

Equal pay and the material factor defence

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Equal pay claims, once the arena for public sector organisations only, have been spreading into the private sector over the last few years. 2019 has seen Asda appeal to the Supreme Court, following a ruling in January of this year by the Court of Appeal that the roles of shop floor workers could be compared to those in distribution centres. Claims have also been made, or intimated, against the likes of Morrisons, Sainsbury's, Tesco, Next and, recently Boots.

The Employment Appeal Tribunal has recently examined the operation of the 'material factor' defence – a means by which an employer can justify pay differentials between employees of different genders, and defeat a claim for equal pay. In *Co-Operative Group Limited and another v Walker*, the employer was able to establish that there were various non-sex-based justifications for setting pay at different level. The issue for the EAT was, as time passed, for how long could the employer rely on those previous reasons. The Employment Tribunal originally found that the material factor defence ceased to operate "at some stage" between the original pay decision and the completion of a job evaluation study a year later. The EAT, pointing out the inherent difficulty with such a vague finding, has given helpful clarification for employees as to when a material factor defence will cease to operate. In the EAT's view, where an employer has established a material factor defence, this will continue to operate until a further decision or omission to decide could be identified; at this stage, the employer would be required again to defend the pay differential. Here, it was only when the job evaluation study became effective that the facts indicated that the original objective justifications no longer continued; and it was not permissible to conclude that the findings of the job evaluation study could be extended backwards into the period prior to the study.

The decision is consistent with previous case law that job evaluation studies do not have retrospective effect. As the focus on pay parity (on various grounds) continues, the decision will be helpful to those employers who are seeking to be proactive in considering whether historic pay rationales continue to apply whilst limiting arguments as to when those rationales ceased to be effective.

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