EMPLOYMENT APPEAL TRIBUNAL

Second Floor, Fleetbank House
2-6 Salisbury Square, London, EC4Y 8AE
Case Manager Queries: 020 7273 1031
Listing Office Queries : 020 7273 1021/1077
Facsimile : 01264 785 028

Your Reference:
Our Reference: UKEAT/0183/17/RN

Ms E Hawksworth
Slater & Gordon (UK) LLP
50-52 Chancery Lane
London
WC2A 1HL

10 August 2017

Dear Madam

Mrs D McNeil & Others v Commissioners for HM Revenue & Customs

I refer to the above matter and enclose by way of service a sealed copy of the Notice of Appeal and Order sealed 10 August 2017. I have also enclosed Respondents's Answer. The appeal has been served on the Respondent.
Please read the Order carefully as it contains directions and deadlines that you should make yourself aware of.

This matter will shortly be referred to the EAT List Office for a date to be fixed for the hearing. Parties are therefore requested to make a list of dates to avoid which covers a period of **4 months from September 2017**.

Within 7 days of the date of this letter parties are asked to supply (i) details of Counsel (if instructed) and/or (ii) any dates that you would like EAT to avoid.

If You Are Appearing In Person (Unrepresented)
Your attention is drawn to Section 15 of the EAT Practice Direction (2013) concerning the listing of Appeals. Please offer available dates throughout the whole 4 month period. It is not acceptable to offer only a few dates or concentrate on dates at the very end of this timeframe. Availability should span the whole 4 months as requested. Please be advised that if the EAT considers that you have not been reasonable with the dates that you have offered, the matter will be listed at the Tribunal's convenience (see paragraph 15.5).

If You Are a Representative (Other Than Counsel)
See above

Where Counsel Is Instructed
It is important that the EAT is made aware of Counsel as soon as they are instructed so that the listing of the hearing is not affected. At the time of listing, the EAT Listing Officer will contact Counsel's Chambers to consult regarding dates. During this

consultation Chambers are expected to agree a date with the Listing Officer. If this agreement cannot be reached the hearing will be fixed to the convenience of the Tribunal.

In The Case Of Expedited Hearings
If a Judge makes an Order for expedition it means your appeal/application must come on for a hearing quickly. There are various reasons why a Judge may order expedition; one possible reason is that an ET hearing is imminent. If expedition is ordered and the matter has to come on quickly you may not be asked to supply dates to avoid because the EAT will need to list the matter for the first available date.

Material for Hearing
Once a date for hearing has been fixed parties will be sent a formal Notice of Hearing. This will confirm the date and time that the hearing will take place. Once you have received the Notice of Hearing, you will need to begin considering the preparation of the Bundles, Skeleton Arguments and Authorities. Please see sections 8, 16 and 17 of the EAT Practice Direction (2013) for details and the deadlines for submitting these important documents. In addition, you may find the attached *"Preparing for the Hearing"* fact sheet helpful.

Yours faithfully

For the Registrar

NEW APPEALS
PREPARING FOR THE HEARING
Fact Sheet 4

Your appeal will shortly be set down for a hearing. If you have been asked to supply dates to avoid, please do so promptly. If you do not advise the EAT that you have dates that you would like us to avoid, the matter will be listed at the Tribunal's convenience

Once your appeal has been listed you will receive a formal Notice of Hearing which will confirm the date, time and particular hearing type. Parties are then asked to turn their attention to the preparation of material for hearing

The RESPONDENT'S ANSWER

If you are the Respondent to an appeal you will be directed, in the case of a matter being set down for a Full Hearing, to lodge a Respondent's Answer. This direction will be conveyed to you by way of the Full Hearing Order.

Unless otherwise directed by the Judge, you must lodge your Answer within 14 days of the seal date of the Order. Please be aware that the 4.00pm cut-off, for lodging documents with the EAT, applies. If your Answer is received after 4.00pm on the 14th day, or any day thereafter, it will be treated as being out of time and you will be required to make an application for an extension of time explaining in full the reasons for lateness.

Preparation of BUNDLES

Please see section 8 of the EAT Practice Direction (2013) which gives full details concerning the preparation and lodging of Bundles for hearing. This section explains that it is ultimately the responsibility of the Appellant to prepare the Bundles for hearing. However, if the appeal is being set down for an all-parties hearing, the Appellant must liaise with the Respondent to agree the contents

There are certain key documents that **must** appear in every Bundle and these are listed at paragraph 8.2 of the EAT Practice Direction (2013). You must ensure that these documents appear in your Bundle in the order that they are listed. You must also include an Index and make sure that you page number every document

There is no page limit in relation to the documents listed at paragraph 8.2.1 to 8.2.9 (inclusive) which will form your key documents Bundle. If you want to include any other documents/evidence that you consider is relevant to the appeal (and that was before the ET) then you may lodge this as a Supplementary Bundle (these would be the documents as mentioned at paragraph 8.2.10). There is a 50 page limit attached to the Supplementary Bundle. It is not necessary to include all the documents that were before the ET. The appeal is not a re-hearing of your ET claim. Only those documents relevant to the grounds of appeal are necessary. Please see paragraph 8.3 of the EAT Practice Direction (2013) for details

Please be aware that if your Bundles do not comply with the EAT Practice Direction they will be returned to you to correct

DEADLINES for Lodging Bundles

Parties are advised that, unless otherwise directed by the EAT, Bundles are due no less than 28 days before the date fixed for hearing. If you have been advised that the Judge will be sitting alone at your hearing you must lodge **2** copies of your indexed and paginated Bundle. If you have been advised that the Judge will be sitting with Lay Members, then you must lodge **4** copies of your indexed and paginated Bundle.

If you are unsure of the deadline for lodgement or the number of Bundles you are expected to supply, you can contact your case manager who will confirm these details for you. Parties are remained that the deadline for lodgement of documents at either EAT office is **4.00pm** on any working day

In the case of NON-COMPLIANCE

If the Appellant does not comply and prepare and agree Bundles in line with EAT directions, the EAT may take the decision to either (i) ask the Respondent to prepare the Bundles or (ii) prepare the Bundles on the Appellants behalf or (iii) consider any other direction it sees fit which may include striking out the appeal

Preparing SKELETON ARGUMENTS

See section 16 of the EAT Practice Direction (2013) for details about how to prepare your Skeleton Argument and the deadlines for lodging it. The Appellant's attention is particularly drawn to paragraph 16.6 which also directs that a **Chronology of Events** should accompany the Skeleton Argument when it is lodged

DEADLINES for Lodging Skeleton Arguments

Please see paragraph 16.11 of the EAT Practice Direction (2013) for details concerning the deadlines for lodging Skeleton Arguments. You will see that there are different deadlines for different hearing types (see paragraphs 16.11.1 and 16.11.2 in particular). Parties are reminded that the deadline for lodgement of documents at either EAT office is **4.00pm** on any working day

Preparing a Bundle of AUTHORITIES

See section 17 of the EAT Practice Direction (2013) for details concerning the preparation of a Bundle/List of Authorities and the deadlines for doing so. Please see in particular paragraph 17.5 which explains that the EAT maintains a list of "familiar" Authorities. To see this List you can visit the EAT's website at

www.justice.gov.uk/tribunals/employment-appeals

DEADLINES for Lodging Authorities

Unless otherwise directed by the EAT Bundles of Authorities are due no later than 10 days before the date fixed for hearing. Parties are reminded that the deadline for lodgement of documents at either EAT office is **4.00pm** on any working day

METHODS FOR LODGING DOCUMENTS

The EAT will **not** accept key document **Bundles**, **Supplementary Bundles** or **Authorities** by any other method than in hard copy (i.e. we will not accept Bundles sent by email or fax).

The EAT will, however, accept the Skelton Argument by email or Fax

LondonEAT@hmcts.gsi.gov.uk
www.justice.gov.uk/tribunals/employment-appeals/

IN THE EMPLOYMENT APPEAL TRIBUNAL UKEAT/PA/0492/16/RN

BETWEEN:

MRS D McNEIL and others

Appellants

and

COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondents

RESPONDENTS' ANSWER

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1 The Respondents are the Commissioners for HM Revenue and Customs.

2 Any communication relating to this appeal may be sent to the Respondents' solicitor: Clare McGann, Government Legal Department, One Kemble Street, WC2B 4TS. Tel: 020 7210 0583. Email: Clare.McGann@governmentlegal.gov.uk.

3 The Respondents intend to resist the appeal of the Appellants ("the Claimants").

4 The grounds on which the Respondents will rely are the grounds relied upon by the Employment Tribunal ("the ET") for making the Judgment and the following grounds:

Grounds of Appeal 1 and 2: Particular Disadvantage

5 The ET's decision contains no misdirection nor misapplication of the law. Its decision in Paragraphs 43–50 is considered and clearly reasoned. The decision was one which the ET was entitled to reach on the facts before it and the case as put.

6 In particular, as set out in ET Reasons at Paragraphs 4(3), 44 and 50, the Claimants accepted that the average pay differences between men and women did not show significant long-term differences between the pay of men and women.

7 The ET found that there was no doubt that this concession was correct, finding that:

7.1. *"the undisputed reality is that there is no significant long-term difference between the basic pay of men and women in either grade"* (Paragraph 44)

7.2. *"[the Claimants] 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"* (Paragraph 50).

8 The Claimants do not challenge those findings of fact – nor could they as they did not dispute them below.

9 Nor do the Claimants challenge, nor can they challenge, the ET's finding that *"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"* (paragraph 50).

10 As set out at Paragraph 40 of the ET reasons, *"there was no real dispute about the figures themselves; the contest was about what they prove"*; at Paragraph 24 *"the parties also agreed that the gap in average basic pay will narrow over the next few years"*; and at Paragraph 27 that the Claimant's expert, Dr Hall, had wrongly stated that the mean pay gap had not narrowed over time.

11 Nor do the Claimants challenge the ET's direction in law (set out at footnote 9) that copious authority points to the need for statistical evidence to be significant and cogent in order to give rise to an inference of indirect discrimination (see ET Reasons, paragraph 50 and footnote 29).

12 Fundamentally, it is for the ET as the tribunal of fact to make the relevant assessment as to whether particular disadvantage has been established: Glasgow CC v Marshall [2000] ICR 196, HL, at 205C; Home Office v Bailey [2005] ICR 1057 at para 21; Grundy v British Airways [2008] IRLR 74, at para 26 and 40; Haq v Audit Commission [2013] IRLR 206, CA, at para 45. The EAT only has jurisdiction to set aside the ET's decision if the ET misdirected itself or misapplied the law or reached a perverse decision. No error of law can be demonstrated.

13 Further, and in any event, the ET was entitled to find (at Paragraphs 44 and 45 of its Reasons) that the distribution-based analysis advanced by the Claimant added nothing of statistical significance to a comparison of pay averages, and to reject the Claimants' case which relied upon distribution-based statistics as an unreliable instrument with which to measure collective disadvantage. That was a factual determination with which the EAT cannot interfere. The ET's decision cannot be said to be perverse.

14 In this respect, if it is necessary to repeat the evidence of Dr Brown, which was accepted by the ET in its entirety, and summarised at Paragraphs 29 and 44-45 of the ET's Reasons, the ET's point is as follows:

14.1. The distributional tests relied upon by the Claimants added nothing because, whichever method of dividing the pay range was adopted, the effect of such was merely to replace known continuous data as to pay with less accurate categorical data (i.e. replacing a known figure with a "range" within which that figure sat).

14.2. In order to make this "less accurate" distributional assessment more accurate, the only way was to continually reduce the size of the range adopted, until the range for each figure became no more than the figure itself, at which stage the Claimants would be doing no more than comparing averages.

14.3. Hence, comparing mean pay was the only method which properly took into account the actual basic pay paid to each and every male and female employee in the relevant pool for comparison.

14.4. The assessment which the Claimants put forward was much more crude, and indeed for reasons set out by Dr Brown in his written reports (and maintained in cross-examination) it was misleading if it was sought to suggest that these added anything of significance to a simple comparison of average pay: which as set out above the Claimants accepted showed no significant difference.

15 That is evidence which was accepted in its entirety by the ET. That acceptance (which is right and certainly nowhere near perverse) cannot be challenged on appeal. The proper basis on which to compare basic pay was on the basis of average pay, and the Claimants

accepted that such comparisons did not show significant long-term pay differentials: the pay differentials were marginal, have diminished over time and will diminish further.

16 Insofar as the Claimants seek to argue in the alternative that the relevant average pay differences are "differences in average pay within the variable part of the pay only", such an argument is again misplaced and was permissibly rejected by the ET in Paragraph 46 of the Reasons (see also Paragraphs 65-67 of the Respondents' submissions to the ET). The term to which the Claimants' claims relate (i.e. the difference about which the complaint was made) was the term as to basic pay. Basic pay was not divisible into sub-terms, nor did the Claimants advance any evidence that in practice a distinction was drawn within basic pay between a proportion representing base salary and a "service-related" element. Further, and in any event, the ET found, as matter of fact (which is not, and cannot be, challenged), that "*[basic pay] in any particular case is explained by several factors of which length of service is one*" (at paragraph 46). Hence, seeking to divide a person's basic pay into sub-parts attributable to one factor of several, the impugned factor in this case, was artificial and erroneous.

17 In summary, the matters set out in Paragraphs 43 to 50 of the ET's Reasons, which are cogently and clearly reasoned, disclose no error of law, and there is no basis for any argument that the decision was perverse, or otherwise in error of law, such as to permit the EAT to interfere in a matter which is properly the judgment of the ET. Insofar as necessary the Respondents will seek to rely upon the totality of the arguments set out in its submissions to the ET in this respect.

Grounds of Appeal 3 and 4

18 These Grounds of Appeal are academic because, as set out above, the ET found that particular disadvantage was not established. Hence, the issue as to whether the Respondents could establish that that particular disadvantage was not related to gender did not, and does not, arise. See e.g. Paragraph 51 and 62 of the ET Reasons, in which the ET underlined that its consideration of this point was based on a premise, which it had rejected, that disparate impact was shown on the statistics.

19 The Claimants appear to accept this at Paragraph of the 6.7 of their Amended Grounds of Appeal. That is, they accept that these Grounds arise only on the premise they

establish their case on Ground 1 and 2. Although they do not expressly accept this in respect of Ground 4, the same must apply too: seeking to argue that the policy-driven increase to the recruitment of women is sufficient to establish a link between the particular disadvantage and sex, presupposes that particular disadvantage has been established – which the ET found it had not.

20 However, even if the Claimants can establish their appeal on Ground 1 and 2, their appeal on these Grounds must be rejected in any event.

21 In this respect, the Supreme Court in Essop v Home Office [2017] 1 WLR 1343 did not doubt nor over-rule the decision of the Court of Appeal in Armstrong. The EAT therefore remains bound by it.

22 In any event, the Supreme Court in Essop confirmed there is a requirement to show that the PCP does put the protected group at a particular disadvantage. Hence, where an employee seeks to rely on statistics as the evidential basis to demonstrate that a factor puts women to a particular disadvantage, then it is still open to an employer to show that in fact women generally are not put to a disadvantage, even if the statistics relied upon appear to show that they are.

23 However, in this case, as set out above, this issue does not arise because the ET found that the statistics relied upon did not found a proper evidential basis to demonstrate particular disadvantage.

Respondents' Additional Reason for dismissing the claim: Individual Disadvantage

24 Further and in any event, if the Claimants establish their Grounds, the Respondents will contend that the ET erred in law in its conclusion at Paragraph 71 of the Reasons, namely that if group disadvantage was shown then each individual Claimant need only show she is a member of the group (i.e. a woman) in order to establish individual disadvantage.

25 Rather, the Supreme Court has now confirmed that the Claimants could not establish their case unless they could show as individuals they were put to the corresponding disadvantage to that of the group generally: see Essop v Home Office [2017] 1 WLR 1343, at Paragraph 32.

26 On the Claimants' case, every woman in the relevant Grades would be able to contend she was individually disadvantaged even where she was clustered towards the top and/or was paid more than the male average: that is, even where she was advantaged as compared to men generally in terms of pay. That cannot be right, and Essop demonstrates that it is not right. That is because it is not sufficient to establish individual disadvantage that the Claimant is a woman: rather they must be put to the particular disadvantage that the group is put to.

27 Put another way, if it were the Claimants' case that women were disadvantaged by a length of service criterion because women tended to have shorter service periods as a result of career breaks or later career starts flowing from their child-care responsibilities (as noted by the Supreme Court in Essop, at para 39) then Essop confirms that a given Claimant would still need to show they had been put to the individual disadvantage that women in general are put to.

28 A Claimant might do that by showing that they themselves had had a shorter service as a result of child-caring responsibilities and were therefore individually disadvantaged in terms of pay. However, that was not the Claimants' case here – nor could it have been. That is because the women in the relevant grades generally came to grade earlier in their careers and so were not in any way disadvantaged as a result of coming to the grade later in their careers or career breaks, nor disadvantaged in the rate they moved up the pay scale, nor was there any evidence of womens' appointment or promotion being delayed (see e.g. ET Reasons, Paragraphs 68 and 61(1)-(3)). Nor did any Claimant put forward any evidence that they had been disadvantaged as a result of having some period of time out of the labour market.

29 Rather, the basis on which the Claimants sought to pursue their case was simply that it sufficed, in order to establish individual disadvantage, to show they were women. That is not sufficient to establish individual disadvantage.

Order

30 By reason of the above matters the Respondents respectfully requests that the Claimants' appeal be dismissed.

31 Should the Claimants' appeal be allowed, the Respondent would submit that the matter should be remitted to the same Tribunal to determine such issues as the EAT identifies.

THOMAS LINDEN QC

ROBERT MORETTO

12 JULY 2017

EMPLOYMENT APPEAL TRIBUNAL **Appeal No. UKEATPA/0492/16/RN**

BETWEEN

DOREEN McNEIL & OTHERS

Appellants

and

COMMISSIONERS FOR HM REVENUE & CUSTOMS

Respondent

AMENDED NOTICE OF APPEAL

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1. The Appellants are the 44 individuals listed in the schedule to this Notice of Appeal.

2. Any communication relating to this appeal may be sent to the Appellants at Slater & Gordon LLP, 50-52 Chancery Lane, London WC2A 1HL; DX 202 London/Chancery Lane. Contact: Emma Hawksworth; Email: Emma.Hawksworth@slatergordon.co.uk; Tel: 020 7657 1514; Ref. EJH/519.65391.

3. The Appellants appeal from the Judgment and Reasons of the Central London Employment Tribunal (Employment Judge Snelson, sitting alone) dismissing the Appellants' claims for equal pay on the grounds that they fail to establish 'particular disadvantage' under section 69(2) of the Equality Act 2010 ('EqA10'), sent to the parties on 17 June 2016 ('the Judgment').

4. The party to the proceedings before the employment tribunal, other than the Appellants, was the Commissioners for Her Majesty's Revenue & Customs, Employee Relations & Advice, Albert Bridge House, 1 Bridge Street, Manchester, M60 9AF. The Respondent was represented before the Employment Tribunal by the Government Legal Department, One Kemble Street, London, WC2B 4TS; DX

123242 Kingsway 6. Contact: Clare McGann; Email: clare.mcgann@governmentlegal.gov.uk; Tel: 020 7210 0583; Ref. 21410095.

5. Copies of:

   (a) the written record of the employment tribunal's judgment and the written reasons of the employment tribunal;

   (b) the claim (ET1);

   (c) the response (ET3)

   are attached to this Notice.

6. The grounds upon which this appeal is brought are that the employment tribunal erred in law as follows:

NUMBERED GROUNDS OF APPEAL

Ground 1: method for testing 'particular disadvantage'

6.1. The Appellants are all women employed by the Respondent in Bands 6 and 7, who claim equal pay with their longer-serving, higher-paid male comparators. In paragraphs 4(4) and 31-33 of the Judgment, the Employment Judge correctly identified the Appellants' complaint, namely that the factor of length of service operates within the Respondent's pay system so as to produce a differential distribution within the pay scales for Bands 6 and 7 that disproportionately disadvantages women compared with men. It was common ground that the relevant pay scales have set minimum and maximum rates of pay with variable annual progression between the two (see sub-paragraph 22 of the agreed facts in paragraph 19 of the Judgment). The Judge rightly noted that the Appellants' claim related solely to differences in pay caused by the operation of length of service (Judgment, paras 31-33). By definition, the effects of that factor and the consequential differences in pay are confined to the variable part of pay between the minimum and the maximum.

6.2. In those circumstances, the Employment Judge erred in concluding, at paragraphs 43, 46-49 and 50 of the Judgment, that the appropriate method by which to test the Appellants' case was to compare average differences in total pay and that it was impermissible to have regard to evidence of 'clustering' or differential distribution of women towards the bottom of the pay scales and men towards the top. In particular:

(a) The Judge erred in paragraphs 43 and 46 in holding that analysis must be restricted to comparing averages of the whole of basic pay and that it is impermissible to consider the distribution produced by length of service and/or its effects within variable part of pay only (between the minimum and the maximum). The material factor defence under section 69 of the EqA10 is expressly concerned with *'the difference'* about which complaint is made. The proper approach is therefore to adopt a methodology which logically tests whether the *differences* in pay caused by the impugned factor disproportionately disadvantage women. There is nothing in section 69 which mandates a rigid or formalistic approach that restricts the analysis to comparisons of *total* average pay under the whole basic pay 'term'.

(b) In this case, the way in which the factor of length of service operates so as to produce differences in pay is to determine (in conjunction with starting salary in grade and performance, the effects of which were accepted and not challenged) each individual employee's position between the minimum and maximum of the relevant pay scale, with no fixed progression points. Thus it determines *distribution* through the variable part of the pay scale (between the minimum and the maximum). It follows that:

(i) Examination of the differential distribution of men and women through the variable part of the pay scales is the best method for testing particular disadvantage, certainly a permissible method, which the Judge was wrong to exclude from his consideration;

(ii) Comparing total average pay distorts the analysis by deliberately aggregating and obscuring distribution through the pay scales and by bringing into consideration the bulk of pay below the minimum which is unaffected by the *differences* that are the required focus of analysis under section 69.

(c) Contrary to paragraphs 47-49 of the Judgment, there is nothing unworkable, undesirable or selective about an analysis which considers whether length of service produces a differential distribution across the whole of each grade within the part of pay that is affected. The dangers of a selective or partial analysis, that apparent effects may be misleading or that the particular statistics may obscure rather than illuminate, are dangers inherent in any statistical analysis: as noted above, using mean total pay may mask significant differences within the variable part by diluting those differences with the bulk of pay which is unaffected by the factor in question. It is the Tribunal's task in any case to consider such potential dangers, but there is nothing inherently misleading, complex or unworkable in an examination of how men and women are respectively distributed through a fixed pay rage. Nothing in the EHRC Code of Practice on Equal Pay (2011) or its Equal Pay Audit Toolkit precludes such an analysis where (as here) it is a logical means for testing the differential effects of the impugned factor: paragraph 182 of the Code makes clear that employers should check all aspects of their pay system, including pay progression, for any differential impact on men and women and Step 3 of the Toolkit advises employers to collect data on gender distribution and by gender and length of service.

<u>Ground 2: disproportionate disadvantage is the only permissible conclusion</u>

6.3. The Employment Judge (rightly) held, at paragraph 20 of the Judgment, that the data relied on by the Claimants *'confirm the "clustering" asserted in the Claimants' pleadings'*. Accordingly, had the Judge not erred in excluding the evidence of such 'clustering' from his considerations (as set out in Ground 1

above), the only possible conclusion was that length of service produced a significant disparate distribution between women and men. That conclusion is inescapable from the data in Appendix 1 to the Judgment, in particular in tables 1a, 1b, 2a, 2b, 5a, 5b, 6a, 6b, 9a, 9b, 10a and 10b, which demonstrate that *however* the pay scale is divided for the purposes of analysis (i.e. not adopting a selective approach) women are shown to be disproportionately lower down the pay scale compared with men. Evidence before the Judge from the Respondent's own equal pay audits demonstrated that length of service was the cause of that disparity (because when it was taken into account, any disparity disappeared and the data showed that the only other factors which affect an individual's position between the minimum and the maximum – starting salary and performance – had no disparate impact by gender).

6.4. Insofar as the Employment Judge purported to reach a different conclusion at paragraphs 44-45 and 50 of the Judgment, he erred in so doing and/or reached a perverse conclusion:

(a) Contrary to paragraph 44, the apparent conflict between the clear evidence of differential distribution and the relative narrowness of the differences in total average pay is not explained by any *'counter-balancing advantage the other way, within and/or outside the relevant decile, quartile or other slice'* but by the distorting effect of using total average pay, referred to above. There was no evidence before the Judge of differential distribution *in favour* of women within any quartile, decile or other segment of pay.

(b) Moreover, if the part of pay below the minimum that is not affected by length of service is (properly) excluded from consideration, then even adopting an analysis based on comparing average differences, those differences are revealed to be significant and the apparent conflict between average pay data and differential distribution data disappears. (If, contrary to the Appellants' primary case that differential distribution data should be used as the basis for analysis, the EAT were to hold that average pay data are

appropriate, the Claimants will submit in the alternative that the *relevant* average pay data are nevertheless the differences in average pay within the variable part of pay only, between the minimum and the maximum, and that on the basis of *those* data the only permissible conclusion is in any event that women are substantially disadvantaged compared with men.)

(c) The evidence of the Respondent's expert, Dr Brown, referred to at paragraph 45 did not address or answer the Appellants' case on differential distribution because, as the Judge noted in paragraph 40 of the Judgment, the parties' different approaches meant that their evidence *'did not meet head on'*. As is recorded in paragraph 29 of the Judgment, Dr Brown's evidence focused on *'the best measure by which to assess the statistical significance of pay gaps'*; whereas the Appellants' case was based on the significance of the differential distribution produced by length of service. Dr Brown declined to express a positive view on the best method for assessing the statistical significance of differential distribution, but accepted in cross-examination that, whilst he would favour an (unspecified) 'more sophisticated' statistical test for assessing the significance of differential distribution, it is nevertheless *possible* to apply the chi-square test to pay data grouped into quartiles or deciles and doing so would test whether distributions between men and women were different. In this case, application of that test to quartiles confirmed a statistically significant differential distribution. Therefore, even the Respondent's own expert gave no positive evidence to contradict the conclusion that there was a statistically significant differential distribution and, insofar as he gave positive evidence on the subject at all, that evidence supported the conclusion that there was a significant differential distribution.

(d) In any event, regardless of any more sophisticated statistical test, the data referred to at paragraph 6.3 above are sufficiently clear to speak for themselves and establish an overwhelming case in favour of differential distribution.

Ground 3: ~~incorrect application of burden of proving no link to sex~~ improper consideration of whether the reason for the particular disadvantage was itself related to sex

6.5. ~~The Appellants formally raise as a ground of appeal the proposition that Armstrong v Newcastle upon Tyne NHS Hospital Trust [2006] IRLR 124, CA, was wrongly decided and that, once disparate impact is established, that is sufficient to establish the necessary link between sex and the difference in pay and it is not open to the employer to contend otherwise. The Appellants accept that at the time of drafting this Notice of Appeal, the EAT is bound by Armstrong and if that remains good law when this appeal is heard the Appellants will not pursue this point before the EAT (but reserve their right to do so should this matter proceed further on appeal). However, the Appellants understand that it is possible that the correctness of Armstrong may be affected by the outcome of the pending appeals to the Supreme Court in Essop v Home Office [2015] ICR 1063 and Naeem v Secretary of State for Justice [2016] IRLR 118, which the Appellants understand are due to be heard by the in November 2016. The Appellants will therefore pursue this ground of appeal before the EAT if the outcome of those appeals to the Supreme Court provides grounds for them to do so.~~ The judgment of the Supreme Court in *Essop & others v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice* [2017] UKSC 27; [2017] ICR 640, SC, establishes that:

(a) in a claim based on indirect discrimination, once it has been established (whether by statistical evidence or otherwise) that the PCP places people with the relevant protected characteristic at a particular disadvantage, that is sufficient to require the respondent to justify its use of the PCP;

(b) it is irrelevant whether or not the reason why the PCP puts that group at a particular disadvantage is itself related to the protected characteristic;

(c) the only required causal link is between the PCP and the particular disadvantage; and

(d) in any event, if the operation of length of service within a pay system places people with the relevant protected characteristic at a particular disadvantage in that people with that characteristic tend to be distributed lower down the pay scale because they have been recruited more recently, that is sufficient (see paras 24, 25, 30, 33, 37-39 *per* Lady Hale DPSC).

6.6. Those principles apply equally to an equal pay claim based on indirect discrimination under EqA10, s69. Consequently, *Armstrong v Newcastle upon Tyne NHS Hospital Trust* [2006] IRLR 124, CA, must be regarded as overruled insofar as the Court of Appeal in that case held that it was open to an employer to avoid having to justify its use of the PCP by showing that the reason why the PCP places people with the relevant protected characteristic at a disadvantage has nothing to do with that characteristic.

6.7. Therefore, on the premise that the Appellants are able to establish that the operation of length of service within the Respondent's pay system places women at a particular disadvantage by producing a differential distribution which means that women tend to be lower down the pay scale than men (on the basis set out in Grounds 1 and 2 above), the Employment Judge erred in paragraphs 52 and 64-71 of the Judgment in holding, applying *Armstrong*, that the Respondent could avoid the requirement to justify the operation of length of service within the pay system by showing that the reason why length of service places women at that disadvantage is unrelated to sex.

6.8. In any event, notwithstanding the Employment Judge's correct self-direction that the burden of disproving any link between an apparent disparate impact and sex under the Armstrong principle is on the employer, the Judge in fact failed properly to apply that burden. In paragraph 66 of the Judgment the Judge in effect placed a burden on the Appellants to identify some particular connection between the disparate impact and sex, failing which he held there to be a reduced 'burden of persuasion' on the Respondent. It is not for the Appellants to show the

~~nature of any such link, but for the Respondent to prove the complete absence of any link whatsoever.~~

Ground 4: ~~link with sex in any event established~~ differential distribution is in any event sufficient

6.9. In any event, the judge erred in paragraphs 59 and 65-70 (in particular in paragraph 67) in holding that some 'sex taint' is required over and above a link between the differential distribution of men and women within the pay scales and the (undisputed) fact that there was an historical gender imbalance within Grades 6 and 7 which has more recently been subject to change as a result of deliberate policy. In an indirect discrimination claim, it is not necessary ~~that the~~ to identify any 'sex taint' causing the disadvantage ~~be something~~ that is itself discriminatory or adverse to women: the purpose of indirect discrimination is to address discriminatory *results* even if their causes are in themselves neutral or benign. The fact that the differential distribution in this case is the result of successful attempts to redress the gender composition of the workforce in these two grades is immaterial ~~plainly is not wholly unconnected with sex, and that is sufficient for the Appellants to succeed~~.

6.10. It is immaterial to the issue of particular disadvantage that the detrimental effect in relation to pay has been caused by the laudable policy of improving the gender balance of the workforce: subject to the (subsequent) question of justification, the fact that a particular policy redresses one aspect of inequality between women and men is no answer to the disparate effects of pay progression arrangements on the women who are recruited as a result of that policy. On the contrary, the fact that the disparate impact is the result, as the Judge found in paragraph 67, of a *'policy-driven increase to the recruitment of women to both grades'* necessarily establishes a link between that disparate impact and sex and the Judge erred holding otherwise in reliance upon the judgment of the Court of Appeal in *Nacem*, now overruled by the Supreme Court (paras 38-39 *per* Lady Hale). Moreover, the fact that it is 'temporary' in the sense that the effect may

not last forever does not address the Appellants' case that the disparate impact is certainly long-term (it has been apparent since at least 2006) and that the effect of the Respondent's policy of not having guaranteed progression, combined with very low or nil pay awards in many years, has meant that it is (as the Respondent's own internal grievance manager held) *'almost as if HMRC developed a pay scale then removed the means to move up that scale'* from the greater numbers of women recruited more recently.

~~7. Grounds of Appeal 3 and 4 raise issues which are likely to be directly affected by the pending conjoined appeals in the Supreme Court against the judgments of the Court of Appeal in Essop v Home Office [2015] ICR 1063 and Naeem v Secretary of State for Justice [2016] IRLR 118, which the Appellants understand are due to be heard by the Supreme Court in November 2016. In those circumstances, the Appellants hereby apply for an order that:~~

~~7.1. this appeal to be stayed pending judgment by the Supreme Court in those appeals; and~~

~~7.2. within 21 days of judgment by the Supreme Court in those appeals, the Appellants shall notify the EAT and the Respondent whether they intend to continue with this appeal or whether it is withdrawn.~~

BEN COOPER QC

Dated: ~~21 July 2016~~ 15 June 2017

London
10-11 Bedford Row
London
WC1R 4BU
DX 1046 London/Chancery Lane

List of Cases for Multiple 2604 - The Commissioners of HM

Submultiple 0 **Not Allocated**

Case Number	Claimant Name	Current Position
2200893/2014	Ms D McNeil	Listed for a preliminary hearing
2200894/2014	Ms K Barnes	Listed for a preliminary hearing(CM)
2200895/2014	Ms A Bedwell	Listed for a preliminary hearing(CM)
2200896/2014	Ms L Becker	Listed for a preliminary hearing(CM)
2200897/2014	Ms D Brookfield	Listed for a preliminary hearing(CM)
2200898/2014	Ms H Baker	Listed for a preliminary hearing(CM)
2200899/2014	Ms CE Elvin	Listed for a preliminary hearing(CM)
2200900/2014	Ms S Brunning	Listed for a preliminary hearing(CM)
2200901/2014	Ms J Carr	Listed for a preliminary hearing(CM)
2200902/2014	Ms C D'Cruz	Listed for a preliminary hearing(CM)
2200903/2014	Ms H Fairholm	Listed for a preliminary hearing(CM)
2200904/2014	Ms C Semini	Listed for a preliminary hearing(CM)
2200905/2014	Ms D Abel	Listed for a preliminary hearing(CM)
2200906/2014	Ms A Ford	Listed for a preliminary hearing(CM)
2200907/2014	Ms R Howlader	Listed for a preliminary hearing(CM)
2200908/2014	Ms A Hurst	Listed for a preliminary hearing(CM)
2200909/2014	Ms S James	Listed for a preliminary hearing(CM)
2200910/2014	Ms M Jamieson	Listed for a preliminary hearing(CM)
2200911/2014	Ms E Johnson	Listed for a preliminary hearing(CM)
2200912/2014	Ms J Kyle	Listed for a preliminary hearing(CM)
2200913/2014	Ms J Lawrence	Listed for a preliminary hearing(CM)
2200914/2014	Ms K Nash	Listed for a preliminary hearing(CM)
2200915/2014	Ms K Pope	Listed for a preliminary hearing(CM)
2200916/2014	Ms A Shell	Listed for a preliminary hearing(CM)
2200917/2014	Ms C Stubbs	Listed for a preliminary hearing(CM)
2200918/2014	Ms J Thomas	Listed for a preliminary hearing(CM)
2200919/2014	Ms DJ Wright	Listed for a preliminary hearing(CM)
2200920/2014	Ms E Dawson	Listed for a preliminary hearing(CM)
2200921/2014	Ms S Donning	Listed for a preliminary hearing(CM)
2200922/2014	Ms HJ Howell	Listed for a preliminary hearing(CM)
2200923/2014	Ms P Rannamets	Listed for a preliminary hearing(CM)
2200924/2014	Ms J Gregory	Listed for a preliminary hearing(CM)
4100284/2014	Ms F Morrison	Listed for a preliminary hearing(CM)

Number of Cases 33

BF List

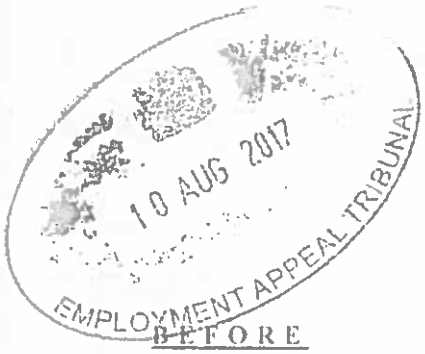
Clerk : REENA PINDORIA

B.F.	BF Date	Case No	Year	Fee Group Ref	Claimant	Respondents	Position	Mult	Sub
Red	03 06 2015	1400503	2015	141182623200	Clarke C Mrs	Commissioners Of HM Revenue And Customs	21 - Awaiting listing Hearing	2684 (L)	0
Clear		1400504	2015	141182623200	Smith H Mrs	Commissioners Of HM Revenue And Customs	3 - Awaiting ET3	2684	0
Clear		1400505	2015	141182623200	Connolly E Miss	Commissioners Of HM Revenue And Customs	3 - Awaiting ET3	2684	0

Multiple Schedule

Multiple: 2720 - The Commissioners Of

Case Number	*Case Name*
2407796/2015	Ms Sarah Elsby -v- The Commissioners Of HM Revenue And Customs
2407797/2015	Ms Ruth Bulteel -v- The Commissioners Of HM Revenue And Customs
2407798/2015	Ms Sally Burton -v- The Commissioners Of HM Revenue And Customs
2407799/2015	Ms Jennifer Hughes -v- The Commissioners Of HM Revenue And Customs
2407800/2015	Ms Louise Maloney -v- The Commissioners Of HM Revenue And Customs
2407801/2015	Ms Charlotte Ormesher -v- The Commissioners Of HM Revenue And Customs
2407802/2015	Ms Alison Weir -v- The Commissioners Of HM Revenue And Customs
2407803/2015	Ms Terry Michelle Wyer -v- The Commissioners Of HM Revenue And Customs



EMPLOYMENT APPEAL TRIBUNAL

Potential Appeal No UKEATPA/0492/16/RN

BEFORE

HIS HONOUR JUDGE DAVID RICHARDSON
IN CHAMBERS

IN THE MATTER of an Appeal under Section 21(1) of the Employment Tribunals Act 1996 from the Judgment of an Employment Tribunal sitting at London Central and sent to the parties on the 17th day of June 2016

BETWEEN:

MRS D MCNEIL & OTHERS — Appellant

- and -

COMMISSIONERS FOR HM REVENUE & CUSTOMS — Respondent

UPON a Notice of Appeal received on the 15th day of June 2017

IT IS ORDERED THAT:

1. This appeal be set down for a full hearing. The time estimate for this hearing (including time for judgment to be delivered) is 3 days *the parties are to notify the Tribunal in writing if and so soon as they disagree with such estimate.* Category P

2. Leave is given to the Appellant and Respondent to amend the Notice of Appeal and the Answer in the forms respectively dated the 15th day of June 2017 and the 12th day of July 2017.

3. If it is considered by any party that a point of law raised in the appeal or cross-appeal cannot be argued without reference to evidence given (or not given) at the Employment Tribunal, the nature of which does not, or does not sufficiently, appear from the written reasons of the Employment Tribunal, then the parties so contending shall within 14 days of the seal date of this Order give notice to the other party, and they shall seek to co-operate in the agreement of a statement or note in that regard; in the absence of such agreement within 14 days of such request, either party shall be at liberty to apply on paper within 7 days thereafter to the Employment Appeal Tribunal, giving notice to the other party, in relation to such evidence (whether for the purpose of resolving such disagreement or of seeking answers to a questionnaire or requesting the Employment Judge's notes (in whole or in part), from the relevant Employment Tribunal).

4. The parties shall co-operate in compiling and agreeing and shall, by no later than 28 days prior to the date fixed for the hearing of the full appeal, lodge with the Employment Appeal Tribunal 2 copies of an agreed, indexed and paginated bundle of material documents for the hearing of the appeal prepared in accordance with the Employment Appeal Tribunal Practice Direction. It shall consist of the Judgment against which the appeal is made, the sealed Notice of Appeal, the Claim (ET1), Response (ET3), any questionnaires and replies, relevant orders, judgments and written reasons of the Employment Tribunal, relevant orders and judgments of the Employment Appeal Tribunal, any affidavits and comments (where ordered). In addition, other relevant documents which (a) were before the Employment Tribunal; and (b) to which it will be *necessary* for any party to refer during the appeal may be added as a separate bundle.

Permission must be sought if it is proposed to lodge a separate bundle which is in excess of 50 pages: any excess will have to be justified.

5. The Appellant shall lodge with the Employment Appeal Tribunal and serve on the Respondent a chronology and the parties shall exchange and lodge with the Employment Appeal Tribunal skeleton arguments for the purposes of this appeal, not less than 14 days before the date fixed for the hearing of the full appeal.

6. The parties shall co-operate in agreeing a list of authorities and shall jointly or severally lodge a list or lists and copies of such authorities for the purposes of the appeal not less than 7 days prior to the date fixed for the hearing of the full appeal. The authorities are to consist only of those which identify a relevant principle, and not those which are merely illustrative of it. If more than 10 are to be relied on, the parties must be prepared to justify their selection to the court. They are to be arranged in chronological order in a ring-file binder, separated by tabs, with relevant passages clearly marked by side-lining, highlighting, or in some other effective way. Electronic copies of reports may be used, but where the authority is reported in the ICR or IRLR series, in the official series of Law Reports, or if not, the All England Reports, then so far as the parties' facilities permit it a copy (whether electronic or not) of one of those reports must be utilised. They do not need to include copies of any authority shown in the list of 'familiar authorities' on the EAT's website, as copies are available in court.

7. The parties are permitted to apply on paper on notice to the other party to vary or discharge this Order: the Employment Appeal Tribunal itself reserves the right to vary or discharge this Order on prior notice to the parties.

D A T E D the 2nd day of August 2017

TO: Messrs Slater & Gordon (UK) LLP for the Appellant

Government Legal Department for the Respondent

The Secretary, Central Office of Employment Tribunals, England & Wales

(Case No.2200893/2014)

APPEAL SIFTED DIRECTLY TO FULL HEARING

REASONS

Appellant	Mrs D McNeil & Others
Respondent	Commissioners for HM Revenue & Customs
Reference number	UKEATPA/0492/16/RN
Sift Judge	His Honour Judge David Richardson

Reasons:

I see the force of the argument that the Employment Judge's conclusion was essentially one of fact based on the statistical expert evidence, but I am nevertheless persuaded that the contrary is reasonably arguable.

It does not seem to me inherently improbable that by reason of a criterion of length of service women would be clustered at the lower levels in the pay scales; this seems to have been established by the evidence (see paragraph 27 of the Reasons) and it is reasonably arguable that the approach taken by Dr Brown simply served to mask a disadvantage which had actually been established. Both **Essop** and **Naeem** may be in play here; and the arguments based on **Naeem** appear to me to be reasonable.

The case is an important one; and it seems to me to merit a Full Hearing.

Ref: UKEAT/0183/17/RN

TO:

LISTING OFFICER
EMPLOYMENT APPEAL TRIBUNAL
SECOND FLOOR, FLEETBANK HOUSE
2-6 SALISBURY SQUARE
LONDON
EC4Y 8AE

Dear Sir

Mrs D McNeil & Others v Commissioners for HM Revenue & Customs

(a) I am not instructing counsel

(b) I am instructing ..... of counsel

Telephone number .....

Fax number .....

Email address .....

Date ..... Signed .....

(Solicitors of the Appellant)