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RECENT CASES

COMMENTARY

Sex Discrimination and the Material Factor Defence under the Equal Pay Act 1970 and the Equality Act 2010

1. INTRODUCTION

The test for whether a difference in pay is lawful under the Equal Pay Act 1970 (EqPA) can be simply stated. Where a claimant can show that she and a male comparator do like work, work rated as equivalent or work of equal value, the equality clause in her contract takes effect to ensure that she enjoys contractual terms equally favourable to his, unless the employer can establish that the difference in pay is genuinely due to a material factor which is not the difference of sex, and which is (or, in an equal value case, may be) a material difference between her case and his: section 1(3).

However, this deceptively simple legislative formulation has given rise to considerable difficulties in employment tribunals and appellate courts. The EqPA was enacted before the UK joined the European Community in 1972 but has long been identified as the means by which the UK gives effect to Article 157 of the Treaty on the Functioning of the European Union,[1] which requires Member States to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. Legislative and judicial developments at EU level have read Article 157 as prohibiting both direct and indirect sex discrimination. The EqPA has therefore had to be construed as doing the same. That task has proved far from straightforward, not merely because of the textual constraints of section 1(3) but also because of the evolving nature of the concept of indirect discrimination itself. By contrast, the Sex Discrimination Act 1975 (SDA), which governs sex discrimination in respect of non-contractual matters, makes express provision prohibiting direct discrimination and indirect discrimination and has been amended to reflect the modern definition of the latter.

A particular problem repeatedly considered by the Employment Appeal Tribunal (EAT) and the Court of Appeal in recent years concerns the circumstances in which an employer is required to provide objective justification for a difference in pay by reference to the principle of proportionality. The controversial decision of the Court of Appeal in *Armstrong v Newcastle upon Tyne NHS Hospital Trust*[2] was felt by some commentators to have wrongly

[1] This provision was Article 119 in the Treaty of Rome and Article 141 in the Treaty of Amsterdam.
[2] [2005] EWCA Civ 1608, [2006] IRLR 124.

provided an additional line of defence for employers, allowing them to avoid the need to provide objective justification even where a prima facie case of indirect discrimination has been established. The point has recently been reconsidered twice: first by the Court of Appeal in *Gibson v Sheffield City Council*[3] and again by the EAT in *Armstrong (No 2)*.[4] Those decisions endorse the earlier *Armstrong* analysis, subject to minor qualifications, and thereby clarify precisely how the concepts of direct and indirect discrimination are properly to be accommodated within section 1(3) EqPA. That clarification may go some way towards quelling criticism of *Armstrong*, although a different viewpoint is likely to persist, revealing a deep-seated disagreement as to the nature of the basic concepts at play and the very purpose of equal pay legislation. Regrettably, Parliament has not taken the opportunity to provide a definitive steer on this issue in the Equality Act 2010 and further litigation on the point seems likely to occur once that Act comes into force.

2. SEX DISCRIMINATION AND PAY: THE *ARMSTRONG* ISSUE

The courts have approached section 1(3) EqPA in the following ways:

(1) The demonstration that a woman is doing like work, work rated as equivalent or work of equal value for lower pay compared with a man raises a rebuttable presumption of sex discrimination in pay. The burden passes to the employer to show that the reason for the difference in their pay is not tainted with sex. The employer must establish that there has been no sex discrimination, direct or indirect.[5]

(2) A pay practice will be *directly* discriminatory on grounds of sex where the sex of the employee is the effective cause of the difference in pay. In this situation, it will not be open to the employer to justify the pay difference.

(3) A prima facie case of *indirect* sex discrimination can be established in two distinct ways: first, by showing that a provision, criterion or practice (PCP) is applied equally as between men and women but puts women at a particular disadvantage when compared with men; secondly, by showing that an exclusively or mainly female group is paid less than an exclusively or mainly male group for doing equal work, where the statistics for the gender composition of the groups are significant. In the latter case—the *Enderby* scenario[6]—there is no requirement for the claimant to identify any PCP.

(4) Where a prima facie case of indirect sex discrimination is established, the burden falls on the employer to show that the pay difference is explained by objectively justified factors unrelated to any discrimination on grounds of sex—in other words, that it is a proportionate means of achieving a legitimate aim.[7]

The *Armstrong* issue is whether, in the *Enderby* scenario, there is an additional stage between the third and fourth stages, whereby the employer can avoid the need to provide objective justification for the pay differential by showing that it arose as a result of factors that are not the result of any form of sex discrimination.

[3] [2010] EWCA Civ 63, [2010] ICR 708.
[4] [2010] ICR 674.
[5] *Glasgow City Council v Marshall* [2000] 1 WLR 333 at 339 (Lord Nicholls).
[6] *Enderby v Frenchay Health Authority (Case C-127/92)* [1994] ICR 112.
[7] *Bilka-Kaufhaus GmbH v Weber Von Hartz (Case 170/84)* [1986] ECR 1607.

The judgment of the European Court of Justice (ECJ) in *Enderby* itself suggests that there is not. The case concerned a claim by a female speech therapist against her employer (a health authority) and the Secretary of State for Health seeking pay parity with two male comparators doing work of equal value, a clinical psychologist and a pharmacist. The tribunal found that the collective bargaining agreements that had led to different pay structures for the three positions were in no way sex-tainted and upheld the section 1(3) defence. The EAT dismissed the claimant's appeal, accepting the respondents' submission that a prima facie case of indirect discrimination can only be established by identifying a 'term or condition' that the claimant has to satisfy before she can achieve equal pay and with which, because she is a woman, she is unable or less able to comply than a man in a similar position.[8] However, the Court of Appeal considered it arguable 'that the absence of any barrier preventing or hindering access to the advantaged group is irrelevant if it is shown that over a period one type of work is in practice done by women and another type of work is in practice done by men and that it is the men's work which attracts the higher salary or other advantages, though the women's work is of equal value'.[9] The court referred the question to the ECJ, which held that 'if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two jobs in question are of equal value and the statistics describing that situation are valid'.[10]

Thus, on its face, the effect of the ECJ's decision is that disparate impact of the type there under consideration *in and of itself* gives rise to a prima facie case of indirect discrimination. There did not appear to be any question of the employer being able to avoid the need to provide objective justification by showing that the difference in treatment was not attributable to a difference of sex. However, the Court of Appeal held in *Armstrong*[11] that it should be open to an employer to do so. Arden LJ set out a 'step by step guide to proving a genuine material factor defence' in the following terms (paragraph 32):

> 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.

[8] [1991] ICR 382 at 400, 418–21.
[9] [1994] ICR 112 at 127.
[10] See para 16 of the ECJ's judgment, which is reported together with that of the Court of Appeal at [1994] ICR 112.
[11] See n. 2 above.

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 between the woman's contract and the man's contract.

Buxton LJ made similar comments (paragraph 110). The difficulty with both passages is that they appeared to introduce a new stage into the indirect discrimination analysis which is inconsistent with *Enderby*. The question whether there is in fact any inconsistency was recently considered in *Gibson* and, in a judgment handed down 12 days later, in *Armstrong (No 2)*.

In *Gibson*,[12] the council had introduced a bonus scheme to encourage greater productivity from a part of its workforce, street cleaners and gardeners, who were predominantly male. The bonuses were later consolidated into their weekly wages, giving wages substantially higher than those paid to carers (a term that included care workers and school supervisors) doing equally valuable work, who were predominantly female. The tribunal held that the council did not need to provide objective justification for the pay disparity since the reason for paying the bonuses was genuinely referable to productivity and a similar productivity bonus was inappropriate for the carers, whose productivity had never been in doubt and whose work was not an objectively measurable task that could form the basis of a calculable bonus reward. The EAT upheld that reasoning but the Court of Appeal disagreed. Pill LJ, with whom Smith and Maurice Kay LJJ agreed, held that the *Armstrong* analysis did not apply on the facts of the case, given the clear and compelling statistics which demonstrated that the pay difference disadvantaged a substantially higher proportion of women (paragraph 51). The impossibility of applying the productivity bonus to women's work was genuine enough but that did not remove the sexual taint from the operation of the scheme. The scheme had a disparately adverse effect on women's work as compared with men's work and the sexual taint was present. It had to be objectively justified if the section 1(3) defence was to succeed. The matter would be remitted to the tribunal to allow the council the opportunity of attempting such justification (paragraph 52).

However, while the judges agreed on the disposal of the appeal, they expressed different views on the *Armstrong* issue. Pill LJ noted that *Armstrong* 'is not an easy case' (paragraph 33). Although he rejected the claimants' submission that it was decided *per incuriam* (paragraph 42), he found the approach in *Armstrong* 'very difficult to reconcile' with *Enderby* and *Marshall* (paragraph 49). By contrast, Smith LJ concluded that *Armstrong* was correctly decided. Her analysis proceeded as follows:

(1) Even in a non-pay case, it is open to the defendant to demonstrate that, notwithstanding the appearance that a practice puts women at a particular disadvantage, in fact the apparent disadvantage has arisen due to factors that are wholly unrelated to gender. There must be an implied possibility of such a defence because the purpose of the legislation is to prevent sex discrimination, including unjustifiable indirect discrimination. A defendant is not to be held to have discriminated—and be put to justification of his practice—merely because it has given rise to a statistical imbalance. Thus, the claimants were wrong to argue that the *Armstrong* analysis of section 1(3) EqPA is inconsistent with the approach under the SDA (paragraphs 62–64).

[12] See n. 3 above.

(2) If that defence is available in a non-pay case under the SDA, it must also be available in a pay case. Although in *Enderby* the ECJ did not mention its availability, that does not mean that the court ruled it out as a theoretical possibility. On the facts of *Enderby*, the explanation advanced for the pay differential was that historically there had been separate negotiating machinery that had not in itself been discriminatory. However, given the history of adverse impact on the female-dominated group as compared with the male-dominated comparators, the inference that the difference was sex-tainted was very strong and the explanation proffered completely failed to demonstrate that the pay differential was wholly unrelated to gender (paragraph 65).

(3) The defence will almost always entail the giving of an historical explanation for how the pay arrangements came to be what they now are and how the claimant (and other women like her) came to be paid less than their comparators. The tribunal must be satisfied that the explanation is genuine, but it must also be satisfied that the difference of 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 readily be drawn and it will be difficult for the employer to prove its absence. Where the evidence reveals that the work done by the disadvantaged group has historically been done by women and the work done by the advantaged group has historically been done by men, there may well be a basis for inferring that the employer has (in the past) had a subconscious attitude that women do not need to earn as much as men and that the present day arrangements are a legacy of that attitude. In such a case, the inference that the difference of treatment is sex-tainted will readily be drawn (paragraph 68).

(4) In her step-by-step guide to section 1(3) EqPA in *Armstrong*, Arden LJ said that, as the first stage of the process, the claimant must produce a gender-based comparison showing that women doing equivalent work were being paid less than men. However, it is clear from section 1(2) that, in order to reach 'first base' and to put the employer to proof of its defence under section 1(3), the claimant need only show that she (as an individual) is being paid less than an individual comparable male worker. She does not have to produce statistics to trigger the section 1(3) defence, although she will have to if she wishes to allege indirect rather than direct discrimination (paragraph 72).

Maurice Kay LJ stated that, subject to the same caveat noted by Smith LJ, he was convinced that *Armstrong* was correct (paragraph 74).

In *Armstrong (No 2)*,[13] Underhill J expressed similar views. Following the Court of Appeal's decision in *Armstrong*, the case was remitted to the same tribunal, which again found that the bonus arrangements under consideration had a disparate adverse impact upon women and that the factors advanced by the trust to explain this were sex-tainted. The EAT dismissed the trust's appeal but unsurprisingly declined the claimants' invitation to depart from the legal analysis on the basis of which the questions remitted to the tribunal had been formulated. However, the EAT did address the argument that *Armstrong* was wrongly decided in a postscript to its judgment. Underhill J's analysis was as follows:

(1) The issue is specific to indirect discrimination of the *Enderby* type. Where the employer himself does something—'applies a PCP'—that has a disparate adverse impact as between men and women, it is entirely appropriate that any detriment to a woman that results should be actionable unless he can show that it is objectively justified: it is his act that is responsible for the discriminatory impact. By contrast, the characteristic of *Enderby*-type cases is that the employer has not—or at any rate cannot be shown to have—done anything with a discriminatory impact. Rather, there exists a

[13] See n. 4 above.

state of affairs in which men and women doing work of equal value are paid differently, and it is judged fair to presume past discrimination (paragraph 69).

(2) That being so, there is no principled basis for confining the available 'defences' to one of 'objective justification'. In a jurisdiction based squarely on the proscription of sex discrimination, albeit one where the burden of proof is placed firmly on the employer, it must be open to an employer to seek to answer the claim of discrimination by showing that the differential complained of is genuinely the result of factors, 'justifiable' or not, which are not the result of any form of gender discrimination. If the conceptual basis of *Enderby* discrimination is that the observed gender disparity is evidence of past discrimination, contrary evidence must be admissible (paragraph 70).

(3) In the paradigm case where the disparity is very marked, and there is reason to suppose the operation of past economic and cultural factors tending to depress women's wages, the inference will be in practice irrebuttable. However, in other cases a much more careful analysis may be needed of whether the statistical disparity relied on does indeed demonstrate discrimination. Findings of discrimination should not be made on a purely mechanistic basis (paragraph 70).

(4) Given this background of principle, decisive significance cannot be attached to the precise wording of the ECJ's decision in *Enderby*. Even judgments of the ECJ are not to be read like sacred texts; and, as with many cases that break new ground, the precise definition of what was decided in *Enderby* will need exploration as the case law develops (paragraph 71).

In a further 'post-postscript', Underhill J noted that the Court of Appeal had handed down judgment in *Gibson* at a stage when the EAT's own judgment existed in final draft and that Smith LJ's approach appeared very close to the EAT's.

3. ANALYSIS

The Court of Appeal's controversial decision in *Armstrong* has been eloquently defended in *Gibson* and *Armstrong (No 2)* by two of the most experienced employment lawyers on the bench. They join another, Elias LJ, who as President of the EAT examined *Armstrong* in detail in *Surtees* and concluded that 'logically it ought in principle to be open to an employer to show that even although there is disparate adverse impact, . . . it is not in any way related to any act of the employer which is sex tainted, and thereby avoid the need to establish justification'.[14] The Court of Appeal thought that Elias P was probably correct but did not need to express a concluded view.[15] However, doubts will persist. Elias P himself had previously held in *Villalba* that *Armstrong* is contrary to *Enderby*.[16] Having acted as Counsel for the Secretary of State in *Enderby*, Elias P was well placed to identify whether the argument he had unsuccessfully advanced before the ECJ had wrongly been approved by the Court of Appeal.

Whether one supports the *Armstrong* approach largely depends on one's view as to the proper nature and ambit of indirect discrimination and the underlying purpose of equal

[14] *Middlesbrough Borough Council v Surtees* [2007] ICR 1644 at para 46.

[15] *Redcar and Cleveland Borough Council v Bainbridge*; *Middlesbrough Borough Council v Surtees* [2008] EWCA Civ 885, [2009] ICR 133 at para 60.

[16] *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at para 131.

pay legislation. The *Armstrong* approach reflects a strong desire to follow to the letter the anti-discrimination model of the SDA. As Smith LJ and Underhill J both noted, it will be a rare case in which an employer faced with compelling statistics showing that one group of workers is predominantly female and another better-paid group is predominantly male will be able to avoid the need to provide objective justification for the difference in pay by showing that the reason for the difference has nothing to do with sex. However, on the narrow anti-discrimination approach, it should in principle be open to the employer to do so. Underhill J's categorisation of *Enderby* indirect discrimination as essentially evidential in nature is particularly helpful in explaining why that should be so. The existence of an *Enderby* situation is indicative of a sex-tainted act by the employer in the past that led to the present day state of affairs in which the predominantly male group is paid more than the predominantly female one. But if the employer can establish that in fact there was no sex-tainted act by explaining the chain of events leading to that state of affairs, then the mischief at which the EqPA is directed—eradicating sex discrimination—has been shown not to be engaged, so that the remedial mechanism—the operation of the equality clause—is not required.

Notably, Smith LJ could identify only a single example, borrowed from Elias P in *Surtees*, of a case where the employer might actually do so. The example involves two groups of workers (A and B), which both in the past comprised only or mainly men, with group A workers always being paid more than group B. Over time, the composition of group B changed so as to become predominantly female but group A remained predominantly male. If the work of the two groups was rated as equivalent and if the women in group B complained of unequal pay, the statistics would show an adverse impact on them. However, on the *Armstrong* approach, the difference in pay is not sex-tainted and therefore the employer can establish the section 1(3) defence without the need to provide objective justification. The employer has rebutted the presumption that the pay disparity resulted from any directly or indirectly discriminatory act on his part. Why should the employer be required objectively to justify a pay practice that did not at its inception put women at a particular disadvantage, and that only came to favour men over women by virtue of the purely adventitious fact that numerous women were subsequently recruited into group B?

By contrast, those who deprecate the *Armstrong* approach would contend for a broader notion of indirect discrimination. They would argue that *Enderby* means what it says. In an *Enderby* situation, it is axiomatic that there is no requirement for the claimant to identify any PCP that put women at a particular disadvantage when the relevant pay practice was introduced; nor does it avail the employer to prove that there was no such PCP. *Armstrong* wrongly confuses the distinct concepts of the *reason* for lower pay (potentially direct discrimination) and the *impact* of particular pay practices on women (potentially indirect discrimination). If a particular pay practice has a significant adverse *effect* on women, the fact that the reasons for its introduction had nothing to do with sex is irrelevant. It is discriminatory because of its effect on women, unless it is objectively justified. It might be difficult in Elias P's example, where the lower-paid group has not always been predominantly female, to show the statistically significant and persistent gender-based disparity that *Enderby* requires. But if there truly is a significant adverse effect on the female group, and the women and the men are doing equal work, then why should the

employer be absolved from the need to justify the pay difference? The fact is that he is paying women as a group less than men as a group for equal work. Moreover, if it were necessary to identify some act on the part of the employer that has a disparate impact, one might point to the *continuation* of the pay practice in circumstances where the two groups have demonstrably become gender polarised.

Some critics of *Armstrong* would go further, preferring to abandon the anti-discrimination model altogether and arguing for broader approach whereby the mere fact that a women is doing work equal to a man's for lower pay is sufficient to require their employer objectively to justify the pay difference. They would contend that this is the only effective way to eliminate centuries of ingrained assumptions and practices leading to the systematic underpayment of women. However, this line of argument advocates a truly seismic shift in the approach consistently taken by the courts since the EqPA was enacted, including on several occasions by the House of Lords. As Elias P observed in *Villalba*, its effect would be 'to convert a law which is designed to eliminate discrimination on grounds of sex into fair wages legislation'.[17] Although the argument was briefly given encouragement by the ECJ's decision in *Brunnhofer*,[18] that decision has subsequently been held not to have removed the need to show some causal link between the pay arrangement and the sex of the claimant before objective justification is required.[19]

The difficulties posed by the *Armstrong* issue stem from a combination of factors: first, the (perceived) need to incorporate complex concepts of direct and indirect discrimination into a statutory provision that was not drafted with such complexity in mind; secondly, the developing nature of the concepts themselves; and thirdly, the problems not infrequently faced by domestic courts in interpreting and applying briefly expressed and lightly reasoned judgments of the ECJ. Nevertheless, following *Gibson* and *Armstrong (No 2)*, the *Armstrong* approach must now be regarded as settled law, at least below the level of the Supreme Court. However, critics of *Armstrong* will be consoled by the fact that Elias P's example—the sole hypothetical case thus far identified in which the *Armstrong* line of defence would apply—is unlikely to arise in practice. The true position is that, traditionally, women have been concentrated in particular areas of employment, and, equally traditionally, those areas have been paid less than areas where men are concentrated. The sort of gender switch and persistent pay disparity that the example posits simply is not real. The underlying reality of the persistent underpayment of women segregated into 'women's work' is the explanation for the social policy behind *Enderby*. Notwithstanding *Armstrong*, that policy can be upheld by the expansive approach to the notion of 'sex tainting' taken by the Court of Appeal in *Gibson*, where

[17] *Villalba* (n. 16 above) at para 135.

[18] *Brunnhofer v Bank der Osterreichischen Postsparkasse AG (Case C-381/99)* [2001] ECR I-4961.

[19] See *Villalba* (n. 16 above) at paras 124–85, disapproving the contrary view expressed in the earlier EAT decision of *Sharp v Caledonia Group Services Ltd* [2006] ICR 218. The claimants reargued the point in *Bainbridge*; *Surtees* (n. 15 above). The Court of Appeal did not expressly address the argument but plainly did not accept it. There was no further attempt to reargue the point before that court in *Gibson*.

the payment of a bonus to those performing traditionally male jobs and the denial of it to those performing traditionally female jobs was in itself a sufficient sex taint to require objective justification for the pay difference.

4. THE POSITION UNDER THE EQUALITY ACT 2010

The recent enactment of the Equality Act 2010 provided an ideal opportunity for Parliament to give a definitive steer to the courts on precisely how the material factor defence is intended to operate. That Act will repeal and replace both the EqPA and the SDA but will continue to address sex discrimination in pay and other contractual benefits in much the same way as does the EqPA: see Part 5, Ch 3. One improvement is that section 69 more clearly prohibits both direct and indirect discrimination in pay than does the EqPA. It provides:

> 69. Defence of material factor
>
> (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 work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.
> . . .

The difficult question is whether Parliament has reversed *Armstrong* so that objective justification must now be demonstrated in *every* case where *Enderby*-type statistics are present, *regardless* of any explanation that the employer might advance. On one view, such an argument would appear to be inconsistent with the statutory language. However stark the statistics may be, if the tribunal is satisfied that women were not put at a particular disadvantage as a result of the factor relied on by the employer as having caused the pay difference, then reliance on that factor is not within section 69(2) and accordingly the employer need not show that such reliance is objectively justified in order to avoid the operation of the equality clause. Take Elias P's example: the women in group B can show the requisite gender-based disparity, but the factor relied on as having caused the pay difference between groups A and B cannot be said to have put women at a particular disadvantage *at the time when it took effect*.

An alternative approach would be to say that the factor relied upon *does* put women at a particular disadvantage *now*, albeit that it did not do so when it was first relied on, and hence the factor is within section 69(2) and the employer must justify the pay difference. That approach is supported by the use of the present tense in section 69(2) (' . . . are put at a particular disadvantage . . .') and by comments from the minister responsible for the

passage of the Act, which suggest that objective justification is now required in every case where *Enderby*-type statistics are present.[20] It is also supported by the fact that section 69 as enacted replaced an earlier draft provision that would have allowed an employer to establish the defence by showing that the material factor was 'not the difference of sex' *or*, if the claimant showed that as a result of the factor women were put at a particular disadvantage compared with men, by showing that relying on the factor was objectively justified. That draft provision was criticised by the Joint Committee on Human Rights as being consistent with *Armstrong* but potentially inconsistent with *Enderby*.[21]

Moreover, the alternative approach pre-empts any argument that section 69 has in fact *extended* the material factor defence by removing the prohibition on *Enderby*-type indirect discrimination. The argument would be that, by requiring objective justification only if the claimant establishes that the factor relied on as having caused the pay difference puts women at a particular disadvantage, section 69 fails to recognise that, in an *Enderby* scenario, the compelling gender-based statistics of the workforce should absolve the claimant of any need to identify a PCP that has a disparate impact on women. However, the courts will strive to interpret section 69 as satisfying the requirements of EU law as explained in *Enderby*. The alternative approach achieves this without doing violence to the fact that section 69(2) places the burden of proof on the claimant since all that the claimant has to show is that the pay practice *currently* has the requisite disparate impact.

However, no clear intention to reverse *Armstrong* was expressed in the government publications that led to the Equality Act 2010[22] or in the lengthy Explanatory Notes.[23]

[20] See Hansard HL Deb, Vol 716, col 939 (19 January 2010), per Baroness Royall of Blaisdon, Leader of the Lords: '[I]f an industrial chemist is paid more than a biologist by an employer, although the work is found to be work of equal value, a difference in pay would have to be justified where it had a disproportionate gender impact—perhaps because chemists were mainly men and biologists were mainly women. The employer would need to provide evidence to show why there were pay differences, such as a skills shortage requiring recruitment at a higher rate of pay and his defence would succeed only if he could show that the pay differential was a proportionate means of recruiting people with the requisite skills'. There was no reference to any possibility of the employer avoiding the need to show objective justification by advancing the *Armstrong* line of defence.

[21] Twenty-sixth Report of 2008–09, *Legislative Scrutiny: Equality Bill* (HL Paper 169, HC 736, 12 November 2009) at paras 196–199. See also the comments made during the 11th sitting of the Equality Bill Committee in the House of Commons (HC Hansard, 23 June 2009, cols 392–395).

[22] The process began with *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain—A Consultation Paper* (Department for Communities and Local Government, June 2007). That paper—published 18 months after the Court of Appeal gave judgment in *Armstrong*—expressed an intention to 'clarify' the material factor defence, without giving further details (para 3.21). The later paper *Framework for a Fairer Future—The Equality Bill* (Cm 7431; Government Equalities Office, June 2008) made no reference at all to the defence. In *The Equality Bill—Government Response to the Consultation* (Cm 7454; June 2008), the government stated that it intended to 'clarify . . . how genuine material factors should be dealt with by the courts' (para 7.71) but did not state what effect this 'clarification' would have on the *Armstrong* issue.

[23] The Explanatory Notes state that s 69 'incorporates the effect of EU law in respect of objective justification of indirectly discriminatory factors' (para 243), but do not make clear whether this refers to *Enderby* read literally or to *Enderby* as interpreted in *Armstrong*. None of the examples given at para 244 as to how s 69 operates concerns the *Enderby* scenario.

Moreover, if that was the intended result, the drafting technique employed to achieve it is somewhat odd, at least so far as it concerns Elias P's example, since in truth the disparate impact results not so much from the historical factor that first gave rise to the pay difference—which in the example occurred at a time when both groups comprised only or mainly men—as from the continuation of the consequent pay practice notwithstanding that the gender composition of the groups has changed. The explanation may simply be that section 69 was drafted by reference to the much more common situation where the gender composition of two groups is fairly static over time. In any event, it will be open to the courts to adopt a broad construction of the phrase 'as a result of the factor' in section 69(2), should they wish to reverse *Armstrong*. They will doubtless be invited to do so once the Act comes into force.

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*I should declare an interest, having acted for the Equality and Human Rights Commission in *Redcar and Cleveland Borough Council v Bainbridge*; *Middlesbrough Borough Council v Surtees* [2008] EWCA Civ 885, [2009] ICR 133, in which some of the issues discussed in this article were canvassed in argument. I am grateful to Beverley Lang QC, Lord Lester of Herne Hill QC, Dinah Rose QC and Diya Sen Gupta for their helpful comments on an earlier draft. The usual disclaimer applies.