole was thought to be through the integration of the segregated male and female labour markets.[153]

Events moved relatively swiftly thereafter. Both the European Parliament[154] and the Economic and Social Committee[155] supported a directive on the elimination of discrimination on grounds of sex. The Council adopted a Resolution on a Social Action Programme in January 1974 which enjoined action *"for the purpose of achieving equality between men and women as regards access to employment and vocational training and advancement and as regards working conditions, including pay, taking into account the important role of management and labour in this field"*; and *"to ensure that the family responsibilities of all concerned may be reconciled with their job aspirations"*.[156]

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[148] *EEC Bulletin* January 1962, pp. 8-10 and 108-9.
[149] See Rapport sur l'application de l'article 119 du traite de la CEE Parlement European: Documents de Seance. 1966-7. doc. 85.
[150] See *'Structure et repartition des salaires'* 1966. Statistiques Socialies, serie speciale (8 vols.) 1971. Volume 8, Synthese pour la Communaute, is of special relevance.
[151] *Rapport sur l'emploi des femmes et ses problemes dans les Etats membres de la communaute. The Employment of Women and the Problems it raises in the Member States of the European Community* (European Commission, Luxembourg, 1972 The Report appeared in both full (237 pp.) and abridged (50 pp.) versions. References are to the latter.
[152] *Ibid.* pp. 43-5.
[153] *Ibid.* p.44.
[154] See *Official Journal* 13 May 1974. No. C 55/43.
[155] See *Official Journal* 26 July 1974. No. C88/7.
[156] *Official Journal* 12 Feb. 1974. No. C13/1 at p.2.

And so the Equal Pay Directive was conceived.

(b) The Equal Pay Directive

The Equal Pay Directive of 1975 on "the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women" which was adopted 10 February 1975[157] was adopted under Article 100 and provides:

> "Article 1
> The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.....
>
> Article 2
> Member states shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities.
>
> Article 3
> Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.
>
> Article 4
> Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.
> ..."

Of importance is the fact that as has been judicially observed on many occasions, nothing in the Directive extends the scope of Article 119, it is explanatory of it only,[158] but, this, to some extent, is a legal fiction, insofar as it was the Equal Pay Directive which introduced the concept of equal value which was then 'found' to have been present in the Article all along.

Article 119 remained largely ineffective and subject to little judicial interpretation before the series of cases brought by Gabrielle Défrenne, with the advice of her union and

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[157] Directive 75/117/EEC.
[158] See **Worringham and Humphries v. Lloyds Bank** C-69/80 [1981] ECR 767 and see also de Burca, G., *'Giving Effect To European Community Directives'* (1992) 55 Modern Law Review 219.

Professor Eliane Vogel-Polsky, against the Belgian national airline Sabena and the Belgian state in the early 1970s.

(c) Judicial Interpretation and application of Article 119 by the European Court of Justice

Gabrielle Défrenne was an air hostess employed by the state airline, Sabena. According to her contract of employment she was forced to retire at 40. She applied to the Belgian *Conseil d'Etat* for annulment of a Royal Decree which provided the special rules about the entitlement of civil aviation air crews to a pension. Under these rules a female air hostess was required to retire at 40 whereas a male air steward could remain in employment until the normal pension age. The *Conseil d'Etat* made use of the Article 177 procedure to refer a number of questions to the European Court, foremost of which was the question of whether the particular pension scheme provided for in this case fell within the definition of pay in Article 119. In **Defrenne I,**[159] she was unable to convince the Court that a pension scheme funded partly by employers, party by employees and partly by the State was 'pay' for purposes of Article 119. The European Court of Justice did, however, leave open the possibility that an entirely voluntary scheme funded by the employer could come within that definition. In answering 'no' to this question, the European Court commenced the long and complicated process of interpreting the application of the principle of equal pay to occupational pensions.

The Court was not required to rule on the issue of the potential direct effect of this provision but the Advocate General indicated that he considered that at least since 31 December 1964 that Article 119, had met the criteria for and had therefore created individual rights[160] and the Court did not disabuse him of this view.

The following year two very similar cases involving discrimination in the payment of expatriation allowances to employees of the Communities came before the Court, [161] both cases raising a number of points about the meaning and applicability of Article 119,

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[159] **Defrenne v. Belgium** C-80/70 [1971] ECR 445 ECJ.
[160] at 447.
[161] **Sabbatini v. European Parliament** C-20/71 [1972] ECR 345 ECJ and **Chollet, née Bauduin v Commission of the European Communities** C-32/71 [1972] ECR 363 ECJ.

but the Court decided in favour of the claimants on other grounds, and did not pronounce upon any of the arguments based upon Article 119.

Gabrielle Défrenne v. Societe Anonyme Belgé de Navigation Aeriénne[162] C-43/75 [1976] ECR 455 ECJ was the first major case under Article 119 to be considered by the European Court of Justice. This has meant that the judgment, its meaning and scope would be scrutinised. To this day, it contains the most principle based exposition of the Article's scope and which still gives rise to problems of interpretation; it is therefore deserving of further analysis.

In 1976, Ms Defrenne's case was referred from the *Cour du Travail* of Brussels because of her application for compensation for loss of salary, severance allowance and pension, on the basis that she had not received equal pay with a man who was engaged as an air steward. Two questions were posed by the national court; firstly, was Article 119 directly enforceable in the national courts and, if so, from what date and, secondly, had Article 119 become applicable in national law by virtue of European Community measures or did the national legislature alone have competence in this matter?

In the written observations to the Court, the United Kingdom put forward the submission that, while Article 119 was unconditional, it was insufficiently clear and precise to satisfy the conditions for direct effect developed by the Court. It contained no comprehensive definition of the principle of equal pay for equal work and it was for that very reason that Directive 75/117 had been introduced. The scope for comparison was further unclear, with no indication as to whether or not equal pay must be available within a particular establishment or throughout an entire trade or profession. Confusion and uncertainty would be created if Article 119 was held to give rise to direct effect, in particular if its direct effect was to operate retrospectively. The UK government concluded that, in any event, in view of the language of the Treaty, the obligation to ensure equal pay was addressed to the Member States and the right to equal pay could not be enforced by one individual against another.

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[162] **Defrenne II.**

The Irish government raised the distinction between Article 119 and the other Articles to which direct effect had already been attributed. They considered that the latter were concerned with *"the attainment of the 'fundamental freedoms' provided for by the Treaty"*[163] whereas Article 119 was *"pursuing a social objective which is limited to a specified class of persons"* and hence could therefore be distinguished from the provisions previously held to have direct effect and on that basis should not be regarded as giving rise to individually enforceable rights.

In his Opinion, Advocate General Trabucchi placed Article 119 within the context of ILO Convention 100, which by the date of the hearing, had been ratified by all of the Member States who were signatories of the EEC Treaty. He considered that the principle of equal pay should have been neither a new nor alien concept to any of the Member States. The Advocate General further set the scene by reflecting on the time limits set for implementation by the Member States and on their failure to comply. In this context, he considered that while the words of the Article may be regarded as vague and unspecific, the purpose of the provision, the prohibition of discrimination against women with regard to pay, was clear. The fact that the concepts used might require to be interpreted by the national courts did not prevent the Article from being relied upon directly, particularly in view of the availability of the Article 177 reference procedure.[164] Having given a clear opinion in favour of the attribution of direct effect to Article 119, the Advocate General equally firmly rejected the possibility that the Resolution of the Member States of 31 December 1964 could have extended the time limit for the application of the equal pay principle laid down in the Treaty.

The Advocate General, Mr Trabucci, at page 486, said:

> "It has been rightly observed that Article 119 does not try to determine when men and women are doing the same work but only to ensure that the sex of the worker is in no way taken into account in decisions on pay. Whether the work is different is a question of fact - to be determined in every individual case in accordance with the responsibilities assigned to each person concerned and must not be the subject of an a priori decision that two men placed on the same rate of pay perform the same work. The conclusion may

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[163] *Ibid* at p.461.
[164] Now Article 234.

therefore be drawn that, as regards the abolition, in connection with pay of all observations based on sex, Article 119 imposes an obligation which is clear, precise and unconditional."

The Court gave a comprehensive opinion on the aim, purpose and scope of Article 119, it said:

"8. Article 119 pursues a double aim.

9. First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay.

10. Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasised by the Preamble to the Treaty.

11. The aim is accentuated by the insertion of Article 119 into the body of a chapter devoted to social policy whose preliminary provision, Article 117, marks "the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained".

12. This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community...

18. For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of Article 119 between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit

implementing provisions of a Community or national character.

19. It is impossible not to recognise that the complete implementation of the aim pursued by Article 119, by means of the **elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level.** (emphasis added)

20. This view is all the more essential in the light of the fact that the Community measures on this question, to which reference will be made in answer to the second question, implement Article 119 from the point of view of extending the narrow criterion of "equal work", in accordance in particular with the provisions of Convention No 100 on equal pay concluded by the International Labour Organisation of 1951, Article 2 of which establishes the principle of equal pay for work "of equal value".

21. Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article 119 must be included, in particular, those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.

22. This applies even more in cases where men and women receive unequal pay for equal work carried out **in the same establishment or service, whether public or private.** (emphasis added)

23. As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks.

24. In such situation, at least, Article 119 is directly applicable and may thus give rise to individual rights which the courts must protect."

The essence of the scope of the provision can be usefully summarised by the parts emphasised above, but, as will become evident, the language in its 'principled' form provides little assistance at the level of application. In application, its scope, purports to be extremely wide and yet it can also be seen that the ruling of the Court attempted to limit the direct applicability of Article 119; a distinction was drawn between 'direct and overt' discrimination and 'indirect and disguised discrimination', which could only be identified with the aid of more detailed implementing provisions at either the Community or national level. Only as regards the former situation would Article 119 be directly applicable, that is, give rise to rights directly enforceable before national courts.

Following the example of the US Supreme Court, the Court ruled that the direct effect of Article 119 would only arise prospectively and therefore, the ruling did not apply to claims prior to the date of judgment, except in the case of claimants who had already initiated legal proceedings or made an equivalent claim.[165] The Court accepted economic arguments put forward by the UK and Ireland, both new Member States at the time, that to apply the direct effect of Article 119 retrospectively would, they believed, cause acute financial problems for companies and might even lead to bankruptcies. According to Hartley,[166] there is 'no basis' for this interpretation in the Treaty itself and the Court's limitation of the temporal effect of its rulings is different from the American practice of prospective overruling because an American court applies the old rule to the case itself, but announces that it will apply the new rule in future cases.[167]

The most significant aspect of **Defrenne II** lay with the breadth of the Court's interpretation of Article 119 extending beyond the 'narrow criterion' of equal work. Hence, even though Directive 75/117 provided for equal pay for work of equal value, it was only capable of being given full effect once this notion was brought within Article 119 itself, making it horizontally directly effective. The Court followed through this logic in **Worringham and Humphries v. Lloyds Bank** C-69/80 [1981] ECR 767 ECJ, holding that, as the Equal Pay Directive was essentially a definition of Article 119, it was binding on private employers as an integral part of the Treaty notwithstanding the parallel duty of the State to ensure that national law was in compliance.

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[165] Paragraphs 69-75
[166] See Hartley, T., *'The European Court, Judicial Objectivity and the Constitution of the European Union'* (1996) 112 Law Quarterly Review 95 at 97.
[167] See Hartley, *ibid.* at 97

Defrenne II established the direct effect of Article 119 and set the way clear for individuals to raise actions in the national courts to uphold the right to equal pay. As the Court itself recognised, Article 119 alone could not eliminate differences in pay between men and women but it was, nonetheless, a very important step forward and throughout a series of subsequent decisions, the Court has further defined, refined and developed the principle of equal pay.

That the principle of equal pay was a fundamental provision of the European Community was developed further by the Court in the third case concerning Ms Defrenne.[168] Here the Court confirmed that the elimination of discrimination based on sex as regards conditions of employment of men and women was one of the fundamental personal human rights of Community law.

Central to understanding the scope of Article 119, it is necessary to examine more closely the meaning of the term *"le même travail"* which, as referred to previously, has not been applied with care in English translation; as the most recent case considering the construct post-dates the Amsterdam Treaty and the recasting of Article 119 into Article 141 of the Treaty of Amsterdam, a short digression into that provision follows.

(d) Article 141 of the Treaty of Amsterdam

Article 119 was augmented[169] and replaced by Article 141 when, on 1 May 1999, the Amsterdam Treaty came into force; the Treaty, amongst other things, renumbers the provisions of the Maastricht Treaty and the Treaty of Rome. Thus, the principle of equal pay for equal work as contained in Article 119 is now enshrined in Article 141[170] which provides:

> "Article 141
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> 1. 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.

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[168] **Defrenne v. Sabena III** C-149/77 [1978] ECR 1365 ECJ.
[169] The augmentations, essentially concerned with affirmative action are not dealt with in this chapter.
[170] From this point onwards, Article 119 and Article 141 are used interchangeably, unless the text dictates otherwise and the augmented provisions are under consideration.

2. For the purpose of this Article, 'pay' means 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.

Equal pay without discrimination based on sex means:

(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 job.

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."

The text in French reads:

1. Chaque État membre assure l'application du principe de l'égalité des rémunérations entre travailleurs masculins et travailleurs féminins pour un même travail ou un travail de même valeur.

2. Aux fins du présent article, on entend par rémunération le salaire ou traitement ordinaire de base ou minimal, et tous autres avantages payés directement ou indirectement, en espèces ou en nature, par l'employeur au travailleur en raison de l'emploi de ce dernier.

L'égalité de rémunération, sans discrimination fondée sur le sexe, implique:

a) que la rémunération accordée pour un même travail payé à la tâche soit établie sur la base d'une même unité de mesure;

b) que la rémunération accordée pour un travail payé au temps soit la même pour un même poste de travail

> 3. Le Conseil, statuant selon la procédure visée à l'article 251 et après consultation du Comité économique et social, adopte des mesures visant à assurer l'application du principe de l'égalité des chances et de l'égalité de traitement entre les hommes et les femmes en matière d'emploi et de travail, y compris le principe de l'égalité des rémunérations pour un même travail ou un travail de même valeur.
>
> 4. Pour assurer concrètement une pleine égalité entre hommes et femmes dans la vie professionnelle, le principe de l'égalité de traitement n'empêche pas un État membre de maintenir ou d'adopter des mesures prévoyant des avantages spécifiques destinés à faciliter l'exercice d'une activité professionnelle par le sexe sous-représenté ou à prévenir ou compenser des désavantages dans la carrière professionnelle.

On 10 February 2000, nearly 25 years on from **Defrenne II**, the Court delivered a series of rulings arising from the exclusion of part-time workers from supplementary occupational pension schemes in **Deutsche Telekom AG v. Schröder** C-50/96 [2000] ECR I-743 ECJ and related references from the German courts.[171] The central issues at stake struck at the heart of the economic/social aims of not just the principle of equal pay but the whole European integration project. Did provisions of national law that enshrined the principle of sex equality and prohibited discrimination against part-time workers entail a retrospective application of the principle of equal pay, notwithstanding the fact that such an interpretation would not only override collective agreements but also risk distortion of competition and have a detrimental economic impact on employers?[172] The Court answered in the affirmative. The time was ripe to re-evaluate the twofold aim of Article 141 now that the Treaty of Amsterdam had entered into force although it was not applicable in the present case.[173] It concluded, at paragraph 57, that:

> "In view of that case-law, it must be concluded that the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member

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[171] **Deutsche Telekom AG v. Vick and Conze** C-234-235/96 [2000] ECR I-799 ECJ and **Deutsche Post AG v. Sievers and Schrage** C-270-271/97 [2000] ECR I-929 ECJ.

[172] This is a reformulation of the first part of the sixth question asked by the national court in **Schröder.**

[173] Mrs Schröder was seeking arrears of pension for the period 20 May 1975 to 31 March 1994. In particular, the Court sought to give substance to its social rhetoric in **Defrenne v. Sabena III** C-149/77 [1978] ECR 1365, paras 26-7. See **Schröder,** para 56 and **P v. S P v. S and Cornwall County Council** C-13/94, [1996] ECR I-2143, para 19.

> States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right."

It followed that, notwithstanding arguments that the principle of legal certainty and the doctrine of supremacy required Member States to adhere to the temporal limitation in **Defrenne II**, national rules which operated to give retrospective effect to the principle of equal pay and 'ensure a result which conforms with Community law' could be relied upon by individuals.[174] Germany, as one of the original Member States, was entitled to bring in laws which clarified or defined the scope of a rule as it must be or ought to have been understood and applied from the time of its coming into force which, in the case of equal pay, was 1 January 1962.[175] Hence the doctrine of legal certainty, which provided cover for the Court to capitulate to market-based arguments in **Defrenne II** and **Barber**, was not allowed to stand in the way of national legislation granting part-time workers the social right of retroactive membership of an occupational pension scheme once it had been established that the exclusion of part-time workers from the scheme amounted to discrimination based on sex.

Schröder is significant for two reasons. First, the Court's judgment reveals an acute awareness of the post-Amsterdam process of Europeanisation of social rights arising from the autonomy of the social provisions in Article 136-145 EC, the affirmation of 'fundamental social rights' in Article 136 EC, and the mainstreaming of sex equality in Articles 2 and 3(2) EC. Moreover, the ongoing negotiation of the EU Charter of Fundamental Rights provided an appropriate backdrop for the Court to uphold core social values. Hence, the court's preparedness to re-evaluate the economic and social aims of Article 141 forms part of a wider recognition of the equivalence of the social and economic objectives of the Treaty as a whole,[176] as demonstrated by its ruling in **Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie Albany International** C-67/96 [1999] ECR I-5751 ECJ where the Court upheld the Dutch system of compulsory pension funds because of the social task that they perform by protecting all workers, notwithstanding the fact that the operation of such funds might violate

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[174] Paragraph 48.
[175] Paragraph 43-47.
[176] See Szyszczak, E., *'The New Paradigm for Social Policy: A Virtuous Circle?'* (2001) 28 Common Market Law Review 1125 at 1154.

Community competition law.[177] The Court justified its approach by referring to the 'whole scheme of the Treaty', paying particular attention to social provisions added to the original Treaty by later amendments.[178] However, as with **Schröder**, subsidiarity played a major part in a case where the Court was anxious to assuage national sensitivities concerning the organisation of national social security systems.

Second, the Court's paradigm shift from the economic to the social in **Schröder** provides a basis for a more fundamental reappraisal of the economic bias in the Court's sex equality jurisprudence. Early indications suggest that this process has begun but the Court remains cautious, particularly where Member States seek to justify indirect discrimination on the basis of economic arguments.

(e) The scope of "le même travail"

The term *"le même travail"* has most recently been subjected to extensive analysis in the Opinion of the Advocate General and the judgment of the European Court of Justice in the case of **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse** C-309/97 [1999] ECR I-2865 ECJ.

The issue in question related to the pay of particular groups of workers who were all employed as psychotherapists by the Vienna Area Health Fund (Wiener Gebietskrankenkasse). There was no question but that both groups of workers were doing the same job, that is, practising as psychotherapists. Two categories of psychotherapist comprised those who had trained firstly as graduate psychologists and a third group who had first completed their general practitioner training as medical doctors. The Staff Committee of the Health Fund (Angestelltenbetriebsrat der Wiener Gebietskrankenkasse) applied to the Labour and Social Security Court for a declaration that the psychotherapists with a degree in psychology should be classified in the same salary category as the medical doctors employed as psychotherapists. In support of this application, the Staff Committee argued that their case was justified by the training and duties of psychologists engaged in psychotherapy.

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[177] Paragraphs 88-123.
[178] Paragraphs 54-58.

Evidence was led that demonstrated that most of the practitioners receiving lower salaries were women. The Health Fund employed 248 doctors, 135 of whom were women. In the clinic referred to by the Staff Committee, 6 psychologists, 5 of whom were women, were employed as psychotherapists, together with 6 doctors, only one of whom was a woman. Out of a total of 34 psychotherapists employed by social insurance institutions in Austria, 24 were graduate psychologists and 10 were doctors. Eighteen of the psychology graduates and 2 of the doctors were women. It was also noted that in Austria 1,125 men and 2,338 women were formally registered as psychologists trained in psychotherapy.

The national court thought that it was necessary to refer a number of questions to the European Court of Justice in order that they could determine the dispute before them. The first question referred to the European Court of Justice and ultimately the only one that they dealt with in their judgment was whether it could be said that the two types of psychotherapist were employed on the 'same work'.

In his Opinion, Advocate General Cosmas reasoned that, at the outset, it was necessary to examine the semantic content of the constructs 'equal work' (incorporating that of 'same work') and 'work of equal value'. At paragraph 24 he states that:-

> "Even if the definition of 'work of equal value' is in principle wider than that of "same work" and if the fundamental semantic difference which they imply is highlighted in the case of work which is dissimilar but of equal value, it must be admitted that the opposite situation may also arise: logically it is possible for similar work to exist which nevertheless has a different value. This could be the case if 'same work' is construed as meaning the performance of 'the same duty'. Consequently it is possible for two workers to carry out the same duty, but for the work they do may be *(sic)* of different value either because it is done under different conditions, or because the workers concerned have different experience or different skills".

In consideration of when work constitutes 'equal work' or 'work of equal value' for paragraph 1 of Article 141, he pointed to the terminology used in paragraph 2 indent (a) and (b) wherein in the former '*même travail*' or 'same work' or 'equal work' refers to the context where the worker is paid at piece rates according to his or her productivity and in

the latter when the criterion for comparison, where pay is based on 'time rates' is the job, that is the 'same job' or '*même poste de travail'* therefore being a specific form of 'equal work' *'même travail'*, the definition of which he reasoned must be based on objective criteria permitting a structural assessment of jobs, not whether financial reward matches the individual results of the work in question.

On the basis of the foregoing, he considered that a systematic interpretation of Article 141 requires acceptance of certain principles; at paragraph 26 he stated that:-

> "The words 'equal work' in the first paragraph of that Article indicates any kind of work and refers to the nature and purpose of the jobs or duties which are being compared. The same words used in indent (a) of the third paragraph refer to work at piece rates and are based on a comparison of the individual results of work. On the other hand, 'the same job' in indent (b) means work at time rates and refers to the formal components of the work in question, that is to say the conditions on which it is done. It follows from what has been said that there may be 'equal work', in the sense of the same duties, without there being 'the same job', because those duties are not carried out on the same conditions or are carried out by workers of different skills".

At paragraph 27, he further stated:-

> "If Article 119 of the Treaty and Directive 75/117 are construed together the following conclusions result. By analogy with the pair of terms 'equal work' and 'the same job', in addition to the term 'work of equal value' there must also exist the notion of 'job of equal value'. This means that two dissimilar jobs may nevertheless have the same value. By analogy with my earlier observation, [*cf* paragraph 24 of his Opinion] it must be accepted that equal work may exist, in the sense that it involves the same duties, carried out by workers holding jobs of different value. In that case, equal work will not have equal value, at least if it is assessed qualitatively".

He noted that, with regard to the criteria for 'equal work' or 'work of equal value', the guidance offered by existing case law is limited, excepting that in **Macarthys Ltd v. Smith** C-129/97 [1980] ECR 1275 ECJ, the European Court of Justice defined its position on the criteria for 'equal work' or 'work of equal value', showing that 'equal work' was an entirely qualitative concept meaning that the only criterion for the existence

of 'equal work' or 'work of equal value' was the actual activity of the workers. He observed that in the case law of the European Court of Justice subsequent to the **Macarthys** judgment, the Court had not modified its position; he said at paragraph 30:-

> "The object and nature of the task in question appears to be a sufficient material criterion for determining whether two groups of workers perform the same work or work of equal value. In addition, the conceptual distinctions made by Article 119 of the Treaty have not hitherto been examined by the Court, which has mainly confined itself to analysing the term 'equal work' in the context of the first paragraph of Article 119, and does not appear to attach importance to systematic analysis of the semantic difference between 'equal work' and 'the same job'. More specifically, the organic and formal elements of work, which are related to the worker's physical and intellectual skills, and also the conditions of employment, have been examined only as objective criteria which may justify different pay for equal work".

He explained the above, in paragraph 31:-

> "...this case-law is explained not only by the fact that, in the context of preliminary rulings the Court is frequently bound by the National Court's presumption as to the existence of equal work or work of the same value. The fundamental reasoning underlying the case-law is that the definition of 'equal work' and the criteria for determining whether there is 'equal work' or not are used by the Court to a large extent as the basis of applying the case-law relating to the burden of proof in the context of applying the principle of equal pay for men and women".

At paragraph 32, the Advocate-General identified three possible interpretations, Firstly, he suggested that the Court may remain faithful to their judgment in **Macarthys** on the view that where the task is the same that that will be sufficient to show 'equal work' or 'work of the same value' or 'the same job' irrespective that the work is performed by workers with different professional qualifications arising from different training and in the context where one group of workers is professionally qualified to perform other tasks, in a wider field. He considered that this interpretation had the disadvantage of restricting 'equal work' to a situation where the same task is carried out and in disregard of the semantic distinctions made in Article 141 of the Treaty. On the positive side, he noted that it did not undermine the Court's case law on matters of the burden of proof. He noted

that if this view was taken then it was not the first question directed to the Court which arose but rather the sixth, namely, where staff perform the same duties in an undertaking, may different training be regarded as a factor justifying lower pay?

The second possible interpretation he identified was that where both groups of workers performed the same duties but have different professional training then the two groups did not have 'the same job' even though they did the same work in the sense of performing the same duties. He reasoned that simultaneously the difference in training meant a difference in the conditions under which the work is done and that, of itself, meant the work of each group cannot have the same economic or qualitative value. He reasoned from the conceptual viewpoint that this interpretation was more consistent than the first but that it had two fundamental disadvantages. Firstly, he considered that it implied that persons having 'the same job' cannot possibly have different levels of training and that, secondly, it called into question and compromised the case law concerning the burden of proof as regards *prima facie* indirect discrimination. He noted that if this interpretation was applied to the facts of **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse,** it would require to be accepted that as the medically trained doctor psychotherapists did not have the same training as those psychotherapists who were psychologists then the question of discrimination did not arise because the two groups were not in the same situation for the purposes of the case law of the Court and hence did not perform tasks of the same value. In this interpretation, the principle of equal pay as laid down by Article 141 did not apply.

The third interpretation which he recommended and the one which found favour with the Court was that the criterion of training required to be regarded as applicable in two ways; firstly that it may be used as an objective criterion justifying a difference in the pay for equal work or work of equal value and secondly it may also be used as a criterion for comparing tasks for ascertaining whether workers are in fact in a comparable situation. This interpretation accorded with the judgment of the Court in **Specialarbejderforbundet i Danmark v. Dansk Industri, acting for Royal Copenhagen A/S** C-400/93 [1995] ECR I-1275 ECJ, where the Court, in seeking factors permitting comparison of the situation of two groups of workers observed, at paragraph 33 of the judgment, that training was one of the factors to be taken account of when comparing the situation of two groups of workers in order to ascertain whether they are in

a comparable situation. Advocate-General Cosmas considered that, in essence, the Court was stating in **Royal Copenhagen** that the training factor could be used not only as a criterion objectively justifying a difference in pay for equal work or for work of equal value, as it did in **Handels-og Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgierforening acting for Danfoss** C-109/88 [1989] ECR 3199 ECJ. Thus, by reference to **Royal Copenhagen**, the Advocate-General considered that this was express confirmation that there were two ways in which factors capable of justifying objectively a difference in pay and relating to the nature of the work and the conditions in which it is carried out may be applied. He further noted that the Court stated in **Royal Copenhagen** at paragraph 42 that the National Court must ascertain whether, in the light of facts relating to the nature of the work carried out and the conditions in which it is carried out, equal value may be attributed to it or whether those facts may be considered to be objective factors unrelated to any discrimination on the grounds of sex which are such to justify any pay differentials.

The training factor cannot be used in a manner akin to 'double counting'; at paragraph 33, Advocate General Cosmas says:-

> "...if the training factor is to be used meaningfully in two ways, it cannot imply the same thing in both cases. As an objective criterion in relation to different pay for equal work or work of equal value, different training cannot be identified with the different training which, if it is found to exist, leads to the conclusion that two groups of workers do not carry out the same work or work of equal value.
>
> In the first case, the difference in training normally consists in qualifications at different levels or, generally, different levels of training. Here, the qualifications at different levels do not entail a distinction so profound that the occupation or job could be said to be different, but they may justify a difference in pay for the same work. The case is similar to that where two workers carry out the same work, but one is presumed, by reason of his length of service, to have greater experience and greater skill in fulfilling the demands of his work. This justifies a corresponding increase in pay, but it does not mean that his work is different.
>
> However, the difference in the level of qualifications may be very great or the difference in training may be

not only quantitative, but also qualitative, so that the qualification in question is different and therefore the work is neither the same nor of equal value in relation to that of another group of workers who have not received the same training. In that case, the *fundamentally* different training, as the Commission puts it, may imply that the work has a different nature or purpose. Therefore it may be that employees of the different groups perform different duties with a different nature or purpose within the same service or undertaking, but without doing equal work or work of equal value or without having the same job or a job of the same value, because the fundamental difference in training may alter radically the value of that work and of the conditions under which it is done".

Therefore, the existence of different professional qualification for each group of workers is a legitimate objective criterion for determining if there is a fundamental difference in training such that it may determine whether the person in question does completely different work or has a completely different job; thus he says at paragraph 34:-

"...if two employees have different qualifications because their training was fundamentally different, it follows that the work of the job in question is different, even if the employees carry out duties which appear to be identical. However, if this distinction is to be made on the basis of the different qualifications of the persons concerned, **the latter must be recruited and must perform their duties on the basis of their own qualification which is related to those duties.**"[Emphasis added].

In **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse,** the doctors could, though not necessarily did, continue to practise as doctors and where necessary could perform associated duties related to their training as doctors. At paragraph 35 the Advocate General states that:-

"...if the training of the two groups of employees is fundamentally different and that difference is confirmed by different qualifications, the two groups do not carry out equal work or have the same job. Even though their duties, considered by reference to the purpose thereof, appear to be the same, that is to say psychotherapy, the persons concerned possess fundamentally different knowledge and experience, and therefore fundamentally different

> therapeutic skills and this has a significant influence on the work they perform". [Emphasis added].

The Advocate General proposed that, if it was accepted that the 'conditions of work' must be examined when considering the preliminary issue of whether the work in question is 'equal work' or 'work of equal value', then logically the only objective criteria which at a later stage could justify a difference in pay must be factors not already considered when deciding whether there was 'equal work' or 'work of equal value'. He explained at paragraph 31:-

> "In other words many of the factors hitherto regarded as objective, which justify different pay for men and women and the existence of which must be proved by the employer (or the Member State or, generally the person on whom the burden of proof lies), will hence forward be discussed in relation to the preliminary question of whether the work in question is equal work or work of the same value, on which point it is the worker (normally a woman) pleading discrimination who has the burden of proof. An employer who justifiably denies that discrimination exists will therefore only have to deny that the work in question is equal work or work of the same value, by relying on one of those factors, without having to show that the particular factor is objective and is unrelated to discrimination based on sex. The mere existence of that factor will entail differentiation in the type of work and will therefore mean that there is no discrimination contrary to the principle of equal pay laid down by Article 119 of the Treaty".

The European Court of Justice pointed out that, in order to determine whether the work being done by different persons was the same, it was necessary to ascertain whether, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions those persons can be considered to be in a comparable situation.

The Court also said that where seemingly identical tasks were performed by different groups of persons who did not have the same training or professional qualifications for the practice of their profession, it was necessary to ascertain whether, taking into account the nature of the tasks that may be assigned to each group respectively, the training

requirements for performance of those tasks and the working conditions, under which they are performed, the different groups in fact do the 'same work'.

The Court agreed with the opinion of the Advocate General that professional training was not merely one of the factors that may be an objective justification for paying differential pay rates for doing the 'same work' but rather the European Court of Justice thought that it was also one of the possible criteria for determining whether or not the 'same work' was actually being performed.

The Court said that although psychologists and doctors employed as psychotherapists performed seemingly identical activities, in treating their patients they drew upon knowledge and skills acquired in the very different disciplines of their professional training, with the expertise of psychologists being grounded in the study of psychology and that of doctors in the study of medicine. Furthermore, they noted that the national court had emphasised that even although doctors and psychologists both, in fact, performed psychotherapy, the doctors are qualified to perform other tasks in the field of medicine which is not open to the latter, who may only perform psychotherapy.

The Court said that where two groups of persons who have received different professional training and who, because of the different scope of the qualifications resulting from that training, are called upon to perform different tasks or duties, they cannot be regarded as being in a comparable situation.

The Court answered the question asked of them by the national court as follows:-

> "...the term 'the same work' does not apply for the purposes of Article 119 of the EC Treaty or the [Equal Pay] Directive, where the same activities are performed over a considerable length of time by persons the basis of whose qualifications to exercise their profession is different".

In order to come to this conclusion, the Court must have adopted the reasoning of the Advocate General, however it does not expressly say so, so doubt remains as to its potential impact. The importance of this case to UK equal pay is difficult to gauge. There is as yet no appellate authority from the courts of Great Britain or Northern Ireland on the correct interpretation of **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse.**

However, the case has the potential to bring about a far reaching reinterpretation of the Act, because it departs from the decision in **Macarthys Ltd. v. Smith** upon which the UK legislation is founded. A number of less radical possibilities are open which involve the courts having to interpret the Equal Pay Act differently. Firstly, the interpretation might apply in advance of consideration of section 1(2) and 1(4) of the Equal Pay Act in that where a difference in qualifications is disclosed, the existence of the different qualification may operate to negative any potential or actual like work finding. Secondly, the interpretation applies to the like work provisions of the Equal Pay Act on the basis that the woman may not be regarded as employed on like work with men where the difference in qualification *per se* renders the work dissimilar. The fact that one party, actually or potentially, can be called upon to do tasks which the other cannot is of itself a difference of practical importance, in that event if the difference in respect of the tasks which one party can be called upon to perform seldom if ever arises in any practical sense, the nature and extent of the qualification difference is sufficient to mean that the work of the woman and the man no longer can be said to be the same or broadly similar because of the underlying qualifications difference. Thirdly, that the interpretation applies to section 1(3) of the Equal Pay Act, in that the existence of a different qualification operates as a 'genuine material factor' which is not the difference of sex and in respect of sub-section 2(a) or (b) must be a material difference between the man's case and the woman's case and in respect of sub-section 2(c) may be a material difference. This interpretation will only arise if the matter is not determined at one or other of the earlier stages outlined above. Fourthly, the judgment may allow justification to be established on the basis of qualifications.

4.3 Indirect discrimination in European law

The principle of equal pay in European law includes not only the application of provisions leading to direct sex discrimination, but also the application of provisions which maintain different treatment between men and women at work as a result of criteria not based on sex and where those differences of treatment are not attributable to objective factors unrelated to sex discrimination, so said the European Court of Justice in **Stadt Lengerich v. Helmig** C-399/92; C-409/92; C-425/92; C-34/93; C-50/93 and C-78/93 [1994] ECR I-5227 ECJ at paragraph 20.

Any understanding of the domestic provision is incomplete without an understanding of indirect discrimination as it applies to equal pay and its origins and development in Europe. The starting point is paragraph 18 of the judgment in **Defrenne II** [set out earlier in this chapter]. This early attempt to explain the difference between direct and indirect discrimination was confusing because direct discrimination was linked with overt conduct, while indirect discrimination was linked with disguise. Yet, either sort of discrimination can be either overt or disguised; and, in practice, it is more often direct discrimination which is disguised by its perpetrator, whilst indirect discrimination is frequently quite overt. In addition, in relation to nationality at least, the Court had never refused to apply EC law directly just because the discrimination was covert. In reality, the distinction which the Court seemed to be trying to make in **Defrenne II** was simply between discrimination which can be identified without the need for further explanatory legislation and that which cannot. Advocate General Van Themaat explained this in **Burton v. British Railways Board** C-91/81 [1982] ECR 555 ECJ, at 582, saying:

> "The distinction drawn in the second **Defrenne** judgment between overt and disguised discrimination, which is important in determining whether or not Article 119 is directly applicable, does not coincide with a factual distinction between direct discrimination or discrimination in form, on the one hand, and indirect discrimination or discrimination in substance, on the other."

Nevertheless, the Court repeated its original formula in **Macarthys Ltd v. Smith** C-129/79 [1980] ECR 1275 ECJ but by the time of **Worringham v. Lloyds Bank Ltd** C-69/80 [1981] ECR 767 ECJ, Advocate General Warner[179] had begun to change its wording and, whilst still making the same distinction, had dropped the expressions "direct and overt" and "indirect and disguised". By the time the case of **Jenkins v. Kingsgate (Clothing Productions Ltd** C-96/80 [1981] ECR 911 ECJ came before the Court, the wording seemed to have changed further. Although the Court states in paragraph 10 that the only differences in pay prohibited by the Treaty are those based on sex, it would appear from the rest of the judgment that this does not mean that only pay differences which are deliberately or directly discriminatory on grounds of sex will breach that provision. On the contrary, the following paragraph indicates that, even where there is no direct sex-based distinction, the difference in hourly pay between part-time and full-time

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[179] At paragraphs 507-508.

workers will be compatible with Article 119 only 'insofar as they are objectively justified'. In paragraph 12, the court gives an example of what it appears to consider a legitimate policy which an employer might be pursuing by maintaining different pay rates for part- and full-time work, namely to encourage a greater number of full-time workers.[180] However, although this might seem to conclude the issue against female workers who, Advocate General Warner noted in his opinion, constituted 90 per cent of part-time workers in the Community, the Court made it clear that the issue was one for the national court to weigh. If the employer claimed that the differential pay policy was justified in the interests of recruiting full-time workers, yet a much smaller proportion of women than of men can, on account of family responsibilities, manage to work full-time, paragraph 13 seems to indicate that the onus remains on the employer to show that the pay policy is genuinely justified on grounds other than sex.

The Court eventually clarified its position in **Bilka-Kaufhaus GmbH v. Weber von Hartz** C-170/84 [1987] ICR 110 ECJ. This was a reference from Germany in which the Court was asked to rule on the legality of the exclusion of part-time workers from an occupational pension scheme. The Court held that an occupational pension scheme, albeit one supplementing a State benefit, did fall within the scope of Article 119 and the benefits provided under such a scheme were 'pay' for the purposes of the article. The Court ruled that if:

> "...it should be found that a much lower proportion of women than of men work full-time, the exclusion of part-time workers from the occupational pension scheme would be contrary to art 119 of the Treaty where, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which exclude any discrimination on grounds of sex".

Two matters must be considered, firstly the composition of the appropriate pools which are to be the subject of comparison must be ascertained, a task rendered more complex in circumstances where a wider or larger class of employee is subsumed within the same collective bargaining arrangements. Secondly, having identified the relevant pools for comparison purposes, the question arises as to when, and to what extent, the gender

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[180] See also the decision of the Court in the context of equal treatment, rather than pay, where it ruled that the interests of the enterprise might justify discrimination against part-time workers, C-189/91 **Kirshammer-Hack v. Sidal** [1993] ECR I-6185 ECJ.

composition of each group (that of the comparator and that of the claimant) must be taken into account and what orders of magnitude of similarity and dissimilarity must be disclosed to establish the presence of *prima facie* indirect sex discrimination. This was considered, at length, in **Enderby v. Frenchay Health Authority and Secretary of State for Health** C-127/92 [1993] ECR I-5535 ECJ, the European Court of Justice held that where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out "almost exclusively" by women and the other "predominantly" by men, Article 119 requires the employer to show that the difference is based on objectively justified factors unrelated to any discrimination on the grounds of sex. The fact that the respective rates of pay of two jobs of equal value, one carried out almost exclusively by women and the other predominantly by men, were arrived at by separate collective bargaining processes which although carried out by the same parties, are distinct, and, taken separately, having themselves no discriminatory effect, it is not sufficient objective justification for the difference in the pay for those two jobs. It was for the national court to determine, by applying the principle of proportionality whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constituted an objectively justified economic reason for the difference in pay between the jobs in question.

The facts were that Dr Enderby was employed as a speech therapist at a particular level of seniority within the NHS. She sought to compare herself with male colleagues at an equivalent level of seniority who were pharmacists and clinical psychologists within the National Health Service but who were paid approximately 60% more than she was. Speech therapy was overwhelmingly a female profession and although both other professions were also predominantly female at the equivalent level of seniority to Dr Enderby they were predominantly male. Dr Enderby's claim for equal pay was dismissed firstly by the employment tribunal and then on appeal by the Employment Appeal Tribunal. Essentially the employment tribunal held that the differences in pay were not attributable to sex discrimination whether direct or indirect. The employment tribunal's decision on direct discrimination was never challenged on appeal, but its decision on indirect discrimination was. The employment tribunal held that the differences in pay were the result of structures specific to each profession and in particular to the collective bargaining arrangements to each profession which were separate and were not discriminatory. It also held that the differences in pay between speech therapists and

pharmacists was attributable to "market forces", that is the need to attract pharmacists into the public sector. The Employment Appeal Tribunal held that the need to pay more to attract pharmacists to the NHS justified the whole of the difference in pay since it was necessary to pay the entire or global sum in order to recruit pharmacists. In dismissing the employees appeal the Employment Appeal Tribunal held that the mere fact of a difference in pay was insufficient to establish a *prima facie* case of unintentional indirect discrimination and said that when analysing a pay practice in order to determine whether it has an indirectly discriminatory impact on one sex so as to cast a burden on the employer to justify such discrimination, it was necessary to show a factor or rule within the alleged pay practice which had a discriminatory factor on women <u>because</u> they were women. If the factor causing the disparate impact has itself no taint of gender, there is nothing which requires justification, since no such causative factor tainted by gender had been shown to exist in the instant case the claim must fail, they stated. The employee again appealed. The Court of Appeal referred the matter to the European Court of Justice. In so doing the Court set out a basic statement of facts as follows:

> "A woman is a member of a predominantly female group of employees doing job A and she claims equal pay with a man, a member of a predominantly male group of employees doing job B. Job B receives higher remuneration than job A and the employees are presumed for the purpose of these proceedings to be doing work of equal value. The rates of pay for job A and job B are and have been determined by collective bargaining between the employer and the representative trade unions. The same trade union represents both groups, but the collective bargaining in relation to the pay level for job A is carried out separately and independently from the collective bargaining in relation to job B. The tribunal of fact have determined that there has been no discrimination, whether direct or indirect, intentional or unintentional, in the manner in which the collective bargaining processes (considered separately) have been carried out. Nevertheless, the separate collective bargaining processes have had an adverse impact on holders of job A in that they receive less remuneration than holders of job B for work that is of equal value.
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> Having thus set out the relevant facts, the Court of Appeal referred three questions to the European Court of Justice:-
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> 1. Does the principle of equal pay enshrined in Article 119 require the employer to justify objectively the

difference in pay between the jobs of principal speech therapist and principal pharmacist?

2. If the answer to question 1 is in the affirmative, can the employer rely as sufficient justification in pay upon the fact that the pay of the two jobs respectively has been determined by different collective bargaining processes which (considered separately) do not discriminate on the grounds of sex and do not operate so as to disadvantage women because of their sex?

3. If the employer is able to demonstrate that at times there are serious shortages of suitable candidates for the job of principal pharmacist and that he pays the higher remuneration to holders of that job so as to attract them to that job but it can also be established that only part of the difference in pay between the two jobs is due to a need to attract suitable candidates to the job of principal pharmacist:

(a) Is the whole of the difference of pay objectively justified; or

(b) Is that part but only that part of the difference which is due to the need to attract suitable candidates to job B objectively justified; or

(c) Must the employer equalise the pay of jobs A and B on the ground that he has failed to show that the whole of the difference is objectively justified?"

The European Court of Justice held that there was a *prima facie* case of sex discrimination and that the onus of showing that the pay differential was not discriminatory shifted to the employer when the *prima facie* case had been shown. They held that it was not sufficient justification that the difference was in consequence of separate collective bargaining machinery. They reasoned that if the employer could rely on that fact alone, the requirement for equal treatment could easily be circumvented by using separate bargaining processes. The Court held further that it was for the national court to decide whether the grounds put forward by the employer and based on market forces, i.e. the shortage of candidates for the job and the need to attract entrants by higher pay, amounted to objectively justifying, on economic grounds, the difference in pay. If the national court had been able to determine precisely what proportion of the increase in pay was attributable to market forces, it must necessarily accept that the pay differential was objectively justified to the extent of that proportion, the Court maintained...

"...[I]t is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to removing the discrimination.

However it is clear from the case law of the Court that the onus may shift when that is necessary to avoid depriving workers who appear to be victims of discrimination of any effective means of enforcing the principle of equal pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or another sex, that measure must be regarded as contrary to the objective pursued by Article 119 of the Treaty of Rome, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on the grounds of sex (judgments in **Case 170/84 Bilka-Kaufhaus GmbH -v- Weber von Hartz; Case C - 33/89 Kowalskav -v-Freie und Hansestadt Hamburg;** and **Case C - 184/89 Nimz -v- Freie und Hansestadt Hamburg).** Similarly, where an undertaking applies a system of pay which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than for men (judgment in **Case 109/88 Danfoss**).

In this case, as both the FHA and the United Kingdom observe, the circumstances are not exactly the same as in the cases just mentioned. First it is not a question of *de facto* discrimination arising from a particular sort of arrangement such as may apply, for example, in the case of part-time workers. Secondly, there can be no complaint that the employer has applied a system of pay wholly lacking in transparency since the rates of pay of NHS speech therapists and pharmacists are decided by regular collective bargaining processes in which there is no evidence of discrimination as regards either of those two professions.

However, if the pay of speech therapists is significantly lower than that of pharmacists and if the former were almost exclusively women while the latter are predominantly men, there is a *prima facie* case of sex

discrimination, at least where the two jobs in question are of equal value and the statistics describing that situation are valid.

It is for the national court to assess whether it may take into account those statistics, that is to say whether they cover enough individuals, whether they are purely fortuitous or short-term phenomena, and whether, in general they appear to be significant.

Where there is a *prima facie* case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a *prima facie* case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory (See by analogy, the judgment in **Danfoss** cited above).

In these circumstances the answer to the first question is that, where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which was carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that difference is based on objectively justified factors unrelated to any discrimination on the ground of sex."

On the basis of this judgment, there is *prima facie* evidence of sex discrimination where the following four factors are present; firstly, a "significant" or "appreciable" difference in pay exists between two jobs; secondly, the lower paid job is carried out almost exclusively by women and the higher paid job predominantly by men; thirdly, the two jobs are or are assumed to be of equal value and fourthly, the statistics describing the situation are valid.

The fourth question sent by the national court to the European Court of Justice in **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse** C-309/97 [1999] ECR I-2865 ECJ asked whether the relevant proportion of men to women is that in the disadvantaged group only or that in both groups. In paragraph 59, of his Opinion the Advocate-General noted by reference to the Court's case law, in particular **Enderby v. Frenchay Health Authority and Secretary of State for Health** *supra* at paragraph 17 of the judgment and at paragraph 16 of the

judgment in **Handels-og Kontorfunktionaerennes Forbund i Danmark v. Dansk Arbeidsgiverforening (acting for Danfoss)** C-109/88 [1989] ECR I-3199 ECJ, that the context and composition of the groups to be compared for the purpose of determining whether there is indirect discrimination not only may but must be subject to certain conditions, *inter alia* to prevent biased or distorted comparisons designed to support the argument of one side. The Advocate General noted, in paragraph 60, that:

> "The first criterion regarding the composition of the groups to be compared can only be a context in which the group is formed" and that the case law of the European Court of Justice discloses no general rule but rather that the context is determined on a case by case basis according to the circumstances of each case...the principle of equal pay laid down by Article 119 is clearly aimed at the body responsible for adopting the regulations in question. Consequently, if they appear in a law, the groups to be compared must consist of all the workers whose pay is governed by that law. Similarly, if the regulations are the result of a decision or a practice of a given employer, the groups to be compared must consist of all the workers employed by the employer in question".

At paragraph 61, in the context of the pay scales of the two groups of workers determined by collective bargaining agreements, given they are binding on other institutions then this, he maintains indicates:-

> "...that the comparable groups of workers to be compared must be formed in the context of the collective bargaining agreements in question, not in the context of the institution concerned. As the Commission observes, if account were taken of all the workers having the qualifications in question, the groups to be compared would be so heterogeneous that it would be pointless to compare them. Moreover, at that level the problem of discrimination would not arise".

Thus in paragraph 62, he opined that:-

> "...where a collective agreement provides that pay for the same work or for work of equal value is to vary according to the employees' professional qualifications, the employees to be taken into account informing the groups to be compared for the purpose of determining whether a particular measure gives rise to discrimination, are those covered by the collective agreement".

Notwithstanding difficulties which may arise in respect of the appropriate selection of the groups for comparison, Advocate General Cosmas notes at paragraph 63 that the case law of the European Court of Justice appears, at first sight, to have reached different conclusions depending on the nature of the case. For example in **Jenkins v. Kingsgate (Clothing Productions) Ltd** Case C-96/80 [1981] ECR 911 he noted that the Court merely examined the category suffering discrimination whereas in **Enderby** *supra* the Court subjected both claimant and comparator groups to scrutiny. He resolved this apparent inconsistency as follows:-

> "...these differences in the case law are due to the fact that, depending on the circumstances of each case, the Court, in order to satisfy itself of the existence of indirect discrimination, not only examines statistical data relating to the groups compared, which by nature are liable to fluctuate and may in general be unreliable, but also requires its conclusions to be supported on grounds which are objective as possible. More particularly, in the **Jenkins** case, the Court found that discrimination against women was shown by the fact that the ostensibly objective justification for different pay because of the number of working hours could entail such discrimination because it was difficult for women, by reason of household and family duties, to work on a full-time basis. This finding, which is a matter of normal experience, is the objective basis of the judgment concerning indirect discrimination. According to the reasoning of the aforementioned judgement, where an objective criterion of that kind exists, it may not be necessary to ascertain the proportion of men and women in the two groups of workers. In such a case, discrimination, even if it has the formal characteristics of indirect discrimination, is in substance much more likely to be regarded as direct discrimination because the occupational group in question is socially predetermined by the social institutions on the basis of sex. Therefore it is sufficient for the National Court to find that discrimination exists in an occupation which is, by nature, a 'female occupation', so that it is unnecessary to compare the two groups. In contrast, where indirect discrimination cannot be proved by the nature of the professional group, as in the **Enderby** case, the 'female' or 'male' nature of the occupation will be shown by a statistical analysis of one of the groups of workers in question, and that analysis must always be compared with that of the other group".

At paragraph 65 he states:-

> "The need for a comparative analysis of the proportion of men and women in the two groups arises, first and foremost, from the fact that in order to find that a provision is 'in principle' contrary to the principle of equal treatment, the Court requires the percentage of women in the group suffering discrimination to be 'much higher' than the percentage of men and/or requires the percentage of women in the favoured group to be 'much lower' than the percentage of men. As I stressed in my Opinion in the case of **Seymour-Smith and Perez**, to ascertain whether there is a 'significant difference' in the percentages in a group, the composition of the other group must also be taken into account. The other group must show a contrary trend, or identical percentages, or the same trend but much less marked than in the first group. If the percentage difference is the same or similar in both groups, the workers in the two groups are being treated in the same way and not unequally".

The conclusion is reached in paragraph 66 of the Advocate General's Opinion:-

> "...as the existence of indirect discrimination is a rebuttable presumption, the presence of a higher percentage of women not only in the group of workers suffering discrimination, but also in the favoured group, is logically significant evidence that the difference in question is objective and unrelated to discrimination on the grounds of sex, which is a factor upon which the employer can rely".

The analysis undertaken by Advocate-General Cosmas in his Opinion in **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse** was, without doubt, the most comprehensive analysis undertaken in the 1990's and by focussing, not just on the composition of the claimant's group (the disadvantaged group) but also the comparators group (the advantaged group), introduced an element that made it more likely to identify real indirect discrimination rather than that which might fortuitously appear from time to time, because the trend in both groups required to be scrutinised.[181]

A year later however, the Court appeared to re-define the test in **Jämställdhetsombudsmannen v. Örebo Läns Landsting** C-236/98 [2000] ECR I-2189 ECJ and, arguably, has removed one element from the test advanced by Advocate-

[181] The practical effects of this are considered further in Chapter 13.

General Cosmas. In **Jämställdhetsombudsmannen,** the Court said that the test for adverse impact involves the following exercise. Firstly, establish the difference in pay between the claimant's group and the comparator's group; secondly, establish the proportion of men and women in the claimant's group and thirdly, determine whether the proportion demonstrates that there is a substantially higher percentage of women than men in the claimant's group. To be valid the exercise must proceed on the basis that; the group must comprise all workers in a comparable situation and not be formed in an arbitrary manner; the statistics must cover enough individuals to be statistically significant; the statistics must cover several years to ensure that they do not illustrate purely fortuitous or short term phenomena and the statistics must be relevant and sufficient for the purpose of resolving the case. It appears therefore that if there is a difference in pay between the two groups, the burden on the employer to objectively justify the difference is triggered if it is shown that there is a substantially higher proportion of women in the disadvantaged group and that this suffices to create a *prima facie* case of sex discrimination under EU law regardless of the gender composition of the higher paid group. This interpretation will undoubtedly permit a wider range of comparisons to be made thereby transferring the burden of proof to the employer more easily. Arguably, it also accurately reflects the definition of indirect discrimination as now contained within Article 2 of the Burden of Proof Directive[182] which defines indirect discrimination as a situation where:

> "an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex".[183]

Having established *prima facie* the existence of discrimination the employer may however invoke the defence of justification, which in the next sub section is considered in a general manner, in terms of the way in which it has developed in the jurisprudence in the European Court of Justice, prior to more detailed examination of three particular grounds of objective justification which are of particular significance in the context of systemic or structural inequality in the labour market.

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[182] EC 97/80.

[183] It should be noted that this definition of indirect discrimination has been criticised both by the Social Affairs commissioner and by a number of women's interest groups, only time will tell if their criticisms are justified.

(a) Justification as a defence to indirect discrimination

Central to the concept of indirect, as opposed to direct, discrimination in the context of equal pay is the employer's defence of justification which, as will be illustrated in Chapter 8, has caused no small problems in application in the domestic provision. It is very much a creation of European jurisprudence.

In **Bilka**, having concluded that the respondent's pension scheme was subject to the principle of equal pay laid down in Article 119, the Court ruled that it was incompatible with that Article for an employer to exclude part-time workers from such a scheme where to do so affected a much higher number of women than men. This would not be the case, however, where the employer could establish that the exclusion of part-time workers was objectively justified and unrelated to discrimination based on sex. An employer could achieve this by showing:

> "...that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end." [184]

This passage indicates that the principle of proportionality must be respected if the defence of justification is to be successfully invoked. An indirectly discriminatory measure of this kind may be justified if, first, the measure answers a 'real need' of the employer; secondly, the measures are 'appropriate' to achieve the objectives they pursue; and, finally, the measures are 'necessary' to achieve those objectives. Phrased in slightly different language, this test corresponds broadly to the 'rule of reason' test for proportionality in the context of the free movement of goods and service. However, determining the objectiveness of the factors relied on has not been without its difficulties.

In **Rummler v. Dato-Druck GmbH** C-237/85 [1986] ECR 2101 ECJ, the European Court ruled on the question of whether a particular job classification system was compatible with provisions of EC law, in particular the Equal Pay Directive. The facts

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[184] Paragraph 37 of the judgment.

were that Mrs Rummler was employed in the German printing industry, where there were seven salary levels corresponding to the difficulty of the work undertaken in terms of knowledge, concentration, physical effort and responsibility. Mrs Rummler was classified in Category III, but took the view that she should have been classified in Category IV in the light of the work she undertook and particularly the fact that she wrapped parcels weighing over 20kg, which constituted, for her, work of considerable physical effort. She instituted proceedings before the German courts to seek her reclassification in a higher wage category. The respondent disputed the nature of the work undertaken by Mrs Rummler, arguing that it did not satisfy the conditions for classification in Category III and that in view of the minimal muscular effort required should in fact be classified in Category II.

The dispute resulted in three questions being referred to the Court by the Arbeitsgericht Oldenburg on the interpretation of Directive 74/117. The Court ruled that, in the context of the criteria governing a job classification system, the nature of the work should be considered objectively, and should be remunerated at the same rate whether it was performed by a man or a woman. It was consequently incompatible with that Directive for a job classification scheme to be based on the average capabilities of workers of a particular sex. Where the job in question required a certain level of physical exertion, it was permissible for such schemes to take account of muscular effort or the heaviness of the work. However, insofar as the nature of the work permitted, they also had to take account of other factors for which workers of both sexes were particularly suited.

The Court's judgment which is not conspicuous for its lucidity was that:

> "... the principle of equal pay requires essentially that the nature of the work to be carried out be considered objectively ... Where a job classification system is used in determining remuneration, that system must be based on criteria which do not differ according to whether the work is carried out by a man or a woman and must not be organised, as a whole, in such a manner that it has the practical effect of discriminating generally against workers of one sex."[185]

[185] Paragraph 13 of the judgment.

The Court held that in order to determine whether or not a particular criterion applied in a job classification scheme is discriminatory, it must be considered in the context of the scheme in its entirety. (paragraph 15 of the judgment). The use of a criterion, such as muscular demand to determine pay, may be justified if the pay difference relates to a genuine need of the employer, in that it ensures a level of pay appropriate to the effort required by the work.[186]

In the case of **Handels-og Kontorfunktionaerennes Forbund i Danmark v. Dansk Arbeidsgiverforening (acting for Danfoss)** C-109/88 [1989] ECR I-3199 ECJ, even though a requirement for flexibility could disadvantage women who were less likely to be able to organise their working time in a flexible way because of their household and family duties, it was held to be justified; the Court stated at paragraphs 22 and 25:

> "In the **Bilka** judgment the Court took the view that an undertaking's policy of generally paying full-time employees more than part-time employees who were excluded from the undertaking's pension scheme, could affect far more women than men in view of the difficulties which women encountered in working full-time. It nevertheless held that the undertaking might show that its wages practice was based on objectively justified factors, unrelated to any discrimination on grounds of sex and if the undertaking did so there was no infringement of Article 119 of the Treaty. Those considerations also apply in the case of a wages practice which specially remunerates the employee's adaptability to variable hours and varying places of work. The employer may therefore justify the remuneration of such adaptability by showing it is of importance for the performance of specific tasks entrusted to the employee."...
>
> "[25]...the Equal Pay Directive must be interpreted as meaning that where it appears that the application of criteria, such as the employee's mobility, training or length of service, for the award of pay supplements systematically works to the disadvantage of female employees:
> (i) the employer may justify recourse to the criterion of mobility if it understood as referring to adaptability to variable hours and varying places of work, by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to

[186] Paragraph 24 of the judgment.

the employee, but not if that criterion is understood as covering the quality of the work of the employee;
(ii) the employer may justify recourse to the criterion of training by showing that such training is of importance for the performance of the specific tasks which are entrusted to the employee
(iii) the employer does not have to provide special justification for recourse to the criterion of length of service."

Danfoss also established that, in a pay system which discriminated against women, by using *inter alia*, the criterion of vocational training as a ground for making additional payments to workers, the use of the criterion of vocational training could justify the discrimination. **Danfoss** also established that paying a more senior worker at a higher level may be a ground for justification of indirect discrimination in EC law.

However, the decision in **Danfoss** has to be read with the decision in **Nimz v. Freie und Hansestadt Hamburg** C-184/89 [1991] ECR 1-297 ECJ. This case concerned a collective labour agreement which provided for different conditions for full- and part-time workers. Workers would automatically be entitled to a wage increase after six years of working three-quarter time to full-time, but would not be entitled to the increase until twelve years of working half-time to three-quarter time. The condition was indirectly discriminatory on grounds of sex. It was argued that the greater experience acquired by the full-time employees justified the discrimination. The Court held that the idea that full-time workers acquire competencies and capabilities pertaining to their service faster than part-time employees or that greater experience justifies greater pay are *"...no more than generalisations about certain categories of workers."* [187] The justification did not necessarily meet the criterion of objectivity. The Court did admit that in some circumstances experience or seniority could justify indirect discrimination, but held that it would depend upon the individual case.

> "[14] Although experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him, the objectivity of such a criterion depends on all the circumstances in a particular case, and in particular on the relationship between the nature of the work performed and the experience gained from the

[187] Paragraph 14 of the judgment.

> performance of that work upon completion of a certain number of working hours."

In **Rinner-Kuhn v. FWW Spezial Gebaudereinigung GmbH & Co** C-171/88 [1989] ECR 2743 ECJ, the question as to the compatibility with Article 119 of provisions of employment policy disadvantaging part-time workers was referred to the European Court for a preliminary ruling. The provision was contained in German legislation, the Lohnfortzahlungsgesetz (of 27 July 1969) (Act on the Continued Payment of Wages) which provided that the employer must continue to pay wages for six weeks to employees unable to work because of illness. However, workers whose employment contract provided for a normal working week not exceeding ten hours a week, or 45 hours a month, were excluded from the provision.

Ms Rinner-Kuhn normally worked for ten hours per week. Her request for payment of sick pay, on her absence due to illness, was therefore refused by the employer. The German Labour Court, faced with the problem of interpretation of the provisions of Article 119 and Directive 75/117, referred to the European Court the following question:

> "Are legislative provisions which derogate from the principle that an employer must continue to pay employees during illness in the case of employed workers whose regular period of work does not exceed ten hours a week or 45 hours a month compatible with Article 119 of the EEC Treaty and with Council Directive (EEC) 75/117 .... even though the proportion of women adversely affected by that derogation is considerably greater than that of men?"[188]

The German government claimed that the exclusion of part-time workers from the provisions granting sick pay to employees was justified by the fact that part-time workers were not integrated in or connected with the undertaking in the same way as full-time workers. Therefore, the duty of care of the employer to its full-time workers, including an obligation to continue to pay wages in the event of illness of the employee, was not present in the case of part-time workers. The EC Commission disagreed and found that the policy permitted by the legislation amounted to the unequal treatment of women and men, which was not objectively justifiable:

> "The Commission cannot understand why it should be economically defensible and socially necessary to allow

[188] Pages 2747-2748.

full-time workers to continue to receive their salary for six weeks whereas this right is refused to part-time workers who are socially less favoured. Such a rule removes protection precisely in the situation where it is most needed. Similarly, the argument that the employer's obligation to continue to pay salary during illness is connected with his welfare obligations which do not apply to part-time workers, is also unconvincing since, when deciding whether or not a welfare obligation exists, the legislature must be guided not only by the employer's willingness to lend assistance but also by the worker's need for assistance." [189]

At paragraph 12 of the judgment, the Court held that the measure in question was in principle contrary to the provisions of Article 119. The Court then turned to the issue of justification, holding that the assertion of the German government, that the lack of integration in or connection with an undertaking of part-time employees justified the legislation, could not be accepted. It did not, however, go as far as the Commission had sought in recognising the vulnerability of part-time workers, most of whom are women and the need for their protection. The Court instead added "necessity for social policy" to the "business necessity" test of **Bilka**.

In **Kowalska v. Freie und Hansestadt Hamburg** C-33/89 [1990] ECR 1-2591 ECJ the Court considered Article 62 of the Bundesangestellten-tarifvertrag (Federal Civil Service employees' collective agreement) which excluded part-time workers from severance pay. The Court found that the severance pay constituted "pay" in the context of Article 119, and that the measure was indirectly discriminatory, since a considerably lower percentage of men than women work part-time. On the question of justification, the employer (Freie und Hansestadt Hamburg):

> "...contended essentially that part-time workers do not provide for their needs and those of their families exclusively out of their income from their employment, and therefore that employers are not under a duty to provide temporary assistance for part-time workers."[190]

As the Advocate General pointed out,[191] the Court had already ruled in **Rinner-Kuhn** that generalisations concerning certain categories of workers do not constitute objective

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[189] Page 2747.
[190] Paragraph 14 of the judgment
[191] at pages 2602-2603.

justification. Moreover, the total exclusion of part-time workers from severance pay was inconsistent with the requirement of proportionality. Part-time workers could be entitled to receive a *pro rata* proportion of the severance pay received by full-time employees, depending upon the proportion of full-time hours worked. Such a solution would be less discriminatory than the total exclusion of part-time employees from entitlement to severance pay.

In **Ruzius-Wilbrink v. Bestuur van de Bedrijfsvereniging voor Overheidsdiensten** C-102/88 [1988] ECR 4311 ECJ, Advocate General Darmon said:

> "17 - A measure does not therefore seem to me to be incompatible merely because it has a discriminatory effect, provided that it is explained by objective factors and does not derive from any discriminatory intention."

The Court confirmed[192] that any difference in treatment must be justified by objective factors unrelated to any discrimination on grounds of sex and it referred to **Rinner-Kuhn.**

The Court of Justice examined the application of Article 37(2) of the German Betreibsverfassungsgesetz to part-time workers in **Arbeiterwohlfahrt der Stadt Berlin eV v. Bötel** C-360/90 [1992] ECR I-3589 ECJ. Article 37(2) required that an employee be released from work in order to attend training courses to enable the employee to participate in staff committees. The employee was to receive remuneration for the time spent away from work at the courses. Ms Botel was a part-time employee of the Arbeiterswohlfahrt of Berlin. She attended training courses as a member of her employer's staff committee. The courses lasted for whole days, whereas Ms Botel only worked part days. Consequently she was required to give up some of her free time in order to attend the course. Ms Botel was not remunerated for the free time she gave up, but only for the hours she would otherwise have worked.

The Court of Justice accepted that the legislation was indirectly discriminatory (paragraph 20 of the judgment). It was argued by the German government that the discrimination was justified because the purpose of the Betreibsverfassungsgesetz was to provide compensation for working hours not worked because the employee attended a training course. Employees were thereby enabled to receive training without losing pay which

[192] At page 4332, paragraph 15.

they would otherwise have earned. Trained employees could carry out their duties on staff committees in an effective manner, in the interests of all employees. There was therefore no distinction between the entitlement of full-time and that of part-time employees.

The Court pointed out[193] that the German government's explanation did not alter the fact that part-time employees receive less remuneration than full-time employees for attendance at the same courses. Moreover, the Court noted[194] that this situation was likely to dissuade part-time workers (who were mostly women) from serving on staff committees, thus reducing the representation of women on the committees. The Court concluded that the difference in treatment could not be treated as justified on these grounds.

The Court expressly reserved for the national court the competence to find that the application of Article 62 of the collective agreement in Ms Kowalska's case[195] and Article 37(2) of the Bundesangestelltentarifvertrag in Ms Botel's case at paragraph 26 of the judgment, was objectively justified for another reason.

In **Jämställdhetsombudsmannen v. Örebo Läns Landsting** C-236/98 [2000] ECR I-2189 ECJ[196] the European Court of Justice had to consider application of the equal pay principle to individual elements of a remuneration package, and whether a differential in basic pay could be offset by the disadvantaged group being able to increase their overall remuneration by access to a supplement for working inconvenient hours, which was not an element in the remuneration package of the comparator group. The facts were that two midwives brought an equal pay claim in respect of the differential between their pay and that of a clinical technician. The basic hours salary was lower for the midwives than the clinical technician, but he had no opportunity to earn the 'inconvenient-hours supplement' that the midwives received on a regular basis. The national court had not actually made a finding that the jobs were of equal value, but referred a number of questions to the Court. The Court held that, because the amount of supplement earned varies from month to month, the basic salaries were the appropriate point of comparison, in order to ensure

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[193] At paragraph 24 of the judgment.
[194] At paragraph 25 of the judgment.
[195] At paragraph 15 of the judgment.
[196] Considered earlier in this chapter in respect of the comparative test with regard to the composition of the advantaged and disadvantaged groups for the purpose of establishing *prima* facie indirect discrimination.

transparency and guarantee compliance with the Equal Pay Directive. In those circumstances, the Court could only conclude that, were the jobs of equal value, the midwives were paid less (i.e. in terms of basic salary) and that as a considerably higher percentage of women than men work as midwives, this would constitute indirect discrimination, unless justified The Court concluded that 'the inconvenient hours supplement' could not be taken into account in calculating the salary which serves as a basis for a pay comparison for the purposes of Article 141[197] but confirmed that if the basic pay rates were equalised, the payment of an inconvenient hours supplement would be justified, stating that:

> "[61] ...differences that might exist in the hours worked by the two groups whose pay is being compared may constitute objective reasons unrelated to any discrimination on grounds of sex such as to justify a difference in pay."

The impact of this decision remains to be seen, particularly since access to overtime and hence the pay for such additional hours, arguably may itself, be 'tainted by sex'.[198]

The foregoing subsection has dealt with the development of justification as a defence to indirect discrimination in the jurisprudence of the European Court of Justice in a general manner, in the following subsections, three particular areas of the defence of justification are examined (i) collective bargaining, (ii) market forces and (iii) qualifications and training. These have been selected because of their importance and relevance in the context of occupational segmentation and the fact that women have traditionally and disproportionately been overrepresented in the low skills sectors of the economy.

(i) The defence of justification: collective bargaining

If a labour force has a high level of segmentation by gender, one way to perpetuate inequality of pay would be by the structural mechanism of separate collective bargaining arrangements between those occupations which have traditionally been the preserve of

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[197] Confirming their earlier decision in **Barber v. Guardian Royal Exchange Assurance Group Limited** C-262/88 [1990] ECR I-1889.

[198] For example, in the public sector, employees in 'manual' job categories comprised of predominantly one sex have traditionally had differential access to overtime, a matter which in Scotland has caused difficulties in the implementation of equalisation mechanisms in the context of the 'Single Status' agreement for former Manual and Administrative, Professional, Technical and Clerical Staff.

men and those which have been the preserve of women, thereby permitting pay bargaining to occur in parallel but separate fashion, absent any inter-scale considerations.

Enderby, *supra*, raised the important issue on the scope of any defence based on collective bargaining. The European Court had to decide whether it was sufficient justification that the rates of pay of the different jobs were determined by separate collective bargaining processes, each of which had no discriminatory effect.

The German Government argued that *"...it is possible for different collective agreements to be concluded on the basis of an objective criterion of differentiation, and accordingly for any comparison between jobs to be precluded."* In that context, the fact that each agreement considered in isolation is apparently not discriminatory was significant.

The answer given by the Court was as follows:

> "22. The fact that the rates of pay at issue are decided by collective bargaining processes conducted separately for each of the two professional groups concerned, without any discriminatory effect within such group, does not preclude a finding of *prima facie* discrimination where the result of these processes show that two groups with the same employer and the same trade union are treated differently. If the employer could rely on the absence of discrimination within each of the collective bargaining processes taken separately as a sufficient justification for the difference in pay, he could, as the German Government pointed out, easily circumvent the principle of equal pay by using separate bargaining processes".

Two passages are difficult to understand. First, the question is not whether the collective bargaining defence *"prevents"* a finding of prima facie discrimination, but whether, given such a finding, the collective bargaining defence provides sufficient objective justification to rebut the prima facie case. Secondly, the Court states that an employer could *"...easily circumvent the principle of equal pay by using separate bargaining processes"* however, if an employer deliberately sets out to organise or structure his bargaining process so as to circumvent the principle of equal pay, it is difficult to understand how he could provide objective justification unrelated to discrimination on grounds of sex.

Advocate General Lenz was inclined to the view that explaining how present situations, such as predominantly female vocations, came about was not the same as showing justification for such a phenomenon. He said:

> "Any practice which leads to the perpetuation of sexual roles in working life is now likely to be subject to very close scrutiny under the standard of both community law and domestic legislation."

The Court did not go as far as the Advocate General. The Court appears to accept the Commission's argument that *"...in this case, it is not the difference in pay which was collectively agreed upon since the rates of pay were agreed upon in separate bargaining processes."* The Court held:

> "23. Accordingly the answer to the second question is that the fact that the respective rates of pay of two jobs of equal value, one carried out almost exclusively by women and the other predominantly by men, were arrived at by collective bargaining processes which, although carried out by the same parties, are distinct and, taken separately, have in themselves no discriminatory effect, is not sufficient objective justification for the difference in pay between those two jobs."

In **Specialarbejderforbundet i Danmark v. Dansk Industri, acting for Royal Copenhagen A/S** C-400/93 [1995] ECR I-1275 ECJ, the final of a number of questions put to the European Court of Justice was:

> "... what significance should be attached to the fact that the rates of pay were determined by collective bargaining or by negotiation at local level ..."

The answer was:

> "...the fact that the rates of pay have been determined by collective bargaining or by negotiation at local level may be taken into account by the national court as a factor in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex."[199]

Advocate General Cosmas considered collective agreements further in **Wiener Gebietskrankenkasse,** he noted at paragraph 54:

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[199] Paragraph 46.

"The fact that the pay of two groups of workers is determined by collective agreements affects the framework for the application of the principle of equal pay set out in Article 119 of the Treaty. In such a case, the national court must go further than the circumstances of a particular enterprise and proceed to assess the circumstances which, in the matter of employment, depend on collective agreements. Furthermore, in the case of collective agreements for a whole sector, the parties, when fixing pay, normally take account not only of the specific work, but also of other factors such as the employment market generally or locally, the economic needs of undertakings in different sectors, and the size and the role of the different trade unions in the particular sector. Therefore the pay of each group of workers must be assessed, not by reference to their actual work on the undertaking, but, ... by reference to the formal characteristics of the work which may be described by the job classification system laid down by the collective employment agreement on the basis of the pay policy adopted. The need to go beyond the specific undertaking and refer to the pay classification system laid down by the collective employment agreement becomes even more important where the agreement provides, as in the present case, for a definitive and mandatory pay system would leave the employer with no power to differentiate on the basis of an individual contract of employment. In this case, the collective agreement is the source of the objective criteria which may justify differences in pay".

He noted that the Court, in the **Royal Copenhagen** judgment, at paragraph 46 states that:

"...the fact that the rates of pay have been determined by collective bargaining or by negotiation at local level may be taken into account by the national court as a factor in its assessment of whether differences in the average pay of two groups of workers are due to objective factors unrelated to any discrimination on the grounds of sex".

He further noted that the European Court of Justice has developed certain criteria concerning the manner in which a national court should assess the details of pay for different groups of workers governed by collective bargaining arrangements. He gave the example of what the Court said at paragraph 22 in its judgment in **Enderby**. However, notwithstanding the above, the Advocate General stated in paragraph 56:-

"As the German government has observed, it is important for the national court to establish whether the collective agreements laying down the pay scales of certain

occupations were drawn up by the same parties. If different stipulations of collective pay agreements are to be found comparable for the purpose of Article 119 of the Treaty, the contracting parties must be the same and the economic sector covered by the agreements in question must be the same. In the present case, it is clear from the order for reference that all the staff regulations were adopted by the General Association of Austrian Social Insurance Institutions and covered the same economic sector, that is to say, social insurance institutions, and during the oral procedure the parties to the main proceedings both admitted that the agreements in question had been drawn up by the same parties. In any case, however, it is still incumbent on the national court, which has the best information on the legal context and the fact of the case before it, to determine whether the aforementioned requirements are fulfilled".

The Advocate General, at paragraph 57, stated:-

"However, the fact that the rates of pay of two groups of workers were the result of collective bargaining processes may be taken into account by the national court as a factor in assessing how far differences in pay are due to objective factors and related to discrimination on the grounds of sex. Likewise, the fact that each group of workers is covered by a different collective agreement may be taken into account by the national court as a factor in assessing how far the two groups may be regarded as being in similar situations. Finally, the national court may take particular account of whether collective agreements relate to the same economic sector, whether they were concluded by the same parties and whether they lay down a definitive and mandatory system for determining rates of pay".

The jurisprudence of the Court has recognised that separate collective bargaining arrangements, taken with occupational segmentation perpetuate sex discrimination in pay, regrettably the Court seems content to leave determination of the issue to the national court. The national court might have some difficulties in this area because of the lack of transparency in the payment systems. When the European Court encounters such a problem, it rules against the employer[200], the national court, however, may not adopt this approach.

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[200] See, for example, **Brunnhofer v. Osterreichischen Postparkasse AG** C-381/99 [2001] ECR I-4961 ECJ.

(ii) The defence of justification: market forces and economic grounds

In any competitive market where supply of and demand for labour are not in perfect equilibrium, when there is oversupply (particularly, as in the unskilled sector, where so many female occupations are congregated) this will serve to keep wage levels down. But, in conditions of undersupply of a particular skill, the potential arises for employers, in competition with each other, to attempt to capture labour in short supply by increasing the pay for that particular skill. Thus creates a differential not only between employers in the same industry sector, but also on occasions between personnel undertaking the same work, depending whether they were recruited in conditions of under or over supply. The third question in **Enderby** raised the issue of the extent to which the fact that a part of the difference in pay is attributable to a shortage of candidates for one job and the need to attract them by higher salaries can objectively justify that pay differential. The Court reaffirmed its case-law that it is for the national court to decide on the existence of objectively justified economic grounds. Such grounds may include, if they reflect the needs and objectives of the undertaking, different criteria such as the workers' flexibility or adaptability to hours and places of work, his training or his length of service. The Court held, at paragraph 26, that:

> "The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground within the meaning of the case-law cited above. How it is to be applied in the circumstances of each case depends on the facts and so falls within the jurisdiction of the national court."

The Court therefore confirmed that a "market forces defence" in this sense could provide the necessary justification and its answer to the third question was:

> "...that it is for the national court to determine, if necessary by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the differences in pay between the jobs in question."[201]

[201] para 29.

The 'market forces' defence also has an analogous and comparable public sector 'cost benefit' equivalent. This arises where discrimination arises from provisions of legislation or other measures taken by the State which regulate the employment relationship, and wherein the State may argue that the discriminatory effect of the measures is justified by the benefit they provide to the public in general. In **Bilka**, the European Court of Justice had stated that economic considerations could constitute a valid defence to an equal pay claim provided the policy could be objectively justified. However, in **Hill and Stapleton v. Revenue Commission and Department of Finance** C-243/95 [1998] ECR I-3739 ECJ and **Jørgenson v. Foreningen af Speciallaeger** C-226/98 [2000] ECR I-2447 ECJ, the European Court has adopted a different approach holding that budgetary constraints could not in themselves justify the discrimination, remarking that, if they could so, it would mean that the application of equal treatment might vary according to the state of the public finances of the member states.

In **Jørgensen v. Foreningen af Speciallæger** C-226/98 [2000] ECR I-2447 ECJ, the Court was asked to determine whether considerations relating to budgetary stringency, savings or medical practice planning might be regarded as objective factors such as to justify a measure that adversely affects a larger number of women than men. The Court decided that although budgetary considerations may underlie a Member State's choice of social policy, and influence the nature and scope of the social protection measures that it wishes to adopt, they do not themselves constitute an aim pursued by that policy and cannot therefore justify sex discrimination.[202] However, the Court added the caveat that:

> "As Community law stands at present, social policy is a matter for the Member States, which enjoy a reasonable margin of discretion as regards the nature of social protection measures and the detailed ... arrangments for their implementation ... If they meet a legitimate aim of social policy, are suitable and requisite for attaining that end and are therefore justified by reasons unrelated to discrimination on grounds of sex, such measures cannot be regarded as being contrary to the principle of equal treatment."[203]

Therefore, while budgetary considerations cannot, in themselves, justify discrimination on the grounds of sex, measures, as in **Jørgensen**, that are intended to ensure sound

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[202] Paragraph 39. See also, C-343/92 **De Weerd and others** [1994] ECR I-571 ECJ, para 35.
[203] Para 41. Se also, C-229/89 **Commission v. Belgium** [1991] ECR I-2205 ECJ, paras 19, 22 and 26; and C-226/91 **Molenbroek** [1992] ECR I-5943 ECJ, paras 13, 15 and 19.

management of public expenditure on specialised medical care, and to guarantee people's access to such care, may be justified if they meet a legitimate objective to that end.[204] Hence, the Court used the language of social aims to justify policy choices that were ultimately driven by economic considerations.

Jørgensen was applied in **Kachelmann v. Bankhaus Hermann Lampe AG** C-322/98 [2000] ECR I-7505 ECJ, a case concerning German legislation providing for 'social criteria' to be taken into account in the selection of workers for dismissal. Ms Kachelmann was a qualified banker working part-time who was selected for redundancy. She sought to compare her position with that of a full-time employee performing equivalent duties and argued that she had the greatest need on the basis of 'social criteria'. However, the Federal Labour court had established that, taking account of the employer's right to organise the business of his company, part-time and full-time workers were not comparable for this purpose.

In his opinion, Advocate General Saggio advised that such an interpretation would lead to indirect discrimination because, if part-time workers were predominantly female, they would have less chance of benefiting from 'social criteria' that might favour women.[205] Moreover, referring explicitly to the reformulation of the aims of Article 141 in **Schröder v Deutsche Telekom AG** *supra*, the Advocate General referred to paragraph 57 of the related case of **Sievers and Schrage**, (which is identical to paragraph 57 of **Schröder**), he observed that *"...it is specifically this principle that constitutes the ground for asserting that it is unlawful to take into account only part-time workers for the purposes of the selection according to social criteria."* In this context, the Advocate General referred to the *"conflict of interest that will inevitably exist"* between the needs of the company and the needs of part-time workers and therefore of women not to suffer discrimination.[206] In his view, it was not possible to make a case for objective justification unrelated to sex on the basis of mere generalisations concerning certain categories of worker.

On the main substantive issue, the court agreed with its Advocate General that the lack of comparability of the social criteria might give rise to a difference of treatment to the

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[204] See Para 42.
[205] Opinion of Advocate General Saggio at para 25.
[206] Para 33

detriment of part-time workers.[207] However, without reference to **Schröder** or its case law on equality as a fundamental right, the Court referred to its statement in **Jørgensen** regarding the margin of discretion left to Member States in the area of social policy and noted that the purpose of the legislation in question was to protect workers against dismissal whilst at the same time taking account of the operational needs of the undertaking.[208] In the light of these factors, the Court ruled that the difference in treatment was justified by objective reasons unrelated to sex because if job comparability between full-time and part-time workers were to be introduced in the selection process on the basis of social criteria under German law that would have the effect of placing part-time workers at an advantage, while putting full-time workers at a disadvantage. In the event of their jobs being abolished, part-time workers would have to be offered a full-time job, even if their employment contract did not entitle them to one.[209] According to the Court, the question of whether part-time workers should enjoy such an advantage was a matter for the national legislature, which alone must find a fair balance in employment law between the various interests concerned.[210]

Whereas **Jørgensen** represented a compromise between the economic and social objectives of Community sex equalities law, **Kachelmann** was a classic case of judicial deference in the face of national legislation that permits the economic interests of the employer to counterbalance the social rights of employees and operates in a manner which, by discriminating against part-time employees, doubly disadvantages women. Moreover, it might be said that an argument that was essentially based on subsidiarity was used as a basis for denying a woman her 'fundamental right' to equality and that, in addition to selectively dis-applying the equality principle, the court took no account of the substantive equality model in its evaluation of the German legislation. While the interpretation proposed by Ms Kachelmann may have benefited part-time workers at the expense of full-time workers, the court accepted that this provided the necessary objective justification at face value without considering the extent to which societal factors had led to the numerical discrepancy between the numbers of women and men working part-time in Germany. Furthermore, this interpretation necessarily requires consideration of the compatibility of the German legislation with the positive action provisions in Article 2(4)

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[207] Judgment, para 28.
[208] Paras 30-1.
[209] Para 33.
[210] Para 34.

of the Equal Treatment Directive and Article 141(4) EC on the basis that the advantage conferred on part-time workers would help to 'reduce the actual instances of equality which may exist in the real world'.[211]

In **Steinicke v. Bundesanstalt fur Arbeit** C-77/02 [2003] IRLR 892 ECJ, the Court reiterated the requirement for objective evidence for a Member State to justify indirect discrimination. The German state agency imposed a requirement of previous full time service for taking part in a German scheme of part time work for older public sector employees. The Court pointed out that in determining whether the scheme was justified even though it had a disparate impact on women, the national court has *"to ascertain, in the light of all the relevant factors and taking into account the possibility of achieving by other means the aims pursued by the provisions in question, whether such aims appear to be unrelated to any discrimination based on sex and whether those provisions, as a means to the achievement of certain aims, are capable of achieving those aims."* The agency had argued that the exclusion of part time workers from the scheme was justified by the cost. As it held in the similar case of **Kutz-Bauer v. Freie und Hansestadt Hamburg** C-187/00 [2003] ECR I-2741 ECJ, however, the Court stressed that budgetary considerations cannot in themselves justify discrimination.

Further, the European Court in **Smith and Others v. Avdel Systems Limited** C-408/92 [1994] ECR I-4435 ECJ held that it is a fundamental principle of European law that the application of equal treatment must be immediate and full thus rendering unlawful phasing in of equalisation measures for economic reasons.

The elimination of discrimination is likely to be an expensive exercise for the employer. The extent to which that expense should be weighed in the balance is one of the most difficult for the courts of capitalist countries which seek to equalise their pay regimes. It is perhaps not surprising that there is no clear answer given.

(iii) The defence of justification: qualifications and training

As stated in Chapter 1, in the highly segregated labour market, notwithstanding females currently outperform males at the level of school education, they tend, even following

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[211] **Marschall v. Land Nordrhein-Westfalen** C-409/95 [1997] ECR 1-6363 ECJ, para 31.

tertiary education, (both at further and higher education levels) to congregate in a narrower range of occupations and, in many instances, follow sex-stereotypical career choices, particularly in the lower paid 'semi-professions'. Additionally, it is argued that once in the labour market, women (and their employers) tend to invest less in job-related training because they expect women will spend less time in the labour market because of childbearing and child rearing responsibilities. There is evidence that part time women workers receive less job-related training than both male and female full-time workers.[212]

A particularly interesting situation arises however when employees coming from two different disciplines, one predominantly male and the other female, undertake additional training to practise a third discipline, the ability to so practise not being specifically dependent on either group's first discipline. This situation arose in **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse** C-309/97 [1999] ECR I-2865 ECJ wherein Wiener Gebietskrankenkasse sought to rely on prior qualifications and training to justify the difference in pay between two groups of workers. The facts are (as stated earlier in this chapter when considering the scope of *le même travail*) that workers who were all employed as psychotherapists by the Vienna Area Health Fund (Wiener Gebietskrankenkasse) were recruited from two different disciplines; those who had trained firstly as graduate psychologists (predominately female) and another group who had first undertaken training as medical doctors (predominately male). The Staff Committee of the Health Fund (Angestelltenbetriebsrat der Wiener Gebietskrankenkasse) applied to the Labour and Social Security Court for a declaration that the psychotherapists with a degree in psychology should be classified in the same salary category as the medical doctors employed as psychotherapists. In support of this application, the Staff Committee argued that their case was justified by the training and duties of psychologists engaged in psychotherapy.

The sixth question referred to the Court by the Overlandesgericht Wien was:

> "...where employees perform the same duties in an establishment, [is] a difference in training to be regarded as a factor justifying a difference in pay. [and] irrespective of the duties actually performed, [are] more extensive professional qualifications to be regarded as an objective factor justifying a difference in pay. This leads

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[212] See for example McColgan *op cit* page 230*ff*.

> to the further question of the decisive factor in that connection: (a) whether the fact that the higher-paid group of employees can be used for other duties in the establishment is a decisive factor or (b) is actual proof of performance of other duties essential?"

At paragraph 39 of his Opinion, the Advocate General noted that the problems raised by this question only occurs if both claimants and comparators are found to *"...carry out equal work or work of the same value, or have the same job"*. He further stated:-

> "...the sixth question is justified in only two cases: (a) if the Court adopts the first interpretation, to the effect that performing the same duties is sufficient for there to be 'equal work' or 'work of equal value' or 'the same job'; (b) if, in accordance with the third interpretation, the Court takes the view that, even if they have different qualifications, employees of the different groups assigned to the same duties in the same establishment have not received fundamentally different training, such as to lead to the conclusion that they carry out different work or have a different job."

In making reference to the relevant case law of the European Court of Justice, in particular **Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH** at paragraph 14 of the judgment and **Nimz v. Freie und Hansestadt Hamburg** C-184/89 [1991] ECR I-297 ECJ, at paragraphs 13-15 of the judgment, and **Danfoss** *supra*, at paragraphs 17-25 of the judgment, the Advocate General noted at paragraph 40-42 that:-

> "40. The Court has held that those criteria include the training factor, in the sense that the best-paid training is relevant to the performance of specific tasks entrusted to the employee, and the adaptability factor, in the sense that an increase in pay is justified by willingness to adapt to varying hours and varying places of work, where the employer shows that such adaptability is relevant to the performance of specific tasks entrusted to the employee, but not if that factor relates to the quality of the work done by the employee.....
>
> 41. In my opinion, the criterion of flexibility accepted by the Court in the **Danfoss** judgment must also cover the idea of adaptability to the performance, in one and the same establishment, of different duties covered by the qualification held by the person concerned. Such flexibility is by nature absolutely neutral in relation to sex or, at least, is no different from the criterion of flexibility in the sense already accepted by the Court. By

comparison with the reasoning in **Danfoss,** it is no more difficult for women to perform other, related duties than to adapt to different working times insofar as such of the duties do not necessarily entail a change in working times.

42. Clearly, the other, related, duties covered by the employee's qualifications must also be covered by the employee's relationship. In other words the employee must be recruited on the basis of his professional qualifications, that is to say, on the basis of the ability to perform several tasks in the establishment or undertaking".

As to whether it is decisive that the employee actually uses at all times all the capabilities he has by virtue of holding the professional qualification in question, the Advocate-General stated at paragraph 44:-

> "As it stands, the Court's case law does not appear to say that it is. According to the **Danfoss** judgment, the criteria of training and adaptability to varying hours and varying places of work must be relevant to the performance of specific tasks entrusted to the employee. This does not necessarily mean that in every case all the duties permitted by professional training or by the ability to adapt must be actually performed. As also appears from the Opinion of Advocate-General Lenz, the condition laid down in **Danfoss** simply means that training and adaptability must be objectively related to the duty in question, that is to say, they must relate to the work done."

He said that the above is consistent not only with the principles of equality but is also justified on the grounds of expediency connected with the job market, on the basis that if employees who do not possess the relevant training or qualifications which would allow them to carry out the different duties should the need arise, received the same pay as those who did have such training and qualifications, then the resultant effect would be that the employer would only recruit employees from the second more highly qualified group, thus ensuring access to a greater range of duties for that rate of pay.

In conclusion, the Advocate-General, at paragraph 47, stated that where there is overt discrimination in the matter of pay between two categories of men and women at work or

a neutral pay practice which, in fact, affects more members of one sex than the other sex then:

> "...the employer may justify the difference in pay by reference to the criterion of professional training, if he shows that it is relevant to the specific tasks entrusted to the worker; the employer may justify the difference in pay by reference to the criterion of a professional qualifications *(sic)* which enables the person concerned to perform several different tasks in the establishment, if the employer shows that the criterion is relevant to the specific tasks entrusted to the worker or may meet the establishment's need to assign workers to duties which differ from those already performed and which are covered by the qualification and the employment relationship, taking account of the provisions of collective agreements protecting employees against dismissal".

Angestelltenbetriebsrat der Wiener Gebietskrankenkasse represents the high water mark for employers in the context of a pay differential for like work on the basis of previous occupational origin; critical to the decision is that there requires to be some connection with the prior qualification, but the scope and extent of that remains unclear. The extent to which different qualifications and training may found an objective justification defence when like work has been found or conceded or put in issue in the context of a *prima facie* indirect claim has yet to be tested in the British appellate courts.[213]

The three particular justification defences considered above remain particularly important in the context of equal pay where there is industrial and occupational segmentation. However, exactly what can constitute objective justification still remains unclear, in part because it is not defined in legislation, and because the European Court of Justice has often left the matter for the national court to decide, with the consequent likelihood of differences amongst the tribunals of the various Members States as to whether an

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[213] The judgment of the European Court of Justice in **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse** was neither reported nor available in English (other than in a draft translation which the ECJ made available to the Council) when **Glasgow City Council v. Marshall** [2000] SC 67 was heard in the House of Lords. The Council added a defence based on the different qualifications of special needs instructors and special needs teachers working in the same establishment or service relying on the reasoning in **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse.** Whilst their Lordships referred to the *"interesting argument based on this decision and the opinion of Advocate General Cosmas"* [p75 at H-76A] they were able to decide the case in the respondents favour on other grounds so did not require to consider the scope of the defence.

indirectly discriminatory pay policy is justified. The effect of applying the principle of proportionality in equal pay cases is that where differential treatment is out of all proportion to the avowed aim of the employer, this will constitute strong evidence that the real intention was to discriminate against employees of a particular sex. The European Court of Justice has gradually begun to give guidance by declaring some grounds of justification to be too general and indicating that others may be sufficient, but problems of inconsistency and uncertainty remain, contributing to the volume of expensive and possibly duplicated litigation in different Member States. Further, even if the disparity amongst the different national courts and authorities on the issue of objective justification, in the absence of firm guidance from the Court, causes problems, it is also clear that the Article 177 (now Article 234) reference procedure does not necessarily provide the best forum for assessing an employer's or a State's proffered justification, unless the factual information supplied to the European Court of Justice is very thorough. Nevertheless, the fact that more guidance on this issue has gradually emerged has to be welcomed.

4.4 Conclusion

In this chapter, the aim has been to present, albeit in abridged form, a cohesive and coherent exposition of the development of the 'equal pay principle' illustrating what are now the main planks of European Union law in the area. It must be stated however that the scope and complexity of the field precludes consideration of all the developments which have impacted on equal pay both in Europe and domestically, so the chapter, necessarily, has been selective and has focussed on those areas which are of particular importance in the analysis of the domestic provision, and, not least, the area upon which the Equal Pay Act is completely silent, namely indirect discrimination in pay provisions and the employers defences to such claims. Whilst the absence of any doctrine of *stare decisis* in the context of the jurisprudence of the European Court of Justice can on occasions serve to confuse, the developments in respect of equal pay have also been characterised by swings between great liberality of interpretation (such as occurred in **Defrenne II** when arguably the Court was seeking to lay the foundations for industry wide application of the equal pay principle) and then a reigning in of the scope of application (for example, with regard to what constitutes 'pay' such as occurred in **Barber** and **Jamstalldhetsombudsmannen** or the extension of scope for objective justification (for example, different qualifications in **Angestelltenbetriebsrat der**

Wiener Gebietskrankenkasse). In the next chapter, some of these issues are developed further in considering the nature of the articulation and integration of domestic provision with that of European law.

CHAPTER 5. THE NATURE OF THE ARTICULATION OF EC PROVISION AND DOMESTIC LAW; PROBLEMS OF INTEGRATION

5.1 Introduction

This chapter illustrates the type of problems and difficulties which have arisen in respect of the articulation and integration of domestic provision with EC provisions. Three particular problems are considered. The first two, might be considered legislative in nature and concern omissions to the domestic provision which were only introduced following infringement proceedings brought by the Commission in 1981 and 1982.

The first of these problems concerns the articulation of domestic law with the Equal Pay Directive, the omission of an equal value provision from consideration in the early years of the operation of the domestic Act and events leading up to the rectification of the shortcoming by the Equal Pay (Amendment) Regulations 1983 and the Industrial Tribunal (Rules of Procedure)(Equal Value Amendment) Regulations 1983.[214]

Secondly, the failure of domestic provision to comply fully with the requirements of the Equal Treatment Directive in respect of collective agreements is considered. The failure in this respect concerned the fact there was no measure to declare void or to amend the very sort of occupationally segmented collective bargaining arrangements which could lead to unequal treatment.

The third problem addressed in this chapter concerns one of judicial interpretation and how there grew up, particularly in the Scottish division of the Employment Appeal Tribunal, an approach, not followed to the same extent in the English division, that employment tribunals had jurisdiction to hear and determine claims based directly on Community law, even where such a claim was outside the scope of domestic legislation. Individuals were accorded 'free standing' rights under Article 119 and thus could succeed under EC law when their claim would fail under domestic law. This is nowhere better

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[214] [SI 1983 No. 1807]

illustrated than in respect of time limits and age related exceptions which preclude the obtaining of a remedy under domestic law, and which provided the earliest developments in this area.[215]

5.2 Articulation of domestic law with the Equal Pay Directive.

The Government made no attempt to amend the Equal Pay Act in the wake of the apparent extension to the scope of its obligations in consequence of the Equal Pay Directive. Their view was that the Equal Pay Act was wide enough to encompass the change because of the existence of section 1(2)(b) and 1(5).[216]

The Conservative Government, elected in 1979, patently did not accept the underlying philosophy of the 1970 Act; an extension of equal pay did not fit into their, eventually quite substantial, programme of labour law reform, for their starting point was that legislative determination of terms and conditions of employment was an interference with the workings of the labour market, an interference whose ultimate victims were likely to be the unemployed. They stated:

> "But in each case the Government have to consider why it is necessary to depart from the basic principle that terms and conditions of employment are matters to be determined by the employer, and the employees concerned (where appropriate through their representatives) in the light of their own individual circumstances". [217]

Consequently, the Government engaged in the process of repealing or curtailing the legislation that laid down minimum terms and conditions of employment, not of expanding it. Thus, there is little doubt that, but for the decision of the European Court

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[215] The foregoing should not be confused with the fact that an employment tribunal has a duty to apply Community law in the exercise of its statutory jurisdiction; that duty extends to disapplying an offending provision of UK domestic legislation *"to the extent that it is incompatible with Community law, in order to give effect to its obligation to safeguard enforceable Community rights"* **Biggs v. Somerset County Council** [1996] IRLR 203 CA at 206. It should be noted, however, that where a sufficient remedy is available under UK domestic law, reliance on the equivalent provisions of EC law will not be permitted; it is only where there is a disparity between the two that the question of the direct enforceability of EC law may be pursued (**Blaik v. Post Office** [1994] IRLR 280, EAT).

[216] See Chapter 10.

[217] *'Building Businesses ... Not Barriers'*, Cmnd. 9794, 1986, para. 7.2

of Justice in **Commission of the European Communities v. United Kingdom** C-61/81 [1982] ECR 2601 ECJ, these amendments to the 1970 Act would not have been made.

The EEC Commission brought infringement proceedings against the United Kingdom for failure to implement the principle of equal pay for work "to which equal value is attributed." The European Court of Justice held that the United Kingdom had failed to fulfil its obligations under Article 119 and the Equal Pay Directive and stated, at paragraph 13, that:

> "Member States must endow an authority with the requisite jurisdiction to decide whether work has the same value as other work, after obtaining such information as may be required."

Within a month of the Court's decision, the Department of Employment published a "Specification" for amending the Equal Pay Act, and in February 1983, a consultation paper with draft Regulations was issued. A number of changes were made, following representations by the Equal Opportunities Commission (EOC) and other individuals and bodies. These included an Opinion by Anthony Lester Q.C. that, far from securing conformity with the principles of equal pay, the proposals would create several new discrepancies between national legislation and EEC law.

New draft Regulations with a revised consultative paper appeared in July 1983. These Regulations, made by Order under section 2(2) of the European Communities Act 1972 were approved by 167 votes to 107 in the House of Commons on July 20, 1983[218] despite strong criticism from the Opposition and Government backbenchers. Conservative opposition to the amendment (which did not fit in with the party's proposals to deregulate the labour market) is seen in the comments of Conservative backbencher, Mr Tony Marlow, who saw the amendment as leading to a situation where:

> "[a]ny trouble-maker ... is going to pretend that her work is of equal value. It is an open invitation to any feminist, any harridan, or any rattle-headed female with a chip on her bra-strap to take action against her employer... This is a charter for petticoat lawyers."[219]

The Parliamentary procedure deployed by the Government meant that the Commons was

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[218] H.C. Deb., 6th ser, vol. 46, cols. 479-500.
[219] *ibid* col 491.

limited to a one-and-a-half hour debate, after 10.30 p.m., and could only accept or reject the Order as a whole, without amendment. Clare Short MP suggested that Alan Clark, the Under Secretary of State for Employment, was somewhat less than sober when he introduced the Regulations to the House of Commons on the evening of 20 July 1983; he admits in his diaries[220] to having attended a wine tasting which he left at 9.40, leaving him with only twenty minutes in which to come to grips with the *"virtually unmarked and unexcised"* text of the Regulations which he was to introduce to the House. Despite his assertion that the Government was *"committed to the full implementation of the [equal pay] directive"*, his tone caused Opposition MP's to claim that he was less than enthusiastic.[221] The Regulations were twice temporarily withdrawn from the House of Lords, apparently to allow the Department of Employment to give further consideration to numerous technical and substantive objections. The government was determined to permit employers to defend equal value claims by reference to market forces.[222] The affirmative Resolution was finally passed by the House of Lords, after what a Government spokesman called *"an extremely interesting debate"* on 5th December 1983, but with the significant amendment that *"this House believes that the Regulations do not adequately reflect the 1982 decision of the European Court of Justice and Article 1 of the Equal Pay Directive of 1975."*[223] Despite this damning criticism, the Government decided to proceed and the Regulations came into force on 1 January 1984.

The Equal Pay (Amendment) Regulations 1983 added a new residual basis for establishing entitlement to equal pay on the basis of work of equal value. Section 1 (2) (c) was inserted and section 1 (3) was amended. Section 1(2) (c) states:

> "(*c*) where a woman is employed on work which, not being work in relation to which paragraph (*a*) or (*b*) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment—
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> (i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's

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[220] Clark, A., '*Diaries*' Wiedenfeld & Nicholson, London 1993 p.30.
[221] *op. cit.* HC Debs 20 July 1983 col 481.
[222] Alan Clark MP 46 HC Debs 20 July 1983 col 484; also see **Rainey v. Greater Glasgow Health Board** [1987] IRLR 26 for the death of this defence.
[223] HL Deb., vol. 445, cols. 882-90, 894-930.

contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term."

5.3 Articulation of domestic law with the Equal Treatment Directive; collective bargaining agreements

In 1983, in a second instance of infringement proceedings brought by the EC Commission, the European Court of Justice held, in **Commission of the European Communities v. United Kingdom** C-165/82 [1983] ECR 3431 ECJ, that the Sex Discrimination Act 1975 did not conform to Article 4 of the Equal Treatment Directive because it did not contain specific provisions for collective agreement to be declared void or to be amended to comply with the principle of equal treatment.

Section 77 of the Sex Discrimination Act originally provided that any contractual term requiring an act of unlawful discrimination to be performed should be void. It was considered irrelevant to collective agreements, most of which are unenforceable as contracts.[224] But the European Court held that section 77 was in breach of the Equal Treatment Directive because it provided no means whereby discriminatory clauses in non-binding collective agreements could be declared void or amended. Section 77 of the 1975 Act was extended by the Sex Discrimination Act 1986 to include non-binding collective agreements, although the effect is problematic because no individual can claim under section 77; there is nothing to force the parties to change their conduct, and nothing specifically to bring the unlawfulness to the attention of those affected thereby encouraging them to bring individual claims. Furthermore, any such claims would only apply to the individual claimants and could not be automatically extended to the remainder of the bargaining group. The employer cannot enforce a discriminatory term which has become part of an individual's contract of employment but, in that case, there will be a claim under section 1.

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[224] See Section 18 of the Trade Union and Labour Relations Act 1974.

Section 3 (1) of the Equal Pay Act stated:[225]

> **"Collective agreements and pay structures**
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> 3. – (1) Where a collective agreement made before or after the commencement of this Act contains any provision applying specifically to men only or to women only, the agreement may be referred, by any party to it or by the Secretary of State, to the Industrial Court constituted under Part I of the Industrial Courts Act 1919 to declare what amendments need to be made in the agreement, in accordance with subsection (4) below, so as to remove that discrimination between men and women..."

It should be noted that the 'like work' and 'work rated as equivalent' limitations on individual claims did not arise in respect of collective agreement references. If, say, a collective agreement provided separate rates of pay for male and female semi-skilled workers, section 3 of the Act required the rates to be equalised even if, in a particular establishment, the male and female semi-skilled workers were doing different types of job and no job evaluation exercise had been carried out. Only discriminatory provisions appearing on the face of the agreement fell within the CAC's jurisdiction.

The section contained a curious method for dealing with the issue of the 'woman's rate', i.e. the practice then common in collective agreements of laying down a rate of payment for women workers without specifying the jobs in which they were employed, the women's rate often being lower than all the male rates specified in the agreement. This method was also to be used where the agreement specified a rate for a particular class of female worker but did not deal at all with male workers doing that job, perhaps because there were none, so that it was not clear with what male rate in the agreement the female rate should be equalised. The solution adopted was to raise the female rate to the lowest male rate.

Both of these provisions severely limited the CAC's jurisdiction. The first meant that the CAC was entitled to apply only a very superficial test of discrimination. As the CAC put

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[225] See Appendix II. Note also that by the time the Act came into force, the jurisdiction was that of the Central Arbitration Committee (CAC).

it in its Annual Report 1977:[226]

> "Discrimination does not always appear on the face of the agreement. For example, an agreement may have been re-negotiated or altered with Grade 1 and Grade 2 replacing the previous male clerks and female clerks with no other change."

The second was a very imperfect way of achieving equal pay; if the female-only rate applied to workers who were in fact semi-skilled, but the lowest male rate was for labourers, what sort of equality was it to equate the two? Moreover, if there were two 'women-only' rates for different grades of job to equate them both with a single male rate, thus eliminating the differential between the two female rates, was something of an absurdity in industrial relations terms as well as a poor method of implementation of the equal pay principle.

The Committee was particularly suspicious of situations where there was a preponderance of men at the top and women at the bottom of an apparently neutral grading structure, where there was a history of a particular type of work being performed only by women and where the rate of pay was not such as to attract males or where there were uneven differentials among the rates of pay attached to the various grades of work.[227] In a piece of purposive interpretation of the legislation, the CAC refused to accept either of the statutory limitations, but rather insisted upon giving effect to its own conception of 'unisex'.[228] This small period of legal history, which is not examined in any detail here[229] came to an end when the Divisional Court, reviewing the CAC's decision in **R v. Central Arbitration Committee ex parte Hy-Mac Ltd** [1979] IRLR 461 DC reasserted the statutory limitations on the CAC's jurisdiction.

In its last decision under this jurisdiction, the CAC (by a majority, Prof. R. Rideout presiding), sought to circumvent the **Hy-mac** decision by directly applying Article 119 in **ASTMS and Norwich Union Insurance Group**[230] but this decision was quashed by the High Court in **R. v. Central Arbitration Committee *ex parte* Norwich Union**[231] which

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[226] CAC *Annual Report 1977,* p. 16.
[227] Davies, P., *The Central Arbitration Committee and Equal Pay* [1980] CLP 165
[228] Davies, *ibid.* p. 175
[229] See Davies, *ibid.* for an account
[230] Award 87/2, 12 E.O.R. (1987) p.32
[231] 22 E.O.R. (1988) p. 41

held that the CAC could amend an agreement only where it was overtly discriminatory or was a sham masking such overt discrimination. Not surprisingly, the CAC received only one reference under section 3 in 1982, one in 1983 and none in 1984 and 1985[232] and it lost its jurisdiction on February 7, 1987 when the Sex Discrimination Act 1986[233] repealed section 3 of the Equal Pay Act.[234]

The strangulation, then loss of the jurisdiction of the CAC must be seen as a serious setback to the elimination of discrimination in collective agreements which reinforce occupational segmentation.

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[232] See Annual Reports of the CAC for the years 1982-85

[233] Section 9, Schedule, Pt.II.

[234] For completeness, it should be noted that the Equal Pay Act was further amended by the Sex Discrimination Act 1986 in that Section 6 was changed so as to render unlawful discriminatory retirement ages and discriminatory age limits for promotion, transfer and training insofar as these are contained in a woman's (or man's) contract. The amendment was a response to the decision of the European Court of Justice in **Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)** [1986] ECR 723 ECJ which was that the Equal Treatment Directive 76/207 is contravened if men and women are required to retire at different ages. The Directive was held to be directly enforceable only by employees of organs of the state. This amendment to the Act to apply the Court's decision to all employees was effective from November 7th 1987. Section 6(1) of the Equal Pay Act excludes terms which are affected by compliance with the laws regulating the employment of women; this exception is of little practical importance since most of the protective legislation restricting the employment of women was repealed by the Sex Discrimination Act 1986 and the Employment Act 1989. In addition, section 1 of the Employment Act 1989 provides that legislation passed before the Sex Discrimination Act 1975 shall be of no effect insofar as it imposes a requirement to commit a discriminatory act. This is so unless the legislation in question was passed for the purpose of protecting women as regards pregnancy or maternity or other circumstances giving rise to risks specifically affecting women (section 3 of the Employment Act 1989). In addition to the foregoing, specific Regulations have been introduced to outlaw discrimination against part-time workers and those who work on fixed term contracts by the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 1995 [SI 1995 No. 3183] and Fixed Term (Prevention of Less Favourable Treatment) Regulations 2002 [SI 2002 No. 2034] and in 2001 the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 [SI 2001 No 2660] introduced new sections (ss 1, 3, 63A) to the 1975 Act in order to bring compliance with the Burden of Proof Directive (Council Directive 97/80/EC of 15 December 1997). Article 4 of the Directive requires Member States to take measures to ensure that the burden of proof moves to the respondent to prove the absence of such discrimination, once facts have been established from which the tribunal may presume there has been direct or indirect discrimination. Further amendments were made in 2003 by the Equal Pay Act 1970 (Amendment) Regulations [SI 2003 No. 1656].

5.4 'Free standing' claims under Article 119

For a period, it was thought that EC law granted what came to be known as 'free standing' rights, independent of domestic provision. It was held in **Secretary of State for Scotland & Anr v. Wright & Hannah** [1991] IRLR 187 EAT that the proper forum in which free-standing claims under Article 119 could be brought was the employment tribunal, notwithstanding the fact that the employment tribunal had no express statutory authority to deal with such claims. The Employment Appeal Tribunal examined the authorities and pointed out, *inter alia*, that applications founded upon the direct application of Article 119 had been dealt with by employment tribunal consistently over a substantial period of time[235] but, as will become evident, this appeared to have been based on a misunderstanding of the circumstances and manner in which European law, albeit having supremacy, articulates with and is applied to domestic provision.

One of the earliest cases considered by the Employment Appeal Tribunal raised the question of time limits in the context of EC and domestic law. In **Stevens and Others v. Bexley Health Authority** [1989] ICR 224 EAT, the appellant women had been made redundant, and were not entitled to contractual redundancy payments under the relevant Whitley Council agreement because they were over 60 years of age at the relevant time. The claimants made claims under the agreement, under the Equal Pay Act and separately under Article 119 of the Treaty and The Equal Treatment Directive.[236] The employment tribunal had held that all three claims were time-barred, for different reasons, but the Employment Appeal Tribunal held that none of the claims was so barred. In regard to the claim under Article 119, the employment tribunal had held that an originating application required to be made within six months by virtue of the provisions of clause 45 of the Whitley Agreement, and that that time limit applied both to the claim under the agreement and to the claim under Article 119. It was held that the employment tribunal were incorrect in the view that they took as regards the time limit which applied under the Whitley Council agreement, and it followed that their decision was incorrect both in regard to the claim under the agreement and the claim under Article 119. The Employment Appeal Tribunal observed that time limits

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[235] An approach which, as this chapter illustrates, was finally disapproved in **Biggs v. Somerset County Council** [1996] ICR 364 CA.
[236] EEC Directive 76/207.

for claims based directly on European law were extremely vague, and the observations suggested that the tribunal were inclined to the view that there was no applicable time limit.

However, in **Livingstone v. Hepworth Refractories plc** [1992] ICR 287 EAT, the Employment Appeal Tribunal reconsidered the problem in a sex discrimination claim. The issue which the Employment Appeal Tribunal had to decide was whether a claim was excluded by an agreement which had been made, or whether the claimant was entitled to take advantage of provisions in the Sex Discrimination Act which had been designed to protect employees against bad settlements, even though the claim was one under European law. It was held that the employee was entitled to take advantage of the provision in question; although the question of applicable time limits did not arise directly as an issue in the case but Wood J referred to the European authorities, citing the principle that the courts should adopt procedures for the purpose of Community law which are not less favourable than the similar provisions of domestic law, provided they are not unreasonable; he stated:[237]

> "...the proper approach therefore is to apply the procedures of the Sex Discrimination Act to direct claims of sexual discrimination under Community law. These procedures would cover not only time limits but also that case which is intended to protect employees against bad bargains. In taking this view we cannot ourselves think that there is any detriment to one side or the other. Both know where they stand under domestic law and it seems to us that the procedural provisions of domestic law comply with those conditions indicated by the European Court of Justice in **Emmott.**"[238]

The next relevant Employment Appeal Tribunal decision was **Cannon v. Barnsley Metropolitan Borough Council** [1992] ICR 698 EAT. In this case, the claimant was made redundant two months before her 60th birthday, and her redundancy payment was reduced by 10/12ths in accordance with the relevant provisions of the Employment Protection (Consolidation) Act 1978,[239] the redundancy taking effect on 31st August 1985. The Employment Appeal Tribunal pointed out that the deduction was properly made in accordance with domestic law at the time, and went on to refer to *inter alia* **Barber v.**

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[237] At page 289

[238] The **Emmott** principle (see **Emmott v. Minister for Social Welfare** C-208/90 [1991] ECR I-4269) essentially holds that in certain circumstances time limits do not start to run until the proper implementation of a Directive into domestic law has occurred, thus not permitting the State to gain advantage by their failure to properly transpose Directives.

[239] Schedule 4 para. 4 of the EP(C)A now Section 162(4) and (5) of the Employment Rights Act 1996.

Guardian Royal Exchange Assurance Group C-262/88 [1990] ECR I-1899 ECJ and **Emmott v. Minister for Social Welfare** C-208/90 [1991] ECR I-4269 ECJ. Mrs Cannon's claim, however, was a claim under a Directive and not a claim under Article 119 or any other provision of the Treaty and accordingly, the Employment Appeal Tribunal had to apply the principles set out in **Emmott** in relation to the enforcement of claims against emanations of the State in respect of Directives. The amending legislation which ended the discrimination in Britain between men and women in relation to redundancy payments came into effect less than two months prior to the presentation of Mrs Cannon's claim, and the decision of the Employment Appeal Tribunal can be summarised by saying that it found that no system of law would have introduced a time limit of less than such a period for such a claim and that, accordingly, the claim itself was not out of time. Knox J did, however, make certain observations in relation to the more general question of time limits; he referred to **Stevens** *supra* and said:

> "The situation as we see it is that there is no relevant provision in the national law setting out a particular time limit in respect of claims under European law, and that was what Mr Justice Wood was asking for to be introduced in the **Stevens** case. But it does not follow from that that any claim under European law can be made at any point of time however remote. That would be a truly intolerable situation. In principle, English law is perfectly capable of evolving, if necessary by analogy to statutory or common law periods which are clearly laid down in terms of months and years, a time limit for the bringing of similar but sufficiently different claims for them not to fall within the strict letter of the statutory or common law limitation period. That has been done in the past in the field of equity, and in principle we see no reason why it should not be done in the field of the enforcement of European law rights. Accordingly, it would in principle, so far as we see, not be an insuperably difficult task to take from the Employment Protection (Consolidation) Act the time limits which are there to be found, generally six months, but in exceptional circumstances one year, for the making of claims for redundancy payments, and if it was legitimate to start the period running from the date called in the legislation "the relevant date" and in this particular case 31st August 1985, we have little doubt that it would be possible to apply, by analogy, the statutory time limit which has been imposed for the bringing of redundancy payment claims."

It is difficult enough to assert a right when the legal basis is well established; these cases illustrate how difficult it was to do so in this early period, before the availability of European rights was publicised, particularly by the trade unions, while parliament had failed to delineate the detailed rules for enforcement of the right.

The Employment Appeal Tribunal in Scotland, in **Rankin v. British Coal Corporation** [1995] ICR 774 EAT, developed the notion of the 'free standing' claim, holding that the following principles could be derived from the judgments of the European Court.

Firstly, that Article 119 of the Treaty confers upon individuals affected by it, rights which are enjoyed by them directly by virtue of the Treaty itself and which, by the same token, any national court or tribunal before which the issue arises is required to protect. Secondly, in protecting such rights, the national court is required to ignore, as not binding upon it, any rule or principle of national law which is inconsistent with the rights which are conferred by the Treaty. Thirdly, given that the principle of legal certainty is one of the principles of Community law to which a national court is required to give effect, the national court is also required to have regard to the principle of legal certainty which would be infringed if transactions, which had been settled on the basis of the law as it was understood to be at the time of the settlement, were liable to be reopened, or claims contrary to such transactions sustained without limit of time. Fourthly, a general time limit for all claims, or all claims before a particular court or tribunal, is not inconsistent with the protection of the individual rights conferred by the Treaty and, especially, to the conditions that the time limit should be reasonable and should not discriminate as between rights conferred by the Treaty and rights exigible under national law. Fifthly, in certain cases, there may be a limit placed under European law on the right to pursue claims, but such a limit can only be imposed by the European Court of Justice itself.

Accordingly, on the basis of the five principles enunciated above, the Employment Appeal Tribunal held that there was no time limit directly applicable under UK law to a 'free-standing' claim under Article 119, nor was there any general time limit applying to all proceedings brought before an employment tribunal, however, the principle of legal certainty which is part of Community law and, as such, binding on national courts, requires that there must be some time limit placed upon those claims brought directly under Article 119. The Employment Appeal Tribunal further held that it was for it to

balance the principle of legal certainty and the requirement on national courts and tribunal to protect the right under EC law conferred upon individuals by Article 119 and enjoyed by them directly by virtue of the Treaty.

Therefore in that case, which concerned redundancy, the Employment Appeal Tribunal considered that a period of three or six months was not an unreasonable time within which to raise a claim, provided the starting date was reasonable and that, balancing the various considerations, a claim brought within a reasonable period of time after the coming into force of the amending legislation should be regarded as timeous and further that the employment tribunal was the appropriate forum, having jurisdiction to hear and determine such claims.

The decision in **Rankin** arose entirely from Lord Coulsfield's determination to give the applicant an enforceable right. In doing so, he not only exceeded the submissions (and expectations) of parties but also stretched legal analysis to breaking point.

The decision in **Rankin** was not followed by other divisions of the Employment Appeal Tribunal. In **Biggs v. Somerset County Council** [1995] ICR 811 EAT, the Employment Appeal Tribunal sitting under the President, Mr Justice Mummery (as he then was) rejected the complaint of a part-time worker who had sought to challenge the fairness of her dismissal eighteen years after the event. In doing so, the Court made a series of pronouncements having wide application and significance:

1. Employment tribunals have no jurisdiction to hear complaints in other than the jurisdiction conferred on them by domestic statute. Any complaint which an employment tribunal hears in the exercise of its jurisdiction and which depends on the application of Community law has to be interpreted as a complaint made under the relevant domestic statute. The contrary view expressed in **Secretary of State for Scotland v. Wright** is wrong. Employment tribunals have no jurisdiction to hear free-standing claims based solely on Community law.

2. The complaint by a part-time worker of unfair dismissal relying on Article 119 in the light of the decision of the House of Lords in **R v. Secretary of State for Employment *ex parte* Equal Opportunities Commission and Another** (1994) ICR 317 is still a complaint of unfair dismissal. The three month time limit for making a complaint applies and it runs in principle from the date of dismissal.

3. At any time from 8th April 1976[240] an employment tribunal could have dis-applied the qualifying conditions in the 1978 Act which had the effect of excluding part-timers. These conditions offended against the rights given by Article 119.

4. Although on the facts, the operation of the Equal Treatment Directive was not in issue, the position of Mrs Biggs would not have been improved had she been dismissed after the Directive had come into force. Specifically the ruling in **Emmott** would not have assisted her. It is not possible to rely on the **Emmott** principle or doctrine where the claimant also has a directly enforceable right under Article 119.[241]

Shortly thereafter **Staffordshire County Council v. Barber** [1996] ICR 379 EAT, followed the decision of the Employment Appeal Tribunal in **Biggs** and the approach in **Biggs** was subsequently also followed in **British Coal Corporation v. Keeble & Ors**[242] and in **McManus v. Daylay Foods Ltd**[243] which was a case heard in Scotland with Mr Justice Mummery presiding and which, not surprisingly, refused to follow the previous Scottish line in **Rankin** and thereafter the Employment Appeal Tribunal in Scotland, under a new Scottish judge, returned to jurisdictional orthodoxy in **Borders Regional Council v. Cunningham.**[244]

More important, however, was the fact that the decision of the Employment Appeal Tribunal in **Biggs** was supported on appeal to the Court of Appeal in England[245] which confirmed that a separate or distinguishable claim under the Equal Pay Directive enforceable vertically against an emanation of the State was simply not an option. Lord Justice Neill said at 377G:-

> "Can it be argued that a separate claim may be made under the Equal Pay Directive which is not subject to any time limit until UK law has been brought into conformity with Community laws? I am satisfied that such an argument must be rejected. The principle that men and women should receive equal pay was set out in Article 119 of the EEC Treaty. The Equal Pay Directive was adopted in order to implement the principle in Article 119. In these circumstances it does not seem to me that

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[240] The date of the ruling of the European Court of Justice in **Defrenne I.**

[241] It should be noted that the Employment Appeal Tribunal expressly said that it was not expressing a concluded view on this matter, as it had not heard argument.

[242] EAT/413/94 (unreported).

[243] EAT/82/95 (unreported).

[244] EAT/885/95 (unreported).

[245] Reported at [1996] ICR 364 CA.

> the Equal Pay Directive conferred any new or separate rights. It follows that in the circumstances of this case I can see no room for the application of the **Emmott** principle to the Equal Pay Directive."

The Court of Appeal subsequently followed **Biggs** in **Preston** [1997] ICR 899 CA, Lord Justice Schiemann said[246]:

> "The doctrine of direct vertical effect has been developed in order to prevent the State from taking advantage of its own failure to enact a Directive into its national law. Where the national law *does* provide a remedy the doctrine of direct vertical effect does not come into play. Nor does the **Emmott** doctrine."

He further added, in parenthesis:-

> "We note that leave to appeal in **Biggs** was refused both by that Court and the House of Lords. It seems no one thought a reference under Article 177 was necessary. We accept that there is no reason to suppose the Court was asked to refer. However, we have no doubt that it gave the matter some thought."

In conclusion therefore, the extent of an employment tribunal's jurisdiction to hear claims directly under Community law was established to be more limited than had formerly been thought, primarily in Scotland. The Court of Appeal in **Biggs** ruled that a tribunal cannot hear and determine claims based directly on Community law, even where these were outside the scope of domestic legislation and that tribunals have no jurisdiction to deal with 'free-standing' complaints under Community law that are not connected to a claim made under a relevant UK statute.

An employment tribunal does, however, have a duty in the exercise of its statutory jurisdiction to apply Community law, in the form of Council Directives such as the Equal Pay Directive and, particular, Articles of the Treaty of Rome which meet the criteria to have direct effect, such as Article 119, in respect of equal pay and that duty extends to disapplying an offending provision of UK domestic legislation to the extent that it is incompatible with Community law, in order to give effect to its obligation to safeguard enforceable Community rights. As stated earlier, where a sufficient remedy is available under UK domestic law, reliance on the equivalent provisions of EC law will not be

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[246] At 918C.

permitted. It is only where there is a disparity between the two that the question of the direct enforceability of EC law may be pursued by an applicant.[247]

For the sake of completeness, it should also be noted that the employment tribunal has no jurisdiction either to hear or determine claims for damages against the State for failing to implement obligations contained in Community legislation.[248] The reason for this is, according to both the Employment Appeal Tribunal and Court of Appeal in **Mann**, that employment tribunals are creatures of statute and their jurisdiction is solely defined by statute; they have no inherent, general or residual jurisdiction. As there is no UK statute permitting damages claims against the State to be brought in employment tribunals, there is no statutory basis for the exercise of such a power and nor is any jurisdiction conferred on employment tribunals by Community law itself. Under Community law, provided an effective remedy is available, Member States are free to specify the courts and procedures whereby Community law claims are to be enforced and in the UK damages claims against the State can be brought in the High Court, the County Court or in Scotland the Court of Session, and it is in these courts, and not in the employment tribunals, that any claim for **Francovich**[249] damages must be made.

5.5 Conclusion

This chapter has sought to provide examples to illustrate of the sort of difficulties which have arisen in the course of attempting to articulate EC provisions for equal pay with the domestic provision, as contained in the Equal Pay Act. The first two examples, both being the subject of infringement proceedings serve to illustrate the process of rectification by amendment, and as shall be the subject of later more detailed examination, one way in which to demonstrate the continuing utility and relevance of the Act is by reference to the relatively small number of amendments to which it has been subject over a thirty year period. Both examples, involving the scope of Directives and occurring as they did within the first eight years of the Act being in force, should be less likely to occur now and

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[247] **Blaik v. Post Office** [1994] IRLR 280 EAT.
[248] See **Secretary of State for Employment v. Mann** [1996] ICR 197, EAT; affd. [1997] ICR 209 CA, *sub nom* **Potter v. Secretary of State for Employment**; see also **Barber v. Staffordshire County Council** [1996] IRLR 209 at 212, CA.
[249] **Francovich and Bonifaci v. Italy** C-6 and C-9/90 [1991] ECR I-5357 ECJ.

probably represent both a learning curve and a government hostile both to expansion of workers rights and the social legislation emanating from Europe.

The third example, on the other hand, is demonstrative of judicial confusion and, in this example, appellate judicial clarity as to the interpretation of domestic provision was all that was required, but it took a substantial length of time before it was given; neither a reference to the European Court of Justice nor amendment to the Act being necessary. Both types of example are however representative of the types of problems which are encountered in the process of integrating domestic law with that required by both European legislation and the jurisprudence of the European Court of Justice.

In chapters 6-12 which follow, the domestic statute is scrutinised in detail, both in respect of its internal construction and meaning and with regard to European legislation and jurisprudence; in particular, its adaptability, without need for amendment, enabling it to embrace the both new concepts and constructs in equal pay provision and the widening scope of extant ones is highlighted.

CHAPTER 6. CLAIMANTS AND COMPARATORS AND THE SCOPE OF THE CLAIM

6.1 Introduction

Up to this point the thesis has focussed on, firstly, conditions leading to the development of and enactment of the Equal Pay Act, including socio-historical and political and economic factors, as well as imperatives emanating from Europe as a result of the United Kingdom's accession to the European Economic Community in 1973, and secondly, provisions emanating from Europe, both legislative and as a result of the jurisprudence of the European Court of Justice in what has become known as the 'equal pay principle'. The previous chapter considered some of the difficulties associated with articulation and integration of the domestic provision with European law in this respect.

The hypothesis postulated here is that notwithstanding such difficulties, the Equal Pay Act has proved amenable to change, particularly in respect of interpretation, to accommodate European requirements, whether by legislative amendment, by purposive construction or by importing provisions from the Sex Discrimination Act, on the basis that both Acts should be construed as a single code.

Insofar as amendment is concerned, it is argued that amendment to the Act has required to be minimal, the most substantial conceptual amendment being to include an equal value provision. Amendments dealing with matters such as time limits or qualifying service, whilst having substantial impact are neither complex nor conceptual, in the sense of striking at the heart or essence of the provisions, and, in this regard, it is argued that the Act is robust, effective and apt to and capable of incorporating developing interpretative requirements.

In this and the next six chapters, to substantiate that hypothesis, close analysis of the key constructs of the domestic Act is undertaken, focussing on the extent to which they have proved habile to accommodate developing European legislative requirements as well as the jurisprudence of the European Court of Justice.

6.2 Claimants and comparators

Fundamental to the operation of the Equal Pay Act is the requirement of a comparative exercise between the claimant and one or more comparators of the opposite sex. This requires consideration of what constitutes both eligible claimants and eligible comparators.

(a) Claimants

The right to claim equal pay without discrimination on grounds of sex applies to anyone who is employed under 'a contract personally to execute any work or labour'. Section 1(6) provides:

> " Subject to the following subsections, for purposes of this section—
>
> (a) "employed" means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;..."

In **Quinnen v. Hovells** [1984] ICR 525 EAT, a man, labelled as self-employed, who was engaged with two self-employed saleswomen for the purpose of engraving and selling pens was held to be entitled to make complaints of discrimination and unequal treatment under the Sex Discrimination Act and the Equal Pay Act as he was engaged personally under contractual terms in an activity which amounted to work or labour.

A person who is the holder of a public office under the Crown is specifically excluded from the general provision by section 1(8)(a) which equates employment in the civil and public service with private employment, but such an office-holder may be held to be 'employed' and so fall within the scope of the Act on other grounds. In **Stevenson v. Lord Advocate** 1998 SC 825 IH, a retired sheriff sought to rely on Article 119 to make comparison with the pay, in the form of pension benefits, received by an English County Court Judge. The Inner House held that the discrimination resulted from a difference in the statutory provisions governing the two jurisdictions and had nothing at all to do with

sex. The Outer House judge, Lord Kirkwood,[250] indicated that a sheriff could avail himself of Article 119 only if he fell within the definition of 'worker' for the purposes of Article 39 (formerly Article 48) applied in **Lawrie-Blum v. Land Baden Württemberg** C-66/85 [1986] ECR 2121 ECJ. Thus, he would have to show he was someone who:

> "for a certain period of time... performs services for and under the direction of another person in return for which he receives remuneration."

The Court took the view that the term 'worker' in Article 119 must have the same meaning as it has in Article 39. The Northern Irish Court of Appeal, in **Perceval-Price v. Department of Economic Development** [2000] IRLR 380 NICA, took the same view, and held that full time chairmen of employment tribunals fall within the scope of Article 141, although it might be wondered from whom they take their direction. The equivalent provision in Northern Ireland legislation to section 1(8)(a) of the Equal Pay Act, so far as it required a different conclusion, was held to be contrary to Community law and, to that extent, disapplied.

The foregoing illustrates that determining who is a competent claimant under the Equal Pay Act is of no particular legal difficulty and, as with other anti-discriminatory measures, no qualifying service is required.

(b) Comparators

If construing 'claimant' has been relatively free from difficulty (and case law), the same cannot be said of the competency of comparators and the permissible scope of comparison.

By virtue of section 1(2), an equality clause operates only where the woman's contract is less favourable than that of a man, the comparator, in the same employment as herself; any analysis therefore must involve consideration of both the selected comparator and the construct 'same employment'.

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[250] 1999 SLT 382.

It is for the woman to select the man with whom she wishes to be compared and the Equal Pay Act does not restrict the claimant from casting her net widely, indeed, in respect of claims based on equal value, such a course of action may well be necessary because until evidence is led, the claimant may have few facts upon which to base her claim. The Employment Act 2002 made provision for the introduction of an equal pay questionnaire and the Equal Pay (Questions and Replies) Order 2003 sets out a form on which the employee may question the employer and another form on which the employer might reply. Use of the form by the employee is not mandatory, but it could be of use to an applicant in selecting the most appropriate comparator. However, it has not yet been judicially determined whether an employee can seek personal information about another individual employee in circumstances where the employer cannot give anonymised information on a class of employee or respond by explaining the pay system as such. It may be that such information cannot be sought as it may conflict with the comparator's right to confidentiality under both the common law and data protection legislation.

The tribunal is not entitled to override the claimant's choice of comparator with its own. In **Ainsworth v. Glass Tubes & Components Ltd** [1977] ICR 347 EAT, the Employment Appeal Tribunal said:

> "But where the Industrial Tribunal fell into error was when the majority took the view that they, the Industrial Tribunal, could select the person with whom the comparison should be made for the purpose of assessing whether it was in fact like work. The lady wished the comparison to be made with regard to the inspector working alongside her. The majority of the Tribunal themselves substituted another inspector working at a different time and, it may well be, in a different grade of work (though on that we express no opinion). In other words, in broad terms, the Industrial Tribunal was choosing the person with whom to make the comparison as to whether or not there was like work and ignored the proposition put forward by the applicant that it was another person with whom comparison should be made in assessing whether or not there was like work. This is so obviously a misdirection that it is unnecessary to deal with the matter in any further detail."

In **Thomas v. National Coal Board** [1987] ICR 757 EAT, the Employment Appeal Tribunal confirmed that it is not for the tribunal to substitute a more suitable or "representative" comparator.

Notwithstanding the foregoing, some limitation on a claimant's freedom of choice has been contemplated in some quarters. Lord Justice Purchas, in **Pickstone v. Freemans plc** [1989] AC 66 CA, did so,[251] but his approach appears to have been rejected by the House of Lords.[252] In **Leverton v. Clwyd County Council** [1998] ICR 33 HL, Lord Bridge alerted tribunals to possible abuse of procedure by claimants who ranged too widely across available comparators, giving the example of the woman who claims equal pay with two men, A (who earns £x) and B (who earns £2x). In his Lordship's view, the claimant could hardly complain if the tribunal concluded that her claim for equality with A demonstrated that there were no reasonable grounds for her claim for equality with B.

In **McPherson v. Rathgael Centre for Children and Young People and the Northern Ireland Office (Training Schools Branch)** [1991] IRLR 206 NICA, the *obiter dicta* of the Lord Chief Justice were that although it was clear from the judgments of the House of Lords, in **Pickstone v. Freemans plc** [1988] ICR 697 HL that a claimant was entitled to select any man in the same employment as a comparator, a question might have been raised before the tribunal as to whether the comparator was in an anomalous position. In **McPherson**, the question raised was whether the claimant was entitled to select an anomalous male comparator and to ignore four or five other men with whom she was paid equally. More recently, the Court of Appeal in **British Coal Corporation v. Smith** [1994] ICR 810 CA expressed the view that if a chosen comparator is not representative of his class (the so-called 'rogue male') then the employer will have a 'material factor' defence under section 1(3). However, strictly speaking, there is a difference between disallowing a particular comparator as non-representative of his class, and allowing him as a comparator but providing that the anomalous nature of his position gives a good defence under section 1(3), although the result amounts to the same thing in the end.

It is clear from the judgments in **Tyldesley v. TML Plastics** [1996] ICR 356 EAT, **Strathclyde Regional Council v. Wallace** 1998 SC 72 HL and **Glasgow City Council v. Marshall and Others** 2000 SC 67 HL that **McPherson** was wrongly decided, in that it was wrong to apply the test of objective justification to a situation where there was no question of indirect discrimination. It might be argued that that part of the judgment in

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[251] At 96B.
[252] At 116G.

McPherson concerning the question of the anomalous comparator may not be affected by the erroneous reasoning in respect of objective justification. Lord Chief Justice Hutton said:

> "This question of the anomalous comparator was raised by Kilner Brown J in **Dance v. Dorothy Perkins Ltd** [1978] ICR 760...
>
> The point arose again in **Thomas v. National Coal Board** [1987] IRLR 451...
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> But the Employment Appeal Tribunal in **Thomas** [1987] IRLR 451 also considered the point raised in **Dance v. Dorothy Perkins Ltd** and in delivering the judgment Sir Ralph Kilner Brown stated at p.455 para.7 at (4):
>
> 'Is there an implicit requirement in the equal pay legislation that *the selected male comparator should be representative of a group?* The question arises out of the fact that Mr Tilstone was an "odd man out", the only male canteen attendant out of dozens and it may be hundreds of male workers in this category whose wages were the same as those paid to women. He was an anomaly created historically as the result of a purely local problem and the situation would never be repeated. The argument for the National Coal Board was based on observations made, "obiter" in **Dance and Ors v. Dorothy Perkins Ltd** [1978] ICR 760 where it was said,
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> "The point which seems to us to be much more troublesome is whether one anomalous man out of a group is a legitimate choice for comparison. The complainants have grouped themselves, albeit each woman's case has to be considered separately. But the broad common sense of the matter seems to us to be that in a case such as this the choice of one man ought to be examined in the context that he is a representative of the group."
>
> The Industrial Tribunal correctly decided that they were not bound by these observations and followed editorial and academic criticism which has taken the view that those observations are unduly restrictive of the statutory working which refers to "a man" and not "a representative man". Nevertheless the Chairman of the Industrial Tribunal appreciated that the suggestion that the way out of a possibly absurd situation is to find a genuine material difference may not always meet the case. Even if the anomaly was a pure accident or the result of an oversight but the differential in grade or pay was arbitrary it might then be difficult for an employer to show that there was a

genuine material difference. The implications of such a slip-up might, as in the instant case, lead to an alarming consequence in financial terms with a "knock-on effect" which would be unfair to the vast majority of the male members of the group unless they too were upgraded. We agree with the Industrial Tribunal that this problem requires investigation and decision by a higher judicial authority. At this stage we cannot find that there was an error in point of law although we would like to do so. So the National Coal Board lose the argument on this point."

Standing the clarification of the law in **Wallace** and **Marshall**, it is unlikely that there will be any need for the law on anomalous comparator to develop, but if justification is introduced to the test, the anomalous comparator might also.

6.3 The nature and scope of the comparison

Unlike the Sex Discrimination Act, the Equal Pay Act does not permit comparison with a hypothetical comparator; there must be an actual comparator, subject to what is said in this chapter. One basic principle can be stated, namely if there is no man whose case can be compared to the woman's there is no prospect of success under the Equal Pay Act. In **Meeks v. National Union of Agricultural and Allied Workers** [1976] IRLR 198 IT, at paragraph 25 it is stated:

> "The ... claim under the Equal Pay Act can be shortly disposed of. It is quite clear that there is no equality clause, as defined in s.1(2) of the Equal Pay Act 1970, to be included in the applicant's contract of employment because there are no men employed on like work as defined in s.1(4). All the employees doing secretarial work employed by the respondents are women and so no comparison can be made as required by that Act. Consequently there is no contravention of the Equal Pay Act and the application must fail."

Whilst there must be a comparator, the foregoing assumed contemporaneity was essential and, in this respect, the law has developed significantly, as shall be shown in the next sub-section, however the central principle of operation of the section depends upon a comparison with a person of the opposite sex which gives rise to the interesting question what if you select a comparator who is biologically the same sex, even if appearing to be

of the opposite sex? This issue was addressed in **Collins v. Wilkin Chapman**[253] and the Employment Appeal Tribunal confirmed that should a claimant happen to name as comparator someone who is in fact of the same sex, judged biologically, the claim for equal pay will fail.[254]

Notwithstanding the foregoing, the notion of comparison with a person of the opposite sex in the same employment remains the cornerstone of the Act and in the three subsections which follow the development of these concepts is analysed.

(a) Contemporaneity and contingency issues

The contemporaneity question, in its simplest form, concerned whether or not it was essential for the female applicant to be able to point to a man at present employed on like work or on work rated as equivalent, or whether it was sufficient that there had been a man recently employed on such work.[255] The argument against a requirement of contemporaneity at the time of application was that if there had been a point in time when the woman satisfied the conditions of the Act, the equality clause still operated to vary her contract and the contract as varied remains in force notwithstanding the subsequent departure of the man in question. [256]

In **Macarthys Ltd v. Smith** [1997] ICR 785 CA, the majority of the Court of Appeal (Lawton and Cumming Bruce LJJ) considered that the Act was clear. It did require contemporaneous employment; in the rubric,[257] it is stated:

> "M, a man, was employed as the manager of one of the stockrooms of the employers' warehouses...For four months the post was not filled and then the employee (Mrs Smith)was appointed employee (Mrs Smith)was appointed. On appeal by the employers: - *Held,* (Lord Denning M.R. dissenting) that the words in section 1(2) of the Equal Pay Act 1970, as amended, by the use of the present tense looked to the present and the future and thus, giving them the grammatical construction,

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[253] EAT 945/93 Unreported 14 March 1994.

[254] This decision may not be followed in the case of post-operative transsexuals following the decision in **Goodwin v. UK** [2002] IRLR 664 ECHR which was that it is a breach of Articles 8 and 12 of the Convention on Human Rights not to recognise the new gender of a post-operative transsexual.

[255] That is the employment of applicant and comparator at some point, previously overlapped.

[256] **Sorbie v. Trust House Forte Hotels Ltd.** [1977] ICR 55 EAT is considered in Chapter 3 on a different point.

[257] At page 785.

> they were consistent with a comparison between a man and a women contemporaneously in the same employment."

And, at page 793 B-C;

> "The Act envisages that women's contracts of employment shall contain an equality clause: see section 1(1). Such a clause is to contain provisions having specified effects: see section 1(2). In my judgment the grammatical construction of section 1(2) is consistent only with a comparison between a woman and a man in the same employment at the same time. The words, by the tenses used, look to the present and the future but not to the past. They are inconsistent with a comparison between a woman and a man, no longer in the same employment, who was doing her job before she got it."

And, as regards being in the same post, at page 796G;

> "At first sight section 1(2)(a)(i) contemplates a man and a woman being employed by the same employer at the same time. The use of the present tense strongly points to that meaning, as both Lord Denning M.R. and Phillips J. accepted. But three grounds are put forward for the contrary view: ..."

And at page 797 F-G;

> "I am left so far wholly unconvinced that there is any reason for giving section 1(2)(a)(i) a meaning other than that which at first impression I thought was the ordinary and natural meaning of the words."

Mrs Smith's claim therefore failed under the Act. Lord Denning seemed to have some sympathy for Mrs Smith's argument, but he did not press the point. The court was, however, unanimous that she might well have a Community right under Article 119, and they referred that question to the European Court of Justice.

The Advocate General suggested that the scope for comparison under Article 119 included a hypothetical comparator. The European Court of Justice[258] rejected the

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[258] At C-129/79 [1980] ECR 1275 ECJ.

Advocate General's Opinion and held that Mrs Smith could succeed under Article 119, the Court said:[259]

> "...Among the forms of discrimination which may thus be judicially identified, the Court (in **Defrenne**) mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service...
>
> In such a situation the decisive test lies in establishing whether there is a difference in treatment between a man and a woman performing 'equal work' within the meaning of Article 119. The scope of that concept, which is entirely qualitative in character in that it is exclusively concerned with the nature of the services in question, **may not be restricted by the introduction of a requirement of contemporaneity.**
>
> It must be acknowledged, however, that, as the Employment Appeal Tribunal properly recognized, it cannot be ruled out that a difference in pay between two workers **occupying the same post but at different periods in time** may be explained by the operation of factors which are unconnected with any discrimination on grounds of sex. That is a question of fact which it is for the court or tribunal to decide.
>
> Thus ... the principle that men and women should receive equal pay for equal work, enshrined in Article 119 of the EEC Treaty, **is not confined to situations in which men and women are contemporaneously doing equal work for the same employer.**" [emphasis added]

Macarthys was followed in **Albion Shipping Agency v. Arnold** [1982] ICR 22 EAT. Mrs Arnold sought parity with her predecessor. It was held that she could not succeed under the Equal Pay Act, but she was entitled to succeed under Article 119.

In **Diocese of Hallam Trustee v. Connaughton** [1996] ICR 860 EAT, it was held that a claimant, relying on Article 119, could make comparison with someone who had been appointed after her resignation from the post in question, i.e. her successor.

Kells v. Pilkington plc [2002] IRLR 693 EAT confirmed that there is no rule of law that an claimant cannot, in seeking to make good her claim by comparison with the work done

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[259] Paragraphs 10-13 page 1288.

by her chosen comparator, only go back a period of six years[260], although the Employment Appeal Tribunal emphasised that the further back in time she casts her net the greater the evidential problems she will have in proving her case.

Recent developments in this area have raised the question of whether or not a comparator is required in special situations or indeed at all. In **Alabaster v. Woolwich Building Society** [2002] IRLR 420 CA, the claimant argued that no comparator is necessary for her under the Equal Pay Act because she was claiming to have suffered inequality of pay by reason of pregnancy. The case was referred to the European Court of Justice but not on this point.[261]

The foregoing illustrates that the nature and scope of the permitted comparison has widened substantially since the Equal Pay Act came into force; at no point however, has it been necessary to amend the Act, the wording of which has been habile to permit such extension. It is however in cases of indirect discrimination that the nature of the required comparison has raised some of the most interesting points, and not least the 'parasitic' or 'contingent' claim, which arguably flies in the face of the wording of the statute.

The concept of the parasitic claim first emerged in **Preston & Ors v. (1) Wolverhampton Healthcare NHS Trust and (2) Secretary of State for Health & Ors** [1996] IRLR 484 EAT; and [1997] ICR 899 CA. This appeared to be a clear case of indirect discrimination because, given the statistical preponderance of women in the part-time workforce compared to men, any detriment applied to part-timer workers would have a greater adverse impact upon women; it followed therefore, that denying part-timer workers access to membership of an occupational pension scheme indirectly discriminated against women. Since this is so, the question arose how it was that male part-time employees could claim also to have been discriminated against. The male claimants' reasoning, endorsed by Mummery J in the Employment Appeal Tribunal, was that the answer lies in the way in which, under the Equal Pay Act 1970, the principle of equal pay for equal work takes effect through the mechanism of an equality clause implied into every individual employee's contract of employment. A female part-time

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[260] Five years in Scotland by virtue of the provisions of Section 6 and Schedule 1 of the Prescription and Limitation (Scotland) Act 1973.
[261] Judgment reported at [2004] IRLR 486 ECJ.

worker was entitled to claim equal pay for being denied access to pension scheme membership on the grounds that the denial breached the equality clause in her contract. As a result, the employer was obliged to remedy the breach so as to restore equality to her terms and conditions. But if, having done this, the employer fails to deal, at the same time and in the same way, with male part-time workers employed on like work or work of equal value to that of the woman, he would be creating a situation where the terms of his male and female part-timers become (in the words used by Mummery J) *"out of sync"*, to the male employees' detriment. The employer would then be directly discriminating against his male employees by failing to confer upon them the same benefits as those to which the female part-timers (having been indirectly discriminated against) have become entitled. That discriminatory treatment would be in breach of the equality clause in the men's contracts such as to entitle them to claim equal pay with the women.

It was argued by the employers and the Secretary of State both before the Employment Appeal Tribunal and the Court of Appeal that whilst female part-time workers were able to claim that their denial of access to occupational pension schemes was indirectly discriminatory, male part-time workers were unable to claim that they had been discriminated against until women employed on like work succeeded in securing backdated membership of the scheme (and the benefits thereunder). Up to that point, male part-time workers would not be 'out of sync' with female part-timers, so that there was no breach of the equality clause and thus no cause of action. As a result, the Secretary of State maintained that the claims of male part-time workers at this stage were merely hypothetical or academic; they depended upon (i) the female employees succeeding in their claims, and (ii) the employers introducing amendments to the scheme rules relating to membership that differed as between male and female part-timers. Since it was by no means obvious that the female claimants were going to succeed, in view of the fact that so many of their applications had been presented out of time, it was possible that there would not, in the event, be any compulsion on employers to satisfy the claims for equal pay made by female part-time workers, with the result that a situation would not arise where women and men were treated differently. The Employment Appeal Tribunal had dealt deftly with the Secretary of State's argument by approaching the matter in terms of procedure. Male claimants were therefore permitted to continue with their claims. The Court of Appeal judgment in **Preston** gives a clear explanation of the reasoning behind its

decision, the relevant part of the judgment of the Court of Appeal by Lord Justice Otton at [1997] ICR 899[262] is set out in full here:

> "The industrial tribunal held that a male part-time worker could bring a claim for equal access to an occupational pension scheme even though no woman applicant's claim had by then succeeded, and that his access should be backdated to the same point in time as that to which a female part-time worker was given retrospective access to the scheme. Thus claims by male applicants which were not struck out as being out of time should remain stayed until a female applicant succeeded in gaining admission to the relevant scheme. The EAT upheld that part of the decision.
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> By a respondent's notice the Secretary of State contends that the EAT erred in law in failing to find that a male employee is not entitled to claim a right of admission to an occupational pension scheme on the grounds that a term of the scheme excluding a group of employees to which he belongs is indirectly discriminatory against a group predominantly composed of women. Further, the EAT erred in holding that where a female employee is granted a declaration that she is entitled to be admitted to such a scheme with effect from a date earlier than that on which she is in fact admitted to the scheme, a male employee is entitled to a corresponding declaration in his favour with effect from that same date. In truth, the declaration granted to the female employee is a remedy for past discrimination against women and its grant does not create a right to a corresponding declaration in favour of a man since there was no discrimination against men. A male employee could only bring proceedings in the event that the terms of such a scheme were or became discriminatory against men, which is not the case here.
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> Mr Nicholas Paines [counsel for the Secretary of State] submitted that the reasoning of the industrial tribunal and the EAT is fallacious. It does not take into account the fact that a male part-time worker cannot claim admission to the scheme on the basis that the exclusionary term constitutes discrimination against women. The flaw in the reasoning is that it fails to appreciate that it is discrimination in the terms of a scheme that gives rise to the right to a remedy in the form of equality with a full-time employee, and that that right is only enjoyed by a member of the sex

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[262] At 922E to 924C.

discriminated against. The granting of the remedy to that sex cannot logically entail the granting of the remedy to the other sex also. The correct course is to strike out claims by men. This would enable a man to bring a fresh complaint for the future in the (perhaps unlikely) event that the terms of the scheme were to provide that only female part-time workers would be admitted.

As indicated at the beginning of the judgment by Schiemann LJ, prior to 31 May 1995 domestic legislation excluded those who worked less than a given number of hours per week from entitlement to join certain occupational pension schemes. In consequence, many schemes excluded part-time workers. This involved indirect discrimination against women in breach of their rights under Article 119 of the Treaty of Rome. Manifestly there was no discrimination against men. The women have always been able to bring proceedings relying on their Treaty rights and asking the court to disapply those provisions which prevented them from joining the pension schemes. Some of the women have done so prior to 31 May 1995. Although those proceedings have not yet been concluded, it may be that as a result some women will be admitted to the schemes.

The cross-appeal is concerned with the position of men. Prior to 31 May 1995 the men were not discriminated against by the schemes either directly or indirectly. That much is common ground. By contrast, women were discriminated against and are entitled, subject to the provisions of S.2(4) and (5) of the Equal Pay Act 1970, to the increased benefits resulting from their service prior to 31 May 1995. It is pointed out that male part-timers, depending on the terms of various pension schemes, may eventually be put in a position where they are less well off than female part-timers. The industrial tribunal, whose decision has been upheld by the EAT on appeal, was only concerned directly with the position of one man, Mr Mannion, who was chosen as a test case. The tribunal struck out his claim, the EAT dismissed Mr Mannion's appeal, and of course the Secretary of State has no cross-appeal in relation to that striking out, although the points made in his cross-appeal could have been put into a notice of additional grounds. However, in the course of its judgment, the tribunal indicated that in principle it was not prepared *at this stage* to strike out the claim of all part-time male employees just because they were male. The EAT was

not prepared to say that the industrial tribunal was wrong in its approach. Mr Paines accepted that if, as in the event is the case, Mr Mannion's appeal to this court failed on the same grounds as the women's appeal, then there is no need for this court to consider in relation to Mr Mannion the validity of the points made in the Secretary of State's cross-appeal. He accepted that anything which we might say would be no more than *obiter dicta.* The EAT's reasoning is set out at pp.45-47 of its decision. Essentially, it took the view that a set of facts might, if some of the present women applicants were successful, arise in which it would be seen that men did not receive equal pay for equal work. That would be a real injustice to the men. Those remarks manifestly have some force. I think it would be wrong for this court at this stage, in the absence of a specific case to the facts of which its attention has been drawn, to state that all cases of a particular kind should be struck out. I would dismiss the cross-appeal"

The case progressed to the House of Lords which held that a reference would be made to the European Court of Justice which in turn gave its opinion and referred the case back to the House of Lords. The issue of whether a male part-time worker was entitled to complain of indirect discrimination was not, however, one that was raised by any of the questions submitted to the European Court of Justice, nor answered by them, nor considered again by the House of Lords.[263]

In another case concerning indirect discrimination, **London Borough of Hammersmith & Fulham v. Jesuthasan** [1998] ICR 640 CA, the Court of Appeal considered the claim of a male part time worker having insufficient hours to be able to claim unfair dismissal and statutory redundancy payments. The Court held, allowing the appeal, that, in **R. v. Secretary of State for Employment *ex parte* Equal Opportunities Commission** [1995] 1 AC 1, the House of Lords had declared the qualifying provisions in the Act of 1978[264] to be incompatible with Community law aimed at elimination of discrimination between men and women in employment, and the provisions were to be disapplied generally in respect of all employees, regardless of sex; that, accordingly, the claimant was entitled to make claims for redundancy pay and unfair dismissal when he was dismissed, since the qualifying provisions were displaced by the paramount force of Community law.

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[263] See C- 78/98 [2000] ECR I-3201 ECJ; applied [2001] ICR 217 HL.
[264] The Employment Protection (Consolidation) Act 1978.

Counsel for the Council argued at page 647E:

> "...that there is a relevant distinction between the cases of the applicant and Mrs. Day: Mrs. Day was a woman and the applicant is a man. Mrs. Day was entitled to rely on the general declarations of incompatibility with European Community law, because the basis of those declarations was that the qualifying periods in the Act of 1978 were incompatible with European Community law by reason of **indirect** discrimination against women: more women than men are part-time workers. But, as there are fewer men than women in part-time work, it is not open to the applicant to complain that he has been indirectly discriminated against on the ground of sex. It follows that a male part-time worker in the public sector is not entitled to bring a claim for redundancy payment or unfair dismissal." [emphasis added]

However the Court concluded at 648F that:

> "[h]e was entitled to make that claim when he was dismissed, as the qualifying conditions in the Act of 1978 were displaced by the paramount force of European Community law. The fact that they were displaced because they indirectly discriminated against women is not relevant to the applicant's claim for redundancy and unfair dismissal. He is not contending (and he can succeed in all his claims without contending) that the provisions directly or indirectly discriminate against men generally or that he, as an individual employee, has been discriminated against as a man. Further, as submitted by Mr. Langstaff in paragraph 7 of his skeleton argument:
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> > "The corollary of a provision which discriminates against women, such that it has to be disapplied at the suit of any woman, is that it must necessarily be disapplied in the case of a man: otherwise, a requirement or condition would exist and be applied in the case of a man which would not lawfully be applied in the case of a woman.""

In a major equal pay claim in Scotland, where applications were lodged by virtually all primary headteachers claiming equal pay with secondary headteachers, in one of the 'test

cases'[265] the scope of a contingency claim arose; the facts, taken from the report in **South Ayrshire Council v. Milligan** 2003 SLT 142 were as follows:

> "This respondent is one of nine male primary head teachers in South Ayrshire, the other 36 being female. Applications had been made by *inter alia* three female primary head teachers in this authority, all of whom identify at least one male comparator who is a secondary head teacher employed by the same authority. The aim of the application is to endeavour to obtain equal pay in relation to the relevant legislation. This respondent's application has been lodged without a comparator of the opposite sex being named who is a secondary head teacher employed by the same authority, since the nine secondary school head teachers under the control of the appellants are all male. The respondent is thus unable to raise a relevant claim citing a female head teacher and has instead identified as a comparator a female primary head teacher currently earning the same or less than him, who herself has raised a claim citing as her comparators two male secondary head teachers employed by the appellants."

The decision of the employment tribunal stated:[266]

> "What we are looking at here is not whether there are barriers between one part of the teaching profession and another, but whether there has been a breach of section 1 of the Equal Pay Act, in that a deemed equality clause is allegedly not being implemented as between two groups of employees, one largely female and one largely male, **both of which groups** [the applicants claim] **are engaged in like work.**" [emphasis added]

Mr Milligan had no comparator earning more than him. In the absence of a comparator, Mr Milligan successfully persuaded the employment tribunal, the Employment Appeal Tribunal and the Court of Session that he had brought himself within the ambit of the decision in **Preston**. The employment tribunal in **Milligan** determined that **Preston** [1997] ICR 899 CA was binding on them, finding it in point, and sisted the application with no reasoning. The Court of Session applied the reasoning in **Preston** to **Milligan**, although the latter case was not pled on the basis of indirect discrimination in the female claimants' case. The case was under appeal to the House of Lords, to be heard in May

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[265] Not a test case in sense that the decision in one would have bound all the sisted claims, but a case which on the facts was representative of the other sisted claims.
[266] At page 2, line 35

2004, but the appeal was abandoned when the female claimants' cases failed on the merits.[267] It is perhaps unfortunate that **Milligan** did not proceed to the House of Lords since determination of the scope of parasitic claims is of some importance, because, if not confined to cases pled on the basis of indirect discrimination, the application of the principle to direct discrimination claims would appear to obviate the need for a comparator of the opposite sex.

What the foregoing does illustrate is the extent to which the comparative basis has been expanded over the last 30 years; it is argued here that its retention is important insofar as the basis of any equal pay claim is founded on sex discrimination rather than 'fair wages', which arguably should not be permitted to enter through the back door of legislation designed for something else.

(b) Comparisons beyond the 'same employer'

Just as the scope of the comparison has expanded, so has the concept of the 'same employment' referred to in section 1(2). The Act always permitted a wider basis of comparison by virtue of the provisions of section 1(6)(c). This provides:

> "two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control and 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."

This is a complicated provision in that the language of the section is opaque because of the additional proviso of common terms and conditions.

The starting point for consideration of this provision is **Defrenne II**. At the outset, it should be noted that this case was not one concerning a public sector body – either the

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[267]**Morton, Nutt and Paterson v. South Ayrshire Council,** Case Nos. S/102584/98, S/102585/98 & S/102586/98.

State or an emanation of the State, Sabena being a *sociétié anonyme,* that is a limited company constituted under the private law and governed by the company law of Belgium, albeit the company had obtained a licence to operate a public service and the majority of shares were in fact held by the Belgian State. Hence, whilst having the role as flag carrier or State airline;

> "[A]s regards the legal status of Sabena it...remains a company constituted under private law and relations between the company and its staff are governed by private law contracts rather than by staff regulations which are adopted unilaterally."[268]

Thus, in order to determine **Defrenne II**, the Court did not require to consider the application of Article 119 to the State or emanations of the State except insofar as it also required to deal with the question of individual rights, direct effectiveness, direct applicability and obligations of the State. In this regard, the observations made by the Commission merit noting, at page 465 they stated:

> "The concepts of pay and equal work can be appreciated easily in the public sector, where wages are based on a particular type of classification given to a job (grades, classes, steps) and are generally fixed by law, independently of the sex of the person taking the post; this does not apply at all in the private sector."

At page 466-467, the Commission further stated:

> "In its recommendation of 20 July 1960 the Commission specified that where a compulsory minimum wage exists which is fixed by law or agreement, it must be the same for men and women workers, and that if the wages are fixed according to some system of job classification, the categories must be the same for men and women workers and the criteria of classification must apply in the same way to both men and women. However, even under this wide concept which was clarified by the Resolution of 30 December 1961, the principle contained in Article 119 does not enable a women worker who is doing certain work in an undertaking in a particular branch of activity in a certain area of a particular country to claim the same wage as a man doing perhaps the same or equivalent work or work of equal value in another undertaking in another branch of activity in another region or another country. This highest form of wage

[268] Page 470

equality ('an equal wage for equal work') does not even exist as between men. ……..

……. as regards public and semi-public undertakings the criterion to be applied in considering the direct applicability of Article 119 in the contest (*sic*) of relations between the State and individual persons is the degree of intervention by the public authorities in the management of these undertakings and, more particularly, in fixing their wages policy. It is particularly important to examine whether wage agreements concluded in the particular undertaking or branch of the economy in question as freely negotiated and implemented, whether, although freely negotiated, such agreement can only be applied after being authorised, approved or ratified by the supervising public authorities or whether the workers in the undertakings in question are subject to staff regulations similar to those applying to civil servants."

The Court held:

"19. It is impossible not to recognise that the complete implementation of the aim pursued by Article 119, by means of the **elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level.** (emphasis added).

20. This view is all the more essential in the light of the fact that the Community measures on this question, to which reference will be made in answer to the second question, implement Article 119 from the point of view of extending the narrow criterion of "equal work" in accordance in particular with the provisions of Convention No 100 on equal pay concluded by the International Labour Organisation of 1951, Article 2 of which establishes the principle of equal pay for work "of equal value".

21. Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article 119 must be included, in particular, those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.

22. This applies even more in cases where men and women receive unequal pay for equal work carried out **in the same establishment or service, whether public or private.** (emphasis added).

23. As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a women worker is receiving lower pay than a male worker performing the same tasks.

24. In such situations, at least, Article 119 is directly applicable and may thus give rise to individual rights which the court must protect."

In French:

"19. qu'on ne saurait méconnaître, en effet, qu'une mise en œuvre intégrale de l'objectif poursuivi par l'article 119, par l'élimination de toutes discrimination entre travailleurs féminins et travailleurs masculins, directes ou indirecter dans la perspective non seulement des entreprises individuelles, mais encore de branches entières de l'industrie et même de l'économie globale, peut impliquer, dans certains cas, la détermination de critères don't la mise en oeuvre reclame l'intervention de mesures communautaires et nationales adéquates;...

22. qu'il en est encore de même dans le cas d'une rémunération inégale de travailleurs masculins et de travailleurs féminins pour un même travail, accompli dans un même établissement ou service, privé ou public;

Ruling 1 of Judgment – English

1. The principle that men and women should receive equal pay, which is laid down by Article 119, may be relied on before the national courts. These courts have a duty to ensure the protection of the rights which that provision vests in individuals, in particular in the case of those forms of discrimination which have their origin in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.

Ruling 1 of Judgment – French

> 1. Le principe de l'égalité des rémunérations entre les travailleurs masculins et les travailleurs féminins fixé par l'article 119 est susceptible d'être invoqué devant les juridictions nationales. Ces juridictions ont le devoir d'assurer la protection des droits que cette disposition confère aux justiciables, notamment dans le cas de discriminations qui ont directement leur source dans des dispositions législatives ou des conventions collectives du travail, ainsi que dans le cas d'une rémunération inégale de travailleurs féminins et de travailleurs masculins pour un même travail, lorsque celui-ci est accompli dans un même établissement ou service, privé ou public.

What is of note in the above passages is that nowhere does the word *'service'* appear and the Commission is considering matters at a macro economic level, at least beyond the level of a single establishment and in contexts where a collective bargaining agreement extends beyond a single workplace. Words such as 'undertaking', 'branch of activity', and 'branch of the economy' are used, one can surmise 'service' is not used either by preference or customary contextual usage or perhaps by virtue of the fact that it possesses a meaning which in the context would not be appropriate.

Thus, there still remains the matter of the scope of *'service'*, and what was in the mind of the Court when it used that term in the same sentence as *'même établissement'*.

At a purely conceptual level, one relevant question is where is the location of the construct '*service*' on a continuum which might have at one end, or somewhere near one end 'establishment' as a definable work location and at the other polar extremity 'employer' as the body responsible for all the work locations or establishments and perhaps groupings of separate establishments comprising departments or functions, all under its ultimate control. If linguistically '*service*' can be subsumed within that type of construct and that it does not create distortion in any technical sense, then that linguistic connotation might have been preferred to any which artificially creates a *supra* employer construct. Some authority for that might be drawn from paragraphs 19-24 of the report. When paragraph 21 is read in conjunction with paragraph 22, then referred back to paragraph 19, it is by no means certain that it can be inferred that what the Court was saying was that where in the context of the totality, or near totality, of an industry, where that industry is provided almost exclusively by separate employers, each of which individually has a separate legal persona and is an identifiable and discrete emanation of

the state and a separate employer for all purposes concerned with the recruiting and employing of staff (albeit recognising service in certain other public sector organisations for the purposes of making redundancy payments) because pay and conditions are negotiated nationally and all employers are statutorily required to adopt the agreement, save that it permits some local variation, that henceforth all such employees shall be deemed to be employed in a single 'service' whether public or private and may treat any other employee in the same industry or service as being in the same employment for any relevant legal and presumably other purposes.

Paragraph 19 of the judgment appears to negate that. Such a step would require, not only measures at national level, but probably also at Community level and further in the context of the **Defrenne** judgment the fact that the word '*service'* may be ascribed a meaning in French, although not necessarily in English (at least at that time) might have confirmed that view.

As regards the use of the word '*service'* as it appears in the judgment at paragraph 22 and in ruling 1 (both of which are re-printed in French and English), an interesting question which arises is whether the masculine noun '*service*' can <u>only</u> mean, taking account of the facts of **Defrenne,** and indeed the time of the judgment, some supra-employer construct or some other collection of duties emanating statutorily from the State such as might be devolved to a body responsible for a public utility, or whether there is any other meaning which may have been in the contemplation of the Court and which does not offend the language as used in the context of the case.

Reference to the most recent edition of Collins Robert French Dictionary (and indeed dictionaries contemporaneous with the **Defrenne** case) demonstrates that the word '*service*' has a wider meaning than that in English, which is also replicated in Dutch by the word '*dienst'* but not replicated in the German '*Dienst'* which follows the English usage. The word '*service'* in French (and Dutch) has a wider meaning than in English (and German) in that it can mean both 'service' in the same way in which that word is commonly used in English but can also mean '*section*' or '*department*', for example *service des acheter* (buying department), *service de la publicitié* (publicity department), *service du contentieux* (legal department). The use of the word '*service'* has perhaps only recently appeared in the lexicon of local government and public administration in the

United Kingdom, as a form of designation for a local government departments, such as 'personnel services' or 'legal services', but such usage in this context is well established in French, which not only is the language of the Court (albeit not the language of Advocate General Trabucchi) but is also the language of the case.

When consideration is given to an organisation like Sabena which not only would have had offices in other countries in addition to those in its home country, as a result of both the size and the nature of its business and operations, allied to the fact that it was the national 'flag carrier' arguably it would have been reasonable to ascribe the meaning *'service'* in the sense of *'section'* or *'department'*, since it is to be expected that there would exist departmental separation between *inter alia* flight operations, air crew employment (including statutory licensing and training matters), maintenance and engineering, cargo handling, passenger handling, not to mention the administrative servicing functions of personnel, finance, legal service etc. What is not known is exactly how the term *'service'* was used in the context of the case, albeit at that time, it was still a requirement that for the purposes of comparison, the comparator had to be employed by the same employer and work in the same work location or establishment as the claimant. Such an analysis and interpretation whilst of interest from a linguistic point of view is of course limiting in scope; what is difficult to comprehend is the use of the word *'service'* in the private sector. It sits comfortably (in both French and English) in a public sector context, for example when referring to a 'health service' or an 'education service' but somewhat uncomfortably when referring to economic activity occurring in private sector industries.

The first major case in Great Britain and Northern Ireland to consider the extent to which a claimant, relying on the domestic Act, might go beyond the level of the employer was that of **Hasley v. Fair Employment Agency** [1989] IRLR 106 NICA. In this case, the claimant and comparator were employed by different statutory bodies; the claimant by the Fair Employment Agency, and the comparator by the Equal Opportunities Commission. It was alleged that the FEA and the EOC were 'associated employers'. The FEA did not wish to contest the claim but the Department of Economic Development [DED] and the Department of Finance and Personnel [DOFAP] did. These two entities exercised detailed financial control over the terms and conditions of employment of those employed by the

FEA and EOC, although the FEA and EOC had functional independence from the State so that neither was directly or indirectly controlled by the DED or DOFAP.

In giving the judgment of the Court, Lord Chief Justice Lowry said:

> "10. First, as to question 2 set out above, the Industrial Tribunal concluded that the FEA and the EOC, by virtue of their functional independence (which the statutory enactments setting them up were careful to emphasise), were not either directly or indirectly controlled by DED or DOFAP. On the other hand those departments have financial control of the FEA and the EOC and also control of the numbers and grades of the persons employed and of their terms and conditions of employment: see para 6 of Schedule 3 to the Sex Discrimination (Northern Ireland) Order 1976 and para 5(1) of Schedule 1 to the Fair Employment (Northern Ireland) Act 1976. By comparison with this control, the functional independence of the FEA and the EOC is, in my view irrelevant. As Mr Kerr QC, who appeared with Mr Treacy for the applicant, rightly said, the Equal Pay Act (Northern Ireland) 1970 was "an Act to prevent discrimination as regards terms and conditions of employment between men and women", and s.1(7)(c) ought to be construed in a manner which is consistent with and takes due account of the object of the legislation. The Tribunal was therefore wrong on this point, considered by itself, but I recognise that para (c) must be considered as a whole and that the word "controlled" (which on one tenable view is referable only to the control of a majority shareholder: **Hair Colour Consultants v. Mena** [1984] IRLR 386 must be read in its context...
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> 20. The principle that "men and women should receive equal pay for equal work" is so general that there must be some limits or boundaries to its operation in practice. The court's decision in **Defrenne v. Sabena**... contained the following observation at p.568D.
>
> 'The reply to the first question must therefore be that the principle of equal pay contained in Article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which

men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public'.

21. The reference to "the same establishment or service" was cited in the court's decision in **Macarthys Ltd v. Smith** (*supra*) at p.215 paragraph 62...

22. It has to be observed that neither the **Defrenne** nor the **Macarthy** judgment treats the remedy given by Article 119 as confined to work carried out in the same establishment or service. Both, however, were decisions of the European Court of Justice and are therefore valuable insofar as the judgments cast light on the meaning of Article 119. I therefore draw attention to paragraph 10... [in the **Macarthy** judgment] which states that Article 119 applies to:

> "all forms of direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question".

Paragraph 12 of the **Macarthy** judgment acknowledges that the kind of difference in pay with which the court was concerned in that case:

> "may be explained by the operation of factors which are unconnected with any discrimination on grounds of sex".

The court then observed:

> "That is a question of fact which it is for the court or tribunal to decide".

23. These statements lend force to the interpretation which I have already adumbrated, namely, that Article 119 is aimed at inequality caused by discrimination based on sex. I refer also to the cases mentioned at paragraphs 1585-6 of Harvey's Industrial Law at pp.I/275 A-B. It is true that s.1(7) does not call for a finding in an employer's favour on that point but the concluding words of paragraph 12 in the **Macarthy** judgment clearly imply that such a finding is required. In this respect the 1970 Act may favour the employee more than Article 119, but **Jenkins v. Kingsgate (Clothing Productions) Ltd** contemplates this possibility...

26. It can no doubt be argued against the applicant, by reference to **Defrenne** and **Macarthy**, that she and Mr White [the comparator] are not in the same

establishment or the same service and it has been conceded that they are not covered by section 1(9) [the sub-section dealing with Crown employment]. But, if one takes a broader view, it can be said that, although expressly not civil servants, they are in public service of the same kind, holding posts which are graded by the same officers and on the same principles of job evaluation and that the fact that the statutory corporations which employ them are not emanations of the Crown is due solely to the political desirability of making the FEA and the EOC appear to be independent of the State (although in reality they depend on the State for their existence and their financial upkeep).

27. On this broad view, therefore, it can be argued that Article 119 must apply, although those employed by the FEA and the EOC are the victims of a *casus omissus* according to the domestic law, if I have correctly construed section 1(7).

28. But I am of the opinion that, if Article 119 is to be called in aid, there must be some evidence of *discrimination* against the applicant on the ground of her sex. I cannot see any such evidence or even infer its existence. It seems to me extremely unlikely that, if both posts had been held by members of the same sex or if the situations of the postholders had been reversed, those posts or either of them would have been differently graded. The situation is not like that encountered in cases like **Wallace v. South-Eastern Education and Library Board** [1980] IRLR 193. Where a man of apparently inferior qualifications is appointed in preference to a woman, the question is, 'Why was the man appointed?' There the comparison is between individuals and the preferment of the apparently less well qualified man has to be justified. But here the comparison is between posts and, in the absence of proved facts, there is no evidence of discrimination on the ground of sex.

29. I would answer the question in the case stated by saying that, for the reasons given by this court, the Tribunal was correct in law in holding that the FEA and the EOC were not associated employers, and, because I am of the further opinion that Article 119 does not provide a remedy on the evidence which was before the Tribunal, I would dismiss the appeal"

This case shows that in order to give effect to Article 119, a broad interpretation of section 1(7) of the Northern Ireland Act (or the equivalent section 1(6)) may be required, but it also demonstrates that Article 119 should not be construed as having unlimited scope of application based on indirect factors, particularly when no discrimination is evident.

Perhaps the most important case of relevance in the context of the developing relationship between Article 119 and section 1(6) is that of **Scullard v. Knowles & Another** [1996] ICR 399 EAT. In this case the Employment Appeal Tribunal presided over by Mummery J, required to consider whether a manager employed by a Regional Council[269] funded by central government in the form of the Department of Environment, could compare herself with male managers employed by other regional (advisory) councils even though the councils were not associated employers within the meaning of section 1(6) of the Equal Pay Act. There, the councils submitted that it was fatal to the claimant's case that she and the comparator were employed by different employers. Among the cases considered by the Employment Appeal Tribunal was **Hasley v. Fair Employment Agency** in relation to which the Employment Appeal Tribunal stated [270]that:-

> "(3) In **Hasley v. Fair Employment Agency** [1989] IRLR 106 the Northern Ireland Court of Appeal recognised that the principle of Article 119 is so general that there must be some limits or boundaries to its operation in practice. Lord Lowry CJ cited passages in **Defrenne v. Sabena** (Case 43/7) [1976] ICR 547 and **Macarthys Ltd v. Smith** (Case 129/79) [1980] ICR 672 which referred to the "same establishment or service" though, as observed by Lord Lowry, at p111, the judgement in **Defrenne** did not treat Article 119 as "confined to work carried out in the same establishment or service". See also p112 where Lord Lowry CJ set out the argument for the view that Article 119 takes in people in public service of the same kind as bodies dependent on the state for their existence and financial upkeep.
>
> (4) The crucial question for the purposes of Article 119 is, therefore, whether the applicant and the male unit managers of the other councils were employed "in the same establishment or service". The industrial tribunal did not ask or answer that question. **To the extent that that is a wider**

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[269] This referred to a regional advisory council – not a regional council in a Scottish local authority sense.
[270] At page 404G.

class of comparators than is contained in section 1 (6) of the Equal Pay Act 1970, section 1(6), which is confined to an "associated employer", is displaced and must yield to the paramount force of Article 119. On this aspect of the claim it will be relevant for the industrial tribunal to examine factual areas which have not so far been explored, namely, whether the regional councils, even though none is a company, were directly or indirectly controlled by a third party - the directorate - the extent and nature of control and whether they constitute the "same establishment or service". For that purpose, it will also be relevant to consider whether common terms and conditions of employment were observed in the regional advisory councils for the relevant class of employees".

Cross-employer comparison was further considered in **South Ayrshire Council v. Morton and Others** 2002 SLT 656 CS, where the Court held that as regards the provision of public education in Scotland, teachers in all thirty two local authorities were employed in the same service.[271] The Court heard submissions on the meaning and interpretation of *'service'* as applied in paragraph 40 of the judgment of the European Court of Justice in **Defrenne II,** but made no reference to them in the judgment. The judgment of the Scottish Court is consistent with the judgment of the European Court of Justice in **Lawrence.**[272]

In **Lawrence & Ors v. Regent Office Care & Ors** [2000] IRLR 608 CA, some of the claimants, who prepared school meals, were employed by North Yorkshire County Council ("NYCC") and had made an equal value claim against the Council which was ultimately successful. Whilst the litigation in relation to that claim was continuing, in response to Government requirements that they should do so, NYCC put out to competitive tender the provision of school meals and cleaning services for the schools for which, as an education authority, they had statutory responsibility. The education

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[271] The applicants in this case did not rely on an argument that the 32 Scottish Councils were associated employers, but rather that all teachers in the public sector were subject to the provisions of the same statutory collective bargaining arrangement.

[272] In **Morton,** the factor which was central to the judgment of the Inner House was the fact that the collective bargaining arrangement which determined teacher's pay was national and both statutory and at that time permitted no derogation from the national agreement at local level (*cf* Education (Scotland) Act 1980 Sections 91 to 97A). Counsel for the applicants in **Morton** was also counsel for one of the respondents (Mitie) in **Lawrence** in the European Court of Justice. In his oral submissions to the Court, heard in January 2002, ensured the issue of a common collective bargain determining he pay was addressed. This point was reflected in the judgment of the Court, rendering unappealable the judgment of the Court of Session.

authority was divided into areas and competitive tenders were sought in relation to each area. In respect of some of the areas, outside contractor's tenders were accepted and the relevant staff became employed by them. In relation to the first and third respondents, when the staff were taken on by these contractors they were paid off by NYCC, and given a redundancy payment. These contractors thought that the Transfer of Undertakings (Protection of Employment) Regulations did not apply. As regards the second respondents, NYCC did not dismiss or purport to dismiss the employees concerned because this contractor believed that the Regulations did apply. In all cases, the employees continued to work on different, less favourable terms than they had enjoyed with NYCC. The claimants argued that unless they could compare themselves with persons who were currently employees of NYCC and whose work had been rated as of equal value to their own, they would be deprived of any of the fruits of their success in that litigation. The appellants argued that Article 141 was wide enough in its scope to entitle them, (and staff recruited after the 'transfer') to compare themselves with staff employed by NYCC who were doing work of equal value to their own albeit they were now employed by one of the Respondent companies.

The matter at issue was whether the rights conferred by Article 141 were such as to permit an employee of organisation A to make a comparison with the work done by an employee of organisation B, and claim unlawful discrimination. The Court of Appeal referred **Lawrence** to the European Court of Justice asking:

(1) whether Article 141 is directly applicable in the circumstances of this case so that it can be relied upon by the claimants in national proceedings to enable them to compare their pay with that of men working for the Council who are performing work of equal value to that done by themselves; and

(2) whether a claimant who seeks to place reliance on the direct effect of Article 141 can only do so if the respondent employer is in a position where he is able to explain why the employer of the chosen comparator pays his employees as he does.

The European Court of Justice[273] held that although the applicability of Article 141 of the EC Treaty is not limited to situations in which men and women work for the same employer, a situation such as in the present case, where the differences identified in the

[273] C-320/00 [2002] ECR I-7325 ECJ.

pay of workers performing equal work or work of equal value cannot be attributed to a single source, did not come within the scope of Article 141 since there is no body which is responsible for the inequality and which could restore equal treatment.

The most recent development in the scope of comparison based on separate and non-associated employers occurred in **Allonby v. Accrington and Rossendale College and ors** [2001] ICR 1189 CA. In this case, in order to meet the statutory requirement for a comparator (at least in a direct discrimination case), the appellant, who had previously been employed by the College, but who had been made redundant and now was attached to an agency who then contracted her to work at the College, would be required to rely on a Mr Johnstone who was not employed by her current employer (the Agency now supplying staff to the College) but was employed by her previous employer (the College) and whose pension scheme she was now denied access to, as she was no longer an employee of the College, but provided lecturing services to the College through the Agency. The Court of Appeal referred the question of cross employer comparison to the European Court of Justice. Lord Justice Sedley,[274] in particular, at paragraph 56, referred to an 'apparent conflict' between the European Court of Justice authorities on the need for a comparator in pension cases. When **Allonby** was referred to the European Court of Justice the questions referred were: -

> "1. whether the female lecturers concerned may compare themselves, in regard to their remuneration, including the conditions governing access to a pension scheme, with a male lecturer remaining in the service of the college, and
> 2 whether the lecturers concerned may demand admission to the pension scheme where the condition restricting access to that scheme to lecturers who are employees of the college results in an objectively unjustified difference in treatment?"

In his Opinion delivered on the 2nd April 2003,[275] Advocate General Geelhoed stated at paragraphs 78 and 79:

> "78. Irrespective of the situation concerning the status of employee as opposed to self-employed person, **it is the case that a comparator or a comparative framework is necessary in order to determine whether there is**

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[274] At paragraphs 51–59 of the judgment.
[275] C-256/01 2003 Pens. LR 97.

discrimination on the ground of sex. That is true also of entitlement to membership. In dealing with the first question I already observed that the situation may be unsatisfactory but that Ms Allonby, as the law currently stands, cannot by reliance on the direct effect of Article 141 EC compare herself with a comparator employed by the College.

79. Even though Ms Allonby cannot rely directly on Article 141 EC in order to compare her situation with that of Mr Johnson, **that does not mean that there cannot be indirect discrimination stemming from a sector-wide or legislative scheme.** In the present case the TSS regulations exclude lecturers who teach under an agreement to provide services. There may be (indirect) discrimination if it appears that appreciably more women than men are affected by this condition of membership. Whether that is the case and whether there is an objective justificatory ground are however matters for the national court." [Emphasis added]

The Court held that a woman whose contract of employment has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is not entitled to rely on the principle of equal pay in Article 141 of the EC Treaty in a claim against the new employer, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer. They said that, although Article 141 is not limited to situations in which men and women work for the same employer and may be invoked in cases of discrimination arising directly from legislative provisions or collective agreements as well as in cases in which work is carried out in the same establishment or service, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141[276].

There is little doubt that the extended interpretation contained in paragraphs 19 and 22 of the judgment of the European Court of Justice **Defrenne II** is the one relied upon by the

[276] In **Trustees of Uppingham School Retirement Benefits Scheme for Non-Teaching Staff and another v. Shillcock** [2002] IRLR 702 HC, Mr Justice Neuberger was uncertain on the issue of whether a comparator was necessary (and did not require to decide that, or refer it to the European Court of Justice as he was able to determine the case on other grounds) because of the reference to the European Court of Justice made by the Court of Appeal in **Allonby**.

Courts and there is no support for confining this very old case in the way described earlier, insofar as *'service'* as used by the Court in 1976 might not have been used in the context now ascribed to it, nor have been given the breadth of linguistic meaning now accorded it. There is little doubt that in order to achieve equality of pay, the widest bases of comparison have been thought necessary, so although it might be a surprise to the members of the Court in **Defrenne II** what it is presently held as being authority for there is no prospect of an argument for a more restrictive approach succeeding.[277]

The language of **Defrenne II,** with what must on any construction of language seem a lengthy continuum from 'establishment' or place of work, to 'service' and arguably a whole employment sector (absent any intermediate construct, such as employer) does accord with the potential scope of Article 141, which only refers to 'employment' and 'occupation' but has no limiting provision. Article 141 is thus very much less precise than the detailed provisions of the Equal Pay Act which confines comparison to the same establishment, or 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 class. The scope of this complicated provision requires some elaboration, particularly since at first blush it might appear that the domestic Act is too restrictive in its current form to comply with the wider European construct.

There is no definition of 'establishment' in the Equal Pay Act. In **Secretary of State for Employment and Productivity v. Vic Hallam Ltd.** [1969] ITR 108 DC, the Divisional Court held, in relation to the use of the term in the Redundancy Payments Act 1965, that there is no comprehensive test and that it is a question of fact and degree to be determined in each case. Relevant factors include; some degree of permanence; some organisation of people working there; whether it is a place in which or from which people are employed; and whether there is exclusive occupation of premises.

In **Defrenne II,** the Court said:

> "The reply to the first question must therefore be that the principle of equal pay contained in Article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular,

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[277] Standing the restatement in **Shröeder**.

> as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public."

In **Macarthys v. Smith,** the Court said[278] that comparisons were to be limited:

> "to parallels which may be drawn on the basis of concrete appraisals of the work actually employees of difference sex within the same establishments or service."

The spatial scope of comparisons under the Equal Pay Directive has not been judicially determined although it would appear to be limited in the same way as Article 141. The wording of the Court in the infringement action against the UK is ambiguous with the spatial scope undefined:[279]

> "a worker must be entitled to claim before an appropriate authority that his work has the same value as other work."

In **EC Commission v. Denmark** C-143/83 [1985] ECR 427 ECJ, the issue was whether the Danish Government had given effect to the principles of Article 119 when it confined the domestic legislation to a comparison between employees undertaking the same work at the same place. The Commission brought proceedings, arguing that the legislation failed to give effect to the principle that a comparison could be made between dissimilar work but work of equal value.

In his Opinion, Advocate General Mr Pieter Ver Loren van Thermaat, said:[280]

> "The legal problem thus presented to the Court seems at first sight to be a simple one. The Council directive in question provides clearly in Article 1 that the principle of equal pay means "for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration". Section 1 of the Danish measure implementing the directive, Act 32 of 4 February 1976, however, states that the principle of equal pay applies only to "the same work" (samme arbejde), "at the same

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[278] At para 15.
[279] At para 13.
[280] At page *428ff.*

place of work". At first sight it therefore seems clear that the Kingdom of Denmark has indeed "failed to take the measures necessary to extend the principle of equal pay ... to activities of equal value", to quote the closing passage of the reasoned opinion. Although in its reasoned opinion and in its application the Commission raises a number of additional grounds and arguments, that apparently obvious conclusion therefore constituted the main argument put forward by the Commission during the proceedings in support of the conclusions in its application. For the Commission's other arguments reference may be made to the Report for the Hearing...

...In certain circumstances comparison with work of equal value in other undertakings covered by the collective agreement in question will be necessary. As is correctly observed in the annual report for 1980 of the Danish Council for Equal Treatment of Men and Women (Ligestillingsradet), submitted by the Commission in evidence, in sectors with a traditionally female workforce comparison with other sectors may even be necessary. In certain circumstances the additional criterion of "the same place of work" for work of equal value may therefore place a restriction on the principle of equal pay laid down in Article 119 of the EEC Treaty and amplified in the directive in question. The mere fact that such a supplementary condition for equal pay which has no foundation in Article 119 or in the directive has been added must in any event be regarded as an infringement of the Treaty. That supplementary condition limits the scope, governed by the Treaty, of an extension of the principle of equal pay for men and women to activities of equal value, which in principle, according to the background of the Danish law and the arbitration award referred to, is recognised in Denmark. It therefore falls within the ambit of the Commission's application as it is to be interpreted in the light of its reasoned opinion of 25 October 1982".

In its judgment, the Court stated:

"[14] The conclusion must therefore be that the Kingdom of Denmark has failed to fulfil its obligations under the first paragraph of Article 1 of Directive 75/117 by failing in the text of Act 32 of 4 February 1976, to extend the principle of equal pay to work of equal value. Since that finding implies that the Act in question does not ensure that employees who consider themselves wronged by failure to apply that principle in a case of work of equal value are able to pursue their claims by judicial process in

accordance with Article 3 of the directive, there is no need to make a separate finding on that head.

[15] It should be added that during the hearing doubts were expressed with regard to the condition laid down in section 1 of the Danish Act, according to which the principle of equal pay for the same work is to be interpreted in relation only to a "single workplace". Since, however, the Commission did not formally raise that objection there is no reason to decide that question.

> [16] For all those reasons it must be declared that by failing to adopt within the prescribed period all the measures necessary to implement Council Directive 75/117 of 10 February 1975 on the approximation of the laws of the Members-States relating to the application of the principle of equal pay for men and women, the Kingdom of Denmark has failed to fulfil its obligations under the EEC Treaty."

In **Rockfon A/S v Specialarbejderforbundet i Danmark, acting on behalf of Søren Nielsen and Others** C-449/93 [1995] ECR I-4291 ECJ, the European Court of Justice defined establishment as meaning simply the local employment unit.[281]

In **Harding v. Scandia Asset Management Ltd.** (unreported ET 3204139/99) the claimant, a portfolio manager, sought to compare herself with two comparators based in another EU country. The employment tribunal has referred the Equal Pay Act limitation to a comparator at an establishment in Great Britain to the European Court of Justice.

The widest possible bases of comparison have been created by the European Court of Justice. This substantially increases the possibilities for applicants to seek to eliminate discrimination their pay.

(c) Common terms and conditions

The Equal Pay Act requires that for an claimant to succeed in an application in a situation where the comparator works at a different establishment, it is necessary for the claimant to establish that he or she is employed on *"common terms and conditions of employment"* as stipulated in section 1(6) of the Act.

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[281] For an example of the difficulties which can be encountered even with comparisons within the same establishment, see **Royal Copenhagen** C-400/93 [1995] ECR I-1275 ECJ, paras. 29-38

The first leading case in establishing certain key principles in this area was the case of **Leverton v. Clwyd County Council** [1989] ICR 33 HL. The claimant, a qualified school nursery nurse employed by Clywd County Council, brought an equal pay complaint against her employers. She claimed that her work was of equal value to that of one or more of eleven more highly paid male comparators who were employed at various Council sites on work ranging from caretaking and supervisory duties to clerical and administrative duties. Both the claimant and her comparators were employed under the conditions of service of the NJC for Local Authorities' Administrative Professional Technical and Clerical Services, in England known as the 'Purple Book' - the English equivalent of the 'Blue Book' governing the terms and conditions of employment for APT&C staff in Scotland as issued by the Scottish Council for the NJC. The salary of the nursery nurses lay within what was known as Scale Point 1 whilst the salaries of the comparators fell within Scales 3 and 4. However the claimant worked a 32.5 hour week as against 37 or 39 hours worked by her comparators; had 70 days holiday a year compared with 20 days (plus increments after 5 years' service) enjoyed by her comparators. These differences in hours and holidays, the Council argued defeated the claimant's claim on the grounds that they showed that she was not 'in the same employment' as her comparators, as required by sections 1(2) (c) and (6) of the Equal Pay Act. Both the employment tribunal and the Employment Appeal Tribunal agreed, holding that the significant differences in hours and holidays meant that common terms and conditions were not observed at both establishments, consequently the claimant and her comparators were not in the same employment and her claim was dismissed under section 2A (1) (a) as showing no reasonable grounds upon which the employment tribunal could determine that the jobs in question were of equal value.

A majority of the Court of Appeal dismissed her appeal on the grounds that for common terms and conditions to apply to a claimant and her comparators their terms had to be 'broadly similar' and that this was not so in this case because of the differences in hours and holidays. May L.J., however, dissented, holding that the requirement that 'common terms and conditions' apply meant no more than that the terms of the claimant and her comparators are not dependent on the establishment at which each is employed but are observed either generally or for employees of the relevant classes, i.e. the class of

employees of which the woman is a member and the class of which the man is a member regardless of their particular place of employment.

Mrs. Leverton appealed to the House of Lords, relying strongly on the minority reasoning in the Court of Appeal. The House of Lords held that for the purposes of section 1(6), a woman is entitled to equal pay with men employed at the employer's establishments other than the one at which she is employed so long as common terms and conditions are observed. It held that (1) the concept of common terms and conditions observed generally at different establishments necessarily contemplates terms and conditions applicable to a wide range of employees whose terms will vary greatly; (2) that terms and conditions of employment governed by the same collective bargaining agreement represent the paradigm, but not necessarily the only example of common terms and conditions contemplated by section 1 (6); (3) it maintained that the majority of the Court of Appeal had erred in law, in holding that it was necessary to establish a broad similarity between the woman's terms and conditions and those of her comparators. Such a construction of section 1(6) frustrated rather than served the manifest purpose of the legislation since, they maintained, it could not have been the intention of Parliament to require a woman claiming equality with a man in another establishment to prove an undefined sub-stratum of similarity between her terms and his as the basis of her entitlement to eliminate discriminatory differences. Since both the claimant and her comparators, though employed at different establishments were employed under the terms of the 'Purple Book' they were employed on common terms and conditions, and the differences in hours and holidays could not prevent them being regarded as employed in the same employment for the purposes of section 1(6). With regard to the Purple Book, Lord Bridge makes reference to and quotes the view of the dissenting member of the employment tribunal as follows

> ".... the dissenting member of the Industrial Tribunal expressed his conclusion in the matter tersely. Having referred to the Purple Book, he said: "within that agreement there are nine sections and numerous clauses. They do not apply with few exceptions, to any particular grade. It is clearly a general agreement and not specific to any particular group or class of employee. It is, in my opinion, beyond doubt that the applicant and the comparators are employed on common terms and conditions, i.e. the APT&C

agreement, and clearly it is within the provisions of Section 1(6)."

It should be noted that the main reason for the House of Lords finding in the claimant's favour on the 'common terms and conditions' point was because she and her comparators were all covered by the same collective bargaining agreement, i.e. the Purple Book and although the House of Lords allied themselves with the decision of May L.J., the dissenting member of the Court of Appeal, it is not evident, whether it contemplated allowing a woman to compare herself with comparators employed at different establishments whose terms and conditions were established by different collective agreements from hers. Accordingly, the House of Lords decision in **Leverton** does not assist the analysis of a situation where the comparator is employed at another establishment of the same employer, under a different collective bargaining arrangement negotiated by a different trade union. In his dissenting opinion in the Court of Appeal, May L.J. indicated that emphasis was to be placed on the terms and conditions of each group of relevant employees.

In order to establish the construction of section 1(6) when cross establishment claims are raised across different collective bargaining groups, it is necessary to turn to **British Coal Corporation v. Smith and Others** [1996] ICR 515 HL. In this case 1,286 claimants employed by British Coal as canteen workers or cleaners attempted to establish work of equal value with some 150 surface mine workers or clerical workers who worked at different establishments from the claimants. The employment tribunal decided as a preliminary issue that the claimants were in the same employment as their comparators for the purpose of section 1(6). British Coal appealed against this ruling and the Employment Appeal Tribunal applying the decision of the House of Lords in the **Leverton** case as their guide outlined three tests to be used in determining whether or not the claimants were in the same employment as their comparators, stating that only if all three tests were satisfied would it be fair to compare an claimant's class at one establishment with a member of the comparator's class at a separate establishment. Firstly, they maintained, both the claimant and the comparator need to be typical of their respective groups with no personal factors, such as 'red circling' affecting their terms and conditions of employment. Secondly they maintained that common terms and conditions require to be observed in relation to the claimant's class in her establishment and the

same class at the comparator's establishment, and thirdly common terms and conditions must be observed in relation to the comparator's class at his establishment and that same class at the claimant's establishment. The Employment Appeal Tribunal identified two factors from **Leverton** which they saw as having to be taken into account in establishing whether such terms and conditions were common to the establishments in question, namely the influence of geography which might indicate from a difference in pay, due to locality, that the claimant and comparator were not in the same employment and the derivation or basis upon which one arrives at the details of terms and conditions, such as historic reasons why a single employer should operate different employment regimes at different establishments.

The Employment Appeal Tribunal noted that as far as the cleaners and clerical staff were concerned the parties had already agreed that common terms and conditions of employment were observed between the relevant establishments. They required to apply the tests to the remaining groups namely the canteen workers and the mine workers. The substantive issue therefore was to decide whether in respect of these groups if their terms and conditions in relation to an incentive bonus and concessionary coal were such that they could not be said to have common terms and conditions. The Employment Appeal Tribunal decided that the canteen workers were entitled to an incentive bonus based upon a central agreement worked out at national level and that, as a result, common terms and conditions could be said to apply to such workers at the relevant establishments. Mine workers however, benefited from a somewhat more complex arrangement being entitled to receive both bonus incentives and concessionary coal, the Employment Appeal Tribunal decided that the right to concessionary coal derived from a national agreement and so was common to all mine workers, they were however divided over the issue of the incentive bonus. The majority, (Wood J. dissenting) concluded that all surface workers had the bonus entitlement as a term of their contract and that such terms looked at in the round, came under the one umbrella of a national agreement. They pointed out that even bonuses covered by a single national agreement were bound to depend for detailed calculation upon specific local variations. The simple fact that bonuses varied in amount did not indicate that each did not derive from common formula incorporated in common terms and conditions of employment. Thus having ruled that mine workers held common terms and conditions relating to both the incentive bonus and the concessionary coal the majority of the Employment Appeal Tribunal concluded that cleaners and canteen staff

were in the same employment as clerical staff and mine workers for the purposes of section 1(6).

A feature of the decisions of the employment tribunal and the Employment Appeal Tribunal was the taking of a 'common sense' approach to the question of 'same employment'. They rejected British Coal's contention that the reference to 'common terms and conditions' meant that the terms and conditions pertaining to employees in the same class in the different establishments had to be the same for section 1(6) to be satisfied, instead they accepted a broad comparison between the terms and conditions of employees in the same class in the different establishments. The employment tribunal had concluded that the surface mine workers were all in the same employment as each other no matter at which establishment they worked because they were governed by national terms and conditions. Although there were local variations in the amount of incentive bonus and concessionary coal to which surface mine workers were entitled, the employment tribunal was of the view that these variations did not destroy the centralised industry-wide nature of the surface workers terms and conditions: similarly they reached the same conclusion for canteen workers, cleaners and clerical workers, thus establishing that "common" within the meaning of section 1(6) means terms and conditions which are substantially comparable on a broad basis rather than the same or the same terms and conditions subject only to *de minimis* differences.

British Coal appealed against the decision. The Court of Appeal in England held that 'common' terms and conditions within the meaning of section 1(6) of the Equal Pay Act means the 'same' terms and conditions rather than those which are 'broadly similar' or 'to the same overall effect'. Consequently, a male comparator may be selected from another establishment operated by the female claimant's employer or an associated employer only if the same terms and conditions are observed in relation to the comparator's class at his establishment and that same class of male employee at the claimant's establishment. If there are no employees of the relevant class at the claimant's establishment it is necessary to determine what terms would be available to such male employees at that establishment. In order to satisfy the same employment 'requirement' the Court of Appeal held that it is not necessary that women in the claimant's class of employees enjoy 'common', that is the same terms and conditions at both establishments. However, evidence of the terms and conditions which do apply to the female employees at the comparator's establishment

is, they maintained, directly relevant in the claim that section 1(6) applies. The Court of Appeal held that it was not possible to say that the terms and conditions on which surface mine workers were employed were the same, regardless of the establishments at which they worked, since the terms entitling those workers to an incentive bonus and to concessionary coal were expressly left for local agreement and as a result substantial variation had resulted from the local negotiating process. Consequently the employment tribunal erred in law in holding that all of the named comparators at other establishments were in the same employment as the claimants, and that the claimants were limited in their choice of male comparators to those districts or areas which had agreed the same terms on the incentive bonus and the concessionary coal allowance.

Put shortly, Lord Justice Balcombe in the Court of Appeal was stating that where section 1(6) is relied on to justify the choice of a male comparator from some other establishment other than the one in which the woman claimant works a second comparison becomes necessary. The underlying comparison is between the woman's and the man's terms of employment but first, before a male comparator can be selected from another establishment, there has to be a comparison between the terms and conditions of employment at the two establishments. Where there is a single collective agreement covering both male and female employees of the same employer, regardless of establishment then **Leverton** decides that the workers are in the same employment. Where that is not the case, according to Lord Justice Balcombe it becomes necessary to decide what degree of similarity is sufficient to make the terms 'common' and whether the male comparator can be chosen from an establishment other than the woman's own, where the test is satisfied as regards male employees but not as regards women of the same class as hers. 'Common terms and conditions' as required by the definition of 'same employment' in section 1(6), meant, according to Lord Justice Balcombe the same terms, that is identical, equal or precisely the same terms. It was he considered not enough that the terms were broadly similar since, if that was the case, a woman would be able to succeed in respect of a particular and different term applicable to a male comparator at another establishment when she would fail against a comparator from her own establishment. This he maintained would have the indirect result of compelling the employer not only to pay women equally with men but also to provide identical terms of pay for all employees doing work of equal value at different establishments, which he believed went beyond the purpose and intention of the legislation.

The case was appealed to the House of Lords which held that the employment tribunal had not erred in finding that the claimant canteen workers and cleaners were in the 'same employment' within the meaning of section 1(6) of the Equal Pay Act as their male comparators in different establishments who were employed as surface mine workers because there were 'common terms and conditions of employment' observed as between the establishments. In maintaining that common terms and conditions within the meaning of section 1(6) meant terms and conditions which are substantially comparable on a broad basis rather than the same terms and conditions subject only to *de minimis* differences Lord Slynn of Hadley reasoned that:[282]

> "The real question, however, is what is meant by 'common terms and conditions of employment' and between whom do such terms and conditions have to be common?
>
> It is plain and it is agreed between the parties that the woman does not have to show that she shares common terms and conditions with her comparator, either in the sense that all the terms are the same, since necessarily his terms must be different in some respect if she is to show a breach of the equality clause, or in regard to terms other than that said to constitute the discrimination.....
>
> ..... What therefore has to be shown is that the male comparators at other establishments and at her establishment share common terms and conditions. If there are no such men at the applicant's place of work then it has to be shown that like terms and conditions would apply if men were employed there in the particular jobs concerned.
>
> The corporation contends that the applicants can only succeed if they show that common terms and conditions were observed at the two establishments for the relevant classes in the sense that they apply 'across the board'; in other words the terms and conditions of the comparators are 'common in substantially all respects' for such workers at her pit and at the places of employment of the comparators. This in effect means that all the terms and conditions must be common i.e. the same, subject only to *de minimis* differences.

[282] At page 526D*ff*

> The applicants reject this and contend that it is sufficient if there is a broad similarity of terms rather than that they are strictly coterminous.
>
> .... The real question is what the legislation was seeking to achieve. Was it seeking to exclude a woman's claim unless, subject to *de minimis* exceptions, there was complete identity of terms and conditions for the comparator at his establishments and those which applied or would apply to a similar male worker at her establishment? Or was the legislation seeking to establish that the terms and conditions of the relevant class were sufficiently relevant for a fair comparison to be made, subject always to the employer's right to establish a 'material difference' defence under s.1(3) of the Act?
>
> If it was the former then the woman would fall at the first hurdle if there was any difference between the terms and conditions between the men to the various establishments, since she could not then show that the men were in the same employment she was. The issue as to whether the differences were material so as to justify different treatment would then never arrive.
>
> I do not consider that this could have been intended. The purpose of requiring common terms and conditions was to avoid it being said simply - 'a gardener does work of equal value to mine and my comparator at another establishment is a gardener'. It was necessary for the applicant to go further and to show that gardeners at other establishments and at her establishment were or would be employed on broadly similar terms it was necessary but it was also sufficient. "

In rejecting all dictionary definitions and literal meanings wherein the word 'common' is held to be analogous with 'the same' or 'identical', Lord Slynn gave a liberal interpretation of 'common' such as to permit very unlikely comparisons to pass the section 1(6) hurdle, on the basis that those of no merit will fail to pass the section 1(3) hurdle.

Michael Rubenstein[283] has suggested that a working test is to ask

> "whether a woman doing the complainant's job would enjoy significantly different terms and conditions were she employed on her existing work in the comparator's

[283] In his comment in [1989] IRLR 2.

> establishment and, similarly, whether the comparator would have significantly different terms and conditions if employed in the complainant's establishment."

This is a useful straightforward test which will no doubt suffice until overtaken by further complexity, but it has one major inadequacy, namely that it cannot cope with the situation where there is absolutely no possibility of the job the applicant undertakes, being done in the comparators establishment; in such a case to make the test applicable it would be necessary to create an additional dimension – namely the hypothetical job in another establishment.[284]

The Courts have extended the basis for comparison under the Act as far as it can be taken, any further extension will have to involve a hypothetical comparator.

6.4 Conclusion

The foregoing illustrates that although the limited scope for comparison under the Equal Pay Act has been extended by European law, the European Court of Justice is not prepared to go outwith a legal entity unless the source of funding or decision making is the same, i.e. there needs to be some strictly drawn connecting factor. Thus European law, whilst it may be coming closer to developing in such a way that might embrace, with some restrictions, whole industry sectors, is in part, still cautious in this area. In respect of the domestic Act, the absence of any definition of 'establishment' has allowed the Act to absorb expansion, and accommodate European interpretation. Indeed the courts and appellate tribunals of England, Northern Ireland and Scotland have been more than prepared to entertain an expansionist approach and nothing in the Act's provisions has precluded that. In conclusion it is contended that the present legislative provision has been habile to incorporate within its provisions the law as it has developed over approximately 30 years.

[284] This issue arose in **Glasgow City Council v. Marshall** at the level of the employment tribunal, but the issue did not require to be pursued on appeal.

CHAPTER 7. THE SCOPE OF PAY

7.1 Introduction

This chapter considers the scope of what constitutes 'pay' in both European and domestic law, considering the way in which it has been interpreted and developed. At the outset, it should be noted that the Equal Pay Act and Article 119/141, and their attendant case law, interpret 'pay' in two different ways, depending upon the context in which the need to do so arises. When it is a matter of deciding whether a particular benefit can be the subject of a claim by an individual worker, a wide interpretation is given, ensuring that not just disparity in wages or salary but also in other employer-provided benefits can be challenged. When the term arises in the context of an employer's defence, when it is the employer's case that an apparent disparity is in fact not real, because a difference in, say, basic wages is balanced by the receipt of other benefits, it will be narrowly defined.[285]

7.2 Pay

In this part of the chapter, the way in which pay has been defined and developed, in both the jurisprudence of the European Court of Justice and the domestic appellate tribunals and courts is considered. Of fundamental significance, in the context of domestic law, is the fact that that for the purposes of making a claim for equal pay, it is necessary to show a difference in contractual entitlement. Where payments are non-contractual, the appropriate vehicle for a claim in domestic law is the Sex Discrimination Act 1975. However, the right under Article 141 is wider than the Equal Pay Act, as it is not restricted to contractual entitlements. It states:

> "For the purposes of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration.[286]whether in cash or kind, which the worker receives, directly or indirectly, in respect of his employment[287] from his employer."

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[285] See Chapter 3 for a discussion of **Hayward v. Cammell Laird Shipbuilders Ltd** [1985] ICR 71 HL and **Jämställdhetsombudsmannen v. Örebo Läns Landsting** C-236/98 [2000] ECR I-2189 ECJ; with regard to the context of the employer's defence, see Chapter 12 and the manner of operation of the equality clause.

[286] In French: *tous autres advantages*

[287] In French: *en raison de l'emploie de çe dernier*

Article 141 does not apply to non-pay terms such as contractual holiday entitlement, which in UK law would be included in the Equal Pay Act, in this regard the relevant EU provision is contained in the Equal Treatment Directive.[288] In accordance with paragraphs 23 and 24 of the judgment of the European Court of Justice in **Gillespie & Ors v. Northern Health & Social Services Board & Ors** C-342/93 [1996] ECR I-475 ECJ, the Equal Treatment Directive does not apply to pay and if what is at issue constitutes pay and therefore falls within the scope of Article 141 of the Treaty and Directive 75/117/EEC, it cannot be covered by Directive 76/207/EEC as well. The Court said, at paragraph 24:

> "...that Directive, as is clear from its second recital in the preamble, does not apply to pay within the meaning of the above mentioned provisions."

"Pay', for the purposes of Article 141 includes indirect benefits and non-contractual bonuses.

The wide interpretation of the definition of pay in Article 119 can be seen in cases such as **Garland v. British Rail Engineering** C-12/81 [1982] ECR 359 ECJ where the Court ruled that the fact that female employees, on retirement, could no longer enjoy travel facilities for their spouses and dependent children, whilst male employees continued to do so, constituted discrimination contrary to Article 119. Since they were benefits conferred in respect of employment, even if after retirement, and irrespective of any specific contractual obligation, they were held to constitute pay. In **Hammersmith and Queen Charlotte's Special Health Authority v. Cato** [1988] ICR 132 EAT, it was explained that the key factor is whether there is an employment relationship to link the consideration received by a worker; if there is, then it is 'pay' within Article 119, and it does not matter that the sums were received only after the employment had ended.[289] Similarly, in **Kowalska v. Freie und Hansestadt Hamburg** C-33/89 [1990] ECR I-2591 ECJ, the meaning of 'pay' under Article 119 was applied to severance payments. A collective agreement restricted severance payments to full-time workers. This, it was alleged, amounted to indirect discrimination against women, contrary to Article 119. It was established that the proportion of part-time women in public service in Germany (from which the reference to the European Court of Justice originated) exceeded the

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[288] 76/207/EEC.

[289] More recently, see also **Grant v. South-West Trains** C-249/96 [1998] ECR I-621 ECJ.

proportion working full-time, namely 77.3 per cent of civil service employees were women and part-time workers and only 55.5 per cent were women and full-time employees. It was held, following **Barber v. Guardian Royal Exchange Assurance Group** C-262/88 [1990] ECR I-1889 ECJ, that the severance payment was 'pay' for the purposes of Article 119, it did not matter that payment was made after the end of the relationship; in the words of the Court at paragraph 13 of their judgment:

> "As regards the payments made to the worker upon the termination of the employment relationship, it must be noted that such payments constitute a form of deferred remuneration to which the worker is entitled by virtue of his employment, but which is paid to him at the time of the termination of the employment relationship".

'Pay' may also extend to additional benefits associated with the termination of employment on grounds of redundancy or unfair dismissal. In **EC Commission v. Belgium** C-173/91 [1993] ECR I-673 ECJ, under Belgian law, workers aged 60 and over who were made redundant enjoyed the right to an additional monthly payment from their last employer, provided they were entitled to unemployment benefit. But, under Belgian legislation, women ceased to be entitled to unemployment benefit at 60, whereas men continued to be entitled to benefit until 65. It was held, in infringement proceedings brought by the Commission, the additional payments constituted 'pay' for the purposes of Article 119 despite the argument of the Belgian Government that, being like early state retirement pensions, they constituted a form of social security falling within the exception in Article 7(1)(a) of Directive 79/7.[290] A key consideration was that payment was due by reason of the employment relationship which existed and had it origins in an agreement between the social partners.

In Britain, the Employment Appeal Tribunal in **McKechnie v. UBM Building Supplies (Southern) Ltd** [1991] ICR 710 EAT, acknowledged the dramatic widening of 'pay' brought about by **Barber** and stated that as a consequence of the decision, payments made on compulsory redundancy, statutory or contractual, were to be seen as within the scope of Article 119. The Court of Appeal, in **Clark v. Secretary of State for Employment** [1997] ICR 64 CA, held that Article 119 did not extend to payments made by the Secretary of State under section 184 of the Employment Rights Act 1996 in respect

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[290] Equal Treatment (Social Security) Directive

of minimum periods of notice, arising as the result of an employer's insolvency because of the exclusion of payments made by employers into statutory social security schemes in **Defrenne I.**

Following certain observations made in **R v. Secretary of State for Employment** ***ex parte*** **Equal Opportunities Commission** [1994] ICR 317 HL, the Employment Appeal Tribunal in **Mediguard Services Ltd v. Thame** [1994] ICR 751 EAT held that compensation for unfair dismissal was also 'pay' for the purposes of Article 119. Indeed, the Employment Appeal Tribunal thought that this was so evidently correct that there was no basis for referring the question to the European Court of Justice; in the view of the Tribunal, the matter was *acte clair*. Be that as it may, as regards unfair dismissal compensation, the European Court of Justice confirmed in **R v. Secretary of State for Employment, ex p Seymour-Smith and Perez** C-167/97 [1999] ECR I-623 ECJ that it was possible to challenge the requirement that an employee must have two years' service before being able to complain of unfair dismissal as indirectly discriminatory against women, given that, on the whole, fewer women than men can comply.[291] In **Rinner-Kuhn v. FWW Spezial-Bebaudereinigung GmbH** C-171/88 [1989] ECR 2743 ECJ, the Court ruled that statutory sick pay, i.e. wages which an employer is required by law to continue to pay an employee in the event of illness, fell within the meaning of pay in Article 119. However, it is difficult to distinguish this kind of pay from a social-security benefit. Although these wages were to be paid by the employer, in the case of employees who worked a certain number of hours for a particular period of time, 80 per cent of such payment was thereafter to be reimbursed by the State. Given this fact, the wages would seem to be paid more as a matter of 'social policy' as suggested in **Defrenne I**, than as pay as part of the contract of employment. Advocate General Darmon did not take this view and emphasised the fact that the sick pay was directly related to the wages paid and to the hours and service of the employee. Clearly, it is in an employee's interests that such sick pay is classified as pay rather than social security, given that Article 119, unlike Directive 79/7, is directly effective both against the State and against private employers.

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[291] The European Court of Justice accepted this was arguable, but gave no clear indication as to what the answer should be, leaving it to the national court to consider the statistical and other evidence relevant to the existence of indirect discrimination. The House of Lords pronounced on this matter in **R v. Secretary of State for Employment ex parte Seymour-Smith and Perez** (No 2) [2000] ICR 244 HL, and has held (by differing majorities)(a) there was sufficient evidence to show indirect discrimination but that (b) the condition was, in the circumstances, justified.

Special bonuses were also considered to be pay in **Commission v. Luxembourg** C-58/81 [1982] ECR 2175 ECJ and in **Lewen v. Denda** C-333/97 [1999] ECR I-7243 ECJ, the European Court of Justice held that a Christmas bonus paid to staff as an incentive for future work and/or loyalty to the firm was likewise 'pay' for the purposes of Article 119.

In **Nimz v. Freie und Hansestadt Hamburg** C-184/89 [1991] ECR I-297 ECJ, the claimant was not challenging pay rates in themselves, but rather the rules governing the system of salary classification into grades. The court confirmed that such rules fell within the concept of pay in Article 119, since they directly governed changes in employees' salaries.[292]

In **Hill and Stapleton v. Revenue Commissioners and Department of Finance** C-243/95 [1998] ECR I-3739 ECJ, it was held that the term 'pay', and thus Article 119, could be applied to a system which classified, for the purposes of pay progression, workers changing from job-sharing to full-time status. Ms Hill and Ms Stapleton were able to rely on Article 119 to challenge a rule of their employers, the Irish civil service, which accorded to them, because of their job-sharing service, a pay progression less favourable than would have applied had they been working full-time. In simple terms, they advanced up their pay scales to a lower point than they would have reached had they not been job-sharing. Since the great preponderance of jobsharers were female (98%), the application of this system amounted to indirect discrimination in pay which, in the absence of objective justification, was unlawful.

In **Arbeiterwohlfahrt der Stadt Berlin eV v. Botel** C-360/90 [1992] ECR I-3589 ECJ, **Kuratorium fur Dialyse und Nierentransplanation v. Lewark** C-457/93 [1996] ECR I-243 ECJ and **Freers and Speckmann v. Deutsche Bundepost** C-278/93 [1996] ECR I-1165 ECJ, the Court ruled that statutorily required compensation payments to workers attending training courses which gave them the knowledge required for working on staff councils would constitute pay, since, even though it did not derive from the contract of

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[292] In contrast, rules governing the calculation of the length of service of public servants for the purposes of determining eligibility for promotion, and thus indirectly determining the possibility of access to a higher level of remuneration, were a matter of equal treatment rather than equal pay, according to **Gerster v. Freistaat Bayern** C-1/95 [1997] ECR I-5253 ECJ.

employment, it was nevertheless paid by the employer by virtue of legislative provisions and under a contract of employment.[293]

Special treatment afforded to women in connection with pregnancy or childbirth is excluded from the Equal Pay Act by section 6(1). This means that a man cannot complain about special treatment a woman receives in connection with pregnancy or childbirth. The rights of women on maternity leave proceed on the basis that she is in a special protected position and is not entitled to claim equal pay in respect of wages or salary. In **Gillespie & Ors. v. Department of Health and Social Services** C-342/93 [1996] ECR I-475 ECJ, the facts arose prior to the adoption of the Pregnant Workers Directive 92/85. The Court ruled that since maternity benefit paid by an employer under legislation or collective agreements was based on the employment relationship, it constituted pay within the meaning of Article 119. Although this did not mean that women were required to receive full pay during maternity leave, they had to receive pay which was not so low as to undermine the purpose of such leave, and they must, like any other worker still linked to the employer by the contract of employment, benefit from any pay rise which is awarded during the period of maternity leave.[294] In **Todd v. Eastern Health and Social Services Board & Anr. (No. 2)** [1997] IRLR 410 NICA the Northern Ireland Court of Appeal confirmed that a woman on maternity leave is not entitled to compare herself with a man on sick leave.

In **CNAVTS v. Thibault** C-136/95 [1998] ECR I-2011 ECJ, the Court required to consider the refusal to grant a woman a performance assessment, on the grounds that she had been absent from work for more than six months of the relevant year, where the absence was largely due to maternity leave. The performance assessment normally led to a "promotion", in terms of a pay increment, but the Court dealt with the case under the Equal Treatment Directive, rather than Article 119 and held that to deny Ms Thibault her performance assessment was directly discriminatory, because if she had not been on maternity leave, she could have qualified for the increment. The reasoning appears to imply that a woman on maternity leave must be compared with her colleagues who remain at work. However, the Court did not expressly acknowledge this, nor did it

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[293] See also **Davies v. Neath Port Talbot County Borough Council** [1999] IRLR 769 EAT.
[294] See also the Opinion of Advocate General Ruiz-Jarabo Colomber in **Margaret Boyle & Ors. v. Equal Opportunities Commission** C-411/96 [1998] ECR I-6401 ECJ.

distinguish this case from others, in which the Court has consistently held that a woman on maternity leave is in a special situation, not comparable with any others.

The extension of the definition of pay beyond contractual benefits brings a degree of uncertainty into the area of equal pay, but only at the margins. Where the extension of the definition has had a marked effect is in relation to pensions.

7.3 Pensions

In **Defrenne I,** the Court was asked whether a Belgian law concerning retirement pensions, which excluded air hostesses from its scope, fell within the ambit of Article 119. The retirement pension was granted under the terms of a social security scheme financed by contributions from workers, employers, and by State subsidy. Defrenne argued that there was a direct and necessary link between the retirement pension and salary, since certain conditions of the employment directly influenced the amount of the pension. The Commission argued that social security benefits in general and pensions in particular must be excluded from the scope of Article 119. The Court stated, at page 451:

> "6. The provision in the second paragraph of the article extends the concept of pay to any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer.
> 7. Although consideration in the nature of social security benefits is not therefore in principle alien to the concept of pay, there cannot be brought within this concept, as defined in Article 119, social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers.
> 8. These schemes assure for the workers the benefit of a legal scheme, the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy.
> 9. Accordingly, the part due from the employers in the financing of such schemes does not constitute a direct or indirect payment to the worker.

> 10. Moreover the worker will normally receive the benefits legally prescribed not by reason of the employer's contribution but solely because the worker fulfils the legal conditions for the grant of benefits."

Although the Court stressed that 'consideration in the nature of social security benefits' was not in itself excluded from the concept of pay, the determining role of the State and the lack of involvement of the particular employer are important. The Court summed up by stating that the pension scheme was set up essentially as a matter of social policy and not as a part of the employment relationship in question. Its definition of the difference between pay and social security is significant, since equal treatment in social security is not covered by article 141, but primarily by the Social Security Directive[295] whereas occupational social security is covered in part by this Article and in part by Directive 86/378[296] and the amending Directive 96/97.

The contributions made by an employee to his pension fund were seen by the Court in **Worringham and Humphreys v. Lloyds Bank Ltd** C-69/80 [1981] ECR 767 ECJ, as 'pay', since they were deducted from the employee's wages;[297] Lloyds Bank required all of their male employees to join a contributory pension scheme, but because so many young women used to leave their employ to have families, they did not require female employees to join a pension scheme until the age of 25. Consequently, male bank clerks under 25 had to pay pension contributions; females under 25 did not. To remedy that inequality, the Bank paid those males 5 per cent more than those females. It then deducted 5 per cent from the men by way of pension contributions. Hence the men and women both took home exactly the same amount. There was nevertheless an element of sex discrimination in the scheme, in that (1) the higher gross pay for men brought indirect benefits (in so far as it was the basis of calculation for redundancy payments, the basic award in unfair dismissal, and unemployment benefit) and (2) a male employee who left the Bank before he reached 25 could reclaim his pension contributions; whereas a female could not. Such discrimination was rendered lawful by virtue of section 6 of the Equal Pay Act, as being a term relating to retirement. The Court of Appeal was asked to say that it was contrary to Community law. The court tended towards the view that private

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[295] 79/7 EEC
[296] Equal Treatment (Occupational Social Security Schemes) Directive.
[297] See also Case 23/83, **Liefting v. Directie van het Academisch Ziekenhuis bij de Universiteit van Amsterdam** [1984] ECR 3225 ECJ.

pension schemes could be regarded as providing deferred remuneration, and hence could be treated as part of the employee's 'pay' within Article 119; as distinct from state pensions or state subsidised schemes, which were social security payments and outside the Article. However, they were not confident of that view and referred the question of the interpretation of Article 119 of the Treaty in relation to the facts of the case to the European Court. The European Court of Justice declined to be drawn further than was necessary to decide the case. The contributions to the pension scheme paid by the employer in the employee's name were held to be part of the employee's 'pay' for the purposes of the Treaty; and that was so even if the employer owed no legal duty to the employee to pay them.

Referring to the definition of 'pay' in Article 119, the Court said of the pensions contributions:

> "Sums such as those in question which are included in the calculation of the gross salary payable to the employee and which directly determine the calculation of other advantages linked to the salary, such as redundancy payments, unemployment benefits, family allowances and credit facilities, form part of the worker's pay within the meaning of the second paragraph of article 119 of the Treaty even if they are immediately deducted by the employer and paid to a pension fund on behalf of the employee. This applied *a fortiori* where those sums are refunded in certain circumstances and subject to certain deductions to the employee as being repayable to him if he ceases to belong to the contractual retirement benefits scheme under which they were deducted."

The most significant developments in the area of uncertainty between pay and social security, however, came in the rulings relating to occupational pensions in the cases of **Barber v. Guardian Royal Exchange Assurance Group** C-262/88 [1990] ECR I-1889 ECJ and **Bilka-Kaufhaus GmbH v. Karin Weber von Hartz** C-170/84 [1986] ECR 1607 ECJ along with the flood of litigation which followed the **Barber** ruling.

The Court first addressed the issue of occupational pension schemes directly in **Bilka-Kaufhaus**. At the time judgment was given, a proposal for what subsequently became Directive 86/378 on occupational social security, to supplement Directive 79/7 on statutory social security, was being considered by the Council of Ministers.

The terms of the 1986 Directive indicated that the institutions considered occupational pensions to be a matter of social security rather than pay, so that they were dealt with in a manner similar to matters covered by Directive 79/7, rather than under Article 119. However, the Court in **Bilka** took a different view, in the context of a supplementary occupational pension scheme, entirely financed by the employer:

> "20. It should be noted that according to the documents before the Court the occupational pension scheme at issue in the main proceedings, although adopted in accordance with the provisions laid down by German legislation for such schemes, is based on an agreement between Bilka and the staff committee representing its employees and has the effect of supplementing the social benefits paid under national legislation of general application with benefits financed entirely by the employer.
>
> 21. The contractual rather than the statutory nature of the scheme in question is confirmed by the fact that, as has been pointed out above, the scheme and the rules governing it are regarded as an integral part of the contracts of employment between Bilka and its employers.
>
> 22. It must therefore be concluded that the scheme does not constitute a social security scheme governed directly by statute and thus does not fall outside the scope of Article 119. Benefits paid to employees under the scheme therefore constitute consideration received by the worker from the employer in respect of his employment, as referred to in the second paragraph of Article 119."

By way of contrast with the statutory pension scheme in **Defrenne I**, the Court in this case highlighted three factors: (1) the contractual nature of the pension scheme, (2) the fact that it was not directly governed by statute but by the agreement between employer and employee, and (3) that it was not financed in part by the public authorities but entirely by the employer. The fact that the employer chose to arrange the scheme in a way which corresponded to the statutory social-security scheme was held to be irrelevant, and the benefits paid to employees under the occupational scheme thus constituted 'pay'.[298]

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[298] In **Dietz v. Stichting Thuiszorg Rotterdam** C-435/93 [1996] ECR I-5223 ECJ, the Court also added that the fact that affiliation to an occupational pension scheme was made compulsory by legislation for employees, not just for reasons of social policy but also relating to considerations of competition in a particular economic sector, was irrelevant to the application of Article 119.

Subsequently, in **Newstead v. Department of Transport & Anr.** C-192/85 [1987] ECR 4753 ECJ, the Court had to consider whether compulsory contributions of employees to a contracted-out occupational pension scheme also constituted pay within Article 119. The case involved a civil servant who, under a compulsory pension scheme, was obliged to pay 1.5 per cent of his gross salary to a widow's pension in contrast to female employees who did not have to do so. The Court held this was not a breach of Article 119, since it involved deduction of contributions from gross pay (and was not therefore a disparity in 'pay' as defined in the Article). The Court went on to hold that there was no breach of the Equal Treatment Directive, since this did not apply to social security matters. It had ruled in **Bilka** that payments to employees from a supplementary occupational pension scheme constituted pay even though the scheme was adapted to correspond with the statutory social security scheme, but, in **Newstead,** it reasoned that since the occupational pension scheme was in part a substitute for the statutory pension scheme, contributions were in the nature of a social security benefit and would fall outside the scope of Article 119. It will become clear after considering the ruling in **Barber** and subsequent decisions below, that the authority of **Newstead** is now very weak, if indeed it has not been overruled;[299] the payments in **Newstead** would have to be distinguished from the payments made in **Neath v. Hugh Steeper Ltd.** C-152/91 [1993] ECR I-6935 ECJ[300] which were held, following **Barber,** to constitute pay.

Although the ruling in **Bilka** should have warned the institutions which were in the process of adopting Directive 86/378 and treating occupational pensions as social security, not subject to Article 119, the Directive was nevertheless adopted in 1986. This difference of view between the Member States in the Council, on the one hand, and the Court, on the other, was starkly highlighted in **Barber,** where the Court once again asserted its authority over the legislative institutions by reading Article 119 in such a way as to render much of Directive 86/378 redundant.

In **Barber,** the facts were that Mr Barber, an employee of Guardian, was made redundant at the age of 52; he belonged to an occupational pension scheme set up and wholly financed by Guardian, which was regarded by the UK Occupational Pensions Board as a

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[299] Curtin, D., *'Scalping the Community Legislator: Occupational Pensons and "Barber"'* (1990) 27 *CMLRev.* 475, 480-1 has suggested that it may remain as authority for the narrow proposition that employee contributions to a widow's pension fund are a matter of social security, rather than pay.
[300] See para. 31

'contracted-out' scheme under social security legislation, and as a substitute for the earnings-related part of the state pension scheme. This meant that members of the contracted-out scheme would contractually waive that part of the state pension scheme. Barber claimed that the terms of redundancy relating to his entitlement to an early retirement pension were in breach of Article 119, since a woman would be entitled to an immediate pension on reaching 50, whereas for a man the relevant age was 55. The question was, in essence, whether contracted-out occupational pension schemes were governed by the principle set out in **Defrenne I**, in which case they were social security, or that in **Bilka**, in which case they were pay. Advocate General van Gerven attempted to explain why payments which were required under statute, such as the statutory minimum redundancy payment, did not necessarily constitute social security benefits, but could constitute pay:

> "The fact that the employer's duty to pay compensation is dictated by social security considerations is not, in my view, sufficient to prevent a minimum payment from falling within the scope of Article 119. The same situation arises with regard to statutory provisions on the minimum wage. It would seem to be self-evident that the salary paid by an employer falls in its entirety within Article 119 even though it is wholly or partly subject to statutory provisions on the minimum wage.
>
> As stated earlier, the crux of the matter is the existence of an unseverable causal connection between the employment and the benefit."

The Court agreed and ruled that severance benefits, including statutory redundancy payments, would constitute pay under Article 119:

> "13. As regards, in particular, the compensation granted to a worker in connection with his redundancy, it must be stated that such compensation constitutes a form of pay to which the worker is entitled in respect of his employment, which is paid to him upon termination of the employment relationship, which makes it possible to facilitate his adjustment to the new circumstances resulting from the loss of his employment and which provides him with a source of income during the period in which he is seeking employment.
> 14. It follows that compensation granted to a worker in connection with his redundancy falls in principle within the concept of pay for the purposes of Article 119 of the Treaty.

15. At the hearing, the United Kingdom argued that the statutory redundancy payment fell outside the scope of Article 119 because it constituted a social security benefit and not a form of pay.

16. In that regard it must be pointed out that a redundancy payment made by the employer, such as that which is at issue, cannot cease to constitute a form of pay on the sole ground that, rather than deriving from the contract of employment, it is a statutory or ex gratia payment.

17. In the case of statutory redundancy payments it must be borne in mind that, as the Court held in its judgment of 8 April 1976 in Case 43/75 **Defrenne v. Sabena** [1976 ECR 455 paragraph 40, Article 119 of the Treaty also applies to discrimination arising directly from legislative provisions. This means that benefits provided for by law may come within the concept of pay for the purposes of that provision.

18. Although it is true that many advantages granted by an employer also reflect considerations of social policy, the fact that a benefit is in the nature of pay cannot be called in question where the worker is entitled to receive the benefit in question from his employer by reason of the existence of the employment relationship."

The Court answered the question whether redundancy-related benefits, including a private occupational pension, constituted pay within article 141 or Directive 75/117. They said:

"22. It must be pointed out in that regard that, in its judgment of 25 May 1971 in Case 80/70 **Defrenne v. Belgium** [1971] ECR 445, paragraph 7 and 8, the Court stated that consideration in the nature of social security benefits is not in principle alien to the concept of pay. However, the Court pointed out that this concept, as defined in Article 119, cannot encompass social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are compulsorily applicable to general categories of workers.

23. The Court noted that those schemes afford the workers the benefit of a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship than by considerations of social policy.

24. In order to answer the second question, therefore, it is necessary to ascertain whether those considerations

also apply to contracted-out private occupational schemes such as that referred to in this case.

25. In that regard it must be pointed out first of all that the schemes in question are the result either of an agreement between workers and employers or of a unilateral decision taken by the employer. They are wholly financed by the employer or by both the employer and the workers without any contribution being made by the public authorities in any circumstances. Accordingly, such schemes form part of the consideration offered to workers by the employer.

26. Secondly, such schemes are not compulsorily applicable to general categories of workers. On the contrary, they apply only to workers employed by certain undertakings, with the result that affiliation to those schemes derives of necessity from the employment relationship with a given employer. Furthermore, even if the schemes in question are established in conformity with national legislation and consequently satisfy the conditions laid down by it for recognition as contracted-out schemes, they are governed by their own rules.

27. Thirdly, it must be pointed out that, even if the contributions paid to those schemes and the benefits which they provide are in part a substitute for those of the general statutory scheme, that fact cannot preclude the application of Article 119. It is apparent from the documents before the Court that occupational schemes such as that referred to in this case may grant to their members benefits greater than those which would be paid by the statutory scheme, with the result that their economic function is similar to that of the supplementary schemes which exist in certain Member States, where affiliation and contribution to the statutory scheme is compulsory and no derogation is allowed. In its judgment of 13 May 1986 in Case 170/84 **Bilka-Kaufhaus v. Weber von Hartz** [1986] ECR 1607, the Court held that the benefits awarded under a supplementary pension scheme fell within the concept of pay, within the meaning of Article 119.

28. It must therefore be concluded that, unlike the benefits awarded by national statutory social security schemes, a pension paid under a contracted-out scheme constitutes consideration paid by the employer to the worker in respect of his employment and consequently falls within the scope of Article 119 of the Treaty.

29. That interpretation of Article 119 is not affected by the fact that the private occupational scheme in question has been set up in the form of a trust and is administered by trustees who are technically

> independent of the employer, since Article 119 also applies to consideration received indirectly from the employer."

Perhaps because of the confusion over **Bilka** and **Newstead**, the **Barber** ruling, in which the issue of 'contracted-out' occupational pension schemes was directly addressed, came as a shock. Many had assumed, in spite of the **Bilka** ruling, that if an occupational pension scheme was contracted out, i.e. was set up by an employer in direct substitution for and in fulfilment of the obligations of the statutory scheme, payments of benefits to employees (and also, according to **Newstead**, deductions from the net pay of employees) would, by analogy with that statutory scheme, be treated as social security rather than as pay.

The Court, mirroring its reasoning in **Bilka**, focused on three features of the contracted-out scheme; firstly, it was agreed and entirely financed by the employer, not imposed directly by statute, secondly, unlike most social security benefits the scheme was not compulsorily applicable to general categories of employees and, although in conformity with national legislation, was governed by its own rules; and finally, although it was in substitution for the statutory scheme, its provisions could also go further and provide additional benefits, thereby making it indistinguishable from supplementary schemes such as those in **Bilka**. The fact that the fund was administered by trustees did not prevent the benefits paid from constituting pay, and this point was underlined in the subsequent ruling in **Coloroll Pension Trustees Ltd v. Coloroll Group plc and Others** C-200/91 [1994] ECR I- 4389 ECJ[301] where the Court held that Article 119 could be relied upon directly as against the trustees, who were bound in their duties by the equal treatment principle. Having thus ruled that private 'contracted-out' occupational pension schemes were covered by the Article, the European Court of Justice went on to consider whether the different pension entitlements on redundancy for men and women were in breach thereof, and whether equal pay had to be ensured with respect to each element of pay:

> "32. In the case of the first of those two questions thus formulated, it is sufficient to point out that Article 119 prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality. Accordingly, it is contrary to Article 119 to impose an age condition which differs

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[301] See para 24

according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men and that for women is based on the one provided for by the national statutory scheme.

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34. With regard to the means of verifying compliance with the principle of equal pay, it must be stated that if the national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of Article 119 would be diminished as a result. It follows that genuine transparency, permitting an effective review, is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women."

It was clear that occupational pensions would henceforth have to be organised differently to comply with the **Barber** ruling, but there was also concern over the prospect of vast numbers of claims being made by all those who had, in the past, been adversely affected by the discriminatory conditions of pension schemes. In response to some of these concerns, the Court decided, as it had done in **Defrenne II**, to limit the retroactivity of its ruling. The UK had made submissions concerning the serious financial consequences the ruling would have, given the number of workers affiliated to contracted-out schemes which had provided for different pensionable ages for men and women. In particular, the UK argued that, unless the retroactive effect of the judgment was limited, the increase in cost would run to between £33 billion and £45 billion, with disastrous effects for the UK economy as a whole. The Court agreed that the Member States and others had been entitled, in light of the authorisation in the two Social Security Directives to defer implementation of the equal-treatment principle in relation to pensionable ages, to consider that Article 119 did not apply to pensions paid under contracted-out schemes:

"44. In those circumstances, overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many contracted-out pensions schemes. It is appropriate, however, to provide for an exception in favour of individuals who have taken action in good time in order to safeguard their rights. Finally, it must be pointed out that no restriction on the effects of the aforesaid interpretation can be permitted

> as regards the acquisition of entitlement to a pension as from the date of this judgment.
> 45. It must therefore be held that the direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law."

Despite the fact that they were intended to promote legal certainty, these paragraphs gave rise to a great deal of uncertainty about the precise limits which had been placed upon the ruling. Several questions remained unanswered, and these came before the Court in the course of litigation arising in different Member States. There was considerable confusion in particular about whether Article 119 could be relied on in relation to periods of service completed before the date of the judgment when no pension payments in respect of those periods had yet been received, or whether it could only be relied on in relation to period of service completed after the date of the judgment. Clearly the latter interpretation was the one which would have the least serious financial consequences for employers.

The distinction between social security and pay, which is one of the central issues in **Barber**, was important in relation to pensions, because of the exceptions to the equal-treatment principle which are allowed under Social Security Directive 79/7 in relation to pensionable age and related benefits. No such exception exists under Article 119, and companies which had operated contracted-out occupational pension schemes had, prior to **Barber**, proceeded on the assumption that they could maintain discriminatory pensionable ages as between men and women. Accordingly, the decision of the Court was one which had serious repercussions throughout the Community, and which fundamentally changed the way employers and others in the Member States would henceforth have to organise their pension schemes.[302] It had been consistently argued over the years, since **Defrenne I**, by Member States, and the Commission, that *inter alia* as a matter of policy highly complex actuarially based factors such as the different life expectancies of men and women, different retirement ages, putative pensionable service during maternity leave etc. all militated against direct effect being ascribed to Article 119

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[302] Curtin, *op cit* page 484.

in the pensions sphere in the absence of implementing legislation.[303] Such a view was based on the notion that since pension benefits were not tangible and calculable in money terms, detailed criteria determining how equality had to be achieved would have to be established through appropriate measures at either Community level or national level. However the Court's judgment in **Barber** adopts the approach that once the question of deciding that occupational benefits fall within the scope of 'pay' in Article 119 has been answered, the national court will *ipso facto* be in a position to decide whether the litigant receives less pay than a member of the opposite sex engaged in the same work. What is radical about this approach is that it confirms that equal treatment in the pension context does not require that the total amount of a particular benefit be mathematically equal since neither the costs nor the value of total pension benefits received will ever be known in advance. What seems to be required is rather that the rate at which the benefit is enjoyed be equal.

The radical nature of the **Barber** judgment, unsurprisingly, met with criticism from Member States, who had argued strongly against the Court's conclusion in their submissions during the case, and from employers alike. Some of the criticisms were expressed in the argument of the employer in the post-**Barber** case of **Moroni v. Firma Collo GmbH** C-110/91 [1993] ECR I-6591 ECJ:

> "The **Barber** judgment ... did not take sufficient account of the requirements of social policy which underlie occupational pension schemes such as that

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[303] See for example the submissions of the United Kingdom in **Coloroll** mentioned earlier in this chapter; it should be noted that the use of sex-based actuarial factors in funded, defined benefit schemes is not prohibited by Article 141 and so inequalities existing in the calculation of commutation payments, reversionary benefits and transfer values, which are determined on the basis of the arrangements chosen for funding the scheme, are permitted as described in **Neath v. Hugh Steeper Ltd** C-152/91 [1993] ECR I-6935 ECJ. It should further be noted that the Equal Treatment Directive (EEC 86/378), which was passed by the Council on 24 July 1986, dealing with *'the implementation of the principle of equal treatment for men and women in occupational social security schemes'* generally provides for 'the principle of equal treatment' to be applied to occupational social security schemes (defined as schemes to provide workers with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them). However, Article 9 of Directive 86/378 allows Member States to defer compulsory application of the principle of equal treatment in relation to: (*a*) equalising pensionable age, until the date on which equality is achieved in statutory schemes (or is required by a Directive);(*b*) survivors' pensions until a further Directive requires equal treatment in statutory social security schemes; and (*c*)differences between levels of employee contributions to take account of different actuarial calculation factors (for up to 13 years from the date of the Directive).Directive 86/378 was made shortly after the ECJ held, in **Bilka-Kaufhaus** that what is now Article 141, applied to pension benefits; it is now clear that the exclusions in Article 9 of Directive 86/378 were in fact ineffective, given that the ECJ had already held that Article 119 had direct effect so as to require equalisation in any event.

involved in this case ... the test of equality which the Court of Justice applies to the factual justification for differential provisions in occupational pensions schemes is stricter than that which it applies to statutory pension schemes.

Community legislation had itself taken account of this unavoidable link between statutory and occupational pensions by providing for the gradual and parallel application of the principle of equal treatment (see Directive 86/378/EEC). However, it is very disturbing, from the point of view of social policy and the protection of legitimate expectations, when a decision of the Court of Justice bypasses the provisions of a directive by means of an interpretation of Article 119."

The concern aroused by **Barber** in the Member States had prompted the annexation of an additional Protocol to the EC Treaty by the Treaty of European Union ("TEU"), which was being negotiated at the time, purporting to limit the retroactive effect of the judgment. The Protocol stipulated that, with the exception of those who had already instituted a legal claim, only pay attributable to periods of service completed after 17 May 1990, the date of the **Barber** judgment, would constitute pay within Article 119. It is noteworthy how, in the subsequent litigation, the Court's explanation of paragraphs 44-45 of **Barber** managed, without mentioning the Protocol, to correspond with its terms, thus avoiding an awkward conflict of Community laws. A Protocol attached to the EC Treaty has Treaty status[304] and this Protocol would override any conflicting judgment of the Court on the scope of Article 119 as soon as the TEU came into effect. Undoubtedly the Protocol was intended by the Member States to ensure that their desired interpretation of the scope of Article 119 would prevail, in the event that the Court chose a different and wider interpretation of the reach of the **Barber** ruling on that Article.[305] However, in **Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassersen Schoonmaakerbedrijf** C-109/91 [1993] ECR I-4879 ECJ, Advocate General Van Gerven asserted that the Protocol was not intended to call into question the Court's case law nor to restrict the scope of Article 119.[306]

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[304] See Article 311 (formerly 239) EC.
[305] See Curtin, D., *'The Constitutional Structure of the Union: A Europe of Bits and Pieces'* (1992) 29 CMLRev. 17, 51.
[306] At para. 23 of his Opinion.

In **Ten Oever,** when the Court was called upon to interpret the limitation in paragraphs 44-45 of the **Barber** ruling, it took the same approach as that which was adopted in the Protocol:

> "16. The precise context in which that limitation was imposed was that of benefits (in particular, pensions) provided for by private occupational schemes which were treated as pay within the meaning of Article 119 of the Treaty.
> 17. The Court's ruling took account of the fact that it is a characteristic of this form of pay that there is a time-lag between the accrual of entitlement to the pension, which occurs gradually throughout the employee's working life, and its actual payment, which is deferred until a particular age.
> 18. The Court also took into consideration the way in which occupational pension funds are financed and thus of the accounting links existing in each individual case between the periodic contributions and the future amounts to be paid.
> 19. Given the reasons explained in paragraph 44 of the **Barber** judgment for limiting its effects in time, it must be made clear that equality of treatment in the matter of occupational pensions may be claimed only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, the date of the **Barber** judgment, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law."

The other matter decided in **Ten Oever** was that Article 119 covered not just pension benefits payable to an employee, but also the employee's survivor, in this case a widow's pension, since the crucial factor was that the pension was paid by reason of the employment relationship between the employee and the employer.[307]

In **Moroni** *supra*, the Court was asked whether the ruling in **Barber** applied in the same way to supplementary pension schemes as it did to contracted-out schemes. It might be thought that this had been decided in **Bilka,** but the issue in **Bilka** was the compatibility with Article 119 of the exclusion of part-time workers from a supplementary pension scheme, whereas the issue in **Moroni** was whether discriminatory pensionable ages within such a scheme were contrary to that article. Despite the German government's

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[307] See also **Dimossia Epicheirissi Ilectrismou (DEI) v. Evrenopoulos** C-47/95 [1997] ECR I-2057 ECJ.

argument that this was a form of social welfare rather than pay, the Court cited the reasoning used in **Bilka**, ruling that sums paid out under a supplementary occupational pension scheme did constitute pay, and that the discriminatory effects of setting different retirement ages were just as much a feature of supplementary occupational pension schemes as they were of contracted-out schemes such as that in **Barber**.

The Court made it clear in **Coloroll**[308] that all benefits payable to an employee under an occupational pension scheme, whether the scheme was contributory or non-contributory, i.e. whether or not the employee also made contributions, constituted pay within the Article 119; the Court ruled that Article 119 could be invoked against the employer or the trustees of the pension scheme, not just by an employee under the scheme, but also by the employee's dependants. This was sharply criticised by the German government in the case, which argued that a survivor's pension benefit should be not regarded as pay, since it did not represent consideration for work performed, but reflected social policy concerns connected to the traditional allocation of men's and women's roles.

Although it adopted a similar approach to the retroactivity of **Barber** as that in the Protocol, the Court in further case law reasserted its independence by limiting the potential reach of that Protocol, ruling in **Fisscher v. Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel** C-128/93 [1994] ECR I-4583 ECJ and **Vroege v. NCIV Institut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV** C-57/93 [1994] ECR I-4541 ECJ, that it had to be read *"in conjunction with the **Barber** judgment and cannot have a scope wider than the limitation of its effects in time."*[309] This meant that the Protocol related only to benefits and not to the right to join or belong to an occupational pension scheme. Thus discriminatory conditions governing membership of an occupational scheme, such as a full-time requirement, or the exclusion of married women, were governed by the Court's earlier ruling in **Bilka** on this issue, rather than by the Protocol. The Court found that the reasons for limiting the retroactivity of the **Barber** ruling, i.e. the fact that the discrimination in pension schemes could reasonably have been considered to be permissible under Directive 86/378, did not apply to the issue of discrimination in access to membership of a pension scheme in **Bilka**, which was decided before the Directive had

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[308] At para 88.
[309] See also **Bestuur van het Algemeen Burgerlijk Pensioenfonds v. Beune** C-7/93 [1994] ECR I-4471.

been adopted. Article 141 could be relied on to challenge a discriminatory exclusion from a pension scheme as from the date of the **Defrenne II** judgment, in which it had been held to be directly effective.[310] The same was true of the entitlement to receive a retirement pension in **Dietz v. Stichting Thuiszorg Rotterdam** C-435/93 [1996] ECR I-5223 paras. 23-5) or entitlement to additional special benefits in **Magorrian and Cunningham v. Eastern Health and Social Services Board and Department of Health and Social Services** C-246/96 [1997] ECR I-7153 ECJ which were indissolubly linked to the right to join or the right fully to participate in an occupational scheme, subject to the application of national time limits for bringing an action.[311]

In the case of **Bestuur van het Algemeen Burgerlijk Pensioenfonds v. Beune** C-7/93 [1994] ECR I-4471 ECJ which concerned civil service pensions, the Court reviewed the criteria it had developed in its case law from **Defrenne I** to **Ten Oever** for determining whether a pension scheme constituted pay under Article 119 or social security under Directive 79/7. Ultimately, having considered the criteria of agreement between employer and employee rather than statutory origin, the absence of public funding of a scheme, and the provision of benefits supplementary to state social security benefits, the Court concluded that the 'decisive' though not the 'exclusive' criterion (which seems to mean 'necessary' but not 'sufficient') was that set out in Article 119 itself, namely that the pension is paid to the worker by reason of the employment relationship between the worker and the former employer.[312] Consequently, even if the civil-service pension scheme was affected by 'considerations of social policy, of State organisation, or of ethics or even budgetary preoccupations', i.e. factors which would normally point to its classification as a state social security scheme rather than pay, these could not prevail if three other factors were also present; if the pension paid by a public employer (1) concerned only a particular category of workers rather than general categories, (2) was directly related to the period of service, and (3) was calculated, in its amount, by

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[310] However, the Court also ruled that the right retroactively to join a pension scheme did not mean that such workers could avoid paying the value of the past contributions, (Case C-128/93, para. 37).
[311] As in the Court's general case law on remedies, the rules relating to national time limits must be no less favourable than for similar actions of a domestic nature and must not render impossible the exercise of the right. See, however, **Dimossia Epicheirissi Ilectrismou (DEI) v. Evrenopoulous** C-47/95 *supra* in which the European Court of Justice considered that a claim initiated before 17 May 1990 should be governed by the **Barber** ruling even if the action was declared inadmissible by the national court due to the claimant's prior failure to lodge an objection, since the time limit for making such an objection had then been extended by the national court.
[312] Paragraphs 43-44.

reference to the civil servant's last salary, then it was comparable to a pension paid by a private employer and would constitute pay.[313]

In both **Beune** and **Moroni**, the Court ruled that whenever the legal criteria of pay and equal work could be identified, an employee could rely directly on Article 119, thus effectively overriding Article 8 of Directive 86/378, which had purported to allow the postponement until 1993 of the establishment of equal pensionable ages in occupational schemes. In **Coloroll**, however, the Court ruled that the limitation on the retroactive effect of the **Barber** ruling applied to discriminatory age conditions in non-contracted-out and contracted-out occupational schemes alike. It had been argued that it was clear, since the ruling in **Bilka** in 1986, that supplementary occupational pension schemes were covered by Article 119, but neither the Advocate General nor the Court accepted this. In the case of a pension benefit payable not according to length of service, but, for example, on the happening of an event such as the death of the employee, the Court held that the limit on the retroactive effect of the **Barber** ruling applied if the event took place before 17 May 1990. This contrasted with **Fisscher, Vroege,** and **Beune.**

Among the various other issues raised in the cases of both **Coloroll** and **Neath** was the question whether payments by an employer to a contracted-out occupational pension scheme (rather than payments to an employee, as in **Barber**) were covered by Article 119. This question arose because actuarial calculations of the different life expectancies of men and women were used in determining the sums payable by an employer into the scheme. In both cases, a 'defined-benefit' pension scheme was in issue, under which employees would receive a pension, the criteria for which were fixed in advance, e.g. by reference to a fraction of their final year's salary for each year of service. It was held that contributions of employees to the scheme must consist of an identical amount for men and women, since, according to **Worringham**, employee contributions were pay within Article 119. However, in such defined-benefit schemes, employers' contributions varied over time and were adjusted to take account of the pensions which would have to be paid. As a consequence of using the sex-based actuarial factors in calculating such employers' contributions, the amount which a male employee would receive on redundancy either in

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[313] Paragraph 45.

the form of a capital sum, transfer benefits, or a deferred pension would be less than that which a woman would receive. The Commission argued that such sums constituted pay, and that the differences in pay between men and women could not be justified by reference to the statistical data based on the average life expectancy of the two sexes, since the right to equal pay was given to employees individually, rather than as members of a class. Advocate General van Gerven agreed and took the view that, in so far as it gave rise to different employee contributions or to different employee benefits (such as lump sums or transfer value), the use of sex-based actuarial factors to ascertain the funding needed for a pension scheme was contrary to Article 119. The Advocate General was impressed by the fact that many differences in risk factors other than life expectancy were ignored in calculating the financing of the pensions scheme, e.g. risks associated with certain occupations, health risks, or smoking. He also noted that no state pension scheme, as opposed to private occupational schemes, found it necessary to use such sex-based actuarial calculation factors. The Court, however, did not follow this view. In a defined-benefit scheme, the Court ruled that the pension which was promised according to fixed criteria constituted pay, since it represented the employer's 'commitment' to the employee. However, the Court considered that employer contributions were paid in order to ensure the adequacy of the funds to cover the cost of the promised pension, and although the pension constituted 'pay' within Article 119, neither the contributions of the employer nor the value of those contributions as represented by a lump sum or transfer benefits would fall within Article 119.[314]

Thus, having gradually broadened the concept of pay, eroding the distinction between pay and occupational social security, and creating a distinction between the latter and state social security, the Court drew back somewhat in **Neath** and **Coloroll**. Despite the force of the Advocate General's opinion that, once a capital sum or transfer value was paid on behalf of an employee, it should be seen as pay within Article 119, the Court ruled that employers' contributions to defined-benefit occupational pensions schemes did not fall within that Article. The contrary argument of the Commission reflected the proposal it had originally put forward for what became Directive 86/378, excluding the possibility of

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[314] **Neath**, paras. 31-2, and **Coloroll**, paras. 80-1.

relying on different actuarial factors for men and women based on life-expectancy,[315] but the Council had rejected this proposal in adopting the Directive.

The tendency to accept broadening of the concept of pay under Article 119 is not, however, without its limits. In a decision dealing with the funding arrangements entered into by an employer to provide certain benefits to workers in a pension context, the European Court of Justice ruled that these may fall outside Article 119. In **Neath v. Hugh Steeper Ltd** *supra*, under the rules of the contracted-out pension scheme operated by the employers, an employee who left the scheme after age 50 could in certain circumstances have an entitlement to a deferred pension or to a transfer payment to another pension scheme. A transfer payment represented the actuarial equivalent to the prospective benefits to which the employee had established an entitlement by reason of his membership of the scheme. Because women live, on average, longer than men, Mr Neath, aged 54, received a lower transfer payment than a woman of the same age would have received on leaving the scheme. If he had exercised his right to receive a lump-sum payment, capitalising a portion of his entitlements, this would also have been less than a woman of the same age would have received. The European Court of Justice held that in neither instance did the employer's action in providing less to Mr Neath constitute an infringement of Article 119. The funding arrangements which an employer chose to secure the adequacy of the funds necessary to cover the cost of pensions promised is not 'pay' within the meaning of Article 119. The European Court of Justice made a distinction between the outcome of **Neath** and the principle established in **Barber,** in the following terms:

> "The assumption underlying this approach [i.e. the rule that pay for Article 119 purposes comprises any consideration received by the worker in respect of his employment from his employer] is that the employer commits himself, albeit unilaterally, to pay his employees defined benefits or to grant them specific advantages and that the employees in turn expect the employer to pay them those benefits or provide them with those advantages. Anything that is not a consequence of that commitment and does not therefore come within the corresponding expectations of the employees falls outside the concept of pay."

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[315] See [1983] OJ C134/7.

The Court in **Neath** took a similar view to the Council rather than the Commission, and this indeed was followed by both the Commission and Council, in Directive 96/97, which amended Directive 86/378 largely by enacting the case law of the Court since **Barber,**[316] **Neath** and **Coloroll** left it unclear whether Article 119 applied to contributions paid by an employer into what is called a 'money-purchase' or 'defined-contribution' scheme, as opposed to a 'defined-benefit' scheme. In contrast with the latter scheme, in which the criteria for the pension to be paid are fixed in advance even though the employer's contributions to the funding of the scheme will vary, the pension is paid in a defined-contribution scheme by reference to the amount of the contributions which the employer has made to the scheme. However, Article 6 of Directive 96/97, in amending Directive 86/378, makes clear that Article 119 does also apply to these, but permits the use of actuarial factors which differ according to sex, and the payment of unequal contributions if the aim is to equalise the amount of the final benefits for both sexes. The Directive also allows another 'exception' to the scope of the equal treatment principle in occupational pensions which was established by the Court in **Coloroll**, where it ruled that certain pension benefits purchased by voluntary employee contributions to an occupational scheme would not fall within Article 119 and thus would not constitute pay.[317] Other exceptions to the scope of the Directive include individual contracts for self-employed workers, schemes for the self-employed having only one member, insurance contracts of salaried workers to which the employer is not a party, and individual optional additional benefits within an occupational scheme.

An important question which remained after the **Barber** ruling was how the discrimination identified was to be remedied. In **Coloroll**, the Court ruled that, between the date of the **Barber** ruling and the date of entry into force of measures designed to eliminate discrimination, *"correct implementation of the principle of equal pay requires that the disadvantaged employees should be granted the same advantages as those previous enjoyed by other employees*". In other words, until amending measures were adopted, pension schemes could only 'level up', by giving men the same advantages as women enjoyed. This principle was first enunciated in **Defrenne II** in which the Court ruled that compliance with the equal pay principle could not be achieved other than by raising the lowest salaries, since Article 119 appeared in the context of the harmonisation

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[316] See [1997] OJ L46/20.
[317] C-200/91, paras. 90-3. See also Article 2(2)(e) of Directive 96/97.

of working conditions while maintaining an improvement in those conditions. However, the Court in **Coloroll** took a more limited approach than that perhaps implied in **Defrenne II**, and applied the 'levelling-up' or improvement in conditions of pay only to the transitional stage between the date of the **Barber** ruling and the date on which measures were adopted to comply with it. The Court further ruled, in **Smith v. Avdel Systems Ltd.** C-408/92 [1994] ECR I-4435 ECJ[318] that, during this transitional stage, it was not open to the pension scheme or the employer to plead that a levelling-down approach was objectively justified by reason of the financial difficulties for the pension scheme, since:

> "...the space of time involved is relatively short and attributable in any event to the conduct of the scheme administrators themselves".

However, once equalising measures were adopted:[319]

> "Article 119 does not then preclude measures to achieve equal treatment by reducing the advantages of the persons previously favoured."

On the other hand, with regard to the period before the date of the **Barber** ruling, during which the pensionable age for women under these occupational schemes was lower than that for men, the Court made clear that, since it had ruled that discrimination was permissible prior to that date, community law provided no justification for equalising the positions of men and women during that earlier period by retroactively reducing the advantages enjoyed by women. In other words, community law had nothing to say about the age discrimination between men and women in occupational pension schemes prior to 17 May 1990, and if a Member State sought to equalise the positions of men and women by retroactive reduction of women's advantages, the justifiability of this would be a matter for national law. The Court reiterated this point in **Smith v. Avdel**, decided on the same day as **Coloroll**, but it ruled further that, once an employer took steps for the future to comply with Article 119, the achievement of equality could not be made partial or progressive.

The step of raising the retirement age for women to that for men, which an employer decides to take in order to remove discrimination in relation to occupational pensions as

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[318] para 30.
[319] **Coloroll** paragraph 33.

regards benefits payable in respect of future periods of service, cannot be accompanied by measures, even if only transitional, designed to limit the adverse consequences which such a step may have for women.[320]

It is noticeable that the Court uses the language of 'advantage' in the occupational pensions case law to describe the position of women, since the retirement age for women was, generally, being linked to that of state pension schemes, lower than that for men. However, it has been pointed out that the language of 'advantage' or 'favoured group' is hardly appropriate to apply to women in this context. It would be misleading to consider this matter of 'more' or 'less' favoured groups at a theoretical level. Unquestionably, the less favoured group is in reality composed of women, who have worked and contributed to the scheme but receive very low pensions because of the level of pay which they earned during their working life, itself frequently shorter than the men's.[321]

It is perhaps this perception of male workers as the disadvantaged group that led the Court to permit what could be seen as direct discrimination in pay by an employer, so as to compensate for the relative disadvantage of men as opposed to women in the context of pensionsable ages. Although the case was decided by the Court on the basis that there was no real discrimination, it can also be seen as a case where discrimination in pay was permitted to make up for what was perceived to be an existing inequality. In **Roberts v. Birds Eye Walls Ltd.** C-132/92 [1993] ECR I-5579 ECJ, Mrs Roberts was forced to retire on grounds of ill-health before reaching the statutory retirement age. She challenged the amount of the bridging pension paid to her under the occupational pension scheme to which she had been affiliated. The bridging pension was an *ex gratia* payment, entirely financed by the employer, to employees who were forced to retire on grounds of ill-health before reaching the statutory retirement age. Its purpose was said to be both to place employees in the financial position they would have been in had they not been forced to retire early, and to place the overall financial treatment of men and women in identical situations on an equal footing. For male and female employees retiring before the age of 60, when neither had reached state pensionable age, the bridging pension included an

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[320] See **Smith v. Avdel**, para. 27 also **Van den Akker v. Stichting Shell Pensioenfonds** C-28/93 [1994] ECR I-4527 ECJ as regards the impermissibility of any advantages for women once a uniform retirement age for men and women is introduced.

[321] See de Vos, D., *'Pensionable Age and Equal Treatment from Charybdis to Scylla'* (1994) 23 ILJ 175, 179.

amount corresponding to the proportion of the state pension attributable to periods of service. After 60, however, the amount of the bridging pension paid to a woman was reduced on the ground that she was in receipt of a state pension, whereas the bridging pension paid to a man was not reduced until the age of 65, when he would receive a state pension. The Court held:

> "17. It should be noted that the principle of equal treatment laid down by Article 119 of the Treaty, like the general principle of non-discrimination which it embodies in a specific form, presupposes that the men and women to whom it applies are in identical situations.
>
> 18. However, that would not appear to be so where the deferred payment which an employer makes to those of his employees who are compelled to take early retirement on grounds of ill-health is regarded as a supplement to the financial resources of the man or woman concerned.
>
> 19. It follows clearly from the mechanism for calculating the bridging pension that the assessment of the amount thereof is not frozen at a particular moment but necessarily varies on account of changes occurring in the financial position of the man or woman concerned with the passage of time.
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> 20. Accordingly, although until the age of 60 the financial position of a woman taking early retirement on grounds of ill-health is comparable to that of a man in the same situation, neither of them as yet entitled to payment of the State pension, that is no longer the case between the ages of 60 and 65 since that is when women, unlike men, start drawing that pension. That difference as regards the objective premise, which necessarily entails that the amount of the bridging pension is not the same for men and women, cannot be considered discriminatory.
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> 21. What is more, given the purpose of the bridging pension, to maintain the amount for women at the same level as that which obtained before they received the State pension would give rise to unequal treatment to the detriment of men who do not receive the State pension until the age of 65."

This judgment was surprising, since, although men and women under a private occupational scheme clearly received different bridging pensions after the age of 60, the Court held that this was not discriminatory within Article 119, but focused instead on the fact that men and women over 60 were differently situated, since women were generally

in receipt of a state pension by them. However, this was a departure from its reasoning in earlier cases such as **Worringham**, where the difference in the actual gross sum paid by an employer to men as opposed to women was held to be discriminatory, regardless of the fact that men were paid the extra sum in order to compensate for a deduction from their earnings to which women were not subject, in other word, regardless of the fact that men and women were not 'similarly situated' in that case either. Further, the ruling seemed to go against the trend of the Court's judgments in its earlier cases such as **Roberts v. Tate & Lyle Industries** C- 151/84 [1986] ECR 703 ECJ in which it was not permissible for employers to link the granting of pensions on voluntary redundancy to the state social-security scheme where the state scheme still maintained discriminatory retirement ages for men and women. Equality of age limits for the grant of a pension on voluntary redundancy, ignoring the different state pensionable ages, was required by the Court in **Roberts**. By way of contrast, although the employer in **Birds Eye Walls** was not seeking to replicate the discrimination in the state system in its bridging pension scheme, it was introducing discrimination between men and women in its scheme in order to counterbalance the effects of the state system, rather than paying equal bridging pensions and ignoring the continuing discrimination in the state system. The case has been criticised for its sudden departure from the formal notion of equal treatment which had so long been followed by the Court. Fitzpatrick (1994) says:[322]

> "How remarkable it is that, the Court having propounded equality irrespective of sex as a fundamental right in Community law for nearly 20 years, a three man chamber of the Court should now discover 'equality of outcomes' – but not for women who, generally speaking, receive much lower benefits in occupational pension schemes, but rather for men upon whose stereotyped working lives the discriminatory structure of pension schemes is based?
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> ...
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> Although **Birds Eye Walls** was decided upon the concept of equality, these conclusions call into question aspects of the court's case law upon the concept of pay within Article 119. In **Barber**, the Court concluded ... that each component part of the payment package had to be judged autonomously on grounds of equality. It was not permissible to set off parts of the remuneration package against each other. Here we are suddenly told that, because of a payment's purpose, it can be set off against, not merely another part of the employer's

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[322] Fitzpatrick, B., *'Equality in Occupational Pension Schemes'* (1994) 23 ILJ 155, 163.

> remuneration package, but rather a *State* benefit. And yet, the focus of the Court's judgment in **Barber** ... has been to break the links between pay and welfare which bedevilled cases such as **Burton** and **Newstead**."

However, the criticism which the judgment attracted did not deter the political institutions from incorporating it into the amended occupational pensions legislation, and Article 2(3) of Directive 86/378 as amended by Directive 96/97 now effectively summarises the **Birds Eye** ruling. For the legislature to follow the lead of the Court in this field may seem surprising, given that social security is an area which has been seen in Community law as a complex matter requiring gradual legislative progress, in the shape of political compromises such as those in Directives 79/7 and 86/378 to enable gradual financial adaptation, rather than immediate judicial or constitutional change. Article 141 on the other hand embodied a straightforward principle of equal pay which appeared to involve none of the complexities of adapting a pension scheme, and which was to be 'policed' by the Court through the cases which came before it. Yet it is precisely the series of rulings of the Court, expanding the concept of pay to include most forms of occupational social security, with limited exceptions such as those for sex-based actuarial calculations in certain employer contributions and for bridging pensions, and permitting a levelling-down rather than requiring a levelling-up approach, which has been followed and enshrined by the legislative institutions in the amending Directive.

More recently and although far reaching in certain respects, **Deutsche Telekom AG v. Schröder** C-50/96 [2000] ECR I-743 ECJ was a relatively straightforward judgment of the Court and the *status quo* on occupational pensions was unaffected. The Court confirmed however, that although part-time workers may join pension schemes, they cannot claim the right to a pension unless they have made the relevant contributions – a *de facto* temporal limitation.[323]

In the UK, in **Griffin v. London Pension Fund Authority** [1993] IRLR 248 EAT, a narrow distinction was drawn between 'pay' (covered by Article 119) and 'social security payments' (not so covered). It was there held that pension payments made under the Local Government Superannuation Scheme were not covered by the extended meaning of

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[323] See Shaw, J., *'Gender and the Court of Justice'* in de Burca, G., and Weiler, J., (eds) *The European Court of Justice* OUP, Oxford, 2001; 87-142 at 123.

'pay' confirmed by **Barber**. The difference, according to the Court, seemed to lie in the fact that the payments in question on the facts were made under a compulsory statutory scheme applying to a general category of workers under which individual employers had no discretion. By contrast, the kind of pension scheme that counted as 'pay' under Article 119 was the subject either of an agreement between workers and employers or a unilateral decision by employers. The facts were thus closer to those of **Defrenne I**, rather than to those found in **Barber**.

The interrelationship between the employment statutes, particularly the Equal Pay Act and pensions provisions is heavily regulated, and amending provisions, mainly by statutory instrument, have required to be introduced in both the Pensions Act and the Equal Pay Act, primarily as a result of the jurisprudence of the European Court of Justice. An appropriate starting point for this analysis is the effect of Regulations which came into effect in 1995.

Section 118(1) of the Pension Schemes Act 1993 provided:

> "(1) ... [T]he equal access requirements in relation to an occupational pension scheme are that membership of the scheme is open to both men and women on terms which are the same as to age and length of service needed for becoming a member *and which do not otherwise discriminate between them either directly or indirectly.*
>
> (2) A rule does not contravene the equal access requirements only because it confers on the scheme's trustees or managers, or others, a discretion whose exercise may result in a person being more or less favourably treated than they otherwise would be, so long as it does not provide for the discretion to be exercised in any discriminatory manner as between men and women.'

On 31 May 1995, the Occupational Pension Schemes (Equal Access to Membership) Amendment Regulations 1995 ("1995 Equal Access Regulations") came into force, modifying section 118 and amending the Occupational Pension Schemes (Equal Access to Membership) Regulations 1976 ("1976 Equal Access Regulations"). Section 118 was amended by the addition of the italicised words at the end of subsection (1). Section 62 of the Pensions Act 1995 has now replaced section 118, it provides as follows:

"(1) An occupational pension scheme which does not contain an equal treatment rule shall be treated as including one.

(2) An equal treatment rule is a rule which relates to the terms on which –

(a) persons become members of the scheme, and

(b) members of the scheme are treated.

(3) Subject to subsection (6), an equal treatment rule has the effect that where –

(a) a woman is employed on like work with a man in the same employment,

(b) a woman is employed on work rated as equivalent with that of a man in the same employment, or

(c) a woman is employed on work which, not being work in relation to which paragraph (a) or (b) applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision) of equal value to that of a man in the same employment,

but (apart from the rule) any of the terms referred to in subsection (2) is or becomes less favourable to the woman than it is to the man, the term shall be treated as so modified as not to be less favourable.

(4) An equal treatment rule does not operate in relation to any difference as between a woman and a man in the operation of any of the terms referred to in subsection (2) if the trustees or managers of the scheme prove that the difference is genuinely due to a material factor which –

(a) is not the difference of sex, but

(b) is a material difference between the woman's case and the man's case."

This section was introduced with effect from 1 January 1996 in response to the judgment of the European Court of Justice in **Barber**. In so far as it relates to the terms on which members of a scheme are treated, it only has effect in relation to service after 17 May 1990.[324]

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[324] See Section 63(6)) of the 1995 Act.

It can be seen that section 62 of the 1995 Act is modelled on section 1 of the Equal Pay Act 1970, indeed, by virtue of section 63(4) of the 1995 Act, section 62 thereof is to be construed as one with section 1 of the 1970 Act. In **Trustees of Uppingham School Retirement Benefits Scheme for Non-Teaching Staff and another v. Shillcock** [2002] IRLR 702 HC, at paragraph 14, the appellants accepted that the effect of section 118, as amended, and/or of section 62 of the Pensions Act 1995 and indeed of Article 141 was to prohibit indirect sex discrimination in access to occupational pension schemes.

Insofar as it relates to the terms on which members of a scheme are treated, the equal treatment rule will only be of effect in relation to periods of pensionable service falling on or after 17 May 1990 (section 63(6)) reflecting the rulings in the European Court of Justice in the cases of **Ten Oever** *supra* and **Coloroll** *supra* and means that inequality can remain to the extent that it impacts on benefits which relate to periods of service falling before 17 May 1990. The 1995 Equal Access Regulations had the effect of applying the limitation in the Equal Pay Act 1970 and in the 1976 Equal Access Regulations stating that any award of back-dated scheme membership would be limited to the two year period preceding the date of the claim.[325]

7.4 Conclusion

There is little doubt that it is in the area of defining and developing what constitutes 'pay' that the European Court of Justice has been at its most expansionist, however the lack of clarity about precisely what it is that determines whether a benefit constitutes social security or pay is not helpful either to employers, employees, or to the Member States in the long run. By extending the definition of pay to cover pensions, the Court was initially more effective than the Member States appear to have wanted to be in making large scale changes to the sex discrimination structure of pension schemes. That it has not been entirely consistent throughout does not detract from the significant advances which have been made in respect of what constitutes pay for the purposes of Article 141. Of no small significance in respect of domestic provision is that although the Pensions Act 1995 has

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[325] Said period being, in Scotland five years, following the judgment of the European Court of Justice in **Levez v. T H Jennings (Harlow Pools) Ltd** *supra*, the provisions of the Prescription and Limitation (Scotland) Act 1973 and the Equal Pay (Amendment) Regulations 2003.

required revision, nothing other than amending Regulations have been required to effect all the aforementioned far reaching developments into the Equal Pay Act.

CHAPTER 8. INDIRECT DISCRIMINATION IN THE CONTEXT OF DOMESTIC LAW

8.1 Introduction

It is in this area that there is exhibited perhaps the greatest disparity between European law and domestic provision. This leads to the very curious situation that courts and tribunals require to engage in an elaborate process of construction to include within or read into the Equal Pay Act 1970 something which is absent from its provisions.

8.2 Indirect discrimination in the discrimination statutes

There is no mention of indirect discrimination in the Equal Pay Act, yet it has proved able to incorporate it by importing the construct from another statute. Section 1(1)(b) of the Sex Discrimination Act 1975, prior to amendment, provided that:

> "(1) A person discriminates against a women in any circumstances relevant for the purposes of any provision of this Act if—
>
> (b) he applies to her a requirement or condition which applies or would apply equally to a man but—
>
> (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
>
> (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
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> (iii) which is to her detriment because she cannot comply with it."

Consideration of the extent to which the provisions of the 1975 Act have influenced the interpretation of the Equal Pay Act, require, in the first instance, consideration of these provisions in their own right, in order to give some insight into the difficulties of interpretation which have been experienced even when the concept has been subject to statutory definition.

(a) Requirement or condition; development of the law

Under the Sex Discrimination Act, prior to the amendment necessitated by Article 2 of the Directive on the Burden of Proof in Discrimination Cases,[326] in order to establish indirect discrimination, it was for the claimant to demonstrate that a 'requirement or condition' has been 'applied' to her.

In **Clarke v. Eley (IMI) Kynoch Limited** [1983] ICR 165 EAT, the Employment Appeal Tribunal held that the phrase 'requirement or condition' should be construed as widely as possible to help eliminate more subtle, covert discriminatory practices. They stated:

> "In our view, it is not right to give these words a narrow construction. The purpose of the legislature in introducing the concept of indirect discrimination into the Act of 1975 and the Race Relations Act 1976 was to seek to eliminate those practices which had a disproportionate impact on women and ethnic minorities and were not justifiable for other reasons...If the elimination of such practices is the policy lying behind the Act, although such policy cannot be used to give the words any wider meaning than they naturally bear it is in our view a powerful argument against giving the words a narrower meaning thereby excluding cases which fall within the mischief which the Act was meant to deal with stopped."

The Employment Appeal Tribunal also held that there was no significant difference between the meanings of the words 'requirement' and 'condition'. In their view, it was to be assumed that the purpose of the draftsman in using both words must have been to extend the ambit of what is covered so as to include anything which fairly falls within the meaning of either word. Thus a contractual stipulation that an employee should pass a particular exam within six months of starting work could be described as either a requirement or condition.

In **Francis v. British Airways Engineering Overhaul Ltd** [1982] IRLR 10 EAT employees were graded in six grades. The lowest grade, grade VI, was 'Aircraft Component Worker' (or ACW). Previously, the grade was explicitly labelled 'women'. After the grade had become 'unisex' ACW, some men had been recruited, but it still

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[326] 97/80/EC wherein an apparently neutral requirement or condition was replaced by 'provision, criterion or practice' and considered later in this chapter.

consisted predominantly of women. Grades I to V had promotion prospects within each grade, but grade VI was a 'dead end job' with no possibility of promotion within the grade. Mrs Francis did not want promotion to a different grade; but she argued that there ought to be promotion prospects for her within grade VI. In seeking to establish a case of indirect discrimination, the 'requirement' imposed by the employer was variously asserted as 'having to move to another grade to get promotion' or 'accepting that there is no careers structure for the grade'. It was held, affirming the employment tribunal, that there was no 'requirement' applied to ACWs at all. Lack of promotion opportunity was just part and parcel of the job.

The requirement or condition may or may not be explicit, but the question was whether it had to constitute an absolute test, not just a matter of preference, however strong. **Perera v. Civil Service Commission and the Department of Customs and Excise** [1983] ICR 428, CA concerned a barrister from Sri Lanka who was rejected for a Civil Service post. The selection committee took several factors into account: practical experience in England, ability to communicate in English, etc. He claimed that these criteria amounted to a 'requirement or condition' but that argument was rejected. Stephenson LJ maintained that *"none of those factors could possibly be regarded as a requirement or condition in the sense that the lack of it...would be an absolute bar"*.[327] The Court of Appeal specifically rejected an invitation to overrule this case or to confirm it as restricted to its own particular facts in **Meer v. London Borough of Tower Hamlets** [1988] IRLR 399 CA. The Employment Appeal Tribunal in Scotland applied the strict line taken in **Perera** in **Connolly v. Strathclyde Regional Council** EAT/1039/94.

In **Home Office v. Holmes** [1984] ICR 678 EAT, Ms Holmes was one of 250 executive officers employed by the Home Office in the Immigration and Nationality Department. All the employees in the relevant grade were required under their contracts of employment to work full-time. In 1975, Ms Holmes became a mother and took maternity leave. As a single parent, she found it difficult to work full-time and took considerable unpaid leave. In September 1981, she had a second child and again took maternity leave. In January 1982, Ms Holmes notified the Home Office that she intended to return to work. She requested, however, that she be allowed to work on a part-time basis. The

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[327] **Clarke** was not cited to the Court in **Perera** but was followed in **Watches of Switzerland Ltd v. Savell** [1983] IRLR 141, a decision which was cited to the Court of Appeal in **Perera**.

Home Office rejected her request on grounds that there were no part-time posts available within her grade and that she only had the right to return to work under her existing contractual terms. Ms Holmes returned to full-time work but claimed that she had been unlawfully discriminated against on grounds of sex. An employment tribunal held that the requirement to work full-time indirectly discriminated against women and that the Home Office had failed to justify the requirement. The Employment Appeal Tribunal held that the employment tribunal had not erred in law in finding that the obligation on the employee to serve full-time was a "requirement" or "condition" within the meaning of section 1(1)(b) of the Sex Discrimination Act in that it was an essential term of her engagement because, unless she went on working full-time, she would not be allowed to continue in her job. They said that words like "requirement" and "condition" are plain, clear words of wide import, fully capable of including any obligation of service whether for full or for part time. The argument on behalf of the Home Office that a duty of full-time service is so fundamental that it cannot properly be regarded as a "requirement" or "condition" of the kind contemplated by the Act, could not be accepted. There was no basis for giving the words a restrictive interpretation in the light of the policy underlying the Act, or in the light of public policy.

Subsequently however, the Employment Appeal Tribunal in **Clymo v. Wandsworth London Borough Council** [1989] ICR 250 EAT came to the opposite view. In that case, a mother sought to return to her work as a branch librarian on a job-sharing basis, following the birth of her child. The employer's refusal to entertain her request to do so was, she alleged, indirect discrimination. She maintained that the employer's requirement of full-time work was a requirement with which a considerably smaller proportion of female librarians with dependant children could comply. Her claim failed, on a number of grounds. One ground was the view of the Employment Appeal Tribunal that the insistence that she work full-time was not a 'requirement or condition' but part of the nature of the job itself. This way of looking at a refusal to allow less than full-time working would not, it was said, necessarily apply to all jobs, but the Employment Appeal Tribunal indicated that the more senior the position, the more likely it was that it would. According to Mr JusticeWood, it is not for a tribunal to make the decision whether a particular job is one which, by its nature requires full-time work, that is a decision for management, and, provided it is made on adequate grounds and is responsible, it cannot be challenged.

The **Clymo** decision was considered but not followed in several important respects by the Northern Ireland Court of Appeal in **Briggs v. North Eastern Education and Library Board** [1990] IRLR 181 NICA where a school teacher was required to undertake extra-curricular teaching duties as part of her contractual obligations in a promoted post. Following the adoption of a baby daughter, she sought to get out of her after-school commitments. She was able to do so but, in consequence, lost her promoted post and was in fact demoted. The issue was whether demanding after-hours attendance was a 'requirement or condition' or, following the analysis of Mr Justice Wood in **Clymo**, part of the job itself. The Northern Irish Court of Appeal preferred the 'broad brush' approach of **Home Office v. Holmes** to that of **Clymo**. The argument used by the Court was that the employer who wished to deny that there was discrimination in a situation where he insisted upon full-time work should show 'justification' in terms of section 1(1)(b) of the Sex Discrimination Act or its equivalent in the Northern Ireland legislation.

The Employment Appeal Tribunal in **Hampson v. Department of Education and Science** [1988] ICR 278 EAT had accepted that a test or yardstick was capable of being a requirement or condition. That conclusion was not challenged on subsequent appeal to the Court of Appeal and House of Lords. This continued to reduce the level of rigidity which had initially been applied to the phrase.

In **Brook v. London Borough of Haringey** [1992] IRLR 478 EAT, the question of identifying a 'requirement or condition' arose in the context of criteria used for redundancy selection. The employers had failed to include certain trades, predominantly filled by males, in the category of trades which were being considered for the making of redundancies. The argument advanced by the claimant was that indirect discrimination was present. The contention was that the Council had applied a requirement or condition by insisting that, unless someone was a member of one of the trades 'not at risk', that person stood in danger of being made redundant. This, it was said, was indirect discrimination against women unless objectively justified by the employers. The Employment Appeal Tribunal held that there was nothing to be justified here; following the line it had taken in **Enderby v. Frenchay Health Authority** [1991] ICR 382 EAT,

the court showed itself to be reluctant to give a broad meaning to the key phrase 'requirement or condition'. In the words of Wood J:[328]

> "If this submission is well founded, namely that the mere holding of a job or position can constitute a requirement or condition, and is *prima facie* discriminatory requiring justification, it could be applied to whole factories."

The reasoning was that, because the trades in question were in principle open to women, there was nothing that could be described as a rule or barrier which had the effect of discriminating against women.

So far as equal pay is concerned, the consequence of the European Court of Justice judgment in **Enderby v. Frenchay Health Authority and Secretary of State for Health** C-127/92 [1993] ECR I-5535 ECJ was that it was not the requirement or condition which had to be justified but the difference in pay. However, in **Bhudi v. IMI Refiners Ltd** [1994] ICR 307 EAT, the company dismissed a number of workers who had been employed on a part-time basis. This followed the company's decision to contract out the cleaning work which they did. The company maintained that part-time workers were disproportionately expensive to administer, but also that no requirement or condition had been applied in selecting for redundancy. The employment tribunal rejected a sex discrimination claim based on indirect discrimination, ruling that there was no requirement or condition imposed. On appeal, the employment tribunal's findings of fact were doubted, but the Employment Appeal Tribunal upheld the tribunal's view that a requirement or condition had to be shown. The argument that the judgment in **Enderby** meant that a different approach should be taken was rejected, and **Enderby** was seen as relevant only to a claim brought under Article 119 and the Equal Pay Directive.[329] The Employment Appeal Tribunal held that even if indirect discrimination under Community law did not require a 'requirement or condition', the Sex Discrimination Act could not be interpreted to give the same result. To do so would be a 'distortion' of the legislation.

It is doubtful whether the view expressed by the Employment Appeal Tribunal in **Clymo** and **Brook** can be sustained as a matter of the correct interpretation of domestic law.

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[328] At 483, paragraph 50.
[329] 75/117EEC, see Chapter 4, 4.1(b).

Clymo was not followed in **United Distillers v. Gordon**[330] and the insistence on the requirement constituting an absolute bar was not adopted by the Employment Appeal Tribunal sitting in Scotland in **Falkirk Council v. Whyte** [1997] IRLR 560 EAT. Falkirk Council's selection procedure described certain criteria as 'desirable' when, in practice, these were determinative of applications for the post in question. The Employment Appeal Tribunal upheld a finding that these criteria in fact amounted to a 'requirement or condition'. However, Lord Johnston stated that he would not have been inclined to follow **Perera** in this context, if the case had turned on whether the criteria concerned constituted an absolute bar to qualification for the post.[331]

Perhaps by this time, the courts had an eye to the proposals to alter the phrase to *"provision, criterion or practice"* when they were diluting their interpretation of "requirement or condition". In any event, the statute gives authority where dubious judicial interpretation might not. The Sex Discrimination Act (Indirect Discrimination and Burden of Proof) Regulations 2001[332] amended the definition of indirect discrimination in the Sex Discrimination Act 1975 with the words *"requirement or condition"* being replaced by *"provision, criterion or practice"*; the 'old' definition of indirect discrimination thus no longer applying[333] to sex discrimination in employment, vocational training or in relation to barristers and advocates.

Harvey[334] states that this new formulation should therefore enshrine a wider approach, looking at *de facto* aspects of the work and not just at absolute requirements. However whilst the definition of indirect discrimination has been amended from making it unlawful to impose an unjustifiable 'requirement or condition' to a 'provision, criterion or practice', this is unlikely, in practice, to make any significant difference. The removal of the need to show that the provision in question is discriminatory because the individual 'can not comply with it' does mean that claims which have in the past failed because the individual can comply with the provision, will now succeed, evidence that the provision is to the claimant's detriment will be sufficient. A practical example of the effect of this change may be where a woman is required to work full-time. In the past, tribunals have

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330 Unreported EAT/12/97.
331 It should be noted that this judgment is conspicuous for its lack of reasoning.
332 SI 2001 No.2660.
333 From 12th October 2001.
334 *'Harvey On Industrial Relations and Employment Law'* Division Q, annotations to section 1(1)(b) of the Sex Discrimination Act 1975 (as amended).

held that even though this requirement may be to the detriment of the woman, it would still be possible for her to comply with it (if, for example, she could afford to employ childcare services). Now, compliance would be an irrelevant consideration and it would merely be necessary for the woman to show that the requirement is detrimental to her family commitments.

It must be emphasised that in an employment-related case, the new provisions require that the 'provision, criterion or practice' which the employer applies to the woman must be 'to her detriment'.

(b) The concept of differential impact

What is at issue in this context is whether men can comply with the 'requirement or condition' more easily than women. Early guidance was to be found in the analysis suggested by Schiemann J in **R v. Secretary of State for Education, *ex parte* Schaffter** [1987] IRLR 53[335] which was that the way to begin was by first establishing the proportion of all women who can comply with the requirement, and then finding the proportion of men who can do so. It will then be necessary to compare the proportions and see whether one is 'considerably smaller' than the other, and it may also be appropriate to look separately at the proportions of those who cannot comply. At the end of the day, the court accepted that it is a matter of the discretion of the court or tribunal hearing the complaint to decide if these figures show a 'considerable' difference between the sexes.

It is, of course, important to identify accurately the 'pool for comparison' in establishing whether the 'disproportionate effect' principle in any indirect discrimination case is applicable. The pool must be identified before any assessment of proportions can take place. In **Pearse v. City of Bradford Metropolitan Council** [1988] IRLR 379 EAT, a female part-time employee complained that the Council's requirement, when advertising to fill a post from within the Council's existing employees (pursuant to an agreement with the recognised Trade Union), was discriminatory in stipulating that to be eligible claimants had to be full-time employees of the Council. The contention was that

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[335] At page 56.

statistically there were fewer female full-time employees than male. The Employment Appeal Tribunal rejected the contention that the pool for comparison comprised those eligible to apply. The correct pool of comparison should comprise those who, ignoring the eligibility condition, were otherwise qualified for the post. The same point was made with regard to the introduction of new working arrangements which were alleged to discriminate against women.

Subsequently, Lord Justice Mustill, in **Jones v. Chief Adjudication Officer** [1990] IRLR 533 CA,[336] set out useful guidance for the identification of unlawful indirect discrimination. He was concerned with the case where the alleged discrimination arose from the operation of a statutory provision, but the guidance he gave has general application to indirect discrimination:

> "What we must consider is whether, if one looks not at individuals but at the population of [applicants] as a whole, it can be seen that there is indirect discrimination. The parties agree that for this purpose it is the effect, not the intent of the legislation which counts. They also agree that what was called the 'demographic' argument represents one way in which indirect discrimination can be established. As I understand it, the process for establishing discrimination on this basis takes the following shape...
> 1. Identify the criterion for selection;
> 2. Identify the relevant population, comprising all those who satisfy all the other criteria for selection. (I do not know to what extent this step in the process is articulated in the cases. To my mind it is vital to the intellectual soundness of the demographic argument);
> 3. Divide the relevant population into groups representing those who satisfy the criterion and those who do not;
> 4. Predict statistically what proportion of each group should consist of women;
> 5. Ascertain what are the actual male/female balances in the two groups;
> 6. Compare the actual with the predicted balances;
> 7. If women are found to be under-represented in the first group and over-represented in the second, it is proved that the criterion is discriminatory."

The later case of **University of Manchester v. Jones** [1993] ICR 474 CA considered this guidance. The case concerned a job advertisement for *"graduates aged 27–35 with relevant experience"* for a post as university careers officer. A complaint was made by

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[336] At page 537.

Miss Jones, who was outside the age range, and who complained that the requirement discriminated against someone, like her, who had taken a degree as a mature student. The Court of Appeal said that the employment tribunal had erred by restricting the pool for comparison to mature students, i.e. graduates who had obtained their degrees at age 25 or over. Instead, the appropriate pool for comparison was all those men and women with the required qualifications for the post, i.e. graduates who had the necessary experience. It was not permissible to argue that there was discrimination because the proportion of women mature graduates who could comply with the age requirement was considerably smaller than the proportion of men mature graduates. When the guidance by Lord Justice Mustill was considered, it was observed by Lord Justice Ralph Gibson[337] that the decision in **Jones v. Chief Adjudication Officer** did not mean that an employment tribunal had to follow it in order to reach the conclusion that indirect discrimination had been made out; it was one route, but not the only one.

Tribunals were said to be entitled to use their common sense and experience in answering the proportionality question, and in defining the 'pools' between which comparisons are to be made.[338] The courts have thus shied away from seeking to define, in strict statistical terms, the proportions of men and women that are required to establish indirect discrimination. For example in **McCausland v. Dungannon District Council** [1993] IRLR 583 NICA, a case concerned with religious discrimination under the special rules of Northern Ireland law, the NICA said that it was for the employment tribunal to decide whether indirect discrimination was made out on the facts. The court refused to endorse a general formula that would determine whether adverse impact against a particular group had been established. This unwillingness to give any formal definition of what is meant by 'considerably smaller' is reflected in all the cases dealing with indirect sexual and racial discrimination.

In **Staffordshire County Council v. Black** [1995] IRLR 234 EAT, the Council operated pension arrangements which gave credits for additional periods of service (affecting entitlements) according to criteria which distinguished between full-time and part-time

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[337] At page 493.

[338] On which see **Briggs** (above), and **Kidd v. DRG (UK) Ltd** [1985] ICR 405, EAT. However, in **Barry v. Midland Bank plc** [1999] ICR 319 HL, the identification of the pool was said to be *"a matter of logic"*.

work. A complaint was made, relying on both domestic and Community law, to establish unlawful indirect discrimination. The facts were that 5,178 women were employed by the Council as full-time teachers and 3,062 men. There were 756 women employed part-time and 45 men. The discriminatory criteria applied only to teachers over the age of 50. Within that group, 89.5% of the female teachers were full-time as compared to 97% of the male teachers. The Employment Appeal Tribunal held that the claim failed. The difference did not show that a 'considerably smaller' proportion of female teachers over the age 50 were able to comply with a criterion based on full-time work than male teachers in that age band. The Employment Appeal Tribunal took the view that, on these facts, the claim could not succeed either on the basis of section 1(1)(b) of the Sex Discrimination Act or under Article 119, both claims being subject to the same requirements.

It must be emphasised that it is the proportion of women and not the absolute number of women, who can comply which is relevant, a point emphasised by Morison J in **Staffordshire County Council** *supra* and in **London Underground v. Edwards (No. 2)** [1998] IRLR 364 CA.

The constancy and persistence of an imbalance is also relevant; for example, the House of Lords in **R v. Secretary of State for Employment** ***ex parte*** **Seymour-Smith and Perez (No 2)** [2000] ICR 244 HL, held, by a 3:2 majority, that a situation, over a seven year period, in which men and women qualified for protection against unfair dismissal in the ratio 10:9 was enough to establish the presence of indirect discrimination, subject to justification. In the words of Lord Nicholls:

> "[A] persistent and constant disparity of the order just mentioned in respect of the entire male and female labour forces of the country over a period of seven years cannot be brushed aside and dismissed as insignificant or inconsiderable".

Although the claimants lost on a justification argument, the approach taken towards interpretation of the statistical evidence shows a readiness to put employers (and others) to the test of demonstrating justification where the imbalance between the sexes is, in purely numerical terms, not particularly striking.

Most recently, in **Nelson v. Carillon Services Ltd.** [2003] ICR 1256 CA, the Court of Appeal in England held that the burden of proof in indirect discrimination is approached the same way irrespective of whether the case is brought under Article 141, under the Sex Discrimination Act 1975 or under the Equal Pay Act 1970. The Burden of Proof Directive thus does not cause any change to be made. Accordingly, it remains for the claimant to provide the necessary statistics, notwithstanding, as Peter Gibson LJ observed in **Barry v. Midland Bank plc** [1999] ICR 319 at 335:

> "...seeking, if necessary with the employment tribunal's assistance, the relevant information from the employer."

(b) The concept of compliance

It was established, in **Price v. Civil Service Commission** [1978] ICR 27 EAT, that to ask whether women in general or a woman in particular 'can comply' with a requirement or condition is to ask not whether she can physically comply so as to indicate a theoretical possibility, but rather is to ask whether she 'can in practice comply', that is according to the *"current usual behaviour of women...as observed in practice."*

In **Price**, the Civil Service advertised the post of executive officer, and stipulated that claimants should be between the ages of 17 and 28. Mrs Price was 36 and alleged sex discrimination. On any interpretation, Mrs Price could not comply with the condition as to age, but the issue was whether the proportion of women who could comply was considerably smaller than the proportion of men who could comply. The proportion of women between the ages of 17 and 28 would be roughly the same as the proportion of men between those ages, so the proportion of women who could physically, or could in theory, apply would be the same, if the women were prepared to forego having a family. But, in practice, many women of that age group would be unable to apply for the job because of family commitments. Therefore the age requirement was *prima facie* discriminatory. In fact, in **Price**, the Employment Appeal Tribunal contented itself with stating the right test for 'can comply' and remitted the case to the Tribunal for a consideration of the facts.[339]

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[339] **Price** was subsequently approved by the House of Lords in **Mandla v. Dowell Lee** [1983] 2AC 548 at page 566 A-B.

(c) The defence of justification

In considering the question of justification for indirect sex discrimination, the Employment Appeal Tribunal initially used a "business necessity" test in **Steel v. Union of Post Office Workers** [1978] ICR 181 EAT. In that case, Ms Steel had been employed as a post-woman since 1961. In 1975, she achieved "permanent full-time status", when the rule disallowing women from such status was abolished. The status was important for Post Office employees for a number of reasons, including the allotment of rounds or 'walks'. When Ms Steel applied for a vacant walk, which was allotted to a postman, because he had received "permanent full-time status" in 1963, she claimed indirect discrimination. The Employment Appeal Tribunal addressed itself to the issue of the relevant standard of justification with the following reasoning:

> "First, the onus of proof lies on the party asserting this proposition, in this case the Post Office. Secondly, it is a heavy onus in the sense that...the industrial tribunal must be satisfied that the case is a genuine one where it can be said that the requirement or condition is necessary. Thirdly, in deciding whether the employer had discharged the onus, the industrial tribunal should take into account all the circumstances, including the discriminatory effect of the requirement or condition if it is permitted to continue. Fourthly, it is necessary to weigh the need for the requirement or condition against that effect. Fifthly, it is right to distinguish between a requirement or condition which is necessary and one which is merely convenient, and for this purpose it is relevant to consider whether the employer can find some other and non-discriminatory method of achieving the object."

The case was remitted to the employment tribunal for a decision on justification where, applying the Employment Appeal Tribunal's test, the employment tribunal found that the discrimination was not justified.

Thereafter another line of reasoning appeared which became the dominant interpretation of 'justifiable'for a time. In **Singh v. Rowntree Mackintosh Ltd** [1979] ICR 554 EAT, the Employment Appeal Tribunal interpreted justification as concerning *"reasonable commercial necessity"*. The result of this was a move to what amounts in practice to a 'reasonableness' test. Both **Singh,** and the case of **Panesar v. The Nestle Co Ltd** [1980] ICR 144 CA, involved a 'no beards' rules, which operated to discriminate against Sikhs

who are forbidden by their religion to shave their beards. It was decided that a no beards rule was justifiable; justifiable did not mean necessary, in the sense that there was no other way of achieving the desired object of the condition. However, "mere convenience" was not considered sufficient justification. The need for a decision on the facts of each case was emphasised; the decision was to be as to whether the grounds put forward for justification (for example, grounds of hygiene) were *"right and proper in the circumstances"*.

In **Ojutiku v. Manpower Services Commission** [1982] ICR 661 CA, another race discrimination case, the issue concerned the policy of the Manpower Services Commission in allocating grants for training. Mr Ojutiku came from West Africa, and had moved to England in the 1960s. He applied for enrolment on a Diploma in Management Studies, and to the Manpower Services Commission for a grant so that he could undertake his studies. The application for a grant was refused on the grounds that Mr Ojutiku lacked management expertise. Mr Ojutiku contended that this requirement was racially discriminatory. The Court of Appeal held that in order to prove a requirement was 'justifiable', it was not necessary to prove that the requirement was *"necessary for the good of the business"*. It expressly disapproved the decision in **Steel.**[340] It considered that, because of its limited funds, the Manpower Services Commission had to some extent to be selective, and the requirement of management expertise was justifiable, as it ensured that the funding would be likely to further the recipient's prospects of employment. Eveleigh LJ stated:[341]

> "...if a person produces reasons for doing something, which would be acceptable to right-thinking people as sound and tolerable reasons for so doing, then he has justified his conduct."

In a not dissimilar vein, in **Raval v. Department of Health and Social Security** [1985] ICR 685 EAT, a requirement of an English 'O' Level is a condition of entry into clerical grades of the Civil Service was regarded as justifiable on the grounds of "overall fairness". The employment tribunal was to:

> "...reflect the attitude of society as a whole regarding the degree of justification required to make

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[340] At page 670
[341] at 668B.

> distinctions of race or sex tolerable in an employment context."

The decision in **Kidd v. DRG (UK) Ltd** [1985] ICR 405 EAT was that a redundancy policy of dismissing part-time workers first was justifiable. It was held that *"marginal advantages"* in cost and efficiency, including the shorter handling records, less frequent laundering of overalls, lack of *"a mild degree of disruption"* caused by changeover in shifts, and the decrease in administrative and personnel functions to the employer in employing one shift of full-time workers rather than two shifts of part-time workers, represented *"sound and tolerable reasons ...acceptable to right-thinking people"* following **Ojutiku** and the Employment Appeal Tribunal itself considered this view to be "realistic and sensible".

The European Court shifted from a test based on external perception to one based on economic considerations, in **Bilka-Kaufhaus v. Weber von Hartz**, they said that justification of sex discrimination might be established "for economic reasons".[342] The Court did not explain which economic reasons it was prepared to consider, nor, whether reasons other than 'economic reasons' might be used by an employer to justify discrimination, nor what the relationship was between such economic reasons and the principle of non-discrimination between women and men on grounds of sex.

In **Rainey v. Greater Glasgow Health Board** 1987 S.C. (HL) 1, the House of Lords held that a genuine material factor had to be based on *"objectively justified grounds"* and said that the same test was appropriate for justifying indirect discrimination. Lord Keith said that:[343]

> "Although the European Court at one point refers to 'economic' grounds objectively justified, whereas Browne-Wilkinson J. speaks of 'economic or other reasons,' I consider that read as a whole the ruling of the European Court would not exclude objectively justified grounds which are other than economic, such as administrative efficiency in a concern not engaged in commerce or business"

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[342] At para 36 of the judgment, see also Chapter 4.
[343] at page 35.

Bilka and **Rainey** set a much higher test of justification than had originally been required by the lower Courts. The decision in **Rainey** that administrative efficiency could constitute a genuine business need was followed in **Reed Packaging Ltd v. Boozer** [1988] ICR 391 EAT. In that case, two women claimed equal pay with a man employed on like work. The employers submitted that the variation in pay was due to separate pay structures and that this constituted a defence under section 1(3). The employment tribunal rejected this submission. The Employment Appeal Tribunal, overturning the decision of the employment tribunal, held that there was no reason why separate pay structures could not constitute a 'material factor', and that the employer had shown an *"objectively justified administrative reason"* for the difference in pay in accordance with **Rainey**. This decision was a departure from the high standard required in **Rainey** and is not consistent with the later decision of the European Court in **Enderby.**

The use of the 'last in, first out' policy in making redundancies, although indirectly discriminatory against women, was also held to be *"easily justified"* in **Brook and Ors v. London Borough of Haringey** [1992] IRLR 478 EAT. Again, it can be observed that the test was being subverted.

In **Cobb v. Secretary of State for Employment** [1989] ICR 506 EAT, which concerned the targeting of the 'Community Programme' to those in receipt of unemployment or supplementary benefit, it was conceded that as more men than women could comply with the condition of being in receipt of one of these benefits, the scheme was indirectly discriminatory, but the Secretary of State argued that this was justified as being the most economical use of available resources. It was held that the requirement was justified on these grounds, as it avoided the need to create a new administrative structure which would have had to be funded by the already limited resources of the Community Programme fund. The need to target a particular sector of the unemployed was achieved by this use of resources. The special social needs of those who benefited from the measures justified their discriminatory effect. It might appear that the State was able to rely on a less high standard by relying on a resources argument. Again, this might not be possible having regard to the recent European Court cases referred to in Chapter 4.

The test in **Rainey** was applied in **Hampson v. Department of Education and Science** [1989] ICR 179 CA, a case which concerned a Hong Kong Chinese national who had

trained as a teacher in Hong Kong and subsequently applied for qualified teacher status to enable her to teach in British schools. Her application was refused on the grounds that her training was not of a sufficiently high standard, in particular that it was not of the duration of three years. She claimed indirect discrimination on the grounds of her race. Lord Justice Balcombe said:[344]

> "In my judgment 'justifiable' requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition."

The Employment Appeal Tribunal in **Clymo v. Wandsworth LBC** held that the tribunal must apply the **Bilka** test by looking at the object the employer sought to achieve, that is, consistency of management, and deciding whether this was "more than a matter of convenience" with a "proper purpose when viewed within the whole of the business or organisation for which the [employer] is responsible". Carrying out a broad balancing exercise, the Employment Appeal Tribunal held that on the facts, the discriminatory requirement was justified. The Employment Appeal Tribunal, expressly following **Hampson,** stated that the European Community principles found in **Bilka** did not differ from the approach of the UK courts found in the line of case law culminating in **Ojutiku.**

The Employment Appeal Tribunal held:

> "...[the tribunal] must carry out a broad and objective balancing exercise taking into account all the circumstances of the case and giving due emphasis to the disadvantage caused by the condition or requirement against the achievement of the object sought...The well-known phrase comes to mind that there is no need to use a sledgehammer to crack a nut. This in our judgment is to express *in extenso* the process which a common lawyer in this jurisdiction is so often called upon to follow when deciding an issue of reasonableness. The civil lawyer of Europe would no doubt describe it as applying the principle of proportionality."

The description of the test is consistent with European law, but the way it was applied in **Clymo,** shows how its effect can be diluted.[345]

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[344] at page 191.

[345] This approach to justification was followed in **Briggs v. North Eastern Education and Library Board** [1990] IRLR 181 NICA; **Greater Manchester Police Authority v. Lea** [1990] IRLR 372 EAT; and **Jones v. Chief Adjudication Officer** [1990] IRLR 533 CA and by the Court of Appeal in **Meade-Hill v. British Council** [1995] ICR 847, CA.

The test in **Hampson** was approved by the House of Lords in **Webb v. Emo Air Cargo** [1993] ICR 175 HL where Lord Keith said that justification requires:[346]

> "an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition."

He said that this test must be regarded as superseding that of Lord Justice Eveleigh in **Ojutiku.**[347]

The House of Lords in **R v. Secretary of State for Employment *ex parte* Equal Opportunities Commission and Another** [1994] ICR 317 HL again considered the question of justification. Lord Keith said:

> "The bringing about of an increase in the availability of part-time work is properly to be regarded as a beneficial social policy aim and it cannot be said that it is not a necessary aim. The question is whether the threshold provisions of the Act of 1978 have been shown, by reference to objective factors, to be suitable and requisite for achieving that aim. As regards suitability for achieving the aim in question, it is to be noted that the purpose of the thresholds is said to be to reduce the costs to employers of employing part-time workers. The same result, however would follow from a situation where the basic rate of pay for part-time workers was less than the basic rate for full-time workers. No distinction in principle can properly be made between direct and indirect labour costs. While in certain circumstances an employer might be justified in paying full-time workers a higher rate than part-time worker sin order to secure the more efficient use of his machinery (see **Jenkins v. Kingsgate (Clothing Productions) Ltd)** that would be a special and limited state of affairs. Legislation which permitted a differential of that kind nation-wide would present a very different aspect and considering that the great majority of part-time workers are women would surely constitute a gross breach of the principle of equal pay and could not possibly be regarded as a suitable means of achieving an increase in part-time employment. Similar considerations apply to legislation which reduces the indirect cost of employing part-time labour."

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[346] at 182H.
[347] at page 183.

This test was subsequently amplified in **Barry v. Midland Bank plc** *supra*, where Lord Nicholls said:[348]

> "More recently, in **Enderby v. Frenchay Health Authority** (Case C-127/92) [1994] ICR 112,163 the Court of Justice drew attention to the need for national courts to apply the principle of proportionality when they have to apply Community law. In other words, the ground relied upon as justification must be of sufficient importance for the national court to regard this as overriding the disparate impact of the difference in treatment, either in whole or in part. The more serious the disparate impact on women or men as the case may be, the more cogent must be the objective justification. There seems to be no particular criteria to which the national court should have regard when assessing the weight of the justification relied upon."

The correct approach to objective justification was helpfully summarised by Lord Justice Peter Gibson in the Court of Appeal in **Barry v. Midland Bank** [1998] IRLR 138,[349] cited with approval by Lord Justice Sedley in **Allonby v. Accrington & Rossendale College**[2001] IRLR 364:[350]

> "One must first consider whether the objective of the scheme is legitimate. If so, then one goes on to consider whether the means used are appropriate to achieve that objective and are reasonably necessary for that end."

The foregoing has illustrated the manner in which indirect discrimination and the defence of objective justification have been treated and developed by the Courts, primarily in those Acts concerned with sex and race discrimination. In the next part of this chapter, the way in which indirect discrimination has been imported into, and treated under, the Equal Pay Act is considered.

8.3 Indirect discrimination and the Equal Pay Act

In **Meeks v. National Union of Agricultural and Allied Workers** [1976] IRLR 198 ET, the industrial tribunal had been prepared to accept the possibility of an indirect discrimination claim under the Equal Pay Act.[351] The Employment Appeal Tribunal

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[348] at page 870.
[349] at 144.
[350] at paragraph 23.
[351] Although it was not prepared to accept a claim where there was no comparable man, see Chapter 6.

however, was not inclined to do so in **Handley v. Mono Ltd.** [1978] IRLR 534 EAT, holding that the difference between the hourly rate paid to a part-time woman machinist and that paid to a full time male machinist was justified by the part-time worker's lower contribution to the overall productivity of the company. Slynn J. (as he then was) said:[352]

> "[t]hat the variation in pay between a [full-time] worker and a [part-time] worker is a material difference which does not depend on the difference in sex is established by the fact that [full-time] women...were also treated differently from [the applicant]"

Slynn J. again rejected an indirect discrimination claim in **Durrant v. North Yorkshire Area Health Authority & Anr.** [1978] IRLR 401 EAT. The Employment Appeal Tribunal ruled, in that case, that the prohibition of disparately impacting treatment contained in the Sex Discrimination Act could not be transposed into the Equal Pay Act, despite the statements of the Employment Appeal Tribunal in **Macarthys Ltd. v. Smith** and the Court of Appeal in England in **Shields v. Coomes** that the Equal Pay Act should be treated as part of a code of anti-discrimination legislation.

It was the Employment Appeal Tribunal in **Jenkins v. Kingsgate (Clothing Productions) Ltd.** [1981] ICR 715 EAT which accepted that indirect discrimination was prohibited by the Equal Pay Act when the European Court of Justice had provided a diffident response to the questions asked of it.

The seminal case on justification in the context of equal pay occurred when the House of Lords, in **Rainey v. Greater Glasgow Health Board** 1987 SC 1 HL, considered section 1(3) of the Equal Pay Act,[353] in the context of recruitment of prosthetists by the National Health Service. In 1979, the Government established a prosthetic fitting service within the National Health Service and no longer relied on private contractors. In order to set up the service, the National Health Service recruited qualified prosthetists on their existing pay scales. Those scales were higher than the pay rates applied throughout the National Health Service on the Whitney Council Scale. After the initial recruitment of higher paid prosthetists (who were all male), subsequent recruits were placed on the lower, standard National Health Service scale, whether they were male or female.

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[352] at page 547.
[353] See Chapter 13.

Ms Rainey, one of the later recruits, claimed that her lower salary was discriminatory on the grounds of sex, contrary to the Equal Pay Act.

The House of Lords, in interpreting section 1(3), recognised the duty of national courts of Member States of the EC to interpret national law so as to be in conformity with EC law, and therefore applied the **Bilka** test:

> "..the new prosthetic service could never have been established within a reasonable time if [the earlier employees from the private sector] had not been offered a scale of remuneration no less favourable than that which they were enjoying. That was undoubtedly a good and objectively justified ground for offering [them] that scale of remuneration." [354]

The need to employ qualified prosthetists from the private sector was a genuine one, if the National Health Service was to set up its own prosthetic service. Offering higher salaries than those enjoyed by other National Health Service employees was necessary to attain this purpose. Once the prosthetic service was set up these considerations no longer applied, and the lower wages of those prosthetists later employed, including Ms Rainey, were justified by the fact that:

> ".,. from the administrative point of view it would have been highly anomalous and inconvenient if prosthetists alone ... were to have been subject to a different salary scale."[355]

Although, in the **Bilka** judgment, the European Court refers to 'economic' grounds for justification, the House of Lords held that:

> ". . read as a whole the ruling of the European Court would not exclude objectively justified grounds which are other than economic, such as administrative efficiency in a concern not engaged in commerce or business."[356]

Lord Keith of Kinkel said at p 145:

> "This provision has the effect of prohibiting indirect discrimination between women and men. In my opinion it does not, for present purposes, add anything to Section 1(3) of the Act of 1970, since, upon the view

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[354] *per* Lord Keith at page 35.
[355] *Ibid per* Lord Keith at page 36.
[356] *Ibid per* Lord Keith at page 36.

> which I have taken as to the proper construction of the latter, a difference which demonstrated unjustified indirect discrimination would not discharge the onus placed on the employer. Further, there would not appear to be any material distinction in principle between the need to demonstrate objectively justified grounds of difference for purposes of Section 1(3) and the need to justify a requirement or condition under Section 1(1)(b)(ii) of the Act of 1975."

Under the early authorities dealing with justification, it was an established and important principle of law that the 'market forces' argument (i.e. where an employer had to pay more in order to attract or keep staff) would not constitute a good defence under section 1(3). In the leading case of **Clay Cross (Quarry Services) Ltd v. Fletcher** [1979] ICR 1 CA, the court observed:

> 'The industrial tribunal is not to have regard to any extrinsic forces which have led to the man being paid more. An employer cannot avoid his obligations under the Act by saying "I paid him more because he asked for more" or "I paid her less because she was willing to come for less". If any such excuse were permitted, the Act would be a dead letter. Those are the very reasons why there was unequal pay before the statute. They are the very circumstances in which the statute was intended to operate' (per Lord Denning MR).

Lord Keith considered the judgments of Lord Denning MR and Lawton LJ in **Clay Cross** which suggested that the tribunal was to have regard to the personal equation of the woman as compared to that of the man, irrespective of any extrinsic forces which led to the variation in pay and commented:

> 'In my opinion these statements are unduly restrictive of the proper interpretation of s 1(3). The difference must be "material", which I would construe as meaning "significant and relevant", and it must be between "her case and his". Consideration of a person's case must necessarily involve consideration of all the circumstances of that case. These may well go beyond what is not very happily described as "the personal equation", i.e. the personal qualities by way of skill, experience or training which the individual brings to the job. In some circumstances it may, on examination, prove to be not significant or not relevant, but others may do so, though not relating to the personal qualities of the employee. In particular, where there is no question of intentional sex discrimination whether

> direct or indirect (and there is none here) a difference which is connected with economic factors affecting the efficient carrying on of the employer's business or other activity may well be relevant.'

Lord Keith drew support for this view from **Jenkins v Kingsgate (Clothing Productions) Ltd** and **Bilka-Kaufhaus GmbH v Weber von Hartz** and in so doing accepted that the true meaning and effect of Article 119 and section 1(3) is the same in the particular context of **Rainey**:

> 'The decision of the European Court on [art 141] [**Bilka-Kaufhaus**] must be accepted as authoritative and the judgment of the Employment Appeal Tribunal on s 1(3) of the Act of 1970 [in **Jenkins**], which in my opinion is correct, is in harmony with it. There is now no reason to construe s 1(3) as conferring greater rights on a worker in this context than does [art 141] of the treaty. It follows that a relevant difference for the purposes of s 1(3) may relate to circumstances other than the personal qualifications or merits of the male and female workers who are the subject of comparison.'

In **North Yorkshire County Council v. Ratcliffe & Others** [1995] ICR 833 HL, the House of Lords upheld the employment tribunal's finding that the material factor relied upon, namely the need to reduce the claimants' wages in order to successfully compete in the tendering process for cleaning contracts against cleaning contractors who employed only women, did not constitute a material factor which was not the difference of sex. The House of Lords ruled that the defence could only succeed to the extent that the market forces were sex neutral, that is they either impacted equally as between men and women or, if they impacted unequally, to the extent that reliance upon them for the purpose of wage setting was nevertheless "justifiable". Given that the uneven pressure upon the Council in terms of predominantly male and predominantly female jobs arose from the ability of the private sector tenderers to undercut wages in the latter but not the former jobs because of *"the general perception in the UK, and certainly in North Yorkshire, that a woman should stay at home to look after her children, and if she wants to work it must fit in with that domestic duty"*, the defence had to fail. Further, Lord Slynn said[357] that:

> "In my opinion the Act of 1970 must be interpreted in its amended form without bringing in the distinction

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[357] at page 839G.

> between so-called "direct" and "indirect" discrimination".

In **British Coal Corporation v. Smith** [1996] ICR 515 HL, the House of Lords upheld the employment tribunal's finding that jobs generally performed by men were classified as surface mineworkers, with consequent favourable terms and conditions, while jobs such as those of the claimants, generally performed by women were not so classified and that this constituted indirect sex discrimination. The conclusion of the employment tribunal that the material factor relied on was not a factor other than sex, was upheld.

Lord Slynn refers to the employment tribunal's reasons, stating :[358]

> " it must decide whether the justification for admitted differences in benefits received by the claimants and their comparators satisfied objective criteria and was not one which occurred because of the difference in sex between claimant and comparator."

Further, he states[359] that the employment tribunal:

> "... looked for specific evidence to justify the difference; the mere existence of different pay structures and negotiating machinery did not in itself constitute such a justification in their view and there was no material to discharge the burden of proof on the corporation that the difference was "genuinely due to a material factors which [was] not the difference of sex" (section 1(3) of the Act of 1970 as amended)."

In **Barry v. Midland Bank plc** [1999] ICR 319 HL, the House of Lords again considered the application of the test of justification. Severance pay under the bank's scheme was calculated by reference to years of service, whether part-time or full-time, taking account only of the final pay the employee was earning at the date of termination. Mrs Barry received a payment based on her final part-time salary. She claimed that this aspect of the scheme discriminated against her because, she said, the method of calculation failed to recognise that she had worked full-time for 11 years. Instead, she was treated the same as an employee who had worked part-time throughout. Therefore, Mrs Barry argued that the scheme disadvantaged part-time workers. She had to be working full-time at the date of termination to avoid having her years of full-time service being counted as years of part-

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[358] At page 530F-G.
[359] At page 534A-B.

time service. The scheme as it stood did not take into account any full-time service a part-time worker might have had, and this was (indirectly) discriminatory against women. The House of Lords disagreed, taking the view that there was no inequality in the way women and men and full-time and part-time workers were treated under the scheme. All were treated in the same way. Because there was no inequality of impact on this approach, there was nothing to justify. The *obiter* views of individual Lords of Appeal show a wide difference of analysis, although all agreed with the outcome. Lord Nicholls and Lord Clyde took the view that, had it been necessary, justification could have been shown to exist, and did not accept the argument that under a different scheme part-time workers could have been better treated. Lord Slynn was of the opinion that the purpose behind the scheme was important in deciding whether there was inequality of treatment.

The case of **Health & Safety Executive v. Cadman** [2004] IRLR 29 EAT concerned a female HSE Principal Inspector who claimed equal pay with four male comparators who earned between £4,000 and £9,000 gross *per annum* more than her. It was accepted before the employment tribunal that the claimant and her comparators were employed on 'like work'; that the pay differential was solely attributable to the application of a length of service criterion for determining pay acceleration; and that using that criterion had a disproportionate adverse impact on women. The issue in dispute was therefore whether the HSE had objectively justified the use of length of service in these circumstances. The tribunal took the view that the HSE had failed to provide specific justification for the differentials based on length of service. However, the Employment Appeal Tribunal overturned that decision, ruling that, in accordance with **Handels-og Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening (acting for Danfoss)** C-109/88 [1989] ECR 3199 ECJ, the employer was entitled to reward seniority without needing to show its actual importance for the performance of the specific duties entrusted to the employee. In reaching its decision, the Employment Appeal Tribunal rejected the argument that in the light of **Nimz v. Freie und Hansestadt Hamburg** C-184/89 [1991] ECR I-297 ECJ, the **Danfoss** decision was no longer good law[360]. The European Court of Justice had held in **Nimz** that where the effect of applying seniority is to indirectly discriminate against female employees, the application of the criterion has to be objectively justified by reference to the experience gained in the job in

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[360] See, Chapter 4.

question. His Honour Judge J Burke QC noted that **Nimz** was concerned with part-time employment and distinguished **Danfoss** on that basis. The crucial feature of **Nimz** did not lie in the length of service but in the different hours worked by the two groups of employees, part-timers and full-timers, to which the claimant and her comparator belonged: length of service was calculated according to the hours worked by employees, with the result that the part-time employees would take longer to progress up the pay scales.

The Employment Appeal Tribunal was concerned about the impact on the HSE's pay structure had the decision gone the other way. Since the pay differential of which Mrs Cadman complained arose from the general pay structure, her case potentially affected many employees within the organisation. A ruling in her favour would have entitled her not only to an immediate pay rise of £9,000 in order to bring her pay up to the same level as that of her highest paid comparator, but also to six years of backdated increases. The HSE would also have faced the possibility that, once Mrs Cadman had been moved up to a higher salary, male Principal Inspectors on lower salaries would have become entitled to the same pay as her and the highest paid comparator.

8.4 Conclusion

In this chapter, the way in which indirect discrimination has been imported into the Equal Pay Act has been considered, as has the manner of its application. It might have been thought that it would have been possible to show UK law and EU law has marched in step, in this respect, at least. This was shown not to have been the case when the European interpretation of indirect discrimination in pay became different to the UK definition of indirect discrimination.

It does appear now that the UK courts do seek to apply the same standard of objective justification as the European Court of Justice, and this is to be welcomed; however there still remains the intriguing question, namely precisely in what circumstances is it actually necessary to require objective justification? This will be considered in detail in Chapters 12 and 13, following an analysis of the three bases of claim available under the Equal Pay Act.

CHAPTER 9. THE 'LIKE WORK' BASIS OF CLAIM

9.1 Introduction

In this chapter, the first basis of claim in the Equal Pay Act is considered.[361] As might be expected, European law has played a minor role in the development of this area; indeed, it is the early case law which defined the parameters of the application of the section and which is as apt today.

9.2 Like work

The first ground for claiming an equality clause is set out in section 1(2) and section 1(4) of the Equal Pay Act and which provides:

> **"1 Requirement of equal treatment for men and women in same employment**
>
> (2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that—
>
> (a) where the woman is employed on like work with a man in the same employment—
>
> (i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and
>
> (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;
>
> ...
>
> (4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly

[361] Section 1(2)(a).

> similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences."

When a claimant makes an application under section 1(2)(a) claiming that she is employed on 'like work' with her comparator, essentially the claimant is saying that she is paid less for doing the same or similar job. If she is not employed on 'like work', it does not matter that her comparator is paid more.[362] What is relevant is the work undertaken by the applicant and comparator in terms of what they actually do and not the work for which they were employed.[363] If the work is not the same, or broadly similar, the claimant must use one of the other routes for obtaining equal pay and claim on the basis that her work has been rated as equivalent to that of the comparator under a job evaluation study in accordance with section 1(2)(b) or by bringing an equal value claim under section 1(2)(c).

There are two separate parts to section 1(4); firstly, the claimant's work must be of the same nature or, if not the same, of a 'broadly similar nature' to that of her comparator and secondly, if there are any differences between the work which the claimant does and the work the comparator does, they must not be of 'practical importance' in relation to the terms and conditions of employment. Tribunals are obliged to consider these two parts separately when deciding whether the claimant is employed on 'like work' with his or her comparator. This was confirmed in **Baker & Ors v. Rochdale Health Authority** Unreported EAT 295/91, where the Employment Appeal Tribunal restated the two stages involved in a 'like work' claim and reminded tribunals that they must be considered in sequence. In terms of the burden of proof, the claimant must prove that she does the same work or work of a broadly similar nature, but the burden shifts to the employer to show the differences are 'differences of practical importance.'[364]

Both elements of the test to be employed are considered below.

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[362] See **Maidment and Hardacre v. Cooper & Co (Birmingham) Ltd** [1978] ICR 1094 EAT.
[363] See **Redland Roof Tiles v. Harper** [1977] ICR 347 EAT.
[364] See **Shields v. E Coomes (Holdings) Ltd** [1978] ICR 1159 CA.

(a) The same or of a broadly similar nature

The first stage of the test is for the tribunal to determine whether the work is the same or of a broadly similar nature. The notion of the 'same' work, in the sense of being identical work, has given rise to little difficulty; the notion of 'broadly similar' has however generated some difficulty. The Employment Appeal Tribunal has warned tribunals against attaching too much significance to slight differences when deciding whether work is broadly similar. In **Capper Pass Ltd v. Lawton** [1977] ICR 93 EAT, Phillips J stated that:

> "...the definition requires the... tribunal to bring to the solution of the question, whether work is of a broadly similar nature, a broad judgment. Because, in such cases, there will be such differences of one sort or another it would be possible in almost every case, by too pedantic an approach, to say that the work was not of a like nature despite the similarity of what was done and the similar kinds of skill and knowledge required to do it. That would be wrong. The intention...is clearly that the...tribunal should not be required to undertake too minute an examination, or be constrained to find that work is not like work merely because of insubstantial differences."

The right approach requires a consideration of the work done by both the claimant and her comparator and the knowledge and skill required to do it and any comparison of jobs must take into account the whole job. The Employment Appeal Tribunal have said that duties that the comparator and the claimant do not have in common cannot be excluded from consideration; this was demonstrated in **Maidment and Hardacre v. Cooper & Co (Birmingham) Ltd** *supra*, where the male comparator had storekeeping duties in addition to those of the claimant, and those additional storekeeping duties meant the work was not broadly similar. In the same way, a claimant cannot remove parts of her work and claim equality in respect of the comparable duties that remain.

(b) Differences of practical importance

Once it is shown that the work is of a broadly similar nature, in general terms, the tribunal must go on to the second and separate stage and consider the details of the claimant's and

comparator's jobs in order to find out whether any differences between them are of 'practical importance in relation to the terms and conditions of employment'. There is some guidance in the closing words of section 1(4) which provides that when comparing jobs, the differences which tribunals should have regard to include; *"the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences"*. What is important at this stage in determining whether the claimant is employed on 'like work' is not the nature of the jobs done by the claimant and his or her comparator but the differences (if any) in the tasks and duties that they perform respectively.

In **Adamson & Hatchett Ltd v. Cartlidge** Unreported EAT 126/77, the Employment Appeal Tribunal held that tribunals must thoroughly examine the detail to decide if there are any differences in the work actually done, how large those differences are and how often they operate. This is because at this stage in deciding if the claimant is employed on 'like work', what is significant is not the nature of the jobs done but the differences in the tasks and duties performed. To help to determine the existence or otherwise of such differences, the employer must therefore provide the tribunal with a detailed analysis of the jobs in question.

When deciding whether differences between the claimant's and comparator's jobs are of 'practical importance', the Employment Appeal Tribunal suggested in **British Leyland Ltd v. Powell** [1978] IRLR 57 EAT, that tribunals might ask themselves whether the differences are such as would put the two employments into different categories or grades under a job evaluation study. In **British Leyland**, both the claimant and comparator were drivers for a catering company. The only difference between their individual duties was that the claimant, who was working for the catering section, was not allowed to drive outside the employer's premises due to a union demarcation agreement, whereas the comparator, who was employed by the transport section, was required to drive out on the public highway. The Employment Appeal Tribunal upheld the tribunal's decision that this difference was not of such practical importance to mean the claimant and comparator be placed on different grades in an evaluation study. Consequently, the claimant was held to be employed on 'like work' with her comparator and so was entitled to equal pay with him.

Whilst the foregoing approach might seem unnecessarily technical, further guidance along these lines was given by the Employment Appeal Tribunal in **Capper Pass Ltd v. Allan** [1980] ICR 194 EAT, where they ruled that if there are differences between jobs which justify differences in grading, those differences will stop the two jobs from being regarded as 'like work'. In **Capper Pass**, the Employment Appeal Tribunal held that the tribunal were incorrect to hold that a female canteen assistant graded 1 and a male canteen attendant graded 3 were employed on 'like work', having acknowledged that the differential was 'justified' because the man handled larger sums of money than the woman and accordingly had more responsibility. Such a finding comprised a difference of practical importance between his work and her work and so the work was not 'like work' for the purposes of the Equal Pay Act. This however would only be one way of approaching the task.

The amount of time that the comparator spends on additional tasks which are supposed to be of practical importance may be relevant. In **Redland Roof Tiles Ltd v. Harper** [1977] ICR 349 EAT, a man and woman were both employed as clerks and the only difference between their jobs was that, for two periods of five weeks in a three-year period, the man had deputised for a transport supervisor whilst the latter was on leave. The Employment Appeal Tribunal held that a tribunal was entitled to find that the irregularity with which the different task arose meant that it was not of practical importance.

In **Brodie v. Startrite Engineering Co. Ltd.** [1976] IRLR 101 EAT, the Employment Appeal Tribunal confirmed that skill levels may be important when considering differences of practical importance. In that case, male and female drill operators were held not to be employed on like work because the man was able to set his own machine, sharpen the drills and carry out minor repairs without the assistance of the charge hand.

Training and professional qualifications might constitute differences of practical importance following the decisions of the European Court of Justice in **Brunnhofer v. Bank der Osterreichischen Postparkasse AG** C-381/99 [2001] ECR I-4961 ECJ and **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse** C-309/97 [1999] ECR I-2865 ECJ; in the latter case, the Court held that:

> "[T]he term 'the same work' does not apply...where the same activities are performed over a considerable length of time by persons the basis of whose qualification to exercise their profession is different".

The Court considered that although the graduate psychologists and the medical doctors both worked as psychotherapists, they drew on different skills and qualifications acquired in different disciplines and this affected the nature of the work and how it was done. Furthermore, the doctors were required to perform other medical tasks in an emergency that the psychologists were not qualified to perform.[365] **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse** has potentially provided a new dimension to the application of section 1(4) insofar as the holding of certain qualifications *per se* may constitute a difference of practical importance, such as to negate a like work finding.[366]

Whether, and to what extent, the man and the woman exercise responsibility may amount to a difference of practical importance. In **Eaton v. Nuttall** [1977] IRLR 71 EAT, a male production scheduler handling items worth between £5 and £1000 each was held not to be doing like work with a female production scheduler handling 2400 items worth no more than £2.50 each, the reasoning being that because the consequences of error on the part of the man were so much greater than for the woman, this constituted a difference of practical importance.

The Employment Appeal Tribunal, in **Dugdale v. Kraft Foods Ltd.** [1977] IRLR 368 EAT, held that the time at which the work is performed should be disregarded, provided that it is the only difference. Where the difference is not merely of the time at which the work was performed which could be recognised by a separate allowance, but a difference in personal risk and responsibility, that justified the different pay and conditions of the female canteen assistants and the male canteen assistant on permanent night shift.

9.3 Conclusion

The terms of section 1(2) and its application by means of the test contained in section 1(4) can be seen as applying to work viewed along a continuum starting with identical work,

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[365] For a full discussion of this case see Chapter 4.
[366] As yet, this area remains undeveloped in the case law of the United Kingdom.

moving through work of a broadly similar nature where any differences are trivial through to work where there are differences of sufficient significance to make the work not even of a broadly similar nature. This is inevitably a question of degree for the fact finding tribunal which must always remain alert to the exaggeration of differences in the work. However, provided the tribunal does not attribute importance to unimportant features of the work, section 1(4) remains a relatively successful means of determining the issue of like work, and it is for this reason most of the authority cited is from the late 1970s, when matters concerning how the test should be applied were developing.

CHAPTER 10. THE 'WORK RATED AS EQUIVALENT' BASIS OF CLAIM

10.1 Introduction

In this chapter, the second basis of claim in the Equal Pay Act is considered.[367] This ground is that the woman's work has been given equal rating to the man's work under a job evaluation scheme. Employers generally use job evaluation schemes as a shield to protect their pay structures from equal pay claims, and, provided the scheme conforms to certain criteria which are considered later in this chapter, the use of such schemes serves a useful purpose for employers and employees alike. They are becoming increasingly popular in the public sector, no doubt as a response to what might be characterised as 'class' type actions which were prolific in the 1980s and 90s. They can however take a very long time to implement.[368]

10.2 Work rated as equivalent

Section 1(2)(b) and section 1(5) of the Equal Pay Act provides:

"(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that—

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

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[367] Section 1(2)(b).

[368] For example, the Scheme applied to local authority workers following the amalgamation of the Manual and APT&C terms and conditions into a Single Status structure has at the time of writing been ongoing for eight years and to date most authorities have not completing the regrading exercise. Similarly, a Scheme is currently being applied to all teachers in Scotland following the McCrone Inquiry and its commissioning of a JES from Price Waterhouse Coopers; that exercise is now in its fifth year.

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term

...

(5) A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, 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 of undertakings, 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."

Section 1(5) includes a definition of job evaluation as being a study undertaken with a view to evaluating, in terms of the demand made on a worker under various headings (e.g. skill, effort, decision taking), the jobs to be done by all or any of the employees in an undertaking or group of undertakings of the same employer. The Equal Pay Act has provided a legal definition to cover what in effect is a type of management technique with various established means of application. Nothing in the definition of job evaluation is to be construed as implying that an employer is under an obligation to apply job evaluation techniques to all or any of his employees. However, where a job evaluation is undertaken, the courts have made it difficult for the relevant parties, whether employers or employees to elide the results of the exercise.

Although Article 1 of the Equal Pay Directive[369] provides that job evaluation schemes must be drawn up by the use of sex-neutral criteria, discrimination is not more clearly defined in either the Directive or the Equal Pay Act. A job evaluation scheme relies upon a set of skills agreed between management and unions, and reflects the relative bargaining strengths not only of these parties but also of male and female workers. Thus there is the

[369] 75/117/EEC.

risk that disproportionate weight may be given to various gender-related attributes such as physical strength or manual dexterity. This is acknowledged by Advocate-General Verloren van Themaat:[370]

> "the evaluation criteria are not always neutral as between the sexes. For example, certain qualities in work could be described as typically female (for instance, dexterity, meticulousness, readiness to undertake repetitive work and so on) and are valued commensurately lower than 'male' qualities (ability to handle materials and machines, physical strength and so on)."

Discrimination is shown where *"...a difference or coincidence between the value set by that system on different demands under the same or different headings is not justifiable irrespective of the sex of the person on whom those demands are made."*[371] This definition of discrimination has been criticised for lack of clarity, particularly on the extent of recognition of indirect discrimination. This is particularly important in cases where women are arguing that aspects of their skill have been overlooked.[372] In **Rummler v Dato-Druck GmbH** C-237/85 [1986] ECR 2101 ECJ, the way was opened for a challenge to a job evaluation scheme if the choice of factors is not representative of the tasks undertaken by both sexes. In this ruling, the European Court of Justice held that Council Directive 75/117/EEC does not preclude the use in job evaluation schemes of factors which favour one sex, provided the system does not discriminate overall on grounds of sex. However, if the job evaluation scheme is not to be discriminatory, criteria should be used which can measure particular aptitudes on the part of the employees of both sexes. The decision of the European Court of Justice in this respect added little to the domestic jurisprudence.

The methodology of job evaluation is not dealt with in any detail here,[373] that area of specialist expertise and of techniques *per se* does not impact upon the case law except insofar as the courts have determined that in order to comply with section 1(5) of the

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[370] **EC Commission v. UK** C-61/81 [1982] ECR 2061 ECJ.
[371] Section 2A(3) of the Equal Pay Act (as amended).
[372] Rubenstein, M., *'Discriminatory Job Evaluation Schemes an the Equal Pay (Amendment) Regulations'* New Law Journal (1983) 133 page 1021.
[373] The principal methods of job evaluation are described in ACAS Advisory Booklet No 1 *'Job Evaluation — An Introduction'*. In addition, the Equal Opportunities Commission publishes a guide entitled *'Job Evaluation Schemes Free of Sex Bias'*. See also, Armstrong, M., and Baron, A., *'The Job Evaluation Handbook'* IPD, London 1995.

Equal Pay Act, to be valid a job evaluation study must be both analytical and objective and consideration is now given to each of these matters.

(a) The 'analytical' aspect of a job evaluation study

The Employment Appeal Tribunal in **Eaton Ltd v. Nuttall** [1977] ICR 272 EAT, in identifying analytical schemes, drew attention to the main types of scheme by adding an Appendix to its judgment which is reprinted here for reference:

> **"Appendix**
> As not all concerned are familiar with job evaluation, we set out below a note on the principal methods...
>
> **Job ranking.** This is commonly thought to be the simplest method. Each job is considered as a whole and is then given a ranking in relation to all other jobs. A ranking table is then drawn up and the ranked jobs grouped into grades. Pay levels can then be fixed for each grade.
>
> **Paired comparisons.** This is also a simple method. Each job is compared as a whole with each other job in turn and points (0, 1 or 2) awarded according to whether its overall importance is judged to be less than, equal to or more than the other. Points awarded for each job are then totalled and a ranking order produced.
>
> **Job classification.** This is similar to ranking except that it starts from the opposite end; the grading structure is established first and individual jobs fitted into it. A broad description of each grade is then drawn up and individual jobs considered typical of each grade are selected as 'benchmarks'. The other jobs are then compared with these benchmarks and the general description and placed in their appropriate grade.
>
> **Points assessment.** This is the most common system in use. It is an analytical method, which, instead of comparing whole jobs, breaks down each job into a number of factors—for example, skills, responsibility, physical and mental requirements and working conditions. Each of these factors may be analysed further. Points are awarded for each factor according to a predetermined scale and the total points decide a job's place in the ranking order. Usually, the factors are weighted so that, for example, more or less weight may

be given to hard physical conditions or to a high degree of skill.

Factor comparison. This is also an analytical method, employing the same principles as points assessment but using only a limited number of factors, such as skill, responsibility and working conditions. A number of"key" jobs are selected because their wage rates are generally agreed to be"fair". The proportion of the total wage attributable to each factor is then decided and a scale produced showing the rate for each factor of each key job. The other jobs are then compared with this scale, factor by factor, so that a rate is finally obtained for each factor of each job. The total pay for each job is reached by adding together the rates for its individual factors."

The Employment Appeal Tribunal in **Eaton** held that only 'Points Assessment' and 'Factor Comparison' schemes were analytical. Just over ten years later, in **Bromley and Others v. H & J Quick Limited** [1988] ICR 623 CA, the Court of Appeal in England held that the use of the word 'analytical' in the context of section 1(5) was merely a convenient way of indicating the general nature of what is required by that section, namely, that the jobs of each worker covered by the study must have been given a value in terms of the demand made on the worker under various headings. The job evaluation scheme which was under scrutiny in **Bromley,** was complex but, in outline, it involved the following. Twenty-three benchmark jobs were selected and were analysed under a number of factor headings. The benchmark jobs were then ranked in order. This was done by means of paired comparisons in which each of the jobs was compared with each of the other jobs. The paired comparisons were done twice, once on a whole job basis and once under each of the factor headings. Once the benchmark jobs had been ranked in order, all the other jobs covered by the job evaluation scheme (which included the jobs of the appellants and their comparators) were slotted in. This was done by an assessment of the whole job in each case and the jobs were not broken down under factor headings. Dillon LJ and Neill LJ refused to express a view on whether the method which had been used to evaluate the benchmark jobs complied with section 1(5), although Woolf LJ was prepared to say that it did. However, the Court was unanimous in holding that the method which had been used to evaluate the jobs of the appellants and their comparators was not analytical, since no attempt had been made to evaluate their jobs by reference to the demands made on those performing them under the selected factor headings.

Woolf LJ took the opportunity to make some *obiter* remarks on benchmark studies. He said that in order to comply with section 1(5), it was not necessary for an employer to arrange for every single job performed by its employees to be compared under factor headings with all the other jobs, since such a requirement would place an immense burden on employers. It would, he said, be sufficient for the employer to divide all the jobs covered by the study into groups of jobs which, when evaluated under the selected headings, were not materially different from each other. The ranking of the jobs could then be carried out using one job as a representative of each group. He added, however, that where this system was adopted, there would always be a risk that an employee would contend that his or her job was in reality materially different from the alleged representative job.

(b) The 'objective' aspect of a job evaluation study

The second necessary characteristic of a valid job evaluation scheme is that the consideration of jobs under the scheme must be 'objective', this being required so that reproduction of sexually discriminatory practice is not permitted to taint the study. The nature of what constitutes objectivity was illustrated in the case of **Eaton Limited v. Nuttall** [1977] ICR 272 EAT. In that case, the employer operated a series of salary grades in respect of which there was a minimum, middle and a maximum point. Employees were placed on one of these points according to management's perception of the responsibility undertaken by them. The Employment Appeal Tribunal held that this was not a valid job evaluation scheme because it was wholly subjective. It added that whilst it is permissible for management to determine an employee's position within a salary range by reference to matters such as merit or seniority, matters concerning the nature of the work must be ascertained objectively on the basis of the job evaluation study.

(c) 'Validity' of a job evaluation scheme

Section 1(5) permits the results of a job evaluation study to be challenged on certain limited grounds; in particular, it allows a woman to claim equal pay under section 1(2)(b) if her job would have been given an equal value with that of a man but for the fact that the evaluation was made on a system which set different values for men and women on the

same demand under any heading, i.e. it was discriminatory. This means that the employment tribunal is required to adjust the results of the job evaluation study to allow for any direct discrimination in its application.

However, notwithstanding the foregoing, there is no scope for the tribunal to make an adjustment of this kind where the job evaluation study is indirectly discriminatory. In such a case, the woman must bring an equal value claim under section 1(2)(c). An absence of intention to discriminate on the part of the employer is no guarantee that the scheme will comply with section 1(5).[374]

The main problem therefore is to try to decide whether and, if so, how, a job evaluation scheme contains elements of sex discrimination in the values it applies. In an attempt to clarify that, section 2A(3), which was added as part of the 1983 equal value amendments, states:

> "An evaluation contained in a study such as is mentioned in Section 1(5) above is made on a system which discriminates on grounds of sex where a difference, or coincidence, between values set by that system on different demands under the same or different headings are not justifiable irrespective of the sex of the person on whom those demands are made."

In practice, using that provision, an employment tribunal should accept a job evaluation scheme's results as valid, if the scheme contains different or coincidental and justifiable variations affecting employees of one sex in comparison with the other. Similarly, when faced with an employer's defence that an employee's claim for equal pay for work of equal value should be rejected because the jobs to be compared have been job evaluated and given different values, a tribunal should accept that defence if it is satisfied that in accordance with section 2A(2)(b) that:

> "there are no reasonable grounds for determining that the evaluation contained in the study was made on a system which discriminates on grounds of sex".

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[374] See **Bromley v. H & J Quick Ltd.** [1988] ICR 623 CA.

Once a proper job evaluation exercise has been completed, there is little chance of escaping its implementation in full, if it involves re-grading the jobs of men and women whose jobs have been rated as equal under the scheme. This is the risk employers and unions which are recognised for collective bargaining purposes take and was illustrated in **Greene and Other v. Broxstowe District Council** [1977] ICR 241 EAT, where the Employment Appeal Tribunal decided that:

> "Where there has been a properly constituted evaluation study the industrial tribunal is bound by the terms of Section 1(5) of the Equal Pay Act 1970 to act upon the conclusions and the content of the evaluation study. This can only be challenged, in our view, if it can be shown that there is a fundamental error in the evaluation study, or where, to use words otherwise used in other cases, there is a plain error on the face of the record."

The Employment Appeal Tribunal rejected the decision of the tribunal in that case, because neither side...

> "...that is to say, the trade union side (no doubt specifically having regard to the position of the men in their union), nor the employers, liked the conclusions of the evaluation study...it could be put on one side. This...was a plain misdirection of themselves".

The equality that is measured by job evaluation is to be interpreted as including the conversion of points into a particular salary grade at the end of a job-grading exercise. The Employment Appeal Tribunal, in **Springboard Sunderland Trust v. Robson** [1992] ICR 554 EAT, held that in deciding whether the jobs of the claimant and her comparator have been given an equal value within the meaning of section 1(5), the tribunal must have regard not only to the end result of the evaluation process, but the arrangements for converting the mathematical scores awarded to the jobs into salary grades or scales. In that case, two jobs were assessed as giving, respectively, 410 and 428 points on a particular scheme. Under the rules of the scheme, these ratings meant that both were placed within the same grade. It was held by the Employment Appeal Tribunal that the employment tribunal had correctly seen the two jobs as 'rated as equivalent' within the meaning of section 1(5) of the Equal Pay Act. The argument which the Employment Appeal Tribunal found convincing was that in assessing whether equality was established, it was appropriate to have regard to the full results of the scheme. This included the final

allocation of a grade at the foot of the score sheets. Therefore when ascertaining if a job evaluation study is a valid study, the disposition of points and how these are organised into grades will be scrutinised, but essentially if the study is found to be valid, the tribunal will not interfere with the banding.

The results of a job evaluation study must be taken as establishing conclusively the respective values of two jobs, unless it can be shown that the study was based on a fundamental error; that is a *"plain error on the face of the record."*[375] Furthermore, a tribunal will be reluctant to reopen the question of evaluation; if it is alleged that the study was indeed based on a fundamental error, the tribunal is likely to insist that the allegation be made in very specific terms, and is then likely confine its investigation of the matter to a very limited area. The tribunal cannot, and must not attempt to, carry out its own evaluation exercise. .

In **Green**, six women claimed equal pay with men in the same employment, basing their claim on a job evaluation study. Evidence was given that neither the employer nor the union considered the results of the study to be satisfactory. The tribunal therefore decided to ignore the study, and it proceeded instead on the basis of 'like work'. The Employment Appeal Tribunal held it improper to ignore the study simply because it was considered "unsatisfactory". The tribunal was bound to accept its conclusions. The case was remitted to a different tribunal for reconsideration. **Green v. Broxtowe** must however be treated with some caution. It has been criticised by another division of the Employment Appeal Tribunal in **Arnold v. Beecham Group Ltd** [1982] ICR 744 EAT, both for saying that a job evaluation study can be valid even if the employer and union do not accept its validity, and for being too liberal in its view of the extent to which it is possible to challenge the validity of a job evaluation study before the tribunal.

Notwithstanding the necessity to have a valid scheme, it must be pointed out that different schemes may rate the same job differently, and still be valid. In **England v. Bromley London Borough Council** [1978] ICR 1 EAT, England claimed parity with two female committee clerks. On the 'London Scheme' of job evaluation, applied by many local authorities, they would all have been rated at 526 points. But Bromley applied a modified

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[375] See **Green v. Broxtowe District Council** *supra*, at paragraph 4 of the judgment.

version of the London Scheme under which the two women had been awarded five extra 'special factor' points to take account of additional pressure of work. The Employment Appeal Tribunal held that England could not rely on the unmodified London Scheme because the Council had never adopted it; he could not rely on the modified London Scheme because his job was not rated as equivalent under the scheme; he could not claim like work, because the tribunal had found against him on the evidence. The Employment Appeal Tribunal could not adopt a 'blue pencil approach' and delete the special factor points on the grounds that the additional pressure they represented had already been taken into account under the unmodified London Scheme; it was not the function of the Employment Appeal Tribunal to do the job evaluation over again. In other words Bromley were operating *bona fide* what appeared to be a genuine scheme, and the point that they had never adopted the London Scheme as such was to be taken in the context of the case.

(d) Unimplemented job evaluation schemes

A more difficult question arises when a scheme is commissioned[376] which is then left on the shelf, unimplemented, for whatever reason. The question which arises is can a claimant claim parity or not in reliance on an unimplemented scheme? The scheme exists; her work has been rated as equivalent under that scheme, but, on the other hand, the employer has not accepted or adopted the scheme, in the sense that he has declined to implement it. The difficulty which arises in this regard is that section 1(2) applies an equality clause in slightly different ways depending on whether the woman is claiming like work or equivalently rated work. When the claim is for like work, the Act is straightforward; when like work is proved, the equality clause operates to vary the contract unless there is a genuine material difference other than sex between her case and his.[377] But where the claim is for equivalently rated work, the job evaluation scheme brings in an equality clause which gives the woman parity in respect of, not the whole contract, but any term determined by the rating of the work.[378] The problem is what is meant by a term 'determined by the rating of the work?'

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[376] To date the UK courts have only considered this in the context of the commissioner being the employer.
[377] Section 1(2)(a).
[378] Section 1(2)(b).

A broad view would be to say that the expression means the tribunal is to compare the terms in her contract and his contract respectively which refer to the work which has been rated as equivalent. That interpretation would allow the woman to take advantage of a scheme which had been left on the shelf, but it strains the language of the subsection. The natural reading of the subsection is that the tribunal is to compare any terms in her contract and his respectively which are a consequence of the grading of the work. But that would mean a woman could not take advantage of a job evaluation scheme if the employer refused to implement it, for her pay and other conditions do not then result from her grading but from the employer's previous method of fixing wages and conditions.

The House of Lords finally resolved the issue in favour of the broad interpretation in **O'Brien v. Sim-Chem Ltd** [1980] ICR 573 HL. The employer had carried out a job evaluation exercise in co-operation with the unions, identified six new grades, agreed the salary ranges for those grades and informed the employees accordingly. The company intended to devise a merit rating scheme which would locate each employee within his appropriate range. They did however tell the employees that anyone below the stated minimum for his grade would be brought up to that minimum as soon as the government's pay policy permitted it; and anyone over the maximum for his grade would keep his current rate as a personally protected salary. But they made it clear that no changes would take place for the time being because of the pay policy. By the time the case reached the Court of Appeal, the pay policy had gone and the new scheme had been implemented. Argument was therefore confined to the matter of arrears and, in particular, could Mrs. O'Brien claim equal pay with a man in the same grade as from the date when the company told her of her new grade? The tribunal said no; the Employment Appeal Tribunal said yes; the Court of Appeal said no; the House of Lords said yes. The issue revolved around the meaning of the phrase 'determined by the rating of the work'; it had no obvious meaning in the context, for in no sense did the job evaluation study determine any terms of the contract. The employer argued that the equality clause could not therefore operate unless and until the study had been implemented so as to make the terms of the contract determined by the rating of the work. However, the House of Lords did not accept this view because they considered that the clear intention of the legislation was that the equality clause should bite immediately discrimination could be detected. Lord Russell of Killowen, who gave the only speech of substance, referring to the

principle of comparison of a woman's job with that of a man which is 'at the heart of the legislation', said:[379]

> "Once a job evaluation study has been undertaken and has resulted in a conclusion that the job of the woman has been evaluated under section 1(5) as of equal value with the job of the man, then the comparison of the respective terms of their contracts is made feasible... At that stage, when comparison first becomes feasible and discrimination can first be detected, the provisions of section 1(2)(b) would be intended to bite, and bite at once...
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> The employers based an argument on the fact that they were under no statutory obligation to participate in a job evaluation exercise, which is true, and which I have already suggested may be due to an impossibility of enforcing it. Therefore, it is contended, that the employers should not be assumed to be under compulsion just because they have co-operated in a voluntary exercise. **I do not agree. It seems eminently sensible that Parliament should impose the requirements of paragraph (b) at the moment when the evaluation study and exercise have made available a comparison which can show discrimination.** [Emphasis added]
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> In summary, therefore, I am of the opinion that the words in dispute cannot have the result contended for by the employers. We are offered a number of dictionary substitutes for 'determined' none of which appeal to me. The best that I can do is to take the phrase as an indication that the very outcome of the equivalent job rating is to show the term to be less favourable. The next best that I can do is to echo the words of Lord Bramwell in **Bank of England v. Vagliano Brothers** [1891] AC 107 at 138: 'This beats me,' and jettison the words in dispute as making no contribution to the manifest intention of Parliament."

According to the Employment Appeal Tribunal in **Arnold v. Beecham Group Ltd** [1982] ICR 744 EAT, although on the authority of **O'Brien v. Sim Chem**, a job evaluation study can bind an employer before he accepts it, in the sense of implementing it, nevertheless it cannot bind him until he accepts that it is a valid study.

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[379] at 579F-580H.

In **Arnold**, the facts were that Miss Arnold was a catering supervisor, grade 1 (the lowest grade) and a Mr. Young was a vending supervisor, grade 2. There was a job evaluation exercise in which the employer and union agreed that a points assessment should first be made, and that the various jobs should be grouped into grades afterwards. The catering supervisor scored 254; the vending supervisor, 233. They were both put in grade 2. But when the staff knew the results of the exercise, there was uproar, and the scheme was never in fact implemented. The Employment Appeal Tribunal held that a woman could not make an equal pay claim under section 1(2)(b) unless the job evaluation study was 'complete'. This, it said, will not occur until the job evaluation study has been accepted as a valid study by the parties to it, i.e. the employer and the employees affected by it (or their trade union representatives). The Employment Appeal Tribunal in **Arnold** could have gone the other way had it wanted to. The reason why it did not wish to do so was one of policy; it said that if employers discovered that they could be bound by a job evaluation study which they found unacceptable, they would be discouraged from instituting a job evaluation study. The Employment Appeal Tribunal said that was undesirable from the point of view of good industrial relations and because employers ought to be encouraged to conduct job evaluations.

The narrower view in **Arnold** increases the conflict between domestic and Community law, as the Employment Appeal Tribunal reached the conclusion that Community law was *"...even more limited than the law as stated by the House of Lords in the **O'Brien** case."*

The judgment in this case is difficult to reconcile with principle and with authority, particularly the conclusion that judgments about the validity or otherwise of the study must be left to the employer and union. That may undermine the purposes of the Equal Pay Act, and does not sit easily with the approach of the House of Lords in **O'Brien v. Sim Chem.**

Despite the insistence of the Employment Appeal Tribunal in **Arnold** that agreement between the employer and union is a precondition of a job evaluation study being regarded as valid, there is later Employment Appeal Tribunal authority which suggests that a study which is carried out at the employer's initiative may have legal significance. In **Dibro Ltd v. Hore** [1990] ICR 370 EAT, an employer faced with a claim based on

equal value, sought to introduce evidence of a job evaluation carried out by him subsequent to the lodging of the equal value claim. By section 2A(2) of the Equal Pay Act, the existence of a valid job evaluation study giving different values to the jobs being compared will prevent the appointment of an independent expert and thus defeat a claim based on equal value. It was argued by the employer that this evaluation exercise had been carried out *"...with the help of the workforce and under the eyes of the trade union"* but the claimants were opposed to this study being considered by the tribunal. The Employment Appeal Tribunal held that the job evaluation exercise was admissible evidence for the purposes of section 2A(2) in order to show that there were 'no reasonable grounds' for determining that the work was of equal value within the meaning of section 2A(1)(a).

The foregoing analysis concerns cases where the job evaluations in question have been undertaken by the actual employer of the claimants, either with or without the direct co-operation if the relevant trade unions, where such are recognised. The recognised principle being that the results of a job evaluation scheme cannot form the basis of a claim or have the effect of blocking an equal pay claim under section 1(2)(b) unless it can be shown that the employees making the claim are employed in the group or group of undertakings in respect of which the job evaluation scheme was undertaken.

In **McAuley and others v. Eastern Health and Social Services Board** [1991] IRLR 467 NICA, the Northern Ireland Court of Appeal held that where a job evaluation had been undertaken by health boards in Great Britain, it had no blocking effect on claims brought by health board employees in Northern Ireland, where the health boards were separate and distinct employers from those in mainland Britain.[380] In **McAuley**, the court observed that there was no evidence to show that the management and unions who had agreed that the British study be undertaken had intended that it would extend to Northern Ireland, and it was not enough for the Northern Ireland employers to show that they had accepted a policy of parity or remuneration and conditions of service which was the same as that agreed for comparable staff in Britain. Had the Northern Ireland Health Board, as employer, 'accepted' and adopted the study, that Board would have become bound by its

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[380] Such a job evaluation scheme was also held not to fall within the meaning of Section 1(6) of the Equal Pay Act (Northern Ireland) 1970, which is the equivalent of Section 1(5) of the Equal Pay Act 1970.

terms. Indeed, the Court had attempted to encourage that outcome by adjourning the hearing and suggesting that the parties seek to arrive at a settlement by agreeing to apply to Northern Ireland, with any necessary adjustments, the job evaluation study carried out in Great Britain - Sir Brian Hutton LCJ, concluding his judgment by expressing regret that the matter failed to be resolved in this manner.

10.3 Conclusion

After an initial period of activity when blatant discriminatory evaluations were struck at, the technique of job evaluation seems to have been able to embrace non-discriminatory factors and analysis, which arguably has led to the provision being less used in recent times, particularly in the private sector. However, job evaluation studies are more frequently used in the public sector (as in the Scottish examples cited earlier) and the reasons for this deserve some consideration. Firstly, the nature of both the collective bargaining process and the pay structures in the public sector means that very large numbers of employees holding the same post are allocated to particular grades, which are now within a single pay and collective bargaining structure which does not distinguish between the former manual and APT&C classes of employee and respective unions recognised for collective bargaining within the sector. Further, whole classes of employee doing the same job, for example social workers, nursery nurses, catering assistants etc are allocated to a particular band within a long spinal column. As the foregoing occupational examples illustrate, there may be very high levels of occupational segregation and thus although within such an environment there may be elaborate mechanisms for the consideration of re-grading appeals, a class type equal pay claim, if successful, could in effect not only involve a whole sector of the workforce receiving a pay-rise as a result of an inevitable and consequential regrading of the post concerned, but would impact on the relativity between the grades in the scale and the posts at those grades. It is this notion of a costly meltdown that has encouraged public sector bodies to embrace job-evaluation.

A further reason why job evaluation may be embraced in the public sector is that it may be utilised in conjunction with other restructuring measures thus having, as a collective exercise, an impact on contracts of employment at the individual level which would be unlikely to have been agreed to. This is illustrated in the context of the employment of teachers in Scotland who, following the McCrone Inquiry and the job evaluation study

commissioned by that Inquiry, have in the course of the collective bargaining relating to the findings, reached compromise and agreement on the stripping out of specific posts and grades of staff from the professional post structure within the secondary school sector.

CHAPTER 11. THE 'WORK OF EQUAL VALUE' BASIS OF CLAIM

11.1 Introduction

In this chapter, the third and residual basis of claim in the Equal Pay Act is considered.[381] This basis of claim is, without doubt, procedurally the most complex, tends to take the most time to effect completion and has been, and currently is, the subject of amendment.[382] The chapter deals with the nature of the basis of an equal value claim and the legal principles involved but, as with the previous chapter, does not consider the methodology of job evaluation employed when an Independent Expert is appointed to undertake a job evaluation study. Of concern here is the impact, particularly on structural inequality in pay, of this basis of claim; it is trite to say that it is this basis of claim that, if effective,[383] should produce the greatest impact in raising and equalising the wages of women where there is occupational segmentation.

11.2 Work of equal value

Section 1(2)(c) states:

> "(c) where a woman is employed on work which, not being work in relation to which paragraph (*a*) or (*b*) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment—
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> (i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and
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> (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is

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[381] Section 1(2)(c)
[382] The details of which are identified and considered in the course of the chapter.
[383] And if the work is found, as a fact, to be of equal value.

> employed, the woman's contract shall be treated as including such a term."

The concept of what constitutes equal value is not formally defined in either European or domestic legislation. The Equal Pay Act states that when a claimant claims equal pay on the grounds of work of equal value, a comparison should be made between the claimant's work and that of the named comparator *"under such headings as effort, skill and decision"*. Such a process inevitably requires and involves an objective weighing and balancing between the distinctive features of the claimant and comparator jobs, to effect and permit comparisons between quite different types of jobs. The comparative methodology and its objectivity is thus central to the process; that process, however, has been seen not just as part of the solution, but also as part of the problem. The process was described by Lord Bridge[384] as *"...lengthy, elaborate and ... expensive"* with the main criticisms made of the law being its complexity and time-consuming nature, particularly in connection with the production of the expert's report.

Before 1996, an employment tribunal had to make a reference to an expert unless it was satisfied there were no reasonable grounds for determining that the work was of equal value. In the latter eventuality, the Employment Appeal Tribunal, in **Sheffield Metropolitan District Council v. Siberry** [1989] ICR 208 EAT, confirmed that it had to dismiss the complaint.

It should be noted that the right of a tribunal to dismiss a claim on the basis of 'no reasonable grounds' is separate and additional to the right which the tribunal has, under rule 14(1)(a) in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) (Scotland) Regulations 2001 to strike out proceedings which are frivolous, vexatious or being conducted unreasonably. Although the power to strike out complaints as frivolous or vexatious is used extremely sparingly, it has been established that it can have an important part to play when individual claimants seek to pursue equal value claims after the hearing and rejection of sample cases which have substantially similar facts to their own complaint. In **Ashmore v. British Coal Corporation** [1990] ICR 485 CA, multiple equal pay claims were made by some 1500 colliery canteen workers. The procedure adopted by the employment tribunal was to select 14 sample cases for trial,

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[384] **In Leverton v. Clwyd County Council** [1989] ICR 33 HL at 38.

representing the common issues. These claims failed (a) on the ground that like work was not made out, and (b) that in any event the employers had a section 1(3) defence, that is, the variation in rates of pay was due to a material factor which was not the difference of sex. This decision was upheld on appeal. Mrs Ashmore, one of the 1500 whose case had not been among the 14 sample cases, subsequently sought to press her claim. The employers argued that her claim should be struck out as vexatious, because of the findings of the tribunal with regard to the original 14. However, she argued that, because the original 14 claims had fallen at the hurdle of proving 'like work', the view expressed in the original hearings with regard to the section 1(3) defence were not binding on her. The Court of Appeal in England held that the categories of 'frivolous or vexatious' proceedings were not closed and that in deciding whether a ruling on this ground was justified in law, considerations of public policy and the interests of justice were very material. The court was unhappy about what it saw as Mrs Ashmore's attempt to relitigate issues which had already been properly investigated, and, in the absence of any fresh evidence, held that the employment tribunal chairman had properly exercised his discretion to strike out Mrs Ashmore's claim.

Since August 1996, an amendment to the law gave the tribunal the option of 'determining the question' of equal value itself, as an alternative to sending the matter on for the preparation of an independent expert's report.[385] The underlying aim of this amendment was to effect some streamlining to a cumbersome procedure. There are at least three kinds of reasons why the tribunal might decide not to call upon the services of an independent expert; firstly, it might take the view that the applicant's case is so hopelessly weak that it would be a waste of time and public money to bother to refer the question to an independent expert. It goes without saying that a tribunal should be reluctant so to hold except in a clear case, for the whole basis of the procedure is that the tribunal really needs expert advice before it is in a position to be able to decide the issue of equal value. Interestingly, the obverse situation is not provided for under the legislation, the tribunal having no formal power to decide that there is no point in a reference because the woman's case is so strong that it is a waste of time referring it to an expert.

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[385] See the Equal Pay Act, section 2A(1)(*a*), as substituted by the Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996 [SI 1996 No.438] Reg. 3.

The second reason for not referring an equal value issue to an expert is that it has already been decided by another expert through a job evaluation study; that is to say, there has been a job evaluation study (see section 1(5) of the Equal Pay Act) and the woman's work and the man's work have been rated differently thereunder; in such circumstances, the tribunal is automatically precluded from further inquiry. It has no discretion with regard to referring an equal value issue to an independent expert, with one notable exception, namely where the job evaluation study is itself biased on grounds of sex.[386] In that event, the job evaluation study is no bar to a reference to an independent expert, but the tribunal may still decide not to refer for other reasons. In the light of **Bromley v. H & J Quick Ltd** [1988] ICR 623 CA, it follows that a job evaluation study which was not 'analytical' in nature would provide no obstacle to the making of a referral, but where a valid job evaluation study exists, however, the position in law is that an employment tribunal has no jurisdiction to hear an equal value claim. A rather different situation arises, however, when the sequence of events is reversed; if a claim for equal value has begun, and the employer then seeks to introduce his own job evaluation scheme, there is no automatic impediment to the equal value claim proceeding. The Employment Appeal Tribunal has held, in **Avon County Council v. Foxall and Webb** [1989] ICR 470 EAT, that, in such circumstances, the tribunal has a discretion to order a sist of the equal value claim. But, according to *dicta* in the judgment, it would appear that the employer who wants such a sist will have to do more than allege that the job evaluation scheme he has in mind might be undermined by a more favourable report from an independent expert implementing the statutory procedure. It was also confirmed in **Dibro Ltd v. Hore** [1990] ICR 370 EAT, that where an employer carries out a job evaluation exercise subsequent to the initiation of an equal value claim, the result of the evaluation will be admissible evidence for the purposes of deciding whether the employer can rely on a section 2A(2)(a) defence (no equal value claim where jobs rated as unequal under a valid job evaluation scheme). It would appear not to matter that such a step has been taken with the express purpose of defeating the equal value claim, although it does not follow that because evidence of such an evaluation is admissible as a matter of law, the employer will succeed in frustrating the equal value claim. There are *dicta* in **Hore** to the effect that the employer may produce evidence of his own job evaluation scheme at any stage up to the final hearing to decide

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[386] See the Equal Pay Act, section 2A(2)(*b*) and section 2A(3).

the equal value claim, and if this is indeed so, this decision gives a substantial procedural advantage to the employer faced with such a claim.

A third reason for not referring to an expert might be that it would be a waste of time proving equality because the employer would have a defence to the claim even if the work were shown to be equal, see **McGregor v. General Municipal Boilermakers and Allied Trades Union** [1987] ICR 505 EAT. The employer is entitled to ask the tribunal to listen to his section 1(3) defence, even before a *prima facie* case has been established.[387] The tribunal is not bound to accede to his request, but it may do so;[388] the employer is not however formally put to his election, but if he fails at that stage to convince the tribunal that there is a genuine material factor (other than sex) which explains the differential treatment, so that the tribunal does refer the question of equal value to an expert, he cannot take a second bite at the cherry and argue his defence all over again if and when the expert's evidence shows that there is a *prima facie* case of discrimination. It used to be that the employer could raise the material factor defence at the initial stage without prejudice to his right to do so subsequently, but with effect from 1st April 1994, this became no longer so.

The tribunal must give the parties the opportunity to adduce their own expert evidence as to equal value and if evidence of equal value is adduced, the tribunal must determine the case on the basis of it. It follows that a tribunal which proceeds to dismiss a claim because it thinks there are no reasonable grounds for determining the work to be of equal value with named comparators without giving the parties a chance to adduce their own evidence will err in law, as indeed was held to be the situation in **Wood v. William Ball Ltd** [1999] IRLR 773 EAT. The Employment Appeal Tribunal contemplated there being a two-stage test; first, a decision whether an expert's report is to be obtained by the tribunal or by the parties, and secondly, a determination of the case on the basis of the evidence presented to it.

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[387] Under Rule 11 (2E) of The Employment Tribunals (Equal Value) Complementary Rules of Procedure (Scotland) as contained in Schedule 3 of the Employment Tribunals Constitution and Rules of Procedure)(Scotland) Regulations 2001.

[388] See for example **Forex Neptune (Overseas) Ltd v. Miller** [1987] ICR 170 EAT, and **McGregor v. General Municipal Boilermakers and Allied Trades Union** *supra*.

11.3 Reference to an independent expert

Where the tribunal decides to seek expert advice, it requires to refer the issue to a member of the panel of experts maintained by ACAS.[389] The procedure relating to the expert's report is set out in Rule10A of the Employment Tribunals (Equal Value) Complementary Rules of Procedure (Scotland) as contained in Schedule 3 of the Employment Tribunals (Constitution and Rules of Procedure)(Scotland) Regulations 2001.[390]

The parties are entitled to make representations to the independent expert, and he is obliged to take account of any relevant representations[391] and, before drawing up his report, he is required to send a written summary of the information and representations and invite the parties to comment on the material contained therein.[392] On completion of that stage, he requires to make his report to the tribunal in a document which reproduces the summary of the information and representations received from the parties and the comments thereon, with the conclusion he has reached upon the question of equal value, including, where applicable, a failure to actually reach a conclusion on the question.[393]

When undertaking his inquiry, the independent expert is not constrained by section 1(2)(c) of the Equal Pay Act to any particular factor comparison method. In **Hayward v. Cammell Laird Shipbuilders Ltd** [1985] ICR 71 HL, for example, the expert used a limited set of criteria, or factors, to compare the work of the claimant cook with that of her named craft comparators, a shipboard painter, carpenter and heating technician.[394] In practice, however, it is common for the expert to analyse the different demands made by the jobs being compared under a larger number of different headings. Notwithstanding the expert has great freedom in deciding how to make his assessment of the jobs, the House of Lords has held, in **Leverton v. Clwyd County Council** [1989] ICR 33 HL, that the expert should not take into account the number of hours worked (as opposed to the nature of the demands made during working hours) in reaching his conclusions, such a

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[389] Equal Pay Act, section 2A(4).
[390] The procedural Rules are not dealt with in any detail here.
[391] Rule 10A(5)(a).
[392] Rule 10A(5)(b).
[393] Rule 10A(5)(c).
[394] These were: skill and knowledge demands; responsibility demands; planning and decision making demands; physical demands and environmental demands.

factor being sex-biased (and itself indirectly sex discriminatory) in that more women than men work fewer hours or on a part-time basis.

When the tribunal receives the expert's report, it must send a copy to each party and fix a date for the resumption of the hearing, allowing at least another fortnight to elapse before the resumed hearing.[395] In practice, and in the context of a complex case, the resumed hearing may not take place for many months or even years *inter alia* because, at this point, if the independent expert has found the jobs compared to be of equal value, the employer may now seek to engage his own expert, both for the purpose of attempting to prevent the admittance of the independent expert's report under Rule 10(A)(18) and by providing an alternative analysis.

Notwithstanding the foregoing, it was the delays which frequently attended the writing of the report which became the major source of complaint among tribunal users in the 1980's and early 1990's, leading to various changes in the rules, introduced in 1994, which sought to speed up the production of the expert's report. For example, the expert was required to give notice to the Secretary in writing, within 14 days of appointment or as soon as practicable thereafter, of the date by which he expects to report and if he cannot do this, he must say why.[396] If he cannot make the projected date, he must inform the parties, via the Tribunal, of this. He may be required by the Tribunal, acting of its own volition or on the application of a party, to submit a progress report on the work he is doing.[397] In practice, such requirements are honoured more in the breach and although the tribunal has three sanctions under Rule 10A(11) namely, to give written notice to the expert that he is still required to send the report by the required date; to substitute a later date or, if (but only if) it considers that it would be in the interests of justice to do so, to replace the expert the tribunal seldom uses the more punitive options and simply extends the due date, not least because that delay is likely to be less than the delay which would be incurred with the appointment of a new expert.[398]

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[395] Rule 10A(16).
[396] See Rule 10A(4)(f) and Rule 10A(7).
[397] See Rule 10A(8).
[398] It should be noted that where a party has delayed the preparation of the expert's report by unreasonable conduct, that party may be penalised either in expenses or in having its originating application or notice of appearance struck out. (see Rule 10A(14)).

In **British Coal Corporation v. Smith** [1993] ICR 529 EAT, Wood J had this to say of the jurisdiction of tribunals in the context of an equal value claim which had taken seven years to come before the court at page 535B:

> "The delays, the complications of procedures, the need to bring separate actions in separate jurisdictions, the overall suitability of our present tribunal procedures and practices, indeed the structure of our present systems of jurisdiction in this field have brought the industrial members of this appeal tribunal to the grim realisation that unless something is done, and quickly, the present unsatisfactory position will become totally unacceptable."

That criticism was echoed by Lord Slynn when the case eventually came before the House of Lords in 1996:[399]

> "That these particular proceedings have taken such an extraordinary amount of time is however much to be regretted since many of the claims were lodged over ten years ago in respect of employment undertaken prior to and current at that time. It is clear that it defeats an essential purpose of the legislation if employees cannot enforce within a reasonable time such rights (if any) as they have to remedy inequality of remuneration."

The 1996 amendments to procedure, whilst they may have been useful insofar as the tribunal can more easily dispose of the patently hopeless or the patently obvious cases, have failed in any significant respect to either speed up the equal value process or make the process more straightforward to apply; whether the 2004 Regulations[400] when in force will have more effect, cannot at the present time be assessed with any degree of confidence, notwithstanding the bold assertions in the Partial Regulatory Impact Assessment contained in Annex B of the Consultation document. [401]

11.4 The resumed hearing

At the resumed hearing, it is for the tribunal to decide whether or not to admit the report in evidence. The tribunal may not reject the report simply because they disagree with the conclusions therein expressed, but the report may be rejected as unsatisfactory because

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[399] [1996] ICR 515 at 519A.
[400] The Draft Employment Tribunals (Equal Value) Complementary Rules of Procedure 2004.
[401] The RIA is hampered by the fact that separate statistics were not available specifically for equal value cases (see for example paragraphs 13 and 14).

the expert failed to follow the correct procedure or because the report is perverse, in the sense that no reasonable expert could possibly have reached that conclusion on the available evidence, or because there is some other material reason for regarding the report as unsatisfactory;[402] in this context the tribunal may reject the report on the application of any party or of its own volition, but if the report is rejected, the whole process must begin all over again, and another report must be sought, from another expert.

Assuming the report is not rejected as unsatisfactory, it is admitted in evidence but it should be noted that it is no more than that, having no special status although once admitted into evidence neither party can challenge the factual basis of the report; that may only be done prior to admitting the report and there are three main reasons why a report would be the subject of a successful challenge. Firstly, that the independent expert has failed to take properly into account the submissions (documentary and otherwise) of the parties; secondly, that he has failed to provide a reasoned exposition on which the conclusions of the report can be justified, for example failing to explain why particular factors and weightings were chosen, or why a particular evaluation system was used and thirdly, that an unsatisfactory methodology has been employed, for example, one that is non-analytical or that he has failed to compile job descriptions or failed to take into account relevant factors or employed unbalanced inconsistent weighting patterns.[403]

The employment tribunal may, at any time, ask the expert (or another expert) to reconsider any part of the report or to provide a fuller explanation of any part of it[404] and it may also require him to attend in person to be cross-examined on his report.[405] In practice, a party seeking to challenge an independent expert's report is well advised to commission its own expert's report and, as stated earlier, challenge those aspects of the expert's report ordered by the tribunal with which that party disagrees, before the report is admitted in evidence. Further, it should be noted that the Employment Appeal Tribunal

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[402] Rule 10A(18)(a)(b)and (c).
[403] Examples where reports have been rejected include; **Allsopp & Ors v. Derbyshire Police Authority** [ETCases 13509-13516/87] the tribunal declined to admit as the expert refused to be questioned or cross examined; **Davies v. Francis Shaw & Co.** [ET Case 22420/85] the tribunal declined to admit as the expert had failed to take full account of the parties' submissions, had not reproduced the summary in the final report and had not provided full reasons for the conclusions; **Thompson v. John Blackburn Ltd.** [ET Case 15650/92] where the tribunal declined to admit as the expert report as the expert had not made findings of fact in relation to significant features of the claimant's job.
[404] Rule 10A(19).
[405] Rule 11(2A).

has held, in **Lloyds Bank plc v. Fox** [1989] ICR 80 EAT, that an employer cannot seek the assistance of the employment tribunal in order to ensure that claimants are questioned by his own expert; the Tribunal has, according to the decision in **Fox**, no power to require an claimant to submit to such questioning.

Either party has the right to cross-examine the expert on his report and to demand his attendance for that purpose, and either party may call its own expert evidence to support or contradict the opinion of the independent expert, but the parties are limited to one expert apiece[406] and they are not allowed to re-open a question of fact upon which the expert's report is based.[407] There are however two exceptions where the tribunal has a discretion to admit further evidence upon a matter of fact, first, where the evidence is relevant to the defence of genuine material factor, and second where the independent expert has been unable to reach a conclusion on the question of equal value because he has been unable to obtain all the information he needed.[408]

Finally, it is for the tribunal to determine whether the claimant's work is or is not of equal value to that of the comparator and, as stated earlier, the expert's report is not conclusive of the question of equality of value, it is evidence only. The tribunal itself must make a final decision on the question of equality, and it must make that decision on the basis of the whole of the available evidence, of which the expert's report is an important part, but only a part. In **Tennants Textile Colours Ltd v. Todd** [1989] IRLR 3 NICA,[409] Lord Lowry LCJ said:

> "...whoever conceived the ideas of a reference to an independent expert intended that expert's report to be conclusive but then drew back ... Reports obtained in the circumstances created by the present Act and Rules must obviously carry considerable weight, as was clearly intended, but there is no provision or principle that the party challenging an independent expert's report has to "persuade the Tribunal that the independent expert's report should be rejected" or that the Tribunal "could only reject the independent expert's report if the evidence were such as to show that it was so plainly wrong that it could not be accepted". The burden of proving a claim under the Act of 1970 is on the applicant. The burden

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[406] Rule 11(2B).
[407] Rule 11(2C).
[408] Rules 11(2E) and 11(2D) respectively.
[409] At page 8.

> does not *in point of law* become heavier if the independent expert's report is against the applicant. Nor, if that report is in favour of the applicant is the burden of proof transferred to the employer."[410]

It is of note that the 2004 proposals for streamlining the equal value procedures change none of the above; in essence they fall into the realm of case management.

11.5 Proposals to streamline equal value tribunal procedures

At the time of writing the process of consultation is underway.[411] The purpose of the reform as set out in the foreword to the consultation document is:

> "...to make the system work more effectively and to tackle lengthy delays, especially in the large-scale cases involving independent experts. The new rules are intended to streamline procedures resulting in a more efficient service and the delivery of swifter justice for the parties. The aim is to enable the key facts to be established more quickly and help the tribunals determine whether jobs are of equal value. This in turn should also encourage the earlier settlement of more cases."

In the first chapter, [412] the consultation document considers the question 'Where are problems occurring?' and identifies the following:

> "Although few in number, the equal value cases cause disproportionate problems for the tribunal system. Independent experts were appointed in 21 cases in 2001-02, and in 15 cases in 2002-03. However, a number of these cases are multiple cases, sometimes involving hundreds of claimants. The average time taken for equal value cases was estimated to be just less than 20 months when last assessed in 2000 – with the time ranging from 5 months to 49 months. Some cases take far longer. For example, one recent multiple case lasted over 5 years, was made up of 93 cases and involved 4 independent experts. In at least two ongoing multiple cases, well over 1,000 cases are involved. There is anecdotal evidence that these large scale cases are becoming more complex, with an increasing

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[410]The Court was referring to the Equal Pay (Northern Ireland) Act 1970, as amended, and the Industrial Tribunals (Rules of Procedure) Regulations (Northern Ireland) 1981, as amended, but the wording of these provisions is the same in this respect.

[411] *'Towards Equal Pay: A Consultation on Proposals to Streamline Equal Value Tribunal Procedures'* DTI 18th March 2004. The consultation phase closed on 10th June 2004.

[412] at page 6*ff*.

tendency for tribunals to appoint teams of independent experts, which could lead to longer timescales."[413]

The consultation document then goes on to identify four specific types of problem as follows:

"**Case Management**
Tribunals can find it difficult to manage the complex, large-scale cases. Equal pay cases represent a small proportion of the number of cases brought to employment tribunals each year, for example 3% in 2002-03. However this percentage includes a number of consolidated claims comprising hundreds or even thousands of claims. Equal value cases represent a far smaller proportion but again they can involve many claimants. This makes it difficult for the tribunals to gain expertise in managing large scale cases in a complex and highly specialized (*sic*) area of law.

Role of independent experts
In equal value cases, a tribunal can appoint an independent expert to prepare a detailed job evaluation report. This whole process is often characterised by long delays. Independent experts are given very little initial information when first asked to complete a report and some appear unwilling to refer problems back to the tribunal. The tribunals have no effective sanction against an independent expert who is taking a long time to produce a report. Sometimes there are issues round the availability of independent experts and the terms of their appointment. Experts in equal pay are in great demand, for example, to advise on pay reviews.

Complex rules
The process has the potential for long delays, for example allowing parties to second-guess the independent experts and to keep their powder dry so that only limited information is produced at the beginning of the case, then months or even years later, independent experts receive large amounts of information, making it difficult for them to produce a "brief summary" as required by the rules. The system also enables parties to wait for the independent experts to produce their job evaluation report before constructing alternative job evaluations of the jobs in question.

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[413] Page 6.

> **Expert evidence**
> Large sums of money can be at stake and the parties have an incentive to use the system to its full to be sure that no stone is unturned. This also acts as an incentive for parties to use their own experts and leads to lengthy cross-examination of the independent expert at the oral hearing"

For any employment lawyer who has worked in this area, particularly for employers, the foregoing, albeit that it is stated in somewhat simplistic fashion, is difficult to refute. The employers may indeed be able to operate tactically, but as the consultation document acknowledges, albeit obliquely, the majority of equal value claims are raised as class actions backed and financed by large trade unions, who are equally able to play tactical games, particularly wherein they can attempt to force the employer to settle, on the basis of some regrading adjustment. As the final chapters of this thesis explain, the equal value route is probably the single most potentially effective means of eliminating the most resistant form of pay inequality, namely structural and occupational inequality, and in this respect procedural tinkering is unlikely to have a major impact. That said, the Government's proposals do merit some attention.

The thrust behind the proposals in the 2004 Regulations is simply to reduce the time it takes to get an equal value claim heard and determined, no more. Before any consideration as to whether this will be sufficient to impact on aspects of structural inequality, the proposals themselves require some consideration. Chapter 2 of the DTI report, which sets out the Government's proposals, illustrates that essentially the proposals impact upon seven areas.[414]

Firstly, the proposals would give the Presidents of the employment tribunal the power to appoint tribunal panels with specialist knowledge of equal value cases. If the successful Scottish experience with regard to the appointment of specialist judges to the Commercial Court is taken into account, such a recommendation would be unlikely to meet with much resistance. Secondly, the proposals would allow tribunals to develop expertise in managing large scale 'class' actions in what is a complex and highly specialised area of law. Again, it is difficult to see where objections might lie, but the recommendation relies on both the competence of tribunal personnel and an effective training programme to

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[414] See IDS Brief No 755 April 2004 page 18, where the seven areas are identified.

ensure they have the requisite knowledge and understanding to be effective.[415] On more tangible fronts, thirdly the DTI recommendations suggest that the tribunals should have the power to insist on the early exchange of factual information, with a requirement that the parties produce a written statement of what they agree and disagree.[416]

Fourthly, the consultation document proposes to introduce new rules of procedure that are more user-friendly and supported by detailed practice directions to ensure a more consistent approach to case management. Again such an aim appears laudable, but it cannot generate more independent experts or indeed ensure even if more experts became available, faster processing of extant claims would follow. It also fails to take into account the somewhat obvious point that user friendly and plain English directions, whilst useful to party litigants, is somewhat redundant in the context of the type of claim where it is not only unusual, but virtually unheard of for a party litigant or non-legally qualified representative to prosecute his or her equal value claim.[417]

The fifth recommendation effectively proposes to limit the number of experts called to give evidence in complex cases. This apparently is to be effected by closer links between the Employment Tribunals Service and ACAS, such as to ensure *"the most effective use of the independent experts"*[418] – ostensibly a laudable aim, but, interestingly, it would appear, at least in part, to relegate such a decision making capacity to non-legally qualified personnel. The sixth recommendation is to set 'timetables' and introduce means of dealing with delays and disagreements, in effect in simple cases the 2004 draft Regulations suggest in Annex 3, the 'indicative timetable' for averages cases, that is, in claims not involving an independent expert the time from lodging the claim to the hearing will be 24 weeks and in claims involving an independent expert 36 weeks. It is trite to

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[415] Herein a difference may lie in respect of the analogy with judges in the Commercial Court, as tribunal chairman are drawn from more diverse and disparate backgrounds than Senators of the Court of Session, all of whom are currently drawn from the Scottish Bar and who on most criteria can be shown to be the most successful and able advocates appearing regularly before the Supreme Courts. Whilst there may be some means of ensuring 'quality control' amongst the legally qualified chairmen, additional and difficult issues arise in respect of the lay members; the best of whom are excellent but who contain within their ranks persons less able to cope with the complex issues involved in equal value claims. This is particularly important in a small jurisdiction, such as Scotland.

[416] This requirement, whilst understandable and laudable from a legalistic perspective, wherein the contents of pleadings are paramount, sits uncomfortably with a legal procedure, open to lay representation and which ostensibly eschews a formalistic or legalistic approach.

[417] An examination of all equal value claims registered with COIT in Scotland and which proceeded to a hearing within the last 5 years failed to uncover a single claim wherein the claimant was a party litigant or represented by someone who was not legally trained.

[418] Page 8.

state that such a rule, if discretionary is dependent on both the competence of the chairman and the relative complexity of the case; complexity in this regard cannot be divorced from the experience and competence of the tribunal hearing the case (and in particular the legally qualified tribunal chairman).

The seventh recommendation focuses on the independent experts being provided with relevant information early on, *inter alia* through the formal use of written questions, the early exchange of information and a mechanism for establishing where parties agree and disagree. To any practitioner familiar, in particular, with Court of Session or English High Court procedure, this recommendation is simply an extension of tightening up the pleadings aspect of a case, with the concomitant focus on issues of relevancy and the inevitable exclusion of all but the legally qualified from the process.

11.6 Conclusion

As the foregoing demonstrates, an equal value claim is an extremely complicated process. Under domestic law, the burden of proof in an equal value claim falls squarely on the claimant, though the principle of 'transparency' as developed in Community law and commencing with **Handles-OG Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening (acting for Danfoss)** C-109/88 [1989] ECR I-3199 ECJ, and most recently in **Brunhofer v. Bank der Österreichischen Postparkasse AG** C-381/99 [2001] ECR I-4961 ECJ[419] might not be compatible with this principle. In the latter case, the European Court of Justice held that where a pay system lacks transparency (in the sense that it is not possible for an outsider to understand and evaluate the criteria which are used to determine pay) it is for the employer to show the absence of discrimination. It is in this respect that an interesting conflation between an equal value claim, which in terms of domestic legislation will in most respects constitute a direct claim, and a claim founded on European law indirect discrimination occurs. As it will be argued in the closing chapters of this thesis, that the means of reducing the structural

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[419] In **Brunnhofer,** the European Court of Justice held that if a pay system lacks transparency so that it is not possible to determine the exact difference in pay between the claimant and her comparator, then the burden of establishing that she receives less pay will be discharged if the claimant establishes, in relation to a relatively large number of employees, that the average pay for women is less than for men undertaking equal work. What is of note in this case is that it was not an indirect type of claim, rather a simple direct claim wherein Susanna Brunnhofer compared herself to one male colleague. As will be seen in the next chapter this case is notable also for potentially at least having imported the objective justification requirement into a direct equal pay claim.

occupational segregation component of unequal pay is most likely to be effective if effected through the means of 'class-action' equal value claims under the domestic law or by reliance on European indirect discrimination, the difference in approach merits some attention at this stage.

An applicant, in a class type action, seeks, under section 1(2)(c), to show that she is a member of a group receiving less pay, for work of equal value with one or more comparators in other occupational groups of the same or associated employer and who are paid more.[420] Whilst she may seek to maximise her spread of comparators, particularly in respect of differing occupational groups (with differing rates of pay) along a continuum or pay gradient, to enhance her chances of success, because such a claim is a 'direct' claim, she has none of the difficulties associated with the nature of the composition of the 'advantaged' and 'disadvantaged' group and the establishment of an 'adverse impact' such as occurs in the case of an indirect claim. Whilst she (at present) has the more onerous evidential burden of proving her claim, rather than pointing to *prima facie* discrimination, after which the burden shifts to the employer to objectively justify the difference in pay,[421] she has effectively the widest possible choice of comparator and the advantage that a single comparator would suffice; further other women in a comparable position to her would be able to invoke the no reasonable grounds defence *per* **Ashmore v. British Coal Corporation** [1990] ICR 485 CA.

As will be evident from the above, there is some evidence that the distinctions between (and the requirements necessary to establish) direct and indirect types of claim are being either conflated, confused and certainly not made clear by decisions of the European Court of Justice. As the next chapter demonstrates, this has impacted significantly on the employer's defence under the domestic Act. However, there is little doubt that given we are 30 years removed from the overt type of unequal pay such as was exemplified by a women's rate for the job and a man's rate and are clearly in the realm of occupational segmentation which has proved so difficult to eradicate by educational means, the equal value claim must today be the most apposite for tackling persistent structural and systemic pay difference, yet the means of pursuing such a claim remains complex,

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[420] The facts in **Hayward v. Cammell Laird Shipbuilders Ltd** [1985] ICR 71 HL provide a good example (in addition to illustrating classic occupational segregation) in that the claimant (a cook) sought equal pay with comparators in the craft groups of painters, carpenters and heating technicians.

[421] A significantly harder test than currently extant following the decision of the House of Lords in **Glasgow City Council v. Marshall** 2000 SC 67 HL as illustrated in the following chapter.

cumbersome and time consuming. The 2004 proposals, whilst likely to have some effect, are unlikely to have the kind of impact suggested in the partial RIA. Rather impact of a significant, wide and far reaching effect is far more likely to be attained by fine tuning of the legal test and, in particular, if there is a narrowing of the scope of the employer's defence, which constitutes the subject matter of the next chapter.

CHAPTER 12. THE EMPLOYER'S DEFENCE TO AN EQUAL PAY CLAIM

12.1 Introduction

In this chapter, the employer's defence to an equal pay claim is examined.[422] Developments in interpretation can be seen as falling into three stages, with an interesting Scottish departure from orthodoxy in the early 1990s. The section has undoubtedly caused tribunals and courts difficulty, mainly because of confusion between the applicable tests in the context of direct and indirect discrimination, reading into the statutory provision words which were not there or through the placing of undue emphasis on certain words. In the 1990's, two Scottish cases[423]decided by the House of Lords, halted this trend, by providing a very clear statement of how the section was to be interpreted and applied; in approach, the application endorsed by the House of Lords might today be characterised as 'restrictive' in the light of one barely reasoned decision of the European Court of Justice.[424] At the time of writing, the decisions of the House of Lords still prevail, but give rise to the interesting question of how long this orthodoxy might prevail and secondly, and the subject of the last chapters in this thesis, if they fail to prevail, will their demise provide a more effective tool in the armoury of attempts to reduce the effect of inequality of pay which is associated with occupational segmentation.

12.2 The employer's defence

The employer's defence to a finding of 'like work', 'work rated equivalent' or work of 'equal value' under section 1(2)(a)(b) or (c) respectively, is provided for in section 1(3) which states:

> "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

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[422] Section 1(3) of the Equal Pay Act.
[423] **Strathclyde Regional Council v. Wallace** 1998 SC (HL) 72 and **Glasgow City Council v. Marshall** 2000 SC (HL) 67.
[424] **Brunhofer v. Bank der Österreichischen Postparkasse AG** C-381/99 [2001] ECR I-4961 ECJ.

> 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."

If one starts from the basis that the Equal Pay Act seeks, by its terms, to eliminate sex discrimination in pay, it does so by requiring the employer to demonstrate that the cause of any difference in pay is not related to sex. The terms of section 1(3) do not operate to justify discrimination. It is trite to say that discrimination unless indirect can never be justified. The establishment of a 'material factor' to which the difference between a woman's contract and the man's is attributable is regarded as evidence that there is no discrimination. The phrase 'is genuinely due to a material factor' semantically connotes a causal concept, not an evaluative or judgmental one; the emphasis being on the words 'due to'. Hence, if the cause of the difference in contractual terms is some factor outside of 'the difference of sex' it is no part of the function of the employment tribunal to evaluate that causal factor and to decide whether it is fair or sensible or reasonable. All the employment tribunal should be concerned with is to be satisfied that the cause of the difference in contractual terms between claimant and comparator is not the difference of sex. If the cause of the variation is established, and it is not the difference of sex, it should not matter whether that cause is rational or irrational, sensible or arbitrary.

This approach is based on the wording of the sub-section. For a variation in contractual terms to be due to (i.e. caused by) a 'material factor', not a 'justified factor', 'which is not the difference of sex', there is no need to establish that the factor is objectively reasonable. The Oxford English Dictionary defines 'material', when applied to evidence or facts as *"being of such significance as to be likely to influence the determination of a cause"*. Once sex discrimination is ruled out, the justifiability or reasonableness of the variation in contracts is irrelevant. As a result, no requirement of objectively justifying causes or factors which are not sex-based is placed on the employer.

The format of the sub-section in the Act emphasises this same point in another respect. The employer can rely on a material factor 'which is not the difference in sex'. 'Material factors' could include objectively unjustified causes of variations except for the express exclusion of sexually discriminatory causes. The words 'which is not the difference of

sex' mean that if the cause of the variation between the claimant and comparator's contracts constitutes sex discrimination, the employer will have failed to bring himself within the defence.

12.3 Interpretation in the period to 1987

One of the earliest decisions on the subsection was **Capper Pass Ltd v. Lawton** [1977] ICR 83 EAT, where the Employment Appeal Tribunal said:[425]

> "Subsection 3 is concerned with the operation of an equality clause which, apart from the provision of the subsection, would apply. For example, suppose a man and a woman to be engaged on like work but the man to be paid at a higher rate than the woman. Despite the application of the equality clause in such a situation, it is not to operate if the variation in remuneration is genuinely due to "material differences (other than the difference of sex) between her and him". Thus in such circumstances, the equality clause will not operate if the variation is due, for example, to be fact that either remuneration is payable to long service employees, which the man is and the woman is not ...."

In **Navy, Army and Air Force Institutes v. Varley** [1977] ICR 11 EAT, the Employment Appeal Tribunal held that:[426]

> "Subsection 3 only comes into play in a case where otherwise the conditions are satisfied for an equality clause to take effect. The general effect, paraphrasing subsection 3 is this: that despite that prima facie position having been established, the equality clause is not to operate if, when the facts are further looked at, it is discovered that the variation between the woman's contract and the man's contract is due not to difference of sex but to some other material difference. The example which we gave the other day was of a case where all the conditions are satisfied for the operation of an equality clause - because, for instance, there is a variation in that a woman is paid less - but it is found on investigation that the employers can establish (and the burden of proof, which is a heavy burden, is always on them) that the reason the man is paid more than the woman has nothing whatever to do with sex but is due to the fact that the employers have in force a system

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425 at page 86 F-H.
426 at page 14B.

> under which a long service employee is paid more; so the variation there, is due not to difference of sex, but to that material difference. It is important to note there that the woman, if she remains sufficiently long in the company's employ, will of course one day herself qualify to receive a long service increment."

The foregoing illustrates that at the time of these decisions tribunals were not envisaging equal pay based on indirect claims. The Act was most effective in removing pay disparity where there was a man's rate and a woman's rate for the same work. That said, it was not long before questions concerning the operation of pay scales which had been agreed through the collective bargaining process were the subject of judicial consideration.

(a) Agreed pay scales

The operation of agreed pay scales came to be addressed first in **Waddington v. Leicester Council for Voluntary Services** [1977] ICR 266 EAT. The Employment Appeal Tribunal said:[427]

> "Looking at the matter generally, the case is a not unfamiliar one where owing to the idiosyncratic operation of different but similar scales, aggravated by a time of financial stringency, anomalies have arisen in the rates of remuneration of two persons doing similar jobs; as a result of which a more responsible post is rewarded with a smaller salary. It does not at first sight seem that the case has anything to do with sex discrimination. It can easily be seen that the results could, and certainly in some cases would, be far-reaching and calamitous. Suppose a man and a woman were doing like work, each being paid in accordance with his place on different scales, which have come out of phase. If a woman or a man succeeds in a claim under the Equal Pay Act 1970, all the other men and women employed on like work with her or him will have a claim based on the variation between his salary or hers and her or his adjusted salary. There will be a proliferation of competing claims and the Industrial Tribunal will have to revise the wage scales, which is not its function...."

The Employment Appeal Tribunal continued:[428]

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[427] At page 268 B-C.
[428] At page 270E-271B.

> "We repeat what we said in the **Naafi** case that before subsection 3 can apply it must be shown by the employer to be a genuine case where it can be seen that the variation is due to some identifiable material difference other than the difference of sex. Usually, at all events, the material difference within subsection 3 will be something other than the differences considered under subsection 4 and will not be differences between the things the woman does and the man does in the course of work.... Where men and women are employed on like work and the variation is in the rate of remuneration and the remuneration is fixed in accordance with nationally, or widely, negotiated wage scales it would seem to us that there will usually be a strong case for saying that the case falls within subsection 3. The other variation very likely genuinely due to a material difference other than a difference of sex viz.: that the man and the woman have been placed in different wage scales or at different points in the same scale. In other words the difference is due to a matter of grading. ....we hasten to say at once that we are not suggesting that the fact that a woman's pay is fixed in accordance with a scale of wide application is a conclusive answer to a claim by her under the Equal Pay Act 1970. It all depends on the nature of the grades and scales and the circumstances in which she has been graded. But when one is dealing with nationally negotiated scales in general use by local authorities it seems unlikely that a problem caused by grading is very likely to give rise to a remedy under the Equal Pay Act 1970."

The Employment Appeal Tribunal repeated what it said in **National Vulcan Engineering Insurance Group Ltd v. Wade** [1977] ICR 455 EAT in **Charles Early & Marriott (Whitney) Ltd v. Smith & Anr.** and **Snoxell & Anr. v. Vauxhall Motors Ltd & Ors** [1977] ICR 700 EAT:[429]

> "Although it is not spelt out in the terms of the Act, once a woman has established that she is being paid less than a man in the same employment employed on like work with her, it is presumed that the variation between her contract and his contract is due to the difference in sex. The Act, which is entitled "An Act to prevent discrimination, as regards terms and conditions of employment, between men and women" forms one code with the Sex Discrimination Act 1975 (see especially section 6) and it is the performance in

[429] At page 712 E-H.

municipal law of this country's obligations under Article 119 of the Treaty of Rome. Thus when an industrial tribunal comes to consider the claim of an employer that Section 1(3) of the Act is satisfied, the prima facie position has been established that the woman is entitled to the relief claimed and that the variation is due to the difference of sex. In applying Section 1(3) it will no doubt be material to consider whether the claimant has succeeded in establishing direct evidence of sex discrimination, but it is not necessary for the claim to succeed that she should be able to do so; for so much is presumed once it is established that a woman employed on like work with a man in the same employment is paid less than he is."

That case concerned red circling; 'red circling' occurs where an employee's salary is personally protected for special reasons, e.g. because he has been moved to his present position from higher paid work as a result of incapacity or because of a demotion. Such provisions frequently occur as a result of a union-management agreement. Where a woman claims equal pay with a man whose salary is artificially high for this reason, the employer may be able to show that the red circle constitutes a material difference within section 1(3).[430]

A red circle defence will not succeed if the higher salary which is being protected is a result of discrimination in the past, **Snoxell and another v. Vauxhall Motors Limited** *supra*. It was further held, in **United Biscuits Limited v. Young** [1978] IRLR 15 EAT, that the defence will also fail if the woman chooses a comparator who has been admitted to the red circle even though he does not qualify as a special case. On the other hand, it was held in **Methven and another v. Cow Industrial Polymers Limited** [1980] IRLR 289 EAT that the fact that the comparator's wages are not precisely the same as those he received in his previous job does not preclude a finding that his higher wage is due to his

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[430] More recently, the concept of 'green-circling' has entered the lexicon of equal pay. It is the practice of phasing-in over a period of time the upgradings that result from a gradings review or a restructuring. An obvious difficulty with 'green-circling' as a ground of defence is that unlike 'red -circling' it is not concerned with the personal preservation of a more advantageous position, but rather (assuming a like work, equal work or equal value finding) it is a mechanism for delaying the effect of the equality clause and in this respect see the *dicta* of the European Court of Justice in **Smith v. Advel** *infra* and **Coloroll Pension Trustees v. Coloroll Group plc** *infra* wherein, albeit in the context of pensions cases, the Court held that once an employer took steps for the future to comply with Article 141 the achievement of equality could not be made partial or progressive. To date there is no appellate decision in Great Britain dealing with 'green-circling' as a Section 1(3) defence and it was rejected (albeit with no legal reasoning) by the Employment Tribunal in **Ferguson v. The Highland Council** on 29th October 2003 (ET Case No S/200596/02).

protected position. There is, in principle, no reason why a red circle differential cannot continue indefinitely, although the Employment Appeal Tribunal in **Outlook Supplies Limited v. Parry** [1979] ICR 388 EAT has suggested that it is good industrial relations practice for the employer to phase it out over time. By reference to **Snoxell** *supra*[431] and **Avon Police v. Emery** [1981] ICR 229,[432] it can be seen that what was initially a valid reason for the difference may cease to be so. This may be because the reason itself has disappeared, as in **Beneviste v. University of Southampton** [1989] ICR 617 CA, or because the circumstances initially validating the difference have changed. But if a reason for the difference in pay was a material difference, and nothing has changed, it is likely that it is the reason for the material difference.

The Employment Appeal Tribunal in **Snoxell** further commented[433] on what it said in **Waddington v. Leicester Council for Social Services** *supra*:

> "In the course of the argument a suggestion was made that the language of the appeal tribunal in **Waddington v Leicester Council for Voluntary Services** was too wide where we said at page 270: "Where men and women are employed on like work and the variation is in the rate of remuneration, and the remuneration is fixed in accordance with national, or widely negotiated wage scales, it would seem to us that there will usually be a strong case for saying that the case falls within sub-section 3". That is really an expression of opinion upon the facts rather than the law and we had assumed that nationally or widely negotiated wages scales would be unisex and non-discriminatory. That is sometimes not the case and if we were over-sanguine it is of course always open to the claimant who is faced with an answer under Section 1(3) based upon such scales to query whether they are nonetheless discriminatory. If the case has been interpreted as saying that in such cases of nationally or widely negotiated wage scales it is not open to the claimant to raise such points, that was not our intention nor would it be a correct conclusion."

When the case of **National Vulcan Engineering Insurance Group Ltd v. Wade** proceeded to the Court of Appeal, it was held at [1978] ICR 800 CA,[434] that the burden of proof on employers under section 1(3) is not a very heavy burden as had been said in

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[431] At page 721 D-E
[432] At page 233.
[433] At page 724 D-G.
[434] At pages 807H-808A.

Snoxell & Davies v. Vauxhall Motors Ltd, Naafi v. Varley and other cases but that it is the ordinary burden of proof in a civil case i.e. on the balance of probabilities. What the employers are required to show is that it is more probable than not that the variation was genuinely due to a material difference not based on sex. The Court of Appeal was of the opinion that the only question in that case was whether the employer genuinely operated the grading system irrespective of sex, or whether the system was a mask for sex discrimination.[435] It was held that the grading system constituted a "material difference" and since it was not sex based the employer was entitled to succeed in his defence. No question of justification arose or was relevant.[436] Placement within the grading system under question in the case consisted simply of personal assessment by a manager, according to the Employment Appeal Tribunal, the scheme could *"be shown in action to be obscure in certain respects."*[437]

The Court of Appeal in **Shields v. E Coombes (Holdings) Ltd** [1978] ICR 1159 CA reviewed the whole area of equal pay and sex discrimination law and Lord Denning, no doubt in an effort to create clarity, (but in the event inducing confusion) introduced the concept of the "personal equation" in the phrase, *"... the personal equation of the man is such that he deserves to be paid at a higher rate than the woman".*[438] He went on to explain:

> Even though the two jobs, viewed as jobs, are evaluated equally, nevertheless there may quite genuinely, be 'material differences' between the two people who are doing them — which merit a variation in pay — irrespective of whether it is a man or woman doing the job. One instance is length of service. In many occupations, a worker, be he man or woman, gets an increment from time to time, according to his seniority or length of service. Another instance is special personal skill or qualifications. In many occupations a degree or diploma is a qualification for higher pay, irrespective of sex. So is a higher grading for skill or capacity within the firm itself, see *National Vulcan Insurance v Ward* [1978] IRLR 225. Likewise, a bigger output or productivity may warrant a 'wage differential' so long as it is not based on sex. So may the place of

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[435] Lord Denning MR at page 808 D-E; Ormerod LJ at page 809 A-G; Geoffrey Lane LJ at page 810 G-H.
[436] See page 811 E-G.
[437] Cited by the Court of Appeal at page 226.
[438] At page 1170 E-F.

> work, see *NAAFI v Varley* [1976] IRLR 408. In all these cases the two jobs are evaluated equally as jobs, but, nevertheless, there are material differences (other than sex) which warrant a 'wage differential' between the two persons doing them.

By the use of this construct, Lord Denning was seeking to explain how the employer's defence operated.

In **Clay Cross (Quarry Services) Ltd v. Fletcher** [1977] ICR 868 EAT, the Employment Appeal Tribunal held that the employers had discharged the onus under the subsection on the basis of the employment tribunal's finding that the employers would have employed either a man or a woman for the vacant post and that the only reason for the difference in pay was that the male clerk had been earning a higher wage in his earlier job. The decision of the Employment Appeal Tribunal was appealed to the Court of Appeal in England[439] and Lord Denning again referred to the "personal equation".[440] He said:

> The issue depends on whether there is a material difference (other than sex) between her case and his. Take heed to those words: 'between her case and his'. They show that the Tribunal is to have regard to *her* and to *him* – to the personal equation of the woman as compared to that of the man – irrespective of any extrinsic forces which led to the variation in pay.

He also pointed out that Article 119 of the Treaty of Rome provided for equal pay for equal work and contained no exceptions such as in section 1(3) of the Equal Pay Act. He said that he had no doubts that the European Court of Justice with its liberal approach would introduce an exception on the same lines, stating:[441]

> "I do not suggest that we should refer the matter to them. Suffice it that I feel confident that it would have regard to the personal equation of the man and the woman, and not to any extrinsic forces..."

Lord Justice Lawton stated: [442]

> "What does Section 1(3) in its context in both the Equal Pay Act and Sex Discrimination Act 1975 mean? The

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[439] At [1979] ICR 1 CA.
[440] At page 5C-D.
[441] At page 6B-C.
[442] At page 9F - 10B.

context is important. The overall object of both Acts is to ensure that women are treated no less favourably than men. If a woman is treated less favourably than a man there is a presumption of discrimination which can only be rebutted in the sphere of employment if the employer brings himself within Section 1(3). He cannot do so merely by proving that he did not intend to discriminate. There are more ways of discriminating against women than by deliberately setting out to do so: See Section 1(1)(b) of the Sex Discrimination Act 1975. If lack of intention had provided a lawful excuse for variation, Section 1(3) would surely have been worded differently. The variation must have been genuinely due to (that is, caused by) a material difference (that is, one which was relevant and real) between - and now come the important words- her case and his. What is her case? And what is his case? In my judgment her case embraces what appertains to her in her job, such as the qualifications she brought to it, the length of time she has been in it, the skill she has acquired, the responsibilities she had undertaken and where an under what conditions she has to do it. It is on this kind of basis that her case is to be compared with that of the man's. What does not appertain to her job or to his are the circumstances in which they came to be employed. These are collateral to the jobs as such."

Lord Denning subsequently said, in **Pointon v. The University of Sussex** [1979] IRLR 119 CA:[443]

> "As I say the simple answer to the whole of this case is that a grading on national scales does not infringe the Act in the least so long as it is operated irrespective of sex. There would be a great danger in any other holding because, as we indicated earlier on, if Dr Pointon received higher pay now everybody else in the department would want it. All the men would want to come up to her as well. Then you would have the whole thing escalating out of all proportion."

A little later, in the Court of Appeal in **Methven & Anr v. Cow Industrial Polymers Ltd** [1980] ICR 463 CA, Lord Justice Dunn accepted an analysis of section 1(3) which showed that three questions arose for decision:[444]

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[443] At page 120 para 8.
[444] At page 468G-469A.

> "(1) Was there a variation between the woman's contract and the man's? The answer in this case was, "Yes, there was a variation between their rates of wages. (2) Was there a material difference (other than the difference of sex) between her case and his? The answer again was, "Yes, Mr Munn was old and infirm, the employees were not. (3) Have the employers proved on the balance of probabilities that the variation in wages was due to the material differences?" Counsel submitted that the words 'due to' indicated that the question was one of causation, that like all questions of causation it was a question of fact and degree and that there was ample evidence to support the decision of the industrial tribunal."

The personal equation was brought to an end by Lord Keith in **Rainey v. Greater Glasgow Health Board** [1987] S.C. (H.L.) 1:

> "In my opinion these statements are unduly restrictive of the proper interpretation of s.1(3). The difference must be 'material', which I would construe as meaning 'significant and relevant', and it must be between 'her case and his'. Consideration of a person's case must necessarily involve consideration of all the circumstances of that case. These may well go beyond what is not very happily described as 'the personal equation', i.e. the personal qualities by way of skill, experience or training which the individual brings to the job. Some circumstances may on examination prove to be not significant or not relevant, but others may do so, though not relating to the personal qualities of the employer. In particular, where there is no question of intentional sex discrimination whether direct or indirect (and there is none here) a difference which is connected with economic factors affecting the efficient carrying on of the employer's business or other activity may well be relevant."

(b) Part time work

Traditionally, it was not unusual, across many industries, for the rate of pay for part-time employees (who would usually be women) not be set at a rate *pro rata* the full time rate, but rather set at a lower rate. The first appellate decision bearing directly upon part-time work and equal pay was **Handley v. H Mono Ltd.** [1978] IRLR 534 EAT. In this case, a machinist who worked twenty-six hours per week and was paid sixpence less per hour than her chosen male comparator brought a claim. Male employees were required to

work a forty-hour week, whereas female employees had a choice - if they chose to work less than forty hours they were paid less per hour but if they worked forty hours the received the same rates of pay as male employees. The employer conceded employment on 'like work' but successfully pleaded that there was a genuine material difference explaining the disparity in pay. It was accepted that although the skill and output of women workers was equal to that of male workers the women contributed less to the company's total productivity because each worker was allocated his or her own machine and the employer had to cover overheads when the part-timers were not working. It was also pointed out that the part-time workers were at an advantage in that they were paid overtime rates once they worked above their shorter basic week. The idea that women were free to choose their hours of work without any constraints was not even commented upon in the legal discussion on the case. Similarly the employer's prerogative of having a preference as to how he organised the working time was accepted without questioning its impact upon women workers.

Such a decision clearly reflects, the populist perception of the time, namely that part-time working was perceived to be of lesser social value. Further, it is indicative that the courts and tribunals were reticent to enter the domain of managements' right to organise and structure their businesses for maximum effectiveness and profitability; this was no more evident than in the development of a 'market forces' defence.

(c) Market forces and differential pay scales

In **Rainey v. Greater Glasgow Health Board** [1987] S.C. (H.L.) 1, the House of Lords considered section 1(3) in the context of recruitment of prosthetists by the National Health Service. In 1979, the Government established a prosthetic fitting service within the National Health Service and no longer relied on private contractors. In order to set up the service, the National Health Service recruited qualified prosthetists working in the private sector on their existing pay scales. Those scales were higher than the pay rates applied throughout the National Health Service on the Whitley Council Scale. After the initial recruitment of higher paid prosthetists (who were all male), subsequent recruits were placed on the lower, standard National Health Service scale, whether they were male or female. Ms Rainey, one of the later recruits, claimed that her lower salary was discriminatory on the grounds of sex, contrary to the Equal Pay Act.

The House of Lords, in interpreting section 1(3), recognised the duty of national courts of Member States of the EC to interpret national law so as to be in conformity with EC law, and therefore applied the **Bilka** test. Lord Keith said:[445]

> "...the new prosthetic service could never have been established within a reasonable time if [the earlier employees from the private sector] had not been offered a scale of remuneration no less favourable than that which they were enjoying. That was undoubtedly a good and objectively justified ground for offering [them] that scale of remuneration."

The need to employ qualified prosthetists from the private sector was a genuine one, if the National Health Service was to set up its own prosthetic service. Offering higher salaries than those enjoyed by other National Health Service employees was necessary to attain this purpose. Once the prosthetic service was set up these considerations no longer applied, and the lower wages of those prosthetists later employed, including Ms Rainey, were justified by the fact that:[446]

> ".. from the administrative point of view it would have been highly anomalous and inconvenient if prosthetists alone ... were to have been subject to a different salary scale."

Although in the **Bilka** judgment the European Court refers to "economic" grounds for justification, Lord Keith expanded the scope of the defence stating that:[447]

> ". . read as a whole the ruling of the European Court would not exclude objectively justified grounds which are other than economic, such as administrative efficiency in a concern not engaged in commerce or business."

In disposing of an argument put forward by Counsel for the appellant based on section 1(1)(b) of the Sex Discrimination Act 1975, that is prohibiting indirect sex discrimination, Lord Keith of Kinkel further stated:[448]

> "This provision has the effect of prohibiting indirect discrimination between women and men. In my opinion it does not, for present purposes, add anything to Section

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[445] At page 144B.
[446] *Per* Lord Keith at page 35.
[447] Page 35.
[448] Page 36.

1(3) of the Act of 1970, since, upon the view which I have taken as to the proper construction of the latter, a difference which demonstrated unjustified indirect discrimination would not discharge the onus placed on the employer. Further, there would not appear to be any material distinction in principle between the need to demonstrate objectively justified grounds of difference for purposes of Section 1(3) and the need to justify a requirement or condition under Section 1(1)(b)(ii) of the Act of 1975."[449]

Notwithstanding the importance of **Rainey** insofar as the scope of the employers defence is concerned, the case sowed the seeds for the subsequent cases in which it was argued that the difference in pay had to be justified by the employer.

12.4 Re-assessment of the employer's defence after 1987

In **McGregor v. General Municipal Boilermakers and Allied Trades Union** [1987] ICR 505 EAT, Mr Justice Wood considered the difference between the wording of section 1(3) before and after the inclusion of the material factor test in 1984 by the Equal Pay (Amendment) Regulations and considered it to be all important. There was no longer the limitation of comparing his case and hers with the result that the authorities decided under the previous wording were not necessarily of much assistance. The former line sought to be drawn between demand factors and personal factors was not necessarily the correct way in which to approach the new wording. Mr Justice Wood considered that in approaching a defence to an equal value claim under section 1(3)(b) the employment tribunal should ask itself (i) was there a variation between the woman's contract and the man's; (ii) was there a material factor other than the difference of sex which was a material difference between a woman's case and the man's case or other material difference; (iii) had the employer proved that it was more probable than not that the variation was genuinely due to that material factor. The words "due to" were words of causation and it was a question of fact and degree for the employment tribunal.

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[449] The House of Lords also considered the *dicta* in the case of **Clay Cross (Quarry Services) Limited** *supra* and **Shields** *supra* so far as applying Section 1(3) to the 'personal equation' between a woman and a man, were considered to be unduly restrictive of the proper interpretation of Section 1(3) *per* Lord Keith at page 32 and 35.

The Employment Appeal Tribunal followed the *dicta* of Geoffrey Lane LJ in **National Vulcan** *supra*:[450]

> "It is not for the tribunal to examine the employer's system with the object of seeing whether it is operating efficiently or even fairly. The only inquiry is whether it is genuine - that is to say, designed to differentiate between employees on some basis other than the basis of sex."

In **Hayward v. Cammell Laird Shipbuilders Ltd (No.2)** [1988] IRLR 257 HL, Lord Mackay was of the opinion that section 1(3) would not provide a defence simply because there was another term in the woman's contract more favourable than the corresponding term in the man's contract (page 261). Lord Goff countered the employer's fear that the term by term approach would lead to leapfrogging claims by men, by saying that an appropriate case in section 1(3) could be relied upon, for example, by showing that the different pay structures under which the woman and the man were employed were *"wholly devoid of discrimination on the grounds of sex"*.[451]

In **Beneviste v. University of Southampton** [1989] ICR 617 CA, the claimant was paid less than her male comparator because she joined the university at a time of financial constraint.[452] There was no evidence of any continuing financial constraints.[453] The Court held that the material difference had evaporated, so that the variation could not be "due to" the financial constraints, thus the employers lost the basis of their defence and the presumption of sex discrimination was brought into play.

In **Davis v. McCartneys** [1989] ICR 705 EAT, the employer's defence to a claim of equal value brought by a secretary who compared her work to that done by a male clerk was that the man carried more financial responsibility in his job and also had to work in more unpleasant physical surroundings. This succeeded before the employment tribunal. On appeal, it was argued that the employment tribunal had erred in taking into account considerations which were properly relevant for deciding whether the work was of equal

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[450] At page 811.
[451] At page 263.
[452] See page 626 D-E.
[453] See page 628 A-B.

value. The Employment Appeal Tribunal rejected this argument stating that there was no limitation on the factors relevant to a consideration of the employer's defence.[454]

In **The Financial Times Limited v. Byrne & Ors** [1992] IRLR 163 EAT, the Employment Appeal Tribunal approved the decision of an employment tribunal which held that the burden of proof required the employer to prove not only that the variation is genuinely due to a material factor but required him to prove also that this is not due to the difference of sex. A rigorous application of the principles enunciated in this case ought to ensure that sex cannot be the reason for the difference in pay. An oddity arose in a situation where the man was paid more than the woman because of a "mistake" by the employer.

(a) The 'mistake' cases

Confusion was brought into this area in **McPherson v. Rathgael Centre for Children and Young People & Another** [1991] IRLR 206 NICA. A male employee had been initially engaged at a level of salary, on the understanding that he held certain recognised teaching qualifications. It later emerged that he did not hold such qualifications, but it was decided to continue his employment and to continue to pay him the salary at which he had been appointed. A woman employed on the same work, but paid on a lesser scale because she did not have a teaching qualification, raised a complaint under the Northern Ireland Equal Pay legislation. The employment tribunal held that there was a genuine material difference, other than sex, between the cases, but that decision was reversed by the Court of Appeal in Northern Ireland. In the course of his judgment, Hutton LCJ said:[455]

> "I consider it to be clear that, once the first respondent received the letter of 2 April 1980 stating that the placing of Mr Millar on a teacher's salary scale would be based on assumptions which were not, in fact, correct, the industrial tribunal was not entitled to find, in the absence of further evidence, that the employer had established a

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[454] See page 711 F. This decision was most recently followed in **Christie v. John E. Haith Ltd.** [2003] IRLR 670 EAT. In this case, it might have been thought that what is in essence was the double counting which was disapproved in **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse** might have caused the Employment Appeal Tribunal not to follow **Davies**. However, the Employment Appeal Tribunal was not referred to **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse.**

[455] At page 211.

defence under Section 1(3). Having placed Mr Millar on a salary scale on assumptions which it knew were not correct the first respondent cannot satisfy the test stated by Browne-Wilkinson J in **Jenkins** case at p 394, that:

> 'In order to show a "material difference" within Section 1(3) of the Act of 1970 an employer must show that the lower pay for the part-time (female) worker is in fact reasonably necessary in order to achieve some objective other than an objective related to the sex of the part-time (female) worker.'

Mr Millar had previously been paid a salary based on the teacher's scale when he was employed at Killyleagh Sailing Centre and it may be, although it is only conjecture, that the first respondent decided to continue to pay Mr Millar a salary based on that scale, notwithstanding that it was on a scale higher than the other instructors, because they regarded him as an excellent instructor and thought that he would leave its employment if he did not continue to receive a salary based on that scale. But it is clear that the first respondent adduced no evidence which came near to furnishing grounds upon which the tribunal could find objectively justified grounds for the difference in salary between Mr Millar and the appellant, such as the House of Lords found between Mr Crumlin and Mrs Rainey. Accordingly I would hold that the industrial tribunal erred in law in holding that the first respondent had established a defence under Section 1(3)(a)."

At the conclusion of his judgment, Lord Chief Justice Hutton said:

> "The only question which it is necessary to answer in the case stated is question 3 which is as follows:
> 'Even if the tribunal was correct to hold that the appellant/applicant was paid less than her male comparator due to a "gross but understandable error", does such a reason constitute a defence to the appellant/applicant's claim under the provisions of the Equal Pay Act (Northern Ireland) 1970 as amended?'
> I would answer the question, 'No'".

As Knox J observed, in **Calder & another v. Rowntree Mackintosh Confectionery Limited** [1992] ICR 372 EAT, that decision is entitled to great respect; but, as he also pointed out, it was a case in which the employer was not represented before the Appeal Court and **National Vulcan Engineering Insurance Group Ltd v. Wade** *supra* was not cited to them. Mr Justice Knox did not question the correctness of the view that an

absence of an intention to discriminate is insufficient to establish a defence under section 1(3):[456]

> "It is only with regard to the additional requirement of objective justification in a case of claimed direct discrimination that we respectfully disagree."

The Court of Appeal approved the decision of the Employment Appeal Tribunal but the interpretation of section 1 (3) was not considered there.[457]

(b) The Scottish approach to interpretation

Around this period, the Scottish division of the Employment Appeal Tribunal developed its own approach to the subsection. In **Barber & Ors v. NCR** [1993] IRLR 95 EAT, the difference between the different conditions applying to men and women in this case arose from separate collective agreements. The case was argued and defended on the basis of indirect discrimination. However, the Employment Appeal Tribunal emphasised the word "is" in the subsection rather than the words "due to" and accordingly, it held that it was not sufficient for the employer merely to explain historically how the difference in remuneration came about. It said that the plain questions posed by section 1 of the 1970 Act were firstly, whether there was a difference in pay and secondly, whether there was a material factor to justify it.

Barber was followed by the Scottish division of the Employment Appeal Tribunal in **Young v. University of Edinburgh** unreported EAT/244/93. This was a case of direct discrimination which nonetheless caused the Employment Appeal Tribunal to comment with approval on its decision in **Barber** and note that its decision seemed to be in accordance with **Enderby** in the European Court. It considered the position of the employers which was that the difference in pay was based on administrative error and held that it was essential for the employers to establish the historical explanation for the difference between the woman and the man, and to show that the explanation was one free of any taint of discrimination on the ground of sex; stating that:

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[456] At page 381B.
[457] See also **Yorkshire Blood Transfusion Services v. Plaskitt** [1994] ICR 74 EAT- a case concerning mistake which was decided on the same analysis as **Calder.**

> "That would not, however, be sufficient in itself to establish the defence because what is required is not an explanation of how the difference came about in the past, but proof that the difference is (its emphasis) due to a genuine material factor operating in the present. The additional element necessary to provide that proof in the present case is, however, found in the fact that the difference in treatment cannot be eliminated without departing from the normal basis of remuneration which the respondents have genuinely accepted and acted upon and so creating further anomalies. Taken together, the circumstances seem to us sufficient to amount to a genuine material factor, in the sense given to that expression in **Rainey** *supra*."

There is nothing controversial in that emphasis in itself. By reference to earlier "red circle" cases, it can be seen that what was initially a justifiable reason for the difference may cease to be so. However, by continuing its earlier approach of requiring some form of justification from the employer, it consolidated the difference of approach to that in England.

The English courts were not immune from creating difficulties in the interpretation of the defence, but the difficulties were different. For example the House of Lords in **Ratcliffe & Ors v. North Yorkshire County Council** [1995] ICR 833 H.L rejected the introduction of the concepts of "direct" and "indirect discrimination" into the 1970 Act which had taken place in **Jenkins**. Lord Slynn said[458] that:

> "There is no provision in the Act of 1975 which expressly incorporates the distinction into the Act of 1970 even though Schedule 1 to the Act of 1975 incorporated a number of amendments to the Act of 1970 and even though Part II of that Schedule set out the Act of 1970 in full in its amended form.
> In my opinion the Act of 1970 must be interpreted in its amended form without bringing in the distinction between so-called "direct" and "indirect" discrimination."

Michael Rubenstein[459] comments on the decision in **Ratcliffe**:

> "In our view, the House of Lords decision in Ratcliffe should be seen, like the ECJ decision in Enderby, as

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[458] At page 839F.
[459] In the September/October issue of the Equal Opportunities Review 1995 page 49 at page 51.

rejecting a formalistic structure of proof in respect of the employer's equal pay defence rather than as an edict that the concepts of direct and indirect discrimination are irrelevant in an equal pay case. Direct discrimination is shorthand for a gender-based reason. Indirect discrimination is shorthand for a gender-neutral reason with an adverse impact. Lord Slynn is doubtless right to regard a reason which is tainted by sex discrimination as gender-based, even where there is no intention to discriminate. Reliance on the labour market to set the wages of a women- only group raises an issue of direct discrimination.

It seems obvious, however that the House of Lords did not intend to preclude the possibility of challenging an employer's defence to unequal pay on grounds that it is indirectly discriminatory, even where it is not directly gender based. As we have been reminded many times, there is no difference between the defence under s.1(3) of the Equal Pay Act and that under Article 119 of the EC Treaty, and the case law challenging the statutory exclusions and qualifications has been, and continues to be, conducted on the basis that a gender-neutral factor with an adverse impact on women can still be objectively justified by the alleged discriminator, whether the case is regarded as a question of sex discrimination under the Equal Treatment Directive or as a question of equal pay under Article 119."

These comments are based on a misunderstanding of the decision of the House of Lords in **Rainey v. Greater Glasgow Health Board** *supra*, for the reasons given by the Employment Appeal Tribunal in **Calder v. Rowntree Mackintosh Ltd** [1992] ICR 372 EAT:[460]

> "It could not be held that it is necessary for an employer to show objective justification for a variation between the contracts of the complainant and the comparator in a case where indirect discrimination is not alleged and the discrimination claimed is direct. The statement of Lord Keith in **Rainey v. Greater Glasgow Health Board** [1987] ICR 129 that "there would not appear to be any material distinction in principle between the need to demonstrate objectively justifiable grounds of difference for purposes of s.1(3) and the need to justify a requirement or condition under s.1(1)(b)(i)" of the Sex Discrimination Act was not intended to apply to all cases of discrimination, whether direct or indirect.

[460] at 380.

Rainey's case was one of indirect discrimination, and the rest of the relevant paragraph from Lord Keith's speech was in terms limited to indirect discrimination. Furthermore, the introduction of a requirement for objective justification would run counter both to existing authority and to the basic scheme of sex discrimination legislation, which is not to secure equal pay for equal work across the board but to eliminate pay differentials on grounds of sex. To introduce a requirement of objective justification outside indirect discrimination would radically alter the scope of the legislation and take it far beyond its legitimate aim."

The retrenchment back to the orthodox interpretation of this provision started with the decision of the Employment Appeal Tribunal in **Tyldesley v. TML Plastics Ltd.** [1996] ICR 356 EAT. Given the importance of this case, the facts are set out in some detail. Mrs Tyldesley was appointed as an inspection supervisor on 2 April 1991, working a shift from 6 am to 2 pm. She had previously been employed as a part-time machine operator. She was paid the same rate as the inspection supervisor on the 2 pm to 10 pm shift, Mrs Richardson. The company had introduced a scheme of "total quality management" (TQM) and Mrs Tyldesley had been given training in TQM and was introducing it on her shift. However, she needed further training in TQM as she had not fully embraced it, although this did not affect her performance as an inspection supervisor. Mrs Richardson was transferred to other duties and on 1 June 1992 Mr Goward took her place. The employers believed Mr Goward understood and was committed to the concept of TQM and had experience of operating in a TQM environment. He was paid £12,500 compared with Mrs Tyldesley's salary of £9,253.

On 26 October 1992, Mrs Tyldesley transferred to work as a part-time operator. However, she brought an equal pay claim comparing her work with that of Mr Goward.

An industrial tribunal found that the Mrs Tyldesley was employed on like work with her comparator. It rejected the employer's section 1(3) defence. The tribunal said that the employers had to show that the variation was genuinely due to a material factor which was not the difference of sex and they also had to show that the discrimination was objectively justified, that is, the respondent was pursuing measures that corresponded to a real need and were appropriate and necessary to meeting that need – that is the indirect discrimination test as set out in **Bilka** and **Rainey**. According to the tribunal, the

employers had not established *"a good and objectively justified ground"* for offering a higher rate of pay to Mr Goward than that enjoyed by Mrs Tyldesley, since there were no objective criteria to show that Mr Goward had any better concept of total quality management that that enjoyed by the applicant. The tribunal therefore ruled that Mrs Tyldesley was entitled to equal pay from the date of Mr Goward's appointment to the date her duties changed.

Mrs Tyldesley appealed on grounds that she should have been entitled to arrears of pay from the earlier date of her appointment. The employers cross-appealed on grounds that the tribunal had erred in law in holding that the defence under section 1(3) of the Equal Pay Act had not been established. The Employment Appeal Tribunal (Mr Justice Mummery presiding) held that the industrial tribunal erred in law in directing itself that in order to establish a defence under section 1(3) of the Equal Pay Act, the employers had to show that the explanation for the difference in pay between the appellant and her comparator employed on like work was objectively justified, in addition to proving that the variation was genuinely due to a material factor which was not the difference of sex. The industrial tribunal had erred, therefore, in finding that the employers' ground for offering a higher rate of pay to the male comparator, their belief that he had experience of total quality management, did not satisfy section 1(3) because it was not objectively justified. The approach adopted by the industrial tribunal incorrectly placed an additional burden on the employer.

The Employment Appeal Tribunal found that in the absence of evidence or a suggestion that the factor relied on to explain the differential was itself tainted by gender, because it was indirectly discriminatory or because it adversely impacted on women as a group, in the sense indicated by the European Court of Justice in **Enderby v. Frenchay Health Authority,** no requirement of objective justification arose, and it is sufficient in law that the explanation itself caused the difference in pay or was a sufficient influence to be significant and relevant, whether or not that explanation was objectively justified.

The Employment Appeal Tribunal stressed that the Equal Pay Act, Article 119 of the Treaty of Rome and the Equal Pay Directive have the purpose of eliminating sex discrimination, not that of achieving "fair wages" and that therefore, a difference in pay explained by a factor not itself a factor of sex or tainted by sex discrimination should, in

principle, constitute a valid defence. Further, they stated that the comment of the House of Lords in **Rainey v. Greater Glasgow Health Board** that objective justification must be shown in order to establish a defence under section 1(3) applies only where, as on the facts of **Rainey** the factor to be relied upon is one which affects a considerably higher proportion of women than men, so as to be indirectly discriminatory unless justified. Similarly, both **Jenkins v Kingsgate (Clothing Productions) Ltd** and **Enderby** were cases where the factor relied upon was one which affected a considerably higher proportion of women than men and therefore required objective justification. Thus, even if a differential is explained by careless mistake which could not possibly be objectively justified, that would amount to a defence, provided the tribunal is satisfied that the mistake was of sufficient influence to be significant or relevant. If a genuine mistake suffices, so must a genuine perception, whether reasonable or not, about the need to engage an individual with particular experience, commitment and skills.

The foregoing is summarised in the judgment as follows:[461]

> "(1) The Equal Pay Act 1970, Article 119 of the E.C. Treaty (O.J. 1992 No. C.224) and the Equal Pay Directive (Council Directive (75/117/E.E.C.)) have as their purpose the elimination of sex discrimination not that of achieving "fair wages". Their detailed provisions are to be construed in the light of that purpose.
> (2) A difference in pay explained by a factor not in itself a factor of sex, or tainted by sex discrimination, should in principle, constitute a valid defence.
> (3) The comment of the House of Lords in **Rainey v. Greater Glasgow Health Board** [1987] ICR 129, 145, that, in order to establish the defence under section 1(3) of the Act of 1970, objective justification must be shown, applies only where, as on the facts of **Rainey,** the factor to be relied upon is one which affects a considerably higher proportion of women than men so as to be indirectly discriminatory and thus tainted by sex discrimination, unless justified. The same observation may be made in relation to the comments of the Court of Justice in **Jenkins v. Kingsgate (Clothing Productions) Ltd** (Case 96/80) [1981] ICR 592 and **Enderby v. Frenchay Health Authority** (Case C-127/92) [1994] ICR 112. Those were both cases where the factor relied upon was one which affected a considerably higher proportion of women than men and therefore required objective justification.

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[461] on page 362.

(4) Even if **Enderby** was not a case of indirect discrimination, as understood by English law, the pre-condition of enjoying a higher salary in that case was membership of a group which comprised predominantly men. A prima facie case of unequal treatment was made out which needed to be rebutted by objective justification. No such case arises here. There was no suggestion that the requirement of particular experience of, or embracing, total quality management was one which affected a considerably higher proportion of women than men.

(5) Accordingly, there was no allegation or evidence in this case of indirect discrimination which required rebuttal by objective justification.

(6) In the absence of evidence or a suggestion that the factor relied on to explain the differential was itself tainted by gender, because indirectly discriminatory or because it adversely impacted on women as a group in the sense indicated in **Enderby,** no requirement of objective justification arises: see **Calder v. Rowntree Mackintosh Confectionery Ltd** [1992] ICR 372, 379-380F, and [1993] ICR 811 and **Yorkshire Blood Transfusion Service v. Plaskitt** [1994] ICR 74, 79-80F".

With this admirably clear statement of the law, the Employment Appeal Tribunal returned the law to a state of orthodoxy;[462] what was, of course, required was that a higher court endorsed that, to bind the inferior courts and tribunals; this occurred with two landmark Scottish cases, concerning the same respondent, namely Strathclyde Regional Council - the largest employer not just in the United Kingdom, but in western Europe.[463]

In **Strathclyde Regional Council v. Wallace** 1998 SC 72 HL, it was held that the employment tribunal had erred in holding that in order for the employer to succeed in a section 1(3) defence, they had to establish that the reasons for the difference in pay justified the disparity. Lord Browne-Wilkinson said:-[464]

> "If the words of subsection (3) are read without reference to authority they do not present any great difficulty in this case. The subsection provides a defence if the employer shows that the variation between the woman's contract

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[462] And indeed the approach which accorded with the decisions of the European Court of Justice and which had been misunderstood by tribunals in Great Britain, which in conflating direct and indirect discrimination had lost sight of the precise legal test.

[463] By the time the second case came before the House of Lords, local government reorganisation in Scotland had occurred and the new respondent was Glasgow City Council.

[464] At page 76E-G.

and the man's contact is "genuinely" due to a factor which is (a) material and (b) not the difference of sex. The requirement of genuineness would be satisfied if the industrial tribunal came to the conclusion that the reason put forward was not a sham or pretence. For the matters relied upon by the employer to constitute "material factors", it would have to be shown that the matters relied upon were in fact causally relevant to the difference in pay, i.e. that they were significant factors. Finally, the employer had to show that the difference of sex was not a factor relied upon."

Further, Lord Browne-Wilkinson stated[465]:-

> "Senior Counsel for the Appellants submitted that the industrial tribunal were right to consider whether the factors relied upon (even though not gender related) 'justified' the disparity in pay. He submitted that for a factor to be a 'material' factor within subsection (3) it had to be demonstrated that the matters relied upon unavoidably led to the disparity in pay: the industrial tribunal was throughout engaged upon a consideration of whether the factors were 'material' in that sense. I cannot accept that submission. The words of the subsection indicate no requirement of such a justification inherent in the use of the words 'material factor'. It has long been established by the decision of this House in **Rainey v. Greater Glasgow Health Board** that a factor is material if it is 'significant and relevant', a test which looks to the reason why there is a disparity in pay not whether there is an excuse for such disparity. To my mind decisively, if one were to accept Senior Counsel for the Appellants' submission that would be to turn the Equal Pay Act into a 'fair wages' Act requiring the elimination of disparity in wages even though such disparity had nothing to do with sex discrimination. As I have said, the preamble to the Act renders such an argument impossible."

And:[466]

> "In my judgment the law was correctly stated by Mummery J giving the judgment of the Employment Appeal Tribunal in **Tyldesley v. TML Plastics Ltd** in which he followed and applied the earlier Employment Appeal Tribunal decisions in **Calder v. Rowntree Mackintosh Confectionery Ltd** and **Yorkshire Blood Transfusion Service v. Plaskitt.** The purpose of section 1 of the Equal Pay Act 1970 is to eliminate sex

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[465] At 78E-G.
[466] At 79C-D.

discrimination in pay not to achieve fair wages. Therefore, if a difference in pay is explained by genuine factors not tainted by discrimination that is sufficient to raise a valid defence under subsection (3); in such a case there is no further burden on the employer to 'justify' anything. However, if the factor explaining the disparity in pay is tainted by sex discrimination (whether direct of indirect) that will be fatal to a defence under subsection (3) unless such discrimination can be objectively justified in accordance with the tests laid down in the Bilka and **Rainey** cases."

Notwithstanding the express endorsement of the approach of the Employment Appeal Tribunal in **Tyldesley,** a similar challenge to the interpretation of section 1(3) arose in **Glasgow City Council v. Marshall** 2000 SC (HL) 67. The claimants worked as instructors in special schools providing training for children with learning disabilities. They claimed equal pay with the teachers with whom they worked alongside, and established before an employment tribunal that they were engaged on 'like work' with them. The employment tribunal rejected the employer's defence under section 1(3), even though it was, on the facts, clear that no sex discrimination, direct or indirect, was linked with the pay differential. The tribunal thought the employer had not done enough by showing that there was an historical explanation for the difference in pay. The House of Lords held otherwise, in effect finding that the tribunal had required the employer to show a good (in the sense of objectively justified) reason for the differential, when there was no basis for this in the legislation. Lord Nicholls said:[467]

> "When Section 1 is thus analysed, it is apparent that an employer who satisfies the third of these requirements [i.e. that the reason for the difference is not "the difference of sex"] is under no obligation to prove a "good" reason for the pay disparity. In order to fulfil the third requirement he must prove the absence of sex discrimination, direct or indirect. If there is any evidence of sex discrimination, such as evidence that the difference in pay has a disparately adverse impact on women, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity."

[467] At page 203 A-C.

Accordingly, the House of Lords held that the employment tribunal had erred in law in finding that the employers had failed to prove that the variation in pay between the claimant instructors and their comparators employed on like work as teachers was genuinely due to a material factor, other than sex within the meaning of section 1(3) of the Equal Pay Act, in circumstances in which it had been established that the variation in pay was not due to sex discrimination and that the employment tribunal erred in holding that section 1(3) requires a good and sufficient reason for the variation in pay, even where the absence of sex discrimination has been demonstrated.

Their Lordships stated that the scheme of the Act means that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden then passes to the employer to show that the explanation for the variation is not tainted by sex.

Lord Nicholls stated:[468]

> "I can well understand that an instructor in a special school, whether a woman or a man, may feel aggrieved that a teacher in the same school is being paid more for doing the same or broadly similar work. I have more difficulty in understanding how, in the absence of sex discrimination, this perceived unfairness is said to be caught and cured by a statute whose object, according to its preamble, is to prevent discrimination between men and women as regards terms and conditions of employment. The instructors' contention is that this conclusion follows from the clear wording of s.1. Further, they contend that this conclusion is not surprising. Proof that women are being paid less than men for like work is prima facie evidence of sex discrimination. Part of the purpose of the Equal Pay Act was to ensure that discrimination does not arise through accident or inertia. If an employer fails to rebut the presumption of sex discrimination because he is unable to show a proper reason for the disparity in pay, the case falls within the mischief the Act was intended to remedy. This conclusion may go further than the provision regarding equal pay for equal work in Article 119 (now renumbered Article 141) of the EC Treaty. But there is no reason why the equality

[468] At page 201G-203B.

of pay legislation in a Member State should be confined in its scope to that of Article 119.

I am unable to agree with the main thrust of this submission or with the approach adopted by the industrial tribunal. This approach would mean that in a case where there is no suggestion of sex discrimination, the equality clause would still operate. That would be difficult to reconcile with the gender-related elements of the statutory equality clause. The equality clause is concerned with variations in pay or conditions between a woman doing like work with a man and vice versa. But if the equality clause were to operate where no sex discrimination is involved, the statutory starting point of a gender-based comparison would become largely meaningless. On this interpretation of the Act, what matters is not sex discrimination. What matters is whether, within one establishment, there is a variation in pay or conditions between one employee doing like work with another employee. The sex of the employees would be neither here nor there, save that to get the claim off the ground the chosen comparator must be of the opposite sex. On this interpretation the Act could be called into operation whenever mixed groups of workers are paid differently but are engaged on work of equal value. In such a case the statutory equality clause would operate even when the pay differences are demonstratively free from any taint of sex discrimination. Indeed, a notable feature of the industrial tribunal's decision in the present case is that a male instructor succeeded as well as seven female instructors. It is a curious result in a sex discrimination case that, on the same facts, claims by women and a claim by a man all succeed.

I do not believe the Equal Pay Act 1970 was intended to have this effect. Nor does the statutory language compel this result. The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of

the disparity. In this regard, and in this sense, the factor must be a 'material' factor, that is, a significant and relevant factor. Third, that the reason is not 'the difference of sex'. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within s.1 (2)(c), may be a 'material' difference, that is, a significant and relevant difference, between the woman's case and the man's case.

When s.1 is thus analysed, it is apparent that an employer who satisfies the third of these requirements is under no obligation to prove a 'good' reason for the pay disparity. In order to fulfil the third requirement he must prove the absence of sex discrimination, direct or indirect. If there is any evidence of sex discrimination, such as evidence that the difference in pay has a disparately adverse impact on women, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity."

It might have been thought that the decisions in **Wallace** and **Marshall** would have settled the debate once and for all, however, there have been two developments which might yet see the 'objective justification' test introduced in a context where an equal pay claim is not based on indirect discrimination. The first is the decision of the European Court of Justice in the case of **Brunnhofer v. Bank der Osterreichischen Postparkasse AG** C-381/99 [2001] ECR I-4961 ECJ which held, in a judgment which is notable for a lack of legal reasoning, that the employer had to justify the difference in pay, in a case where the facts disclosed only direct discrimination, and the second is the effect in the UK of the implementation of the Burden of Proof Directive. These matters are considered in the next subsection.

12.5 A new approach to interpretation?

In order to examine the extent to which the case of **Brunnhofer v. Bank der Osterreichischen Postparkasse AG** C-381/99 [2001] ECR I-4961 ECJ might herald a new approach to interpretation, which essentially disposes of any distinction between direct and indirect claims and imports both a higher burden and more restrictive defence

upon the employer, it is necessary to examine the facts of the case and the judgment of the European Court in some detail.

The facts of the case were that Ms Brunnhofer was employed by the bank from July 1993 to July 1997 and claimed equal pay with a male colleague employed from August 1994. Both employees were classified under the collective agreement applicable to banking employees in Austria as in the same category as employees (category V) with training in banking who carry out skilled banking work on their own. They received the same basic salary, but from the time of his recruitment onwards, the man received an individual supplement higher than the supplement received by Ms Brunnhofer. The equal pay claim was dismissed at first instance; Ms Brunnhofer appealed to the Higher Regional Court for Vienna. The bank denied discrimination, contending that there were objective reasons for the difference in the individual supplements. According to the bank, her male comparator carried out more important functions than Ms Brunnhofer, who was not authorised to enter into binding commitments on behalf of the bank and the quality of the work of the two employees was also said to be different. The Higher Regional Court for Vienna referred the following questions to the European Court of Justice for a preliminary ruling.[469]

> "1(a) In assessing whether work is equal work or constitutes the same job within the meaning of Article 119 of the EC Treaty (now Article 141 EC) or is the same work or work to which equal value is attributed within the meaning of Directive 75/117/EEC, is it sufficient, where individual contracts of employment stipulate supplements to pay fixed by collective agreement, to ascertain whether the two workers being compared are classified in the same job, category under the collective agreement?
>
> (b) If the reply to question 1(a) is in the negative:
> In the situation described in question 1(a), is the same classification under the collective agreement evidence of the same work or work of equal value within the meaning of Article 119 (now Article 141) of the Treaty and of Directive 75/117/EEC, with the result that it is for the employer to prove that the work is different?
>
> (c) Can the employer rely on circumstances not taken into account in the collective agreements **in order to justify a difference in pay?**

[469] Paragraph 23 of the Judgment.

(d) If the reply to question 1(a) or 1(b) is in the affirmative: Does this also apply if the classification in the job category under the collective agreement is based on a job description couched in very general terms?

2(a) Are Article 119 (now Article 141) of the Treaty and Directive 75/117/EEC based on a definition of worker which is uniform at least in so far as the worker's obligations under the contract of employment depend not only on generally defined standards but also on the individual capacity of the worker himself?

(b) Are Article 119 (now Article 141) of the Treaty and Article 1 of Directive 75/117/EEC to be interpreted as meaning that **the fixing of different pay may be objectively justified by circumstances which can be established only ex post facto,** such as in particular a specific employee's work performance?" [Emphasis added]

The first problem with this judgment actually arises from the way in which the Higher Regional Court for Vienna[470] drafted the questions to the European Court of Justice for a Preliminary Ruling, in that in Question 1(b) the issue of upon whom the burden of proof fell was raised and in Question 2(b) the Higher Regional Court itself introduced the notion of objective justification in a case the facts of which clearly demonstrate the case was not one founded on indirect discrimination. The words in the reference emphasised in bold show that notwithstanding the facts of the case clearly demonstrate that this is not an indirect claim, but rather concerns a single claimant claiming equal pay with a single male colleague, with whom she shared a common grade but different pay, the Oberlandesgericht Wien in posing the questions adopts the language of indirect discrimination, both in respect of objective justification and burden of proof.

In their 'preliminary remarks',[471] the Court characterises the questions raised as follows:

"24 Preliminary Remarks

It is clear from the documents in the case that the national court has made a reference to the Court on the interpretation of Article 119 of the Treaty and Article 1 of the Directive in order to assess whether there is discrimination on grounds of sex prohibited by Community law in a case where the woman concerned receives

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[470] The Oberlandesgericht Wien.
[471] at paragraphs 24, 25 and 26.

the same basic pay, fixed by a collective agreement, as her male comparator, but from the start of her employment receives a monthly salary supplement, stipulated in her individual employment contract, which proves to be less than that paid to the man, although both employees are classified in the same grade of the same job category under the collective agreement governing their employment.

25 The questions raised by the national court, which can be examined together, essentially concern (i) the concepts of 'the same work', 'the same job' and 'work to which equal value is attributed' within the meaning of Article 119 of the Treaty and Article 1 of the Directive, (ii) the rules of evidence concerning the existence of unequal pay for men and women and of possible objective justification for any difference in treatment and (iii) the question whether certain specific factors, such as the personal capacity or work performance, may be relied on by an employer in order to justify paying an employee, such as the plaintiff in this case, remuneration lower than that paid to her male colleague.

26 Those questions therefore relate both to some of the conditions determining the actual application of the principle of equal pay for men and women and to the various circumstances relied on by the employer in this case to justify the existence of a difference in the amount of the individual salary supplement paid to each of the employees concerned."

The Court then reminds itself of the relationship between the Directive and Article 141 by *inter alia* referring primarily to indirect cases:

> 27 It should be recalled at the outset that Article 119 of the Treaty lays down the principle that the same work or work to which equal value is attributed must be remunerated in the same way, whether it is performed by a man or a woman ...
>
> 28 As the Court has already held in case 43/75 **Defrenne II** [1976] ECR 455, paragraph 12, that principle, which is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified, forms part of the foundations of the Community.
>
> 29 The Court has also repeatedly held that the Directive is essentially designed to facilitate the practical application of the principle of equal pay laid down in Article 119 of the Treaty and in no way alters the scope or content of that principle as defined in Article 119 ... so that the terms used in the Treaty Article and in the Directive have the same meaning (see, as regards 'pay', case C-167/97 **Seymour-Smith and Perez** ...

and as regards 'the same work', case C-309/97 **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse...)**

30 So understood, the fundamental principle laid down in Article 119 of the Treaty and elaborated by the Directive precludes unequal pay as between men and women for the same job or work of equal value, whatever the mechanism which produces such inequality ... unless the difference in pay is justified by objective factors unrelated to any discrimination linked to the difference in sex ..."

The references to **Seymour-Smith and Perez** and **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse** are of interest in view of the fact that it was in these cases that Advocate General Cosmas gave a lengthy exposition on the nature of the composition of the advantaged and disadvantaged groups in cases of indirect sex discrimination.[472] Clearly, the Court is directing itself in accordance with its own jurisprudence in cases of indirect discrimination.

As regards the burden of proof, the Court likewise makes no express distinction between direct and indirect cases, and referring only to the latter, states:[473]

"51 The burden of proof

By this part of the reference, the national court is asking essentially which party to the main proceedings bears the burden of proving the existence of an inequality in pay between men and women and any circumstances capable of objectively justifying such a difference in treatment.

52 As to that point, it should be observed that it is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination in the matter of pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to having the discrimination removed (see case C-127/92 **Enderby** paragraph 13).

53 However, it is clear from the case law of the Court that the burden of proof may shift when this is necessary to avoid depriving workers who appear to be the victims of

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[472] Considered in Chapter 4 and illustrated in practice in Chapter 13.

[473] at paragraphs 51 -62, although at paragraph 56 the Court notes that this is not a case to which **Enderby** applies.

discrimination of any effective means of enforcing the principle of equal pay (see **Enderby** paragraph 14).

54 In particular, where an undertaking applies a system of pay with a mechanism for applying individual supplements to the basic salary, which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (case 109/88 **Danfoss** paragraph 16).

55 Under such a system, female employees are unable to compare the different components of their salary with those of the pay of their male colleagues belonging to the same salary group and can establish differences only in average pay, so that in practice they would be deprived of any possibility of effectively examining whether the principle of equal pay was being complied with if the employer did not have to indicate how he applied the criteria concerning supplements (see **Danfoss** paragraphs 10, 13 and 15).

56 However, there are no such special circumstances in the present case, which concerns the inequality, which is not denied, of a precise component of the overall remuneration granted by the employer to two particular employees of different sex, so that the case law set out in paragraphs 53 to 55 above is not applicable to this case.

57 In accordance with the normal rules of evidence, it is therefore for the plaintiff in the main proceedings to establish before the national court that the conditions giving rise to a presumption that there is unequal pay prohibited by Article 119 of the Treaty and by the Directive are fulfilled.

58 It is accordingly for the plaintiff to prove by any form of allowable evidence that the pay she receives from the Bank is less than that of her chosen comparator, and that she does the same work or work of equal value, comparable to that performed by him, so that *prima facie* she is the victim of discrimination which can be explained only by the difference in sex.

59 Contrary to what the national court seems to accept, the employer is not therefore bound to show that the activities of the two employees concerned are different.

60 If the plaintiff in the main proceedings adduced evidence to show that the criteria for establishing the

existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied in this case, a *prima facie* case of discrimination would exist and it would then be for the employer to prove that there was no breach of the principle of equal pay.

61 To do this, the employer could deny that the conditions for the application of the principle were met, by establishing by any legal means *inter alia* that the activities actually performed by the two employees were not in fact comparable.

62 The employer could also justify the difference in pay by objective factors unrelated to any discrimination based on sex, by proving that there was a difference, unrelated to sex, to explain the payment of a higher monthly supplement to the chosen comparator."

The foregoing paragraphs demonstrate that the Court is of the view, that even if direct and indirect claims fall to be distinguished in some way, the way in which the burden of proof falls to be considered is the same; what is unclear is if this pertains only in the absence of transparency, or more generally. It is the case that Article 2 of the Burden of Proof Directive[474] does make a distinction, insofar as it defined indirect discrimination as:

"an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex".

In practice, with reference to domestic law, it is difficult to speculate what in a direct case would (in accordance with the provisions set out in paragraph 57 to 60 above) be sufficient for the applicant to establish a *prima facie* case other than by demonstrating that she does the same work or work of equal value. In effect, nothing in the Court's judgment in the above quoted paragraphs is at odds with the way in which the burden is currently discharged in a direct case under domestic law. The onus is on the applicant, and it is difficult in a direct claim to see how that can be discharged in any way other than the claimant leading evidence that she does in fact undertake the same work or work of equal value. The language of indirect discrimination appears superfluous. Of some note is that, at paragraph 62, which in the context of a direct case, the Court envisages that the employer might run his defence first, before any inquiry into the work undertaken by

[474] EC 97/80.

claimant and comparator. Given the onerous nature of a justification test, as opposed to a test based on explaining what the difference in pay is due to and that it is not tainted by sex, it would seem unlikely that most employers would wish to avail themselves of such a facility. Of interest also is the conflation of 'explanation' with 'justification' – the very point advanced by the appellants in the House of Lords in **Marshall** and rejected by their Lordships.[475]

As regards the Court's observations on the scope of the employers defence, there is no distinction made between direct and indirect cases, and yet again the Court refers exclusively to indirect cases; the Court states:[476]

> "63 Objective justifications for unequal pay
> The national court is essentially asking whether a difference between a woman's and a man's pay for the same work or work of equal value is capable of being objectively justified, first, by circumstances not taken into consideration under the collective agreement applicable to the employees concerned and, second, by factors which are known only after the employees have taken up their duties and which can be assessed only while the employment contract is being performed, such as a difference in the individual work capacity of the employees concerned or in the effectiveness of an employee's work in relation to that of a colleague.
>
> 64 The national court is thereby seeking to determine legal criteria which would enable the existence of an objective justification for unequal treatment *prima facie* based on sex to be established.
>
> 65 In preliminary ruling proceedings, although it is ultimately for the national court, which alone is competent to assess the facts, to establish whether, in the particular case before it, there are objective grounds unrelated to any discrimination based on sex to justify such inequality, the Court of Justice, which is called on to provide answers of use to the national court, may nevertheless provide guidance based on the documents in the file and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (see **Seymour-Smith and Perez** paragraphs 67 and 68).
>
> 66 It is appropriate to recall here the case law according to which a difference in the remuneration paid to women in relation to that paid to men for the same work or work of equal value must, in

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[475] See **Glasgow City Council v. Marshall** 2000 SC (HL) 67 at 74D-G *per* Lord Nicholls.
[476] Because of the importance of this point the relevant part of the judgment is quoted in full.

principle, be considered contrary to Article 119 of the Treaty and, consequently, to the Directive. It would be otherwise only if the difference in treatment were justified by objective factors unrelated to any discrimination based on sex (see, *inter alia*, **Macarthys** paragraph 12, and **Hill and Stapleton** paragraph 34).

67 Furthermore, the grounds put forward by the employer to explain the inequality must correspond to a real need of the undertaking, be appropriate to achieving the objectives pursued and necessary to that end (case 170/84 **Bilka** paragraph 36).

68 As regards the first part of that latter aspect of the reference, as reformulated, concerning possible justifications for unequal treatment, it need merely be stated that it follows from the foregoing that the employer may validly explain the difference in pay, in particular by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, in so far as they constitute objectively justified reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality.

69 It is for the national court to make such an assessment of the facts in each case before it, in the light of all the evidence.

70 With regard to the second part of this aspect of the reference, as reformulated, it must be pointed out that the third paragraph of Article 119 makes a distinction between work paid at piece rates and work paid at time rates.

71 In the first case, that provision states that pay is to be calculated on the basis of the same unit of measurement, without giving further details.

72 In the case of work paid at time rates, it is essential for the employer to be able to take employees' productivity into account and therefore their individual work capacity.

73 In that context, the Court has, moreover, held that, where the unit of measurement is the same for two groups of workers carrying out the same work at piece rates, the principle of equal pay does not prohibit those workers from receiving different pay if that is due to different individual output (see, to that effect, **Royal Copenhagen** paragraph 21).

74 However, in the second case, the criterion used in the third paragraph of Article 119 is 'the same job', a term which is equivalent to 'the same work' used in the first paragraph of that provision and Article 1 of the Directive.

75 As was pointed out in paragraphs 42, 43 and 48 of this judgment, such a term is defined on the basis of objective criteria, which do not include the essentially subjective and variable factor of each employee's productivity taken in isolation.

76 In so far as the questions clearly concern work paid at time rates, as the national court has, moreover, stated in its order for reference, it follows from the foregoing that circumstances linked to the person of the employee which cannot be determined objectively at the time of that person's appointment but come to light only during the actual performance of the employee's activities, such as personal capacity or the effectiveness or quality of the work actually done by the employee, cannot be relied upon by the employer to justify the fixing, right from the start of the employment relationship, of pay different from that paid to a colleague of the other sex performing identical or comparable work.

77 As the Commission has rightly pointed out in relation to work paid at time rates, an employer cannot therefore pay an unequal salary on the basis of the effectiveness or quality of the work done in the actual performance of the tasks initially conferred except by conferring different duties on the employees concerned, for example by moving the employee whose work has not met expectations to another post. In circumstances such as those described in the previous paragraph, there is nothing to stop individual work capacity from being taken into account and from having an effect on the employee's career development as compared with that of her colleague, and hence on the subsequent posting and pay of the persons concerned, even though they might, at the beginning of the employment relationship, have been regarded as performing the same work or work of equal value.

78 It should also be pointed out in this connection that, contrary to what the national court appears to accept, it is not possible to treat in the same way all the factors directly concerning the person of the employee and therefore, in particular, to assimilate the professional training necessary to perform the activity in question to its concrete results. Although professional training is a valid criterion not only for ascertaining whether or not employees are doing the same work, but also as an objective justification for a difference in pay granted to employees doing comparable work (see, to that effect, **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse** paragraph 19), that is because it is a factor which is objectively known at the time when the employee is appointed, whereas work performance can be assessed only subsequently and cannot therefore constitute a proper ground for unequal treatment right from the start of the employment of the employees concerned.

79 In those circumstances, the employer cannot, at the time when the employees concerned are appointed, pay to a specific employee remuneration lower than that paid to a colleague of the other sex and later justify that difference on the ground that the latter's work is superior, or on the ground that the quality of the former's work steadily deteriorated after that employee's recruitment, where it is established that the employees concerned are actually performing the same work or at any rate work of equal value. If that latter condition is met, a justification for unequal treatment based on future assessment of the work of each employee concerned still cannot exclude the existence of considerations based on the different sex of the employees concerned. As is already clear from paragraphs 30 and 66 of this judgment, the difference in pay between a woman and a man occupying the same job can be justified only by objective factors unrelated to any discrimination linked to the difference in sex."

Given the foregoing, and the failure of the Court to distinguish, at least expressly, between direct and indirect bases of claim, the question arises as to whether any distinction may be inferred. Some weak support for that might be found if the Court's judgment is read in the context of the facts of the particular case relative to the nature of the collective agreement which was the source of the pay of both the claimant and her comparator and the particular points raised concerning that collective agreement, by the Oberlandesgericht Wien in Question 1(a), 1(b), 1(c) and 1(d). However, to do so, would be both to read more into the judgment than is there and to presume the Court chose to ignore that on the facts of the case, this was not a case of a collective bargaining agreement which *per se* was indirectly discriminatory, what was at issue was its application (and the manner of its application) to a single applicant and her sole comparator. Consideration of the answers to questions referred by the Oberlandesgericht Wien could perhaps be expected to shed some light on the matter, but as the contents of paragraph 80 demonstrate, they do not:

"80 In the light of all the foregoing considerations, the reply to be given to the questions referred must be that the principle of equal pay for men and women laid down in Article 119 of the Treaty and elaborated by the Directive must be interpreted as follows:

- a monthly salary supplement to which the employees concerned are entitled under their individual employment contracts, paid by the employer in respect of their employment, constitutes pay within the scope of Article 119 of the Treaty and the Directive; equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees but also in the light of each aspect of pay taken in isolation;

- the fact that a female employee who claims to be the victim of discrimination on grounds of sex and the male comparator are classified in the same job category under the collective agreement governing their employment is not in itself sufficient for concluding that the two employees concerned are performing the same work or work to which equal value is attributed within the meaning of Article 119 of the Treaty and Article 1 of the Directive, since this fact is only one indication amongst others that this criterion is met;

- as a general rule, it is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay;

- a difference in pay is capable of being justified by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, provided that they constitute objective reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality;

- in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of different sex for the same job or work of equal value cannot be justified by factors which become known only after the employees concerned take up their duties and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the effectiveness of the work of a specific employee compared with that of a colleague." [Emphasis added][477]

Notwithstanding the principle led nature of judgments of the European Court of Justice, the Court's lack of *stare decisis* in its own jurisprudence and, on occasions, its minimalist approach to reasoning, **Brunnhofer** undoubtedly appears to support, on the basis of omission of explanation, rather than any express affirmation, the proposition that objective justification is a requirement in an employer's defence to an equal pay claim, irrespective of whether that claim is direct or indirect. If that is the case, the decision of the House of Lords in both **Wallace** and **Marshall** must, on the basis of European law, be

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[477] The relevant parts of the answers of the Court to the questions referred by the Oberlandesgericht Wien for the purposes of the issue under discussion here are emphasised in bold.

considered to be wrongly decided and that a new tenet has entered European equal pay law – namely that any difference in pay (whether in the context of a direct or indirect claim) requires to be objectively justified, notwithstanding that such a proposition incorporates both a logical and a legal fallacy until now not even considered by the European Court and certainly never having been the subject of a reference – namely that direct discrimination is actually capable of objective justification.[478]

In **Parliamentary Commissioner for Administration v. Fernandez** [2004] IRLR 22 EAT. The majority accepted the general proposition set out in paragraph 28 of **Brunnhofer,** where the Court said:

> "As the Court has already held in case 43/75 **Defrenne II** [1976] ECR 455, paragraph 12, that principle [Article 119 (now 141)] [that the same work must be remunerated in the same way, whether it is performed by a man or a woman] which is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified, forms part of the foundations of the Community."

However, they pointed out that the European Court of Justice went on to say:[479]

> "... the differences in treatment prohibited by Article 119 are exclusively those based in the difference in sex of the employees concerned."

They paraphrased that observation to mean, using the expression to be found in the domestic cases, that the variation in pay is tainted by sex; they state:[480]

> "[27] This in turn begs the question, when is a pay differential tainted by sex? To answer this question we return to the basic principles of sex discrimination law. In a case of direct sex discrimination, where there is a difference of sex and less favourable treatment of the complainant compared with his or her comparator the

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[478] Not reflected in any detail in any reported law reports in **Strathclyde Regional Council v. Wallace** 1998 SC (HL) 72 (but referred to at page 78 B-C) this matter as to whether direct discrimination was ever capable of being justified was canvassed by Lord Browne-Wilkinson, who observed that he was unaware of any case in which the ECJ had held that a directly discriminatory practice could be justified in the **Bilka** sense; he postulated that there might be some USA authority to that effect; subsequent research has failed to find any such authority. See also, Bowers, J., and Moran, E., *'Justification in Direct Sex Discrimination Law: Breaking the Taboo'* 2002 ILJ 307 and the exchange between the authors and the reply by Gill T., and Monaghan K., in 2003 ILJ 115 and the subsequent response by Bowers, J., and Moran, E. 2003 ILJ 185 which did not advance the debate.

[479] in paragraph 40.

[480] at paragraph 27 *ff.*

employer is required to provide an explanation for the difference in treatment which is gender neutral. If he does so, that is the end of the claim; if he does not then, today, the provisions of s.63A SDA come into play. That amendment was not in force at the time of the material events in the present case.

[28] However, if the employment tribunal finds direct sex discrimination is made out, then such discrimination cannot be justified, in the **Bilka** sense or at all. Mummery LJ so observed when considering the then relatively new and different provisions of the Disability Discrimination Act 1995 in **Clark v. Novacold** [1999] IRLR 318, 324. For an extreme example of the principle that direct sex discrimination cannot be justified in the European jurisprudence see the ECJ judgment in **Tele Danmark A/S v. Handels** [2001] IRLR 853.

[29] Pausing there, it seems to us as a matter of logic that where direct discrimination is found not to exist no question of objective justification can arise. The factor relied on by the employer is untainted by sex and Article 119 (now 141) is, as the ECJ pointed out in **Brunnhofer,** concerned with prohibiting differences in treatment based on the difference in sex.

[30] Equally, where the factor relied upon amounts to direct sex discrimination, again the question of objective justification cannot arise.

[31]Conversely, where a *prima facie* case of indirect discrimination is made out in relation to the factor relied upon by the employer to establish the s.1(3) defence then that factor is tainted by sex discrimination unless it can be objectively justified. That, we think, is the effect of **Bilka**, itself a case of alleged indirect sex discrimination."

This reasoning led the Employment Appeal Tribunal to dispose of **Brunnhofer** relatively easily, as follows:

"[32]... It is important to note the relevant question posed by the national court. Question 2(b) reads:
'Are Article 119 (now Article 141) of the Treaty and Article 1 of [the Equal Treatment] Directive 75/117/EEC to be interpreted as meaning that the fixing of different pay may be objectively justified by circumstances which can be established only *ex post*

facto, such as in particular a specific employee's work performance?'

[33] It is that question which is addressed in paragraph 63 and following of the judgment. Thus, the reference to the **Bilka**-test at paragraph 67, on which Mr Allen relies, must be seen in the context of the specific question posed to the Court. We do not understand the Court to be laying down, in that case, any requirement that in a case where the factor relied on by the employer is not tainted by direct sex discrimination, and where no suggestion of prima facie indirect sex discrimination is raised, that it is nevertheless necessary for the employer to objectively justify the pay difference in the **Bilka** sense.

[34] In these circumstances the majority are not persuaded that the European jurisprudence requires us to depart from the approach set out in the domestic jurisprudence to which we have referred."

To turn to the second factor impacting on the employer's defence, namely the scope of the Burden of Proof Directive, it should be noted (and as explained above), that notwithstanding **Brunnhofer** which, if it incorporates a requirement for objective justification in a direct case, that case itself actually says or adds nothing new as regards the claimant's practical burden.

In the context of domestic law, the changes wrought by the Burden of Proof Directive and its effects were summarised in the judgment of the Employment Appeal Tribunal in **Barton v. Investec Henderson Crosthwaite Securities Ltd.** [2003] IRLR 332 EAT. The Employment Appeal Tribunal said:

"The correct approach to the burden of proof in sex discrimination cases, in light of the introduction of s.63A of the Sex Discrimination Act implementing the EC Burden of Proof Directive, is as follows:

(1) Pursuant to s.63A, it is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondents have committed an act of discrimination which is unlawful by virtue of Part II or which by virtue of s.41 or 42 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases, the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word is "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts proved by the claimant to see what inferences of secondary fact could be drawn from them.

(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the Sex Discrimination Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2).

(7) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts pursuant to s.56A(10). This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(8) Where the claimant has proved facts from which inferences could be drawn that the respondents have treated the claimant less favourably on the grounds of sex, then the burden of proof moves to the respondent.

(9) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act.

(10) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(11) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question.

> (12) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

Steps 11 and 12 in above quotation, insofar as they consider the quality of an 'explanation' would seem to come very close to inferring a requirement for justification of that explanation.[481] However, the Court of Appeal in **Nelson v. Carillon Services** [2003] IRLR 428 CA[482] and the Employment Appeal Tribunal in **Pratt v. Sanden International (Europe) Ltd.** Unreported EAT/529/02 have decided that the changes to the burden of proof amount to little in practice thus inferring the status quo will prevail. **Nelson** was an equal pay claim based on indirect discrimination and the Court re-iterated that the applicant has the burden of proving that a relevant provision has a disproportionate adverse impact on her sex. It is only when the applicant has established a *prima facie* case that the burden shifts to the employer to prove that the difference in pay was objectively justified. Therefore on balance and in the context of domestic decisions it would appear that the impact of the Burden of Proof Directive is that it does not, of itself or by its own terms, import any objective justification test into a direct claim.

However, the judgment in **Barton** is significant because the Employment Appeal Tribunal held that the employment tribunal erred in finding that the employers had proved that the variation in salary and other remuneration between the claimant and her comparator was genuinely due to a material factor which was not the difference of sex within the meaning of section 1(3), saying that, in accordance with the decision of the European Court of Justice in **Brunnhofer v. Bank der Österreichischen Postsparkasse AG**, there was a positive burden on an employer seeking to establish a material factor defence to prove that there were objective reasons for the difference, unrelated to sex; corresponding to a real need on the part of the undertaking; appropriate to achieving the objective pursued; and that it was necessary to that end; that the difference conformed to the principle of proportionality; and that in **Barton** that was the case throughout the period during which the differential existed.

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[481] Notwithstanding the guidance relates to the Sex Discrimination Act.
[482] Also considered at page 222.

The cases of **Barton** and **Fernandez** neatly demonstrate the difference of approach which can be achieved from the same European jurisprudence. The approach of the Employment Appeal Tribunal in **Fernandez** has not been without its critics; for example Michael Rubenstein considers:[483]

> "It is rather ironic that one division of the EAT takes a 1989 ECJ statement on equal pay as gospel, whereas another division of the EAT does not feel itself bound to apply the literal words of an ECJ equal pay case from 2001. **Parliamentary Commissioner for Administration v. Fernandez** [2004] IRLR 22 raises the familiar question of whether a difference in pay needs to be justified if it is not based on sex and there is no adverse impact. A line of UK cases, culminating in **Strathclyde Regional Council v. Wallace** and **Glasgow City Council v. Marshall,** has clearly held that there is no such requirement on an employer. However, in **Brunnhofer,** the ECJ ruled that "a difference in pay is capable of being justified by circumstances ... provided that they constitute objective reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality". There was no suggestion that the requirement to have an objectively justified and proportionate reason is restricted to cases of indirect discrimination, nor was the case on its facts one of indirect discrimination. In **Fernandez,** it was argued that this overrode the domestic decisions, but the EAT, by a majority, does not agree. Somewhat strangely, Judge Peter Clark's decision for the majority makes no reference to the precise language of the ECJ's ruling quoted above. Instead, the **Brunnhofer** argument is dismissed by saying that: "We do not understand the Court to be laying down, in that case, any requirement that in a case where the factor relied on by the employer is not tainted by direct sex discrimination, and where no suggestion of prima facie indirect sex discrimination is raised, that it is nevertheless necessary for the employer to objectively justify the pay difference in the **Bilka** sense." Permission was granted to appeal, but we understand that the Government has now settled the case."

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[483] In IRLR Volume 33 Number 1 January 2004 'Highlights'. In the quotation the 1989 case referred to is **Handels-og Kontorfunktionaerennes Forbund i Danmark v. Dansk Arbeidsgiverforening (acting for Danfoss)** C-109/88 [1989] ECR I-3199 ECJ and case in the division of the Employment Appeal Tribunal referred to in line 1 is **Safety Executive v. Cadman** [2004] IRLR 29 EAT.

From the foregoing, it is apparent that the law in respect of 'objective justification' in an equal pay claim that can only be characterised as a direct claim, is at an interesting crossroads; if, in time, the indirect test, is applied to the factual circumstances of a direct claim and **Wallace** and **Marshall** overturned on the basis of loose 'reasoning' in **Brunnhofer,** the employer will have to go far beyond the current requirement of explaining and showing that the difference in pay is not related sex or is in any way tainted by sex, and, in effect, show that not only is there no causal link between sex and pay but that whether or not there was a link, the difference in pay can still be justified. As a matter of logical as well as legal reasoning, it has to date been impossible to justify direct discrimination and it should remain so. This raises the question as to whether or not direct discrimination and justification in the context of equal pay will require to be re-characterised in order to actually make a defence of objective justification applicable in any meaningful way. As the law currently stands, and on a purist approach, a defence of objective justification in an equal pay claim based on direct discrimination could never succeed. Practically and even with some distortion of the legal principles hitherto adhered to, for most employers the addition of a further layer to the defence, over and above requiring to provide an explanation of what the difference in pay is due to and proving that it is free from the taint of sex, to then having to justify it, will be a step too far and it is difficult to envisage that the courts and tribunals would in such circumstances become other than the arbiters of 'fair wages'.

12.6 Conclusion

In this chapter, the aim has been to show the nature and scope of the employers defence, and how it has developed since the Equal Pay Act came into force. What has been demonstrated is that today the employer's defence is balanced upon a somewhat unstable cusp. It may be that the orthodox position expounded in **Wallace** and **Marshall** prevails, or the largely unreasoned position in **Brunnhofer** is adopted. Whatever the eventual outcome, the significance cannot be underrated because it will determine the ease with which a woman may achieve equal pay with a male comparator irrespective of whether the claim is genuine (in terms of the law as it now stands) or contrived (in that the 'sex' card can be played in what is in effect is a 'fair wages' claim).

The impact of foregoing cannot be underestimated. If the distinction between claims based on direct and indirect discrimination is removed, thereby entailing that the employer is subjected in a direct case, to any more onerous burden of proof and the higher and far harder indirect test of not just demonstrating and explaining the difference in pay is not tainted by sex, but that it is also justified, the basis of the test will have shifted and a direct claim will become the vehicle for 'fair wages' types of claims which have little whatsoever to do with genuine sex discrimination, but may be 'window dressed' as such. When this is taken in conjunction with the potential effect of the decision of the European Court of Justice in **Jämställdhetsombudsmannen v. Örebo Läns Landsting** *supra* insofar as any requirements regarding the composition of the disadvantaged group in an indirect case may now be removed, equal pay law will have been radically transformed and employers will essentially have little defence to a finding of like work, equal work or work of equal value. In the following and penultimate chapter, the nature of such a change, if it prevails, both as regards European law and the domestic provision is considered, including the extent to which the Equal Pay Act as currently drafted and amended would remain relevant. In the final chapter, if such changes to equal pay law as it currently stands in this jurisdiction prevail, the potential impact on occupational segmentation and its attendant gender-related earnings gap is assessed in the context of the vexed matter of balancing jurisprudential coherence and integrity with enabling the law to be used as a tool of social engineering for the attaining of a desired or desirable end or outcome.

CHAPTER 13. EQUAL PAY LAW AT THE POINT OF TRANSITION

13.1 Introduction

The analysis of equal pay law, both European and domestic, has, it is argued, arrived at a point of, at the very least, potential transition. In the light of recent European Court decisions, factors which have been taken as central pillars of European jurisprudential orthodoxy in equal pay for approximately two decades and which have been incorporated into British domestic provision (with minimal amendment to the Equal Pay Act) now themselves might be on the point of being excised from European law, with the concomitant effect on domestic law. In this chapter, the two greatest potential shifts from what have come to represent orthodoxy are considered in terms of their potential impact on how equal pay claims may be advanced by claimants under the Equal Pay Act.

Firstly, the impact of the decision in the case of **Jämställdhetsombudsmannen v. Örebo Läns Landsting** C-236/98 [2000] ECR-I 2189 ECJ is considered. It was explained in Chapter 4 that it may now be significantly easier for a claim based on indirect discrimination to be prosecuted, if it is now no longer the case that the sex composition of the 'advantaged' group requires to be taken into account in any analysis to establish *prima facie* indirect sex discrimination. This is analysed further by reference to the actual statistical composition of the advantaged and disadvantaged groups in the case of **Glasgow City Council v. Marshall** 2000 SC (HL) 67[484] in order to illustrate the nature of the change, if indeed **Jämställdhetsombudsmannen** has heralded such a change.

Secondly, the impact of **Brunnhofer v. Bank der Osterreichischen Postparkasse AG** C-381/99 [2001] ECR I-4961 ECJ, dealt with at length in the last chapter is reconsidered, but only in terms of what its purported effect might be as regards the importation of the indirect test in direct claims for equal pay might have on claimants and their employers.

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[484] This material was available to and presented in oral argument to their Lordships in this case but is only set out briefly in the in published law reports of the case (page 74G to page 75 E) and the detailed analysis is not reported as the Court was not minded to permit the appellants to pursue an indirect claim in that forum when it had not been raised in the employment tribunal, the Employment Appeal Tribunal or the Court of Session and when it was not necessary to enable them to reach a decision.

Thirdly, the chapter also illustrates what the effect of both of the foregoing judgments might have on a claimant seeking the least onerous means of achieving equal pay and, in particular, considers whether there is any real difference now between direct and indirect claims, by using the example of a 'class action' based on a direct claim founded on the equal value provisions and an indirect claim. It postulates whether the retention of the comparative base will in the light of the developments discussed, amount to little more than a fig leaf clothing fair wages claims in the guise of a claim based on sex discrimination.

13.2 Analysis of the potential impact of Jämställdhetsombudsmannen v. Örebo Läns Landsting in the context of an equal pay claim based on indirect sex discrimination

The facts in **Jämställdhetsombudsmannen** are of no great significance as regards the point in question, but the basic facts are as follows. The Jämställdhetsombudsmannen is the Swedish Equal Opportunities Ombudsman; the Ombudsman brought an equal pay claim on behalf of two midwives employed by Örebro County Council who claimed that their pay was lower than that received by a clinical technician, even though they were employed on work of equal value. The basic monthly salary for midwives was lower than that of the clinical technician. However, they worked rotating shifts and, in accordance with the relevant collective agreement, received an inconvenient hours supplement on a regular basis, the clinical technician however did not work hours entitling him to a supplement. On the other hand, the collective agreement provided that the standard working week was 40 hours, but that the week for shift workers was 34 hours and 20 minutes. Before the Labour Court, the Ombudsman argued that in making the pay comparison between the workers concerned, no account should be taken either of the inconvenient hours supplement or of the midwives' reduced working time. The employers argued that the midwives were not paid less than the medical technician once the inconvenient hours supplement and the value of the reduced working time was taken into account in the comparison. The questions referred for a preliminary ruling essentially related to whether or not the supplement for inconvenient working hours was to be included in the basis for pay comparison and shift regimes as incorporated in the relevant collective agreements. What is of relevance for the discussion is that this was an equal pay claim, based on indirect principles and wherein Advocate General Jacobs and the

European Court of Justice in its judgment made observations in respect of the advantaged and disadvantaged groups.

Advocate General Jacobs[485] of his opinion states:

> "16 A woman employee (to take the usual case) seeking to establish infringement of the principle of equal pay for work to which equal value is attributed will have to address two distinct issues and may have to deal with a third. In the case, as here, of alleged indirect indiscrimination these may be expressed as follows. **First, she must be part of a group of predominantly female employees performing work of equal value to that performed by a group of predominantly male employees. Secondly, the first group must receive lower remuneration than the comparator group. If both those elements are shown by the employee, a prima facie case of discrimination arises.** Thirdly, however, the employer may displace that presumption by showing that the difference in pay is based on objectively justified factors unrelated to any discrimination on grounds of sex.
>
> 17 Although it will normally in my view be appropriate to answer those three issues in the order set out above, there may be cases in which for one reason or another it is expedient to consider them in a different order. In such circumstances the national court may wish to have guidance from the Court on, for example, the second or third issue before establishing the first..." [Emphasis added]

The Advocate General thus sets out one key element in respect of the advantaged and disadvantaged groups – namely that, in accordance with **Enderby**, the claimant (assuming she is female) must belong to a group comprised predominantly of females, and the comparator must belong to the advantaged group the sex composition of which must be comprised predominantly of males. He reiterates this, stating:[486]

> "34...It will be recalled that a woman employee establishes a prima facie case of infringement of the principle of equal pay for work of equal value by showing, first, that she is part of a group of predominantly female employees performing work of equal value to that performed by a group of predominantly male employees and, secondly, that the first group receives lower remuneration than the comparator group. It is then, however, open to the employer to displace that presumption by showing that the

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[485] At paragraphs 16 and 17.
[486] At paragraph 34.

> difference in pay is based on objectively justified factors unrelated to any discrimination on grounds of sex."

However, when the Court delivers its judgment it makes no reference to the composition of the advantaged group, stating only at paragraph 50:

> "50 It follows that, in order to establish whether it is contrary to Article 119 of the Treaty and to Directive 75/117 for the midwives to be paid less, the national court must **verify whether the statistics available indicate that a considerably higher percentage of women than men work as midwives. If so, there is indirect sex discrimination, unless the measure in point is justified by objective factors unrelated to any discrimination based on sex** (C-167/97 **Seymour-Smith and Perez** paragraph 65)."

It behoves one to ask, 'did the Court mean to omit any reference to the composition of the advantaged group?' If it did, it has succeeded in rendering the test for adverse impact met in cases, where, to take a very extreme example, the comparator of the opposite sex, being a member of the advantaged group, might be the only member of that sex, in that group, all other members being of the same sex as the claimant from the disadvantaged group. The 'error' theory or 'sloppy drafting' theory would not appear to have received much support from commentators, practitioners (particularly those associated with applicants) or academic commentators.

For example, Michael Rubenstein states:[487]

> "The ECJ goes on to affirm that if there is a difference in pay between the two groups, the burden on the employer to objectively justify the difference is triggered if it is shown that there is a substantially higher proportion of women than men in the disadvantaged group. That, it would seem, suffices to create a *prima facie* case of sex discrimination under EU law regardless of the gender composition of the higher-paid group."

Leslie *et al*[488] states that:

> "Following **Jämställdhetsombudsmannen,** the test for adverse impact will involve the following exercise:
>
> (a) establish the difference in pay between the claimant's group and the comparator's group;

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[487] At IRLR [2000] 367.
[488] Leslie, S., Hastings, S. and Morris, J *'Equal Pay'* The Law Society, London, 2003 at page 142.

(b) establish the proportion of women and men in the claimant's group; and
(c) determine whether the proportion demonstrates that there is a substantially higher percentage of women than men in the claimant's group"

Later, Leslie *et al* states:[489]

"Where the level of significance is not immediately obvious and disparate impact is in dispute, it will also be necessary to instruct a statistician to analyse the statistics and give expert evidence as to whether:
(a) the statistics illustrating the gender composition of the claimant's group over the years can (or cannot) be regarded as fortuitous or short-term; and
(b) the statistical difference in the proportions of the women and men in the claimant's group is (not) so small as to be insignificant."

Harvey[490]states simply and briefly:

"In **Jämställdhetsombudsmannen v. Örebo Läns Landsting** C C-236/98 [2000] IRLR 421, ECJ it was said that the duty to show objective justification arose when, in respect of work of equal value, it could be shown that there was a 'substantially higher proportion' of women than men in the disadvantaged group. Although the HL in **Barry**[491] said it was 'not sufficient merely to ask whether one [group] gets more or less money than the other', it would appear that the ECJ in **Jämställdhetsombudsmannen** thought the contrary."

Given the foregoing views, in which the authors may be seeing **Jämställdhetsombudsmannen** very simplistically, endorsing as necessary and sufficient the simple test for adverse impact in the context of equal treatment as set out in Article of the Council Directive 97/80/EC,[492] there is little doubt that arguing that the approach set out by the European Court of Justice is a mistake or the product of loose writing and translation becomes harder to sustain. But the judgment, if effecting such radical change on the basis of omission (even from Advocate General Jacob's opinion) of any reference to the comparator group composition, far less any reasoning, in such stark contradistinction to the previous jurisprudence of the Court that it simply cannot be accepted as correct, without more.

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489 *Ibid* page 143.
490 *'On Industrial Relations and Labour Law'* at Division K para 6.
491 **Barry v. Midland Bank plc** [1999] ICR 319 HL.
492 On the Burden of Proof in Cases of Discrimination Based on Sex.

The most detailed analyses of the test for *prima facie* indirect sex discrimination in equal pay claims in the European Court of Justice's jurisprudence undoubtedly has been contained in the lengthy and very erudite opinions of Advocate General Cosmas, particularly in two cases,[493] where he engages in an extensive macro analysis of the European Court's jurisprudence in this area, resolves any apparent conflicts, and, in effect, takes a developmental approach to the correct test to be applied.[494] The nature of the test as expounded by him and which until the decision in **Jämställdhetsombudsmannen,** was not irregularly pled even before employment tribunals in Scotland[495]can be illustrated by application to the relevant statistics in **Glasgow City Council v. Marshall** 2000 SC (HL) 67 and which were laid before the House of Lords by the council in that case.

At this point, the test for *prima facie* indirect sex discrimination in the context of equal pay can be most usefully summarised by abbreviating Advocate General Cosmas' test as follows:

> **Advocate General Cosmas test in Angestelltenbetriebsrat der Wiener Gebietskrankenkasse: Opinion paragraph 65**
>
> *"...to ascertain whether there is a significant difference in the percentages in a group, the composition of the other group must be taken into account. The other group must show a contrary trend, or identical percentages, or the same trend but much less marked than the first group."*

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[493] **R v. Secretary of State for Employment** ***ex parte*** **Seymour-Smith and Perez** C-167/97 and **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse** C-309/97.

[494] In both cases the Court followed the Opinion of Advocate General Cosmas although in neither did they expressly endorse particular aspects of his detailed reasoning for reaching the conclusion he did. Neither however did they omit to make any reference to a significant or salient point in the reasoning, such as could change the nature of a key legal test, as occurred in **Jämställdhetsombudsmannen,** when the Court in its judgment referred only to the composition of the disadvantaged group in the context of the test for indirect discrimination (see paragraph 50 of the judgment) when Advocate General Jacobs had expressly stated the test required the composition of both the advantaged and disadvantaged groups to be taken into account in establishing whether or not there was *prima facie* discrimination (see paragraph 16 of his Opinion). Seen this starkly, it is difficult, to come to any other conclusion than that the 'omission' in **Jämställdhetsombudsmannen** was an error, which the Court, in the absence of any 'correcting' or 'slip' procedure will retreat from in subsequent jurisprudence - by which time Courts and tribunals, in well argued cases will have been struggling with competing tests and considering whether an Article 234 reference is necessary.

[495] For example, in **Hoffin v. East Dunbartonshire Council** (Case No. S/100/327/00) determined in 2002 and **Morton and Others v. South Ayrshire Council** (Case Nos. S/102585/98) determined in 2003, neither of which were appealed.

Advocate General Cosmas test in Seymour-Smith Opinion paragraph 116

"...in order to determine whether there is a 'significant difference' in the percentages within a group, account should also be taken of the proportions in the other (advantaged) group. The advantaged group would have to show either the contrary tendency, or equal percentages, or the same tendency but much more weakly in relation to the first group. If the difference in percentages is in fact identical or similar in both groups, employees in both groups are receiving the same rather than unequal treatment."

In **Marshall,** the Council disclosed extensive statistics concerning the composition of its workforce,[496] by sex, insofar as it comprised teachers and instructors working not just within the special educational needs sector but across what had been Strathclyde Regional Council as a whole. It was the Council's submission that the statistics did not disclose the presence of indirect sex discrimination; without doubt, they would have if the **Jämställdhetsombudsmannen** test is correct, but, on the test set out in **R v. Secretary of State for Employment** *ex parte* **Seymour-Smith and Perez** and **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse,** the claimant's would have failed to show a *prima facie* case of indirect discrimination. The analysis forming the basis of the Council's submissions in the House of Lords is set out below.

The Council argued that the first stage required the correct composition of the appropriate pools which were to be the subject of comparison to be ascertained and, in this respect, the views of the Appellants and the Council were significantly at odds. Secondly, having identified the relevant pools for comparison purposes, the question then arises as to when, and to what extent, the gender composition of each group (comparator and applicant) must be taken into account and what orders of magnitude of similarity and dissimilarity must be disclosed to establish the presence of *prima facie* indirect sex discrimination.

In relation to the first matter, Advocate General Cosmas in paragraph 59 of his Opinion in **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse** notes by reference to the

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[496] The statistics related to the workforce across what had been Strathclyde Regional Council and which in 1996, as a result of local government re-organisation was disaggregated into 12 unitary authorities, of which Glasgow City Council was the largest and hence assumed the role of lead authority by the time the case reached the House of Lords.

Court's case law, in particular **Enderby v. Frenchay Health Authority and Secretary of State for Health** at paragraph 17 of the judgment and the **Danfoss** judgment at paragraph 16, that the context and composition of the groups to be compared for the purpose of determining whether there is indirect discrimination not only may but must be subject to certain conditions, *inter alia*, to prevent bias or distorted comparisons designed to support the argument of one side.

The Advocate General notes that:[497]

> "...the first criterion regarding the composition of the groups to be compared can only be a context in which the group is formed"

and that the case law of the European Court of Justice discloses no general rule but rather that the context is determined on a case by case basis according to the circumstances of each case. At paragraph 60, he further states that:-

> "...the principle of equal pay laid down by Article 119 is clearly aimed at the body responsible for adopting the regulations in question. Consequently, if they appear in a law, the groups to be compared must consist of all the workers whose pay is governed by that law. Similarly, if the regulations are the result of a decision or a practice of a given employer, the groups to be compared must consist of all the workers employed by the employer in question".

At paragraph 61, in the context of the pay scales of the two groups of workers determined by collective bargaining agreements, given they are binding on other institutions then this, he maintains indicates:

> "...that the comparable groups of workers to be compared must be formed in the context of the collective bargaining agreements in question, not in the context of the institution concerned. As the Commission observes, if account were taken of all the workers having the qualifications in question, the groups to be compared would be so heterogeneous that it would be pointless to compare them. Moreover, at that level the problem of discrimination would not arise".

Thus, he opines that:[498]

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[497] In paragraph 60,
[498] In paragraph 62.

> "...where a collective agreement provides that pay for the same work or for work of equal value is to vary according to the employees' professional qualifications, the employees to be taken into account informing the groups to be compared for the purpose of determining whether a particular measure gives rise to discrimination, are those covered by the collective agreement".

As regards the composition of the applicant and comparator groups in the **Marshall** case, the Council submitted that three variations were possible. Firstly, that the relevant group for consideration would be all teachers covered by the Scottish Joint Negotiating Committee collective bargaining agreement and entitled to teach in special schools, but not necessarily so doing.[499] In respect of such personnel employed by Strathclyde Regional Council this comprised, at the relevant time 23,494 teachers of whom 16,944 (72.13%) were female and 6,548 (27.87%) were male. As regards the composition of the applicant group, at that time, the Regional Council employed a total of 228 instructors on Administrative, Professional, Technical & Clerical conditions of service of which 195 (85.53%) were female and 33 (14.47%) were male; this group included music instructors and outdoor education instructors, in addition to instructors in the special needs sector. The deployment of staff according to this breakdown is illustrated in Figure 2:

Figure 2. STATISTICAL COMBINATION 1:

ALL TEACHERS & ALL INSTRUCTORS EMPLOYED BY THE RESPONDENTS

	Male	%	Female	%
Disadvantaged Group	**N**		**n**	
Instructors (all)	33	14.47%	195	85.53%

[499] Effectively this meant appropriately qualified teachers, whether registered with the General Teaching Council for Scotland as primary or secondary teachers, on the basis that they conformed to the requirements of paragraph 7 of the Schools (Scotland) Code 1956 (as amended) (1956 SI No 894). These provisions, included a deeming provision such as to permit both primary and secondary qualified teachers not to obtemper the normal restrictions as to the sector (i.e. primary or secondary) in which they were qualified work in the case of teaching children with special educational needs; essentially that meant that primary teachers were permitted to work with secondary age pupils, but only in the context of special needs pupils.

Advantaged Group				
Teachers (all)	6,548	27.87%	16,944	72.13%

NOTE:
1. Trend is in the same direction in the advantaged group.
2. Extent of trend (85.53-72.13) =13.40 percentage points difference.
3. Same trend but **not much less** marked.

It was submitted by the Council that, whilst an argument might be made for stating that the appropriate cohorts for comparison were those disclosed above, this grouping was too widely drawn, the APT&C group being too homogeneous, thus the context of the groupings is lost. In order to retain the context of the groups regard must be had to the nature of the work, the training requirements and working conditions.[500]

The second interpretation as regards the appropriate composition of the groups to be considered, and the one relied upon by the Council in **Marshall**, was one which which disclosed <u>all</u> teachers and <u>all</u> instructors, from across the six administrative divisions of Strathclyde Regional Council who worked in special schools catering for SLD/PLD[501] children. This permitted the collective agreements to be taken in the context which they themselves recognised, in that both specifically addressed issues in connection with special schools.

The foregoing breakdown demonstrated that a total of 119 teachers were employed in this sector of whom 115 (96.64%) were female and 4 (3.36%) were male and that 145 instructors were employed in the sector of whom 139 (95.86%) were female and 6 (4.14%) were male. The deployment according to this breakdown is illustrated in Figure 3:

Figure 3. STATISTICAL COMBINATION 2:
ALL TEACHERS & ALL INSTRUCTORS EMPLOYED BY THE RESPONDENTS IN SLD/PLD SCHOOLS

	Male	%	Female	%

[500] See paragraph 69 of the Advocate General's opinion.
[501] Refers to children with 'Severe Learning Difficulties/Profound Learning Difficulties'.

Disadvantaged Group	N		n	
Instructors in SLD/PLD Schools	6	4.14%	139	95.86%
Advantaged Group				
Teachers in SLD/PLD Schools	4	3.36%	115	96.64%

NOTE:

1. Trend is in the same direction in the advantaged group.
2. Extent of trend (96.64-95.86) =0.78 percentage points difference.
3. Same trend; almost identical.

It was submitted that the cohorts shown in Figure 3 constituted the correct groupings for comparative purposes in ascertaining whether or not *prima facie* indirect sex discrimination could be inferred in this case

The Appellants argued from a position which would be consistent with **Jämställdhetsombudsmannen** but, if comparison was required, a third interpretation as to the appropriate groupings was proposed by the Appellants but was challenged by the Council as inappropriate and biased because it sought to select as the appropriate disadvantaged group representative of the composition of the applicants, instructors working in special schools only (i.e. 145 comprising 6 males (4.14%) and 139 females (95.86%)) and sought to compare that sub-grouping of instructors employed in the special school sector with <u>all</u> teachers employed by the Council, in all sectors i.e. 23,494, teachers composed of 16,944 (72.13%) females and 6,548 (27.87%) males. The Council argument was that to compare a sub-group comprising 63.59% of instructors (i.e. 145 from a possible 228) who happen to work in special schools with the total universe of teachers comprising 23,494, only 119 of whom, 0.506%, were employed in the same sector, not only failed to compare like with like but also engendered distortion. This breakdown is set out in Figure 4:

Figure 4. STATISTICAL COMBINATION 3:

ALL TEACHERS EMPLOYED BY THE RESPONDENTS IN ALL SCHOOL TYPES AND INSTRUCTORS EMPLOYED IN SLD/PLD SCHOOLS ONLY

Disadvantaged Group	Male n	%	Female n	%
Instructors in SLD/PLD Schools	6	4.14%	139	95.86%

Advantaged Group				
Teachers in **ALL** Schools	6,548	27.87%	16,944	72.13%

NOTE:

1. Trend is in the same direction in the advantaged group
2. Extent of trend (95.86-72.13)=23.73 percentage points difference
3. Same trend but **not much less** marked.

On the test set out by Advocate General Cosmas, the Appellants could not demonstrate *prima facie* indirect discrimination (the breakdown in Figure 4 providing the best statistical distribution for such a claim, but still falling short of the threshold advanced by the Advocate General) and, not surprisingly, they sought to rely on the composition of the applicant group only, as indeed had apparently been sufficient in the case of **Jenkins v. Kingsgate (Clothing Productions) Ltd** C-96/80 [1981] ECR 911 ECJ.[502] However, Advocate General Cosmas notes, at paragraph 63 of his Opinion, that the case law of the European Court of Justice appears at first sight to have reached different conclusions as to the required comparison, depending on the nature of the case. For example, in **Jenkins v. Kingsgate (Clothing Productions) Ltd,** he noted that the Court merely examined the category allegedly suffering discrimination, that is the disadvantaged category of part time women workers, whereas in **Enderby,** the Court subjected both the applicant and comparator groups to scrutiny. This apparent inconsistency is, according to Advocate General Cosmas, able to be resolved; he stated that:[503]

> "...these differences in the case law are due to the fact that, depending on the circumstances of each case, the Court, in order to satisfy itself of the existence of indirect discrimination, not only examines statistical data relating to the groups compared, which by nature are liable to fluctuate and may in general be unreliable, but also requires its conclusions to be supported on grounds which are objective as possible. More particularly, in the **Jenkins** case, the Court found that discrimination against women was shown by the fact that the ostensibly objective justification for different pay because of the number of working hours could entail such discrimination because it was difficult for women, by reason of household and

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[502] Which concerned the fact that part time workers (which as a generality across all industries and virtually all occupations are predominantly women) who received less than the *pro rata* full time wage for the same work.

[503] At paragraph 63.

family duties, to work on a full-time basis. This finding, which is a matter of normal experience, is the objective basis of the judgment concerning indirect discrimination. According to the reasoning of the aforementioned judgement, where an objective criterion of that kind exists, it may not be necessary to ascertain the proportion of men and women in the two groups of workers. In such a case, discrimination, even if it has the formal characteristics of indirect discrimination, is in substance much more likely to be regarded as direct discrimination because the occupational group in question is socially predetermined by the social institutions on the basis of sex. Therefore it is sufficient for the National Court to find that discrimination exists in an occupation which is, by nature, a 'female occupation', so that it is unnecessary to compare the two groups. In contrast, where indirect discrimination cannot be proved by the nature of the professional group, as in the **Enderby** case, the 'female' or 'male' nature of the occupation will be shown by a statistical analysis of one of the groups of workers in question, and that analysis must always be compared with that of the other group".

Thus, it is evident that the Advocate General had taken into account the concept of occupational segmentation and female occupational characteristics, such as the fact that part time working is an almost exclusively female phenomenon, without finding it necessary to propose a rule which could enable *prima facie* indirect discrimination to be contrived or found when it clearly did not exist. At paragraph 65 of his Opinion, he further states:

"The need for a comparative analysis of the proportion of men and women in the two groups arises, first and foremost, from the fact that in order to find that a provision is 'in principle' contrary to the principle of equal treatment, the Court requires the percentage of women in the group suffering discrimination to be 'much higher' than the percentage of men and/or requires the percentage of women in the favoured group to be 'much lower' than the percentage of men. As I stressed in my Opinion in the case of **Seymour-Smith and Perez**, to ascertain whether there is a 'significant difference' in the percentages in a group, the composition of the other group must also be taken into account. The other group must show a contrary trend, or identical percentages, or the same trend but much less marked than in the first group. If the percentage difference is the same or similar in both groups, the workers in the two groups are being treated in the same way and not unequally".

The situation in **Marshall** was closer to **Enderby** than **Jenkins** and it never was claimed that the applicants were members of an occupationally segmented group.[504] The Council submitted that on the basis of Figures 2-4 above the presence of a higher percentage of women occurred not only in the group of workers alleging discrimination but also in the favoured group, i.e. the teachers. If it was accepted that the correct groups for comparative purposes are those identified in Figure 3, because the percentage difference in gender composition is almost identical in both groups (Appellant instructors; 95.86% female and 4.14% male and comparator teachers; 96.64% female and 3.36% male) that the existence of indirect discrimination had been rebutted on the basis that the workers in both groups were being treated in the same way and hence not unequally. The Council relied on the conclusion reached by the Advocate General in paragraph 66 of his Opinion that this represented the correct interpretation of the law, namely that:

> "...as the existence of indirect discrimination is a rebuttable presumption, the presence of a higher percentage of women not only in the group of workers suffering discrimination, but also in the favoured group, is logically significant evidence that the difference in question is objective and unrelated to discrimination on the grounds of sex, which is a factor upon which the employer can rely".

The Council further submitted that should it be considered that the relevant groupings which should be compared were those identified at Figure 2 then by reference to the fact that the advantaged group still has a high percentage of women meant that the Council had still rebutted the claim of indirect sex discrimination although the analysis is more complex.[505]

The foregoing analysis illustrates both the complexity of the test but also its inherent fairness. Under the test in **Jämställdhetsombudsmannen,** the female Appellants (but not the sole male applicant) in **Marshall** would have easily met the test in all three statistical combinations contained in Figures 2-4 above, purely as a result of small numbers, being able to show that they represented 85.5%, 95.8% and 95.8% of the disadvantaged groups respectively. Had **Marshall** been decided now, the arguments advanced by the applicants

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[504] Indeed if the group 'instructor' was disaggregated in respect of music instructors, more men than women comprised that sub-group.

[505] This refers to the expression *"the same trend but much less marked than in the first group"* first used in **Seymour Smith** at page 117 para 11 F-G. A trend which is much less marked will have a substantial gap between the two groups whereas on the figures relied upon by the appellants the gap was not substantial.

and Appellants in the House of Lords may well have succeeded, in a case that was acknowledged by all, including in the evidence of applicants, to be an attempt to achieve higher wages in a context where there was no sex discrimination and the employer was reluctant and indeed had refused to regrade them *inter alia* because of the knock-on effect on pay differentials amongst other groups of workers paid at the same levels on the APT&C scale.

The law as applied a mere five years ago, did not permit, what was a spirited attempt[506] to achieve higher pay, when all other routes had failed. Today it is doubtful that the outcome would be the same;[507] the employer on the test in **Jämställdhetsombudsmannen** (if indeed it only requires the claimant to show she is a member of a group comprised mainly of women with nothing more, before the burden of proof shifts to the employer to objectively justify the difference in pay), faces not simply defending a discrimination claim, but convincing a tribunal, the members of which will have their own ideas about social value and the worth of various occupations, that in the absence of any finding of discrimination, that the employer valued and remunerated employees undertaking the work in question appropriately. Thus sociological and personal value judgments rather than legal constructs would in all probability come to dominate the tribunal decision making process.

13.3 Analysis of the potential impact of Brunnhofer v. Bank der Osterreichischen Postparkasse AG in the context of an equal pay claim based on direct sex discrimination

Insofar as a claim for equal pay, which is founded on direct discrimination is concerned, as set out in the previous chapter, what may be categorised as the orthodox position, as held by the House of Lords in **Wallace** and **Marshall** starts from the basis that the Equal Pay Act seeks, by its terms, to eliminate sex discrimination in pay and it does so by requiring the employer to demonstrate that the cause of any difference in pay is not related to sex. As illustrated in Chapter 12, certain Scottish employment tribunals, supported by the Employment Appeal Tribunal, distorted the interpretation of the

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[506] Funded at all appellate stages by the EOC.
[507] Notwithstanding in such circumstances the employer would have sought that a tribunal or Court made a reference to the European Court of Justice.

legislation to expand it beyond the elimination of sex discrimination to the enforcement of some general principle of 'payment in accordance with one's just desserts' or the elimination of wage differences and thus the employment tribunal in Scotland, for a period, became a wage fixing council carrying out the task of determining how much a particular group of workers should fairly be paid. Whilst such a development might have and could achieve laudable social outcomes, the question arises as to whether the facility to engage in social engineering under the guise of legal reasoning and determination can ever be appropriate.

As considered at length in Chapter 12, the decision of the European Court of Justice in **Brunnhofer** would appear to signal that the requirement to have an objectively justified and proportionate reason is not to be restricted to cases of indirect discrimination, thus casting doubt on the interpretation of equal pay law by the House of Lords in **Glasgow City Council v. Marshall** as summarised above, namely that an employer is only required to have an objective justification for unequal pay where there is evidence of an adverse impact on women, that is, when the claim is based on indirect discrimination. As the Court did not provide any reasoning for this conclusion, that yet again raises the same question raised in respect of **Jämställdhetsombudsmannen**, namely that in the absence of express reasoning is the interpretation that the judgment can bear actually what the Court intended, or would have said had the implications of the omission to say anything been drawn to their attention?

The combined effects of the decisions of the European Court of Justice in **Brunnhofer** and **Jämställdhetsombudsmannen**, if correct, when applied to the structure of the domestic Act will have radically altered the landscape of equal pay litigation in Great Britain *inter alia* making equal pay claims harder to defend; whilst that might be unobjectionable in respect of genuine claims, it is in respect of contrived claims.

In the next subsection, some further consideration is given to the effect of the decisions in **Brunnhofer** and **Jämställdhetsombudsmannen** (assuming they are correctly decided in the terms set out above) as regards the tactical options which are now open to a prospective claimant raising an equal pay claim under the Equal Pay Act.

13.4 Claiming equal pay – a tactical approach?

The first decision the prospective claimant faces is whether her claim is to be characterised as direct or indirect. Until **Jämställdhetsombudsmannen** and, unless the facts of the case were of the sort described by Advocate General Cosmas in paragraph 63 of his Opinion in **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse,**[508] the difficulty for the applicant lay in having to belong to a disadvantaged group almost exclusively comprised of women and then identifying a comparative group comprised predominantly of men, employed by the same employer. If the sex composition of the comparative group is not a factor to be taken into account, the woman's choice of comparator is significantly widened and comparisons not hitherto available become both available and attractive. An example will serve to illustrate. At the time of writing, Scottish nursery nurses in a number of local authorities were on strike for higher pay. They occupy a category comprised almost exclusively of women. As regards comparators, a potentially attractive group would be primary teachers, who are employed alongside nursery nurses in the pre-school sector; unpromoted teachers in this sector are paid on the same scale as unpromoted teachers in the primary and secondary sectors and have a starting pay of approximately £6,000 *per anum* more. To date such a comparison would not have been available to an applicant nursery nurse, because primary teachers also comprise a grouping which is predominantly female, but albeit with a higher proportion of males in the occupational group than is the case with nursery nurses. If **Jämställdhetsombudsmannen** is correctly decided, that comparison becomes not only available, but potentially attractive. The *prima facie* sex discrimination threshold is met with ease because only the occupational structure of the claimant's group is taken into account and the burden of proof shifts to the employer, in the context of a like work or equal value finding to objectively justify the difference in pay. If the applicant has selected wisely her comparator or comparators,[509] in such a case she may well succeed. In

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[508] That is bearing resemblance to **Jenkins** including self evident factors such as more women work part time and whether the job in question is by its nature clearly being capable of being characterised as what he termed a 'female occupation', being different in nature from the situation characterised by **Enderby**, that is professional or occupational groupings not self-evidently 'female' or 'male'.

[509] A factor evident in the **Marshall** case, where extremely able and competent instructors had in effect expanded their job remits taking on over time more of the functions which should more properly have been the domain and preserve of teachers; thus by selecting as comparators weak or poor subjects the instructor claimants were able to secure a finding, on the facts, of like work.

respect of a defence, the employers would require to fall back on a 'professional training' and 'qualifications' defence.[510]

Until now, such a comparison between a nursery nurse and a primary teacher employed in the nursery sector would only have been possible by means of a direct claim under section 1(2)(a) or 1(2)(c) of the Equal Pay Act with the more onerous evidential burden falling upon the applicant and, given the decision in **Marshall**, no requirement for the employer in respect of the section 1(3) defence requiring to objectively justify the difference in pay. If **Brunnhofer** displaces **Marshall,** even in a direct claim, such as this, the employer still has the burden of objectively justifying the genuine material factor advanced for the difference in pay. Further, if the pay scheme lacks transparency also, in accordance with **Brunnhofer,**[511] the evidential burden may have shifted at an earlier stage.

What the foregoing example demonstrates is that if both **Brunnhofer** and **Jämställdhetsombudsmannen** have been decided correctly by the European Court of Justice, equal pay law as hitherto applied has been radically changed and the operation of the Equal Pay Act altered in the most significant way since its enactment.

13.5 Conclusion

This chapter has sought to illustrate that two recent decisions of the European Court of Justice (if correctly decided and not retreated from in subsequent jurisprudence of that Court) may have an impact on the operation of the Equal Pay Act that is more far reaching than any other decision of the European Court of Justice or any legislative change (European or domestic) or amendment since the inception of the Act.[512] The

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[510] In which regard see **Angestelltenbetriebsrat der Wiener Gebietskrankenkasse** and **Danfoss.**

[511] Wherein the European Court of Justice also held that if a pay system lacks transparency so that it is not possible to determine the exact difference in pay between the claimant and her comparator, then the burden of establishing that she receives less pay will be discharged if the claimant establishes, in relation to a relatively large number of employees, that the average pay for women is less than for men undertaking equal work.

[512] Or prospective change to the domestic provision such as envisaged by the streamlining of the equal value provisions considered in Chapter 11 or the proposals for a 'Single Equality Act' as contained in the *'Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation'* The University of Cambridge Centre for Public Law and Judge Institute of Management Studies, Hart Publishing Ltd, Oxford, 2000.

potential impact of these judgments has in effect relaxed the conditions under which a claimant may be able to raise an action and succeed in proving the claim; the difficulty for the employer being that, even in the absence of any genuine discriminatory pay policy, he may still be required to justify it.

However, reducing the difficulty for the applicant in the manner explained in this chapter does raise the difficult question that contrived claims may have a very much greater chance of succeeding and that raises the subsidiary and vexed question as to whether that is an acceptable consequence, if it also impacts on the gender pay gap associated with structural inequality and occupational segmentation and creates lasting change in that regard.

In the final chapter in this thesis, these strands are brought together. The extent to which the Equal Pay Act has reduced the earnings gap and in what respects is assessed, as are the limitations of legislation in effecting complex social and attitudinal change.

CHAPTER 14. THE EFFECTIVENESS OF EQUAL PAY LEGISLATION

14.1 Introduction

This thesis started (in Chapter 1) by identifying the nature of the earnings gap highlighting the seemingly intractable pay disparity exemplified in and by occupational segmentation, and by giving some consideration to the complex relationship between cultural attitudes to gender and the economic and family structure. Further, it highlighted the role played by the education system both formally, and, in more recent times, informally through the hidden curriculum and how in spite of countless equal opportunities initiatives, gender stereotypical career choices persist. Thus occupational segmentation is still effected through subtle means of cultural reproduction, which, in British society, is firmly rooted in the class structure. It is axiomatic to say that not dissimilar mechanisms of cultural reproduction have operated within the workplace and across industries, making change at the macro level complex and difficult. That is not, to say that there has not been change, that legislation, in the form of the Equal Pay Act (and the Sex Discrimination Act read as part of a code with it) and the way in which they have required to be interpreted as a result of European legislation and the jurisprudence of the European Court of Justice have played a significant, though difficult to quantify, role in effecting change and reducing the pay gap between the sexes. The succeeding chapters traced and analysed that process; Chapter 2 considering developments in legislation concerning women's pay from the 19th century to the enactment of the Equal Pay Act in 1970; Chapter 3 examining the nature of the changes wrought to the Act in the five year period prior to its implementation in 1975; Chapters 4 and 5 focussing on European law in respect of equal pay and the articulation of European law with domestic provision; Chapters 6 to 13 analysing in detail the scope, application and development of the domestic Act by reference to the case law both of the United Kingdom appellate tribunals and courts and the European Court of Justice.

From the foregoing analysis, it is evident that the Act, as enacted and amended, has, over the last thirty years, been able to enlarge its scope and grasp, as European developments have required it, to become more expansionist, and as Chapters 12 and 13 have illustrated, if the recent decisions in **Brunnhofer** and **Jämställdhetsombudsmannen**

have been decided correctly by the European Court of Justice, equal pay law as hitherto applied has been radically changed and the operation of the Equal Pay Act will be altered in the most significant way since its enactment. What is of note is that the text of the Act remains capable of absorbing such interpretation without textual change.[513] This, at first glance, might seem counter- intuitive, given the Equal Pay Act is an extremely precise and detailed instrument and the jurisprudence of the European Court of Justice, being principle led is characterised by its open textured nature; this would lend weight to the argument that the Equal Pay Act is too complex and should be replaced by a new and different form of instrument. However, there is little agreement as to the form such an instrument should take; on the one hand commentators such as Hepple *et al* [514] advocate a single Equality Act[515] constituting a framework, wherein constructs such as direct and indirect discrimination, victimisation and justification are defined in an inclusive manner, to be supplemented where necessary by detailed Regulations and Codes of Practice and augmented by the kind of organisational practice extolled in the Kingsmill Report (2003),[516] Hepple *et al*, also *inter alia*, recommending that employers comply with a positive duty to promote equality aimed at securing fair participation of under-represented groups in the workforce. This approach has the advantage of tidiness by bringing a commonality of approach across all anti-discriminatory provisions but whether it would actually impact on structural inequalities and occupational segmentation is a moot point and there is no academic research evidence to support such a contention. On the other hand feminist writers, such as McColgan,[517] consider that an approach based on such principles is *per se* defective because any legislation restricted to the workplace and embodying the requirement for a comparator is simply incapable of removing structural inequality and particularly that exemplified by occupational segmentation. Irrespective of which approach could eventually prove the more effective, few today would disagree that

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[513] And notwithstanding the Act itself is silent on an indirect basis of claim, importing such from the Sex Discrimination Act.

[514] Hepple, B., Coussey, M., and Choudhury, T. *'Equality: A New Framework'* The University of Cambridge Centre for Public Law and Judge Institute of Management Studies, Hart Publishing, Oxford 2000.

[515] Covering *inter alia* race, sex and disability discrimination and equal pay.

[516] The remit of which was "to examine and report on possible non-legislative and cost-effective proposals to deliver improvements to women's employment prospects and participation in the labour market so that: effective use is made of the skills and experience of both men and women to their benefit and the benefit of businesses and the economy in terms of productivity and competitiveness; the pay gap between men and women is reduced; best practice is developed and promoted; and understanding and awareness of existing equality legislation is increased amongst employers and individuals."

[517] McColgan 1997 *op cit.*

the driving force for change of an expansionist sort in equal pay provision is likely to come from Europe and, in particular, from the jurisprudence of the European Court of Justice.

This final chapter re-assesses the extent to which the Equal Pay Act can be claimed to have been effective in reducing the earnings gap and considers the deficiencies which have been attributed to both its form and operation. This analysis however, has to be tempered with a realism imported from the disciplines of sociology and social psychology to the effect that the use of legislation as a means of effecting social change, particularly in the context of impinging on social attitudes, in addition to behaviour, has limitations; it works best in simple and structurally undifferentiated contexts. An example of the type of simple legislation that can, in this regard be very effective was legislation making compulsory the wearing of seatbelts. The enforced behavioural change within a relatively short period of time (which might be postulated as one generation of new drivers) would seem to have had a consequential positive effect on the attitudinal dimension, so that behaviour and attitude were within a short time frame, for the majority, well synchronised. However, the more complex the required behavioural component, the more socially differentiated the population to which it is applied and the more complex and culturally moderated the attitudinal component, it is argued here, the more difficult to both analyse or attribute cause and effect (or even the direction of causality) or the success or failure of the legislative measure, because the intervening variables, even if all could be identified, are complex and their interrelationship little understood. Notwithstanding this, the Equal Pay Act has been subject to the type of criticism that on occasions fails to recognise the complexity of this relationship and the dynamics of how behavioural and attitudinal change is generated in the industrial, organisational and work contexts.

This chapter therefore considers some of the concerns which have been expressed about the effectiveness of the Act as a measure for reducing the earnings gap or producing equality of outcome. Some of these criticisms are examined and assessed,[518] as is the

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[518] See for example McColgan 1997 *op cit.* and Hepple, B., Coussey, M., and Choudhury, T. *'Equality: A New Framework'* The University of Cambridge Centre for Public Law and Judge Institute of Management Studies, Hart Publishing, Oxford 2000.

question of the extent to which it is either fair or accurate to blame perceived deficiencies in the Equal Pay Act for the current persistence of the earnings gap.

In the first part of this chapter, research on the impact of the Equal Pay Act is considered; in the second part, radical criticism of why the Act has been perceived to be ineffective in reducing the earnings gap is examined and assessed. Whilst evidence of unequal outcome is readily ascertainable, for example, through statistics, attributing a large part of the cause simply to failures of the Equal Pay Act omits to take into account or understand the complex social circumstances surrounding and underlying women's employment. To close much of the remainder of the structural earnings gap would require measures which are beyond the scope of legislative reach in any form hitherto contemplated in the field of anti-discriminatory provisions, and are certainly not on the political agenda of any of the main British political parties. In the concluding section, an attempt is made to assess the extent to assess the extent to which the Equal Pay Act has succeeded and is relevant to the 21st Century and to predict the equal pay landscape of the (near) future.

14.2 The effectiveness of the Equal Pay Act in reducing the earnings gap

The research evidence about the impact of legislation upon pay levels is of two main sorts, firstly, macro-economic analysis examining the changes in the levels of earnings of women relative to those of men, and, secondly, field research examining aspects of implementing equal pay policies in individual organisations.[519] It is only the former that is considered here, the latter being outwith the scope of this thesis. The most comprehensive macro-economic analysis, conducted by Zabalza and Tzannatos[520] suggested that one may ascribe to the legislation a significant, if limited, impact. They noted that, in 1970, the hourly earnings of women were 58% of men's, but by 1977 they had risen to 68% of men's, an increase of 18%. After 1977, there was a slight falling back in women's earnings to 66% by 1983, but that still constituted an increase of nearly 15% since 1970. Today, the figure stands at 82%.[521]

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[519] For example the Department of Employment funded a team of researchers to carry out case studies in 26 organisations on how the Act was implemented. See also Snell, M., Glucklich, P. and Povall, M., '*Equal Pay and Opportunities*', Research Paper 20, Department of Employment, 1981.

[520] Zabalza, T., and Tzannatos, Z., '*Women and Equal Pay: The Effects of the Legislation on Female Employment and Wages*' Cambridge University Press, Cambridge, 1985.

[521] NES 2003, with according to the EOC Equal Pay Task Force 50% of that figure being attributable to the effect of family responsibility and occupational segmentation; see also Chapter 1 and footnote 5 therein.

Two questions about these figures immediately arise. First, was the increase in the relative earnings of women due to (in the causal sense) the Equal Pay Act? Earlier research[522] had attributed a significant effect to the flat-rate incomes policies operated in the middle 1970s, which tended to favour, relatively, the low-paid, of whom the majority were women. Zabalza and Tzannatos, however, found that the effect of flat-rate incomes policy was small in producing the improvement in relative earnings. They also concluded that the effect of any movement of women into higher-paying occupations or industries, or of changes in the ranking of industries or occupations in terms of their pay (i.e. industries or occupations in which women are concentrated becoming as a *whole* higher paying) was also small.[523] They therefore attributed the lion's share of the improvement in relative earnings to the effect of Act.

The second question which arises, is how much of the differential between women's earnings and men's earnings is actually due to discrimination in pay, or, to put the matter another way, has the Act in fact eliminated all discriminatory elements in setting rates of pay?[524] It is contended that it not an appropriate test of the effectiveness of the Equal Pay Act, to ask whether women's' earnings are, as a whole, equal to men's because the overall differential in pay may be due to a number of factors other than discrimination in setting rates of pay, and these other factors may or may not involve other more complex or subtle types of sex discrimination. Thus, for example, women may be less fitted for the labour market because the education and training they have received is less appropriate than that received by men or because they spend more time on unpaid domestic duties at home than men and so acquire less job-related experience and skills, or they may not be present in equal numbers with men in the higher paying occupations and industries. Those factors, which themselves may reflect direct or indirect discrimination against women in education and access to jobs or women's internalisation of a hostile environment or women's free choice, would give rise to an overall differential in pay as between men and women no matter how well drafted the equal pay law. Isolating and evaluating the effect of such factors even with the most sophisticated multivariate

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[522] See for example Chiplin, B., Curran, M. and Parsley, C., *'Relative Female Earnings in Great Britain and the Impact of Legislation'* in Sloane, P., (ed.) *'women and Low Pay'* Macmillan, London 1980.
[523] Zabalza, T., and Tzannatos, Z., *op cit* Chapters 2 and 4.
[524] The EOC Equal Pay Task Force attributed 50% of the earnings gap to pay discrimination (notwithstanding the premises upon which this conclusion was reached were never made explicit). See Chapter 1 and footnote 5.

analysis must realistically place a limitation upon the goals of equal pay legislation and the measurement of its success, and further constitute a strong argument for bolstering equal pay legislation with other types of initiative directed towards promoting equality of opportunity, not least early in the formal education process, when it might at a later stage assist in inducing less gender stereotypical subject selection, with the concomitant narrowing of occupational choice.[525]

Quantifying the contributions of the various possible influencing factors and causes to the still substantial differential between men's and women's earnings with any degree of precision currently seems beyond the scope of economic modelling[526] but Zabalza and Tzannatos suggest that the Equal Pay Act eliminated between one third and one half of the differential that can be attributed to what they call 'market sex discrimination', however since their concept of 'market sex discrimination' appears to embrace both inequality in pay and discrimination in access to jobs, it is difficult to say how much of the failure to eliminate the 'discrimination differential' is due to the failure of the Equal Pay Act to achieve its goals and how much to failure in operation of the Sex Discrimination Act.[527]

In terms of the impact of the Equal Pay Act, Zabalza and Tzannatos described the improvement as "remarkable". Stating that the...

> "...[i]mprovement cannot be attributed to shifts in female employment from low to high paying sectors of the economy...[b]y far the major factor ...is an increase in relative pay within industries and within occupations, and this is the case for both contracting and expanding sectors."[528]

A number of commentators[529] have attributed the greater part of the reduction in the gender pay gap which took place in the early to mid 70's to the collective provisions of

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[525] Even when holding constant social class.

[526] Notwithstanding such attempts, see for example Becker, G *Investment in Human Capital – A Theoretical Analysis'*; (1962) 70 (5) Journal of Political Economy 9; Becker, G *'Human Capital, Effort and the Sexual Division of Labour'* (1985) 3(I)(2) Journal of Labour Economics; England, P *'The Failure of Human Capital Theory to Explain Occupational Sex Segregation'* (1982) 17(3) Journal of Human Resources 358; England, P., Farcas, G., Kilbourne, R., and Dou, T., *'Explaining Occupational Sex Segregation and Wages: Findings from a Fixed Effects Model'* (1988) 53(4) American Sociological Review 544.

[527] Zabalza, T., and Tzannatos, Z., *op cit* pp. 11-16 and Ch. 5.

[528] *Ibid pp 9 and 1-7.*

[529] See for example Rubery, J., *'Structured Labour Markets, Worker Organisation and Low Pay'* in Amsden, A., (ed) *'The Economics of Women and Work'* Penguin, Harmondsworth 1980.

the Act. However Zabalza and Tzannatos found[530]:

> "evidence that collective agreements started to move towards equalisation quite early in the decade, that these increases in relative rates resulted in corresponding and contemporaneous increases in relative earnings, and that the effect on average earnings was not confined to the covered sectors but also spilled over to non-covered employees"

Notwithstanding the foregoing, the statement made earlier in this section, that the Equal Pay Act had a *"significant, if limited, effect"* seems a safe one, and whilst this may seem a modest claim to make, one cannot but speculate for how many pieces of social legislation a greater achievement can plausibly be claimed.

The remaining disparities in pay cannot be explained merely in terms of the ineffectiveness of the Equal Pay Act. In support of this contention is the fact that women generally work shorter hours than men, are less likely to be entitled to seniority bonuses, and most significantly of all, do not do work which is relatively well paid - in other words, because of occupational segmentation, a large proportion of women do not actually compete in the same labour market. That being so, the Act could only ever make a partial difference, in overall terms, by simply equalising rates in those situations where men and women do happen to do the same work (or work rated equivalent as a result of job evaluation). Clearly, the initial gains in closing the earnings gap reflected that, but given the extent of a systemic or structural earnings gap caused by the effects of job segregation and a high proportion of female employees in the unskilled sector, with its attendant low pay, that shifts the emphasis to the concept of the value placed on dissimilar jobs. Whilst comparison of dissimilar jobs by reference to their value became possible in 1983, [531] the matter of the social value accorded to unskilled tasks, and the translation of that into monetary worth, whether performed by men or women, raises questions which extend far beyond anything the legislative domain can or arguably, should interfere in, to so do would be to engage in social engineering of an unwarranted sort. To take a very simple example; the Equal Pay Act would permit, say, a female classroom assistant to compare herself with a labourer; in terms of occupational classification both fall into social class VII (unskilled manual). In a quasi-objective manner, the law permits a

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[530] *Op. cit.* p.9.
[531] Following the implementation of the Equal Pay (Amendment) Regulations 1983 [SI 1983 No. 1794].

comparison on the basis of factors such as 'effort', 'decision' and 'skill'; but there may be a high level of overtime available to the labourer, increasing his gross earnings and the classroom assistant may have her gross income depressed by the fact that schools are closed for up to 12 weeks a year; to accord the woman the same equality of outcome in terms of final earnings, would require a value judgment to be made, valuing the woman's work above that of the male, not on the basis of anything resembling objective criteria, but on the basis of social criteria as to the importance of what each worker does. That kind of value judgment is a socio-cultural one and one which is clearly outwith the scope of the law on equal pay as it currently stands. However, more radical criticism of the Act and its implementation has at its root the fact that the law as enacted, simply does not effect that very kind of change.

In the next subsection, this more radical critique of the Equal Pay Act is considered.

14.3 A radical critique of the Equal Pay Act

Radical critique of the failure of the Equal Pay Act[532] focuses primarily on its failure to impact significantly on what is seen as structural inequality, particularly as exemplified by occupational segmentation. Critics point to four perceived 'deficiencies' in respect of the structure of the legislation, these being portrayed as the cause of the Act's ineffectiveness; these are firstly, the Act's workplace focus; secondly, it's comparator based approach; thirdly, the cost (financial and other) of pursuing a claim and fourthly, the individualistic approach, required by the Act. Each of these elements in the critique merits some attention.

(a) The workplace focus of the Equal Pay Act

McColgan[533]argues that one of the main reasons...

> "...why the Equal Pay Act as amended has had so small an impact on women's relative pay...[is because]...no claim is possible under the Act, save where the woman and her comparator work in the 'same employment'."

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[532] Such as postulated by McColgan 1997 *op cit.*
[533] *Op cit* page 137.

As was shown in Chapter 6, the basis of this comparison has widened incrementally but significantly, most recently since the judgment of the Inner House in **South Ayrshire Council v. Milligan** 2003 SLT 142, at least as regards the public sector. Applicants within that sector may rely on the direct effect of Article 141 and the extended meaning of *'service'* contained in paragraph 22 of the judgment in **Défrenne II**. It is not difficult to envisage professional and semi-professional groups within, for example, local government and the National Health Service and which are comprised predominantly of women, raising cross-employer claims, with the concomitant effect of placing grading structures under strain and attempting to reduce geographical and inter-employer variations in pay by such means. Whilst this particular criticism of the workplace focus may have been in some respects reduced because of the scope of Article 141, the criticism remains valid in respect of the pattern of women's labour market participation. As was shown in Chapter 1, large proportions of the female workforce are concentrated in different industries and workplaces, as well as different occupations from those which men occupy. The only means whereby equal pay legislation could strike at this sort of pay disparity would be by permitting cross-industry as well as cross-employer comparisons and that would only be feasible or tenable in an economy with centralised pay determination mechanisms, which would have both access to the relevant comparative information and the power to remedy wage disparity associated with traditionally undervalued female jobs; it is trite to say that such centralised politico-economic models are anathema to modern free market economies.

Therefore the criticism of the feminist and radical lobby that the Equal Pay Act is inadequate in this respect, whilst on one level true is invalid insofar as the legislation could never have been expected to have the effect it is claimed it has not been able to achieve. The argument fails because it is reminiscent of saying that the aeroplane has been a failure because it has been unable to fly to the moon; that is not a failure of design, but a failure of purpose, something different, possibly radically different in shape and form, being required to achieve the greater purpose; to stretch the analogy one stage further, you don't reach the moon, by incremental additions or alterations to a bi-plane.

(b) The comparative based approach

McColgan notes:[534]

> "The second major problem associated with the Act lies in the narrowness of its approach. By the time the equal pay amendments were introduced the CAC's power to adjudicate *collective* equal pay disputes was, although not yet abolished, effectively a dead letter. The only legal recourse in respect of pay discrimination lay in an individual complaint to an industrial tribunal, whether that complaint was based on a claim of 'like work', 'work rated as equivalent', or the new 'work of 'equal value'. The new claim depended, as did the old, upon the woman establishing a disparity between her wage and that of an *equal* (in one of three senses) man or men. No complaint was available regarding *generalised* underpayment of women within a firm or industry: jurisdiction was available to the tribunal only in respect of individual comparators."

The foregoing illustrates that the basis of the critique is primarily predicated on the notion of fair pay (as opposed to equal pay) incorporating those very factors struck at by the House of Lords in **Strathclyde Regional Council v. Wallace, Glasgow City Council v. Marshall** and perhaps best articulated by Mummery J in **Tyldesley v. T M L Plastics Ltd.** It cannot be denied that pay disparity resulting from occupational segmentation is a residual problem, but that is a socio-economic problem which the structure of the domestic Act could never have been expected to strike out and which would require very differently framed legislation to even address the problem, far less ameliorate or remove it.

McColgan also notes that:[535]

> "Women's difficulties in selecting an appropriate comparator are exacerbated in the context of equal value claims. The equal value claimant has to assert that her job is as valuable as that done by a particular man; yet the determination of value is an *ex post facto* question for the tribunal to decide, generally on the basis of an independent expert's report ... equal value claimants...have no certain grounds upon which to select an appropriate comparator."

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[534] *Ibid* at page 137*ff*.
[535] *Ibid* at page 138.

Further, she considers:[536]

> "The difficulty in choosing a comparator stems, in essence, from the failure of the Act to allow for proportionate value claims[537]- the first step for the equal value claimant is to establish *equality* and, without this, the claim must fail. While a woman may claim equal (but not greater) pay than that received by a man doing *less valuable* work, but there is no provision for the applicant whose job is paid 50 percent of the salary, and rated as 90 percent as valuable, as that of her male comparator. A tribunal may (but does not have to) accept 'equal value' where an independent expert has rated jobs at 100 percent and 98 percent, or at 400 and 420 points on a scale of 200 to 600, but it is unlikely that a 10 percent differential in the assigned values could found a determination of equal value. So, even in the face of the strongest evidence that differentials between jobs were maintained at high levels because of arguments about men needing a 'family wage', women working for 'pin money'; the claimant who fails to establish *equality* of value between her job and that of a man has no legal means of challenging the employers discriminatory practices. Nor is even the amended Act of any assistance to women working in very predominantly female workplaces. These women, who are among the lowest paid of *all* women, have almost no chance of finding an appropriate comparator."

Notwithstanding the (in part at least) somewhat intemperate language, the observations regarding 'proportionate' pay in the context of equal value claims, has, from a practical perspective some merit. Whilst it would be inappropriate for a tribunal to become a wage fixing body, determining the actual percentage value *ex propriou motu*, a procedure permitting the Independent Expert (and indeed the claimant's and respondent's experts if used) in an equal value claim to consider the *quantum* of the value in proportionate terms has certain attractions, *inter alia* job-evaluation specialists would in all likelihood be comfortable with the relevant methodology necessary to undertake such an analysis, since it patently shares much in common with 'benchmarking'; it would constitute the further streamlining of a complex procedure and would speed up the process; it would reduce the

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[536] *Ibid* at page 139.

[537] Which have also been determined by the European Court of Justice in **Murphy v. Bord Telecom Eireann** C-157/86 [1988] ECR 673 as beyond the scope of Article 119. The Court ruling that Article 119 (and hence by implication the Equal Pay Act): *"must be interpreted as covering the case where a worker who relies on that provision to obtain equal pay within the meaning thereof is engaged in work of higher value than that of the person with whom a comparison is to be made".*

need for the claimant to cast her net as widely in order to alight on the most appropriate comparator and would almost certainly would lead to a far greater number of compromised settlements in equal value claims. However it would also inevitably lead to a far greater number of claims being raised under the equal value head of claim rather than the like work head of claim, as such a construct would, in effect, give claimants the equivalent of an almost infinite number of comparators. The conservatism inherent in the new proposals to streamline equal value procedures, as discussed in Chapter 11,[538] do not anticipate any movement in this respect and yet it might be effected in domestic law without upsetting the scheme of the Act.

Notwithstanding the foregoing, there is however one respect in which McColgan's criticisms as regards the Equal Pay Act's individuality of approach, particularly as regards equal value claims, wherein a direct comparison is between a claimant and one or more comparators is required, do not, stand up to scrutiny. She omits from consideration the fact that many of the equal value actions raised, are financially backed and coordinated by the largest trade unions and whilst not 'mass actions' in the conventional sense, have, in practice, that effect, insofar as all the applicants in the sisted or stayed claims which depend on essentially the same factual basis as the case or cases determined, may invoke the 'no reasonable grounds' defence as set out by the Court of Appeal in **Ashmore v. British Coal Corporation** [1990] ICR 485 CA.[539] It is also the case that as regards equal value claims, the majority of which arise in the public sector or in the context of large employers with complex grading structures, the employer will, if unsuccessful cause the necessary revision to be made to the grading structure which will also benefit employees who were not litigants in the main or sisted/stayed actions.

As to McColgan's criticism of the inherent unfairness of a comparator based approach because it is predicated on an applicant seeking an equality clause, that again goes to the heart of the scheme of the Act. It should hardly be surprising that the Act has not succeeded in achieving a social or socio-economic outcome characterised by a revaluation of the worth of women's work, since the very scheme of the Act was simply not designed to accomplish such a generalised purpose. The focus of this area of

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[538] *'Towards Equal Pay: A Consultation on Proposals to Streamline Equal Value Tribunal Procedures'* DTI 18th March 2004.
[539] As discussed in Chapter 11.

litigation, as with most employment law, is primarily individual, therefore any collective social benefits which may ensue are derivative.

(c) The cost of 'equal pay'

McColgan asserts that:[540]

> "Not only does the requirement for individual claimants give rise to difficulties in determining appropriate comparators, it also acts as a disincentive to complaints. The direct financial costs of equal value claims are high (particularly now that both employer and employee generally commission their own experts to balance the views of the independent expert), and the fear of victimisation prevents many potential claimants from pursuing their cases. The EOC's *Annual Reports* have often attributed drops in the numbers of cases brought to tribunals to down-swings in the economy and the resulting increased fear of unemployment."

This is perhaps the weakest or least well argued deficiency attributed to the operation of the Equal Pay Act. It is trite to say that <u>any</u> adversarial legal contest in the employment field can be the source of fear and friction between the parties, the more so in times of high unemployment. McColgan does however omit to mention the protections afforded to applicants who have brought equal pay proceedings, against victimisation, because of those proceedings.[541]

(d) The individualistic approach of the Equal Pay Act

It is in this respect that Mc Colgan makes her most focussed attack on the Equal Pay Act. She states:[542]

> "[t]he absurdity of the individual approach is perhaps most apparent in the manner of the legislation's approach to *systemic* pay discrimination. It is almost certainly the case that women's underpayment stems, not only from deliberate discrimination against individual, but from structural assumptions about the value of women's work and their position in the workforce, and from traditional

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[540] *Op cit* page 139*ff*.
[541] Section 4(1)(c) and (d) of the Sex Discrimination Act 1975.
[542] *Op cit* page 140*ff*.

notions of the 'family wage' (available, of course, exclusively to men). Pre- 1975 pay structures operated to the disadvantage of women, relating men's wages to family needs, but women's, at best, to the requirements of an individual. Trade unions embraced the notion of the 'family wage' at the same time as they pressed for men to be rewarded on the basis of effort. And even those economists who embraced the 'marginal productivity' theory of wage setting claiming that wages were dependent on the worker's utility to the employer, abandoned this theory when it came to explaining women's lower wages. To the extent that they were unable to explain women's lower wages in terms of their lower productivity (the result of their lack of employment opportunity and training), they justified them in terms of subsistence theory. Whatever the ideology surrounding men's wages, women's salaries were depressed by virtue of the assumption that they were not responsible for others; that, indeed, they were subsidized by male family members and so did not have to receive even subsistence wages.

The Equal Pay Act did little to challenge the shape of the pay structures resulting from these assumptions. The Act does not prohibit the discriminatory under-payment of women *because* they are women in the absence of a suitable male comparator. Even the 'equal value' claim depends upon the *initial* determination that a women's job is in fact of equal value to that of her male comparator, and the question whether the employer's overall pay practices are such as to disadvantage women (and, in particular, the incumbents of female dominated jobs) arises only if the employer puts forward that pay structure as a material factor defence. If this does happen the tribunal is dependent on the evidence of the employer and employee/trade union in order to determine whether the 'pay structure' factor is a factor which is 'not the difference of sex'. Although the burden of proof is on the employer to establish that the difference between the man's pay and the woman's pay is due to a factor not being the difference of sex, the burden is not a heavy one and arguments about the preponderance of women in low-paid grades or the impact of market forces on the pay in particular (male-dominated) grades appear often to be beyond the grasp of tribunals and, in particular, the EAT."

Whilst not quibbling with the socio-historical assumptions underpinning the origins of low pay relativism, with its adverse effect on women, the majority of the critique misses the point in respect of the Equal Pay Act, for the same reasons as given in respect of the

workplace focus of the Act. To strike at the deficiencies complained of above, is not a failure of this piece of legislation, which never contained any provisions, no matter how purposively construed, which would permit it to strike at this type of structural inequality, but rather a failure of another kind, and wherein the socio-political process has been unable to institute measures of the sort that can generate social, behavioural and attitudinal change. A parallel can be drawn with the example given in Chapter 1, concerning the fact that, between 1948 and 1976, there was no evidence that overall educational attainment including the relative proportions of working class and middle class children entering higher education had changed;[543] in that context, legislation has never been proposed as either a solution or a panacea for diminishing relativities and exactly like structural inequality in respect of pay, what is sought or aspired to by most people is a fairer or more representative equality of outcome.

McColgan does admit[544] that *"[E]qual pay legislation may not in itself be sufficient to deal with the gender-pay gap"* and, indeed, she does suggest means whereby she perceives that this gap, may be reduced. The central planks being minimum wage regulation,[545]something now in place but with seemingly minimal effect on relativities, including *" ...a drive towards more centralised pay determination (with a specific view to the remedying of traditional undervaluation of female jobs)"*[546] and the institution of a specifically collective legislative approach to the issue of equal pay. In this last respect she envisages that rather than legislation requiring workers individually to challenge their pay and/or conditions to an employment tribunal, the collective model would give a body:[547]...

> "...responsibility for examining collective agreements for discriminatory effect (whether these agreements covered entire sectors...or in the absence of such sectoral agreements or in the event of gaps in their coverage, individual workplaces). The body would take account of those differences which arise between white and ethnic minority workers and, where sectoral employment commissions were in place there orders too would be referred (indeed, would for preference be referred by them before promulgation) to the body for 'equality proofing'.

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[543] Gray, J., McPherson, A. F., & Raffe, D., *op cit* page 227*ff*.
[544] At page 397.
[545] Although how this is meant to tackle relativities is unclear.
[546] Page 412.
[547] *Ibid*.

> To the extent that workplaces which were not covered by collective bargaining continued to exist, pay structures could also be referred. In order to achieve the maximum utility from the system, the power to refer should be widely drawn (being available to trade unions employers, and individual workers affected by the agreement) and individual complaints should be permitted to be made under the cloak of anonymity."

McColgan concludes:

> "If equal pay legislation were to be amended along these lines, coupled with an appropriately pitched minimum wage and a drive towards more centralized pay determination (with a specific view to the remedying of traditional undervaluation of female jobs), the gender-pay gap in the United Kingdom... could really begin to dissolve away. Some sex inequality would remain, and will continue to do so for as long as men and women share unequal burdens of domestic and childcare responsibility. But the improvement of women's wages would itself do much to address this wider inequality: if women were not so underpaid, relative to men, the 'choice' of which parent takes primary responsibility for childcare would perhaps be more neutral as between men and women and the change in pattern of both men's and women's employment would do much to undermine the wider discrimination which persists against women in the workforce."

Even if McColgan's solution in respect of minimum wage regulation and centralised pay determination including the screening of collective bargaining agreements for discriminatory effects[548] could, if implemented, ameliorate the problem of systemic wage inequality, it is not a realistic political option given the model which she advocates necessitates it being clothed in a legal and regulatory framework akin to that of the Equal Pay Act but requires it to be collective, cross-industry and non-comparative in nature and application. Neither domestic nor European law in respect of equal pay is based on such a model, however good practice now dictates that employers should carry out 'equality audits' and put in place mechanisms to review pay structures. In other words, the collective approach urged by such writers as McColgan is accepted, in terms of sound management and human resources practice, but not in the context of black letter law. For example, in 1999, the Equal Opportunities Commission launched a major three-year

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[548] This of course assumes that effects can always be surmised prior to implementation; extremely sophisticated modelling (including economic modelling) and 'scenario analysis' would be necessary to give any such scheme even basic credibility.

campaign for equal pay with the title "Valuing Women". Its aim, somewhat ambitiously stated, was to eliminate those remaining elements of the pay gap between men and women that were due to sex discrimination, focussing on the fact that when the Act came into force in 1975 the pay difference between men and women was 38 per cent, and notwithstanding the pay difference has dropped to 18 per cent for full-time workers for part-time women workers it has remained as high as 40 per cent.[549] The Equal Pay Task Force set up as part of the "Valuing Women" campaign reported in 2001[550] and recommended, *inter alia*, that there should be improved legislation to make pay reviews mandatory. Government, however, subsequently announced that it will be encouraging employers in the private sector to undertake and act on pay reviews on a voluntary basis.[551] The Task Force, like McColgan, views the Equal Pay Act as defective for not having achieved more, and although not made explicit or exhibiting theoretical coherence, apparently for similar reasons.

The foregoing radical critique of the effectiveness of the Equal Pay Act is misdirected. The diagnosis of the nature and extent of pay differentials, between men and women and which are systemic in nature, particularly as characterised by occupational segmentation are not disputed, what is disputed is the contention that the Equal Pay Act has failed and will be an inappropriate instrument in the future, insofar as closing that pay gap is concerned. It is contended that what is now claimed as a failure was simply never within its legislative scope or grasp. Likewise, there can no disagreement that women's earnings remain significantly lower than those of men in all occupational categories, whether measured on a weekly or on an hourly basis and the great majority of women are in an absolute sense 'low paid' and this pattern of absolute low pay has important implications for any policy aimed to improve the position of women in employment. It is a disturbing fact that most women (and particularly in the unskilled sector) do not compete in the same labour market as men, this in turn suggests that whilst it is important to ensure that there is equality of treatment in terms and conditions of employment when the two sexes are in direct competition, it is even more important that they should actually compete with each other. Whilst this may be the logic which impels legislation such as the Sex

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[549] Equal Opportunities Commission, *"The Gender Pay Gap: a Research Review'* (2001).
[550] Equal Pay Task Force, *'Just Pay: the Report of the Equal Pay Task Force'* (2001).
[551] On 27th March 2001 the Rt Hon Tessa Jowell, then Minister for Employment stated that *"Departments and Agencies [will] undertake pay reviews and prepare action plans within two years, as they review their pay systems, in order to close any equal pay gaps"* quoted in the Kingsmill Review *op cit* at para 1.7.

Discrimination Act,[552] it also illustrates that negative regulation such as that contained in the 1970 and 1975 Acts can do no more than scratch the surface of what is a much larger social and cultural problem. The principle-led case law of the European Court of Justice, and particularly recently, has without doubt extended the development of equal pay law into the collective domain on the basis of indirect discrimination cases or direct cases, re-characterised as if they were indirect, and potentially as a result of its decisions in **Brunnhofer** and **Jämställdhetsombudsmannen**, may have overstepped the boundaries and compromised its own jurisprudence by moving too far in this direction, but the fact remains, legal systems, European or domestic are of little use in enforcing the aspirational, being limited to providing remedies for identifiable and specific wrongs as they affect individuals.

What is evident is that there are alternative and complimentary approaches to dealing with the sort of systemic inequality in respect of pay that persists today. It is argued that the law is a very blunt and largely ineffective tool with which to tackle this type of inequality; for example, as explained earlier and in Chapter 1, it has done little to ameliorate educational access relativities based on social class and likewise its impact on other social inequalities, such as those borne of poverty and related to social class position remain stubbornly persistent, with the law providing a remedy in relatively circumscribed circumstances wherein an individual's rights have been infringed. To eradicate the gender pay gap as it remains today, will not be effected by legislation in the form of the Equal Pay Act (as it is now or as it may in the future be incorporated into a Single Equalities Act) but rather by social, sociological, socio-economic and educational initiatives, and which inevitably are the offspring of social policy[553] and political policy. Given the evidence that women are still both highly concentrated in particular occupations and industries and highly segregated from men at work is now overwhelming,[554] an important policy question for the 21st century is how what is seen as a necessary social change be effected or engineered in a context where it inevitably competes in an arena (not least for resources) with other equally meritorious social policy

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[552] See HC Standing Committee Report, cols. 14-46 (19 February 1970).

[553] The term being used in the context not just of political interest groups, at local and national government level, but policy as generated and promulgated by other agencies, including those with partisan and vested interests in the area.

[554] See Martin, J., and Roberts, C., '*Women and Employment: A Lifetime Perspective*' HMSO 1984, Ch 3; Craig, C., Garnsey, E., and Rubery, J., *'Payment Structures and Smaller Firms'*, D.E. Research Paper 48, 1985, p. 99.

aims.

Any social policy approach must involve a fundamental re-assessment of traditional sex roles and the general social attitudes and assumptions which underpin them. Such a re-assessment, and the social and economic changes which it must generate if it is to succeed, cannot take place in isolation from the legal process, but it is contended, in this respect the legal process follows rather than leads. Arguably education will be a better agent to create change in labour market disposition in the 21st century than enforcement, particularly since, as has been argued here, is difficult to enforce equality within something which does not exist, namely a homogenous and non-segmented labour market. Educational and policy initiatives may be categorised as falling into two main kinds; those targeted at school level which *inter alia* aim to impact on subject selection and career choice and those aimed at employers and employing organisations such as outlined by both the Kingsmill Report and by the Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation,[555] what they have in common is that their impact will be evolutionary rather than revolutionary and whatever success they achieve will be apparent and measurable only over a period of years.

It is in the context set out above, that the question posed in the title of this work has to be considered, namely *'The Equal Pay Act 1970 – an Act Suitable for the 21st Century?'* In the last subsection below, this question is finally answered, being set in the scene of what the equal pay landscape may look like in the near future.

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[555] It is notable that the *'Kingsmill Review of Women's Employment and Pay'* Women and Equality Unit 2003 whilst making extensive recommendations as to good practice, strategies and initiatives which may be implemented at the level of the employer including *"practical and business focussed ways of addressing this disparity"*(see Foreword and page 51*ff*) and whilst recognising that the reasons for the pay disparity *"...are both complex and culturally embedded"*(Forward) the Report contains not a single reference to what occurs before women actually enter the labour market, nor makes any recommendations, even as to research, at the level of the school or tertiary education and providers thereof. See also *'Equality: A New Framework – Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation'* Cambridge Centre for Public Law and the Judge Institute of Management Studies at Cambridge University, cited earlier under the authorship of Hepple, B., *et al* 2000.

14.4 Conclusion

The Equal Pay Act, has in terms of the scope wherein it may reasonably, realistically and fairly be examined, succeeded. It has, as demonstrated by Zabala and Tzannatos[556]made a significant, albeit limited, impact in reducing the earnings gap and as shown in earlier chapters, it has proved flexible and able to incorporate radical and principle led decisions of the European Court of Justice, where a lesser instrument would have required to have been re-written. For ease of understanding, the Act would certainly benefit from some re-drafting[557] and such changes as regards inducing more clarity in respect of claims based on indirect discrimination and proposed innovations making genuine, explicit and express the raising of class actions, absent the necessity to pray-in-aid authority[558]to achieve the same result will benefit claimants, respondents and practitioners alike, but nothing which is proposed involves any change from the comparative and workplace or employer basis upon which the Act as currently framed, turns. The criticisms of those seeking radical change to equal pay legislation, to render it habile to include cross-employer and cross industry comparison or to strike at wage inequality borne of occupational segmentation in addition to other forms of wage inequality, particularly in the low paid and unskilled sector, is nowhere addressed as being on the legislative agenda.[559]

The equal pay landscape of the future and the domestic legislative instruments regulating it, will, in essence and character, be not dissimilar from that which has been in force since 1975, as amended and moderated by the jurisprudence of the European Court of Justice, that is the basis of the legislation will not change though the form might.[560] Change, of a radical sort, if it is going to occur, will, occur as a result of the jurisprudence of the European Court of Justice, but even change from that forum will not be in the conceptual mode advanced by McColgan.

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[556] *Op cit* Zabalza, T., and Tzannatos, Z., *'Women and Equal Pay: The Effects of the Legislation on Female Employment and Wages'* Cambridge University Press, Cambridge, 1985.
[557] Particularly in respect of introducing express provisions on indirect discrimination in equal pay.
[558] Namely **Ashmore v. British Coal Corporation** [1990] ICR 485 CA
[559] Even assuming legislation capable of addressing the mischiefs identified by McColgan is capable firstly of being drafted and secondly of actually being implemented and enforced.
[560] Any Single Equalities Act, in addition to not departing from the current basis will inevitably in the early days run into difficulties of interpretation. The risk of a 'one size fits all' approach to anti discrimination legislative drafting and subsequent interpretation is likely to encounter particular difficulties in the equal pay area, as even framing the basis of claim necessarily requires a level of detail beyond that required for race, sex or disability discrimination, as currently provided for.

As regards European developments in this respect, two scenarios are possible. Either **Brunnhofer** and **Jämställdhetsombudsmannen** will be found to have been correctly decided by the European Court, and the result will be to extend significantly the ease with which claimants may pursue their claims and reduce equally significantly, the ability of the employer to defend equal pay claims or the European Court, will in subsequent jurisprudence, return to its previous orthodoxy, admit to incomplete reasoning or mis-statement of principle and thus remove the ability for claimants to rely on an omission in a judgment, in place of a positive statement.

It is notable that this current position as regards the European Court has much in common with the position of the Scottish tribunals and Courts in the early 1990's when the Scottish division of the Employment Appeal Tribunal developed an approach to section 1(3) of the Equal Pay Act that effectively for a period turned an appellate tribunal into a wage fixing body[561] and Scottish employment tribunals into arbiters of fair wages. As the Scottish division of the Employment Appeal Tribunal was returned to orthodoxy by the decision, firstly in **Tyldesley v. TML Plastics Ltd** and subsequently by the decisions of the House of Lords in **Strathclyde Regional Council v. Wallace** and **Glasgow City Council v. Marshall,** so the European Court of Justice may return to the orthodox position pre- **Brunnhofer** and **Jämställdhetsombudsmannen** or perhaps more accurately assert it never departed from it. Which of course leaves the intriguing question, namely if **Brunnhofer** and **Jämställdhetsombudsmannen** are correctly decided would their effects serve to effect the changes which are required at the systemic level as identified by writers such as McColgan. It is contended that they would not, because the conceptual base of the sort McColgan identifies as necessary to impact on *inter alia* occupational segmentation, has not changed, merely the ease with which claims of the sort currently raised may continue to be brought coupled with an added difficulty for the employer in defending such actions; claims lacking in merit[562] would undoubtedly succeed where hitherto they had not.

This thesis has sought to place consideration of the effectiveness of the Equal Pay Act at the centre of a raft of statistical and economic data which, at a simplistic level, might tend

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[561] See the cases of **Barber and Others v. NCR** [1993] IRLR 95 EAT and **Young v. University of Edinburgh** Unreported EAT/244/93 and generally Chapter 12.
[562] At least as perceived by the law as it currently stands.

to show its failure. On one view, the Act should be scrapped and replaced by a mechanism which has as its focus the elimination of the pay differential attributed to social unfairness which happens to disclose that women are unequally represented in a narrow range of occupations and enjoy comparatively less pay than men. That view, whilst in accordance with social justice, fails to take into account some of the factors which cause it and which arguably no piece of legislation can strike at. Social legislation has not eliminated poverty, it has not removed the differential relative access to higher education borne of social class; legislative measures may have such outcomes as a social aim but something more than black letter law is required to effect them in practice. The roots of occupation segmentation are nurtured in the school where although subject choice is not restricted in any formal sense, young people still make choices that largely reflect conservative social and cultural appropriateness, in spite of thirty years of curriculum development initiatives.

As this work has attempted to show, the apparently antiquated Equal Pay Act has been able to expand its scope and accommodate change, for example, by the inclusion of indirect discrimination, by the expansion of what constitutes pay, by the extension, beyond all recognition of what constitutes a relevant comparator; much of this expansion and extension has derived from Europe. But the elimination of sex discrimination in matters concerning pay must remain grounded in a comparative exercise, notwithstanding this imposes certain limitations and may not always achieve social justice. It is accepted that removing the comparative base however is no guarantor that social justice, in terms of equality of outcome would follow. What would follow, would be an increase in the number of manipulative and disingenuous claims lodged and an increase in the use of the threat of raising such actions in the context of re-grading claims and wage bargaining. A law which might strike at the fairness (rather than, or as well as, the discriminatory nature) of a pay practice would thereby become a potentially useful negotiating tool in the hands of hands of wage bargainers. That carries risk of damaging the notion of the impartiality of the law in addressing the particular mischief at issue, in this case, inequality of pay based on the sex of the claimant and nothing more.

The law concerning equal pay certainly requires clarification, particularly in the area of indirect discrimination. It may be that the most efficient way to achieve this would be for the UK to enact an indirect discrimination amendment to the Equal Pay Act based on the

reasoning of Advocate General Cosmas and for the EC Commission to refer the legislation to the European Court of Justice to rule on whether it correctly encapsulates the relevant principles. The issue of the elimination of sex discrimination and the adjudication on fair wages would be clearly before the Court.

It is argued that the removal of the comparative base which is the cornerstone of both EU and UK law, in an effort to cure what is identified, in a value laden and social context, as a 'bad thing' (namely structural inequality as exemplified by occupational segmentation and low pay particularly in the unskilled sector, with the concomitant problems of poverty and deprivation that may ensue for those trapped in it), is in this writer's opinion to expect of the law more than it can, could and arguably should deliver and to attempt to transform it into an instrument of social engineering, in conclusion, a step too far for equal pay law.

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Appendix I

The long title of the 1970 Act was:

> "An Act to prevent discrimination, as regards terms and conditions of employment, between men and women".

In its 1970 form, it provided:

> **"Requirement of equal treatment for men and women in same employment**
>
> 1. – (1) The provisions of this section shall have effect with a view to securing that employers give equal treatment as regards terms and conditions of employment to men and to women, that is to say that (subject to the provisions of this section and of section 6 below) –
>
> (a) for men and women employed on like work the terms and conditions of one sex are not in any respect less favourable than those of the other; and
>
> (b) for men and women employed on work rated as equivalent (within the meaning of subsection (5) below) the terms and conditions of one sex are not less favourable than those of the other in any respect in which the terms and conditions of both are determined by the rating of their work.
>
> The following provisions of this section and section 2 below are framed with reference to women and their treatment relative to men, but are to be read as applying equally in a converse case to men and their treatment relative to women.
>
> (2) It shall be a term of the contract under which a women is employed at an establishment in Great Britain that she shall be given equal treatment with men in the same employment, that is to say 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.
>
> (3) Where a woman is employed at an establishment in Great Britain otherwise than under a contract which includes (directly or by reference to a collective agreement or otherwise) a term satisfying subsection (2) above, the terms and conditions of her employment shall include an implied term giving effect to that subsection.
>
> (4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.
>
> (5) A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, 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 of undertakings, 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..."

Appendix II

Part II
ACT AS AMENDED
[*In the provisions set out in this Schedule words inserted by the Bill are printed in* **bold type** *and omissions are denoted by dots.*]

1970 CHAPTER 41
An Act to prevent discrimination, as regards terms and conditions of employment, between men and women. [29th May 1970]

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1. – (1) 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.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that –

(a) where the woman is employed in like work with a man in the same employment –

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment –

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.

(3) An equality clause deemed by subsection (1) to be included in a woman's contract 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 difference between her case and his, being a difference in –

(a) the conditions under which, or the time of day when, their work is done, or any other matter relating to the carrying out by them of the duties of the job, or
(b) their qualifications, experience, length of service, or other personal attributes (other than sex).

(4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.

(5) A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, 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 of undertakings, 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.

(6) Subject to the following subsections, for purposes of this section –

(a) "employed" means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;

. . . . . .

(c) two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly has control,

and 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.

. . . . . .

(8) This section shall apply to service for purposes of a Minister of the Crown or government department, or service on behalf of the Crown in an office set up by an enactment, or for purposes of a person holding such an office or of a body so set up, other than service as a member –

(a) the naval, military or air forces of the Crown, or

(b) any women's service administered by the Defence Council,

as it applies to employment by a private person, and shall so apply as if references to a contract of employment included references to the terms of service.

(9) For the purposes of this Act it is immaterial whether the law which (apart from this subsection) is the proper law of a contract is the law of any part of the United Kingdom or not.

(10) In this Act "Great Britain" includes such of the territorial waters of the United Kingdom as are adjacent to Great Britain.

(11) Provisions of this section and section 2 below framed with reference to women and their treatment relative to men are to be read as applying equally in a converse case to men and their treatment relative to woman.

2. – (1) Any claim in respect of the contravention of a term modified or included by virtue of an equality clause may be presented by way of a complaint to an industrial tribunal.

(1A) Where a dispute arises in relation to the effect of an equality clause, or the employer is in doubt as to its effect, the employer may apply to an industrial tribunal for an order declaring the rights of the employer and the employee in relation to the matter in question.

(2) Where it appears to the Secretary of State that there may be a question whether the employer of any women is or has been **contravening a term modified or included by virtue of their equality clauses,** but that it is not reasonable to expect them to take steps to have the question determined, the question may be referred by him to an industrial tribunal and shall be dealt with as if the reference were of a claim by the women against their employer.

(3) Where it appears to the court in which any proceedings are pending that a claim or counter-claim in respect of the operation of an **equality** clause could more conveniently be disposed of separately by an industrial tribunal, the court may direct that the claim or counter-claim shall be struck out; and (without prejudice to the foregoing) where in proceedings before any court a question arises as to the operation of an **equality** clause, the court may on the application of any party to the proceedings or otherwise refer that question, or direct it to be referred by a party to the proceedings, to an industrial tribunal for determination by the tribunal, and may stay or sist the proceedings in the meantime.

(4) No claim in respect of the operation of an **equality** clause relating to a woman's employment shall be referred to an industrial tribunal otherwise than by virtue of subsection (3) above, if she has not been employed in the employment within the six months preceding the date of the reference.

(5) A woman shall not be entitled, in proceedings brought in respect of a failure to comply with an **equality** clause (including proceedings before an industrial tribunal), to be awarded any payment by way of arrears of remuneration or damages in respect of a time earlier than two years before the date on which the proceedings were instituted.

. . . . . .

(7) In this section "industrial tribunal" means a tribunal established under section 12 of the Industrial Training Act 1964 ...

3. – (1) Where a collective agreement made before or after the commencement of this Act contains any provision applying specifically to men only or to women only, the agreement may be referred, by any party to it or by the Secretary of State, to the Industrial **Arbitration Board** constituted under Part I of the Industrial Courts Act 1919 to declare what amendments need to be made in the agreement, in accordance with subsection (4) below, so as to remove that discrimination between men and women.

(2) Where on a reference under subsection (1) above the Industrial **Arbitration Board** have declared the amendments needing to be made in a collective agreement in accordance with that subsection, then –

(a) in so far as the terms and conditions of person's employment are dependent on that agreement, they shall be ascertained by reference to the agreement as so amended, and any contract regulating those terms and conditions shall have effect accordingly; and

(b) if the Industrial **Arbitration Board** make or have made, under section 8 of the Terms and Conditions of Employment Act 1959 or any other enactment, an award or determination requiring an employer to observe the collective agreement, the award or determination shall have effect by reference to the agreement as so amended.

(3) On a reference under subsection (1) above the Industrial **Arbitration Board** may direct that all or any of the amendments needing to be made in the collective agreement shall be treated as not becoming effective until a date after their decision, or as having been effective from a date before their decision but not before the reference to them, and may specify different dates for different purposes; and subsection (2) above and any such contract, award or determination as is there mentioned shall have or be deemed to have had effect accordingly.

(4) Subject to section 6 below, the amendments to be made in a collective agreement under this section shall be such as are needed –

(a) to extend to both men and women any provision applying specifically to men only or to women only; and

(b) to eliminate any resulting duplication in the provisions of the agreement in such a way as not to make the terms and conditions agreed for men, or those agreed for women, less favourable in any respect than they would have been without the amendments;

but the amendments shall not extend the operation of the collective agreement to men or to women not previously falling within it, and where accordingly a provision applying specifically to men only or to women only continues to be required for a category of men or of women (there being no provision in the agreement for women or, as the case may be, for men of that category), then the provision shall be limited to men or women of that category but there shall be made to it such amendments, if any, as are needed to secure that the terms and conditions of the men or women of that category are not in any respect less favourable than those of all persons of the other sex to whom the agreement applies.

(5) For purposes of this section "collective agreement" means any agreement as to terms and conditions of employment, being an agreement between –

(a) parties who are or represent employers or organisations of employers or associations of such organisations; and

(b) parties who are or represent organisations of employees or associations of such organisations;

but includes also any award modifying or supplementing such an agreement.

(6) Subsections (1) to (4) above (except subsection (2)(b) and subsection (3) in so far as it relates to subsection (2)(b) shall have effect in relation to an employer's pay structure as they have effect in relation to a collective agreement, with the adaptation that a reference to the Industrial **Arbitration Board** may be made by the employer or by the Secretary of State; and for this purpose "pay structure" means any arrangements adopted by an employer (with or without any associated employer) which fix common terms and conditions of employment for his employees or any class of his employees, and of which the provisions are generally known or open to be known by the employees concerned.

(7) In this section the expression "employment" and related expressions, and the reference to an associated employer, shall be construed in the same way as in section 1 above, and section 1(8) shall have effect in relation to this section as well as in relation to that section.

4. – (1) Where a wages regulation order made before or after the commencement of this Act contains any provision applying specifically to men only or to women only, the order may be referred by the Secretary of State to the Industrial **Arbitration Board** to declare what amendments need to be made in the order, in accordance with the like rules as apply under section

3(4) above to the amendment under that section of a collective agreement, so as to remove that discrimination between men and women; and when the **Board** have declared the amendments needing to be so made, the Secretary of State may by order made by statutory instrument coming into operation not later than five months after the date of the **Board's** decision direct that (subject to any further wages regulation order) the order referred to the **Board** shall have effect subject to those amendments.

(2) A wages regulation order shall be referred to the Industrial **Arbitration Board** under this section if the Secretary of State is requested so to refer it either –

(a) by a member or members of the wages council concerned with the order who was or who were appointed as representing employers; or

(b) by a member or members of that wages council who was or who were appointed as representing workers;

or if in any case it appears to the Secretary of State that the order may be amendable under this section.

(3) Where by virtue of section 12(1) of the Wages Councils Act 1959 a contract between a worker and an employer is to have effect with modifications specified in section 12(1), then (without prejudice to the general saving in section 11(7) of that Act for rights conferred by or under other Acts) the contract as so modified shall have effect subject to any further term implied by virtue of section 1 above.

(4) In this section "wages regulation order" means an order made or having effect as if made under section 11 of the Wages Councils Act 1959.

5. – (1) Where an agricultural wages order made before or after the commencement of this Act contains any provision applying specifically to men only or to women only, the order may be referred by the Secretary of State to the Industrial **Arbitration Board** to declare what amendments need to be made in the order, in accordance with the like rules as apply under section 3(4) above to the amendment under that section of a collective agreement, so as to remove that discrimination between men and women; and when the **Industrial Arbitration Board** have declared the amendments needing to be so made, it shall be the duty of the Agricultural Wages Board, by a further agricultural wages order coming into operation not later than five months after the date of the **Industrial Arbitration Board's** decision, either to make those amendments in the order referred to the **Industrial Arbitration Board** or otherwise to replace or amend that order so as to remove the discrimination.

(2) Where the Agricultural Wages Board certify that the effect of an agricultural wages order is only to make such amendments of a previous order as have under this section been declared by the Industrial **Arbitration Board** to be needed, or to make such amendments as aforesaid with minor modifications or modifications of limited application, or is only to revoke and reproduce with such amendments a previous order, then the **Agricultural Wages** Board may instead of complying with paragraphs 1 and 2 of Schedule 4, or in the case of Scotland paragraphs 1 and 2 of Schedule 3, to the Agricultural Wages Act give notice of the proposed order in such manner as appears to the **Agricultural Wages** Board expedient in the circumstances, and may make the order at any time after the expiration of seven days from the giving of the notice.

(3) An agricultural wages order shall be referred to the Industrial **Arbitration Board** under this section if the Secretary of State is requested so to refer it either –

(a) by a body for the time being entitled to nominate for membership of the Agricultural Wages Board persons representing employers (or, if provision is made for any of the persons representing employers to be elected instead of nominated, then by a member or members representing employers); or

(b) by a body for the time being entitled to nominate for membership of the **Agricultural Wages** Board persons representing workers (or, if provision is made for any of the persons representing workers to be elected instead of nominated, then by a member or members representing workers);

or if in any case it appears to the Secretary of State that the order may be amendable under this section.

(4) In this section "the Agricultural Wages Board" means the Agricultural Wages Board for England and Wales or the Scottish Agricultural Wages Board, "the Agricultural Wages Act" means the Agricultural Wages Act 1948 or the Agricultural Wages (Scotland) Act 1949 and "agricultural wages order" means an order of the Agricultural Wages Board under the Agricultural Wages Act.

6. – (1) Neither an equality clause nor the provisions of section 3(4) above shall operate in relation to terms –

(a) affected by compliance with the laws regulating the employment of women, or
(b) affording special treatment to women in connection with pregnancy or childbirth, or
(c) relating to death or retirement.

(2) Any reference in this section to retirement includes retirement, whether voluntary or not, on grounds of age, length of service or incapacity.

7. – (1) The Secretary of State or Defence Council shall not make, or recommend to Her Majesty the making of, any instrument relating to the terms and conditions of service of members of the naval, military or air forces of the Crown or of any women's service administered by the Defence Council, if the instrument has the effect of making a distinction, as regards pay, allowances or leave, between men and women who are members of those forces or of any such service, not being a distinction fairly attributable to differences between the obligations undertaken by men and those undertaken by women as such members as aforesaid.

(2) The Secretary of State or Defence Council may refer to the Industrial **Arbitration Board** for their advice any question whether a provision made or proposed to be made by any such instrument as is referred to in subsection (1) above ought to be regarded for purposes of this section as making a distinction not permitted by that subsection.

. . . . . .

(9) – (1) . . . . . the foregoing provisions of this Act shall come into force on the 29th December 1975 and references in this Act to its commencement shall be construed as referring to the coming into force of those provisions on that date.

. . . . . .

(10) – (1) A collective agreement, pay structure or order which after the commencement of this Act could under section 3, 4 or 5 of this Act be referred to the Industrial **Arbitration Board** to declare what amendments need to be made as mentioned in that section may at any time not earlier than one year before that commencement be referred to the **Board** under this section for their advice as to the amendments needing to be so made.

(2) A reference under this section may be made by any person authorised by section 3, 4 or 5, as the case may be, to make a corresponding reference under that section, but the Secretary of State shall not under this section refer an order to the Industrial **Arbitration Board** unless

requested so to do as mentioned in section 4(2) or 5(3), as the case may be, nor be required to refer an order if so requested.

(3) A collective agreement, pay structure or order referred to the Industrial **Arbitration Board** under this section may after the commencement of this Act be again referred to the **Board** under section 3, 4 or 5; but at that commencement any reference under this section (if still pending) shall lapse.

. . . . . .

11. – (1) This Act may be cited as the Equal Pay Act 1970.

(2) In this Act the expressions "man" and "woman" shall be read as applying to persons of whatever age.

(3) This Act shall not extend to Northern Ireland.

Appendix III

The statute now reads:

"**1. Requirement of equal treatment for men and women in same employment**

(1) 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.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the 'woman's contract'), and has the effect that—

(*a*) where the woman is employed on like work with a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;

(*b*) where the woman is employed on work rated as equivalent with that of a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.

[(3) 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

(4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and condition of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences

(5) A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, 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 of undertakings, 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..."

Appendix IV

Equal Pay Act 1970
1970 CHAPTER 41

An Act to prevent discrimination, as regards terms and conditions of employment between men and women

[29th May 1970]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:–

1 Requirement of equal treatment for men and women in same employment

[(1) 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.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that—

(a) where the woman is employed on like work with a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term

[(c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term].]

[(3) 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.]

(4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.

(5) A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, 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 of undertakings, 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.

(6) Subject to the following subsections, for purposes of this section—

(a) "employed" means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;

(b) . . .

(c) two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control

[and 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].

(7) . . .

[(8) This section shall apply to—

(a) service for purposes of a Minister of the Crown or government department, other than service of a person holding a statutory office, or

(b) service on behalf of the Crown for purposes of a person holding a statutory office or purposes of a statutory body,

as it applies to employment by a private person, and shall so apply as if references to a contract of employment included references to the terms of service.

(9) . . .

(10) In this section "statutory body" means a body set up by or in pursuance of an enactment [(including an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament)], and "statutory office" means an office so set up; and service "for purposes of "a Minister of the Crown or government department does not include service in any office in Schedule 2 (Ministerial offices) to the House of Commons Disqualification Act 1975 as for the time being in force.]

[(10A) This section applies in relation to service as a relevant member of the House of Commons staff as in relation to service for the purposes of a Minister of the Crown or government department, and accordingly applies as if references to a contract of employment included references to the terms of service of such a member.

In this subsection "relevant member of the House of Commons staff" has the same meaning as in [section 195 of the Employment Rights Act 1996]; and [subsections (6) to (12)] of that section (person to be treated as employer of House of Commons staff) apply, with any necessary modifications, for the purposes of this section.]

[(10B) This section applies in relation to employment as a relevant member of the House of Lords staff as in relation to other employment.

In this subsection "relevant member of the House of Lords staff" has the same meaning as in [section 194 of the Employment Rights Act 1996]; and [subsection (7)] of that section applies for the purposes of this section.]

[(11) For the purposes of this Act it is immaterial whether the law which (apart from this subsection) is the [law applicable to] a contract is the law of any part of the United Kingdom or not.

(12) In this Act "Great Britain" includes such of the territorial waters of the United Kingdom as are adjacent to Great Britain.

(13) Provisions of this section and [sections 2 [to 2A]] below framed with reference to women and their treatment relative to men are to be read as applying equally in a converse case to men and their treatment relative to women.]

NOTES

Initial Commencement

Specified date

Specified date: 29 December 1975: see s 9(1).

Amendment

Sub-s (1): substituted by the Sex Discrimination Act 1975, s 8(1).

Sub-s (2): substituted by the Sex Discrimination Act 1975, s 8(1); para (c) inserted by SI 1983/1794, reg 2(1).

Sub-s (3): substituted by SI 1983/1794, reg 2(2).

Sub-s (6): para (b) repealed, and words in square brackets inserted, by the Sex Discrimination Act 1975, s 8(6), Sch 1, Part I.

Sub-s (7): repealed by the Sex Discrimination Act 1975, s 8(6), Sch 1, Part I.

Sub-ss (8), (10): substituted, together with sub-s (9), for sub-s (8) as originally enacted, by the Sex Discrimination Act 1975, s 8(6), Sch 1, Part I.

Sub-s (9): repealed by the Armed Forces Act 1996, s 35(2), Sch 7, Pt III.

Date in force: 1 May 2001: see SI 2001/1519, art 2(1)(b), (2).

Sub-s (10): words "(including an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament)" in square brackets inserted by SI 2000/2040, art 2(1), Schedule, Pt I, para 4.

Date in force: 27 July 2000: see SI 2000/2040, art 1(1).

Sub-s (10A): inserted by the Trade Union and Labour Relations (Consolidation) Act 1992, s 300(2), Sch 2, para 3; words in square brackets substituted by the Employment Rights Act 1996, s 240, Sch 1, para 1(1), (2).

Sub-s (10B): inserted by the Trade Union Reform and Employment Rights Act 1993, s 49(1), Sch 7, para 8; words in square brackets substituted by the Employment Rights Act 1996, s 240, Sch 1, para 1(1), (3).

Sub-s (11): inserted by the Sex Discrimination Act 1975, s 8(6), Sch 1, Part I; words in square brackets substituted by the Contracts (Applicable Law) Act 1990, s 5, Sch 4, para 1.

Sub-s (12): inserted by the Sex Discrimination Act 1975, s 8(6), Sch 1, Part I.

Sub-s (13): inserted by the Sex Discrimination Act 1975, s 8(6), Sch 1, Pt 1.

Sub-s (13): words in square brackets beginning with the words "sections 2" inserted by SI 1983/1794, reg 3(2).

Sub-s (13): words "to 2A" in square brackets substituted by SI 2003/1656, reg 10.

Date in force: 19 July 2003: see SI 2003/1656, reg 1(2).

See Further

See the Pensions Act 1995, s 63(4), for provision whereby s 62 of that Act is to be construed as one with this section.

2 Disputes as to, and enforcement of, requirement of equal treatment

[(1) Any claim in respect of the contravention of a term modified or included by virtue of an equality clause, including a claim for arrears of remuneration or damages in respect of the contravention, may be presented by way of a complaint to an [employment tribunal].]

[(1A) Where a dispute arises in relation to the effect of an equality clause the employer may apply to an [employment tribunal] for an order declaring the rights of the employer and the employee in relation to the matter in question.]

(2) Where it appears to the Secretary of State that there may be a question whether the employer of any women is or has been [contravening a term modified or included by virtue of their equality clauses], but that it is not reasonable to expect them to take steps to have the question determined, the question may be referred by him [as respects all or any of them] to an [employment tribunal] and shall be dealt with as if the reference were of a claim by the women [or woman] against the employer.

(3) Where it appears to the court in which any proceedings are pending that a claim or counter-claim in respect of the operation of an [equality clause] could more conveniently be disposed of separately by an [employment tribunal], the court may direct that the claim or counter-claim shall be struck out; and (without prejudice to the foregoing) where in proceedings before any court a question arises as to the operation of an [equality clause], the court may on the application of any party to the proceedings or otherwise refer that question, or direct it to be referred by a party to the proceedings, to an [employment tribunal] for determination by the tribunal, and may stay or sist the proceedings in the meantime.

[(4) No determination may be made by an employment tribunal in the following proceedings—

(a) on a complaint under subsection (1) above,

(b) on an application under subsection (1A) above, or

(c) on a reference under subsection (2) above,

unless the proceedings are instituted on or before the qualifying date (determined in accordance with section 2ZA below).]

[(5) A woman shall not be entitled, in proceedings brought in respect of a contravention of a term modified or included by virtue of an equality clause (including proceedings before an employment tribunal), to be awarded any payment by way of arrears of remuneration or damages—

(a) in proceedings in England and Wales, in respect of a time earlier than the arrears date (determined in accordance with section 2ZB below), and

(b) in proceedings in Scotland, in respect of a time before the period determined in accordance with section 2ZC below.]

(6), (7) . . .

NOTES

Initial Commencement

Specified date

Specified date: 29 December 1975: see s 9(1).

Amendment

Sub-s (1): substituted by the Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I.

Sub-s (1): words "employment tribunal" in square brackets substituted by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(a).

Date in force: 1 August 1998: see SI 1998/1658, art 2(1), Sch 1.

Sub-s (1A): inserted by the Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I.

Sub-s (1A): words "employment tribunal" in square brackets substituted by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(a).

Date in force: 1 August 1998: see SI 1998/1658, art 2(1), Sch 1.

Sub-s (2): words "contravening a term modified or included by virtue of their equality clauses" in square brackets substituted by the Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I.

Sub-s (2): words "as respects all or any of them" in square brackets inserted by the Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I.

Sub-s (2): words "employment tribunal" in square brackets substituted by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(a).

Date in force: 1 August 1998: see SI 1998/1658, art 2(1), Sch 1.

Sub-s (2): words "or woman" in square brackets inserted by the Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I.

Sub-s (3): words "equality clause" in square brackets in both places they occur substituted by the Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I.

Sub-s (3): words "employment tribunal" in square brackets in both places they occur substituted by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(a).

Date in force: 1 August 1998: see SI 1998/1658, art 2(1), Sch 1.

Sub-s (4): substituted by SI 2003/1656, reg 3(1), (2).

Date in force: 19 July 2003: see SI 2003/1656, reg 1(2); for effect see reg 2(1)(a), (2)–(4) thereof.

Sub-s (5): substituted by SI 2003/1656, reg 3(1), (3).

Date in force: 19 July 2003 (in relation to proceedings instituted on or after that date): see SI 2003/1656, regs 1(2), 2(5)(a).

Sub-s (6): repealed by the Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I.

Sub-s (7): repealed by the Employment Protection (Consolidation) Act 1978, s 159(3), Sch 17.

[2ZA "Qualifying date" under section 2(4)]

[(1) This section applies for the purpose of determining the qualifying date, in relation to proceedings in respect of a woman's employment, for the purposes of section 2(4) above.

(2) In this section—

"concealment case" means a case where—

(a) the employer deliberately concealed from the woman any fact (referred to in this section as a "qualifying fact")—

(i) which is relevant to the contravention to which the proceedings relate, and

(ii) without knowledge of which the woman could not reasonably have been expected to institute the proceedings, and

(b) the woman did not discover the qualifying fact (or could not with reasonable diligence have discovered it) until after—

(i) the last day on which she was employed in the employment, or

(ii) the day on which the stable employment relationship between her and the employer ended,

(as the case may be);

"disability case" means a case where the woman was under a disability at any time during the six months after—

(a) the last day on which she was employed in the employment,

(b) the day on which the stable employment relationship between her and the employer ended, or

(c) the day on which she discovered (or could with reasonable diligence have discovered) the qualifying fact deliberately concealed from her by the employer (if that day falls after the day referred to in paragraph (a) or (b) above, as the case may be),

(as the case may be);

"stable employment case" means a case where the proceedings relate to a period during which a stable employment relationship subsists between the woman and the employer, notwithstanding that the period includes any time after the ending of a contract of employment when no further contract of employment is in force;

"standard case" means a case which is not—

(a) a stable employment case,

(b) a concealment case,

(c) a disability case, or

(d) both a concealment and a disability case.

(3) In a standard case, the qualifying date is the date falling six months after the last day on which the woman was employed in the employment.

(4) In a case which is a stable employment case (but not also a concealment or a disability case or both), the qualifying date is the date falling six months after the day on which the stable employment relationship ended.

(5) In a case which is a concealment case (but not also a disability case), the qualifying date is the date falling six months after the day on which the woman discovered the qualifying fact in question (or could with reasonable diligence have discovered it).
(6) In a case which is a disability case (but not also a concealment case), the qualifying date is the date falling six months after the day on which the woman ceased to be under a disability.
(7) In a case which is both a concealment and a disability case, the qualifying date is the later of the dates referred to in subsections (5) and (6) above.]

NOTES

Amendment

Inserted by SI 2003/1656, reg 4.

Date in force: 19 July 2003: see SI 2003/1656, reg 1(2); for effect see reg 2(1)(b), (2)–(4) thereof.

[2ZB "Arrears date" in proceedings in England and Wales under section 2(5)]

[(1) This section applies for the purpose of determining the arrears date, in relation to an award of any payment by way of arrears of remuneration or damages in proceedings in England and Wales in respect of a woman's employment, for the purposes of section 2(5)(a) above.
(2) In this section—

"concealment case" means a case where—

(a) the employer deliberately concealed from the woman any fact—

(i) which is relevant to the contravention to which the proceedings relate, and

(ii) without knowledge of which the woman could not reasonably have been expected to institute the proceedings, and

(b) the woman instituted the proceedings within six years of the day on which she discovered the fact (or could with reasonable diligence have discovered it);

"disability case" means a case where—

(a) the woman was under a disability at the time of the contravention to which the proceedings relate, and

(b) the woman instituted the proceedings within six years of the day on which she ceased to be under a disability;

"standard case" means a case which is not—

(a) a concealment case,

(b) a disability case, or

(c) both.

(3) In a standard case, the arrears date is the date falling six years before the day on which the proceedings were instituted.
(4) In a case which is a concealment or a disability case or both, the arrears date is the date of the contravention.]

NOTES

Amendment

Inserted by SI 2003/1656, reg 5.

Date in force: 19 July 2003 (in relation to proceedings instituted on or after that date): see SI 2003/1656, regs 1(2), 2(5)(b).

[2ZC Determination of "period" in proceedings in Scotland under section 2(5)]

[(1) This section applies, in relation to an award of any payment by way of arrears of remuneration or damages in proceedings in Scotland in respect of a woman's employment, for the purpose of determining the period mentioned in section 2(5)(b) above.
(2) Subject to subsection (3) below, that period is the period of five years which ends on the day on which the proceedings were instituted, except that the five years shall not be regarded as running during—

(a) any time when the woman was induced, by reason of fraud on the part of, or error induced by the words or conduct of, the employer or any person acting on his behalf,

to refrain from commencing proceedings (not being a time after she could with reasonable diligence have discovered the fraud or error), or

(b) any time when she was under a disability.

(3) If, after regard is had to the exceptions in subsection (2) above, that period would include any time more than twenty years before the day mentioned in that subsection, that period is instead the period of twenty years which ends on that day.]

NOTES

Amendment

Inserted by SI 2003/1656, reg 5.

Date in force: 19 July 2003 (in relation to proceedings instituted on or after that date): see SI 2003/1656, regs 1(2), 2(5)(b).

[2A Procedure before tribunal in certain cases]

[(1) Where on a complaint or reference made to an [employment tribunal] under section 2 above, a dispute arises as to whether any work is of equal value as mentioned in section 1(2)(c) above the tribunal [may either—

(a) proceed to determine that question; or

(b) unless it is satisfied that there are no reasonable grounds for determining that the work is of equal value as so mentioned, require a member of the panel of independent experts to prepare a report with respect to that question;

and, if it requires the preparation of a report under paragraph (b) of this subsection, it shall not determine that question unless it has received the report.]

(2) Without prejudice to the generality of . . . subsection (1) above, there shall be taken, for the purposes of [that subsection], to be no reasonable grounds for determining that the work of a woman is of equal value as mentioned in section 1(2)(c) above if—

(a) that work and the work of the man in question have been given different values on a study such as is mentioned in section 1(5) above; and

(b) there are no reasonable grounds for determining that the evaluation contained in the study was (within the meaning of subsection (3) below) made on a system which discriminates on grounds of sex.

(3) An evaluation contained in a study such as is mentioned in section 1(5) above is made on a system which discriminates on grounds of sex where a difference, or coincidence, between values set by that system on different demands under the same or different headings is not justifiable irrespective of the sex of the person on whom those demands are made.

(4) In paragraph (b) of subsection (1) above the reference to a member of the panel of independent experts is a reference to a person who is for the time being designated by the Advisory, Conciliation and Arbitration Service for the purposes of that paragraph as such a member, being neither a member of the Council of that Service nor one of its officers or servants.]

NOTES

Amendment

Inserted by SI 1983/1794, reg 3(1).

Sub-s (1): words "employment tribunal" in square brackets substituted by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(a).

Date in force: 1 August 1998: see SI 1998/1658, art 2(1), Sch 1.

Sub-s (1): words from "may either—" to "received the report." in square brackets substituted by SI 1996/438, reg 3(2).

Sub-s (2): words omitted repealed by SI 1996/438, reg 3(3).

Sub-s (2): words "that subsection" in square brackets substituted by SI 1996/438, reg 3(3).

3 . . .

. . .

NOTES

Amendment

Repealed by the Sex Discrimination Act 1986, s 9, Schedule, Pt II.

4 . . .

. . .

NOTES

Amendment

Repealed by the Wages Act 1986, s 32(2), Sch 5, Pt II.

5 Agricultural wages orders

(1) Where an agricultural wages order made before or after the commencement of this Act contains any provision applying specifically to men only or to women only, the order may be referred by the Secretary of State to the [Central Arbitration Committee] to declare what amendments need to be made in the order, in accordance with the like rules as apply under section 3(4) above to the amendment under that section of a collective agreement, so as to remove that discrimination between men and women; and when the [Central Arbitration Committee] have declared the amendments needing to be so made, it shall be the duty of the Agricultural Wages Board, by a further agricultural wages order coming into operation not later than five months after the date of the [Central Arbitration Committee]'s decision, either to make those amendments in the order referred to the [Central Arbitration Committee] or otherwise to replace or amend that order so as to remove the discrimination.

(2) Where the Agricultural Wages Board certify that the effect of an agricultural wages order is only to make such amendments of a previous order as have under this section been declared by the [Central Arbitration Committee] to be needed, or to make such amendments as aforesaid with minor modifications or modifications of limited application, or is only to revoke and reproduce with such amendments a previous order, then the [Agricultural Wages Board] may instead of complying with paragraphs 1 and 2 of Schedule 4, or in the case of Scotland paragraphs 1 and 2 of Schedule 3, to the Agricultural Wages Act give notice of the proposed order in such manner as appears to the [Agricultural Wages Board] expedient in the circumstances, and may make the order at any time after the expiration of seven days from the giving of the notice.

(3) An agricultural wages order shall be referred to the [Central Arbitration Committee] under this section if the Secretary of State is requested so to refer it either—

(a) by a body for the time being entitled to nominate for membership of the Agricultural Wages Board persons representing employers (or, if provision is made for any of the persons representing employers to be elected instead of nominated, then by a member or members representing employers); or

(b) by a body for the time being entitled to nominate for membership of the [Agricultural Wages Board] persons representing workers (or, if provision is made for any of the persons representing workers to be elected instead of nominated, then by a member or members representing workers);

or if in any case it appears to the Secretary of State that the order may be amendable under this section.

(4) In this section "the Agricultural Wages Board" means the Agricultural Wages Board for England and Wales or the Scottish Agricultural Wages Board, "the Agricultural Wages Act" means the Agricultural Wages Act 1948 or the Agricultural Wages (Scotland) Act 1949 and "agricultural wages order" means an order of the Agricultural Wages Board under the Agricultural Wages Act.

NOTES

Initial Commencement

Specified date

Specified date: 29 December 1975: see s 9(1).

Amendment

Sub-s (1): words in square brackets originally substituted by the Employment Protection Act 1975, s 125(1), Sch 16, Part IV, and continue to have effect by virtue of the Trade Union and Labour Relations (Consolidation) Act 1992, s 300(2), Sch 2, para 3.

Sub-s (2): first words in square brackets originally substituted by the Employment Protection Act 1975, s 125(1), Sch 16, Part IV, and continue to have effect by virtue of the Trade Union and Labour Relations (Consolidation) Act 1992, s 300(2), Sch 2, para 3; second and third words in square brackets substituted by the Sex Discrimination Act 1975, s 8(6), Sch 1, Part I.

Sub-s (3): first words in square brackets originally substituted by the Employment Protection Act 1975, s 125(1), Sch 16, Part IV, and continue to have effect by virtue of the

Trade Union and Labour Relations (Consolidation) Act 1992, s 300(2), Sch 2, para 3; second words in square brackets substituted by the Sex Discrimination Act 1975, s 8(6), Sch 1, Part I.

6 Exclusion from s. 1 to 5 of pensions etc

[(1) [An equality clause shall not] operate in relation to terms—

(a) affected by compliance with the laws regulating the employment of women, or

(b) affording special treatment to women in connection with pregnancy or childbirth.

(1A) . . .]

[(1B) An equality clause shall not operate in relation to terms relating to a person's membership of, or rights under, an occupational pension scheme, being terms in relation to which, by reason only of any provision made by or under sections 62 to 64 of the Pensions Act 1995 (equal treatment), an equal treatment rule would not operate if the terms were included in the scheme.

(1C) In subsection (1B), "occupational pension scheme" has the same meaning as in the Pension Schemes Act 1993 and "equal treatment rule" has the meaning given by section 62 of the Pensions Act 1995.]

(2) . . .

NOTES

Initial Commencement

Specified date

Specified date: 29 December 1975: see s 9(1).

Amendment

Sub-s (1): substituted, together with sub-s (1A), for sub-s (1) as originally enacted, by the Sex Discrimination Act 1975, s 8(6), Sch 1, Part I; words in square brackets substituted by the Sex Discrimination Act 1986, s 9(1).

Sub-s (1A): substituted, together with sub-s (1), for sub-s (1) as originally enacted, by the Sex Discrimination Act 1975, s 8(6), Sch 1, Part I; further substituted together with sub-s (2) by subsequent sub-ss (1B), (1C) by the Pensions Act 1995, s 66(1).

Sub-ss (1B), (1C): substituted for sub-ss (1A), (2), by the Pensions Act 1995, s 66(1).

Sub-s (2): substituted together with sub-s (1A) by subsequent sub-ss (1B), (1C) by the Pensions Act 1995, s 66(1).

[7A Service pay and conditions]

(1) Sections 1 and 6 above shall apply, with the modifications mentioned in subsection (2) below and any other necessary modifications, to service by a woman in any of the armed forces as they apply to employment by a private person.

(2) In the application of those sections to service by a woman in any of the armed forces—

(a) references to a contract of employment shall be regarded as references to the terms of service;

(b) in section 1, in subsection (6), paragraph (c) and the words "or any associated employer" and subsections (8) to (11) (which have no application) [and subsection (13)] shall be omitted; and

(c) references to an equality clause shall be regarded as referring to a corresponding term of service capable of requiring the terms of service applicable in her case to be treated as modified or as including other terms.

(3) Any claim in respect of the contravention of a term of service modified or included, in relation to a woman's service in any of the armed forces, by a term corresponding to an equality clause in a contract of employment (including a claim for arrears of pay or damages in respect of the contravention) may be presented by way of complaint to an [employment tribunal].

Any such contravention shall be regarded for the purposes of a claim under this subsection as if it were a breach of contract.

(4) Subsections (5) to (10) below apply in relation to any claim by a woman ("the claimant") arising from a contravention of a term of service referred to in subsection (3) above.

(5) No complaint in respect of the claim shall be presented to an [employment tribunal] unless—

(a) the claimant has made a complaint to an officer under the service redress procedures applicable to her and has submitted that complaint to the Defence Council under those procedures; and

(b) the Defence Council have made a determination with respect to the complaint.

(6) Regulations may make provision enabling a complaint in respect of the claim to be presented to an [employment tribunal] in such circumstances as may be specified by the regulations, notwithstanding that subsection (5) above would otherwise preclude its presentation.

(7) Where a complaint is presented to an [employment tribunal] by virtue of regulations under subsection (6) above, the service redress procedures may continue after the complaint is presented.

[(8) No determination may be made by an employment tribunal in proceedings on a complaint in respect of the claim unless the complaint is presented on or before the qualifying date (determined in accordance with section 7AA below).]

(9) A woman shall not be entitled, in proceedings on a complaint in respect of the claim, to be awarded any payment by way of arrears of pay or damages—

[(a) in proceedings in England and Wales, in respect of a time earlier than the arrears date (determined in accordance with section 7AB below), and

(b) in proceedings in Scotland, in respect of a time before the period determined in accordance with section 7AC below].

(10) Section 2A above shall apply in relation to a complaint in respect of the claim as it applies to a complaint presented to an [employment tribunal] under section 2(1) above.

(11) Regulations under subsection (6) above shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(12) In this section [and sections 7AA to 7AC below]—

"armed forces" means the naval, military or air forces of the Crown; and

"the service redress procedures" means the procedures, excluding those which relate to the making of a report on a complaint to Her Majesty, referred to in section 180 of the Army Act 1955, section 180 of the Air Force Act 1955 and section 130 of the Naval Discipline Act 1957.

[(13) Provisions of this section and sections 7AA to 7AC below, and provisions applied by this section, framed with reference to women and their treatment relative to men are to be read as applying equally in a converse case to men and their treatment relative to women.]]

NOTES

Amendment

Substituted, for s 7 as originally enacted, by the Armed Forces Act 1996, s 24(2).

Sub-s (2): in para (b) words "and subsection (13)" in square brackets inserted by SI 2003/1656, reg 6(1), (2).

Date in force: 19 July 2003: see SI 2003/1656, reg 1(2).

Sub-s (3): words "employment tribunal" in square brackets substituted by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(a).

Date in force: 1 August 1998: see SI 1998/1658, art 2(1), Sch 1.

Sub-s (5): words "employment tribunal" in square brackets substituted by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(a).

Date in force: 1 August 1998: see SI 1998/1658, art 2(1), Sch 1.

Sub-s (6): words "employment tribunal" in square brackets substituted by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(a).

Date in force: 1 August 1998: see SI 1998/1658, art 2(1), Sch 1.

Sub-s (7): words "employment tribunal" in square brackets substituted by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(a).

Date in force: 1 August 1998: see SI 1998/1658, art 2(1), Sch 1.

Sub-s (8): substituted by SI 2003/1656, reg 6(1), (3).

Date in force: 19 July 2003: see SI 2003/1656, reg 1(2); for effect see reg 2(6)(a), (7) thereof.

Sub-s (9): paras (a), (b) substituted by SI 2003/1656, reg 6(1), (4).

Date in force: 19 July 2003 (in relation to proceedings instituted on or after that date): see SI 2003/1656, regs 1(2), 2(5)(c).

Sub-s (10): words "employment tribunal" in square brackets substituted by the Employment Rights (Dispute Resolution) Act 1998, s 1(2)(a).

Date in force: 1 August 1998: see SI 1998/1658, art 2(1), Sch 1.

Sub-s (12): words "and sections 7AA to 7AC below" in square brackets inserted by SI 2003/1656, reg 6(1), (5).

Date in force: 19 July 2003: see SI 2003/1656, reg 1(2).

Sub-s (13): inserted by SI 2003/1656, reg 6(1), (6).

Date in force: 19 July 2003: see SI 2003/1656, reg 1(2).

[7AA "Qualifying date" under section 7A(8)]

[(1) This section applies for the purpose of determining the qualifying date, in relation to proceedings on a complaint in respect of a woman's service in any of the armed forces, for the purposes of section 7A(8) above.

(2) In this section—

"concealment case" means a case where—

(a) the employer deliberately concealed from the woman any fact (referred to in this section as a "qualifying fact")—

(i) which is relevant to the contravention to which the complaint relates, and

(ii) without knowledge of which the woman could not reasonably have been expected to present the complaint, and

(b) the woman did not discover the qualifying fact (or could not with reasonable diligence have discovered it) until after the last day of the period of service during which the claim arose;

"disability case" means a case where the woman was under a disability at any time during the nine months after—

(a) the last day of the period of service during which the claim arose, or

(b) the day on which she discovered (or could with reasonable diligence have discovered) the qualifying fact deliberately concealed from her by the employer (if that day falls after the day referred to in paragraph (a) above),

(as the case may be);

"standard case" means a case which is not—

(a) a concealment case,

(b) a disability case, or

(c) both.

(3) In a standard case, the qualifying date is the date falling nine months after the last day of the period of service during which the claim arose.

(4) In a case which is a concealment case (but not also a disability case), the qualifying date is the date falling nine months after the day on which the woman discovered the qualifying fact in question (or could with reasonable diligence have discovered it).

(5) In a case which is a disability case (but not also a concealment case), the qualifying date is the date falling nine months after the day on which the woman ceased to be under a disability.

(6) In a case which is both a concealment and a disability case, the qualifying date is the later of the dates referred to in subsections (4) and (5) above.]

NOTES

Amendment

Inserted by SI 2003/1656, reg 7.

Date in force: 19 July 2003: see SI 2003/1656, reg 1(2); for effect see reg 2(6)(b), (7) thereof.

[7AB "Arrears date" in proceedings in England and Wales under section 7A(9)]

[(1) This section applies for the purpose of determining the arrears date, in relation to an award of any payment by way of arrears of pay or damages in proceedings in England and Wales on a complaint in respect of a woman's service in any of the armed forces, for the purposes of section 7A(9)(a) above.

(2) In this section—

"concealment case" means a case where—

(a) the employer deliberately concealed from the woman any fact—

(i) which is relevant to the contravention to which the proceedings relate, and

(ii) without knowledge of which the woman could not reasonably have been expected to institute the proceedings, and

(b) the woman made a complaint under the service redress procedures within six years of the day on which she discovered the fact (or could with reasonable diligence have discovered it);

"disability case" means a case where—

(a) the woman was under a disability at the time of the contravention to which the proceedings relate, and

(b) the woman made a complaint under the service redress procedures within six years of the day on which she ceased to be under a disability;

"standard case" means a case which is not—

(a) a concealment case,

(b) a disability case, or

(c) both.

(3) In a standard case, the arrears date is the date falling six years before the day on which the complaint under the service redress procedures was made.

(4) In a case which is a concealment or a disability case or both, the arrears date is the date of the contravention.

(5) Subsection (6) below applies in a case where, in accordance with regulations made under section 7A(6) above, proceedings are instituted without a complaint having been made under the service redress procedures.

(6) In that case, references in this section to the making of a complaint under the service redress procedures shall be read as references to the institution of proceedings.]

NOTES

Amendment

Inserted by SI 2003/1656, reg 8.

Date in force: 19 July 2003 (in relation to proceedings instituted on or after that date): see SI 2003/1656, regs 1(2), 2(5)(d).

[7AC Determination of "period" in proceedings in Scotland under section 7A(9)]

[(1) This section applies, in relation to an award of any payment by way of arrears of pay or damages in proceedings in Scotland on a complaint in respect of a woman's service in any of the armed forces, for the purposes of determining the period mentioned in section 7A(9)(b) above.

(2) Subject to subsection (3) below, that period is the period of five years which ends on the day on which the complaint under the service redress procedures was made, except that the five years shall not be regarded as running during—

(a) any time when the woman was induced, by reason of fraud on the part of, or error induced by the words or conduct of, the employer or any person acting on his behalf, to refrain from instituting the proceedings (not being a time after she could with reasonable diligence have discovered the fraud or error), or

(b) any time when she was under a disability.

(3) If, after regard is had to the exceptions in subsection (2) above, that period would include any time more than twenty years before the day mentioned in that subsection, that period is instead the period of twenty years which ends on that day.

(4) Subsection (5) below applies in a case where, in accordance with regulations made under section 7A(6) above, proceedings are instituted without a complaint having been made under the service redress procedures.
(5) In that case, the reference in subsection (2) above to the making of the complaint under the service redress procedures shall be read as a reference to the institution of proceedings.]

NOTES

Amendment

Inserted by SI 2003/1656, reg 8.

Date in force: 19 July 2003 (in relation to proceedings instituted on or after that date): see SI 2003/1656, regs 1(2), 2(5)(d).

[7B Questioning of employer]

[(1) For the purposes of this section—

(a) a person who considers that she may have a claim under section 1 above is referred to as "the complainant", and

(b) a person against whom the complainant may decide to make, or has made, a complaint under section 2(1) or 7A(3) above is referred to as "the respondent".

(2) With a view to helping a complainant to decide whether to institute proceedings and, if she does so, to formulate and present her case in the most effective manner, the Secretary of State shall by order prescribe—

(a) forms by which the complainant may question the respondent on any matter which is or may be relevant, and

(b) forms by which the respondent may if he so wishes reply to any questions.

(3) Where the complainant questions the respondent (whether in accordance with an order under subsection (2) above or not), the question and any reply by the respondent (whether in accordance with such an order or not) shall, subject to the following provisions of this section, be admissible as evidence in any proceedings under section 2(1) or 7A(3) above.

(4) If in any proceedings under section 2(1) or 7A(3) above it appears to the employment tribunal that the complainant has questioned the respondent (whether in accordance with an order under subsection (2) above or not) and that—

(a) the respondent deliberately and without reasonable excuse omitted to reply within such period as the Secretary of State may by order prescribe, or

(b) the respondent's reply is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw, including an inference that the respondent has contravened a term modified or included by virtue of the complainant's equality clause or corresponding term of service.

(5) Where the Secretary of State questions an employer in relation to whom he may decide to make, or has made, a reference under section 2(2) above, the question and any reply by the employer shall, subject to the following provisions of this section, be admissible as evidence in any proceedings under that provision.

(6) If in any proceedings on a reference under section 2(2) above it appears to the employment tribunal that the Secretary of State has questioned the employer to whom the reference relates and that—

(a) the employer deliberately and without reasonable excuse omitted to reply within such period as the Secretary of State may by order prescribe, or

(b) the employer's reply is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw, including an inference that the employer has contravened a term modified or included by virtue of the equality clause of the woman, or women, as respects whom the reference is made.

(7) The Secretary of State may by order—

(a) prescribe the period within which questions must be duly served in order to be admissible under subsection (3) or (5) above, and

(b) prescribe the manner in which a question, and any reply, may be duly served.

(8) This section is without prejudice to any other enactment or rule of law regulating interlocutory and preliminary matters in proceedings before an employment tribunal, and has

effect subject to any enactment or rule of law regulating the admissibility of evidence in such proceedings.

(9) Power to make orders under this section is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(10) An order under this section may make different provision for different cases.]

NOTES

Amendment

Inserted by the Employment Act 2002, s 42.

Date in force: 6 April 2003: see SI 2002/2866, art 2(3), Sch 1, Pt 3.

Subordinate Legislation

Equal Pay (Questions and Replies) Order 2003, SI 2003/722.

8 . . .

. . .

NOTES

Amendment

Repealed by the Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I, para 4.

9 Commencement

(1) . . . the foregoing provisions of this Act shall come into force on the 29th December 1975 and references in this Act to its commencement shall be construed as referring to the coming into force of those provisions on that date.

(2)–(5) . . .

NOTES

Initial Commencement

Royal Assent

Royal Assent: 29 May 1970: (no specific commencement provision).

Amendment

Sub-s (1): words omitted repealed by the Sex Discrimination Act 1975, s 8(6), Sch 1, Part I.

Sub-ss (2)–(5): repealed by the Sex Discrimination Act 1975, s 8(6), Sch 1, Part I.

10 . . .

. . .

NOTES

Amendment

Repealed by the Sex Discrimination Act 1986, s 9, Schedule, Pt II.

11 Short title, interpretation and extent

(1) This Act may be cited as the Equal Pay Act 1970.

(2) In this Act the expression "man" and "woman" shall be read as applying to persons of whatever age.

[(2A) For the purposes of this Act a woman is under a disability—

(a) in the case of proceedings in England and Wales, if she is a minor or of unsound mind (which has the same meaning as in section 38(2) of the Limitation Act 1980); or

(b) in the case of proceedings in Scotland, if she has not attained the age of sixteen years or is incapable within the meaning of the Adults with Incapacity (Scotland) Act 2000.]

(3) This Act shall not extend to Northern Ireland.

NOTES

Initial Commencement

Royal Assent

Royal Assent: 29 May 1970: (no specific commencement provision).

Amendment

Sub-s (2A): inserted by SI 2003/1656, reg 9.

Date in force: 19 July 2003: see SI 2003/1656, reg 1(2).