DEVELOPMENTS IN EQUAL PAY LAW

MICHAEL FORD, Old Square Chambers

1. In a simple legal world, equal pay law would involve the following:

   (1) A woman would show that she was employed in like work, work rated as equivalent or work of equal value to that of a man employed by the same employer.

   (2) The employer would then need to show that the difference in pay was not tainted by discrimination and, if it was indirectly discriminatory, that it was justified.

   A quick read of the authorities on Article 141 might suggest precisely such an approach, as might a glance at the House of Lords decisions in ***Strathclyde v Wallace*** [1998] ICR 205 and ***Glasgow CC v Marshall*** [2000] ICR 196.

2. But one should never underestimate the abilities of lawyers and judges, when they wish, to find conceptual problems where none appear to exist and to revive what looked like dead arguments. Equal pay law exemplifies this tendency, perhaps because of the high sums which are often at stake, a point illustrated by the recent developments set out in this paper.

Like work, work rated as equivalent and work of equal value

3. The equality clause under s.1(1) EqPA only arises if the woman (i) is employed in (ii) "like work", "work rated as equivalent" or "work of equal value" with (iii) a man in the same employment.

4. **Employed**. The definition of "employed" in s.1(6) includes employed under a "contract personally to execute any work or labour" and now extends to office-holders.[1] There is

[1] See s.1(6A)-(6C).

an overlapping but autonomous concept of "worker" for the purpose of Article 141, which applies to a person in a relationship of subordination, following ***Allonby v Accrington and Rossendale*** [2004] IRLR 224, ECJ.[2]

5. **Work rated as equivalent**. A job evaluation study may operate as a shield against equal values claims as well as the springboard for claims: see s.2A(2A). The courts have tended to lay down strict requirements which the study must meet: see ***Bromley v Quick*** [1988] ICR 623.

6. The work must be rated as equivalent in a single study. In ***Douglas v Islington*** UKEAT/0347/03 the employer's scheme provided for assessment by reference to national jobs. In assessing the comparator's job the panel had compared it with a "local" job which was similar in content, to confirm that their assessment was accurate. A majority of the EAT (Rimer J) held that this departure from the rules of the scheme meant that the comparator's job was not assessed under the same scheme as the applicant's job.

7. **Work of equal value**. This concept in s.1(2)(c) was introduced as a consequence of ***Enderby***. Equal value claims typically leads to the reference to an independent expert. New tribunal rules, in Schedule 6 to the 2004 Regulations, have been introduced with the intention of improving the process. In my experience they are a disaster, in common with much else in the new tribunal rules. The new procedure provides for:

    (1) A stage 1 hearing, at which the tribunal decides whether or not to refer the matter to an independent expert.[3]

    (2) A stage 2 hearing, when the tribunal is supposed to determine the facts upon which the parties cannot agree.[4]

---

[2] For a useful discussion of the distinction between an "employee" and a "worker" (albeit under the different definition of the Working Time Regulations), see ***Cotswold v Williams*** [2006] IRLR 181, EAT.

[3] See rule 4(3). It may determine the question itself or it may refuse to refer because of an existing job evaluation study.

[4] See rule 7.

(3) The independent expert then makes his or her report. The report must be prepared solely on the basis of the facts determined by the tribunal at stage 2, subject to making an application to the tribunal.[5] The parties may put written questions to the expert but only for the purpose of clarifying the report's factual basis.[6]

(4) Finally, there is a hearing at which the report is admitted in evidence

8. In my experience the procedure is too rigid and produces problems. For example, before the stage 2 hearing the parties are supposed to agree a statement of facts and issues on which they agree, those on which they disagree and a summary of the reasons for disagreeing. In practice this takes an enormous amount of time and often produces a document of little value. A second problem is that, after the tribunal has determined factual conflicts as to what are the content of the jobs at stage 2, the expert may well, after speaking to the parties, form a different view as to the facts or want to supplement the facts determined at stage 2. The result is that the expert makes an application under rule 7(6) to amend or supplement the facts, but because those amended or new facts are in dispute, there is a further hearing at which disputes about those further facts are resolved; and the expert's final report may still, inadvertently, include factual premises which are disputed. The procedure assumes that a neat distinction can be drawn between facts and expert opinion, which is not how matters work in practice.

9. My practical tips are (i) to ask the tribunal to involve the expert at stage 2, to assist in clarifying what facts he will need for his report[7] and (ii) to try and ensure that the tribunal makes as extensive findings as possible at stage 2.

10. **A man in the same employment**. The comparison under the EqPA is with a man (or woman in the case of a claim by a man) in the same employment. The test for that

[5] See rule 8(1) and rule 7(6).

[6] See rule 12(2).

[7] See rule 6.

comparator is set out in s.1(6):

> *....men shall be treated as in the same employment with a woman if they are men employed by her 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.*

The effect of this definition is that employment by the same employer is not sufficient for comparability: it is necessary to show either employment at the "same establishment" or common terms and conditions: see on this ***British Coal Corporation v Smith*** [1996] ICR 515, HL.

11. One might have thought that the test under Article 141 would be wider. In ***Defrenne*** [1976] ICR 547 the ECJ spoke of Art.141 applying when discrimination had its origins in legislative provisions or in collective labour agreements, or where men and women received unequal pay for work of equal value "carried out in the same establishment or service, whether public or private".[8] Later ECJ decisions opened up the possibility of claims extending beyond the boundary of the employer, while accepting it as self-evident that comparison could be made within an employer.[9] Drawing on ***Defrenne***, domestic courts have allowed comparisons between persons employed by *different* employers: see e.g. ***Scullard v Knowles*** [1996] ICR 399 and ***South Ayrshire Council v Morton*** [2002] ICR 956.

12. In ***Lawrence v Regent Office Care*** [2003] ICR 1092 the ECJ confirmed that Art.141 permits comparison beyond the boundaries of the employment unit. Employees of a local authority were transferred to private companies as a result of contracting out and sought to compare their pay with that of employees still employed by a local authority. Though rejecting their claim, the ECJ stated that:

---

[8] See paras 21-22.

[9] In ***McCarthys v Smith*** [1980] ICR 673, for example, it said at 690 "The principle that men and women should receive equal pay for equal work...is not confined to situations in which men and women are contemporaneously doing equal work for the same employer."

> 17. There is....nothing in the wording of Article 141(1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer. The Court has held that the principle established by that Article may be invoked before national courts in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service: see, inter alia, ***Defrenne*** [1976] ICR 457, 568, para 40....
>
> 18. However, where, as in the main proceedings here, the differences identified in the pay conditions of workers performing 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(1) EC. The work and the pay of those workers cannot therefore be compared on the basis of that provision.

Lawrence was followed in ***Allonby***, with the ECJ again ruling that on the facts that there was no "common source" in circumstances where a female lecturer was engaged through an agency sought to compare her pay with that of a male lecturer employed directly by the college.

13. The above citation suggests that a comparison could be made between employees employed by the same employer[10] while in some circumstances Article 141 could allow comparisons between workers employed by different employers. In ***DEFRA v Robertson*** [2005] ICR 750, however, the Court of Appeal relied upon it to narrow the scope of permissible comparison between employees employed by the same employer.

14. In ***Robertson*** male Civil Servants sought to compare their pay with that of female civil servants during the periods when they and their comparators were working in different departments. At all times the men and women had the same employer, the Crown, and many of their terms and conditions were laid down centrally in the Civil Service Management Code. From 1 April 1996 the Minister for the Civil Service delegated the

[10] It should be noted that the ECJ accepted a comparison could be made when the women were employed in a Direct Service Organisation, before they moved to a private employer. See similarly the Advocate-General at para 54 (emphasis added): "It is clear...that the direct effect of Art 141 EC extends to *employees working for the same legal person or group of legal persons, for public authorities operating under joint control*, as well as cases in which, for purposes of job classification and remuneration, a binding collective agreement or statutory regulation applies. In all these cases the terms and conditions of employment can be traced back to a common source."

determination of civil servants' remuneration and allowances to individual departments - a delegation which could be revoked at any time. The tribunal found in favour of the claimants on the preliminary point of comparison but the EAT (Burton J presiding) and the Court of Appeal disagreed. The CA decided that a "single source" was required even in circumstances where an applicant and his/her comparator were employed by the same employer and that it was the individual departments which fixed terms and conditions and which were responsible for inequality.

15. The implications of the CA decision are significant: as the CA recognised, the reasoning is equally applicable to the private sector. The use of devolved pay bargaining at different establishments will rule out claims, unless there is evidence of deliberate avoidance or there are common terms and conditions. The CA's decision, and its refusal to refer the matter to the ECJ, has been criticised.

16. ***Robertson*** was followed in ***Armstrong v Newcastle upon Tyne NHS Trust*** [2006] IRLR 124, CA. In one part of the claims, female domestic workers formerly employed at the one hospital sought to compare themselves with male porters previously employed at a different hospital who received bonus payments. The claim related to the period after 1 April 1998 when the claimants and their comparators had the same employer, NHT, which took some steps to harmonise terms and conditions after that date. The two groups worked at different establishments and did not have common terms and conditions, so s.1(6) EqPA was inapplicable. Although NHT was involved to some extent in departmental negotiations and harmonisation of terms after 1 April 1998, the CA held that the tribunal was entitled to find that it was not responsible for the terms of the employees. The question is therefore one of fact for the tribunal.

17. ***Robertson*** was recently applied in ***Dolphin v Hartlepool Borough Council***, EAT XX. The EAT held that support staff employed by the governing body of a voluntary aided school could not compare themselves with manual workers employed by a local authority. According to the EAT there was no single body responsible for restoring equal treatment.

18. The result of the domestic cases is not easy to reconcile with the purpose of Article 141, the statements of the ECJ (which has never held that employees employed by the same employer cannot make a comparison), or the cases on pensions (in which employees can compare themselves with colleagues even though the "source" of the terms is usually the pension trust). But, for the present, the CA decisions are binding.

19. Note two important points:

(1) In some circumstances a comparator is not required. One of the claims in ***Allonby*** concerned Ms Allonby's exclusion from the teachers' superannuation scheme, a scheme set up by regulations.[11] Although she could not compare herself with a man employed by the college (see above), in the case of a pension set up by state legislation no comparator was necessary. See too ***Alabaster v Barclays Bank*** [2005] ICR 1246, CA: no comparator needed in context of entitlement to statutory maternity pay.

(2) Despite the restrictive interpretation given by domestic cases on the scope of Article 141 in some circumstances a claimant may be able to rely on s.1(6) EqPA. The meaning of "establishment" for this purpose means that unit to which the workers are assigned.[12] Where workers are employed at different establishments it is necessary to show the existence of common terms and conditions but, rather, whether there would be common terms and conditions if the comparators were employed at the same establishment: see ***British Coal v Smith***, above, per Lord Slynn at paragraph 44 and ***Dolphin*** at paragraph 35.

When is the equality clause breached

20. Matters relating to when the equality clause is breached have arisen especially in the part-time pensions litigation, originally proceeding under the name of ***Preston*** (until Mrs

[11] The Teachers' Superannuation (Consolidation) Regulations 1988 as amended.

[12] See ***Dolphin***, above, applying the test of ***Rockfon*** [1996] IRLR 168.

Preston settled her claim). There, a variety of complicated issues have arisen as to when the equality clause is breached for the purpose of declaration of membership of a pension scheme: see ***Preston (No.3)*** [2004] IRLR 90, EAT and *Information Bulletin (No.9)* on the ETS website. In particular:

(1) It is a breach of the EqPA and Article 141 in circumstances where pension scheme membership is compulsory for full-time staff but part-time staff are excluded: see paragraphs 42-. For this purpose, it is irrelevant what the excluded employees did in any period after which the barrier was lifted.

(2) There is no breach of the EqPA or Article 141 if a part-time woman is offered voluntary membership of a pension scheme in circumstances in which membership is compulsory for full-time employees.

(3) It is not a breach of the EqPA for an employer to fail to inform staff of the removal of a barrier to membership, unless there is a practice or policy of not informing part-timers of their rights.

21. The right is to equal treatment in relation to individual terms of the contract and not the contract as a whole.[13] In ***Degnan v Redcar and Cleveland BC*** [2005] IRLR 615 female cleaners were paid a basic hourly rate whereas some of their male comparators were paid an attendance allowance and bonus payments. Overruling the tribunal, the CA held that the payment of the attendance allowances were all part of a single term for the payment of money for working normal hours, even though the attendance allowance was paid just for turning up for work on a day and not working throughout the shift.

The Genuine Material Factor Defence

22. EqPA s.1(3) operates as a defence to the equality clause which applies if the work of a man and woman is rated as a equivalent. It states:

[13] See ***Hayward v Cammell Laird*** [1988] ICR 464, HL.

> *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*;

The operation of the defence was explained in ***Glasgow v Marshall*** per Lord Nicholls at 202F-203C. The onus is on the employer to establish the defence. In relation to the explanation - the material factor - put forward to explain the difference in pay the employer must show: (i) that it was a genuine reason, and not a sham or pretence; (ii) that it was in fact the cause of the difference in pay; (iii) that the reason for the difference in pay is not "the difference of sex", which is apt to embrace any form of direct or indirect discrimination (see below); and (iv) that the factor is a significant and relevant difference between the man and woman's.

23. In practice it is the third requirement which has generated the most debate, largely because if there is no evidence of sex discrimination anything will "justify" the difference in pay. If there is any evidence of direct or indirect sex discrimination (in the sense understood under Article 141) in relation to the difference in pay, then the employer must show that the difference in pay is objectively justified. This arises if there is evidence (for example) that the difference in pay has a disproportionately adverse impact on women: see Lord Nicholls in ***Marshall*** at 203B and Lord Browne-Wilkinson in ***Strathclyde v Wallace*** at 211H-212F. A classic example is where part-timers, who tend to be overwhelmingly female, are paid proportionately less than full-timers. The law is now in a state of confusion, principally as a result of ***Armstrong***.

24. **Disparate impact: onus of proof.** There is a continuing debate as to who bears the onus of demonstrating that a difference in pay has an disproportionate adverse impact on women. The issue is not academic: in many of the part-time pension claims, statistics do not exist. The matter has now resurfaced as a result of ***Sharp v Caledonia*** [2006] IRLR 4, in which the EAT were persuaded that as a consequence of the ECJ decision in ***Brunhofer*** [2001] IRLR 571, once a woman shows that she is paid less than a man doing

like work etc., that is in itself evidence of *prima facie* discrimination, which the employer must rebut (whether by statistics or objective justification). The matter may be resolved, at least for a while, when ***Sharp*** is heard by the CA.

25. In summary, the conflict is as follows:

(1) In the ***Preston*** litigation, the Chairman decided that the burden of proof was on the employer, focussing in particular on the words of s.1(3) EqPA. That decision was not appealed.

(2) Subsequently, in ***Nelson v Carillion Services*** [2003] IRLR 428, which was decided after the decision in ***Brunhofer***, the Court of Appeal considered the burden of proof in relation to equal pay cases in the light of European jurisprudence, including ***Enderby***, the Burden of Proof Directive, s.63A of the Sex Discrimination Act 1975 and s.1(3) EqPA. Purporting to follow ***Marshall*** and ***Wallace***, it held that unless the complainant establishes that a condition has a disproportionate adverse impact, there is nothing which the employer has to explain: see Simon Brown LJ at paragraphs 21-36. An argument that ***Brunhofer*** requires a different result was rejected by the majority of the EAT in ***Parliamentary Commissioner v Fernandez*** [2004] IRLR 22, EAT, especially at paragraphs 25-33.

(3) In ***Bailey v Home Office*** [2005] ICR 1957 the Court of Appeal cast doubt on the correctness of the approach in ***Nelson***, again by reference to the wording of s.1(3) EqPA: see especially Waller LJ at paragraphs 37-38.

(4) ***Brunhofer*** is not so easily interpreted away, however, as the EAT recognised in ***Sharp*** (subsequent to ***Fernandez***). Thus at paragraph 30 the ECJ said:

> 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 discrimination linked to the difference in sex.

On its face, the same result would seem to emerge from the wording of s.1(3) EqPA.

(5) In ***Armstrong v Newcastle upon Tyne NHS Hospital Trust*** [2005] EWCA Civ 1608. The Court of Appeal followed orthodox domestic approach and, also purporting to follow ***Marshall***, said that the claimant must prove that women in general are being paid less for a rebuttable presumption of sex discrimination to arise.[14] But in ***Armstrong*** no point was taken that Article 141 requires a different approach.[15]

(6) In ***Villalba v Merrill Lynch*** [2006] IRLR 437, the EAT disagreed with the decision in ***Sharp*** to the effect that ***Brunnhofer*** had changed the law [A30]. The argument before it appeared to be that in any case in which a woman showed she was paid less than a man doing work of equal value etc, then the employer must show objective justification: see paragraph 90 at p 786. The EAT did not deal with the burden of proof in any great detail, and did not refer to ***Nelson***.

26. I can suggest a tentative solution to this persistent riddle. It may be that ***Brunhofer*** was speaking not of the need to show objective justification but of the need for the employer to show that what in fact caused the difference in pay was not tainted by discrimination. For example, if the reason for the difference in pay was e.g. length of service, objective justification is not triggered if the employer shows that such a factor was not discriminatory. It should be noted, however, that this would suggest that ***Nelson*** is wrong and is at variance with what was said in ***Villalba***. For on this reading the employer, and not the worker, would be required to show that the factor was not *prima facie* discriminatory.

---

[14] See Arden LJ at paragraphs 32-40; Buxton LJ at paragraphs 101-103.

[15] See Arden LJ at paragraph 33.

27. In any case, when acting for the Claimant, it is open to argue that ***Brunhofer*** means what ***Sharp*** took it to mean. But it is sensible (i) to ask for statistics from the employer and (ii) if they do not exist, to introduce as much other evidence as possible tending to show discrimination (see below).

28. **Evidence of discrimination**. Whoever bears the onus of proof, what will be sufficient evidence to demonstrate that a difference in pay has a discriminatory impact on women(or men)? This area, too, is full of uncertainties.

29. It is important to note that the test of discrimination under the EqPA and/or Article 141 does not require the identification of a practice, requirement or condition which informs the test under the SDA: see ***Bailey v Home Office*** [2005] IRLR 369. The point ought to have been obvious ever since ***Enderby***, in which the ECJ indicated a case of *prima facie* discrimination could arise e.g. where the lower paid job was carried out almost exclusively by women or if they receive less in pay system lacking in transparency. But the technical argument was revived by the EAT in ***Bailey***. The lower paid group was 51% female, whereas the better paid group was predominantly male. The EAT held that (i) it was circular to say that the requirement or condition of obtaining the higher salary as a member of the better paid group was to be a member of the higher paid group and (ii) ***Enderby*** only applies where the disadvantaged group is predominantly female and the advantaged predominantly male. The CA agreed on the first point but thought that on the second point the EAT had adopted a nice and irrelevant distinction. Since there was no prescription in EqPA or Article 141 as to how a tribunal should investigate whether a *prima facie* case of sex discrimination has arisen, it was for the tribunal of fact to make the relevant assessment.[16] See Peter Gibson LJ at paragraph 29:

> In each case the ET is concerned to determine whether what on its face is a gender neutral practice may be disguising the fact that female employees are being disadvantaged as compared with male employees to an extent that signifies that the disparity is *prima facie* attributable to a difference of sex.

[16] See paragraph 21.

The appeal to the House of Lords is now unlikely to proceed.

30. As to the evidence which shows whether the threshold has been crossed, my personal view is that it is a mistake to require a focus to be on statistical evidence, or on any single approach to statistical evidence (e.g. the advantaged or disadvantaged group). The central issue is simply whether a tribunal is satisfied that the evidence - statistical or otherwise - demonstrates a case of *prima facie* discrimination, and there is no restriction on the evidence or approach which a tribunal should take to that question. If statistics show a higher proportion of women than men in one group - whether the advantaged or disadvantaged - than the other, and these proportions are consistent and persistent across time, this tends to suggest that (i) the disparities are not accidental and/or (ii) and the statistics are reliable indicators of gender-based disadvantage, rather than the produce of chance.[17] But a tribunal may and should, I think, have regard to other considerations (e.g. the acknowledged social fact that part-time workers tend to be female), to test whether statistical evidence is accidental or reliable and, more fundamentally, to decide whether a difference in pay is likely to have a disproportionate adverse impact on women.

31. Unfortunately some of the cases have tended to focus on narrow issues - e.g. whether as a matter of law the focus should be on the advantaged or disadvantaged group - with the result that they often seem to lose sight of that key question. This arose especially following ***Seymour Smith*** in the ECJ. At paragraph 59 the ECJ said

> the best approach to the comparison of statistics is to consider, on the one hand the respective proportions of men and women in the workforce able to satisfy the requirement of two years' employment under the disputed rule and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce.

However, the ECJ went on to state that

> It is...for the national court to assess whether the statistics concerning the

[17] See ***Enderby*** [1994] ICR 112, ECJ at paragraph 17, saying that in relation to statistical evidence the question is simply whether the statistics illustrate purely accidental or fortuitous phenomena or whether they appear to be a significant indication of discrimination:

> situation of the workforce are valid and can be taken into account, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short term phenomena and whether, in general, they appear to be significant: see ***Enderby v Frenchay Health Authority*** [1994] ICR 112, 161, para.17.

I think it is a misreading of the decision to view it as laying down a rule of law that there can only be a focus on the advantaged group.

32. Though some recent authorities suggest there is only one correct approach to statistical information,[18] most confirm the flexibility of the approach which may be taken. See:

(1) The review of the ECJ and domestic authorities on Article 141 in ***Harvest Town Circle Ltd v Rutherford (No.1)*** [2002] ICR 123 at 127C-130F and the conclusion at paragraph 18, 130F-131E, in which the EAT (Lindsay J presiding) said:

> Again, leaving aside the cases where a smaller but persistent and constant disparity appears, we believe the authorities are to be synthesised and may be extended as follows:
> (i) There will be some cases in which disparate impact is so obvious that a look at numbers alone or proportions alone, whether or the advantaged (qualifiers) or disadvantaged (non-qualifiers) will suffice beyond doubt to show that the members of one sex are substantially or considerably disadvantaged in comparison with those of the other.
> (ii) However, in less obvious cases it will be proper for an employment tribunal, as the national court of fact, to use more than one form of comparison, no one of which is necessarily to be regarded as on its own decisive.
> (iii) In such less obvious cases it will be proper for the employment tribunal to look not merely at proportions (as proportions alone can be misleading) but also numbers, and to look at both disadvantaged and non-disadvantaged groups and even to the respective proportions in the disadvantaged groups expressed as a ratio of each other.

The EAT went on to state that there is no simple or universal touchstone for the test.

(2) ***Ministry of Defence v Armstrong*** [2004] IRLR 672, EAT at paragraph 46:

[18] See e.g. ***British Airways v Grundy*** EAT 0676/04 (an appeal is pending in this case).

> the principles to be applied in determining the s.1(3) defence...involve the tribunal focussing on substance, rather than form and on the result, rather than the route taken to arrive at it....The fundamental question is whether there is a causative link between the applicant's sex and the fact that she is paid less than the true value of her job as reflected in the pay of her named comparator. This link may arise in a variety of different ways, depending upon the facts of the case. It may arise, for example, as a result of job segregation or from pay structures or pay practices which disadvantage women because they are likely to have shorter service or work less hours than men, due to historical discrimination or disadvantage, or because of the traditional role of women and their family responsibilities.

(3) The useful guidance in the unreported case of ***Chew v Avon & Somerset Council*** EAT/503/00 at pp 23-27,[19] referring in particular to ***London Underground v Edwards (No.2)*** [1998] IRLR 364, CA.

(4) The approach of the EAT in ***British Airways v Starmer*** [2005] IRLR 862, holding that a tribunal could look at factors other than statistics to determine whether or not disparate impact arose, including the common knowledge that women tend to have greater child care responsibilities (the CA has stayed a decision on leave to appeal until ***Rutherford*** has been decided by the HL).

33. Unfortunately, more confusion has been added by the decision of the House of Lords in ***Rutherford (No.2)*** [2006] ICR 785. Like ***Seymour-Smith***, the case proves the rule that hard cases make bad law. The only evidence in that case was statistical, so it is no wonder that the House of Lords concentrated on the adequacy of statistics. But there are unhelpful statements made by Lord Walker to the effect that a tribunal should not look at "sociological or economic factors".[20] If this is intended to mean that a tribunal can never take notice of the fact, for example, that part-timers tend to be female because of their primary child-care role, it has absurd consequences. I do not think his speech was so intended, and the point can be made that none of the case-law which says that statistics are not the sole answer was cited to the court.

---

[19] Note that in ***Chew*** the differences in percentage terms were very small, but this was upheld because of the inherently discriminatory nature of the provision.

[20] See paragraph 65.

34. **Justification**. This requires the tribunal to consider whether the objective of the scheme was legitimate and, if so, whether the means used were appropriate and reasonably necessary: see ***Bilka-Kaufhaus v Weber*** [1987] ICR 110[21] and the summary of the law set out in ***Barry v Midland Bank*** [1998] IRLR 138, CA at paragraphs 35-38. This question must be answered in the light of all relevant factors, taking into account the possibility of achieving the end by other means, whether such aims appear to be unrelated to discrimination based on sex and whether the means are capable of achieving those aims: see ***Kutz-Bauer v Freie und Hansestadt Hamburg*** [2003] IRLR 368, ECJ at HN, paras 48-63.[22] There is a further condition of "proportionality", by which the employer must show that grounds are of sufficient importance to outweigh discriminatory effect, so that the greater the disparate impact, the more compelling must be the justification: see ***Enderby*** [1994] ICR 112, ECJ at para 27, 163 as explained in ***Barry v Midland Bank*** [1999] ICR 858, HL per Lord Nicholls at 870E-F.

35. As the ECJ made clear in ***Kutz-Bauer***, mere generalisations are not sufficient to show that a measure is unrelated to discrimination based on sex or to provide evidence to show that the means are appropriate to the end. For example, the ECJ has been critical of generalisations that longer hours necessarily go hand in hand with a greater level of experience and has required that the employer demonstrates that fewer hours result in a slower acquisition of skills: see e.g. ***Gerster v Freistaat Bayern*** [1997] IRLR 699, ECJ at paras 26, 31-2, 39-40. At least in relation to the state, budgetary considerations are not a legitimate aim for the purpose of objective justification, and nor can an employer justify discrimination solely because avoiding it would involve increased cost: see ***Kutz-Bauer*** at paragraphs 59-61 (the case involved differential treatment of part-time workers in relation to a scheme of reduced work near to the end of working life) and ***Schonheit v Stadt Frankfurt am Main*** [2004] IRLR 983 (limiting public expenditure not justification

---

[21] Though ***Bilka*** used the term "necessary" this means "reasonably necessary" in this context. See the citation from ***Barry v Midland Bank plc*** in ***Allonby v Accrington and Rossendale College*** [2001] ICR 1189, CA per Sedley LJ at para 24.

[22] The case concerned the Equal Treatment Directive 76/207 rather than Article 141 because it concerned the availability of part-time work for older workers; but the same principles of objective justification apply.

for indirectly discriminatory pension legislation). It is not clear to what extent this principle applies to the private sector.

36. At the conceptual level the test is strict; in practice, in my experience, tribunals are often more deferential to employer justifications than the words suggest. One reason is no doubt the familiarity of employment tribunals with a test involving a much lower degree of scrutiny - the band of reasonable responses test. This in turn reflects a tradition of judicial deference to the decision-maker at appellate level, exemplified by the test of ***Wednesbury*** irrationality. Claimants should draw attention to the Court of Appeal in ***Hardy & Hansons v Lax*** [2005] ICR 1565, CA, based on the parallel provisions of the SDA, in which Pill LJ reviewed the authorities at paragraphs and made clear that the test of objective justification is stricter than the range of reasonable responses or similar tests which are deferential to the employer.

37. Recent authorities, once more, have often left confusion in their wake. In ***HSE v Cadman*** [2004] IRLR 971 the Court of Appeal held, on the basis of a concession, that an employer could rely on justifications which were not in its mind at the time a measure was adopted. The ECJ has recently ruled to the like effect in the context of legislative measures: see ***Schonheit***. It is not clear how extensive this principle is: at its conceptual extreme it allows an employer to justify a decision on the basis of reasons which never occurred to it at the time, which were never stated to the claimant at the time and which only occurred to its lawyers after proceedings were issued. Note, however, as the EAT made clear in ***Cadman*** at [2004] IRLR 29, the fact that a justification is put forward subsequent to a decision being taken will have *evidential* significance.[23]

38. The CA in ***Cadman*** referred to the ECJ the question of whether differences in pay based on length of service do not require justification. The hearing before the ECJ has just taken place.

---

[23] See the EAT at paragraphs 90-91. On this point the CA did not disagree with the EAT: see CA at paragraph 29.

39. **Another step in the process?** Yet more conceptual confusion has been added by ***Armstrong***. On my simple view of how the EqPA and Article 141 should operate (i) once a woman crosses the threshold of showing discriminatory impact then (ii) the employer must justify the difference. In ***Armstrong*** the ET found, based on statistical evidence, that the bonus scheme had a disparate adverse impact on women, that the difference in pay arose from a decision not to put the (male) portering service out to tender, and that this factor was not justified because one of the underlying reasons was that opposition was expected to any such decision from a more unionised, male workforce.[24] The CA overturned this conclusion but for different reasons. Arden LJ held that the tribunal was entitled to find disparate impact on the statistics, but she said there was a further necessary step - whether the justifications were tainted by discrimination - and held that the justifications were genuine operational reasons, untainted by sex. Buxton LJ, with whom Latham LJ agreed, held that the statistics were insufficient to show disparate adverse impact and, in keeping with Arden LJ's additional step, that the reasons for not putting the portering out to tender were not gender-related: it did not occur "because the porters were men".[25]

40. The reasoning of the CA is hard to reconcile with the cases on Article 141. In claims of indirect discrimination the reason for the treatment will almost invariably be genuine; the question is whether those reasons meet the test of objective justification. The approach of the CA seems to have confused direct and indirect discrimination, and to allow an employer to establish a s.1(3) EqPA defence if it can show that the reasons for the difference in pay were not directly discriminatory. The case radically diminishes the effect of equal pay law.

41. In ***Villalba*** the EAT criticised the decision in ***Armstrong***, saying that it appeared to have overlooked ***Enderby***, which decided that once disparate impact is shown then the employer must show the difference in pay is objectively justified.[26] This is a polite way

---

[24] See ET para 8(u) set out by the CA at para 11 and ET paras 29-31 at para 18 of CA.

[25] See paras 101-109 (disparate impact) and para 116 (tainted by discrimination).

[26] See paragraph 131.

of putting it. The truth is that the decision is completely at variance with the principles of Article 141 and equal pay law and makes no sense. It is another appalling example of the judiciary's hostility to equal pay law.

Time limits

42. The question of time limits for bringing claims has been dealt with extensively in the part-time pension litigation. As a consequence of the ECJ decision in ***Preston***, s.2(4) EqPA was replaced by new wording, stating that a claim for equal pay under s.2(1) must be brought on or before the "qualifying date" specified in s.2ZA.[27] Section 2ZA provides for different qualifying dates in respect of "concealment cases", "disability cases", "stable employment cases" and "standard cases". A "standard case" is defined in s.2ZA(2) as a case which is not one of the preceding cases. EqPA s.2ZA(3) states:

> 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.

43. The phrase "employed in the employment" in s.2(4) refers to the employment in which the claimant is employed and not the contract of employment: see ***Preston v Wolverhampton NHS Trust*** [1998] ICR per Lord Slynn at 237E-H and, especially. ***Powerhouse Retail v Burroughs*** [2006] IRLR 381. In ***Powerhouse*** the House of Lords held that in the case of a claim for exclusion from an employer's pension scheme, where there was a transfer under TUPE, time for the purpose of s.2(4) ran from the date of the transfer. It has also been held that the definition of "employed" in s.1(6) EqPA applied to the term "the employment" in former s.2(4) EqPA.[28] The same interpretation presumably applies to the words "employed in the employment" in (new)s.2ZA(3). It seems from ***Powerhouse*** that even if a woman has a single contract of employment within the extended meaning of s.1(6) EqPA following a transfer, the change of employer means that she is in different "employment" for the purpose of the time limit.. The limitation period in s.2ZA(3) should be distinguished from the temporal effect of the

[27] The amending regulations were the Equal Pay Act 1970 (Amendment) Regulations 2003, SI 2003/1656.

[28] See ***Young v National Power*** [2001] ICR 328 per Smith J at 335D-F: this was despite the fact that s.1(6) is expressed to apply only for the purpose of s.1 EqPA.

equality clause implied by the EqPA: the two may but need not correspond.

MICHAEL FORD

OLD SQUARE CHAMBERS

3 Orchard Court, St Augustine's Yard, Bristol BS1 5DP
Tel.: 0117 9305100 Fax: 0117 927 3748 DX 78229 Bristol

1 Verulam Buildings, Gray's Inn, London WC1R 5LQ
Tel.: 020 7269 0300 Fax: 020 7405 1387 DX 1046 Chancery Lane