EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	and	Respondents
[redacted]		Commissioners for HM Revenue & Customs

REASONS FOR THE RESERVED JUDGMENT SENT TO THE PARTIES ON 17 JUNE 2016

Introduction

1 The Respondents are the product of the union in 2005 of the Inland Revenue and HM Customs & Excise. At the time of the merger the two organisations together employed over 100,000 people. By January 2015 the headcount had fallen to under 65,000.

2 The Claimants in these consolidated proceedings, of whom there are 44[1], are all women. Under the Equality Act 2010 ('the Act'), they claim equal pay with named male comparators. The claims are limited to Grades 7 and 6 which are, in ascending order, the two highest grades below the Senior Civil Service.

3 The nub of the Claimants' complaint is that the Respondents' pay system indirectly discriminates[2] against women owing to the fact that it includes length of service as a determinant of basic pay. That central contention has been consistently maintained, but it is right to say that the way in which their case has been advanced has undergone a degree of evolution. In particular, they have abandoned pleaded allegations that the length of service criterion disadvantages women because they have had later career starts and/or career breaks to have children and that median average pay statistics show significant and persistent disparity favouring men in both grades, in London and nationally[3]. That leaves the key assertion that the 'particular disadvantage' suffered by women lies in, or is evidenced by:

> **... 'clustering' of women towards the lower end of the pay scales and men towards the upper end ...[4]**

[1] A further 21 identical claims (in one 'multiple' of 16 and one of 5) have been issued and stayed
[2] There has never been any suggestion of direct discrimination in this case.
[3] Details of Complaint in the McNeil claims (Multiple 2604), para 7a and c
[4] Ibid, para 7b

4 In further particulars the Claimants have been admirably clear in spelling out the narrow and specific nature of their claims. The following clarification has been supplied.

(1) They disavow any complaint that either of the other determinants of basic pay (starting salary and performance) is discriminatory[5].

(2) They eschew an '*Enderby*'[6] claim (based on gender segregation between different jobs of equal value attracting different pay rates) or a '*Seymour-Smith*'[7] claim (involving the application of a provision, criterion or practice ('PCP') which divides employees into 'advantaged' and 'disadvantaged' groups and with which a smaller proportion of women than men can comply).[8]

(3) They accept that average pay statistics (not limited to median figures) do not show significant long-term differences between the pay of men and women.[9]

(4) They focus their case on this 'core allegation'[10]:

> **It is the Claimants' case that the Respondent's use of length of service as a determinant of pay in both Grades 6 and 7 places, and has at all material times placed, women at a particular disadvantage compared with men because those grades are historically male-dominated and women have only more recently begun to be recruited or promoted into those grades in greater numbers, with the result that women tend to be disproportionately over-represented at the lower end of the pay scale for each grade and disproportionately under-represented at the upper end of the pay scale for each grade. That effect has been exacerbated by the Respondent's failure over the years to reduce the length of the pay scales and the period taken to move from minimum to maximum for the two grades in question and by the imposition of the public sector 'pay freeze' in 2010, which has had the effect of protecting the higher pay of longer-serving employees and precluding any narrowing of the gap for employees with shorter service.**

(5) They further contend that[11]:

> **The most appropriate method for testing the core allegation ... is to analyse whether the proportion of women within the lower part (e.g. the bottom quartile or decile) of the pay scale for each grade is significantly greater than the proportion of men in the same part of the pay scale and, conversely, whether the proportion of women within the upper part (e.g. the top quartile or decile) of the pay scale for each grade is significantly lower than the proportion of men in the same part of the pay scale.**

5 The Respondents resist the claims on numerous grounds. The central strands of their case, so far as now material, may be summarised thus[12]:

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[5] Particulars of 13 May 2015, para 5
[6] *Enderby-v-Frenchay Health Authority* [1994] ICR 112 ECJ
[7] *R-v-Secretary of State for Employment, ex parte Seymour-Smith* [1999] ICR 447 ECJ
[8] Particulars of 1 October 2014, para 5
[9] Ibid, para 15
[10] Ibid, para 3, amplifying Details of Complaint, para 7b (already mentioned)
[11] Ibid, para 7
[12] Grounds of Resistance and further 'pleadings' of 1 December 2014 and 4 June 2015

(1) They admit that the Claimants and their comparators in the same grade performed work rated as equivalent.

(2) They admit differences in basic pay as between the Claimants and their comparators.

(3) They contend that the differences are explained by their pay system, which determines levels of pay by reference to length of service, starting salary in grade and performance.

(4) They rely on average pay statistics for the proposition that any differences in pay between men and women are (a) not statistically significant and (b) temporary.

(5) They further contend that if, on average, the Claimants have shorter service than men, it is attributable to the fact that they came to the grade later than their comparators. That reflects the undisputed fact that the two grades were historically heavily male-dominated, but that state of affairs (which is being redressed) is nothing to do with the sex of the Claimants or their comparators or anyone else.

(6) In reliance on the matters referred to in (3) to (5) above and many others, they deny that the pay system puts women at a 'particular disadvantage' (the Act, s69(2)) when compared with men.

(7) They further plead (if necessary) an objective justification defence under s69(1)(b), largely to the effect that the pay system rewards experience, which is a legitimate aim, and does so in a proportionate way.

6 It can be seen from the above that the case turns on 'material factor' points. In the course of case management I agreed with the parties that the dispute was apt for preliminary hearing of what, for convenience, was referred to as the 'particular disadvantage' issue. I accepted that it would be in keeping with the overriding objective to isolate that part of the case for initial consideration since, if the decision went in favour of the Respondents, the proceedings would come to an end there and a very long and costly final hearing[13] would be avoided, and if the Claimants succeeded what remained would at least be disposed of more quickly and cheaply than otherwise.

7 The preliminary hearing came before me on 14 March this year, with five sitting days allocated. Mr Ben Cooper, counsel, appeared for the Claimants and Mr Thomas Linden QC, leading counsel, and Mr Robert Moretto, counsel, for the Respondents. All three have been instructed throughout. I am most grateful to them for their excellent written and oral submissions. I also acknowledge the helpful preparatory work of the legal teams instructing them.

8 By agreement I reserved judgment at the end of day three. I regret that the parties have had to wait longer for my decision than I (and more importantly, they) would have wished. The delay is attributable to a combination of (a) the fact that some of the points raised were, to me at least, difficult and I felt the need to reflect on them at some length; (b) my absence on two spells of leave; and (c) general pressure of work.

[13] The Respondents estimated that such a hearing, largely dedicated to the objective justification issue, would last about 15 days.

The Preliminary Issues

9 The questions for determination were agreed in these terms.

(1) What is or are the 'factors' within s69(1) of the Act causing the difference in basic pay between any Claimant and comparator who has a higher basic pay?

(2) In light of the proper definition of the factor or factors, did that factor or those factors put the Claimants and women at a particular disadvantage when compared with men in grades 6 and/or 7 (respectively) for the purposes of s69(2) of the Act?

The Statutory Framework

10 The 2010 Act, s64 includes:

> **(1) Sections 66 to 70 apply where –**
>
> **(a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does ...**

By s65, the concept of 'equal work' is defined. Under s66, provision is made for the sex equality rule. The section includes:

> **(1) If the terms of A's work do not (by whatever means) include a sex equality clause , they are to be treated as including one.**
>
> **(2) A sex equality clause is a provision that has the following effect –**
>
> **(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable ...**

Under the rubric of 'Defence of material factor', s69, so far as relevant, stipulates:

> **(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which –**
>
> **(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and**
> **(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.**
>
> **(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing equal work to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.**

In a different part of the Act, directed to unlawful discrimination, s23 provides (inter alia):

> **(1) On a comparison of cases for the purposes of section 13 ... or 19[14] there must be no material difference between the circumstances relating to each case.**

[14] The sections which define direct and indirect discrimination respectively

Any reference below to a section number is a reference to the Act.

11 A substantial number of authorities were cited in argument. Those which I think it necessary to refer to will be discussed in my analysis below.

Evidence and Materials

12 The Claimants called two witnesses of fact: Mr Anthony Wallace and Mr Terry Cook. Both joined the Inland Revenue in the early 1980's and have held posts at Grade 7 and Grade 6. Mr Cook retired in 2014 after over 30 years in the service; Mr Wallace remains in the Respondents' employment.

13 The Respondents called Ms Kerry Black, who joined the Inland Revenue (from the Benefits Agency) in 2002 and is now employed by the Respondents in a Grade 7 role within the HR Policy team.

14 In addition to calling 'live' evidence, Mr Cooper produced statements in the names of two of the Claimants [redacted] and [redacted] and their comparators [redacted] and [redacted] respectively.

15 At Mr Linden's request I read two further statements prepared on behalf of the Respondents, both in the name of Ms Carole Martin, also at all relevant times a Grade 7 officer in the Respondents' HR Policy team.[15]

16 I also heard evidence from expert witnesses called on both sides: Dr Alison Hall, HR Consultant, on behalf of the Claimants and, on behalf of the Respondents, Dr Gary Brown, Principal Methodologist at the Office for National Statistics. I will return to the expert evidence in due course.

17 The agreed bundle ran to four lever arch files. It contained the copious 'pleadings', the expert evidence (including lengthy appendices), documents generated by questionnaires and equal pay audits, guidance materials and a great deal besides.

18 Finally, I was supplied with a copy of the Government Equalities Office consultation document on mandatory gender pay gap reporting issued on 12 February 2016, together with the Equality Act 2010 (Gender Pay Gap Information) Regulations 2016 in draft form.

The Principal Facts

19 There was very little disagreement about the essential facts. Following the hearing the parties, at my request, co-operated to produce a useful statement of agreed facts in the following terms.

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[15] Unfortunately Ms Martin had to withdraw from the case (to be replaced by Ms Black) on health grounds.

HMRC's Pay System – Background

1. HM Treasury has overall responsibility for the Government's public sector pay policy, which includes defining the overall parameters for Civil Service pay and budget for all government departments. Each year, HM Treasury publishes Civil Service Pay Guidance. For example, the 2010/11 guidance is at pages 1173-1203 of the hearing bundle.

2. Pay for delegated grades (AA to Grade 6) has been delegated to Government departments since 1996. In line with public sector pay policy, and therefore operating within the pay guidance set by HM Treasury, HMRC submits a pay remit proposal in relation to these grades to its Minister, which for HMRC is the Treasury Minister. Following approval of the total spending allocation, and under collective bargaining, HMRC negotiates the pay settlement with the two Departmental Trade Unions (collectively referred to in this statement as the 'DTUS'), which are Association of Revenue and Customs (ARC), which is a section of the First Division Association (FDA) and the Public and Commercial Services Union (PCS). Examples of submissions made to HMRC by PCS and ARC in relation to pay can be seen in the hearing bundle at pages 1227-1235 (PCS) and pages 1278-1284 (ARC). It is not essential for agreement to be reached with DTUS. In the absence of agreement, the pay settlement is implemented following discussion and consultation.

3. HMRC was formed in April 2005 by the merger of two separate Government departments, Inland Revenue ('IR') and HM Customs and Excise ('CE'). Following negotiations with the DTUS, a set of pay and other terms and conditions was implemented for staff in the new department. The new terms and conditions aligned the pay and grading systems of the former departments. They also involved an "assimilation exercise" in 2006 based upon the length of past satisfactory performance in the current grade. Further details about this assimilation exercise are given below.

Pre-merger pay structures

4. Prior to the merger in 2005, IR and C&E had separate delegated pay arrangements aligned with their own business needs, considering a range of factors including grading, location, staffing levels and business priorities.

Inland Revenue pay structure

5. As at April 2005 IR was the bigger department with approximately 77,000 people, compared to 24,000 in C&E. (page 971AB).

6. IR's pre-merger grading structure mirrored the traditional Civil Service structure though the grades had different names. For example, Grade 7 was known as Band B2 and Grade 6 was Band B1.

7. IR's grading structure had a pay system that had:
   - London and National pay zones;
   - A two tier pay structure (with an upper and lower tier) and a 'pay target' within each band. The 'pay target' was 81% up the pay range for the National zone and 86% up the pay range for the London zone (page 950B), (See tables on pages 950F to 950I for details of the IR maxima, minima and pay targets between 2002 and 2004).

8. Annual pay awards payable from 1 August each year consisted of:
   - A flat rate monetary basic performance award, the value the same for each individual in the pay band, and;
   - A flat rate monetary progression award for staff below their maximum. The value of the award differed depending where an individual sat in the pay range (i.e. upper or lower tier, above or below pay target), and;

- A lump sum non-consolidated additional award for satisfactory performers.

The pay offer for 2002-2004 can be seen in hearing bundle at pages 950A to 950I.

9. IR's pay system provided for guaranteed pay progression (subject to performance) for Bands B2 and B1 from the pay range minimum to the 'target rate' in 7-years, and from the 'target rate' to the pay range maximum in 5-years, i.e.12-years in total to move from minimum to maximum. See page 950A paragraph 3.

10. The IR pay offer 2002-2004 document in the bundle shows (see table on page 950H) that following the 2004 pay award, so just prior to the merger:
- B2 National (Grade 7) pay range minimum was £37,630 and pay range maximum was £47,590;
- B2 London (Grade 7) pay range minimum was £42,250 and pay range maximum was £54,170;
- B1 National (Grade 6) pay range minimum was £45,670 and pay range maximum was £58,530;
- B1 London (Grade 6) pay range minimum was £51,320 and pay range maximum was £65,270.

11. The table on page 950AY shows pay range length for IR B1 and B2 grades at 2004 were:
- B2 National 26.5%
- B2 London 28.2%
- B1 National 28.2%
- B1 London 27.2%

Customs & Excise pay structure

12. C&E's grading system pre-merger did not align with the traditional Civil Service seven graded structure. From 1996 C&E had a twelve graded structure with junior and middle management grades (Administrative Assistant to Senior Officer) having both a general and technical band (Bands 1 to 10). Grade 7 and Grade 6 were not split and were Bands 11 and 12 respectively.

13. In 1999 C&E amalgamated Band1 and 2 (for the Administrative Assistant grade) so at April 2005 (the time of the merger) C&E had 11 pay bands numbered 2-12. (See table on page 950 AR, within the 2004 C&E pay settlement document)

14. C&E's grading structure was supported by a pay structure that had:
- London, National and other premium pay zones;
- An 'entry point rate' (pay range minimum) and a 'bonus point rate' (pay range maximum) for each of the 11 bands in the National pay zone (with higher entry point rate and bonus point rate for the London pay zone). The pay ranges were subject to annual review, and would increase according to C&E's reward strategy and available funds. (The terminology was changed to minimum and maximum in the 2004 pay offer: see page 950AU)
- In addition, Office Premium allowances were payable to individuals working in London, and in a few other hotspot locations which had recruitment or retention challenges.

The C&E pay settlements for 2002 to 2004 can be seen in the bundle at pages 950Y to 950AY.

15. The annual pay awards payable from 1 June (see page 950AR for the 2004 award) consisted of:

- A salary-related percentage-based increase for Top and Good performers, with Less Effective performers receiving a lower award; and
- A flat rate monetary progression award for Top and Good performers (only if they were below their pay band maximum) and
- A non-consolidated non-pensionable lump sum award for Top performers

16. The salary-related percentage-based increase mirrored the increase applied to the pay range entry point and the bonus point rate. For example, in 2004 the pay range entry and bonus points (the minimum and maximum) were increased by 2.6%, so staff received an initial increase of 2.6% to their salary (i.e. before the addition of the progression award) to preserve their position within the pay range and thereby ensure that any 'progression award' would actually move them up to a higher position. C&E had an aim – but not a guarantee - that people would reach the bonus point of their pay band in around 9 years (see page 971AI). It is not known how long this took in practice at Band's 11 and 12 prior to the merger.

17. The 2004 C&E pay settlement document shows (see table on page 950AX) that following the 2004 pay award, i.e. just prior to the merger:
- Band 11 National (Grade 7) pay range minimum was £40,954 and pay range maximum was £48,285;
- Band 11 London (Grade 7) pay range minimum was £43,012 and pay range maximum was £50,711;
- Band 12 National (Grade 6) pay range minimum was £51,164 and pay range maximum was £60,322;
- Band 12 London (Grade 6) pay range minimum was £53,682 and pay range maximum was £63,292.

18. It also shows the pay range length for C&E Band 11 and Band 12 (National and London) was 17.9% (see page 950AY).

19. The HMRC Pay Remit 2005/6 to 2007/8 includes a table at page 971AW which shows both the 'existing' (2004) pay ranges for IR and C&E prior to the merger, and the 'proposed' (2005 to 2008) pay ranges for HMRC post-merger. This provides a useful summary and comparison of the grading and pay bands pre and post merger, showing how they differed.

<u>HMRC's post-merger pay structure</u>

20. A new set of pay, grading, terms and conditions were required for the newly merged HMRC as the former departments arrangements were so different, especially for C&E staff who would move from an eleven banded structure back to a traditional seven banded one. Transitional arrangements also had to be put in place.

21. The documents at pages 950BB to 971BJ of the bundle – in particular the HMRC Pay Remit 2005/6 to 2007/8 - date from 2005 and refer to the various pay options which were considered for the newly merged department, and those which were eventually put forward to the Paymaster General by HMRC. The pay structure options and proposals are summarised at Appendix B of the Remit document, on pages 971AA to 971BB.

22. Since 2005, the merged department has had seven grades below the Senior Civil Service, which reflects the traditional Civil Service grading structure (see page 980). Each of the seven grades has a London and a National pay band (see page 964), with the London pay band being on average 15% higher owing to the associated costs of living in London. Each pay band has a minimum and a maximum rate of pay, with no set points (such as milestones, or incremental increases) in between (see page 981 and the table on page 1172).

23. HMRC does not have contractual pay progression; movement up through the pay range for each grade is by annual pay awards, payable on 1 June. The value of these annual pay awards is not guaranteed, and varies each year, impacting on the rate at which a person's pay will increase during their time in grade.

24. HMRC operates a performance management system, where people receive an annual rating based on their performance at 31 March. Up to March 2013, the ratings were Top; Good; Improvement Needed and Poor Performance. Since 2005, the consolidated value of the pay award for both Top and Good performance was the same, so people progressed at the same rate if they joined on the same day and remained in the same grade and pay location (page 982). A person with an Improvement Needed mark received a lower award, and those managed under Poor performance did not receive an award.

25. In April 2013, HMRC modified its performance management system, and the ratings are now Exceeded, Achieved, Must Improve and Poor Performance. The pay policy has not changed as a result, as both performance management systems have many similarities, although currently the value of the consolidated pay award is the same for Exceeded, Achieved and Must Improve performance.

26. HMRC employed 64,515 people as at 31 January 2015, of whom 3,010 (5% of the total workforce) were at employed at Grade 7 and 1,262 (2% of the total workforce) were at the more senior Grade 6, being the two grades relevant to this case. For Grade 7, 2,027 employees were in the National pay band and 983 were in the London pay band as at 31 January 2015. For Grade 6, 718 were in the National pay band and 544 were in the London pay band as at 31 January 2015.

27. Between 1 April 2005 and 31 January 2015, HMRC reduced its total workforce by 40,155 from 104,670 to 64,515. However, during this period the number of Grade 7 staff increased from 2,424 to 3,010 (i.e. by 25%), and the number of Grade 6 staff also increased from 1,225 to 1,262 (i.e. by 3%).

<u>HMRC pay awards</u>

28. Historically, pay awards were agreed with HM Treasury as a multi-year settlement, often covering three years at a time. This practice ceased following the public sector pay freeze (see below), so pay awards are now settled on an annual basis. To be eligible for a pay award, a person must have been in post on 1 June of the settlement year, and have completed at least 91 days paid reckonable service in the appraisal year ending 31 March, with a performance mark of Top, Good or Improvement Needed (see pages 1038, 1104 and 1154).

<u>2005/06 to 2007/08 settlement (pages 972-1019)</u>

29. Before the merger, IR and CE had very different terms and conditions, including pay and grading. Transitional arrangements to take effect from 1 June 2006 had been agreed with the DTUS and HM Treasury to align pay for staff from the two merging departments where there were unjustifiable differences. This was necessary because former CE staff had moved from the traditional Civil Service seven-graded structure in 1996 to an eleven-graded structure, where grades AO, Officer, Higher Officer and Senior Officer had each been split into two grades. IR had maintained the traditional Civil Service seven-graded structure. (See page 980). In the interests of fairness, HMRC sought to ensure that, when staff transferred to the relevant new HMRC grade, their pay reflected the number of years of satisfactory or better performance in their equivalent 'old' grade as at 31 May 2006 (pages 951-971).

30. HMRC's first pay settlement was an average of 3.86% for each of the three years from 1 June 2005 to 31 May 2008, including an assimilation exercise in 2006. The settlement percentage reflects the amount that the paybill increased by, in total, though individual pay awards ranged from 0% - 10%.

31. The annual pay award (known as stage 1) was paid to all eligible staff on 1 June 2006 as normal practice, and was then followed by the assimilation exercise (stage 2), also on 1 June 2006. For the purposes of the assimilation exercise only, notional pay points and rates within each new pay range were set, establishing the minimum pay a person would receive for a given historical duration of satisfactory or better service, e.g. someone with 2 years satisfactory service (but less than three years) as at 31 May 2006 would move to the notional rate for point 2, if their pay, after the stage 1 pay award was below this notional rate. So a Grade 7 or 6 with at least 8 years satisfactory service could move to the maximum of the pay range, which was point 8 in the notional tables if their pay was still below the maximum after the pay award. If they were already being paid above the notional rate for their historical length of service, their pay remained the same. No-one received a pay cut on assimilation. (See pages 986, 998-9, 1001-2)

32. To ensure that the assimilation exercise did not disadvantage any particular group of staff, HMRC included all service in the equivalent grade including periods of maternity leave, both paid and unpaid, and career breaks (whether male or female). The exercise was intended to ensure parity of pay according to length of service for men and women from the two former departments (see pages 1017-1019).

33. A further assimilation exercise was repeated on a smaller scale for selected groups on 1 June 2007 (depending on when staff opted in to the arrangements).

34. The pay award in 2005 (i.e. for the year 2004-5, but paid out post-merger) maintained many of the elements of the two former departments, chiefly because individuals had had their performance assessed up to 31 March 2005 under their former department's arrangements, and with different performance management processes.

35. Former C&E Band 11's (Grade 7) and Band 12's (Grade 6) received their pay award on 1 June 2005 (under C&E's existing arrangements) and were paid a non-consolidated bonus. Former IR B2's (Grade 7) and B1's (Grade 6) received their pay award on 1 August 2005 (under IR's existing arrangements) and were paid an individual non-consolidated bonus if they received a Top performance rating.

36. As part of the HMRC terms and conditions it was agreed to introduce a common pay award settlement date of 1 June. This meant IR staff would receive their 2006 award just 10 months after they received their 2005 award so the amounts were amended to reflect this.

37. The next pay award, for 2005/6 – which formed part of the 2005-2008 3 year settlement - was the first year that all HMRC staff were assessed on their performance using a common performance management system. It was also the year when the first assimilation exercise was carried out.

2008/09 to 2010/11 settlement (pages 1064-1073)

38. By 2008, pay band lengths had decreased from a combined IR/CE average of 38% (pre-merger) down to 23% (page 1025).

39. In 2008, the overall pay settlement from 1 June 2008 to 31 May 2011 was 2.4% for each of the three years, and in the 2008/09 pay offer HMRC announced that for the 2009/10 and 2010/11 pay awards, greater priority would be given to progression and further range shortening (see page 1027). In 2008/09, the minima for all grades increased by 3%, by 4.1% on average for 2009/10, and by 4.6% on average for 2010/11. The settlement was agreed by the trade union.

2011/12 to 2012/13 settlement (pages 1081-1087)

40. The Government announced a two year pay freeze for public sector workforces from 2011 for those earning above £21,000 per annum, which included all Grade 7s and Grade 6s. The immediate pay freeze applied to all organisations and departments in the Civil Service that had not entered into legally binding pay agreements. As HMRC had already agreed a pay settlement for 2010, the pay freeze took effect from June 2011 for staff in grades AA to Grade 6. (The Senior Civil Service had a pay freeze of three years from 1 April 2010 to 31 March 2013.) Cabinet Office instructions to HR Directors on the implementation of this policy are set out at pages 1204-1212.

41. Details of HMRC's pay offer during the pay freeze, i.e. for 2011/12 and 2012/13, covering the grades for staff earning less than £21,000, are set out at pages 1081-1087. Following the Government's Spending Review published in October 2010, in the 2011 Autumn Statement the Chancellor of the Exchequer announced that pay awards for the public sector would average 1% for the two years following the pay freeze – 2013/14 and 2014/15 (see pages 1088 and 1129). This was later extended to three years, i.e. to 2015/16, in the 2013 Budget (see page 1131).

2013/14 settlement (pages 1133-1152)

42. For the 2013 pay award, which averaged 1%, the value of the award paid to people at the pay range maximum for all grades was 0.70%. Awards greater than 1% were paid to people below the maximum, which would provide them with some movement towards the maximum (see pages 1138 and 1142). The maximum was frozen. The award was implemented following discussion and consultation with DTUS, rather than negotiation, as they do not have a mandate to negotiate pay settlements below 3%.

2014/15 settlement (pages 1153-1171)

43. For the 2014 pay award, which again averaged 1%, the value of the award paid to people at the pay range maximum was 0.50% for Grade 7s and 6s, and 0.55% for other grades. Awards greater than 1% were paid to people below the maximum, to provide them with some movement towards the maximum (see pages 1153 and 1168). The maximum of the pay range was frozen and the pay range minimum increased. For the first time, people on the 2013 minimum received the increase to the new minimum and then received the pay award. In previous years, the new minimum was applied after the pay award. As in the previous year, the award was implemented following discussion and consultation with DTUS rather than negotiation.

2015/16 settlement (pages 1172P-1172AD)

44. Details of the 2015/16 pay award are in the hearing bundle at pages 1172P to 1172AD.

45. The 1% average pay award applicable to the public sector workforce in 2013/14 and 2014/15 was extended to three years in the 2013 Budget (https://www.gov.uk/government/speeches/budget-2013-chancellors-statement), so it was also applied to HMRC's pay award for 2015/2016.

46. **HMRC increased the pay range maximum for all grades by 0.5% in recognition of the fact that individuals on maximum had not received a consolidated pay increase for five years, since 2010.**

47. **The remainder of the sum available was used to pay awards of greater than 1% to individuals who were below maximum, to provide movement towards pay range maximum for each grade. Pages 1172P-1172AD. As in 2014, the minimum grade increase was applied before individual pay awards were added to ensure progression within grade.**

48. **As in the previous year the award was implemented following discussion and consultation with DTUS.**

20 Consolidated tables of figures relied on by the Claimants are contained in Appendix 1 hereto. Save for saying that, as the Respondents do not dispute, they confirm the 'clustering' asserted in the Claimants' pleadings, I will allow the data to speak for themselves.

21 Appendix 2 contains the Respondents' tables. Within it, Annex G contains mean base pay differentials for the years 2009-2015. The overall figures (London and national combined) show falling differentials over the seven years, for Grade 7 from 2.3% to 1.2% and for Grade 6, from 1.9% to 1.5%. Only in one year did a differential exceed 3%.[16]

22 Annex D of Appendix 2 contains 'age to grade' statistics, which show a consistent pattern since 2009 of women being appointed at each Grade slightly younger than their male peers. It was not suggested that 2009 marked a significant change from previous years.

23 It is common ground that the Respondents have made it a priority to redress the gender imbalance at Grades 7 and 6. Their efforts have borne some fruit, as can be seen from Appendix 2, Annex E. In 2009 the women at Grade 7 represented 39.3% of the headcount of 1,939. By 2015 they made up 42.9% of 3,142. The corresponding Grade 6 figures were 32.6% of 862 and 39.2% of 1,300.

24 The parties also agreed that the gap in average basic pay will narrow over the next few years. That is the inevitable result of more men than women retiring during that time (see *eg* Appendix 2, Annex J), women rising in larger numbers up the pay scales and the pay scales becoming shorter (mentioned in the statement of agreed facts).

25 In his evidence Mr Wallace spoke of a male culture in some offices in which he has worked. He told me that the Inland Revenue was traditionally split into 'Collection' and the 'Inspectorate' and remarked that it was difficult to give a confident opinion as to whether the Inspectorate was seen as 'men's work'. He recalled male-dominated management at Grade 6 and 7, although he also noted growing numbers of women in recent years at Grade 7. In cross-examination he accepted that an increasing requirement for managers to travel had not presented a barrier to entry for women. Mr Cook spoke of a "very male compliance culture" and said that parts of the Respondents' organisation continue to be perceived as a

[16] Grade 6, London, 2009: 3.3%

'man's world'. He referred in particular to those responsible for "areas where tax avoidance and evasion overlap with organised criminality", which, he said, have a "macho" and "police-type" culture. In cross-examination, however, he readily accepted that officers in these roles constituted a tiny proportion of the total headcount.[17] I have seen no evidence of the gender balance of those seeking appointment to Grade 7 or Grade 6 positions as against those appointed, no doubt because direct sex discrimination was never alleged and it was not suggested that female numbers had been depressed by any form of indirect discrimination *in the recruitment process.*

Expert Evidence

26 Dr Hall has a scientific background (she holds a doctorate in Virology) but has worked for the last 25 years or so in the field of human resources. She does not put herself forward as a statistician.

27 In her evidence Dr Hall confirmed the basic facts which underpin the Claimants' claims, including in particular the 'clustering' which decile by decile or quartile by quartile analysis reveals[18]. Some of her energies were also devoted to matters which no longer form part of the Claimants' case (in particular, the question whether career breaks and/or later career starts had prejudiced women when compared with men). She relied on the somewhat abstruse 'Chi-Square' test for the proposition that the 'clustering' figures were statistically significant and said that she had been confirmed in that view by an unnamed statistician. She wrongly stated that the mean pay gap had not narrowed over time.

28 Dr Brown is a statistician. He holds a degree in Mathematics and a doctorate in Statistics. He has been a member of the Royal Statistical Society since 2002 and, as I have mentioned, holds the position of Principal Methodologist at the Office for National Statistics.

29 Dr Brown gave reasons in his evidence for his view that average figures[19] were the best measure by which to assess the statistical significance of pay gaps. He explained that the basic pay data did not show signs of 'outlier distortion' (produced by infrequent values at one extreme or the other of the sample under consideration), that, on Dr Hall's figures, the median figures were more volatile than the mean figures, and that accordingly, in line with EHRC guidance[20], he favoured using the mean to interpret and evaluate differences in basic pay. On those figures, a statistically significant pay gap was not established. Dr Brown also considered Dr Hall's evidence on the 'chi-squared'[21] test. He stated:[22]

> **The chi-squared test is designed for categorical data – which can take a limited number of possible values, for example the presence/absence of an attribute or one**

[17] 2.5% and 3.2% of Grades 7 and 6 respectively, according to Ms Martin's supplementary statement, para 12
[18] In her supplemental report Dr Hall extended her quartile-based analysis, examining distribution by gender in the bottom 75% and 50% of each sample.
[19] The mean and median are known as "central measures of location".
[20] Addressed below
[21] As Dr Brown calls it
[22] First report, para 14

> **of a discrete number of options, such as colour of car driven. The aim of the chi-squared test is to assess whether the proportions of observed counts in each category are in line with expectations (from known proportions from a population, or comparative proportions (for example men in the categories). A significant chi-squared test means that the observed proportions differ, in some way, from the expected proportions.**

He went on to explain that since basic pay was not categorical but 'continuous' data, the chi-squared test was inappropriate and that, without numbers, its use based on distribution percentages alone was meaningless.

Analysis

Issue (1): the factor(s)

30 Mr Linden submitted shortly that the factors causing differences of pay as between the Claimants and their comparators were, according to the particular comparison, (a) starting pay in grade, (b) in the cases of Claimants and comparators in grade on assimilation (1 June 2006), the determination of their pay on that date in accordance with the assimilation rules, and (c) increases in pay in each pay year after entry or assimilation on account of performance and/or length of service.

31 In reply, Mr Cooper submitted as follows. The focus must be on the case which the Claimants pursue. Their case is confined to challenging the length of service criterion within the pay scheme. If and in so far as any other component of the scheme disadvantages them, they make no complaint about it. They say that the length of service element produces a disparate distribution across the pay scales. That constitutes the 'factor' under s69(2), namely the cause of the difference in pay which is the subject of the claim. It is not for the Respondents to name the factor which the law requires the Claimants to establish. In any event, the factor which the Respondents propose is inappropriate because it includes elements of the pay system about which no complaint is made (starting salary and performance-related awards).

32 It seems to me that the difference between the parties on this part of the case may be more apparent than real. The difficulty may stem from the fact that s69 imposes three separate burdens: first, that under s69(1)(a) to show an absence of direct discrimination; second, that under s69(2) to show, in an indirect discrimination case, the relevant factor and its consequential particular disadvantage; third, where the second burden is discharged, that under s69(1)(b) to make out objective justification. The first burden is imposed upon the employer, but it is only applicable to the extent that the claim under consideration requires it to be discharged. Here there is no suggestion of direct discrimination and accordingly s69(1)(a) becomes irrelevant. The third burden, again borne by the employer, comes into play (if at all) at a later stage in the analysis. As to the second, where a claim rests on indirect discrimination, the claimant bears the burden of proving (a) the factor which is said to have discriminatory effect and (b) the 'particular disadvantage' (individual and collective) which it is alleged to cause. That is in keeping with the plain language of s69(2) and high authority (*Nelson-v-Carillion Services Ltd* [2003] ICR 1256 CA). I agree with Mr Cooper that it is for

the Claimants to decide how to put their case and that it is not open to the Respondents to dictate what the s69(2) factor should be. I also agree that it is inherent in the statutory language that the s69(2) factor will be the same as the s69(1) 'material' factor, namely that which produces the difference *about which complaint is made*. (That need not be the entirety of the difference in pay but, as the Claimants have formally acknowledged,[23] any remedy will be limited to that part of the difference.) So the burden of justification under s69(1)(b), if it is cast upon the employer at all, will be limited to the factor which the employee, *ex hypothesi*, has made out under s69(2).

33 My reasoning very largely adopts Mr Cooper's arguments on the first issue. The agreed question is directed to the factor(s) "within s69(1) ... causing the difference in basic pay". Of course, read literally, it *could* be answered as Mr Linden proposes: pay differences undoubtedly arise from all of the factors which he identifies. But in the context of this case, the sole criterion that matters is length of service. The Claimants rely on none other. They complain of breach of the equality clause in respect of "*a* [my emphasis] difference" in pay (s69(1)) in so far as that difference is referable to length of service, but not otherwise. In these circumstances, I am satisfied that the '*material* [my emphasis] factor' within s69(1) is, as Mr Cooper submits, length of service.[24]

34 I also accept Mr Cooper's further submission that the precise linguistic formulation of the factor is unimportant.

Issue (2): substantial disadvantage

35 This part of the case breaks down into separate points, which I will address in turn under three headings.

The appropriate comparison

36 Mr Linden's challenge to the Claimants' case on substantial disadvantage began with the submission that they rely on untenable comparisons in that there are material differences between their circumstances and those of their comparators. He reminded me of the wording of s23(1) (admittedly not expressed to apply to equal pay claims) and of the emphasis in the authorities on the need for a common approach in indirect discrimination and equal pay cases (see *eg Gibson-v-Sheffield City Council* [2010] ICR 708 CA). The differences in circumstances are not limited to length of service *per se*. A key distinction is between those appointed to the relevant grade pre-assimilation as against those appointed post-assimilation. They necessarily have different pay histories because of the special arrangements which were made to protect pay at that time. But material differences have arisen each year. Awards have varied from year to year, and there have been some years when no award was made. On Mr Linden's argument, each cohort must be treated as having been subject to a separate PCP

[23] Further Particulars, para 5

[24] I am reinforced in my view by the fact that it corresponds with that of Underhill LJ in *Naeem-v-Secretary of State for Justice* [2016] IRLR 118 CA, a case of indirect discrimination, in which an argument advanced by Mr Linden similar to that addressed to me was rejected (judgment, para 18). I will return to *Naeem* in due course.

every year, and in the case of each Claimant the proper pool for comparison must be limited to men to whom the Respondents applied the same PCPs as they applied to her.

37 Mr Cooper replied that s23(1) has no place in the equal pay scheme because (a) the provision is explicitly restricted to direct and indirect discrimination and (b) the comparison required in such cases does not apply by implication in equal pay cases because there a quite different comparison is required – between women and men undertaking 'equal' work as defined in ss64 and 65. Moreover, submitted Mr Cooper, Mr Linden's arguments, if right, would mean that it was impossible to pursue *any* equal pay claim seeking to challenge *any* pay progression arrangement, since the very thing complained of (that those with longer service enjoyed more favourable terms) would be excluded from the inquiry.

38 In support of their arguments counsel took me to two EAT authorities, *ABN Amro Management Services Ltd-v-Hogben* UKEAT/266/09 (unreported) 1 Nov 2009 (Underhill P) and *Edie-v-HCL Insurance BPO Services Ltd* [2015] ICR 713 EAT (Lewis J and members), and a first-instance decision, *Mort & others-v-Cmmrs of HM Revenue & Customs* case no. 2410596/13, Liverpool ET (EJ Barker and members), promulgated on 22 May 2014. All involved complaints of indirect age discrimination. In *Hogben*, it was held (*inter alia)* that the ET had erred in refusing to strike out a claim based on a difference of age profile between those made redundant before and after the date of introduction of new and less generous terms governing bonuses paid to dismissed employees. Underhill P explained[25] that the *introduction* of the new terms could not be seen as a PCP and, while the new terms themselves could, there was no basis for holding that they were discriminatory. In *Edie*, the EAT upheld the ET's judgment that a requirement applied to the entire workforce to enter into a new contract was, unless objectively justified[26], indirectly discriminatory against older employees, because it entailed their losing more substantial benefits (accrued under the original terms) than their younger colleagues. It amounted to a PCP and substantial disadvantage (group and individual) was made out. *Hogben* was distinguished on the ground that there was in that case no time when some employees were treated differently from others. There was simply a change in an employment practice and the claimant's (untenable) claim involved looking from one side of the 'change-date' to the other. In *Mort*, the ET considered itself bound by *Hogben*. The facts, however, were quite different. The claimants were all employed by HMRC in or after June 2006 and sought to compare their remuneration with that enjoyed by others who had joined (HM Revenue or Customs) prior to the merger. The key finding was that s23(1) precluded them from relying on that comparison.

39 On this part of the case I again prefer the submissions of Mr Cooper. Parliament has enacted that the 'like for like' comparison specified by s23(1) is to apply to direct and indirect discrimination claims only and I agree that the subsection cannot be read as extending by implication to equal pay claims, for the compelling reasons Mr Cooper gave. Indeed, I have difficulty in conceiving of a workable system of equal pay legislation with that subsection woven into it. How, for example, could a Tribunal entertain a claim by carers citing gardeners/road

[25] Judgment, paras 26-27
[26] The EAT went on to uphold the ET's finding in favour of the employer on the justification issue

cleaners as comparators (*cf Gibson*) if it was an essential requirement that the circumstances relating to each group were the same or not materially different? Nor do the authorities dictate that analysis. I find the decisions cited to me of limited assistance, since they are concerned with indirect discrimination. It is of course right that the Tribunal's approaches to indirect discrimination and equal pay should not be in conflict, but that does not excuse me from the obligation to apply the legislation which is invoked. It seems to me that the questions which I must ask myself are not at all the same as those confronting the ETs and EAT in *Hogben*, *Edie* and *Mort*. I remind myself that I am concerned with a material factor resulting in substantial disadvantage. There is nothing in s69(2) which requires the Claimants to identify a PCP at all. Still less does the subsection point to the need for every annual pay review to be treated as a fresh PCP. Such a reading of the statute would, in my view, be both artificial and unwarranted. It would also lead to obvious injustice. I can also see no answer to Mr Cooper's objection that, on Mr Linden's logic, all cases of the kind here brought would fall *in limine*, regardless of whether they otherwise had merit. It would be a somewhat absurd state of affairs if any woman's complaint of indirect discrimination based on a length of service criterion could be met with the answer, "You can bring such a claim, but only based on a comparison with men who have the same length of service as you". Self-evidently, if that limitation was valid, it would be impossible to test the assertion that the criterion had a discriminatory effect. I am sure that it was not Parliament's intention to make pursuit of claims such as the Claimants' a practical impossibility. Moreover, in so far as the authorities cited assist, I accept Mr Cooper's submission that the 'heresy' at the heart of the claimant's case in *Hogben* does not arise in the instant case. The relevant factor is the pay progression element of the pay policy, which has applied throughout. The Tribunal is not asked to treat as comparable different circumstances which applied either side of a material 'change-date'. *Edie* is, to that extent, more in point.

Statistics: distribution or mean?

40 Both sides produced statistics in support of their cases on substantial disadvantage but since they disagree profoundly as to the nature of the material apt to illuminate the dispute, the rival evidence does not meet head on. The Claimants' statistics are said to demonstrate 'bunching' or 'clustering' of men in the upper quartiles or deciles of the pay ranges and women in the lower quartiles or deciles. The Respondents cite figures which, they say, show a narrow and steadily diminishing gap in average pay across both grades. There was no real dispute about the figures themselves; the contest was as to what they prove. The arguments were developed in considerable detail in the written submissions, which I will leave to speak for themselves. What follows is a bare summary of the main points advanced on both sides. Here it is convenient to begin with the Claimants' case.

41 Mr Cooper submitted as follows.

(1) The methodology apt to test the factor relied upon under s69(2) must be logically fitted to the Claimants' case.

(2) The Claimants' case is that the system of pay progression based on length of service produces a disparate distribution by gender across the pay scales.

(3) Comparison of mean averages (as proposed by the Respondents) does not assist in a proper evaluation of the Claimants' case because (a) it brings into account the large part of basic pay which is unaffected by the s69(2) factor and (b) it masks differential distribution by smoothing it out.

(4) By contrast, an analysis of the proportions of men and women within each decile or quartile of the pay scales *will* serve to identify any disparity and demonstrate whether it is significant.

(5) Dr Hall's Chi-square analysis lends further support to the Claimants' case.

(6) Application of the methodology referred to in (4) and (5) shows clearly that women are over-represented at the lower end of the pay scales and under-represented at the upper end.

(7) Accordingly, without prejudice to any objective justification defence, particular disadvantage is made out.

42 Mr Linden replied as follows.

(1) The Claimants' statistical approach based on distribution is flawed because it ignores actual pay, replacing it with an approximation.

(2) The Claimants' figures also ignore distribution both within and outside any selected decile, quartile or other segment of the population.

(3) The Claimants' case depends on impermissibly breaking down basic pay, which is indivisible, in order to isolate the notional sub-element referable to length of service.

(4) The Claimants' approach is arbitrary in that the pools for comparison would have to depend (for the purposes, presumably, of the issue under s69(2) of *individual* disadvantage, *ie* whether 'A' is put at a particular disadvantage), on the identity of the particular Claimant under consideration.[27]

(5) The Claimants' approach is also crude, misleading and, in practical terms, unworkable.

(6) Dr Hall's Chi-square analysis is unsound and proves nothing.

(7) The only proper way to test the Claimants' case on group disadvantage is through measuring mean average pay. On that approach, the undisputed figures conclude the particular disadvantage issue in favour of the Respondents.

43 Mr Cooper's arguments were most persuasively presented, but I cannot accept them. I have several reasons. In the first place, I agree with Mr Linden that distribution cannot be equated with, or allowed to supplant, *pay*. To state the obvious, the law is concerned with ensuring equal pay for equal work. Ascertaining the *distribution* of men and women within any particular segment of the overall sample may provide a partial picture of apparent advantage, but it says nothing about actual *pay difference*, within or outside the segment.

[27] So, for example, for the purposes of showing individual disadvantage, a Claimant paid at 80% of the pay scale could only hold herself to be disadvantaged as against men in the top 20%, but a Claimant paid at 50% could compare herself with all men in the top half.

44 The second fundamental problem with the Claimants' argument is that it ignores the undisputed reality that, as the average figures show, there is no significant long-term difference between the basic pay of men and women in either of the two grades. Given that reality, it necessarily follows that, in so far as selective analysis based on deciles, quartiles or any other slice of the total grade population reveals a 'clustering' phenomenon apparently favouring men over women, there must be a (more or less) counter-balancing advantage the other way, within and/or outside the relevant decile, quartile or other slice. Otherwise, the mean figures would not tell the story they do. This being so, the methodology advanced on behalf of the Claimants cannot be regarded as a reliable instrument and certainly does not substantiate the assertion that women are collectively disadvantaged.

45 Thirdly, I am much more impressed by the evidence of Dr Brown than that of Dr Hall, whose qualifications and experience do not seem to me, with respect, to equip her fully for the task entrusted to her. I accept the entirety of Dr Brown's evidence, including his remarks about the chi-squared test. It satisfies me that the statistics relied on by the Claimants are statistically insignificant.

46 Fourthly, I agree with Mr Linden that it is not permissible to divide basic pay into separate elements in order to challenge the length of service criterion. The sex equality clause under s66 modifies any 'term' shown to be less favourable than the corresponding 'term' of any comparator. The term relied on in this case is that which entitles the Claimants and their comparators to basic pay. Basic pay is indivisible, albeit that the figure in any particular case is explained by several factors of which length of service is one. Moreover, for the reasons already given, the Claimants' statistical evidence does not make good a theory of particular disadvantage attributable to any proposed 'sub-term', even if such were permissible.

47 Fifthly, I agree with Mr Linden that the distribution-based approach favoured by the Claimants would be unworkable in practice and liable to produce most undesirable results. If it was permissible, no employer could be sure of escaping liability under the equal pay provisions, or at least being put at risk in having to make out objective justification, since it would never be possible to guard against a complaint that, on this or that selective statistical analysis of a portion of the relevant population, one gender group appeared to enjoy an advantage over the other.

48 Sixthly, the logic of the Claimants' case does indeed, as Mr Linden pointed out, admit the possibility that distribution statistics could establish the 'particular disadvantage' of one gender group in respect of basic pay in a case where overall mean figures showed, by reference to the same term, that it was substantially advantaged. If the law contemplated a finding of particular disadvantage of gender group X as against gender group Y in circumstances where group X was the better paid of the two, Mr Bumble's celebrated remark would be entirely apposite. I do not, however, accept that view of the law.

49 Seventhly, although I accept that the categories of indirect discrimination are not closed and the law is constantly developing, it is a material fact that there is

no authority to support the Claimants' case. I do not refer only to decisions of the higher courts. The Equality and Human Rights Commission ('EHRC') Code of Practice on Equal Pay (2011) says nothing about distribution-based analysis. It does refer (para 177) to the need for employers to calculate average basic pay and total earnings. Likewise the guidance in the EHRC 'Equal Pay Audit Toolkit' ('the Toolkit'), which points out that 'significant' differences in pay (as referred to, for example, in the Code, para 179) are to be reckoned in percentages of basic pay and total earnings[28].

50 For all of these reasons, I reject the Claimants' case on the statistics issue. The result is that they fail to establish particular disadvantage by their chosen route of distribution-based analysis. No alternative is advanced and, as I have noted, they do not dispute that average figures do not disclose significant, long-term differences between the basic pay of men and women in either of the two relevant grades. I am in no doubt that they are right to accept that those figures are against them[29]. The Respondents have demonstrated (not that they bore any legal onus) that the differences in basic pay have been consistently marginal, have diminished over time, and will diminish further as time passes.

The Armstrong point: is any disadvantage materially linked to sex?

51 The conclusion just stated is fatal to the Claimants' claims but, given the strong probability of this litigation going further, counsel were anxious that I should give a decision on all main points. I turn to the third and last.

52 The parties proceed on the shared footing[30] that, even where disparate impact is made out on the statistical evidence, it is open to the employer to show that the disadvantage suffered by the employee(s) is wholly unrelated (indirectly) to sex (see *Armstrong-v-Newcastle upon Tyne NHS Hospital Trust* [2006] IRLR 124 CA).

53 In *Glasgow City Council-v-Marshall* [2000] ICR 196 Lord Nicholls of Birkenhead, delivering the only substantial speech in the House of Lords, said this:

> **18. ... 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 a 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 the 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,**

[28] Under 'step 3'
[29] Copious authority points to the need for statistical evidence to be significant and cogent (*eg Villalba-v-Merrill Lynch & Co Inc* [2007] ICR469 EAT). The Toolkit, again under step 3, classifies as 'significant' any pay gap of 5% or more, or 3% if there is a pattern of gaps favouring one sex
[30] The Claimants reserving the right to argue otherwise at a higher level

> **that the factor relied upon is ... a "material" difference, that is, a significant and relevant difference, between the woman's case and the man's case.**
>
> **19. When [the Equal Pay Act 1970] s1 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.**

54 *Marshall*, like most of the accumulated case-law, was decided under the Equal Pay Act 1970. Having considered the language of the 2010 Act, s69 against the 1970 legislation, I do not understand it to be intended to effect any significant reform. It does, however, seek to spell out the need, alluded to by Lord Nicholls, for the reason for a difference in pay to be free from any taint of sex discrimination, whether through direct or indirect means. I also agree with Mr Cooper that the 2010 Act is framed in rather wider terms than the predecessor legislation.

55 In *Armstrong*, Arden LJ referred to the remarks of Lord Nicholls just cited and continued (para 32):

> **That passage sets out a step by step guide to proving a genuine material factor defence. For the purposes of this appeal, the steps can be summarised as follows:**
>
> **(1) The complainant must produce a gender-based comparison showing that women doing like work, or work rated as equivalent or work of equal value to that of men, are being paid or treated less favourably than men. If the complainant can produce a gender-based comparison of this kind, a rebuttable presumption of sex discrimination arises.**
>
> **(2) The employer must then show that the variation between the woman's contract and the man's contract is not tainted with sex, that is, that it is genuinely due to a material factor which is not the difference of sex. To do this, the employer must show each of the following matters:**
>
> **(a) that the explanation for the variation is genuine,**
> **(b) that the more favourable treatment of the man is due to that reason, and**
> **(c) that the reason is not the difference of sex.**
>
> **(3) If, but only if, the employer cannot show that the reason was not due to the difference of sex, he must show objective justification for the disparity of the woman's contract and the man's contract.**

At para 34, Arden LJ added this:

> **In the *Marshall* case, Lord Nicholls uses the words 'disparately adverse effect'. He held that evidence that a difference in pay had such an effect on women could be evidence of sex discrimination. He did not, however, hold that the mere fact that there was a disparately adverse effect was itself sex discrimination. In the *Marshall* case, Lord Nicholls used the phrase 'disparately adverse effect' to denote the trigger at which the rebuttable presumption would arise under step 1 mentioned above.**

Buxton LJ and Latham LJ agreed with this part of Arden LJ's judgment.

56 *Armstrong* became the subject of some controversy among commentators but it has not been overruled and is binding upon me. The EAT accepted as much in the subsequent appeal in the same litigation[31] and the judgments of the majority of the Court of Appeal (Smith LJ and Maurice Kay LJ) in *Gibson* went further, explicitly approving the essential elements of Arden LJ's analysis.

57 From other equal pay authorities I take two further points. First, the Tribunal must have regard to substance rather than form. It must eschew technicalities. In *Ministry of Defence-v-Armstrong* [2004] IRLR 672 EAT, Cox J, sitting in the EAT, said this[32]:

> **The fundamental question for the Tribunal 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 be established in a variety of different ways, depending on 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 to work less hours than men, due to historical discrimination or disadvantage, or because of the traditional social role of women and their family responsibilities.**

58 Secondly, a contention by an employer that a particular disadvantage has nothing to do with sex must be examined with great care. In *Haq-v-Audit Commission* [2013] IRLR 206, Mummery LJ observed[33]:

> **The explanation must not only be genuine: the ET must also be satisfied that the difference in treatment is not *in any way* related to the difference of sex. Where the disadvantaged group is heavily dominated by women and the group of advantaged comparators is heavily dominated by men the inference of 'sex taint' will be readily drawn: it will be difficult for the employer to prove its absence. Where the work of the disadvantaged group has historically been done by women and the work of the advantaged group has historically been done by men there is a basis for inferring a legacy of sex-tainted attitudes, such as that women do not need to earn as much as men. Those are not matters of direct discrimination. The issue is whether the disadvantage complained about is indirectly causally linked to gender ...**

Similar comments are to be found in many other authorities (see *eg Gibson* and *Middlesborough Borough Council-v-Surtees* [2007] ICR 1644 EAT).

59 It is now necessary to return to *Naeem*. As I have said, that was not an equal pay case but a claim for indirect discrimination. The Claimant, a Muslim of Pakistani origin, became a prison chaplain in 2002. Prior to that year there were no Muslim chaplains because there was no need for them. He complained of discrimination related to his religion and belief and/or race based on the fact that, owing to a pay progression term in the conditions of service of prison chaplains, he was paid less than his longer-serving Christian peers. The Tribunal found that Mr Naeem had established *prima facie* discrimination but that the employer had made out a justification defence. The EAT, basing itself on s23(1) of the Act, held that no case calling for justification had been made out. The Court of Appeal reached the same conclusion as the EAT, but by a different route. Giving the principal judgment, with which Lord Dyson MR and Lewison LJ agreed, Underhill LJ said:

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[31] [2010] ICR 674 (Underhill P and members)
[32] Judgment, para 46
[33] Judgment, para 48

22. ... I agree that it is necessary to consider the impact of the length of service criterion on the actual population to which it is applied. However, I do not agree that if it is shown, as it is here, that the use of the criterion leads to a disparity in the pay of Muslim and Christian chaplains, the enquiry under section 19 (2) (b) must end at that point. In my view it was and is open to the Respondent to go behind the bare fact that Muslim and Christian chaplains have different lengths of service and seek to establish the reason why that was so. What has been established in this case – indeed it was never in dispute – is that the reason for the difference is that there was no need for employed Muslim chaplains prior to 2002[6]. That being so, I do not believe that it can properly be said that it is the use of the length of service criterion which puts Muslim chaplains at a disadvantage, within the meaning of section 19 (2) (b). The concept of "putting" persons at a disadvantage is causal, and, as in any legal analysis of causation, it is necessary to distinguish the legally relevant cause or causes from other factors in the situation. In my view the only material cause of the disparity in remuneration relied on by the Claimant is the (on average) more recent start-dates of the Muslim chaplains. But that does not reflect any characteristic peculiar to them as Muslims: rather, it reflects the fact that there was no need for their services (as employees) at any earlier date.

23. I do not need to express a definitive view about what the position would be if the non-recruitment of Muslim chaplains before 2002 were itself the product of discrimination (e.g. because the Prison Service assessed "need" according to some different criterion in the case of Muslims), since the ET has held that that was not so. Mr Linden submitted that even in such a case the Claimant would be obliged to complain about that discrimination in its own right – i.e. about the policy of not recruiting Muslim chaplains prior to 2002 – and to prove that his own recruitment had been delayed as a result. I am not so sure. I am inclined to think that in such a case it would be right to regard the shorter service of Muslim chaplains as a characteristic of the population to which the length of service criterion was applied since it was related to their religion in a different sense from the relationship in the present case. But the point is not quite straightforward and can be left to be decided in a case where it arises.

24. It may be instructive to compare the position of the Muslim chaplains in this case with that of the claimants in the litigation about the use of a length of service criterion by the Health and Safety Executive in determining the pay of its inspectors – see *Cadman v Health and Safety Executive* [2004] EWCA Civ 1317, [2005] ICR 1546, (CA) and [2006] ICR 1623 (CJEU) and *Wilson v Health and Safety Executive* [2009] EWCA Civ 1074, [2010] ICR 302. In that litigation female inspectors claimed under the Equal Pay Act 1970 on the basis that their pay was, on average, lower than that of their male colleagues because they had, on average, shorter service. To that extent the claims parallel the claim in these proceedings. But the difference is that it was acknowledged in those cases that a length of service criterion had an inherent tendency to put women at a disadvantage because women are liable to start their careers later than men and/or to take career breaks because of family and childcare responsibilities: see, e.g., para. 2 of the judgment of Arden LJ in *Wilson* (p. 305D). Accordingly the use of the criterion had to be justified. If the employer had been able to establish that the only reason for the disparity in average lengths of service had been that the proportion of women being recruited had increased in recent years – say, as a result of a changes in social attitudes, so that women were more willing to contemplate working in an industrial environment – the analysis would have been different.[7] The essential point about the present case is that the shorter average length of service of Muslim chaplains can be shown to be attributable to a factor – that is, the change in the need for their services as the proportion of Muslim prisoners grew – which does not operate to the disadvantage of Muslims.

Footnote [7] reads:

Indeed if it were otherwise an employer who made positive efforts to increase the diversity of his workforce – say by advertising vacancies in media with a greater appeal for women or members of ethnic minorities – would be making a rod for his own back, at least if length of service were a criterion in his pay system.

60 Shortly summarised, Mr Cooper's main submissions were the following.

(1) This being a claim based on indirect discrimination, the focus must be on the *effect* of the relevant factor. The law is designed to prevent discriminatory *results* which arise where "requirements which look neutral on their face ... work to the comparative disadvantage of people with a particular protected characteristic" (*Chief Constable of West Yorkshire Police-v-Homer* [2012] ICR 704 SC *per* Baroness Hale JSC, para 17).

(2) It is sufficient for the Claimants' cases if women generally are more likely to belong in the disadvantaged pool and any individual Claimant is in the pool. The relevant 'particular disadvantage' is the lower pay which women suffer as a result of the application of the relevant factor. The Claimants suffer that disadvantage. There is nothing else for them to prove. In particular, they do not need to show that they personally share particular individual characteristics with all other affected women that are associated with being women and are themselves causative of the disadvantage.

(3) An interrelationship between the factor of length of service and changes in social attitudes *may* (*pace* Underhill LJ in *Naeem*) amount to a sex taint. An analogy can be drawn with *Enderby*-type cases.

(4) The reason for the difference in pay is a combination of (a) the fact that the grades were historically male-dominated, (b) in part because the Respondents' core compliance and enforcement business had a 'macho' environment and was seen as 'men's work' and (c) as a result of (a) and (b) recruitment of women in greater numbers has only happened more recently and so women tend to have shorter service. The roots of the disadvantage lie in the historical gender imbalance, and accordingly it is impossible to say that the disadvantage (collective and individual) is not related *in any way* to sex. On the contrary, it is *obviously* related to sex.

(5) *Naeem* must be distinguished in any event as there the pay differential was attributable to the fact that there had been no *need* until recently for Muslim prison chaplains. That is quite different from a case in which changing social attitudes as to what is 'men's work' or 'women's work' explain a shift in the gender balance of a particular work force.

61 Mr Linden submitted as follows.

(1) The Claimants do not say that they as women are more likely to have come into grade later than men.[34] Nor could they so assert: the evidence is the other way.

(2) That evidence defeats any suggestion that women in either grade have been disadvantaged as a result of the historical gender imbalance, for example by their appointment or promotion to it being delayed.

(3) Nor is there any suggestion of discrimination in the rate at which women move up the pay scale.

[34] Further Particulars, para 4

(4) In so far as a Claimant can point to a male comparator appointed before her and earning more than her, the difference may well be attributable, at least to a large extent, to the fact that he entered the grade before her. But that cannot be anything to do with her sex in circumstances where (a) the evidence is that, on average, women have been appointed earlier than men, and (b) it is (now) no part of the Claimants' case to assert that the length of service criterion disadvantages women because of child-bearing and/or childcare obligations.

(5) The foregoing points differentiate the instant case from authorities such as *Cadman* and *Wilson*, where length of service criteria were shown on the evidence to disadvantage women, and accordingly a sex taint was apparent.

(6) In so far as the increase in the number of women in both grades explains the (alleged) disadvantage, the Respondents' successful policy to redress the gender imbalance provides an additional non-discriminatory explanation.

(7) If the alleged group disadvantage is not sex-tainted, the same must apply to any alleged individual disadvantage.

62 I have taken account of all the telling points made by Mr Cooper (not just those which I have summarised). I have been careful to avoid the error of failing to ensure strict separation of the point under consideration from the question (not now before me) of objective justification. I have not lost sight of the central purpose of the legislation or of the fact that, on this part of the case, the burden is firmly upon the Respondents. I fully understand why numerous authorities stress that it will often be far from easy to make out what some have called the '*Armstrong* defence'. Nonetheless, I have in the end come to the clear conclusion that Mr Linden's submissions are to be preferred. In summary, my reasoning (constructed, to repeat, on a premise which I have rejected, namely that disparate adverse effect is shown on the statistics) is as follows.

63 First, I accept Mr Cooper's first two submissions, by which he reminds me of what I take to be well-established and uncontroversial principles of equal pay law[35], but they do not call into question the legitimacy of the *Armstrong* defence. Rightly, he did not argue that they did.

64 Secondly, I find on the evidence presented that there is no basis for inferring that the historical gender imbalance in the two grades has been materially influenced by their working environment or by any perception that those employed in them performed 'men's work'. On the contrary, the Respondents have established to my satisfaction that the male/female ratios were *not* so influenced.

65 Thirdly, given the list of other gender-based assertions that have been withdrawn, disavowed or determined against the Claimants, it follows that the central question becomes: In circumstances where their case relies on an inference of sex taint based only on a combination of (a) the bare fact of the historical gender imbalance in the grades ('factor (a)') and (b) the fact that that imbalance has been redressed to a significant extent in recent years, producing a

[35] As to the second, I do not accept, as Mr Linden appeared to suggest, that *Essop-v-Home Office* 2015] ICR 1063 CA, an indirect discrimination case currently under appeal to the Supreme Court, must be taken to have drastically re-written equal pay law on the subject of individual disadvantage.

consequential increase in the numbers of women in both grades (factor (b)'), have the Respondents proved that those factors had nothing at all to do with the Claimants' sex?

66 Fourthly, as to factor (a), the Claimants' case in relation to the gender imbalance now amounts to saying, "We don't know why or when or how, but for some reason, at some time, in some way, sex *must* have had something to do with it." In these circumstances, the "burden of persuasion"[36] upon the Respondents is lighter than in cases where there is a substantial basis for an inference of discrimination. It is necessary to bear in mind that the employer is required to establish a negative. The law is designed to set a rigorous, but not impossible, standard.

67 Fifthly, as to factor (b), the gender imbalance is in any event not alleged alone and of itself to produce the 'particular disadvantage' under s69(2); the change in female numbers and in the proportion women bear to men in each grade is the second essential ingredient. Of course, the recent policy-driven increase in the recruitment of women to both grades is, in one sense, obviously "something to do with sex". But it is equally obvious, in my view, that it cannot constitute any sort of sex taint. It seems to me that increasing female numbers and redressing the gender imbalance is not capable of amounting to (indirect) discrimination *against* women, even if one by-product is a temporary state of affairs in which, analysed by quartiles or deciles (or any other selected sample), distribution statistics appear to suggest (and for the purposes of this part of the argument are assumed to produce) a temporary pay advantage in favour of men. I respectfully adopt what Underhill LJ says (albeit *obiter*) in *Naeem* at para 24, and in particular footnote [7]. I accept, of course, Mr Cooper's submission that an interrelationship between a length of service criterion and changes in social attitudes or assumptions *could* amount to, or give rise to, a sex taint. I do not understand Underhill LJ in *Naeem* to be saying otherwise:[37] he only makes the point that an increase in female numbers (another step on the long road towards equality) resulting from women becoming more willing to work in a historically male-dominated sector cannot constitute, or produce, such a taint.

68 Sixthly, in these circumstances, I conclude that although the Respondents have the awkward task of proving a negative, it is clearly accomplished. In respect of factor (a), they have shown that there is no basis for an inference of discrimination; in respect of factor (b), they have supplied an explanation which negatives discrimination and is reinforced by undisputed evidence that, notwithstanding the gender imbalance, women have not been disadvantaged as members of either grade.[38]

69 Seventhly, to put the matter another way, the Respondents have shown that neither factor (a), nor factor (b), nor the length of service criterion itself, operated to the disadvantage of women[39].

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[36] *per* Buxton LJ in *Armstrong*, para 111
[37] And in para 23 of his judgment he contemplates just such a case.
[38] See Mr Linden's first three propositions (as summarised above).
[39] *Cf Naeem*, para 24.

70 Eighthly, to put it a third way, the Respondents have shown that the operation of the length of service criterion did not 'put' women at a particular disadvantage when compared with men. Adopting the reasoning of Underhill LJ in *Naeem*, the only legally relevant cause of the disparity was factor (b). For reasons already given, that factor was not discriminatory. (But even if one widens the analysis, the same result follows because neither in factor (a), nor in the length of service criterion or the manner of its operation, is any discrimination to be found.)

71 Ninthly, I have accepted Mr Cooper's submission that, if group disadvantage is shown, each individual Claimant need only show that she is a member of the group in order to establish individual disadvantage. But it is also right, as Mr Linden points out, that if, as here, group disadvantage is not established, all claims of all Claimants must fail.

Outcome

72 For the reasons stated, the consolidated claims are dismissed.

A.M. Snelson

EMPLOYMENT JUDGE

Reasons entered in the Register and copies sent to the parties on 17TH JUNE 2016

..... **for Office of the Tribunals**