

## Equal Pay John Cavanagh QC

### Introduction

1. The bleak outlook for local authorities continues. There have been a number of recent judgments which have made life harder still for local authorities which are trying to defend themselves against multiple equal pay claims, brought by claimants supported by unions, or by no win, no fee solicitors, or by a combination of both. Many cases have settled, or are in the process of settling, but there is still a large number of cases which are currently progressing through the tribunals, or higher courts. A substantial minority of local authorities has not yet implemented Single Status, and so equal pay is likely to be a very hot topic in local government for quite a few years yet.
2. The resounding defeat of Birmingham City Council in its Genuine Material Factor (“GMF”) defence earlier this year shows how difficult life has become for local authorities, where equal pay litigation is concerned. There was nothing that made the Birmingham case out of the ordinary: the Council had fairly standard White Book bonus arrangements for refuse workers, gardeners and the like; and it had plenty of evidence to support its defence that the pay differential between the claimants and the comparators was not the result of sex discrimination. Its case was very well-presented. And yet the ET had no trouble in rejecting the GMF defence, holding that the bonuses were based on sexist assumptions that men’s work, though of equal value, was in fact harder and more deserving of bonus. The ET said of the performance related bonus: “It was, in fact, a fig leaf to conceal a desire to pay the refuse workers very significantly more than their basic pay and in that sense was a sham.”
3. Over the last few years it has usually (but not invariably) been the case that local authorities’ GMF defences have failed. Another ominous development is that in two other recent cases, involving Bury and Sunderland MBCs, the ET has held that the bonus GMF that was advanced by the local authorities were a “sham” and so fell at the first hurdle. Again, there was nothing special about these cases. Indeed, in the Bury case (in which I act for the local authority) the authority’s evidence to explain the historical background to the bonus arrangements was much better and more comprehensive than is often the case. Both the **Bury** and the **Sunderland** cases is going to the EAT in September 2010 and the EAT may well yet find that the finding of “sham” was caused by an error of law on the part of the ET. However, the very fact that ETs were prepared to find that bonus arrangements were a sham in this way is a sign of the difficulties facing local authorities.

4. At the moment, ETs are cynical about GMF defences. They approach cases on the starting assumption that bonus schemes are not really linked to productivity at all.
5. The perception that local authorities' GMF defences are bound to fail has even reached as far as the Court of Appeal. In **Suffolk Mental Health Trust v Hurst/Arnold v Sandwell MBC** [2009] ICR 1011, Pill LJ said, at para 57(b):

“The continued failure in parts of the public sector, notwithstanding the 1970 Act, to pay women equally with men is well documented and publicised and, on the evidence, I find it unsurprising that the claimants in these cases had at least suspicions about their unfavourable treatment in this respect. I am prepared to take judicial notice of the public concern about failure fully to implement provisions of the 1970 Act.”

6. In this Paper, I will look at the current state of the law in relation to the following areas of the law of equal pay, each of which has an important significance for the local authority litigation:
  - The choice of comparators
  - The GMF defence
  - Pay protection
  - Male claimants

### **THE CHOICE OF COMPARATORS**

7. The normal permutations of claimants and comparators in the local government litigation are as follows:
  - White Book (or ex-White Book) claimants v White Book (or ex-White Book) comparators;
  - Purple Book (or ex-Purple Book) claimants v White Book (or ex-White Book) comparators;
  - White Book or Purple Book claimants v Red Book comparators;
  - Claimants employed as non-teaching support staff in community schools, who are relying on comparators employed elsewhere in the Council
8. An unusual aspect of this part of the law of equal pay is that a claimant has two bites at the cherry, in the sense that she can rely upon a comparator who is “employed in the same employment” as that phrase is defined in section 1(6) of the Equal Pay Act 1970 (“EqPA”), but may also rely upon a comparator, even if he does not fit the statutory language of the EqPA, if he counts as a comparator for the purposes of Art 141 of the EU Treaty. The legal tests for a valid comparator under the EqPA are different, and it is possible for a comparator to be a valid comparator under the

EqPA but not under Art 141 or vice versa. This has been made clear recently by the EAT in **Potter v North Cumbria NHS Trust** [2009] IRLR 176 (Nelson J), at paras 86 and 87.

### **Section 1(6) of the EqPA**

9. The test for section 1(6) of the EqPA is whether the claimants and comparators are employed in the same establishment or in other establishments with common terms and conditions.
10. However, in **British Coal v Smith** [1996] ICR 515, the House of Lords applied a purposive interpretation to section 1(6) which had the effect of extending it in two respects. In **Smith**, Lord Slynn said the following:

“What therefore has to be shown is that the male comparators at other establishments and at her establishment share common terms and conditions. If there are no such men at the applicant’s place of work then it has to be shown that like terms and conditions would apply if men were employed there on the particular jobs concerned.” (526F).

11. The first point is that a claimant can rely upon a comparator from a different establishment even if the comparator is employed on different terms and conditions from those on which the claimant is employed, if there are other employees at the same establishment as the claimant who are employed on the same terms and conditions as the comparator.
12. However, the second point goes even further, and allows the claimant to rely upon a hypothetical comparator. If there is no-one at the claimant’s establishment doing the same job as the comparator, the tribunal has to speculate as to what terms and conditions someone doing that job at the claimant’s establishment would be engaged upon. If the hypothetical comparator within the claimant’s establishment would have been on the same terms and conditions as the real comparator in a different establishment, that would mean that the “common terms and conditions” test is satisfied.
13. The passage at page 526F in **British Coal v Smith** which makes this point is obiter, because in that case there were people in the claimant’s establishment who were doing the same work as the comparators in different establishment. However, the point has been reiterated more recently by the Court of Appeal in **South Tyneside v Anderson** [2007] IRLR 715 at para 26 (although again the point was obiter).
14. The “hypothetical comparator” extension in **British Coal v Smith** was recently considered, and narrowed, by Lady Smith in **Dumfries & Galloway Council v North** [2009] ICR 1363. In that case, the EAT held that non-White Book teaching assistants could not rely upon White Book male manual workers who were employed elsewhere such as road workers, groundsmen, refuse

collectors, refuse drivers (ie the usual male bonus earning groups) and a leisure attendant.

15. Lady Smith distinguished **British Coal v Smith** on the basis that the hypothetical exercise could only be carried out if there is a realistic possibility that a comparator would ever be employed in the claimant's establishment. There could never be a refuse worker, or a roadworker, employed at a school.
16. The summary of her conclusions is at paragraph 59 of the judgment:

“I conclude, in these circumstances, that where a woman seeks to use a male comparator that is not employed at her establishment, she requires to show a real possibility of him being employed there in the job he carries out at the other establishment or in a broadly similar job. Then, it is necessary for her to show that the terms and conditions on which he would be employed at her establishment would be broadly similar to those under which the class of which he is a member are employed at his establishment. That will involve taking account of any particular conditions that apply to all employees at her establishment.”
17. Lady Smith struck out the claims on the basis that the school-based claimants were not able to rely upon their nominated comparators.
18. This judgment is under appeal to the Court of Session. It is due to be heard in October 2010.

#### **Art 141**

19. The real significance of the **Dumfries & Galloway** judgment was that Lady Smith held that the fact that the claimants could not avail themselves of s1(6) meant that their claims had to be struck out altogether. EU law could not rescue it. It was not at all clear why Lady Smith came to this conclusion and she has now recanted in **Edinburgh Council v Wilkinson** [2010] IRLR 756.
20. She was right to do so. The test for a comparator under Art 141 is much more easy to satisfy than the test in s1(6).
21. There have been a number of cases in which equal pay claims in the ET have been permitted to proceed on the basis of an Art 141 comparator even though the comparator does not come within the definition in s1(6) of the EqPA. Examples are **Robertson v DEFRA** [2005] ICR 750 (CA), **Armstrong v Newcastle Upon Tyne NHS Trust** [2006] IRLR 124 (CA) and **Potter v North Cumbria NHS Trust**.
22. The leading European Court of Justice authority on comparators is the judgment of the ECJ in **Lawrence v Regent Office Care (C-320/00)** [2003] ICR 1092.
23. In **Lawrence**, a group of workers was transferred out from local authority employment to the employment of a contractor. They brought an equal pay claim against the contractor, relying upon

some employees who were still employed by the local authority as their comparators.

24. The ECJ held that the claims could not succeed. The rationale for the ECJ's judgment is at paragraph 18:

“where, as in the main proceedings here, the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141(1) EC.”.

25. The same approach was adopted by the ECJ in the later case of **Allonby v Accrington and Rossendale College** (C-256/01) [2004] ICR 1328, where the facts were similar.
26. This EU law test for a comparator is, of course, commonly known as the “single source” test. As is so often the case with EU law principles, the test is vague and general, and it is not at all easy to apply to specific, concrete, situations.
27. Both of the leading EU authorities deal with cases in which Art 141 was being used to support a claim in which the claimant could rely upon a comparator who had a different employer than the claimant. In both cases, the claimants were employees who had been transferred by TUPE to work for contractors and who wanted to rely upon comparators who had remained in employment with the public authority for which the claimants used to work.
28. Because of the facts of **Lawrence** and **Allonby**, it was not necessary for the ECJ to consider the circumstances in which the “single source” test could mean that a claimant cannot rely upon a comparator who has the same employer as her. However, these circumstances have been considered by the Court of Appeal in two cases, **Robertson v DEFRA** and **Armstrong**.
29. The leading case in the domestic courts is **Robertson v DEFRA** [2005] ICR 750. This case concerned two sets of civil servants, all of whom were employed by the Crown. The claimants worked in one Government Department, DEFRA, and the comparators worked in another, DETR. Different sets of terms and conditions were used in both departments.
30. The Court of Appeal held that the DEFRA claimants could not rely upon the DETR comparators, because, even though they had the same employer, there was no “single source” that determined their pay and conditions. This was because pay and conditions were a matter for Departmental decision. Responsibility was delegated. This meant that there was no body which was responsible for the inequality and which could restore equal treatment. See judgment, para 29.

31. In **Robertson**, Mummery LJ described the test set out in paragraph 18 of Lawrence as being a “rather imprecise approach” (judgment, para 13). As paragraph 28 of **Robertson** Mummery agreed with the EAT which had said that the issue was whether there was a common responsibility for the terms and conditions. At paragraph 29, he said that the test is whether the terms and conditions are traceable to one source.
32. It is important to note that the circumstances in **Robertson** were extreme in that the delegation of the power to negotiate and set most aspects of pay of the civil servants employed in DEFRA was delegated by the Minister for the Civil Service to that department by a statutory instrument, an Order in Council, the Transfer of Functions Orders dated 26 March 1996 and 20 August 2001, made under section 1(2) and (5) of the Civil Service (Management Functions) Act 1992. It follows that the case was one in which the delegation of the power to set pay and conditions to a sub-division of the employer had been put into effect by operation of law.
33. The position was less clear-cut in **Armstrong**. In **Armstrong**, the two groups of workers worked at different hospitals within a NHS Trust. There was evidence that the Trust centrally had taken part in pay negotiations relating to both groups of workers, but that the final decisions had been made by the hospitals themselves. There was a dispute between the parties as to whether, on this evidence, it was the Trust or the constituent hospitals that were responsible for setting terms and conditions. The Court of Appeal said that the ET had to evaluate all of the relevant evidence and decide which side of the line the case fell. Arden LJ rejected the claimants’ submission that because there was some evidence of harmonisation of terms and conditions the tribunal could only properly conclude that the Trust had assumed responsibility for the terms and conditions of all the employees for the purposes of the **Robertson** test (judgment, para 30).
34. The Court of Appeal in **Armstrong** said that the test is not a “brightline” test: judgment, para 30. Rather, it is a question of fact and degree.
35. In **Potter v North Cumbria**, at paras 109-111, the EAT held that the ability of the respondent to harmonise terms and conditions meant that all of its employees had the same “single source” even though the Trust had not been responsible for the pay inequalities in the first place, which had resulted from the merger of several trusts. In **Wilkinson**, Lady Smith accepted that this was right, and so that she should have found in **Dumfries & Galloway** that the claimants could rely upon their nominated comparator, because they had the same employer.

### **Conclusion**

36. In light of **Potter** and **Wilkinson**, it is likely that it will be said in future that an employee of a local authority can select their comparator from any other employees of the same authority, even if they

are in different departments, establishments, or locations. This means, for example, that school-based claimants can select non-school based comparators, and White Book and Purple Book claimants can select Red Book comparators, even though they work in completely different parts of the Council.

37. The only group of claimants which is definitely left high and dry by the “comparator” requirement, consists of those who work in voluntary aided schools. This is because their employer is the governing body, not the LEA. Therefore, they do not have the same “single source” as the White Book or Red Book comparators. This was held to be the position in **Dolphin v Hartlepool/South Tyneside MBC v Anderson** (UKEAT 0559/05 and 0684/05, unreported, 9<sup>th</sup> August 2006).
38. There ought also to be an argument that the same applies to claimants who work in community schools, because, although they are employees of the LEA, the responsibility for setting their terms and conditions rests with the governing body, not the authority (School Staffing Regulations). By parity of reasoning with **Robertson v DEFRA**, one would have thought, this should mean that they do not have the same “single source” as those employed elsewhere in the Council. However, in **South Tyneside v Anderson**, the Court of Appeal rejected this argument, on the basis that the apparent freedom for governing bodies to decide on staff terms and conditions is an illusion and, in practice, terms and conditions are dictated by the LEA. There may be scope to challenge this conclusion in a particular case if the facts suggest otherwise.
39. Sometimes it has been argued that claimants can rely on comparators who have a different employer. This argument has been advanced because an early ECJ judgment have referred to comparators in the same establishment or service *Defrenne v Sabena* (No 2) (43/75) [1976] ECR 455 ECJ. In *South Ayrshire v Morton* [2002] IRLR 256, the Scottish Court of Session used the reference to “service” in para 22 of *Defrenne* to widen the meaning of “comparator”. The Court of Session held that a headteacher employed by one LEA was able to rely upon a comparator who was employed by a different LEA because both LEAs used the standard terms and conditions for headteachers which were used by LEAs throughout Scotland.
40. This is wrong. **Morton** was decided before **Lawrence** and must be regarded as being wrongly decided. A local authority worker cannot rely upon someone employed elsewhere in local government service because there will not be the same “single sources” that is responsible for the pay differential.

## **THE GMF DEFENCE**

### **The law**

41. An ET should adopt a five-stage analysis when considering the GMF defence:
42. **Stage One:** Are the reasons given by the Respondent for the pay differentials, ie the bonus

schemes, a sham or pretence, designed to disguise the true reason for the difference in pay, itself tainted by sex? If the answer is “Yes”, the GMF defence will fail. If the bonus schemes are not a sham, it will also follow that the reason for the difference in pay is not direct discrimination and the Tribunal must go on to Stage Two. (**Glasgow City Council v Marshall** [2000] ICR 196 (HL))

43. **Stage Two:** Disparate adverse impact. Were the particular Claimant jobs done predominantly by women and the particular comparator jobs done predominantly by men? This issue must be considered job by job. (**Enderby v Frenchay Health Authority** [1994] ICR 112 (ECJ)). In most local authority bonus cases, there is no question but there is a disparate impact.
44. **Stage Three:** if there is no disparate adverse impact. If there is no disparate adverse impact, the Respondent need only provide a material reason, not necessarily a good or objectively justified reason, for the difference in pay. If the Respondent has got this far, it will mean that it has shown that the bonus schemes were not a sham or pretence, and so it will inevitably have shown that there was such a reason. In other words, if there is no disparate adverse impact the GMF defence will succeed. (**Marshall**)
45. **Stage Four:** if there is a disparate adverse impact, is the difference in pay explained by a reason other than sex? If there is a disparate adverse impact, the next question is whether the difference in pay is explained by a reason other than sex, so that, despite the statistics, there is no sex-taint. If the answer is “Yes”, then, as with Stage Three, the Respondent need only provide a reason, not necessarily a good or justified reason, for the difference in pay (even mistake or incompetence would do). The very fact that the bonus schemes are not a sham or pretence means that this requirement is satisfied. Therefore, if the difference in pay is explained by a reason other than sex, the GMF defence will succeed. (**Marshall, Armstrong v Newcastle Upon Tyne NHS Hospital Trust** [2005] EWCA Civ 1608; [2006] IRLR 345; **Gibson v Sheffield City Council** [2010] EWCA Civ 63; [2010] ICR 708).
46. **Stage Five,** if there is a disparate adverse impact and the difference in pay is not explained by a reason other than sex, has the Respondent shown that the difference is objectively justified? If there is a disparate adverse impact, and the difference in pay is not explained by a reason other than sex, there will be prima facie indirect discrimination (ie sex taint), but this does not mean that the GMF defence automatically fails. Rather, it means that, in order for the GMF defence to succeed, the Respondent must show that the difference in pay is objectively justified, ie that it was a proportionate means of achieving a legitimate aim. (**Enderby** etc).

#### **STAGE ONE: SHAM**

47. In two high-profile recent cases, **Bridges v Bury MBC** and **Brennan v Sunderland MBC**, the ET

has held that the bonuses were no longer effective in promoting productivity and so were a sham. In **Bury**, at least, the ET found that the bonuses when originally introduced were genuine performance related bonuses, that the claimants' jobs were not suitable for such bonuses, and that there was no sex stereotyping involved in the selection of jobs to be given bonuses.

48. As mentioned above, both **Bury** and **Sunderland** will be heard by the EAT. The hearings will take place before the Local Government Conference, but it is inconceivable that the EAT will hand down judgment immediately.
49. The Councils' argument in both cases, in essence, is that the ET erred in law because a GMF defence falls at the "sham" hurdle only if the reason advanced by the respondent for the pay differential was deliberately intended to deceive and to conceal that the real reason for the difference in pay was simply the difference of sex. On the primary findings of fact made by the ET, that is not what happened in these cases. Rather, the ET directed itself that simply because the link with productivity had been broken over time, this meant that the schemes were a "sham" in the **Marshall** sense. In **Bury**, the ET specifically directed itself that it was irrelevant whether the pay differential was "tainted by sex".
50. By taking the short cut of finding, wrongly, that there was a sham, the ET in these cases have deprived the Councils of the opportunity of obtaining a finding that, despite the disparate impact, the GMF defence should succeed because there was no sex taint (Stage 4), or, alternatively, of a finding that even if there was a sex taint the pay differential between 2001 and 2007 (the relevant period) was objectively justified (Stage 5).
51. In fact, the approach taken by the ET in these cases means that a local authority can be liable for (massive) equal pay compensation if the ET thinks that the bonus, during the relevant period, was inefficient, or a bad idea, regardless of whether the pay differential had anything to do with sex discrimination. Arguably, this means that ETs are punishing local authorities for perceived incompetence or unfairness in their bonus arrangements. That is not the purpose of the Equal Pay Act, which is concerned only with sex discrimination: see **Strathclyde Regional Council v Wallace** [1988] ICR 205 (HL) at 210E-G; **Marshall** at 201 H-202F, per Lord Nicholls; **Villalba v Merrill Lynch Inc Co** [2007] ICR 469 (EAT), paras 183-184, and **Armstrong v Newcastle Upon Tyne NHS Hospital Trust**, at para 40.

**STAGE FOUR: ESTABLISHING THAT THE REASONS FOR THE PAY DIFFERENTIAL, EVEN IF NOT JUSTIFIED, HAVE NOTHING TO DO WITH SEX DISCRIMINATION**

52. This will often be the key plank in a local authority's defence. In many cases it is hard to succeed with the objective justification defence (Stage 5) because it will be hard to show that the bonuses are justified, even if they started off as valid Standard Minute Value performance related bonuses. The problem is that, very often, the performance of the bonus earners ceased to be measured,

and may even have been consolidated into basic pay. If the bonus is automatic, it is hard to argue that it nevertheless works as an incentive to work harder. The ET must assess whether the bonus is justified during the period to which the claim relates, which may be many years after the bonuses were first introduced.

53. There will often be a better argument that, even if the bonus was no longer serving its purpose, the fact remains that the reason why the comparators received it and the claimants did not has nothing to do with sex. So, for example, in **Bury**, the point can be made that the reason why the comparators received the bonuses and the claimants did not was that, in the past, the bonuses for the comparators were genuine and had no taint of sex discrimination. In other words, the comparators may have been lucky still to be receiving bonuses in recent years, but that luck had nothing to do with their gender. Again, in **Armstrong**, the claimants (hospital domestics) used to receive bonuses in the same way as their comparators (hospital porters) but then the introduction of the CCT regime meant that the domestic services had to be put out to tender. The Trust decided it had to reduce the claimants' pay in order to match the lower prevailing pay rates in the private sector, if it was to have any chance of winning the tender process. There was no need to do the same for the comparators, because there was no obligation to put their work out to tender.
54. The two leading authorities on Stage 4 (no sex taint, even if a disparate impact and no objective justification) are **Armstrong** and **Gibson v Sheffield City Council**.

#### **Armstrong No 1**

55. In the first ET hearing in **Armstrong**, having found that there was a disparate adverse impact, the ET went straight on to consider objective justification. It missed out Stage 4. The Court of Appeal held that they were wrong to do so (see Lady Arden at para 68).
56. The first judgment in the Court of Appeal was given by Arden LJ. At para 33 she said that:
- “It follows from the **Marshall** case that there is no need for an employer to provide justification for a disparity unless the disparity is due to sex discrimination. Miss Tether does not submit any different principle applies by virtue of Art 141.”
57. The clearest exposition of the relevant principle can be found in the judgment of Buxton LJ at para 110:

“110, As Lord Nicholls said at the end of the passage from Glasgow City Council v Marshall ....***if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity.*** That is the basis of the step by step approach explained by Arden LJ in her paragraph 32, above. Once disparate adverse impact has been established, the burden passes to the employer in respect of two issues. First, that the difference between the man's and the woman's contract is not discriminatory, in the sense of being attributable to a difference of gender. Second, if the employer cannot show that

the difference of treatment was not attributable to a difference of gender he must then demonstrate that there was nonetheless an objective justification for the difference between the woman's and the man's contract." (emphasis added)

58. Importantly, at paragraph 116, Buxton LJ makes clear that an employer can prove the absence of sex discrimination by contending that the difference in pay is due to incompetence or a failure to follow through a stated policy. It follows that, in the present case, if the Tribunal accepts that the reasons put forward by the Respondent for why the comparators received bonuses and the Claimants did not are genuine – those reasons not being the difference of sex – it must follow that the GMF defence is made out, even if the Tribunal does not think that the reasons are justified, and even if the Tribunal thinks that the Respondent's actions were misconceived or incompetent.

59. At para 127, set out above, Buxton LJ said that:

"I do not see how it can be said that a failure to deprive the male comparators of part of their income was discriminatory if the assumption is that their original receipt of that part of their income was not discriminatory."

### **Armstrong No 2**

60. When **Armstrong** was remitted to the ET, the ET rejected the GMF defence once again. This decision was appealed once again, and the EAT, presided over by the President, dismissed the Trust's appeal ([2010] ICR 674). An application to appeal to the Court of Appeal was rejected on the papers by Smith LJ and it is to be renewed orally on 7th September 2010. The writer is now leading counsel for the Trust and so can report on the outcome of the hearing in **Armstrong No 2** at the Conference.

61. In **Armstrong**, as stated above, the claimants' jobs had been subjected to CCT and the comparators had not. This had meant that the claimants' pay had to be brought in line with market forces and so was reduced below the level of the comparators' pay, via the removal of bonus. (see EAT, para 25). The Trust had argued that this was a reason that was not the reason of sex for the difference in pay and so that the GMF defence succeeded at Stage 4.

62. The EAT, whilst somewhat critical of the ET's analysis (see, eg, EAT, para 52), found that the ET was entitled to conclude that this reason was sex tainted and so that there was a need to provide objective justification. The sex taint arose because the ET found that the Trust's predecessor in 1985 had appreciated that the market rates to which it intended to move the claimant domestics were as low as they were because they were depressed by social and economic factors peculiar to women, and that it intended to pay those rates in that knowledge. In other words, the Trust

deliberately exploited the fact that the claimants were women in order to pay them low rates.

63. The EAT in **Armstrong No 2** does not challenge the reasoning in Armstrong No 1 that there may be no sex taint even if there is a disparate impact (see EAT, para 26). There is a helpful section in the **Armstrong No 2** judgment, paras 66-73 in which the EAT gives reason why this reasoning is correct (anticipating the reasoning of Smith LJ in **Gibson** which was handed down when the Armstrong No 2 judgment was in final draft). At para 70 in **Armstrong No 2**, the EAT said that “Findings of discrimination should not be made on a purely mechanistic basis”.
64. In **Armstrong No 2**, the EAT accepted that it was not enough, to find a sex taint leading to a requirement to provide objective justification, that the claimant group was mainly female and the comparator group was mainly male. There had to be some “additional element”. In fact (it will be argued on behalf of the Trust at the Court of Appeal), there was no additional element in that case. The ET appears to have made assumptions that the labour market in the North East at the relevant time was inherently discriminatory, but there was no evidence before it to support such a conclusion. There is no clear indication in the ET’s judgment in **Armstrong No 2** that the ET in fact took the view that management deliberately exploited sex discrimination in the labour market and, in any event, the GMF defence should not depend on the thought processes of management.
65. Much of the EAT’s reasoning in **Armstrong No 2** involved a consideration of the meaning and effect of the difficult House of Lords judgment in **Ratcliffe v North Yorkshire County Council** [1995] ICR 833 (CA)

### **Gibson**

66. In this case, the Court of Appeal held that an ET had been perverse to find that a pay differential that had a disparate adverse impact was sex tainted. See Smith LJ at para 54.

### ***The primary findings of fact in Gibson***

67. The key finding of primary fact in **Gibson**, which led to the finding that the conclusion of “no sex taint” was perverse, was that “it is correct that there were stereotypical assumptions that the claimants’ work was essentially “women’s work” and the comparators’ work considered man’s work” (citation from para 3.116 of the ET judgment, set out at para 12 of the Court of Appeal’s judgment).
68. The only difference between the comparators’ jobs and the claimants’ jobs which was advanced to explain the pay differential in Gibson was “measurability” (Pill LJ at paras 17 and 48). This was not enough to prevent the statistics demonstrating that there was a sex taint in circumstances where there was sex stereotyping (Pill LJ at para 52). Indeed, in **Gibson**, one of the comparator witnesses said that he was not even aware that he was in receipt of a performance related bonus.

***The analysis of the law by the Court of Appeal in Gibson***

69. Pill LJ did not find **Armstrong** an easy case (para 33 and 49), but was content to conclude that **Armstrong** had no application to the facts of **Gibson** (para 51).

70. Smith LJ went further than Pill LJ. She said at para 57 that:

“Unless and until the Supreme Court says otherwise, it is open to an employer to avoid the need for objective justification if he can show that, notwithstanding the statistics have been produced which show that the pay practice in question has an adverse impact upon women, that pay practice is not sex-tainted....I am convinced that this is correct.”

71. At para 59, Smith LJ said:

“There is an express opportunity for the employer to defend himself by showing that the pay differential was not due to the difference of sex.”

72. And at paragraph 66 she said:

“66. My conclusion is that whether the indirect discrimination arises in the field of pay or non-pay, it is always open to a defendant to demonstrate that, notwithstanding the appearance that the practice puts women at a particular disadvantage, in fact the apparent disadvantage has arisen due to factors which are wholly unrelated to gender.”

73. At para 67, Smith LJ describes the Stage 4 defence as being “an express defence of “nothing to do with sex”.

74. However, Smith LJ then went on to say that where the disadvantaged group is heavily dominated by women and the advantaged comparators are 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 (paras 68 and 71). She did accept, though, that there may be cases in which it will be possible for the employer to demonstrate that the adverse impact was not sex tainted.

75. Smith LJ warned that the guidance in **Armstrong** is readily misunderstood and that it does not mean that it is sufficient for an employer to show that there is a difference of pay which is not directly discriminatory in order to show that there is no sex-taint (paras 58 and 59). The employer must also show that there was no sex taint arising from indirect discrimination.

76. At para 68, Smith LJ said that, in carefully considering the “no sex taint” argument, this will entail “the giving of a historical explanation for how the pay arrangements came to be what they now are

and how the complainant (and women like her) came to be paid less than their comparators.”

77. Maurice Kay LJ said that he was convinced that **Armstrong** is correct. Like Smith LJ he said that an employer which is faced with ostensibly significant statistics will generally have a difficult task, but Maurice Kay LJ preferred to resist the language of exceptionality (paras 74 and 75).

### **Conclusion**

78. Contrary to first impressions, the “no sex taint” Stage 4 defence is still alive and kicking in local government cases, even after the **Gibson** judgment. However, the comments of the Court of Appeal show that the burden of demonstrating that there was no sex taint in relation to the pay differential will be a heavy one.

### **PAY PROTECTION**

79. This is the one chink of light for local authorities in the equal pay litigation. In the **Bury** case, the ET found that, even though there had been a breach of the Equal Pay Act in relation to the bonus schemes, the pay protection which was put in place to soften the blow for those whose bonuses were taken away was not a breach of the Act. Therefore, the claims relating to pay protection failed. A pay protection defence has also, very recently, succeeded in **Nicholls v Coventry City Council**.
80. The **Bury** claimants are appealing the conclusion on pay protection in that case. Again, this appeal will have been heard before the Conference takes place.

### **The law on pay protection**

81. The argument put forward by claimants in relation to pay protection is that, if it had not been for the historic discrimination which they have suffered, they too would have suffered a drop in pay when the bonuses were withdrawn, and so that the grant of protection to the comparators but not to them cannot be justified.
82. The leading authority is **Bainbridge/Surtees**. The Court of Appeal, [2009] ICR 133, rejected the Claimants’ submission that it was not possible ever to justify pay protection that perpetuates historic discrimination (see judgment paras 105, 113, and 130-135).
83. However, at paragraphs 106-107 the Court of Appeal explained that the historic discrimination meant that there was prima facie sex discrimination as between the White Book claimants and the former bonus-earning male comparators:
84. At paragraphs 172 and 173 of its judgment, the Court of Appeal made some important observations on the views on justification that had been expressed by the EAT in **Middlesbrough BC v Surtees**. At paragraph 108 of the Surtees judgment, the EAT had said:

'We consider given that the purpose of the scheme was to cushion employees from the potentially disastrous effects of a sudden drop in pay, the council was entitled to take the view that it should limit the benefit to those actually in that group and to exclude all others even if some of them ought to have been in the group. Unless the pay was actually being received, there was nothing to protect. We think that is itself sufficient justification, but it is reinforced by the fact that the need to reach a protected pay arrangement, with the agreement of the unions was crucial to the making of the job evaluation scheme. Any assessment of future costing would inevitably be highly speculative and would undermine the ability to obtain agreement for the scheme.'

85. Thus, the **Surtees** EAT highlighted (a) the need to reach a protected pay arrangement and (b) the fact that any assessment of future costing would be highly speculative and would undermine the ability to obtain agreement for the scheme. The Court of Appeal said, at para 173, "We would accept that, if the EAT had been the Tribunal of first instance, it would have been entitled to decide the issue of justification in this way."

86. At paragraph 175, the Court said:

"We accept that a large public employer might be able to demonstrate that the constraints on its finances were so pressing that it could not do other than it did and that it was justified in putting the need to cushion the men's pay reduction ahead of the need to bring the women up to parity with the men. But we do not accept that that result should be a foregone conclusion. The employer must be put to proof that what he had done was objectively justified in the individual case."

87. The Court of Appeal's judgment in **Bainbridge/Surtees** was considered by the EAT in **Pulham v Barking & Dagenham Council** [2010] ICR 333 (an age discrimination case). The analysis of the Court of Appeal in **Bainbridge/Surtees** was summarised at para 24 of Pulham. At footnote 9, the EAT said that "it is plain from **Bainbridge** [2009] ICR 133 that in principle it is open to an employer to seek to justify discriminatory pay protection arrangements on the basis that it would be disproportionately expensive to extend the benefits in question to all employees".

### **Conclusion**

88. Subject to the ruling in the **Bury** appeal (in which the judge is Underhill J, the same judge as in **Pulham**), it appears that there is scope for a local authority succeed with a GMF defence in relation to pay protection, even if it loses the bonus claims, on the basis that it would not have been possible to work out who else to give pay protection to (as it was not known who might have a good

bonus equal pay claim), and/or that it was obvious that it would have been prohibitively expensive to give pay protection to anyone other than the actual losers.

**MALE CLAIMANTS**

89. In **Hartlepool Borough Council v Llewellyn** [2009] ICR 1429, the EAT held that male claimants could succeed by making a comparison with female complaints who in turn had succeeded in their equal pay claims using other male comparators. The EAT went so far as to say that it had been an act of sex discrimination by one local authority to have made settlement offers to female claimants but not to have made the same offers to the male claimants.
90. The two local authorities involved in this case appealed it to the Court of Appeal. The hearing before the Court of Appeal was due to take place in late Spring 2010, but the cases settled and the appeal was withdrawn. Accordingly, EAT judgment is currently binding on ETs.

**September 2010**