

## **COLLOQUIUM:**

### **GENDER AND THE LAW**

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**St. Lucia,**

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Judicial Education Institute**

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## **GENDER EQUALITY IN THE WORKPLACE**

The aim of this paper is to share the experience of EU and UK law in its aim to eliminate gender inequality in the workplace and to chart developments of the law in this area.

### **Background**

1. Most, if not all, international human rights instruments include some prohibition against gender discrimination and make provision for gender equality to varying degrees either as a freestanding right or parasitic on other convention rights –the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (CESCR); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); International Labour Organisation Conventions; not to mention the regional instruments such as the European Convention on Human Rights (ECHR); European Social Charter of 1961 and revised Social Charter of 1996 and the Charter of Fundamental Rights of the European Union 2009; the American Covenant on Human Rights and the African Charter on Human and People's Rights; and the Arab Charter on Human Rights, adopted by the Council of the League of Arab States in 1994.
2. However it was only following the enactment of the Sex Discrimination Act 1975 and Equal Pay Act 1970 in the United Kingdom after effective campaigning by

the women's movement and trade unions and a general shift in attitudes towards the role of women in society that the legal rights became entrenched and brought home to the UK. The new laws were enthusiastically embraced by individuals and civil society stakeholders alike and a powerful Equal Opportunities Commission sought to publicise and embed the concept of gender equality through a national advertising campaign and test case litigation strategy. The UK legal rights were given European statutory underpin when the UK joined the European Union (EU) in 1971.

3. The effect of EU Community law has been dramatic. Gender equality rights were incorporated at the heart of the founding treaty and from the earliest directives. Article 119 of the Treaty of Rome 1958 obliged Member States to establish and maintain the principle of equal pay for equal work by men and women. There followed Directives binding as to their effect on all member states on both the right to equal treatment for men and women in the field of employment and vocational training<sup>1</sup> and equal pay for equal work between men and women<sup>2</sup>.
4. In discrimination law, as in every other area, the devil is in the detail, and the effect of EU law in the upward harmonisation of equality rights, was to extend the law in the UK considerably. This occurred in two ways. Firstly through the direct legal effect under the UK European Communities Act 1972 which had the effect of incorporating EU Treaties directly into UK law:

*“All such rights, powers, liabilities, obligations and restrictions from time to time created by or arising under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced and allowed accordingly.” s2(1)*

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<sup>1</sup> Directive 76/207 The Equal Treatment Directive

<sup>2</sup> Directive 75/117 The Equal Pay Directive

It therefore became the duty of all judges throughout the UK to strive to interpret domestic law so as to conform to EU law, including by adding words if necessary. It is only if the domestic legislation is incapable of bearing the meaning required of it in order to conform to EU law that a judge must follow the domestic law. Secondly, during the 1980s and 1990s in a series of cases before the Court of Justice of the European Union (CJEU) UK sex discrimination law was repeatedly found to be in breach of EU equality law, causing embarrassment for the then government and requiring a change to UK law. Examples include the artificial limiting of compensation for sex discrimination regardless of actual loss<sup>3</sup>; the failure to provide for interest to be paid in calculating compensation<sup>4</sup>; the failure of UK law to protect post-employment discrimination and retaliation for alleging sex discrimination<sup>5</sup>; the exclusion of pensions and redundancy payments from the definition of pay<sup>6</sup>; and most significantly, the narrow definition of equal work, which excluded work of equal value, and only encompassed like or similar work<sup>7</sup>.

5. The European Commission is empowered to take action against a member state if it considers the state has not fulfilled its obligations under the treaty.<sup>8</sup> The European Commission policed equality laws across the European Community which are seen as an important part of the level playing field the Community sought to establish – not only because gender equality was a founding principal of the Community, but also because compliant member states were alert to the risk of being undercut by another member state, thereby putting their businesses at a competitive disadvantage. The effective enforcement of the regulation of equality in employment was to be consistent throughout the EU.

## The present position

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<sup>3</sup> *Marshall v Southampton and South West Hampshire Area Health Authority* 152/84 [1986] ECR 723

<sup>4</sup> *Marshall v Southampton and South West Hampshire Area Health Authority (No. 2)* 271/91 [1993] ECR I-4367

<sup>5</sup> *Coote v Granada Hospitality Ltd* 185/97 [1998] ECR I-5199

<sup>6</sup> *Barber v GRE Assurance* 262/88 ECR I-6591

<sup>7</sup> *Commission v UK* 61/81 [1982] ECR 2601

<sup>8</sup> Article 226 EC

6. UK anti-discrimination law at work therefore developed in a piecemeal way, mainly led by Europe and from pressure from trade unions on the one hand and employers on the other. Europe continued to stress the importance of equality in the workplace in the area of gender and race and, more recently has extended protection to other protected characteristics such as disability, religion, belief, transgender and sexual orientation and age in the Framework Directive for Equal Treatment in Employment and Occupation of 2000<sup>9</sup> which member states were required to bring into force by 2006.
  
7. One of the last acts of the UK Labour government before losing power in 2010, was to overhaul, recast and harmonise the entire anti-discrimination legal framework. Judgments of the CJEU and domestic interpretation were incorporated, and a number of inconsistencies were ironed out. A single equality act was introduced to create a greater degree of uniformity across the protected characteristics, with an eye to simplification. In some areas, rights were strengthened and in all areas the language was simplified and modernised.<sup>10</sup> The new law consists of the Equality Act 2010, a statutory code of practice on equality in the workplace<sup>11</sup> and explanatory notes produced by parliament although of advisory assistance only. A new statutory equality body the Equality and Human rights Commission (EHRC) was established, replacing three separate bodies which had focussed on each of sex, race and disability discrimination respectively.
  
8. I shall now outline the structure and provisions of the Equality Act 2010 (EqA2010) insofar as it affects employment. A claim under the EqA2010 will have three components – it will allege that the treatment occurred in a proscribed

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<sup>9</sup> 2000/78/EC

<sup>10</sup> The substantive amendments to the anti-discrimination provisions mainly fall outside the field of employment and the protected characteristic of sex and are outside the scope of this paper.

<sup>11</sup> The EHRC have issued Codes of Practice on Employment, and Equal Pay and Services, Public Functions and Associations, as well as non-statutory guidance [The Codes are now available online at http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/](http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/).

context and manner bringing it within the jurisdiction of the Court or Tribunal – such as treatment in employment; it will identify the particular alleged type of prohibited conduct – the form of discrimination; and will complain of such conduct by reference to a protected characteristic.

### **The protected characteristic of sex**

9. The protected characteristic is being a man or a woman<sup>12</sup>.

### **Prohibited conduct**

10. There are 5 relevant forms of prohibited conduct: direct discrimination; indirect discrimination; harassment; victimisation and pregnancy/maternity discrimination.

### **Direct discrimination<sup>13</sup>**

11. Direct discrimination is less favourable treatment because of a person's sex: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."
12. There are two questions that need to be answered in order to decide whether a particular act amounts to direct discrimination:
- a. Did 'A' treat 'B' less favourably because of a protected characteristic, eg sex, race, where actual, perceived and whether belonging to the claimant or a person with whom s/he is associated (eg partner, son)
  - b. Would a person of a different sex, race, etc, (usually referred to as the "comparator" – actual or hypothetical) have been treated more favourably? Note that a comparator is not necessary in pregnancy and maternity leave cases.
13. To decide whether 'A' has treated 'B' 'less favourably' a comparison must be made with how 'A' has treated, or would treat, other people without B's protected

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<sup>12</sup> S.11EqA2010

<sup>13</sup> S.13EqA2010

characteristic, eg comparing how woman 'B' was treated compared to how a man in a similar situation was or would have been treated. Like must be compared with like (s23). If there is no actual comparator, a hypothetical comparator should be considered.

14. When making the comparison, between 'B' & others without B's protected characteristic, there must be 'no material difference between the circumstances relating to B and those others (s23). The relevant circumstances are those which 'A' takes into account when decided to treat the claimant and comparator as he does. The circumstances do not have to be precisely the same but they must not be materially difference. Characteristics that have no bearing on the way B was treated can be ignored.
  
15. In practice, these two questions are closely inter-related and may be impossible to separate one from the other (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285, HL, *Aylott v Stockton on Tees BC* [2010] IRLR 994). They can often be reduced to the single question: why was the claimant treated in the way she was? Was it because of a protected characteristic - sex. Once that is decided there should be no difficulty in deciding whether the treatment on that ground was less favourable than afforded to others.<sup>14</sup>
  
16. It is often helpful to consider how a person of the opposite sex would have been treated in materially similar circumstances – a hypothetical comparator – or in some cases there is an actual comparator whose treatment can be considered. For example in a recruitment case, where the claim concerns a failure to interview a female candidate for a job, the other application forms can be considered to assess

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<sup>14</sup> For discussion of direct discrimination see *James v Eastleigh Borough Council* [1990] IRLR 288 HL, *Nagarajan v London Regional Transport* [1999] IRLR 572 HL, *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 HL, *Amnesty International v Ahmed* [[2009] IRLR 884 EAT, *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2010] IRLR 136 SC and *Aylott* above.

if the candidate's gender explains her failure to be shortlisted. An actual comparator is not necessary however.

17. An important feature of direct discrimination is that it is incapable of justification, regardless of the explanation. An employer cannot, for example rely on the prejudices of his clients or customers to justify not employing a woman, whatever the consequences.
18. Motive is irrelevant – a well-meaning action in the workplace can amount to direct discrimination, such as repeated compliments on a person's figure or good looks, if she finds it offensive. Unwanted attention may not be seen as unwanted by the perpetrator, but his, or her, motive is beside the point. In *R v Governing Body of JFS and the Admission Appeal Panel of JFS*[2009] UKSC 1, [2010] IRLR 136 the Supreme Court held that 'grounds' (or basis) for the decision must be distinguished from the motive, thus:
  - a. Where the factual criteria which influenced the discriminator to act as he did were plain (as here) motive was not relevant and the respondent could not rely on the fact that the ground of discrimination was mandated by his religion [it is equally applicable to the protected characteristic of sex] .
  - b. Where the factual criteria influencing the discriminator are not clear, it is necessary to explore the mental processes of the discriminator in order to discover what facts led him to discrimination, i.e. what facts operated on his mind, not his motive.

### **Stereotyping is to be avoided**

19. In *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55 [2005] IRLR 115 the HL said:

*'The individual should not be assumed to hold the characteristics which 'A' associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most*

*men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it ... [I]f strength is a qualification, all applicants should be required to demonstrate that they qualify’.*

*... because people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence’*

Stereotyping of male and female roles at work continues to be commonplace. Men and women who do not conform to the traditional stereotype are frequently the target of criticism in the workplace. How often is decisiveness praised in a man and criticised as high handed and arrogant behaviour in a woman? Where men are described as clear and forthright, women are branded as aggressive. Likewise a woman may be praised for her gentleness, whilst a man with similar qualities may be criticised for weakness.

### **Pregnancy and maternity discrimination<sup>15</sup>**

20. Special protection is afforded to women on account of their unique role as childbearers and mothers during what is referred to as “the protected period” – which is during pregnancy and maternity leave. Unfavourable treatment because of the pregnancy or because of illness suffered by her as a result of it, as well as unfavourable treatment during maternity leave or in relation to the exercise of maternity leave rights and the right to return to work after maternity leave, constitutes pregnancy and maternity discrimination and is made unlawful if it occurs within the employment context.
21. No comparison with how a man would, or has been treated is necessary since their cases are not alike. “Different treatment is allowed or imposed in favour of and to protect female workers, in order to arrive at material and not formal equality, since that would constitute a denial of equality.”<sup>16</sup> EU law has been particularly strong in this area, ruling for example that the dismissal of an employee who discovered she

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<sup>15</sup> S.18EqA2010

<sup>16</sup> *CNAVTS v Thibault* Case C-136/95 [1999]ICR ECJ



was pregnant after she was hired specifically to provide maternity leave cover, constituted sex discrimination.<sup>17</sup>

22. Prior to the removal of the comparator provisions, complex comparisons with “sick men” were devised, to test whether there had been less favourable treatment. Now the focus is on the link between the pregnancy and maternity leave and the treatment. The consequences of the pregnancy, such as the need for time off, are viewed as inextricably linked to the pregnancy itself.<sup>18</sup> The question is whether the pregnancy/maternity leave is an effective cause of the treatment.<sup>19</sup>
23. The advance in protection in the area of pregnancy and maternity has been of great assistance in the aim of achieving equality between men and women at work. Pregnancy dismissals still account for a significant volume of the sex discrimination caseload of UK Employment Tribunals, particularly in the small employer fraternity. Amongst larger employers issues commonly arise following return from maternity leave and difficulties encountered on resuming a previous career trajectory.

### **Indirect discrimination**<sup>20</sup>

24. A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory in relation to a protected characteristic of B's.
25. For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:
  - a. A applies, or would apply, it to persons with whom B does not share the characteristic,

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<sup>17</sup> *Webb v EMO Air Cargo* [1993] IRLR 27

<sup>18</sup> See for example *Brown v Rentokil Ltd* C-394/96 [1998] IRLR 445 ECJ

<sup>19</sup> See *O'Neill v Governors of St Thomas More School* [1997] ICR 33 EAT

<sup>20</sup> S.19 EqA2010

- b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - c. it puts, or would put, B at that disadvantage, and
  - d. A cannot show it to be a proportionate means of achieving a legitimate aim.
26. Indirect discrimination is where *unjustified* practices, provisions or criteria disadvantage a group with a protected characteristic compared to a group who does not have this characteristic. Such as where an employer insists on only employing someone who can work full time when the position could easily be performed by two people in a job-share, since women are more likely to be disadvantaged and unable to work full time on account of caring responsibilities.
27. Indirect discrimination does not apply to pregnancy/maternity. Unfavourable treatment on grounds of pregnancy/maternity is direct pregnancy/maternity discrimination and indirect sex discrimination may provide an avenue of challenge.
28. It is not necessary to produce statistical evidence of group disadvantage, although it may be relevant to show the particular disadvantage; It is not necessary to show *why* the particular disadvantage occurs, though again this may be helpful evidence to show the impact.
29. It is necessary to choose a group for comparison purposes when considering whether there is a particular disadvantage to those with a particular characteristic.
30. In order for the PCP to be a proportionate means of achieving a legitimate aim, it must correspond to a 'real need' and be an 'appropriate' means of achieving the objective pursued and 'necessary' to that end.<sup>21</sup> The court must follow a structured approach to this proportionality test in that:
- a. the aim must be sufficiently important to justify the measure which disadvantages some groups,

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<sup>21</sup> *Bilka-Kaufhaus GmbH v Weber von Hartz* (Case 179/84) [1987] ICR 110 at 128.

- b. the measures designed to meet the objective must be rationally connected to that aim,
  - c. the means must be no more than is necessary to accomplish the objective, and
  - d. the interests of the affected individual and the wider community must be fairly balanced.<sup>22</sup>
31. It is relevant to consider if there was a non, or less, discriminatory way of achieving the legitimate aim.
32. Indirect sex discrimination has been used successfully to challenge less than pro-rata rights for part-time workers; informal recruitment practices that disadvantage women, such as through golf course chats and networking in exclusively male environments; promotion based solely on length of service; and redundancy selection criteria that disproportionately benefit men.

## Harassment<sup>23</sup>

33. There is now free-standing protection from sex harassment, which was previously considered to be a form of direct sex discrimination, with its own definition. The introduction of a separate cause of action for harassment arose as a result of amendments in the EU to the Equal Treatment Directive 2002/73/EC. There are three types of harassment:
- a. unwanted conduct by A related to sex, that has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant or violating her/his dignity.
  - b. unwanted conduct of a *sexual nature* where this has the same harassing purpose or effect as above;

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<sup>22</sup> *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2AC 167.

<sup>23</sup> S.26EqA2010

- c. less favourable treatment because the victim has either submitted or refused to submit to sexual harassment.
- 28. In deciding whether the conduct has the harassing 'effect' (if the purpose is not proved) account must be taken of:
  - a. the perception of B;
  - b. the other circumstances of the case; and
  - c. whether it is reasonable for the conduct to have that effect.
- 29. It is therefore partly an objective test. The victim does not have to possess the protected characteristic. Note the wider causation test of “related to” than “because of” for direct discrimination. Tribunals and courts will usually look in some detail at the surrounding circumstances – such as whether the complaint is against an equal colleague or a more senior employee to analyse the power relationship, any age differential, previous history, and sometimes, how the complainant has behaved in relation to his or her colleagues. If a female employee has been the initiator of inappropriate workplace conversation a tribunal will be less willing to accept that she has been offended when others have joined in. However courts and tribunals accept that behaviour may be welcome from some colleague and not others.
- 30. A single act is capable of amounting to sex harassment. There is no rule that it must have occurred previously or that the recipient has previously complained<sup>24</sup>.

### **Victimisation**<sup>25</sup>

- 31. A victimises B if A subjects B to a detriment because:
  - a. B does a protected act; or
  - b. A believes that B has done, or may do, a protected act.

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<sup>24</sup> *In situ Cleaning v Heads* [1995] IRLR 4 EAT

<sup>25</sup> S.27EqA2010

32. Protected acts are:
- a. bringing proceedings,
  - b. giving evidence or information in connection with proceedings under the Act,
  - c. doing any other thing for the purposes of or in connection with the Act,
  - d. making an allegation that A or another person has contravened the Act,
  - e. seeking, making or receiving a 'relevant pay disclosure' (under s 77(4)). This applies to a disclosure made to determine whether the employee is receiving lower pay because of a protected characteristic.
33. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.<sup>26</sup>
34. The anti-victimisation provisions are particularly important in the employment field where employment law and procedural law encourage the early resolution of disputes by use of internal procedures, so an employee is more likely to have made an allegation of sex discrimination as part of the grievance process.
35. The EqA removes the need for a comparator. It is immaterial whether the victim is male or female and whether or not the allegation of discrimination is made on behalf of the victim or another. Nor does it matter if the allegation is upheld, the protection arises as long as the allegation is made in good faith.

### **Post employment and former employment relationships**

36. Former employees are protected from the forms of discrimination set out above. It is particularly relevant in the provision of references, when past employers have been found to have provided a damaging reference for a former employee to a

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<sup>26</sup> S.27(30EqA2010

putative employer because of a previous complaint of sex discrimination, or when a former employee has spurned the advances of an employer.<sup>27</sup>

37. It is unlawful to discriminate against or harass a person after a relationship (covered by the EqA) has ended. It covers any former relationship in which the EqA prohibits one person from discriminating against another, egas employee or job applicant.

### **Instructing and causing discrimination<sup>28</sup>**

38. It is unlawful for A to instruct, cause or induce another person B to discriminate, harass or victimise a third person (C), or to attempt to do so. Proceedings can be brought by the EHRC or a person subjected to a detriment as a result of A's conduct.

### **Ancillary: liability, instructing/ aiding discrimination**

#### *Principals<sup>29</sup>*

39. Principals are liable for discrimination, harassment and victimisation carried out by their agents. It does not matter whether that thing is done with the principal's knowledge or approval.

#### *Agents<sup>30</sup>*

40. An agent is liable for any unlawful acts committed under a principal's authority, unless the principal has told the agent that the act is lawful and s/he reasonable believes this to be true.

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<sup>27</sup> S.108EqA2010

<sup>28</sup> S.111EqA2010

<sup>29</sup> S.109EqA2010

<sup>30</sup> S.110EqA2010

### **Instructing, causing or inducing contraventions**<sup>31</sup>

41. It is also unlawful for a person to instruct, cause or induce someone to discriminate against, harass or victimise another person, or to attempt to do so. This only applies where the person giving instructions is in a relationship with the recipient of the instruction. If the recipient suffers a detriment as a result of the instruction s/he has a remedy as well as the victim.

### **Aiding another to discriminate**<sup>32</sup>

42. It is unlawful for a person knowingly to help another person to discriminate, unless the former reasonably relied on the latter's statement that he or she was not breaching the EqA. Aiding means helping, assisting, co-operating or collaborating with the other. The help need not be substantial or productive (see *Anyanwu v South Bank Students Union* [2001] IRLR 305, HL. A general attitude of helpfulness is not sufficient (*Hallam v Cheltenham Borough Council* [2001] IRLR 312 HL) nor is allowing a particular environment to exist (*May & Baker Ltd t/a Sanofi-Aventis Pharma v Okerago* [2010] IRLR 394 EAT).

### **The context of the conduct: The field of employment**

42. All employees, workers, trainees, apprentices, police, prison officers, Crown employees and other office holders are within the scope of the Equality Act 2010. The Armed Forces, contract workers, Ministers of Religion and House of Commons and House of Lords staff are also covered as are trainee and qualified Barristers and Advocates and partners in a law or any other firm.<sup>33</sup> The wide definition of employment includes all but the genuinely self employed and the comprehensive scope of the EqA2010 is seen as a strength. There is currently a case before the UK Supreme Court as to whether unpaid volunteers without a

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<sup>31</sup> S.111EqA2010

<sup>32</sup> S112EqA2010

<sup>33</sup> Ss.39-56 EqA2010

contract with the employer are protected from sex and other forms of discrimination.<sup>34</sup>

43. Job applicants are also protected from the forms of discrimination and harassment set out in EqA2010 since its scope encompasses all “arrangements” for offering employment.<sup>35</sup> Recruitment procedures that disadvantage women, skewed selection criteria and tests and discrimination in interviews are all prohibited by the Act.
44. Since discrimination, harassment and victimisation are statutory torts the protection from the Act extends beyond contractual terms to issues of treatment during, prior to and post employment. It therefore encompasses promotions, transfer and training as well as benefits, facilities and services. The law protects women and men from discrimination in dismissal and “any other detriment” detriment has been given a wide meaning and is not limited to economic disadvantage and a detriment “exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his or her detriment” (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

### **Dress Codes and Appearance cases**

45. Where employers have dress codes they are not always identical for men and women. Courts have resolved the dilemma of gender specific dress codes – for example a requirement for men to wear ties or a prohibition on men wearing earrings and long hair, by assessing whether differential dress codes between men and women are imposed to an equal degree on men and women. Thus even where restrictions are not identical for both sexes, provided the dress code imposed is comparable between the sexes the code will not breach sex equality legislation. Where the code is more onerous to one sex than the other – for example where a

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<sup>34</sup> *X v Mid Sussex CAB* [2011] Civ 28 CA

<sup>35</sup> Ss.39EqA2010



woman was dismissed for wearing trousers in circumstances where the employer imposed no equivalent dress or appearance rule on male employees it is likely to amount to discrimination (*Stone on Trent Community Transport v Creswell [EAT] 359/93, 1994*).

### **Positive discrimination**

46. The law allows for positive action in very limited circumstances.<sup>36</sup> If an employer reasonably considers that women, or indeed men, suffer a disadvantage connected to their gender or there are disproportionately fewer of one gender than another in an activity, the employer may encourage applicants from the disadvantaged or under-represented sex – both in terms of recruitment and promotion. But the employer may only treat someone more favourably if she (or he as the case may be) is equally qualified to be recruited or promoted as a man (or woman), it is not part of a wider policy, and the appointment of the woman (or man) will aid participation by the under represented sex, or overcome or minimise the disadvantage. In other words, it is only in cases of a genuine tie-break, that positive action can be used to advance women’s rights at work.

### **Equal Pay**

47. Both UK and European law distinguishes between issues of treatment in and access to employment and equal pay in contractual terms although the law is intended to be a seamless whole embracing sex equality in contractual terms and treatment.
48. EqA2010 implies an equality clause into the contract of employment of all employees engaged on equal work and extends not just to pay but all contractual terms – “the sex equality clause”.<sup>37</sup> All elements of remuneration – wages, bonuses, shift payments, overtime, service pay, holidays, contractual redundancy

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<sup>36</sup> S.159 EqA2010

<sup>37</sup> S.66 EqA2010

payments and mortgages have been held to come within the sex equality clause. All employees come within the scope of the Act.

49. A woman can claim equal pay and contractual terms with a man who is employed by the same or an associated employer who works in the same establishment or one in which similar terms and conditions apply and who is engaged in like work or work of equal value to her or work that has been rated as equivalent under a job evaluation scheme<sup>38</sup>.
50. It is necessary to have an actual comparator and the court will analyse the extent of the similarity between the woman and the man's job and the extent to which the work is of equal value. The claimant and her comparator do not have to be employed simultaneously and a comparison may be made with a successor and, possibly a predecessor.
51. If equality is established and there is a difference in pay or any contractual term an employer may objectively justify the pay differential if it can demonstrate that there is a genuine and material difference (other than sex) that explains the difference in pay. The employer must show the factual basis for the difference and the relevance of the factor relied on and that the pay difference is proportionate having regard to the reason shown.
52. Examples of material factor defences have been merit or performance pay; productivity, training; skills, experience or qualifications; length of service; market forces factors; flexibility; and working conditions.
53. Equal pay law was successful in challenging differential pay rates between part and full time workers and the exclusion of part time workers, mainly women, from pension schemes. It has successfully challenged differential pay rates in jobs traditionally seen as female work – caring, cleaning, cooking and traditionally male manual roles – such as gardening, refuse collection and maintenance. There

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<sup>38</sup> S.65EqA2010

is currently extensive ongoing litigation in the health sector, local government and central government sector in the UK.

### **Equal pay during pregnancy and maternity**

54. During maternity leave a woman is entitled to the same pay rises as would have been applicable had she not been absent on maternity leave.<sup>39</sup> The provisions are complex and the detail is outside the scope of this paper, but broadly speaking statutory maternity pay partly depends on length of service and employers often provide more generous contractual maternity pay. If an employee is on paid maternity leave and her pay is linked to pre-maternity pay, she is entitled to whatever pay rises she would have received had she been at work. When she returns to work she is entitled to the benefit of any pay rises awarded to others engaged on equal work, so that she is not detrimentally affected on account of her absence. UK law provides for statutory maternity leave of up to 52 weeks, of which 39 weeks may be paid by state benefit – Statutory Maternity Pay (SMP) or for employees with less service and government contributions in the form of national Insurance a Maternity Allowance.

### **Employer Liability**

55. Employers are liable for the discriminatory acts of their employees and managers. A broad interpretation of vicarious liability has been applied so that employers have been found liable for acts of sex harassment at office parties outside the work place and on residential training courses. It is sometimes however a fine line between “employment” and off duty conduct, but courts have tended to take a liberal interpretation.

56. An employer’s defence arises if the employer can show that it has taken such steps as were reasonably practicable to prevent employees committing a particular discriminatory act or committing such acts in general. The burden is on the

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<sup>39</sup> S.74EqA2010

employer to establish the defence and the employer must show that the steps were taken prior to the alleged act – remedial steps thereafter are insufficient. A rigorous equal opportunities policy, adopted and endorsed at high level in an organisation and appropriate training of staff and supervision have been held to be sufficient.<sup>40</sup> A court will assess whether there were any preventative steps taken by the employer and, secondly whether there were any further preventative steps that the employer could have taken that were reasonably practicable in order to assess whether the defence has been made out.

## Remedies

57. The remedial powers of Courts and Tribunals include the power to make recommendations as well as compensation.
58. Compensation is assessed on normal tortious principles to compensate the Claimant for financial loss, such as loss of earnings following a sex discriminatory dismissal and to award some small injury to feelings. Three bands have been developed for assessing injury to feeling compensation: a top band for the most serious cases – for example after a lengthy campaign of discriminatory harassment on grounds of sex of £18,000 to £30,000. A middle band of between £6,000 and £18,000 for serious cases that do not merit an award in the highest band and a lower band of between £500 and £6,000 for less serious cases, such as where an act of discrimination is an isolated or one off occurrence<sup>41</sup>. Awards of less than £750 should be avoided as they risk being regarded as so low as to not be a proper recognition of injury to feelings.
59. Aggravated damages are available where the conduct of the discriminator at any stage – including their conduct at the hearing itself, can be awarded where the behaviour of the employer has aggravated the injury caused to the Claimant.

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<sup>40</sup> *Balogun v LB Tower Hamlets*

<sup>41</sup> *Da'Bell v NSPCC* [201]IRLR 19 and *Vento v W Yorkshre Chief of Police* [2003]IRLR102 CA

60. In rare circumstances exemplary damages are available aimed at punishing the wrongdoer where there has been conduct by servants of government that is oppressive, arbitrary or unconstitutional, conduct in the Respondent has been designed to be self profiting and damages have been specifically authorised by statute. Such awards are extremely rare.
61. Interest is calculated on awards made.
62. There is no upper ceiling on compensation available thus enabling Courts and Tribunals to award compensation at full value. In the case of senior employees and employees who have lost secure employment (such as in the Armed Forces or Police Force) because of discrimination have received substantial compensation – awards for several million pounds are not unknown.

### **Recommendations**

63. Courts and Tribunals also have power to make recommendations to require the employer to take action for the purpose of obviating or reducing the adverse effect on the complainant of any discrimination to which the complaint relates, within a specified period. If a recommendation is made and without reasonable justification the employer fails to comply with it then the Court or Tribunal may increase the amount of any compensatory award if it is just and equitable to do so. Examples of recommendations include publicising the Tribunal's decision and findings of discrimination, allowing a woman to return part-time after maternity leave; requiring a written apology to the worker; removing discriminatory documents such as warnings or appraisals from the employee's personnel file; a requirement to attend a discrimination awareness course for an individual discriminator; to take steps to improve and implement an equal opportunities policy.
64. Courts and Tribunals also make declarations – a statement declaring the rights of the complainant and Respondent.

## Conclusion

65. As I hope I have demonstrated, on paper UK law is clear and comprehensive in seeking to eliminate gender inequality in the workplace. The statistics however show that stubborn differences remain at all levels – from board room participation – the FTSE 100 index has as few women board members as has ever been the case, to the pay of manual staff – women’s pay lags 15% behind that of men. However in 40 years of equal pay legislation the pay gap has narrowed from 34%.<sup>42</sup> Economists have calculated that on average women forfeit approximately £50,000 over a life time’s earnings if they have children whereas fathers do not.
66. It is puzzling that whilst female academic and educational achievement is now the equal to, if not greater than, that their male peers, this has yet to translate into equality in the workplace. It is partly a question of time, but progress is slow – on current calculations it will take female managers 57 years to achieve equal pay to their male counterparts.<sup>43</sup> In the meantime, the Equality Act 2010 provides a solid statutory framework to tackle issues of discrimination in the workplace.

Mary Stacey,

Employment Judge and Civil and Criminal Recorder

London

7<sup>th</sup> November 2011

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<sup>42</sup> [www.ehrc.org.uk](http://www.ehrc.org.uk) and <http://www.bbc.co.uk/news/uk-11015445>

<sup>43</sup> Chartered Institute for Personnel and Development (CIPD) 2011 survey