Coventry City Council

7.2.6

Public report

Report to
Cabinet 11th March 2008
Council 18th March 2008

Report of Chief Executive and Director of Customer and Workforce Services

Title: Equal Pay Claims - Employment Tribunal Judgement

1. **Purpose**

1.1 To report to Cabinet the outcome of equal pay claims case Ms Nicholls and others vs Coventry City Council heard by the Birmingham Employment Tribunal during September – December 2007and seek agreement to taking forward an Appeal against parts of the Tribunal judgement. This report needs to be read in conjunction with the associated private report on this agenda on the legal advice to the Council.

2. **Recommendation:**

2.1 Note the outcome of the Employment Tribunal and its implications for the Council

2.2 Agree the taking forward of an Appeal against parts of the Tribunal judgement.

3. **Background**

3.1 Following the job evaluation exercise and subsequent introduction of Single Status in June 2005, in December 2005 the Birmingham Employment Tribunal started to receive claims for equal pay against the council, claiming that the Council had breached an equality clause in the Equal Pay Act 1970. The claimants were members of Unison and Unite (Amicus and the T&G).

3.2 Claims continued into 2006 and there are still a small number being received regularly. We currently have 652 equal pay claims. In addition to the volume of the claims, rather than quote one comparator against whom the claimant is comparing their difference in pay a large number of the claims are quoting multiple comparators which makes the claims more complex. Of the claims 489 quoted refuse workers as a comparator. Of that number approximately 250 compared themselves only to refuse workers.

3.3 The Tribunal decided in consultation with both parties

a) to 'bundle' claims together on the basis of their comparators and
b) to hear the claims where claimants were citing refuse as a comparator either in isolation or a part of a group first.

3.4 The basis of the Tribunal was that the unions were challenging the council on:

- Whether it was sex discrimination to have a bonus scheme in the refuse service (before Single Status) which did not apply to some other services employing more women;

- Whether the Council's pay protection scheme (implemented as part of Single Status) should apply to the "gainers" as well as the "losers";

In addition to hearing the Council's defence on these two points, the Tribunal also agreed to hear an overarching argument put by the Council, which would have created a new potential defence, as follows:

- Whether the Council had a defence against equal pay claims (in connection with pay arrangements before Single Status) because of the efforts it had made over so many years to implement Single Status.

Using the comparator of the refuse scheme would determine the largest number of claims in one go. The Tribunal also determined that it would hear the case in relation to the Council's 'genuine material factor' defence in respect of all of these claims before hearing any of the individual equal pay claims.

3.5 The council received the ET judgement on 15 February and has until 27 March 2008 to appeal against any part of the judgement. The Trade Union may also appeal against the judgement in the same timescale. The Council received legal advice on the outcome of the judgement on 29 February. The reason for this urgent item at Cabinet is to put before Cabinet at the first opportunity the outcome of the Tribunal and the options based on this legal advice regarding appealing this decision. Taking the report at this time enables this report to be debated at full Council on 18 March 2008.

4. **Tribunal**

4.1 The Tribunal sat for 24 days during September – December 2007, hearing evidence from six witnesses for the council and two union witnesses. On Friday 18 February the Council received the judgement of the Tribunal. Elected Members and staff were provided with a summary of the judgement and the full judgement was posted onto the Council's website (attached at appendix 1)

4.2 The judgment from the Tribunal found in part for the claimants and in part, for the Council. Taking each of the three areas of defence in turn:

- **Refuse Bonus Scheme** - The claimants alleged that female workers in different services were unfairly paid less than the (male) refuse workers because of their gender. In other words claiming the refuse workers were paid more (i.e. a bonus) because they were men. The Council explained that this was not the case; the refuse bonus was put in place to improve the refuse service by incentivising and rewarding better productivity and performance. The Tribunal agreed that the Council's refuse bonus scheme, (put in place in 1999), was a genuine, transparent and well monitored scheme that was about delivering a better service through increased productivity. This bonus scheme along with all others was abolished on the introduction of Single Status in 2005 which implemented pay equality. However the Tribunal determined that, the Council should at least have considered alternative methods of achieving its management objectives other than by payment of a bonus and also considered whether it could apply similar schemes to groups of employees with a bigger female workforce and therefore found against the Council in this instance.

- **Pay Protection** - In addition to their claim for back pay, the claimants also claimed a sum equivalent to the pay protection the Council had paid the 'losers' in Single Status in order to cushion them from the pay reduction they received under Single Status. The claimants lost this argument. The Tribunal upheld the application of the Council's pay protection scheme which was introduced as part of the Single Status arrangements to protect the pay of those employees who had been re-graded at a lower level. Had the Tribunal found against the council in respect of Pay Protection there would have been a large potential financial liability.

- **Overarching defence** – The Council put forward an overall defence of the claims to the effect that the Council would not have been in receipt of these claims had it not been for the frustration of the trade union during the many years of negotiation to get a collective agreement and introduce Single Status. This would have been a new defence in law and would have set a significant precedent for local authorities and other employers. The Council had a significant weight of evidence on this issue but the Tribunal were not persuaded of this argument and considered that the reasonable efforts made over many years by the Council were not a relevant consideration under the Equal Pay Act.

5. **Current situation**

5.1 It is important to point out that at this stage the Council does not yet face any financial liability as no successful equal pay claims have yet been made. The Tribunal has only heard the general defence against these claims as opposed to the individual defence on each claim. Claimants have yet to demonstrate on an individual basis that they are entitled to equal pay. The judgment does potentially mean that at least some of the claimants may now be able to succeed with their claims, if they can prove to the Tribunal that they have an equal value claim for back pay against the Council or that their jobs were rated equivalent to refuse posts previously under a valid job evaluation scheme. The Tribunal will then make a decision on each claim and this will require a separate hearing or hearings.

5.2 Potential liability pre June 2005 is for back pay. The maximum potential liability under the EqPA is for six years. However this period runs from the date the claim was submitted so for the majority of the claims this will be a maximum of 5.5 years, as the claims were submitted in February 2006 and there is no liability for the period from June 2005 after Single Status was implemented. However about 150 claims were not submitted until more than 12 months later, and therefore for those claimants the maximum would be 4.5 years. In any event the claimant would have to show that their work was either rated as equivalent or of equal value for the entire period of back pay claimed.

What the Claimants Must Prove

5.3 In order to understand how many of the claimants are likely to take their claims further and be able to establish that they are entitled to back pay, we need to analyse two issues. Firstly we need to understand which claimants, if any, were rated under a previous valid job evaluation scheme at the same grade or higher than the refuse comparators, but were paid less than the refuse comparators prior to June 2005. If the Claimants cannot show that they were rated as equivalent before June 2005 under a valid job evaluation scheme, then the alternative way of showing entitlement to back pay, is to prove that they were doing work of equal value prior to that date. Normally establishing equal value is quite an arduous process in the Tribunal with special rules governing the appointment of an independent expert to report to the Tribunal on the claimants jobs and the comparators jobs to assist the Tribunal in deciding whether the work was of equal value or not. The claimants would need to

demonstrate the work of equal value case. They are likely to seek to use the work undertaken in the council's job evaluation scheme.

6. **Legal Advice on Appeal**

6.1 The Council's external legal advisors including the QC who represented the Council at Tribunal have provided an assessment of the merits of appealing the aspects of the judgement that the Tribunal found against the council. Counsel's advice is that there are issues of law which remain contestable i.e.

- Whether the Council has an overarching defence to the claims for equal pay
- Whether it was sex discrimination to have a bonus scheme (before Single Status) in the refuse service which did not apply to other services employing more women.

The overall conclusion at point 27 of the advice note is that the Council could consider an appeal as being worthwhile, given the limited costs of appeal and balancing the risk of cross appeal from the Trade Unions.

6.2 The counsel's full legal advice is available to councillors in a private report later on this agenda, for reasons of protection of the council's position in any impending legal case.

7 Key Issues

7.1 The key issue is whether the Council should appeal against the judgements on the over-arching defence and sex discrimination in relation to the refuse bonus.

7.2 After careful consideration by senior officers including the Head of Legal Services Designate the recommendation to elected members is that the Council should appeal. This advice is being given after considerable thought following receipt of the full barrister's advice on 29 February 2008. The main reason for this is to continue to defend the potential costs to the Council taxpayer of any future liability. As stated before these could clearly amount to several million pounds depending on the number of claims which were demonstrable breaches of equal pay legislation in the eyes of the court. We believe

a) that the Council more than demonstrated its good faith in seeking to resolve the problems of equal pay

and

b) that the Tribunal findings in relation to the refuse bonus scheme went against what was demonstrable in the case, particularly as the Tribunal itself confirmed that the scheme itself was robust.

The legal fees for the Appeal are likely to be no more than £50k, which, even when added to the legal expenditure to date of £535k, weighed against the potential liability to the Council, make the expenditure worthwhile.

7.3 Alternative Option 1 is to await trade union pursuit of the equal pay claims through the courts following the judgement. However given the legal advice , the positive findings of the Tribunal in relation to the transparency and defensibility of the refuse bonus scheme and the Council's responsibility to minimise the financial burden to the council tax payer, officers would advise continuing to pursue the issue through to Appeal stage on both the overarching defence and the issue of sex discrimination.

7.4. Alternative Option 2 would be to seek to reach agreement with trades unions without resorting to further Appeal. Given the legal advice in relation to the Council's case and the

previous experience of failure to reach any settlement officers would not advise seeking to settle without testing the ET judgement against Appeal.

8 Other specific implications

	Implications (See below)	No Implications
Best Value	☒	
Children and Young People		☒
Climate Change & Sustainable Development		☒
Comparable Benchmark Data		☒
Corporate Parenting		☒
Coventry Community Plan		☒
Crime and Disorder		☒
Equal Opportunities	☒	
Finance	☒	
Health and Safety		☒
Human Resources	☒	
Human Rights Act		☒
Impact on Partner Organisations		☒
Information and Communications Technology		☒
Legal Implications	☒	
Neighbourhood Management		☒
Property Implications		☒
Race Equality Scheme		☒
Risk Management	☒	
Trade Union Consultation	☒	
Voluntary Sector – The Coventry Compact		☒

8.1 Best Value

The report seeks to set out best value considerations

8.2 Finance

The Council has to date incurred costs of £535k on defending this phase of equal pay claims. The proposal to appeal against the ET judgement will incur up to £50K in external legal fees to prepare and present the Appeal.

8.3 Human Resources

Following the introduction of Single Status, the Council received claims that the Council had breached an equality clause in the Equal Pay Act 1970. The claims which cited refuse employees in receipt of the Refuse Bonus Scheme were cited as comparators, these claims have been defended in the Tribunal and are now subject to appeal.

8.4 Risk Management

Legal risks of pursuing the Appeal in have been assessed by the barrister. While clearly there could be a risk that the judgement which went in favour of the Council on pay protection could be overturned , this is judged by the barrister to be a low risk.

The risks of pursuing this Appeal needs to be assessed against the outcome if the Council were successful in its over-arching defence which would be that all claims for unequal pay would fail. If this were not successful but the Council was successful in its challenge to the judgement in relation to the refuse bonus then several hundred claims would be dismissed thus reducing the Council's liability.

If the council is unsuccessful in its Appeal it will then have to consider whether to go through court processes in response to trade unions, or whether to seek to settle.

8.5 Trade Union Consultation

The Trade Unions can also appeal against any part of the judgement within the same timescale. This issue has not been consulted on with trade unions given the nature of the legal case.

8.6 Legal

The Council has sought appropriate expert legal advice on this issue .

9 Monitoring

9.1 Monitoring of progress will be undertaken through the leadership of the council and through the Cabinet Member (Customer,Workforce and Legal Services)

10 Timescale and expected outcomes

10.1 The Council has until 27 March 2008 to lodge an appeal against the ET judgement. Possible outcomes are set out above

	Yes	No
Key Decision		**x**
Scrutiny Consideration (if yes, which Scrutiny meeting and date)		**x**
Council Consideration (if yes, date of Council meeting)	**18 March 2008**	

List of background papers

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Papers open to Public Inspection

Description of paper	**Location**

(Reserved Judgment)

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs M Nichols and others	**AND**	Coventry City Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 24 – 28 September 2007 inclusive
1, 2, 4, 5, 8, 9, 11, 12, 15 October 2007
7, 11, 13, 14 December 2007
17 – 20 December 2007 inclusive
7 January 2008

EMPLOYMENT JUDGE Mr C P Rostant **MEMBERS** Mr K Thaper
Mrs J Williams

Representation

For the Claimants: Ms K Rayner and Ms I Omambala both of counsel
For the Respondent: Mr A Lynch QC

JUDGMENT

It is the unanimous judgment of the tribunal that:

1) The respondent has failed to show that the variation between the claimants' contracts and that of their male comparators, whilst accounted for by the refuse workers bonus scheme is genuinely due to a material factor which is not the difference of sex.

2) The respondent has shown that the variation between the claimants' contracts and that of their male comparators, whilst accounted for by protected pay is genuinely due to a material factor which is not the difference of sex.

REASONS

1. **Background to the claims**

The following is the agreed factual backdrop to these claims.

1.1 In 1997 Local Authorities and Trades Unions nationally agreed to implement a unified pay and conditions structure for local government employees known as Single Status. This entailed subjecting all posts to a job evaluation survey (JES) and from that point onward Coventry City Council sought to obtain a negotiated agreement with the trades unions representing the majority of its workforce. To that end, agreement was reached in 2001 on a

pay protection package of five years for losers. Despite this agreement, no final agreement on single status was ever achieved.

1.2 In June 2005, no negotiated agreement having been reached with the trades unions, the respondent imposed Single Status, having concluded that it was now able to do so lawfully.

1.3 In February 2006, the claimants presented their claims to the tribunal complaining that there had been a breach of an equality clause because they were in jobs rated as equivalent or, in the alternative, jobs of equal value to those done by their chosen male comparators.

1.4 The 500 claimants are all employed in jobs where it is agreed that in the great majority of the employees in these jobs are women.

1.5 Amongst others, the claimants compare themselves with refuse workers.

1.6 The respondent employs staff in its domestic refuse collection service and also in its commercial waste collection service. The former staff had their pay determined by an agreement entered into between the respondent and the relevant trades unions at the time of a successful compulsory competitive tender (CCT) by the respondent's direct labour organisation (DLO) in the early 1990s (the pre-1999 scheme) and subsequently by an agreement for a successful Best Value tender in 1999, (the 1999 scheme).

1.7 The respondent contends, without conceding any issues raised by Section 1(2), that there are genuine material factors (GMF) explaining any difference in pay.

2. The Law

2.1 The relevant parts of Section 1 Equal Pay Act 1970 (the Act) provide as follows

1. Requirement of equal treatment for men and women in same employment

[(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that—

(a) where the woman is employed on like work with a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the

contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term;

[(c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term];

[(d) where—

(i) any term of the woman's contract regulating maternity-related pay provides for any of her maternity-related pay to be calculated by reference to her pay at a particular time,

(ii) after that time (but before the end of the statutory maternity leave period) her pay is increased, or would have increased had she not been on statutory maternity leave, and

(iii) the maternity-related pay is neither what her pay would have been had she not been on statutory maternity leave nor the difference between what her pay would have been had she not been on statutory maternity leave and any statutory maternity pay to which she is entitled,

if (apart from the equality clause) the terms of the woman's contract do not provide for the increase to be taken into account for the purpose of calculating

the maternity-related pay, the term mentioned in sub-paragraph (i) above shall be treated as so modified as to provide for the increase to be taken into account for that purpose;

(e) if (apart from the equality clause) the terms of the woman's contract as to—

(i) pay (including pay by way of bonus) in respect of times before she begins to be on statutory maternity leave,

(ii) pay by way of bonus in respect of times when she is absent from work in consequence of the prohibition in section 72(1) of the Employment Rights Act 1996 (compulsory maternity leave), or

(iii) pay by way of bonus in respect of times after she returns to work following her having been on statutory maternity leave,

do not provide for such pay to be paid when it would be paid but for her having time off on statutory maternity leave, the woman's contract shall be treated as including a term providing for such pay to be paid when ordinarily it would be paid;

(f) if (apart from the equality clause) the terms of the woman's contract regulating her pay after returning to work following her having been on statutory maternity leave provide for any of that pay to be calculated without taking into account any amount by which her pay would have increased had she not been on statutory maternity leave, the woman's contract shall be treated as including a term providing for the increase to be taken into account in calculating that pay].]

[(3) [An equality clause falling within subsection (2)(a), (b) or (c) above shall not] operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor—

(a) in the case of an equality clause falling within subsection (2)(a) or (b) above, must be a material difference between the woman's case and the man's; and

(b) in the case of an equality clause falling within subsection (2)(c) above, may be such a material difference.]

(4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.

(5) A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, in terms of the demand made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to

evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading.

2.2 Article 141 of the Treaty Establishing the European Community provides as follows.

1. Each Member State shall ensure the principals of equal pay for male and female workers for equal work or work of equal value is applied.

2. ……..

3. **The relevant authorities**

In the course of the three sets of submissions made by the parties the following cases were referred to

Brunnhofer v Bank der osterreichichen Postparkasse AG [2001]IRLR 571
Enderby v Frenchay Health Authority and Secretary of State for Health [1993] 591
Strathclyde Regional Council v Wallace [1998] ICR 205
Tyldesley v TML Plastics ltd [1996] IRLR 35
Glasgow City Council v Marshall [2000] IRLR 272
Armstrong v Newcastle upon Tyne NHS Hospital Trust [2000] IRLR 124
Parliamentary Commissioner for Administration v Fernandez [2004] IRLR 22
Sharp v Caledonia Group Services [2006] IRLR 4
Villalba v Merrill Lynch & Co Inc and others [2006] IRLR 437
Rainey v Greater Glasgow Health Board [1987] IRLR 26
O'Neill v Governers of St Thomas Moore RCVA Upper School and others [1996] IRLR 372
Snoxall v Vauxhall Motors [1977] IRLR 123
Seide v Gillette Industries Ltd [1980] 427
O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615
Farthing v Ministry of Defence[1980] IRLR 402
Cross and others v British Airways plc [2005] IRLR 423
Middlesbrough Council v Surtees [2007] IRLR 869
Redcar and Cleveland Borough Council v Bainbridge [2007]IRLR 91
Cumbria County Council v Ms E Dow and others UKEAT/0148/06
and 4 joined cases, collectively referred to as Joss
Hockenjos v Secretary of State for Social Security [2005] IRLR 471
R (on the application of Elias) v Secretary of State for Defence [2005] IRLR 788
The Chief Constable of West Midlands Police v Ms Blackburn UKEAT/000/07
Also cited
Causation in the Law (2nd ed) H.L.A Hart and T Honore Oxford
Clerk & Lindsell on Torts (19th ed) London

We also considered

Barton v Investec Henderson Crossthwaite Securities Ltd [2000] IRLR 332
Kutz-Bauer v Freie und Hansestadty Hamburg [2003] IRLR 368

4. **The Hearings and the Preliminary Decisions**

4.1 There were case management discussions on 13 September 2006; 19 December 2006; 16 August 2007 and 7 September 2007. In the course of those discussions it was, inter alia, agreed that the question of the material factor defences would be dealt with at a Pre Hearing Review with members. Originally the hearing was listed for 15 days and was set down for hearing commencing 24 September. The original agreed list of issues ran to in excess of 90 points. Ultimately it was heard by this tribunal over two blocks of days; 24 September to 15 October 2007 (15 days) and 7 to 19 December 2007 (7days). The tribunal reserved judgement on the remaining points and deliberated on 20 December and 7 January 2008.

4.2 The parties agreed a common bundle running to some 34 lever arch files of documents and all witnesses exchanged witness statements and supplementary statements many of which were revised following the tribunal's decision on the first GMF. The tribunal spent three days reading, the bulk of which was witness statements. Within two days of the start of the scheduled 15 day hearing, the parties agreed that a further 15 days (making a total of 30) would be required to try the case as currently being put forward. (See below)

4.3 This vast array of material was aimed at establishing whether the respondent could show that if, which is not admitted, the claimants have established a pay disparity pursuant to s 1(2) Equal Pay Act 1970 (THE ACT) there were genuine material factors (GMF) which explained that disparity. The factors relied on are the fact that the difference in pay is explained by a non-discriminatory productivity bonus (later abandoned but perpetuated for a time by pay protection), and that the delay in remedying and disparity, by way of the introduction of single status, was to be ascribed to the respondent's inability to secure agreement over its introduction with the relevant recognised trades unions. This latter point accounted for a very large amount of the material already referred to. Within two days of the start of the scheduled 15 day hearing, the parties agreed that a further 15 days (making a total of 30) would be required to try the case as currently being put forward.

4.4 At an early stage it was identified that the parties differed on the question of whether an employer was always required to objectively justify any difference in pay for equal work (the *Brunnhofer* point). In discussion between the tribunal and the parties, it became apparent the respondent believed that a significant amount of the evidence it wished to adduce on the second GMF was necessary only if it was obliged to objectively justify the GMF even though, by its nature, it could not possibly bear the taint of sex discrimination. The claimant's confirmed that they wished to seek to persuade the tribunal that on a proper reading of *Brunnhofer* that was indeed what the respondent would be required to do. It was agreed that that matter could

conveniently be dealt with at an early stage on the basis of legal argument only.

4.5 The parties produced detailed written submissions and made oral submissions and the tribunal decided the point delivering its conclusions. Its conclusions on that point are set out below.

4.6 Having dealt with that matter, the tribunal turned its attention to another matter which seemed to us to be susceptible to a potentially time-saving early resolution. The claimants contended that whether or not the respondent could prove the facts it sought to rely on, its first GMF was incapable as a matter of law of being a defence under S1(3). The tribunal ordered the parties in the circumstances set out below to make submissions on this point before the completion of the evidence.

Once again, the parties made oral submissions supported by detailed written submissions and the tribunal decided that point on 15 October. At that point, the proceedings were adjourned. The effect of the tribunal's decision was that the GMF failed. Its conclusions on that issue are also set out below.

4.7 Following the adjournment the tribunal heard further evidence and submissions on the second and third GMFs.

Evidence was heard from the following witnesses for the respondent.

Ms J Sutton, former Employment Policy manager for the respondent Council
Ms S Manzie, Chief Executive of the respondent Council
Ms B Messenger, Director of Customer and Workforce Services for the respondent Council
Mr M Rawson, former Head of External Services for the respondent Council
Mr T Dorrofield, formally employed in management services by the respondent Council
Mr A Lech, formerly Waste Services manager for the respondent Council

And, for the claimants,

Mr M Shortland full-time Representative TGWU/Unite
Mr T Higham Regional Industrial Organiser TGWU/Unite

4.8 Finally, the tribunal having heard evidence and taken submissions (once again oral and written) on the remaining GMFs, reserved judgment.

5. The Issues

5.1 The parties agreed that the following were the main issues for this hearing.

> "This forthcoming hearing is concerned only with claims based on comparators who are refuse workers; further, the hearing is confined to examining whether the respondent has made out a material factor defence within section 1(3) of the Equal Pay Act 1970. If that is not the

case in regard to any of the Claimants, a number of further issues remain to be determined, and have not been conceded by the respondent.

The respondent's GMF defences arise in three ways:

I. The history of negotiations and the position adopted by the Trade Unions in regard to the move to Single Status;

II. Pay Protection provided within the terms of the move to Single Status;

III. The rationale of the bonus payments made to refuse workers."

5.2 The first issue was resolved by a preliminary decision made at the end of the first block of hearing time as described above.

5.3 The parties then further defined the issues raised by points II and III above as follows:

5.3.1 If there is pay inequality between the claimants and the comparators, what is the root cause of that pay inequality?

5.3.2 Is the difference in pay attributable in whole or in part, to the payment of bonus payments to the refuse workers or is it attributable to some other cause?

5.3.3 If yes, is the continued pay inequality attributable to pay protection for refuse workers or some other cause?

5.3.4 In particular, is the pay inequality attributable to any factors arising from the negotiations between the parties in respect of the move to single status?

5.3.5 Can the Respondent rely upon a collective agreement if it has the effect of continuing historical unlawful sex discrimination as the basis for a genuine material factor defence to equal pay claims brought by female employees?

5.3.6 Do the Respondent's responsibilities in relation to the provision of services take precedence over its statutory obligations in relation to equal pay?

5.3.7 Is the Respondent entitled to balance its other statutory responsibilities against its statutory obligations in relation to equal pay?

5.3.8 Whether, if historical inequality did exist in relation to the refuse bonus payments, any delay on the part of the Respondent in addressing such inequalities needs to be objectively justified?

5.3.9 Do the material factors relied on by the Respondent explain the whole of the difference in pay? **In fact the parties agreed that this was to be answered in the affirmative.**

5.3.10 Whether the need to introduce pay protection (as required by the recognised trade unions) and in order to ensure that the Respondent met its statutory and other obligations amounted to a genuine material factor in terms of any gender specific pay differentials.

5.3.11 If the respondent is entitled to balance its other statutory responsibilities against its statutory responsibilities in relation to equal pay, what, in the context of this case, are the circumstances in which it can do this, and what are the criteria and parameters of any such balancing/

5.3.12 Have the pay protection arrangements in place since the imposition of Single Status had a disproportionate adverse impact on the Respondent's female employees?

5.3.13 Do the pay protection arrangements need to be objectively justified and if so are they objectively justified?

5.3.14 Is the recognition in the 1997 National Agreement that there would be a need for pay protection a factor to take into consideration in determining the genuine material factor defence.

5.3.15 Did the pay protection arrangements for refuse workers have the effect of protecting payments made which were themselves unlawful?

6. **The Facts**

6.1 The following facts were agreed between the parties.

"The terms of the 1997 National Agreement on Single Status are set out in the Green Book.

REFUSE WORKERS BONUS SCHEME

1. The NJC Joint Bonus Technical Working Group reported in February 1998: its report sets out its conclusions in relation to bonus schemes in local authorities.

2. The NJC endorsed the report of the Joint Technical Working group on 25 February 1998.

3. It is agreed that in Coventry CC the refuse workers' bonus payments were historically paid pursuant to two schemes: one pre 1999; the other the 1999 bonus scheme.

4. The provisions of the 1999 bonus scheme are set out in a document called the Operational Agreement.

For convenience the tribunal here sets out its understanding of the provisions of that scheme.

The operational agreement provided for a bonus of £140 per week payable to each refused collector or refuse vehicle driver. The refuse workers worked 37 hours per week over a four-day Tuesday to Friday week. Up to £110 of the bonus could be lost for non-attendance as follows: £35 for one day's absence; £65 for two; £90 for three and £110 for four. There were specific exemptions for certain absences and a residual management discretion for the rest. In the event of customer satisfaction, measured solely by the number of complaints logged, falling below 99.5%, up to £10 could be lost on a sliding scale down to 99.0%. There was no extra penalty below that.

5. The background research carried out by the Respondent and at other comparable local authorities prior to the introduction of the 1999 Coventry scheme is set out in the witness statements of: Messers Lech, Dorrofield and Rawson.

6. It is agreed that during negotiations the trade unions raised concerns about the terms of the 1999 bonus scheme.

7. The Respondent's figures in relation to absenteeism amongst refuse workers for the periods:

(a) January 1998- February 1999;
(b) March 1999- May 1999;
(c) June 1999-May 2005
(d) June 2005 following the implementation of Single Status;

are not disputed.

8. It is agreed that absenteeism reduced over the periods set out (a) and (b). In the period from in or about 2003 absence began to increase:

PAY PROTECTION

9. It is agreed that refuse worker posts have historically been predominantly occupied by men.

10. It is agreed that the Respondent has received at least one application from a woman for a refuse worker post since 1999.

11. Pay protection arrangements are not inherently unlawful or discriminatory.

12. In this case pay protection for refuse workers derived wholly or primarily from a difference in pay which arose from the historical payment of bonus to this group.

13. The Respondent and the recognised trades unions agreed pay protection for a period of five years: doc 1387.

14. In October 2001 all the Respondent's employees were balloted on whether or not to accept the Respondent's pay protection agreement.

15. The Respondent's employees voted in favour of the pay protection agreement.

16. The pay protection agreement applies to all Respondent employees who suffered a loss in pay on the introduction of single status.

17. It is agreed that officers of Coventry City Council did not carry out an equality impact assessment of the refuse bonus scheme proposals by reference to the recommendations of the national technical bonus working group or otherwise.

18. The nature of the mechanism of applying the 1999 bonus system and measuring its effectiveness is agreed as set out in the operational agreement."

6.2 The Contested Evidence.

The parties identified a number of relevant factual issues which were not agreed. They are to be found in paragraphs 34 to 49a of the agreed list of issues. The majority of the factual disputes are dealt with in our conclusions section below, together with our reasoning in reaching those conclusions. Here, however, we set out our findings on certain other factual questions posed by the parties.

6.2.1 Since 1997 how have Coventry City Council demonstrated their commitment to equal opportunities in general and to equal pay in particular?

The respondent Council adduced ample evidence of its commitment to Equal Opportunities in a general sense. The tribunal did not consider that the question was of significance in determining the matters before it

6.2.2 Did the bonus payment schemes provide a genuine productivity bonus?
What was the number of weekly rubbish collections made by the refuse workers from January 1999 to 1 June 2005?

What were the staffing levels of the refuse workers from January 1999 to 1 June 2005?

These three questions can be taken together

Attention is drawn to our conclusions below. It was not contested that the 1999 agreement resulted in a reduction in the workforce, although the number of bins to be collected remained static or even rose slightly. The precise numbers made redundant remain unclear but the workforce reduced to 51 from a permanent establishment of 63 (82, if temporary staff are included). It is also agreed that prior to the agreement, the refuse workers were working an average of 28 hours out of a contracted 39 hour week and that this increased to 34 from 37. The tribunal finds that, in part, this change was made possible by reducing the amount of absenteeism from levels of between 16 and 19% to less than 5%, which itself was achieved by the linking of bonus to attendance. An updated fleet of collection vehicles and a change from a five to a four day working week also played their part. The overall package, which was interlinked, resulted in the increased productivity of the individual members of the workforce insofar as each employee collected on average 240 bins per hour (averaged over the contracted hours) as compared to 180 before.

6.2.3 What were financial savings achieved through the bonus system?

The claimants sought to dispute the respondent's claim that the bonus scheme was self financing. Again attention is drawn to our conclusions below but we add the following. We find that no effective challenge was mounted to Mr Rawson's evidence that the new scheme achieved savings of £0.5million per annum, resulting in an end to the subsidy of the domestic refuse service by the respondent's commercial waste service and a return of some money to the centre. The savings were achieved by a 10%+ reduction in staff absence, resulting in equivalent savings on relatively more expensive agency staff; a reduction in total staff numbers; the reduction of overtime payments brought about by the move to the four day week and savings on vehicle purchase and maintenance. We were unable to determine the precise contribution of each element of the scheme to the total savings but since the whole scheme was an integrated negotiated package, that does not seem to us to be significant.

6.2.4 Did the bonus scheme for refuse workers focus on achieving measurable improvements in future service throughout its existence?

We are unclear about the relevance of this question. We heard no evidence to suggest that the quality of the collection service declined. There was some evidence that customer satisfaction, as measured by a survey, improved. Complaints remained at broadly the same level

6.2.5 Was the operation of the bonus scheme subjected to regular review having regard to its stated object?
Did these reviews persist throughout the scheme's existence?

The claimants adduced no evidence to challenge Mr Rawson's assertion that Best Value criteria required regular reviews and that these were carried out throughout the life of the scheme. The tribunal finds that this was so although we regard this matter as of tangential relevance.

6.2.6 Was pay protection appropriate to ensure that the respondent could continue to meet its duties to provide services?

We consider this matter below but add that Ms Manzie gave evidence which in the context of the agreed history of this matter we found entirely convincing. She said that had an attempt been made to row back on the 5 years pay protection agreement "all hell would have broken loose". In fact, there was some attempt to reconsider it near the end when it was clear that extra money would have to be found to fund back-pay for winners but that met with resistance by the trades unions and not proceeded with.

6.2.7 The respondent also ran a commercial waste service. The tribunal finds that the pay of workers (all men) in that service was determined by reference to a basic pay topped up by an extra amount for each individual job done, calculated by reference to an agreed scale. That element of the pay was effectively a piece rate and workers' pay varied depending on the speed with which they worked. Rates of pay were also determined by reference to the commercial sector for commercial waste which was hotly competitive in Coventry as elsewhere.

7. The Submissions

The parties made three separate sets of written and oral submissions and they are dealt with in the context of the three separate decisions we made

8. The Tribunal's Conclusions

8.1 The *Brunnhofer* point

8.1.1 The submissions

8.1.1.2 For the claimants, Ms Rayner's submission started by the blunt assertion that the decision in *Brunnhofer*, contrary to the decision in *Villalba*, is to be read as imposing an obligation to objectively justify every disparity in pay between men and women in equivalent work. We ought to follow *Brunnhofer* because the subject was Article 141, on which the ECJ was the highest authority and because *Brunhofer* is the product of an experienced court with the benefit of considerable previous jurisprudence to draw on. Ms Rayner then embarked on a close analysis of the decision in *Brunnhofer*, much of which is considered in our judgment later. Ms Rayner's criticism of the

analysis adopted by the British courts before *Brunnhofer* was that, in effect, it placed an additional unwonted requirement on claimants, that is, to have rebut any attempt by an employer to show that the difference in pay is not tainted by sex. This despite the fact that they have already established a prima facie case of discrimination. Further, the pre-*Brunnhofer* cases can also be understood in the context of their being about granting *access* to claimants to the legislation not about erecting *hurdles.*

8.1.1.3 Ms Omambala made a brief submission in which she adopted Ms Rayner's submissions and made the additional point that *Villalba* ought to be seen as an entirely policy driven decision.

8.1.1.4 For the respondent, Mr Lynch made the following points. The tribunal was bound by *Villalba* even in the light of *Sharp*. This point, helpfully, was conceded by Ms Rayner. Secondly, *Brunnhofer* is not to be read in the way urged upon us by Ms Rayner and on the EAT by Ms Rose in *Villalba.* Thirdly, *Villaba* correctly identifies that the prohibition in the legislation is against discrimination *on the ground of sex,* and that neither Art 141 or the Act are fair wage provisions. In the context of his second and third points, Mr Lynch drew both upon the very full analysis of *Brunnhofer* in *Villalaba* and upon his own careful dissection of the ECJ's judgment. He also made the point that there was no previous authority from any source that supported Ms Rayner's view of the law and her view of *Brunnhofer.* Indeed, cases like *Enderby* proceeded to and in the ECJ on what might be thought of as the traditional understanding of the requirements on the parties to an equal pay claim. Fourthly, *Sharp* because of its lack of careful analysis of the authorities and of *Brunnhofer,* and because of its lack of reasoning ought to be disregarded.

8.1.2 Our conclusions

8.1.2.1 Precedent

8.1.2.1.1 As we have already observed the parties were united in their agreement that this tribunal was bound by the decision in *Villalba* and that it followed that from that point of view alone Ms Rayner's submissions could not succeed. Nevertheless it would be inappropriate for the tribunal to avoid engaging with the very able submissions made by all the advocates on the substance of the issue and we do so below

8.1.2.2 The Domestic Law

8.1.2.1.2 The parties were, in essence, agreed that prior to *Brunhoffer* the domestic authorities, (T*yldesely,*

Webster, Marshall etc) are all to be read as approaching the Equal Pay Act 1970 in the following manner. 1) Has disparity of pay been demonstrated by the claimant in one of the ways contemplated by S1(2)? 2) If so, can the employer show that the disparity is explained by a GMF (see S1(3))? 3) If so, is that GMF tainted by sex? 4) If so, is it nevertheless capable of being justified?

8.1.2.1.3 We would simply comment that that is scarcely surprising because such an approach is apparently dictated by the structure of the EQP and the shifting onus of proof at the point when disparate pay has been shown by the claimant.

8.1.2.1.4 Ms Rayner urged on us the view that *Brunnhofer* required that matters which might traditionally have been canvassed at the second stage now fall to be considered at stage 1. In other words, once disparate pay is shown, taking into account any GMF type argument the employer might have to show that an apparent disparity is in fact nothing of the sort, discrimination has been established and the onus lies on the employer to justify it if it is capable of being so justified.

8.1.2.1.5 As an aside it is difficult to see, in that approach, at what point a tribunal would be invited to consider the fact that the disparity of pay was a result of **direct** discrimination and thus not capable of being justified at all.

8.1.2.1.6 In any event and with great respect to Ms Rayner, it is impossible to see how the Act can be read to require that approach. We would observe that as far as we know there has never been any challenge to the THE ACT as ineffectively transposing EU law. Of course, since the EU position is based on a treaty article, any claimant may have direct recourse to it and that may explain the lack of such a challenge. Nevertheless the ECJ has had the opportunity to comment on the Act on more than one occasion cf eg *Enderby*. As Mr Lynch eloquently pointed out, that case proceeded on the unchallenged assumption that there was nothing incompatible between (the then) Art 119 and a domestic provision which permitted an employer to explain a disparity in pay by reference to factors which were not discriminatory on the grounds of sex and so avoid a finding against it.

8.1.2.1.7 Furthermore, it is by no means clear that that is the approach being adopted by the ECJ in any case.

Certainly one reading of paragraphs 60 to 62 of the judgment might simply be as an affirmation of the Act's approach. Paragraph 60 can be taken to be a reference to the task upon the claimant to show pay disparity. To say that, once that has been done prima facie discrimination has been shown, might mean little more than that, at that point, absent a non-discriminatory explanation from the employer in the form of a GMF untainted by sex (paragraph 61), or justification for an explanation which does have that taint (para 62), the claimant must win. That, of course, is entirely consistent with the pre-*Brunnhofer* position.

8.1.2.3 The decision in *Brunhoffer*

8.1.2.3.1 It is helpful to consider the context of the *Brunhoffer* decision. There is no doubt in the mind of the tribunal that prior to that case, there is nowhere to be found in the European jurisprudence authority for the proposition that **any** difference in pay needs justification. Indeed Ms Rose's submissions in *Villalba* and the submissions made to us today are innocent of reference to any such authority.

8.1.2.3.2 It follows that were *Brunhoffer* to be read as imposing a requirement it would at the very least be, in Ms Rayner's phrase, a development of the law and possibly, in Mr Lynch's description, a revolution.

8.1.2.3.3 With that in mind, it is very significant that there is no acknowledgment in the judgment itself that such a departure is being made. We think that the reason for that is that the ECJ did not understand itself to be taking that step. The clue to that is to be found in a consideration of what question the ECJ was being asked to answer by the national court

8.1.2.3.4 We think it likely that Mr Lynch and indeed HHJ Clark in *Fernandez* are right and that the ECJ in *Brunhoffer* was being asked to consider not "when does an employer need to justify a difference in pay?" but "if an employer needs to justify a difference in pay (because of a sex taint), what will suffice?" and, in the particular context of the *Brunnhofer* case, would the matters relied upon by the employer suffice? We think it must be the case that question 2b in *Brunhoffer* was posed on the predicate that a sex taint had been established. There is no hint in the question that the issue of the need for justification in the first place was in doubt. The question is posed on the assumption that justification is necessary. It seems inconceivable that

that would be so, given the previous jurisprudence, if the question of the existence a sex taint was in some way still open. That seems to us to be the natural reading of paragraphs 63 and 64 of the judgment.

8.1.2.3.5 Although Ms Rayner relied on para 65 as evidence that the ECJ were asserting principals of more general application, we respectfully disagree. The references in para 65 are to **the** national court, that is the court making the reference, and the whole of the observations of the ECJ in that paragraph are to be understood as being made in the context of the particular question referred to it.

8.1.2.3.6 Reliance was also placed on paragraph 66 but here the reasoning in *Villalba* is entirely compelling. The cases referred to in that paragraph as providing the context for the rest of the paragraph are in no way examples of situations were justification was thought necessary, except to deal with differences in pay which were tainted by sex.

8.1.2.3.7 We respectfully disagree with Ms Omambala's submission that the willingness of the EAT in *Villalba* to ignore the literal meaning of the ECJ's words in that paragraph are suggestive of a policy driven basis for its decision. ECJ decisions are notoriously not to be approached as one would decisions of a British court. They are committee decisions par excellence and are often expressed in terms which can seem opaque to lawyers from a precedent based background. It is important to attempt to divine the true meaning and import of the judgment and we take the view that *Villalba* does that convincingly.

8.1.2.4 The post *Brunnhofer* authorities

8.1.2.4.1 We have already acknowledged that we are bound by the decision of the ECJ in *Villalba.* Nevertheless it is the case the EAT has not spoken with one voice when considering the meaning and effect of *Brunhofer.* The matter has been canvassed in four reported cases. In *Barton* and EAT chaired by HHJ Ansell seems to have concluded that *Brunhofer* did require objective justification even where the difference was not one of sex (see paragraph 26) but then agreed with counsel for the claimant the *Tyldeseley* was not applicable because in the instant case the discrimination was *"both tainted by sex and involved a lack of transparency"* (p 338, para 27). With the greatest

possible respect to the EAT, the reasoning on that point, in what is otherwise a seminal judgment, is unclear.

8.1.2.4.2 A much clearer exposition of HHJ Ansell's view comes in the case of *Sharp* where an EAT chaired by him unequivocally adopts the view of *Brunnhofer* put forward on behalf of the claimants in this case. *Sharp* was decided after the case of *Fernandez*, also in the EAT, this time chaired by HHJ Peter Clark. In a majority judgment, that EAT took the opposite view, concluding that an analysis of the questions before the ECJ in *Brunnhofer* and the court's reference to the fact that Art 141 was aimed at outlawing pay disparity on the grounds of sex showed that *Brunnhofer* was not to be taken as imposing an obligation to objectively justify every pay disparity.

8.1.2.4.3 *Fernandez* and *Sharp* were both considered in *Villalba.* We agree with Mr Lynch's respectful, but nevertheless critical, analysis of the judgment in *Sharp.* Certainly it stands in contrast to the careful and thorough reasoning in *Villalba* Indeed, were we invited to choose between *Fernandez* and *Sharp*, notwithstanding the fact that *Sharp* is the later of the two cases, we would have found the approach in *Fernandez*, somewhat compressed though it be in its expression, more persuasive. For reasons that we have already mentioned we think that an important key to properly understanding *Brunnhofer* is to consider the question being posed by the national court, as HHJ Peter Clark does in paragraph s 32 and 34 of that judgment.

8.1.2.4 For all the reasons outlined above the tribunal prefers the respondent's submissions to those of the claimants on this point.

8.2 The first GMF

8.2.1 The context

At an early stage in the hearing, the tribunal raised the possibility of deciding as a preliminary point the entire question, posed by the claimants, as to whether, even if the respondent proved such facts as it would wish to, the second matter was capable of amounting to a GMF. In doing so, it observed that more than half of the evidence was aimed exclusively at the second GMF. Initially, that course of action was resisted by all the parties. After the tribunal delivered its judgment on the *Brunnhofer* point, several days in to the trial, the chairman invited the parties to reconsider. By this stage, it was apparent that the original

15 day listing was hopelessly inadequate and a further 15 days had been set aside in March. Furthermore, even the revised timetable for the first set of hearing days had slipped considerably. Once again, the parties were unanimous in their resistance to the tribunal's suggested approach. However, the following day the respondent changed its stance and invited the tribunal to take the matter as a preliminary point. Ms Rayner for the TGWU also now thought that, despite reservations, the balance had shifted marginally in favour of that course. Ms Omambala for the Unison claimants maintained her resistance. After reflection the tribunal decided, in the interests of the overriding objective, to pursue that course. In doing so we had regard to the potential saving that our decision might deliver and were mindful that the claimants would ask us to take this point at the end of the hearing in any case and that the point could successfully be argued in isolation from the evidence. We took the view that the point could be dealt with by making no more assumptions of fact than those involved in considering GMF defences before determination of the S1(2) issue. We also bore in mind that it was the respondent which had now urged us to this course.

8.2.2 The Question

What question is it then that the tribunal was asked to determine? In the response to the claim at paragraph 51 the respondent pleaded thus.

> "As set out above, the respondent has consistently sought from 1997 to introduce single status and a fair and transparent grading and pay system. The fact that, despite continuing effort to do so, the respondent has not been able to achieve that until it imposed single status in June 2005 was through no fault of its own. The opposite was a case. Further, in the light of the circumstances facing the respondent, the respondent could not, realistically have achieved single status before it did. The respondent respectfully avers that the respondent's continual efforts from 1997 to achieve single status and a wholly fair and transparent pay and grading system constitutes a genuine material factor which is not the difference in gender in terms of explaining the difference in pay up to the implementation of single status in June 2005".

Despite the various different ways in which the matter has been set down by the respondent subsequently, Mr Lynch is content in the end to fall back upon that paragraph as encapsulating the nature of the defence which has come to be known as the "overarching" GMF.

That formulation was revised and added to for the purpose of this part of the hearing as follows.

> "1. The issue for determination is whether, as a matter of law, the Respondent is capable of establishing a GMF if it establishes that:-

(1) the Respondent has taken all reasonable steps including making a series of reasonable proposals in order to achieve Single Status and has done so in order to achieve a pay system devoid of historical bonus payments and based on the best principles of equal opportunities;

(2) the Respondent has so acted wholly genuinely at all times and has pursued its aim persistently;

(3) the Respondent's reasonable expectation was that, through its said efforts, Single Status would be achieved and the difference of pay eradicated by a date more than six years prior to the presentation of the claims;

(4) in particular, the Respondent:-

a. proposed the removal of the bonuses that formed the basis of the pay gap complained of in these claims;

b. proposed the introduction of "performance related pay" for all jobs covered by the Single Status agreement, including, for the avoidance of doubt, the claimants and comparators;

c. proposed a period of pay protection of two then three years; and

d. those proposals were not supported by the trade unions and were rejected by the workforce at ballot in 1999 and 2000

(5) the Respondent continued to negotiate a collective agreement between 2000 and 2005 in the course of which it repeatedly revised its proposals in seeking to meet trade union requirements;

(6) the Respondent's inability to achieve its aim was not in any way the fault of the Respondent. In particular:-

a. the Respondent was wholly reasonable in its view that, prior to 2005, it would have been wrong and inappropriate to have sought to impose Single Status without a collective agreement;

b. the Respondent was wholly reasonable in its view that it was impractical to achieve Single Status on the basis that no employees would be "losers" even if that rendered agreement difficult, if not impossible, to achieve

(7) at all times the Respondent was wholly committed to seeking to ensure that its pay arrangements were free of any sex discrimination;

(8) but for the Respondent's inability to achieve its reasonable expectation despite all of its efforts, the claimants would not have the difference of pay with their comparators which is the basis of the claims.

2. The Respondent respectfully avers that if the above is established it entails that the Respondent has established that the cause of the difference in pay is not a difference of gender and is a material factor within section 1(3) of the Equal Pay Act 1970."

8.2.3 The submissions

For the GMB claimants, Ms Rayner relied on the case of *Marshall* as setting out the true meaning of Section 1(3) of the Act. Her submission was that from *Marshall* it was clear that the section required a consideration of the effective cause or reason for the initial and continuing disparity. It followed that a "but for" test was not the appropriate test. She argued that inherent in the respondent's case was an acknowledgement that a discriminatory disparity existed. If not, there would be nothing for the respondent to remedy (or, rather, fail to remedy). In reliance upon *Enderby,* she submitted that an explanation as to why something had not ceased was not, and could not become, its cause. She submitted that the failure to remedy the disparity was neither the genuine reason for the disparity nor was it the material difference between the man's and the woman's case (*Rainey*). Finally, Ms Rayner made the point that the effect of the respondent succeeding would be to effectively produce a period of moratorium for equal pay claims whilst employers were engaged in a negotiation over a collective agreement which might (or might not) have the ultimate effect of ending discriminatory pay disparity. Ms Omambala adopted Ms Rayner's submissions. We deal with Mr Lynch's submissions in detail in our conclusions

8.2.4 Our Conclusions

8.2.4.1 We start with the statute. It is uncontroversial to say that the purpose of the statute is to impose upon an employer an obligation to pay men and women the same pay when they are doing the same work. Where men and women are doing the same work and are not paid the same, the employer has an obligation to remedy that disparity, **unless the employer can provide an explanation for the disparity which is not to do with gender**. That obligation subsists until the disparity is remedied. If, on the other hand, the explanation for disparity is unconnected with the genders of the comparator and the claimant, no such obligation arises because an equality clause has not been breached.

8.2.4.2 The structure of S.1 of the Act provides for a shifting burden of proof in establishing whether pay arrangements result (a) in disparate pay as between men and women doing equal work and (b) whether the disparity in pay is caused by the gender of the comparator groups. In our view, that means that the Act invites us to focus on, (and we use the term neutrally here), the **cause** of the pay arrangement in question or, in other words, if the pay arrangement in question produces disparate pay, and if the men and women are properly to be compared with each other because they are doing equal work, then the question is, "why is there a difference in their pay?". For the purpose of this hearing, this tribunal is operating on the assumption that the burden of proof has shifted to the respondent and that we are in the territory delineated by section 1(3). Therefore, the question for this hearing has always been, "can the respondent now prove to us that the difference that has already been established between the two groups is not the difference of sex and can be explained by factors unconnected with the respective sexes of the claimants and their comparators?".

8.2.4.3 In this context it is impossible, in our view, to better the very clear analysis in the speech of Lord Nichols in the House of Lords in the case of *Marshall –v- Glasgow City Council* and indeed all of the advocates before us were content with the formulation set out in *Marshall.*

> The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a 'material' factor, that is, a significant and relevant factor. Third, that the reason is not 'the difference of sex'. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within s.1(2)(c), may be a 'material' difference, that is, a significant and relevant difference, between the woman's case and the man's case. (para18)

and

> Some of the confusion which has arisen on this point stems from an ambiguity in the expression 'material factor'. A material factor is to be contrasted with an immaterial factor. Following the observations of Lord Keith of Kinkel in *Rainey v Greater Glasgow Health Board [1987] IRLR 26, 29*, the accepted synonym for 'material' is 'significant and relevant'. This leaves open the question of what is the yardstick to be used in measuring materiality, or significance and relevance. One possibility is that the factor must be material in a causative sense. The factor relied on must have been the cause of the pay disparity. Another possibility is that the factor must be material in a justificatory sense. The factor must be one which justifies the pay disparity. As already indicated, I prefer the former of these two interpretations. It accords better with the purpose of the Act.

Our finding is that the factor being relied on by Mr Lynch for the respondent is a justificatory factor not a causative factor and therefore fails the test for a GMF set out by the House of Lords.

8.2.4.4 The parties are agreed that there is no example of an authority where a genuine material factor of the type urged on us by Mr Lynch has ever been in issue. That certainly is the product of our researches, such as they were, and apparently the product of the research of three extremely able counsel. That rather begs the question, "why not?" With great respect to Mr Lynch, we think the reason is obvious. A liability to end pay disparity only comes into being if the burden imposed by S1(3) has not been met. The obligation placed upon the respondent, once all of the conditions in S1 are met, is to remedy a sexually discriminatory pay disparity and that obligation is not discharged until equal pay is achieved. A narrative explaining the failure of the employer to end disparate pay fails to address the central question of whether that disparate pay is discriminatory on the grounds of sex and deals instead with why any breach of the claimants' equality clauses has not been repaired. In effect, it amounts to a plea in mitigation.

8.2.4.5 We prefer the claimant's submissions to those of Mr Lynch, which may conveniently be addressed by reference to the propositions he puts forward.

> 1) The tribunal is required to examine all the circumstances relating to a case to determine the cause or reason for different rates of pay.

We have no difficulty with this as a general observation. However, the issue is really to what question is that

consideration directed? *Rainey* points us to the question of the difference between the man's case and the woman's case. In considering that, all sorts of factors may be relevant. However, in our judgments those must be factors aimed at rebutting the presumption that the explanation for the disparate pay is the sex of the respective recipients. Any factors which explain, rather, why a disparate pay regime, which shifts burden to the employer for an explanation, has not been ended earlier, will not help.

8.2.4.6
2) The categories of material factor defences are not closed.

That is indeed so and we would only add that they remain open but have not been added to in this case.

8.2.4.7
3) Supervening events can constitute supervening causes in a state of affairs, such as the rates of pay that apply to various employees.

This seemed to us to be the crux of Mr Lynch's argument. We find that if there is room for the concept of supervening act in discrimination law, it is not here. As a general observation, it is a doctrine aimed at the question of remoteness of damage. It posits an act on the part of a defendant which would, in the ordinary way, have given rise to a liability for damages but for the fact that some intervening actor had broken the chain of causation by himself committing some act, not made inevitable by the original conduct of the defendant, which itself causes the damage ultimately complained if. We, on the other hand, are concerned with liability. The respondent is not seeking to avoid paying damages for a tortious act but, by making out a S1(3) defence, to show that no statutory tort has been committed at all. As we have already observed, once a claimant has proved disparate pay under S1(2), unless the employer avoids liability by a successful S1(3) defence, that employer is fixed with an obligation that can only be discharged by meeting it. The reliance by the respondent on its reasonable, but failed, attempts to introduce single status as a supervening cause, is the equivalent of the farmer who negligently leaves his stable open and thus unlooses a rampaging horse. It would scarcely avail that farmer, in defending the personal injury action of an injured passer by, to assert that he had made genuine and even reasonable attempts to catch the horse but failed.

In this context, we were entirely unassisted by Mr Lynch's analogy of an employer with a liability to ensure his employees safety at work. As Ms Rayner pointed out, should an employee fail to co-operate in that, say by refusing to wear a safety helmet, even in the face of valiant efforts by the employer to

ensure his safety, that may be a disciplinary matter for the employee but the law still fixes the employer with an absolute obligation to ensure his safety and a breach of that obligation will lead to liability.

When one focuses on the matter that is at issue here, that is to say, what gives rise to the disparate pay in the first place, then one can see that the concept of supervening cause is of very little help. The failure to introduce and negotiate a single status agreement is in no sense the cause, supervening or otherwise, of the disparity of pay assumed to exist for the purposes of this hearing. Single status was this respondent's chosen vehicle for ending discrimination. It was not the only vehicle. The respondent could, for example, simply have declined to pay the bonus to the refuse workers or pay the same bonus to the claimants. Doubtless the respondent would want to persuade the tribunal that a properly negotiated single status agreement was a thoroughly reasonable and indeed, by far the best, way of doing it. We find that even were it to succeed in doing that, it would be nothing to the point.

Purely speculatively, had single status been introduced earlier rather than later, what might have happened? It seems to us entirely possible, indeed probable, that we would merely have dealt with these equal pay claims 4, 5 or 6 years earlier than we now are.

8.2.4.8
4) When facing a choice between a number of co-existing "causes for discrimination" the law will examine the policy that underlies the cause of action before it in identifying the relevant cause.

5) The policy question in the context of section 1(3) is whether the pay rates in question at the date of the claims reflect that fact that the employer is one who discriminates against staff in determining pay.

These two points can be taken together.

With great respect to Mr Lynch, this is unnecessarily to complicate the issue. We have already set out what we consider the purpose of the Act. We do not find in that analysis any need to trouble ourselves with policy considerations. The Act describes itself as "an Act to prevent discrimination, as regards terms and conditions of employment between men and women". Provisions as to pay which offend that principle give rise to liability under the act. Whether a pay provision does so offend is determined by reference to S1. Even an employer generally committed, as a matter of policy, to equal pay, may

offend under the Act since goodwill and good intentions are not of themselves defences.

8.2.4.9
6) Retaining the status quo can constitute a GMF (for example red circling).

7) Red circling cases reveal that an employer can make out a GMF even where there is a historical connection between pay and gender. The key issue is the rationale for pay protection.

We take these two points together also.

Here the tribunal understood Mr Lynch to be relying upon *Farthing*. In that case, Mr Lynch submitted, the fact that the employer had adopted a pay policy precisely to end discrimination had been taken into account in concluding that a red circling of the higher pay it produced was defensible under S1(3). What seems to us to be significant about that case is that the Court of Appeal, in examining the employer's GMF, was concerned to consider whether the original reason for the pay disparity was discriminatory. Once it was found not to be, the red circling, which resulted in the pay disparity under attack by the claimants, was held to be defensible because it was an explanation for the pay disparity which was not that of sex. It must be said that even Lord Denning in his judgment in that case described it as a "curious and exceptional situation". Had, however, the original disparity been directly discriminatory, the case of *Snoxall v Vauxhall Motors [1977] IRLR 123* makes it clear that the red circling could not have been defended. The cases of *Bainbridge* and *Surtees* simply amplify the point that red circling (or pay protection, as it has been called in this case) can in appropriate circumstances be justified. In all of the cases referred to, however, the red circling was the cause of, not the justification for, the difference in pay. We are unable to see how this case assists Mr Lynch.

8.2.4.10
8) In examining the reason for different pay rates the history of collective bargaining may be examined.

This seems to us to be uncontroversial. Separate collective bargaining arrangements may give rise to different pay structures which produce pay disparities. Once again, however, the focus is on the reason why the pay disparities arose in the first place. (*Surtees* is a recent example of this type of GMF). The history of collective bargaining conducted in relation to the ending of those pay practices seems to us to be irrelevant

8.2.4.11

9) The employer is entitled to have regard to costs on introducing new systems of pay.

Here Mr Lynch sought to pray in aid the case of *Cross*. That case concerns an attempt by the employer to objectively justify an indirectly discriminatory retirement age for cabin crews. The EAT found that a tribunal had been entitled to take cost implications into account when concluding that objective justification had been established. With respect to Mr Lynch, we are not much assisted by cases directed at the question of justification. We are considering a prior question. Financial considerations may give rise to a GMF (See eg *Benveniste v University of Southampton [1989] IRLR 122*) but insofar as they provide a non discriminatory reason for a pay disparity arising, and only to the extent that they continue to explain that disparity.

8.2.4.12 We must also say, with great respect to Mr Lynch, that we were not much assisted by references to *Surtees*. We understand, in particular, that part of the *Surtees* judgment, paragraph 53, is relied on by Mr Lynch as evidence of the fact that higher courts have thought it permissible to consider, for example, the attitude of parts of the workforce in negotiations with the employer over the subject of equal pay. Mr Lynch sought to draw the analogy between that and the GMF that he wants to make.

8.2.4.13 The issue in Surtees, insofar as it is relevant, is whether the respondent's GMF (red circling) was discriminatory and, if so, whether it had been justified. The EAT spent time discussing the first part of that question. Paragraph 55 and the preceding paragraphs are intent on showing that the EAT had got it wrong in *Villalba* by concluding that, in an *Enderby* type situation, there was an irrebuttable presumption of prima facie sex discrimination. On reflection, Mr Justice Elias now says there must be the possibility, albeit an unlikely one, that one *can* rebut the presumption. Paragraph 55 is a series of examples of how an employer might do that. It does not seem to us to be very helpful when talking about what might or might not amount to a GMF. The examples are aimed at an entirely different matter.

8.2.4.14 Mr Lynch asserts that *Farthing* requires us to consider, in the round, why as at February 2006 there were differences in pay and when, but for that cause or reason, would a different pay system have been in place. A hypothetical informed observer would respond that the reason was that for many years the council had tried, and through no fault of its own, failed to introduce a new system of pay. We find that *Farthing* requires no such thing. There is no reference to a hypothetical informed observer or to considering the matter in the round. Rather, in

that judgment, there is a conventional application of the provisions of the Act to an unusual circumstance. As Elias J in *Bainbridge* explains (para 147), *Farthing* is not a case of historical discrimination and is a classic red circling case.

8.2.4.15 Mr Lynch employs the "but for" test in this way. But for the inability of the respondent to achieve its reasonably anticipated goal of achieving single status much earlier than was the case, through its wholly reasonable and persistent efforts to do so, the pay rates of the claimants and comparators would have been very different to what they were 6 years before and up to February 2006 (the dates of claim). As a result, the cause of the different pay rates was the inability of the respondent to achieve its aim of single status. Even on face value, that argument suffers from requiring the presupposition that single status was the only practicable method of ending pay disparity and we have already commented on that. However, it seems to us to be flawed more fundamentally. A simple "but for" test is not the test that applies in determining the reason for pay disparity. The true test is that which is laid out in *Marshall.* The factor must be the cause of the disparity and in that regard must be a material, that is, a significant and relevant, factor which is material in a causative not justificatory sense. This echoes the judgment of Mummery (P) in *O'Neill* which commends an approach to causation that is "simple, pragmatic and commonsensical"

8.2.4.16 A feature of Mr Lynch's formulation of the factual matrix he would need to establish to support his GMF, and of his submissions on causation, is a reliance on the reasonableness of the conduct of the respondent. In our view, there is absolutely no room for the question of reasonableness when considering a S1(3) defence. If Mr Lynch's GMF is capable of being a GMF, it is not even slightly to the point (except perhaps forensically) that the respondent behaved reasonably or otherwise. What would matter is that the respondent genuinely wanted to introduce single status as a way of ending discrimination and its failure to do that is the reason for the disparate pay under consideration. Those are the tests of genuineness and materiality demanded by the statute. Lest there be any doubt about that, the decision of Lord Nichols in *Marshall* makes it plain that the reason need not be a "good" reason (see paragraph 19). In the earlier case of *Tildesley v TML Plastics Ltd [1996] 395* (approved in *Marshall*) Mummery J went even further and said that it can be a careless error (paragraph 22). In other words, the respondent could have relied on a completely unreasonable negotiating position based, for example, on a totally false understanding of the union's stance or a completely muddle-headed understanding of its own financial position. The fact that Mr Lynch shies away from the logic of that and submits to a requirement of

reasonableness, seems to us, with great respect, to demonstrate the essential weakness of his argument.

8.2.4.17 We have given thought to what counsel have said about the consequences of this decision. Mr Lynch submitted that if it really is the case that he can not pray in aid his client's attempts to end disparate pay, it would be a travesty which means, effectively, that employees who subsequently benefit from the introduction of equal pay can get away with attempting to obstruct its introduction. That seems to us to be a general appeal to fairness. Whilst we are sympathetic if it is indeed the case that the respondent has done all it reasonably could have done (a point by no means conceded by the claimants) we are adjudicating in the context of a statutory scheme and it is not insouciance (pace Mr Lynch) that leads this tribunal to conclude that that is indeed a possible result of the current structure of the law. We would, however, point out that no one has ever suggested that any of the claimants in this case were individually consulted about the introduction of single status. Insofar as they were able to influence the negotiations it was as part of a workforce, male and female, balloted by their trades unions from time to time. Whilst that seems inevitable in the context of collective bargaining, it must not be forgotten that each of the claimants has an individual right to equal pay and that pay is ultimately a matter for the employer.

8.2.4.18 Mr Lynch asserts that his result would accord with the policy of the Act. However, we respectfully agree with claimant's characterisation of the consequences of accepting the respondent's arguments. It is the case that all local authorities are obliged to behave reasonably and so one would assume that every local authority going into negotiations is at least in its own mind, attempting to behave reasonably. Further, it would be surprising to find a local authority which was careless of its statutory obligation to discharge its functions in a way which does not discriminate on the grounds of sex. That is not, with great respect to Mr Lynch, the high bar that he would have us believe it is. If that is all an employer needed to show then there would, in effect, be a moratorium on very many claims for equal pay, despite the fact that women may have been paid unequally, where an employer can show an attempt to remedy that situation, however long that attempt may take. That does not seem to us to accord with the policy of an act designed to end discriminatory pay regimes.

8.2.4.19 With great respect to Mr Lynch, his argument is not sustainable. We therefore take the view that evidence on this point will not assist the respondent and we find that the overarching GMF must fail at this preliminary stage.

8.3 The remaining GMFs

8.3.1 The submissions

In this part of the judgment we have chosen to incorporate the respective submissions within the text of our conclusions on the separate sub-issues. At each stage it ought to be clear what view each party took of the particular point. The claimants made a joint submission so there has been no need to make separate reference to the two counsel appearing on their behalf.

8.3.2 Genuine Material Factors.

The respondent's case is that the differences in pay between the claimants and their male comparators are explained by genuine material factors which are not the difference of sex.

The parties agree the following formulation of the approach to be adopted.

> "Where the respondent relies upon a genuine material factor defence it is for the respondent to demonstrate what that factor is and that the factor relied upon is
>
> (a) A genuine reason, and not a sham or a pretence, which existed and was known to the employer at the date that the pay was fixed and which continues to the point of the hearing;
>
> (b) That the less favourable treatment is due to this reason. The factor must be a material factor and must be causative, not just justificatory;
>
> (c) The reason must not be the difference of sex. This can include direct or indirect discrimination;
>
> (d) The factor relied upon is a significant and relevant difference between the woman's case and the man's case;
>
> (e) If the factor relied upon is indirectly discriminatory on the grounds of sex, that reliance upon it is justified."

Of the foregoing, (b) and (d) were not in issue. It was accepted that the bonus and then the protected pay explain the difference in pay and are the reason for that difference Unlike the overarching GMF dealt with above, there was no suggestion that they were not causative factors. In relation to (c), it was not contended that either the bonus or the

protected pay was directly discriminatory. We set out below our judgment on those issues which were in contest between the parties

8.3.3 Are either of the GMFs a sham ?

8.3.3.1 The claimants argue that, at least in respect of the refuse workers' bonus scheme, the defence fails at the first hurdle because the scheme is a sham. In so far as it is aimed at sickness absence, the absence problem was not caused by sickness but by, in Mr Rawson's words, "lead swinging". Insofar as it was addressed to issues of customer satisfaction, there was no problem to address and the scheme was simply a way of putting money into the pockets of the workers.

The respondent hotly denies the suggestion that the scheme was a sham.

8.3.3.2 The tribunal has concluded that both the bonus scheme and the pay protection scheme were genuine attempts to put in place pay arrangements not designed merely to "put money in the pockets of men" as Ms Rayner suggested.

8.3.3.3 It did not seem to us that the claimants were seriously suggesting that the pay protection arrangements were anything other than what they purported to be and we need only say that in our view the evidence explaining their genesis and purpose was compelling.

8.3.3.4 What of the refuse workers' bonus? We find that the evidence we heard on this issue from Mr Rawson and Mr Dorrofield was entirely convincing. The claimants were never able to challenge the stark figures about the refuse service facing Mr Rawson in 1999. The service was being cross-subsidised and was, in business terms, running at a loss. He had commissioned careful research into benchmark authorities and had discovered that in terms of bins-per-hour, Coventry's service was inefficient. He had too many workers, working an inefficient pattern of hours and displaying expensive and unacceptably high levels of "sickness" absence.

8.3.3.5 We have been taken to the minutes of the negotiations between management and the unions leading to the introduction of the 1999 scheme. They reveal that, throughout, it was Mr Rawson's concern to address the foregoing difficulties. The report to the council urging its introduction similarly concentrates on those issues. Mr Shortland confirmed that once the scheme was introduced, sickness levels were monitored, as were complaints levels, that bonus was removed in appropriate cases and that appeals were properly investigated and dealt with. This points to a genuine desire to operate the scheme for

its ostensible purposes of improving attendance and maintaining customer satisfaction.

8.3.3.6 We also accept Mr Rawson's evidence that the part of the bonus in relation to customer satisfaction was introduced to counter any tendency the collectors may have had to skimp on their work as a way of either ensuring overtime payments for collecting uncollected bins on Saturdays or of being able to go home early without having done the job properly.

8.3.3.7 We accept that that remained an important consideration for the life of the scheme. We further accept that the reasoning that led to the attendance aspects of the scheme was also applicable throughout the life of the scheme. Indeed, the evidence shows that once the link between receipt of bonus and attendance was abandoned, attendance began to decline toward pre-1999 levels.

8.3.3.8 We are satisfied that the bonus scheme was genuine and was so from its introduction to its replacement by single status.

8.3.4 The need for justification

8.3.4.1 Since we decide that matter in favour of the respondent, we must next ask ourselves whether the respondent needs to justify the pay arrangements or, to put it another way, are the factors relied upon indirectly discriminatory?

8.3.4.2 The answer to this question requires an examination of the following question. When does prima facie discrimination arise so as to require an employer, seeking to make out a genuine material factor defence under S1(3) of the Act, to justify the pay arrangement?

8.3.4.3 The decision in *Surtees* starts with an analysis of the case law since *Enderby* and in particular an examination of the decisions of the House of Lords in *Marshall* and of the Court of Appeal in *Armstrong*.

8.3.4.4 At paragraph 34 of the judgement, Elias J refers to the EAT's decision in *Villalba*, dealing with *Armstrong* and *Enderby* and at paragraph 45, he acknowledges that the EAT is bound by *Armstrong*. The effect of that conclusion is that he expressly retreats from the position adopted in *Villalba* that once disparate impact is shown, established by cogent statistics, there is an irrebuttable presumption of indirect discrimination, calling for justification by the employer. Instead he says this

> "It may be helpful to consider what we perceive to be the practical significance of this analysis, assuming it to

> be correct. First, in all cases of what might be termed 'classic' examples of indirect discrimination the very criterion which the employer chooses to differentiate pay scales will, because of the position of women in society, itself impact adversely on women rather than men (or vice versa). A traditional example is where full timers are paid more than part timers as in the *Bilka* case. The criterion itself – the distinction between full and part time – is the very factor that *causes* the disparate impact. In such cases the pay arrangements are inevitably tainted by sex – it is the direct consequence of the employer's pay criterion – and plainly the obligation to justify arises. That was not of course the *Enderby* situation, as the Court of Justice in terms recognised."paragraph 51, page 867.

In neither the context of the 1999 bonus scheme nor of the pay protection following the introduction of single status, do the claimants seek to assert that there is classic *Bilka* type indirect discrimination. Rather, they assert that, either by way of stark statistics, telling their own tale, or by reliance on a principle they derive from the case of *Joss* (with which we shall deal later), the requirement to justify arrises as it does in a second type of situation, dealt with by the EAT in *Surtees* in the following paragraph.

> "Second, in many cases the women will be claiming that the pay arrangements adversely impact upon them as a group, but there is no obvious feature which causes the differentiation. It is not possible to point to a specific factor which would be likely to cause the women to fall into the lower paid group. However where disadvantage, typically gleaned from the statistics, is sufficiently striking, it may be justified to draw the inference that the difference in pay reflects traditional attitudes about what is appropriate male and female work and pay, even though no obvious discriminatory factor is identified." Page 876.

8.3.4.5 Mr Lynch points out that in this case the Council, unlike the respondent in *Enderby,* is not relying on a history of separate negotiations to explain the pay differentials. Instead, he submits that the Council can point to an explanation for the difference in pay that is a

> "particular and specific factor which .....causes the difference in pay but which is applied only to the predominantly male group. The factor does not create the two pools but it is applied to only one of them. In those circumstances it will be sex tainted unless the employer can show – the onus being on him – that

> notwithstanding that the factor has been applied so as to benefit only the male group, there are non-discriminatory reasons why that is so." paragraph 55 page 876.

This factor, says Mr Lynch, is the productivity bonus embodied by the 1999 scheme. It was, he submits, a scheme arrived at to deal with specific problems in the refuse collection service, which can be summarised as being overmanning, high absenteeism rates and a pattern of work which created expensive collection backlogs following Bank Holidays.

8.3.4.6 He lays stress on the fact that it was self financing. Although that matter was disputed by the claimants we have found, on the balance of probabilities, that that is indeed the case. Insofar as he needs to explain why other (predominantly female) groups did not receive similar bonuses, he points to the fact that there was no scope for self-financing schemes in those areas of work and that in any case, with the possible exception of the cleaners, those jobs simply do not lend themselves to productivity based bonus schemes.

8.3.4.7 If Mr Lynch is right about that latter point, and there was something inherent about the way in which work and pay was organised within the respondent's organisation which meant that typically male jobs could be rewarded with productivity bonus schemes and vice versa, that would not, in our view avail him. We were referred to the unreported judgement of the EAT in the joined cases *of Cumbria County Council v Dow and others* UKEAT/0148/06 (refered to as *Joss*). An identical argument was advanced on behalf of the respondent council in that case. Mr Justice Elias commented on it thus

> "It does seem to us that Mr Jeans is in fact running two inconsistent arguments. He has submitted that it was not possible to confer similar productivity benefits on any of the claimant groups and indeed, appeals against the Tribunal's finding that it was possible to adopt productivity schemes for caterers and cleaners. If he is right about that, then in our view the only conceivable finding is that there was sex tainting. If the benefit is given only to those who perform traditionally male jobs and cannot be conferred on the claimants doing traditionally women's work, then prima facie indirect discrimination inevitably arises. On the premise, only the predominantly male groups can benefit from the way the pay arrangements are structured. It is akin to paying more to full timers than part timers. The differential may be justified, but the need to justify plainly arises.

> It seems to us, therefore, that it is only on the assumption that there is the possibility of claimant and comparator being subject to the same schemes that it can even be contended that the explanation for treating them differently has nothing to do with sex. (Paras 1164 and 116)

8.3.4.8 Nevertheless the tribunal has found that the respondent has failed to show that there was an inherent impossibility created by the nature of the work and pay structures in extending bonus schemes similar to the refuse workers scheme to the work done by the claimants (which was done predominatly by women).

8.3.4.9 We have concluded that there were no reasons of principle preventing bonus schemes predicated on high attendence and low complaints volumes being extended to any of the jobs done by the claimants. We have however also concluded on the balance of probabilities that the reason why such schemes were not in place for women were budgetary.

8.3.4.10 This issue was the subject of contested evidence from Mrs Sutton, in particular, for the respondent and Mr Higham for the claimant. We found Mrs Sutton's view that there was no scope for bonus schemes similar to the refuse workers scheme in the areas of work represented by the claimants, unpersuasive. At base, the refuse workers scheme is connected to two easily measured factors, attendence and complaints. We were given no reason why, for example, school meal cooks or social services care workers could not have received flat payments over and above their basic pay which were subject to deduction in the case of non-attendence at work. Indeed we heard uncontested evidence from the respondent that, at least for a period, the council cleaners (mainly female) were subject to a 20% bonus which was gained by cleaning beyond a measured norm and was tied to attendence. Ms Messenger very fairly conceded that a bonus could have been used to improve attendance in female dominated jobs and there was indeed some evidence from Mr Higham that absence levels were an issue in female dominated manual jobs although not to the levels experienced in refuse. We had no reason not to accept that evidence. There was also evidence that there was a sickness problem in social work/care but there it was thought that sickness levels reflected genuine illness, caused by the nature of the work.

Nor did we understand the difficulty of creating a system whereby service user's disatisfaction could be logged (say by way of a dedicated complaints line) and used to determine an aspect of pay. Mr Lynch appeared to contrast the straightforward nature of the refuse collectors job (either a bin has been collected or it has not) with the much more complex

relationship with clients entailed in care work. That argument was not persuasive. It did not deal at all with the cases of cooks and cleaners. Furthermore, the bonus measurement criterion for the refuse workers was the mere fact of a complaint. There was no requirement that the complaint be verified or its precise nature identified. As far as we can see, it could as equally have been about refuse being left scattered on the road, a refuse worker being rude or a bin being uncollected. We have concluded that a service, no matter what it is, can either be provided to a client's satisfaction or not. If the mere fact of the complaint is the determinant in a bonus scheme, the nature of the service is an irrelevance. We heard no evidence to suggest that consideration had ever been given to a bonus scheme for any of the claimants' jobs (apart from the cleaners) and it seems clear to us that these are ex post facto rationalisations.

8.3.4.11 We did however accept the respondent's point that once there was a requirement that these scheme be self financing, the picture is somewhat different. For example we heard evidence about a 2003 review of the social work delivery drivers service. That too had been carried out in the context of a Best Value exercise and of a budget deficit Mr Higham agreed that once you accept that no *extra* money was to be pumped in to the social work deliver service, and that the level of service could not be cut, the £.4m budget deficit could only be cleared by efficiency savings (rejigging the fleet of vehicles and making them multi purpose, making management cost savings and getting staff to multi-task) That left no room for self financing bonuses for the drivers. He accepted that by the same token in other areas where there were no staff cut backs to be made because there was already high efficiency (school meals) or because of statutory necessity (care workers) self financing bonuses were not affordable.

8.3.4.12 This latter conclusion is, we think significant. Mr Lynch would wish us to conclude that the situation prior to 1999 vis-a-vis the refuse scheme, is an irrelevance. It is the 1999 scheme that creates the bonus which the parties accept accounts for the whole of the difference in pay between the refuse collectors and the claimants. The claimants, on the other hand, submit that historic issues can be and are relevant in this case.

We respectfully adopt the judgment of Elias J in *Surtees* in this regard

> "We accept, therefore, Mr Jeans' submission that proof of a non-sex based reason will be a complete answer to any discrimination claim, direct or indirect. At the same time, it is important to bear in mind the purpose of the legislation and in particular the fact that there are structural reasons causing unequal pay. There has

> historically been much stereotyping of jobs with assumptions being made both about what work is suitable for men and women and what pay is appropriate for these jobs. This has led to much de facto job segregation (which is not to suggest that this is a deliberate or intended policy of employers, or that they have in any way formally limited women's access to the predominantly male jobs).
>
> That history continues to leave its mark on pay structures. Tribunals must be alive to the very real possibility that where there is adverse impact, identified where necessary by sufficiently cogent statistics, that may be the result of factors which are sex tainted. We agree with the observation of Cox J in the EAT in *Ministry of Defence v Armstrong* [2004] IRLR 672, paragraph 42, that tribunals should not apply a formulaic approach to issues of sex discrimination; what matters is whether the tribunal is satisfied in any particular case that the evidence discloses a pay difference which is related to the difference of sex." Paragraph 49 and 50 page 876

8.3.4.13 The history of the refuse service was to some extent relied upon by the respondent when seeking to explain how the 1999 scheme came about. The 1991 CCT contract had created or exacerbated the problems which faced Messers Rawson and Dorrofield when designing a Best Value contract. In particular, if the bonus enshrined in that agreement had ever been linked to attendence, it had lost that link either before or during the currency of the CCT contract. As a result there was no particular financial incentive to attend work and absenteeism was high. This created the necessity for expensive agency staff to cover. The respondent's solution was, in effect, to pay refuse workers not to "swing the lead" and at least in part to use the savings generated by higher attendence by contracted staff to fund that payment.

8.3.4.14 There are other reasons why the pre-1999 pay arangements cannot be simply ignored in considering the post 1999 scheme. Mr Rawson gave evidence that he could not have reached an agreement with the Trades Union for his scheme on the basis of a reduction in pay. Indeed, he emphasised the opportunity it presented to increase pay. Furthermore, it did not occur to him to attempt to reach an agreement by stripping out the bonus element and, as it were, starting with a blank sheet of paper. The fact of the bonus was, we find, as much part of the landscape as the levels of absenteeism or the fact that refuse workers were receiving pay for a full working week whilst working on average 11 hours short of their contracted hours.

Crucially we find that that bonus made the post 1999 levels of pay, however arranged, inevitable.

8.3.4.15 Prior to the 1999 scheme the refuse workers received a bonus which was not linked to any particular measure of work and would be received even if they didn't attend work. The bonus had been paid at increasing levels over time. By 1999, that bonus amounted to almost 50% of the total pay packet. There was no requirement to meet any individual or collective targets for customer satisfaction. The CCT tender had been made on the basis of 40 immediate redundancies, with more to come on the introduction of wheeled bins. However, even after the redundancies, refuse workers, who were permitted to work job-and-finish, were still only working an average of 28 hours per week against a contracted basic of 39.

8.3.4.16 Mr Dorrofield gave evidence, which we accepted, that the large size of the bonus reflected the "high-profile nature of the job". This we took to be a referrence to the fact that refuse workers had a collective industrial muscle, granted to them by the political conseqences of their taking industrial action, which other staff did not enjoy. It is a natural conclusion that budgets for the refuse service have always been of a size to meet the pay demands which this position brought about.

8.3.4.17 We have accepted that the respondent was operating in a a financial environment where any objectives of the new scheme had to be met by generating savings so that the scheme was "self-financing". It is evident that the Council was unwilling or unable to find extra money to increase budgets merely to better reward staff. However, any consideration of what was "self-financing" must start with a consideration of the size of the budget in the first place. The inability of the budget for Social Services transport drivers, and indeed of the budgets for other job groups occupied by the claimants, to yield savings which would "self-finance" bonuses has, as we have noted, been advanced as a reason for not being able to extend bonus schemes to those workers. Indeed, we were told, and we accept, that those services had, by and large, been pared down to the point were they were running at high levels of efficiency. Unlike the refuse scheme, that paring down was achieved with no extra cost to the employer in terms of the wage bill and, in any, event those budgets were rooted, historically, in the context of pay structures which, we now know under-rewarded jobs occupied almost exclusively by women and vice versa.

8.3.4.18 The pre-1999 refuse bonus scheme is a classic example of a bonus whose original rationale, if there ever had one, had been lost. In effect, the bonus at that point was indistinguishable from basic pay. The fact of that bonus made inevitable that a bonus payment which at least matched it,

would be part of the 1999 scheme. The 1999 scheme was capable of being self financing because it started with a budget that reflected the historically high levels of pay enjoyed by workers in a traditionally male job. We take the view that this history taints the 1999 refuse bonus scheme.

8.3.4.19 As to the statistical evidence, that is stark. Of the entitled to the refuse workers bonus, only one was a woman. In addition, we noted that Mrs Sutton headed a bonus review sub committee. In 1998 that sub-committee reported on the existance of 38 bonus schemes in payment across the council. Of those schemes, only the cleaners' bonus, (a fraction of the refuse workers' one and subsequently removed), was paid for a job mainly done by women. Indeed, the respondent has not sought to argue that the refuse workers bonus scheme did not create a disparate impact when judged statistically.

8.3.4.20 Taking those factors into account, we have concluded that in respect of the pay differential created by and attributable to the refuse workers bonus, there is a prima facie case of sex discrimination and that the respondent must justify the pay arrangments enjoyed by the refuse workers before the introduction of Single Status insofar as they give rise to a difference in pay with the comparator claimants.

8.3.5 Can the bonus be justified?

8.3.5.1 It is the respondent's case that, if necessary, the bonus can be justified.

In setting out the legal tests relevant to this part of our consideration, the tribunal notes that there is no fundamental disagreement between the parties.

8.3.5.2 We here set out the claimants' formulation

> In order to demonstrate that a difference in pay which has a disparate adverse impact on women is objectively justified, an employer must show that the relevant difference:-
>
> 1.1. corresponds to a real business need;
> 1.2. is necessary to achieve the objective in question; and
> 1.3. conforms to the principle of proportionality
>
> See Rainey v Greater Glasgow Health Board [1987] ICR 129.
>
> The principle of proportionality applies. It requires an

objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it – see Barry v Midland Bank plc [1999] ICR 859.

Guidance on the way in which this balancing exercise should be carried out was provided by the Court of Appeal in Hardy & Hansons plc v Lax [2005] ICR 1565, an appeal relating to a complaint of indirect discrimination on grounds of sex. The Court held that it is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. The Court emphasised that there is no room to introduce into the test of objective justification the range of reasonable responses' which is available to an employer in cases of unfair dismissal.

The standard of scrutiny required is illustrated by the judgment of Sedley LJ in Allonby v Accrington & Rossendale College and others [2001] ICR 1189 at paragraphs 26 – 29 and can be summarised as follows:

(1) There must be a critical evaluation of whether the employer's reasons demonstrated a real business need. In assessing whether the employer had a real business need, the tribunal must evaluate objectively whether the employer's measure was reasonably necessary. The tribunal should not accept uncritically the employer's reasons for the measure;
(2) If there was such a need, the tribunal are then to look at the seriousness of the disparate impact the employer's measure had;
(3) The justification must be weighed against the discriminatory effect to ascertain whether the justification outweighs the discriminatory effect."

8.3.5.3 To these observations the respondent would add the following:

"However, if objective justification were required, the most recent authoritative statement of what is required to be shown is the EAT's judgment in The Chief Constable of West Midlands Police v Ms Blackburn UKEAT/0007/MAA. What this case (and others) emphasise is:-

(1) the test of objective justification is whether the aim or purpose of the payments made to the comparator is legitimate and, if it is, whether the means are proportionate;

(2) it is an error of law to consider that the employer is obliged to equalise the pay of the claimant group of employees, or to introduce a similar scheme of payments for them;

(3) in particular, it is an error of law to conclude that the employer is obliged to make payments to the claimant group of workers on a basis that does not in fact apply to them (although that basis does apply to the comparator group of employees);

(4) attention should be focussed in cases where objective justification needs to be shown, on whether the scheme in place that applies to the comparator groups of workers is justified, rather than on what existed or did not exist in terms of pay arrangements for other workers.

In addition to the above, reference should be made to the fact that financial costs can be relied on as a factor by the employer in terms of establishing objective justification (see Bainbridge [2007] IRLR 91). Further, local authorities owe fiduciary duties to their rate payers which include having regard to market rates of pay and to not reducing necessary services in order to finance additional payments to staff.

8.3.5.4 Genuine business need.

8.3.5.4.1 With those principles in mind, we consider the nature of the scheme before us. Mr Lynch's submission is that the scheme was adopted for entirely understandable reasons which were aimed at dealing with structural inefficiencies in the delivery of the refuse collection service in Coventry and the securing of that service for the Council's own Direct Labour Organisation (DLO) under Best Value principles. This represented a genuine business need. The claimants challenge this assertion. They point to the fact that the majority of the bonus was aimed at ensuring acceptible rates of attendence but that there was in existance a mechanism to deal with absence by way of the council's own procedure. The rest of the bonus was aimed at maintaining customer satisfaction and £30 of the bonus was aimed at nothing at all, being payable even if a refuse worker failed to attend each of the four days of any week.

8.3.5.4.2 We refer here to our conclusions on the question as to whether the bonus scheme was a sham. We have little difficulty in concluding that, for many of the same reasons the bonus scheme was aimed at a genuine business need. For political and other reasons Coventry Council wished to retain the refuse collection service in-house. That seems to the tribunal to be a legitimate aim of a local authority which not only provides important services to its council tax payers but is a significant employer with a general interest in maintaining good quality employment in its locality. To retain the collection service it had to design a tender which met Best Value principles. To meet Best Value criteria Mr Rawson needed to deal with the inefficiencies he identified in the existing service. He did so by means of the 1999 scheme.

8.3.5.5. Was it necessary and proportionate?

8.3.5.5.1 In the view of the tribunal, this is the real issue in this case, as least as far as the bonus is concerned. Even if we find that the scheme is a genuine one aimed at dealing with a legitimate business need, can we find that the means arrived at are necessary and proportionate?

8.3.5.5.2 The burden rests upon the respondent to establish the justification. It is the respondent's case that the crucial question for us is whether the "1999 refuse scheme consisted of a completely genuine and effective productivity scheme" and the respondent would answer that in the affirmative. With that answer, Mr Lynch says that the respondent has shown all it needs to by way of justification. We disagree.

8.3.5.5.3 In examining respondent's case, the tribunal must consider whether the respondent has shown that it has correctly struck the balance between the discriminatory effect of its policy and the respondent's legitimate needs.

8.3.5.5.4 As a preliminary proposition, the claimants argue that the burden on the employer at this point will be harder to discharge if no thought appears to have been given to the question of proportionality at the time of the introduction of the scheme. (*Elias* and *Hockenjos*).

8.3.5.5.5 We note that the evidence shows that the trades unions in the form of Mr Shortland did, on one occasion during the negotiations, raise a question about the legality of the scheme and was assured by

management that it passed muster. Unfortunately, there is no explanation as to how that view was arrived at.

8.3.5.5.6 We are satisfied from the evidence of Mrs Sutton's report that her bonus review did not consider the details of any of the bonus schemes it identified. For Mrs Sutton, it was enough that they failed the test of gender access in that they were predominaly aimed at men. We accept that Mrs Sutton's group lacked the evidence it needed to carry out a more detailed analysis. In any case, the group's report pre-dated the 1999 refuse scheme. It is clear to us that Mr Rawson, the designer of the scheme, gave no thought himself to equal pay issues, relying on others above him to deal with that. Not having been told to stop, he proceeded. We did not hear from either of his two line managers and we know not what was in their minds. We do know that Mrs Sutton advised them of her objection to the scheme on the basis that it was a bonus scheme aimed at men and that all such schemes were about to be swept away by single status, them thought to be imminant. Why her objections were ignored we cannot tell.

8.3.5.5.7 We are unable to find evidence of considerations of proportionality at the introduction of the scheme.

8.3.5.5.8 The claimants attacks the bonus scheme on its own terms and says that it was not a proportionate means of meeting the need.

8.3.5.5.9 In assessing the question of proportionality we observe that the ECJ has concluded in *Kutz-Bauer v Freie und Hansestadty Hamburg [2003] IRLR 368* that it will not be possible for an employer to meet this test if there is evidence that less discriminatory means could be used to achieve the same objective.

8.3.5.5.10 The claimants points to the fact that the scheme is mainly aimed at absence. Were there other less discriminatory ways to skin that particular cat?

8.3.5.5.11 Both Mr Rawson and Mr Dorrofield gave helpful evidence on this point. In being asked to comment on the reasons behind the historically high levels of absenteeism amongs the refuse workers, Mr Rawson agreed that the levels were much higher than the council norm of 5.5%. He agreed that the council had an absence management procedure and that the workforce had been poorly managed, at least in this regard. Mr Dorrofield agreed that apparently no consideration had been given to using management

tools to control the absenteesism, although it should have been. We heard no evidence that absence levels were addressed elsewhere in the council other than by referrence to the management policy.

8.3.5.5.12 Whilst we accept that it may well have been less contentious and more convenient for management to address the absence problem amongst refuse workers by way of cash incentives, since there is no evidence that even the obvious alternative was given any thought, let alone attempted, we find that the respondent cannot justify this element of the bonus.

8.3.5.5.13 That must be so even more forcefully after February 2004, when the formal link between the payment of bonus and attendence at work was abandoned. This appears to have happened because the Trades Union put the matter into dispute, seeking to resile from it agreement with the respondent, and because the respondent, thinking that Single Status was imminant did not think the fight worth the candle. We are unable to see anything in that narrative that could justify what amounted to a return to the pre-1999 state of affairs.

8.3.5.5.14 Finally, we would observe that £30 per week of the bonus was payable even if a worker failed to attend work on any day of any given pay week. No one was able to give us a satisfactory explanation for this element of the bonus payment, let alone a justification.

8.3.5.5.15 We turn now to that aspect of the bonus that related to customer satisfaction. It will be recalled that the rationale for this was that there was anxiety that complaints might increase because, under the new arrangments, more bins needed to be collected by each worker, leading to a temptation to do the work less well. It will also be recalled however that under the new arrangements the collectors were still getting through their work in an average of 34 hours per week. Further, it was said by the respondent that the collection of bins was checked not just by the volume of customer complaints but also by supervisors doing spot checks. We heard no reason why customer satisfaction could not have been maintained by ensuring that the job was carried out to proper standards by the normal methods of management control and supervision. The bonus seems to us to have been a further example of rewarding workers for doing the job that they were contractually obliged to do.

8.3.5.5.16 In any event, the unchallenged evidence of Mr Shortland was that prior to 1999 customer complaints were running at a mere 30 a week and that under the bonus arrangments in the 1999 scheme they would have to increase to 600 per week to trigger a loss of bonus. It seems to us inherently unlikely that this was a serious or signifiant risk and certainly not one which justified payments which added to a situation of gender pay inequality.

8.3.5.5.17 At this point, it may be helpful to deal with a fundamental disagreement between the parties about the meaning of the authorities on an issue in relation to proportionality. That relates to the evidence about the possibility of extending bonus schemes to the comparators in this case.

8.3.5.5.18 It is Mr Lynch's case that we should not focus on the failure to consider whether or not a similar scheme could have been extended to others but should focus instead of the circumstances that give rise to the scheme before us. In saying this he relies on paragraphs 40 to 42 of Blackburn. The claimants relys on paragraph 57 in the judgment of the EAT in *Bainbridge* to submit that in assessing proportionality

> " it may be necessary to focus on the disadvantaged as well as the the advantaged group and to ask why the disadvantaged group were not given the same benefits, or opportunities to benefit as the the advantaged group" page 99.

8.3.5.5.19 It seems to us that *Blackburn* is merely saying that there is no obligation upon an employer to invent ways to reward disadvantaged groups merely as a way of limiting or removing the impact of schemes of pay that reward other groups. That was, effectively, what was being proposed in *Blackburn* and was expressly dealt with by paragraph 58 in *Bainbridge* when the EAT said

> "It cannot in our judgment be the case that in order to seek to bring the pay back into equilibrium that the employer should be under an obligation to adopt some other technique, be it a bonus scheme or some other way, of seeking to pay the claimants more" page 99

Nothing about that passage seems to us to take away from the force of the comments in paragraph 57.

8.3.5.5.20 Although we prefer the claimants' submissions on the position in law, we derive little assistance from this issue when considering the question of proportionality. The case before us bears a strong similarity to *Bainbridge* in this regard. As we have aleady stated, we accept that the respondent has shown that the reason why female dominated groups were not rewarded with equivalent bonus schemes lies in the fact that the opportunity for self financing schemes did not exist in their areas of work. That seems to us to explain the reason for not introducing the scheme to others and is not a matter which assists the claimants.

8.3.5.5.21 For the reasons set out above, we have concluded that the respondent has failed to justify the 1999 bonus scheme and insofar as it is responsible for a the difference between the claimants' pay and that of their comparators, there is no material factor defence.

8.3.6 Does the pay protection need to be justified?

8.3.6.1 It will have been seen from our findings above that that what was being protected in the case of the refuse workers was pay derived from a bonus scheme which we regard as tainted by sex and unjustified.

8.3.6.2 We are also satisfied, on the basis of our analysis of the agreed statistical evidence before us, that the decision to protect the pay of losers has itself resulted in gender disparity. On one measure the pay protection arrangements benefited more women than men. They were entirely gender neutral in that all "losers" under single status benefited from the provisions. In all, 1637 employees benefited from pay protection of whom 65% were women. But on another measure, given that 75% of the respondent's workforce is female, the arrangements benefited men disproportionately. Ms Messenger was obliged to concede that approximately 23% of all men on the workforce received pay protection as compared to 14.5% of the women. Furthermore it was agreed by the respondent's witnesses that the amount of the protection was significantly higher for men (approximately £2.5k per annum as compared to £250) and it follows that as pay protection continues in operation the number of men receiving it, as percentage of all those getting protection, will increase.

8.3.6.3 For the foregoing reasons, and applying the reasoning we set out when dealing with the need to justify the bonus arrangements, we find that the pay protection too requires justification.

8.3.7 Can the pay protection be justified?

The tribunal has concluded that the respondent has discharged the burden on it to justify the pay protection arrangements.

8.3.7.1 Genuine business need

8.3.7.1.1 The tribunal found that respondents wished to introduce equal pay by way of single status. We do not say that single status was the only possible way of achieving pay equality. Manifestly it was not. That is not however the issue. What is of relevance is that the respondent council genuinely sought to achieve a situation of general pay equity (including gender) by a comprehensive review of all jobs and an ending of the outdated distinction between manual and clerical grades. In doing so, it was seeking to give effect to a nationally negotiated agreement. That seems to us to be an entirely legitimate aim.

8.3.7.1.2 The 1997 National Single Status agreement provided the context in which the respondent approached this task. That agreement recognised that any move to single status would involve losers as well as gainers and that for the former some form of cushioning by way of pay protection would be necessary. The respondent sought to introduce single status by agreement with the trades unions. Once again, we find that to be an entirely legitimate approach for reasons which almost go without saying. Indeed, we were somewhat puzzled by Mr Higham's attempt (at least by implication) to suggest that the need for agreement was not as great as the respondent suggested.

We accept that the history of relations between the respondent and its staff had been recently soured by a dispute known as "pay versus jobs" in which the respondent had come close to issuing notices of dismissal and reengagement in order to impose pay structures on its staff. The documentary evidence shows that, at the time of that dispute Mr Higham himself had regarded the relationship between staff and employer to have been seriously scarred. The desire to avoid that situation arising, by seeking to obtain a negotiated agreement, is entirely understandable and legitimate in the context of the respondent's duties to its tax payers and employees.

8.3.7.1.3 As to the significance of pay protection in all of this, the evidence was not seriously contested. The first phase of the single status process which had started in 1998 had been brought to an end by the trades unions

withdrawing from the process and refusing to cooperate with the job evaluation process. A significant reason for that, as is evident from the contemporaneous documents, was that no agreement had yet been reached on pay protection. The process was revived in 2001 once agreement was reached on a pay protection package of five years, which was balloted on and accepted by union members at the recommendation of their representatives.

8.3.7.2 Was it necessary and proportionate?

8.3.7.2.1 Given the significance placed on pay protection by the national agreement and by the Coventry trades unions we find that the introduction of an acceptable pay protection package was necessary to achieving the legitimate business aim of a negotiated single status agreement.

8.3.7.2.2 We also consider that it was proportionate. It was an agreement that applied to all losers, male or female. We accept (see above) that in broad terms it advantaged men over women. Nevertheless, it served the important function of cushioning all losers against the effect of sudden, and in some cases, drastic reductions in income and it is difficult to see how else this could have been done. There has been no specific criticism by the claimants about the length of the arrangements and given the history that is unsurprising.

8.3.9 The failure to extend pay protection

8.3.9.1 At a relatively late stage in the proceedings, it emerged that, in reliance upon *Bainbridge*, the claimants' case in relation to the pay protection issue was also as follows. Although no admissions were made as to the jutifiability of the pay protection arrangment itself, it was contended that the real question was whether or not the respondent needed to, and could, justify the decision not to extend pay protection to other staff who were not losers under the JES but who would continue to be paid less then men rated as equivalent by that JES but in receipt of higher pay by virtue of the pay protection.

8.3.9.2 The decision of the EAT in *Surtees,* in part deals with the complaint made by female workers in Middlesborough that they ought to have had the benefit of pay protection arrangements even though they had not had any pay reduction as a result of a JES. In other words, precisely the argument put forward by the claimants in this case.

8.3.9.3 The tribunal at first instance in the *Surtees* case relied greatly on the EAT decision in *Bainbridge* in concluding that the respondent had failed to discharge the burden on it to show that the difference in the pay arrangments was related to sex. That tribunal concluded that, although the respondent could show that pay protection was for a legitimate business aim, it could not show that it was a proportionate means of meeting that aim since the size of the disadvantaged group and the cost of including within it arrangments to extend pay protection to non-losers had not been calculated.

8.3.9.3 The claimants argue in this case that the respondent must have known, at least once the JES exercise had been completed, where the likely Equal Pay challenges were going to come from and who the likely comparators were. It follows that it was in a position to calculate the cost of extending pay protection to the non-losers with some precision. Its failure so to do meant that it could not justify its failure to extend the pay protection to that class of employees.

8.3.9.4 On appeal in *Surtees*, both parties focused on the pay protection scheme as implemented. The EAT in *Surtees* concluded however that they had focused on the wrong question. Almost as an aside, the EAT concluded that it was likely on the facts that the pay protection did have a disparate impact but that there was no doubt that it could be justified. The real question was whether or not the respondent could justify its failure to extend the pay arrangments to the non-losers.

8.3.9.5 The EAT concluded that the tribunal had been wrong to conclude that there was sufficient similarity on the facts of the case before it and those in Bainbridge to feel itself bound by the latter decision.

8.3.9.6 The claimants in this case urge us to the view that our case is much closer, on its facts, to that of *Bainbridg*e than to that of *Surtees*. The respondent urges us to the opposite view.

8.3.9.7 The relevant facts seem to us to be the following.

It is common ground that at the time of the agreement on pay protection and indeed at the time of its implementation in 2005, there were no equal pay claims against the respondent even extant let alone conceded or determined. It is also common ground that the trades unions, giving no thought at all to the issue, did not seek to have the benefits of pay protection extended to non-losers. They focused on obtaining an acceptible pay protection agreement for the losers and then, later on, agreeing compensation by way of back pay for the gainers. In her evidence, Mrs Sutton pointed out, cogently, that

had she believed, in 2005 when she made her report to the Council on back pay and the risks posed by bonuses, that there was another risk, posed by the possibility of claims being brought on the basis that women ought to have the benefit of pay protection extended to them, she would have been explicit about that. As it was she was unaware that there had been claims of the *Bainbridge* type until the following year. We found Mrs Sutton's evidence on this entirely credible.

8.3.9.8 For that reason there was no costing of such an exercise. Ms Manzie gave us unchallenged evidence that, on the basis of calculations done for this hearing, the cost would have been £31million per annum, reducing annually over the life of the pay protection arrangement. The agreed figure for the overall cost of the introduction of single status (including pay protection) was some £10.7 million.

8.3.9.9 As to the state of knowledge of the respondent of its potential liability for equal pay claims, it is common ground that the respondent was aware that there had been no equal pay claims against them because the unions had agreed not to sponsor such claims whilst the parties negotiated over single status. Clearly, such an ageement fell away when the respondent decided to impose single status having failed to secure agreement. We also find that the respondent must have known, in broad terms, once the JES had been carried out from where the claims would come and with which workers comparisons were likely to be made.

8.3.9.10 We also conclude that it knew, or ought to have known, that some at any rate of those claims were likely to succeed. As an example, the respondent has been unable to provide any explanation at all for the £30 of the refuse bonus which is not attributable to attendence and almost nothing that could justify the attenence aspects of the scheme once the link with attenence wa abandoned in 2004. As to the possibilty of extending bonus schemes to the claimants, the respondent has been silent on its ability to reward cleaners in similar ways to refuse workers (save for considerations of budget) for the obvious reason that it has actually done so in the past.

8.3.9.11 In applying the law to those facts, it seems to the tribunal that we must first discern the proper ambit of the principle established by *Bainbridge*. It is clear that in certain circumstances an employer will not be able to justify a failure to extend to non-losers the benefit of pay protection arrangments so as to ensure pay parity throughout the life of those arrangements. However, as Mr Lynch pointed out, *Bainbridge* is characterised by a highly unusual factual background. The employer had conceded that certain bonus arrangments, which were the difference between the claimants' pay and their comparators were unjustifiable. It had in so doing

conceded liability under the Equal Pay Act. Despite that concession, the employer had gone on to perpetuate the inequality when on the introduction of single status it accorded pay protection for the men who lost their bonuses.

8.3.9.12 It is apparent that its decision in *Bainbridge* caused the EAT some disquiet and in paragraphs 161 and 163 of its judgment it was careful to say that there were potential limits to the applicability of its own judgment. Those limits were explored more fully as part of the ratio in *Surtees*. The decision in Bainbridge was distinguished because a significant feature of that case was the employer's knowledge that in paying pay protection it was perpetuating a known breach of an equality clause. That was contrasted with the situation in *Surtees* where, there having been no claims determined or conceded at the time of the inception of the scheme, the respondent was not in the same position of knowledge which would mean that sex was a direct and significant cause of the difference in treatment.(See paragraphs 98 and 99)

8.3.9.13 It seems to us that for the same reasons we too must distinguish *Bainbridge.* Just as in *Surtees*, we are in a situation where the respondent must have been aware that there were some claims which were likely to suceed. In *Surtees* those claims had been lodged and in this case, not. However, we find it inconceivable, in the climate prevailing at the time that the respondent did not anticipate these claims being made. It follows therefore that, just as in Surtees, the decision not to extend the scheme to non-losers requires justification.

8.3.9.14 In paragraph 103 of *Surtees* the EAT concluded, in answer to its important preliminary question, that it can, as a matter of law, be proportionate to deny a woman a benefit she would have had had she received her equal pay at the appropriate time.

8.3.9.15 Is it proportionate in this case? We have concluded that it is and for many of the same reasons relied upon by the EAT in *Surtees* in answering the same question in the same way. We respectfully adopt the reasoning of the EAT in paragraph 108 as it relates to the importance of cushioning the effect of single status. Furthermore, we have no reason to doubt the broad accuracy of the figure given as the cost of extending pay protection. It is certainly true that that figure was not even considered at the relevant time and, as a justification, it suffers from being arrived at after the event. Nevertheless, it is a very significant sum and would have been bound to have had a considerable adverse effect upon the ability of the respondent to reach an agreement on pay protection with the unions. We have already commented on the importance of that agreement.

8.3.9.16 For the above reasons, we conclude that the respondant has made out its defence as it relates to pay protection.

8.3.10 The commercial waste service

8.3.10.1 Although we heard some evidence about the pay structures of the commercial waste staff employed by the respondent, that evidence and its significance was not referred to at all in the agreed facts and issues or in the submissions of either party. We were told, however, that at least one claimant had as a comparator someone employed in the commercial waste service.

8.3.10.2 We refer to our findings of fact at 5.2.8. We are satisfied that if it needs to, the respondent has made out a S1(3) defence to explain the difference in pay between the claimants and any comparator in the commercial waste service. Pay in that service was determined by referrence to a basic rate of pay and a piece work bonus, genuinely connected to productivity. Rates were determined by the market which is significant in the sector, providing ready alternatives for workers not content with pay offered by any particular employer. This is an explanation which does not seem to us to carry the taint of sex at all. However, if it does it is justifiable. The respondent was entitled to seek to run a commercial waste service as a revenue generating operation. Indeed, as we know, it used revenues generated by that service to subsidise its domestic refuse arm. In order to provide such a service it needed to attract staff by offering competetive rates of pay. We did not have our attention drawn to any ready alternative to paying a market rate even if that resulted in gender imbalance.

9. For all of the reasons set out above we have concluded that the respondent has failed to make out its case in relation to its first GMF, and in relation to the refuse workers bonus. We further find that the respondent succeeeds in relation to the protected pay period.

Employment Judge

Judgment sent to Parties on

14 February 2008