



Equal Pay and the Equality Act 2010: An Accidental Paradox in Need of Change?

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Abstract

The approach in the United Kingdom to sex-based equal pay has for a long time been distinct from general sex discrimination and from equal pay based on other protected characteristics. This dichotomy allows for a greater focus on sex-based equal pay, in a distinct statutory regime, but also risks creating unnecessary, unintended and detrimental distinctions. This article outlines the different legislative approaches adopted in pursuit of related public policy goals regarding equality and explores, and suggests legislative and interpretative solutions to, a significant issue whereby problematic wording in the Equality Act 2010, and judicial interpretation of it, could unjustifiably leave sex-based claimants in a worse position than those with other protected characteristics with regard to both to injury to feelings and constructive dismissal.

Keywords Equal pay · Equality law · Constructive dismissal · Remedies · Statutory interpretation

Introduction

Provisions seeking to regulate equal pay between men and women in the United Kingdom have been in the statute books for over 50 years now. When the Equality Act 2010 was passed, with the aim, primarily, to consolidate, simplify and to a limited extent strengthen much of the British anti-discrimination laws that had

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emerged over the previous 40 years,¹ the decision was made to retain the historic dichotomy regarding equal pay. Thus, if the protected characteristic were sex, it would remain subject to specific provisions in a discrete chapter of the Equality Act whereas for other protected characteristics it would continue to come within the general discrimination provisions. Having a separate mechanism for sex-based equal pay claims creates not only a greater focus on the characteristic of sex, but also a potential and peculiar disadvantage for it. This article outlines the underpinning law of the different approaches before addressing significant issues arising from the difference. These regard both the nature of compensation and more fundamentally, and which current proposals for reform leave unaddressed, the construction of a barrier, uniquely, to some sex-based claims arising in constructive dismissal situations.

One reason for different treatment of sex-based equal pay from the approach taken for both ordinary sex discrimination and claims for equal pay based on other characteristics lies in the history of the law. The antecedent to current equal pay provisions,² the Equal Pay Act 1970, received Royal Assent in May 1970 (it being among the last pieces of legislation before the 1970 general election),³ but was always intended to come into effect five years later.⁴ The Act thus came into force on 29 December 1975 alongside the landmark Sex Discrimination Act 1975. The two Acts created two distinct systems whereby matters of equal pay for equal work, and subsequently work of equal value, would fall under the Equal Pay Act 1970 regime whereas matters regarding other discriminatory treatment would fall under the Sex Discrimination Act 1975. When the Race Relations Act 1976 was passed the following year—and for all subsequent protected characteristics—it was considered appropriate to deal with equal pay alongside other discriminatory terms and treatment rather than laying out discrete equal pay provisions. This article first discusses these different mechanisms before highlighting and exploring a particular restrictive consequence of the difference. It then suggests a minor amendment to resolve the arguably paradoxical position of the sex-based equal pay claimant being unjustifiably detrimentally treated by a preferential regime.

Moves to strengthen equal pay protection are not uncommon. In recent years, pay reporting and transparency have been among the focuses of proposed amendments

¹ See e.g. Hepple (2014), Hand, Davis & Feast (2012), Ashtiany (2012). The term British is used here as the Northern Ireland anti-discrimination takes a different form and the Equality Act (and its forerunners) are part of the law of England & Wales and, for the most part, the law of Scotland.

² Contained in Chapter 3 of Part 5 of the Equality Act 2010.

³ Hansard HC Deb vol 801 col 2130 (29 May 1970) <https://api.parliament.uk/historic-hansard/commons/1970/may/29/royal-assent>; the Equality Act 2010 also mirrored the Equal Pay Act 1970 in being among the last pieces of Labour government legislation to receive Royal Assent before an election which the Labour Party lost (Hansard HL Deb Vol 718, col 1738 (8 April 2010) <https://publications.parliament.uk/pa/ld200910/ldhansrd/text/100408-0013.htm#10040856001075>

⁴ e.g. Hansard HC Deb vol 811 col335W (15 February 1971 WA) https://api.parliament.uk/historic-hansard/written-answers/1971/feb/15/equal-pay#S5CV0811P0_19710215_CWA_187

to equal pay law.⁵ The Fawcett Society have proposed a draft bill,⁶ which, alongside greater transparency (through providing a right for employees to obtain information relating to the pay of a comparator⁷; including equal pay within the statutory statement of employment particulars⁸; and amending gender pay gap provisions),⁹ also seeks to slightly reform time limits relating to sex-based equal pay¹⁰ and to make available remedies for injured feelings, personal injury, and loss of pension rights for such claims. The proposal would provide an element of harmonisation between the protected characteristics in terms of compensation, but does not address the lack of harmonisation of available claim routes. Others have gone much further, suggesting more radical change, such as unifying the equal pay—and gender pay gap—provisions across the protected characteristics (e.g. Downie 2019). It may be the case that the time may not be right for such a major change, which would have to contest the appropriateness of adopting (and maintaining) disparate approaches to different problems according to their nature and history (discussed to a contextual extent below). However, the disparate approach threatens to prevent an important mode of claim (that of constructive dismissal) for women in specific circumstances. The specific focus of this article is thus not general potential reform or harmonisation of equal pay. Instead, after considering the history of the provisions, and the effect of the dichotomy on remedies, it raises and focuses on a less considered and generally more readily resolvable issue: namely that the Equality Act 2010 risks treating women (and, indeed, men),¹¹ as a protected group, less favourably by shutting off constructive dismissal as an avenue of redress, when it is readily available for other protected characteristics in pay disparity claims.

The Disparate Approaches to Equal Pay

Sect. 1(1) of the Equal Pay Act 1970 provided a symmetrical right between men and women by establishing that all employment contracts have an implied equality clause: that the terms and conditions of employees of one sex, working for the same employer,¹² should be no less favourable than those of the other sex (pay being one

⁵ As can be seen in e.g. Global Institute for Women's Leadership and the Fawcett Society (2021); Hooton and Pearce (2023).

⁶ Fawcett Society (2020); discussed in Hand and Hooton (2022).

⁷ Building on the Equality Act 2010's provision (in Sect. 77) making such disclosures a protected act.

⁸ Under Sect. 1 of the Employment Rights Act 1996.

⁹ By reducing the threshold to employers with 100 staff, introducing mandatory action plans, and extending the reporting to include the ethnicity pay gap. See e.g. Equal Pay Bill (HL Bill 65) (Session 2019–21), Equal Pay (Information and Claims) Bill (Private Members' Bill (under the Ten Minute Rule) (Session 2019–21), HC Deb Vol 682, col 909 (20 October 2020).

¹⁰ By, as with discrimination claims, allowing a 'just and equitable' extension to the time limit.

¹¹ Equality Act 2010, s 64(1).

¹² This includes those who are 'employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant class' (Equal Pay Act 1970, s 1(2)).

such term). The approach, accordingly, was a contractual one. Where differences in terms were experienced, such as where a woman's¹³ pay was less, the Equal Pay Act provided redress where: a) a woman's work was established as being the same or broadly similar to a male comparator's,¹⁴ so long as any differences in work were 'not of practical importance in relation to terms and conditions of employment'¹⁵; b) the woman's work had been rated as 'equivalent' to the male comparator's by a job evaluation¹⁶; and, after some intervention from the European Court of Justice,¹⁷ c) the work was considered to be of equal value to a comparator's, in terms of the demand, skill and effort of the roles.¹⁸

Where a claimant could show there was a less favourable term in their contract, through job evaluation or comparator, a defence was open to the employer if they could establish that the difference in pay was genuinely due to a 'material difference' between their employment situations.¹⁹ 'Material differences' were defined as being differences that would be reflected in the terms and conditions of employment,²⁰ rather than any trivial differences.²¹

The equal pay provisions contrasted with the generalised approach to non-discrimination promulgated by the Sex Discrimination Act 1975, and with the subsequent string of discrimination legislation starting with the Race Relations Act 1976. The Sex Discrimination Act 1975 prohibited direct and indirect discrimination on the basis of sex. This made it unlawful (across various fields) for certain people to treat women and men in a less favourable way than they would treat the other sex (direct)²² or to impose requirements or conditions that could be fulfilled by a much smaller proportion of one sex than the other unless there was a justifiable (non-sex based) reason for the requirement (indirect).²³ Within the employment field, the

¹³ 'Woman's work' or 'woman' are used here as the typical example of an equal pay claim dichotomy, with women usually being subject to the less favourable employment terms. However, it is important to note that equal pay works symmetrically.

¹⁴ Equal Pay Act 1970, s 1(2)(a).

¹⁵ Equal Pay Act 1970, s 1(4).

¹⁶ Equal Pay Act 1970, s 1(2)(b), (5).

¹⁷ Case 61/81 *Commission v UK* [1982] ECLI:EU:C:1982:258 leading to The Equal Pay (Amendment) Regulations 1983, SI 1983/1794 to better implement Council Directive 75/117/EEC and Article 119 EC Treaty (now Article 157 TFEU).

¹⁸ Equal Pay Act 1970, s 1(2)(c).

¹⁹ Equality Act 2010, s 1(3).

²⁰ *Pass v Lawton* [1976] IRLR 366.

²¹ Such as where, in *Walton v Wellington College* as noted by Rendel (1978, p. 906), the male comparator moved milk bottles and stoked the boiler, which the woman did not. It is notable that despite the relative simplicity of the justification step, the Court of Appeal's interpretation of the material factor defence has been criticised for its complexity (in *Armstrong v Newcastle upon Tyne NHS Hospital Trust* [2006] IRLR 124 the Court suggested if the employer can show that the difference in pay is not tainted by sex discrimination, there being a genuine non-sex related reason for the variation in the circumstances, this would defeat an equal pay claim; and if the employer could not then they must show an objective justification for the difference in pay), which has been described as potentially giving employer's two bites at the defence cherry (Steele 2010, p.264).

²² Sex Discrimination Act 1975, s 1(1)(a).

²³ Sex Discrimination Act 1975, s 1(1)(b).

Sex Discrimination Act 1975 and subsequently the Race Relations Act 1976 (and then further legislation covering disability, sexual orientation, religion or belief and age) prohibited discrimination during the processes of hiring, employing and dismissing staff. This took an essentially tortious approach by stating it is unlawful to discriminate by doing certain things.²⁴ The tortious nature was further evident through the definition of the financial remedy, it being an ‘amount corresponding to any damages [that] could have been ordered by a county court or by a sheriff court to pay to the complainant if the complaint’ had fallen to be dealt with as a tort or, in Scotland, a breach of statutory duty.²⁵ A significant difference between the sex discrimination model and race discrimination model, as they emerged in the mid-1970s, was that the latter did not differentiate between employment contract provisions (such as pay) and discrimination not relating to the employment contract. The pre-employment unlawful acts were essentially identical across the protected characteristics.²⁶ And, indeed, the sub-sections outlawing discrimination in employment were also highly similar (covering dismissal, detriment and access to opportunities, etc.),²⁷ except that the race relations provision included an additional unlawful act, relating to the ‘terms of employment’ afforded to the claimant.²⁸ With the exception of separating out pre-employment and in-employment aspects, this substantially replicated the approach as regards employment-field unlawful acts of the predecessor Race Relations Act 1968.²⁹ While the Sex Discrimination Act 1975 is seen as the progenitor of that generation of discrimination legislation, and deservedly so in terms of enforcement and general structure, the expansion of grounds in the 1990s (disability) and 2000s (religion or belief, sexual orientation and age) adopted the Race Relations Act 1976’s exclusively tortious, non-contractual, approach.

While the Race Relations Act’s comprehensive approach allowed for a much more straightforward, coherent approach to discrimination law, sex discrimination arguably benefits from the distinct focus on equal pay and from the potential for using the longer, contractual, limitation periods.³⁰ However, the contractual/non-contractual

²⁴ See e.g. Sex Discrimination Act 1975, s 6(1),(2); Race Relations Act 1976, s 4(1),(2).

²⁵ See e.g. Sex Discrimination Act 1975, ss 65(1), 66(1); Race Relations Act 1976, ss 56(1), 57(1).

²⁶ Sex Discrimination Act 1975, s 6(1)(a)-(c); Race Relations Act 1976, s 4(1)(a)-(c).

²⁷ Sex Discrimination Act 1975, s 6(2)(a); Race Relations Act 1976, s 4(2)(b) covering ‘affording access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford’ access to them; Sex Discrimination Act 1975, s 6(2)(a); Race Relations Act 1976, s 4(2)(b) covering discrimination during dismissal or subjecting those with a protected characteristic to any other detriment.

²⁸ Race Relations Act 1976, s 4(2)(a).

²⁹ The Race Relations Act 1968 prohibited race discrimination in the form of refusing employment that is available and for which the individual is qualified (s 3(1)(a)), in the form of refusing like terms of employment with others similarly qualified (s 3(1)(b)) or dismissing the individual in instances where others are or would not be dismissed (s 3(1)(c))—though enforcement was indirect through applications to the Race Relations Board who would decide whether to take legal proceedings.

³⁰ Claims can be brought in the Employment Tribunal within six months (Equality Act 2010, s 129) or due to concurrent jurisdiction through the court system and thereby be subject to the standard six year contractual limitation period (but also the court costs regime which may see costs not follow the event if

split adds complexity.³¹ The general prohibition of discrimination approach, rather than equality of terms, allows for a broader consideration of unequal treatment. The equal pay provisions revolve around comparison, requiring a specific comparator or group of comparators to be named by the claimant in proceedings. The claimant has the high burden of showing someone is in the same employment, doing like work, work of equal value, or work rated as equivalent, and that that person has more favourable terms. The wording of general anti-discrimination legislation, however, clearly left room for the hypothetical comparator: direct discrimination, for example, being where an employer treats an employee ‘less favourably than he treats *or would* treat other persons’.³² Unlike in equal pay cases, a general discrimination claim would not fail (even if regarding the terms of employment) for lack of a real comparator. Here, at least, there was some change when the Equality Act 2010 was introduced, but other long-standing concerns³³ were ignored.

Equal Pay in the Equality Act 2010

Hopes that the simplifying and unifying Equality Act 2010 would remedy concerns about the complex provisions were, for the most part, dashed when it largely replicated the provisions of the Equal Pay Act 1970 within Chapter 3 of the Employment part of the new Act.³⁴ While equal pay is now encompassed in the general equality legislation, it is still treated completely distinctly from sex discrimination. Section 66 of the Equality Act 2010, therefore, follows the same pattern of construction as the 1970 provisions, and ensures that an employment contract without an explicit sex equality clause will have an implied term to the same effect, stating:

- (1) If the terms of A’s work do not (by whatever means) include a sex equality clause, they are to be treated as including one.
- (2) A sex equality clause is a provision that has the following effect—
 - (a) if a term of A’s is less favourable to A than a corresponding term of B’s is to B, A’s term is modified so as not to be less favourable;

Footnote 30 (Continued)

a claim could reasonably have been brought in time to an Employment Tribunal (*Birmingham City Council v Abdulla and others* [2012] UKSC 47, [29]-[30]).

³¹ Not least because of the impact of EU law regarding sex discrimination before the UK left the EU, with the broad approach to equal pay in EU law better reflecting the national sex discrimination provisions than the specific contract-centred approach to equality of terms, creating tension between the two legal frameworks.

³² See e.g. Race Relations Act 1976, s 1(1)(a).

³³ For instance, the inability of the Acts to deliver equality of access to particular roles. Or, that neither job evaluations nor comparators took into consideration the undervaluing of typical ‘women’s work’, as per (respectively) Barrett (1971, p. 310); Simpson (1981); Seear (1971, p. 314).

³⁴ On the replication and dashed hopes, see, e.g. Gow and Middlemiss (2011), Hand et al 2012, p. 522; on hopes ahead of the Act, see e.g. Fredman (2008).

- (b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.
- (3) Subsection (2)(a) applies to a term of A's relating to membership of or rights under an occupational pension scheme only in so far as a sex equality rule would have effect in relation to the term.
- (4) In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have).

The effect of this wording is that the legislation still works so that *any* contractual term, including those not relating to remuneration, are the subject of the sex equality clause and can be adopted into the employment contract of the aggrieved party as a result of a complaint. This can be beneficial as assessing equality on a term-by-term basis can lead to a situation where a woman's overall 'deal' with her employer (contractual benefits, remuneration etc.) is better than a man's, who is doing equal work, as any individual favourable term from his contract would have to be amended/added into hers.

It remains the case that the sex equality of terms provisions in the 2010 Act are still functionally different from the general prohibition of discrimination, in that, mostly, a particular comparator is still required and the burden of proof is on the claimant to establish the comparability of work with someone with more favourable terms, rather than general 'less favourable treatment'. The equality clause still only takes effect if the claimant can show that they are employed in like work,³⁵ work rated as equivalent,³⁶ or work of equal value,³⁷ and the employer still has the 'material factor' defence³⁸ (although the wording is tweaked to include the effect of EU law with regard to indirectly discriminatory pay and to omit 'genuine', 'since the adverb added nothing to the meaning').³⁹

Moreover, despite the consolidation into one Act, there is still a concrete segregation between equal pay claims and sex discrimination claims, as Sect. 70 of the Equality Act specifically bars contractual inequality from falling under the provisions on sex discrimination. The Sex Discrimination Act 1975 had previously delineated the roles of the Equal Pay Act 1970 and the Sex Discrimination 1975 by stating in Sect. 8(5) that an employer's act would not contravene Sect. 6(2) of the Sex Discrimination Act if it contravened a term modified or included by virtue of an equality clause (or it would have contravened such a term were it not for the operation of genuine material factor defence). This rolled through into the Equality Act 2010 through Sect. 70 which holds that

³⁵ Equality Act 2010, s 65(1)(a).

³⁶ Equality Act 2010, s 65(1)(b).

³⁷ Equality Act 2010, s 65(1)(c).

³⁸ Equality Act 2010, s 69.

³⁹ Explanatory notes to the Equality Act 2010, para 239.

- (1) The relevant sex discrimination provision has no effect in relation to a term of A's that:
- (a) is modified by, or included by virtue of, a sex equality clause or rule, or

(b) would be so modified or included but for Sect. 69 or Part 2 of Schedule 7 with subsection (3) providing a table which shows that the relevant sex discrimination provision for employment is Sect. 39(2). While it may be necessary to delineate the areas protected by contractual equal pay from tortious discriminatory detriment—although superfluity is not unknown in the Equality Act 2010⁴⁰ and it is now well established that contract and tortious claims can co-exist⁴¹—and the ills of unequal pay between the sexes may somehow still be different from the likes of racial or disability equal pay, such delineation if misplaced could cause unjustifiable problems for claimants.

Before examining this further, it is worth noting a few areas where the 2010 Act differs from the 1970 Act.⁴² With regard to comparators, the Equality Act 2010 introduced a novation, and a partial blurring of the lines with regard to equal pay, by providing in Sect. 71 for an exception to the requirement for an actual comparator. It allows, where the statutorily imposed equality clause is not operable in a pay disparity dispute (i.e. when the individual cannot point to an actual male comparator), for a hypothetical comparator to be used, with the claimant using the general provisions for direct discrimination. With regard to discreet sex-based role-segregation, two further sections aid disclosure of information which may help to shed light on the issue and help to combat it. Sect. 77 renders attempts to restrict disclosure of an employee's pay void if the disclosure is intended to help find out whether between pay and a particular protected characteristic and Sect. 78 provides for the publication of gender pay gap information.⁴³ However, while these provisions can help sex-based claimants, when compared to the other protected characteristics, the essential contractual nature of the equal pay provisions creates some particular issues. These are, firstly, with regard to compensation for injury to feelings (an area which the Fawcett Society proposals seek to address) and, more fundamentally, with the

⁴⁰ see, e.g., the concept of associative discrimination within s 13(1) (and exemplified at Explanatory Note para 63) and discriminatory instructions within s 111(5)(a); the overlap between discrimination arising from a disability (s 15) and indirect discrimination (s 19); and, as noted in Hand (2011) the non-introduced dual discrimination provisions (which, the government contended, could be a greater multiple through combining its use with s 13 undermining the rationale to have a separate, limited provision).

⁴¹ e.g. *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; Taylor (2019).

⁴² The equal pay provisions in the 2010 Act, being very similar, face similar criticisms to those found in the 1970 provisions: there are still structural challenges to equal pay claims, women may struggle to find a suitable comparator and the comparative approach in general is criticisable for being vulnerable to prevailing unconscious biases or norms that discriminate against women more discreetly, manifesting as sex-based segregation in roles/duties or subconscious weighting in favour of 'male' roles in the process of job evaluations.

⁴³ As noted above the Fawcett Society's proposals aim to strengthen Sect. 77 by providing for a right to obtain information not merely prevent the obtaining of it and to deepen and widen the pay gap provision by reducing the minimum size of business the obligation falls on and extending it to ethnicity as well. See e.g. Equal Pay Bill (HL Bill 65) (Session 2019–21), cl 1, cl 7.

availability of constructive dismissal, placing the protected characteristic of sex, and thus predominantly women, in an unfavourable position.

The Unfavourable Position of Sex Equality Equal Pay Claimants: (i) Introduction and Injury to Feelings

While contractual and tortious actions and remedies can co-exist, they are intended to do different things and at common law are subject to different rules and constraints (although statute can intervene). The effect of this difference when it comes to the dichotomous approach to equal pay can be quite profound. If, for example, a black man, an Asian woman, a young or disabled person, or an adherent of a religion discovered they were being paid less than a comparator from a different racial or age or other such group and that treatment was because of their protected characteristic, they could bring an action for direct discrimination as such treatment on those grounds is rendered unlawful by Sect. 39(2)(a) of the Equality Act 2010. If they felt that they could no longer work for the firm, the unlawful act could be dismissal, under Sect. 39(2)(c), if such discrimination was deemed to be in breach of contract (as constructive dismissals are included within the definition of dismissal in the Act).⁴⁴ Similarly, if a woman, following the introduction of Sect. 71, which as noted above was the main change in the Equality Act 2010 regarding equal pay (and, indeed, one of the small areas where protection was increased by the Act), could find no actual comparator under the equal pay provisions, she may have a remedy. Under the section she could potentially establish that a hypothetical comparator would be better treated in terms of pay, and she too could bring an action for direct discrimination rendered unlawful by Sect. 39 (be it for unequal terms or dismissal). But where a woman can point to an actual comparator, she must bring her claim through the contractual equal pay provisions. While the aim of compensation in tort is to put the parties in the position they would have been in had the tort not occurred, and encompasses non-economic (as well as economic) loss,⁴⁵ when looking at contractual equal pay, as noted by Burton P in *Newcastle Upon Tyne v Allan & Ors*, '[t]here is a distinct absence from the Equal Pay Act of any provision for recovery of non-economic loss'.⁴⁶

The contractual nature of the equal pay provisions therefore entails, as with wrongful dismissal⁴⁷ and unfair dismissal,⁴⁸ there should be no recovery for injury to feelings. While there can in contract, exceptionally, be awards for injury to feelings,

⁴⁴ Equality Act 2010, s 39(7)(b) expressly including constructive dismissal within the definition of dismissal (Sect. 39(2)(c) 'includes a reference to the termination of B's employment... by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice').

⁴⁵ See e.g. *Alexander v Home Office* [1988] ICR 685.

⁴⁶ *Newcastle Upon Tyne v Allan & Ors* [2005] ICR 1170, [7].

⁴⁷ *Johnson v Unisys* [2001] ICR 480.

⁴⁸ *Dunnachie v Kingston upon Hull City Council* [2004] ICR 1052, [16]-[22] (Lord Steyn), citing inter alia *Norton Tool Co Ltd v Tewson* [1972] IRLR 86, [15] (Lord Donaldson).

such as ‘[w]here the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation’, equal pay does not fall within that restricted category. Instead it falls among the general run of contracts where there is no liability ‘for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation’⁴⁹ (to quote Bingham LJ in a different context but invoked by Burton P).⁵⁰ This contrasts with the tortious, or quasi-tortious, discrimination claim where recovery for injury to feelings is almost automatic, it being, in general, inherent in the claim to varying extents.⁵¹ This distinction is maintained by the Equality Act 2010. As noted by Hand HHJ in *BMC Software Ltd v Ms A Shaikh*, ‘the two statutes [the Equal Pay Act and the Sex Discrimination Act] [were] mutually exclusive... It seems to me that is also the object of Sect. 70 EqA and that separation of remedies is preserved by Sects. 124 (breach of discrimination provisions) and 132 (breach of an equality clause)’.⁵²

There is, accordingly, strong and wide authority that contractual equal pay provisions do not allow for claims for injury to feelings. However, as proposed by the Fawcett Society, it would be open to Parliament to change the statutory basis if it so wished. While the common law grounding explains why sex is treated differently from the other characteristics, it is by no means clear why in principle it should be, other than as part of the swings and roundabouts of different systems which see sex based equal pay claims advantaged in a number of other of ways. These include the longer contractual limitation periods (although that may of limited and diminishing value)⁵³ and the term by term comparison rather than the holistic/balancing approach of discrimination.⁵⁴ As the lower band for injury to feelings is, at time of writing, set at £990–£9,900 (with the middle band going up to £26,600 and the higher band to £49,300), with annual increases to reflect inflation,⁵⁵ the sum is not insignificant. However, of potential greater significance is the prevention of an alternative claim.

⁴⁹ *Watts v Morrow* [1991] 1 WLR 1421, 1445 (Bingham LJ).

⁵⁰ *Newcastle Upon Tyne v Allan & Ors* [2005] ICR 1170, [11].

⁵¹ *Chief Constable of West Yorkshire v Vento (No.2)* [2002] EWCA Civ 1871.

⁵² *BMC Software Ltd v Ms A Shaikh* [2017] UKEAT 0092_16_0908, [71].

⁵³ If a claim is brought in the County Court rather than the under the jurisdiction of the Employment Tribunal, claimants have six years in England and Wales (five years in Scotland) to bring a claim but they would also face much greater court expenses and the costs regime; if a complaint is brought to an Employment Tribunal, equal pay complainants currently have six months as opposed to three months for discrimination (but the Law Commission (2020) has recommended raising discrimination and unfair dismissal claims to six months, too).

⁵⁴ See e.g. *St Helens & Knowsley Hospitals NHS Trust v Brownbill & Ors* [2011] EWCA Civ 903.

⁵⁵ See e.g. Presidential Guidance: Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879—Fifth Addendum to Presidential Guidance Originally Issued on 5 September 2017.

The Unfavourable Position of Sex Equality Equal Pay Claimants: (ii) Constructive Dismissal

(a) Constructive Dismissal within the Equality Act

Slightly more controversially, going beyond compensation, the same argument can be, and has been (as explored below), made that Sect. 70 prevents a claim for constructive dismissal under Sect. 39(2) as the two systems are mutually exclusive. However, this is arguably paradoxical. It is the contractual nature of the equal pay provision that, without legislative intervention, prevents broader, tortious remedies being available; but it is also that contractual nature that acts as a block to a claim that is essentially contractual in nature.

In *BMC Software Ltd v Ms A Shaikh*, at first instance, the Employment Tribunal did hold that breach of the equality clause inserted by Sect. 66(1) of the Equality Act 2010 could give rise to constructive dismissal claims, holding:

We find that the equality clause lies at the heart of the relationship of trust and confidence between employer and employee. It is fundamental to the relationship, and breach of it is objectively likely to destroy or seriously damage the relationship. Error or misunderstanding by the employer do not amount to proper cause for the breach. The breach was referred to prominently as a material consideration in her resignation letter, and we accept that in so writing, the claimant accurately expressed the considerations which led her to resign. Accordingly, such of the claimant's claim of constructive dismissal as relies upon breach of the statutory equality clause succeeds and is upheld.⁵⁶

Significantly, they started that paragraph by saying '[f]or avoidance of doubt, we find under this heading that the claim of constructive dismissal succeeds both under the [Employment Rights Act] 1996 and under Sect. 39 of the Equality Act 2010.'⁵⁷ However, on appeal, Hand HHJ took issue with this. Indeed, a literal reading of Sect. 70 provides support for the view that Sect. 39 has no effect in relation to a term either modified by, or included by, a sex equality clause or rule. In the Employment Appeal Tribunal judgment, he went on to rebuff suggestions that the provisions of the Equality Act 2010 should be given a broad interpretation under indirect effect so as to comply with European legislation, such as happened in *Rowstock v Jesseme* [2014] EWCA Civ 185, or that the European provisions should have horizontal direct effect, as in *Küçükdeveci v Swedex GmbH* [2010] EUECJ C-555/07 and *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33. He took this approach on the bases that the legislation was clear and so there was no lacuna to fill; it fully implemented the Equal Treatment Directive; and that that directive provided a significant amount of discretion to member states to determine compensation.⁵⁸ None of these points were subject to the appeal at the Court of Appeal

⁵⁶ Cited in *BMC Software Ltd v Ms A Shaikh* [2017] UKEAT 0092_16_0908, [5].

⁵⁷ *BMC Software Ltd v Ms A Shaikh* [2017] UKEAT 0092_16_0908, [5].

⁵⁸ *BMC Software Ltd v Ms A Shaikh* [2017] UKEAT 0092_16_0908, [66]—[68], [77]—[79].

(which reversed the case on the reasoning of the material factor defence and the process of remittal) and so were not commented on. Likewise, the Court of Appeal did not have occasion to comment on some more worrying but opaque obiter dicta which could see non-Equality Act claims further restricted.

(b) Constructive Dismissal: Outside the Equality Act

While a case can thus clearly be made (although a counter interpretation is considered further below when considering possible amendments) that Sect. 70, by holding that Sect. 39(2) has no effect where there is a sex equality clause, excludes discrimination claims under Sect. 39(2)(c) including constructive dismissal, the judge mooted that the exclusion could go further. He declined to comment further beyond noting that his judgment did not affect the Tribunal's finding that there had been a constructive unfair dismissal, as Eady HHJ (who heard the preliminary appeal hearing) did not allow that ground of appeal to proceed, and so nothing he had 'said can have any bearing on that aspect of the case' but added 'although, perhaps, it is a topic on which more might need to be said on some future occasion.'⁵⁹ In so doing he raises the prospect of a further exclusion joining the *Johnson* exclusion area, named after the House of Lords decision in *Johnson v Unisys*.⁶⁰

In *Johnson v Unisys*,⁶¹ the House of Lords held that loss arising from the unfair manner of a dismissal is not recoverable in contract, for breach of the implied term of mutual trust and confidence, as the implied term could not extend into territory specifically intended by Parliament to be governed by the unfair dismissal legislation. The 'Johnson exclusion zone' has variously been described as 'contentious' (Deakin and Morris 2009 para 5–45), giving 'rise to difficult boundary disputes' (Brodie 2002 p. 260), 'productive of anomalies and difficulties' (Hale in *Edwards*),⁶² a case which 'sticks in the craw' for many labour lawyers (Barnard and Merrett 2013 p. 323), and 'one of the most notorious and controversial judgments of the twenty-first century' (Bogg and Collins 2015 p. 185). The scope was limited a few years after the decision, when the House of Lords distinguished between loss occasioned by a dismissal and where, 'an employee has acquired a cause of action at law, for breach of contract or otherwise' before the dismissal, 'whether actual or constructive'.⁶³ In the former case, the exclusion area applies; in the latter the cause of action is unimpaired. A seven-member UK Supreme Court followed those cases in 2011 and, by a majority, extended the application to express terms.⁶⁴

⁵⁹ *BMC Software Ltd v Ms A Shaikh* [2017] UKEAT 0092_16_0908, [80].

⁶⁰ *Johnson v Unisys Ltd* [2001] UKHL 13.

⁶¹ *Johnson v Unisys Ltd* [2001] UKHL 13.

⁶² *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [121] (Lady Hale).

⁶³ *Eastwood and another v Magnox Electric plc and McCabe v Cornwall County Council and another* [2004] UKHL 35, [27] (Lord Nicholls).

⁶⁴ *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58.

The question of constructive dismissal and the Johnson exclusion zone was later considered by the EAT in *Gebremariam v Ethiopian Airlines*.⁶⁵ That case included the complicating factor of the fundamental breach relating to a failure to follow normal, fair redundancy processes and a subsequent withdrawal of the dismissal. Even in that case, it was held that the conduct of the employer ‘took place before any dismissal could have taken place’ and ‘were not steps leading to the dismissal’,⁶⁶ and so fell outside the Johnson exclusion zone. Furthermore, rather than being an attempt to use the common law wrongful dismissal claim to ‘conflict with the statutory jurisdiction as to unfair dismissal’⁶⁷ (the mischief that the exclusion zone is designed to prevent), the claim as to constructive dismissal was actually part of an unfair dismissal claim and so no conflict or subversion arose. Contrasting the situation in *Gebremariam* with that in *BMC Software Ltd v Ms A Shaikh*, it can be said that a breach of an equality clause, as in the latter, is much further removed from steps leading to a dismissal than is a mishandled redundancy (as in the former). Furthermore, while a constructive wrongful dismissal action may raise Johnson exclusion zone issues,⁶⁸ and a Sect. 39 Equality Act 2010 claim could, as set out above, be barred by Sect. 70, a claim under the Employment Rights Act 1996 would seem even more to have ‘no basis in law or logic which would or should disable that employee from relying on the employer’s treatment... constituting or as being part of the breaches of contract upon which he or she relies to justify his or her resignation and subsequent claim for unfair dismissal.’⁶⁹ While legislative intervention is required if compensation for injury to feelings is to be extended to gender equal pay claims (other than those where no comparator is available allowing for a direct discrimination claim following the introduction of Sect. 71), and may be required with regard to allowing s.39 claims for constructive dismissal, when it comes to constructive unfair dismissal an interpretative approach should be sufficient.

How the Equality Act could be Interpreted/Amended

(a) Remedies

Firstly, and briefly, with regard to remedies, the Equal Pay Bill (HL Bill 65), introduced in the 2019–21 session by Baroness Prosser and written by a panel

⁶⁵ [2014] IRLR 354; *Petersham Hotel Ltd v Castro* [1996] UKEAT 635_96_151 also saw a constructive unfair dismissal and constructive discriminatory dismissal succeed where schedule and tronc payments were changed (but pre-dated the *Johnson* line of cases).

⁶⁶ [2014] IRLR 354, [38].

⁶⁷ [2014] IRLR 354, [40].

⁶⁸ Lord Nicholls in *Eastwood* noting ‘In cases of constructive dismissal a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee’s acceptance of these breaches as a repudiation of the contract. The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the Johnson exclusion area, the loss flowing from the dismissal itself is within that area.’

⁶⁹ [2014] IRLR 354, [39].

convened by the Fawcett Society,⁷⁰ sought to deal with the disparity between equal pay and other claims by simply proposing the insertion of the phrase ‘, which may include compensation for injured feelings, personal injury, and loss of pension rights,’ after the reference to ‘damages’ in Sect. 132(2)(b) of the Equality Act 2010.⁷¹ These are routinely claimable in other discrimination claims and when it comes to injury to feelings the cost is not likely to be very high but would provide an adequate remedy to the claimants and end a situation whereby the law seems to be portraying sex-based non-equal pay as less injurious to feelings than when based on other protected characteristics.

(b) Constructive Dismissal—an Interpretative Approach

With regard to constructive dismissal within the Equality Act 2010, while on first reading it seems plain that a literal reading of Sect. 70—like its predecessor—precludes all of Sect. 39(2) from having effect where a sex equality clause is present (or would be but for a material factor defence), a different interpretative approach could be taken. It could be argued that such a literal reading goes against the expansionist approach evident in Sect. 71 (which, as noted above, provides for the exception to the Sect. 70 demarcation between pay and discrimination by allowing a direct discrimination claim, and thus a hypothetical comparator to be used, where the sex equality clause has no effect). On the other hand, the argument can be made, as indeed was the case in *BMC Software v Shaikh*, that Sect. 71 was meant just to be a limited alternative which allowed liability for direct discrimination in circumstances where Sect. 70 did not apply and should not be taken to allow for wider exceptions (as the Court of Appeal in *Ali v Capita Customer Management Ltd; Chief Constable of Leicestershire v Hextall* put it, it acts as a tempering of the mutual exclusivity).⁷²

When considering the effect of Sect. 71, it is notable that there has been little judicial comment on the section so far.⁷³ Westlaw reports 13 cases as having cited Sect. 71.⁷⁴ Of those one is *BMC Software v Shaikh* (as discussed above), one merely mentions the section in passing,⁷⁵ and nine are mis-citations (generally for the racial

⁷⁰ Explanatory Notes to the Equal Pay Bill [HL] available at <https://publications.parliament.uk/pa/bills/lbill/58-01/065/5801065en02.htm>

⁷¹ Equal Pay Bill (HL Bill 65) (Session 2019–21), clause 5.

⁷² [2019] EWCA Civ 900, [111].

⁷³ Furthermore, there are no articles on the section on Westlaw.

⁷⁴ As of February 2023, and counting cases once (disregarding any appeals).

⁷⁵ *Capita ATL Pension Trustees Ltd v Zurkinkas* [2010] EWHC 3365 (Ch) (by mentioning that the current equal pay rules ‘are contained in ss 64 to 71 Equality Act 2010’ at [21]).

equality duty which used to be in Sect. 71 of the Race Relations Act 1976).⁷⁶ The remaining two cases address specific pregnancy related aspects. In the first of those cases (*Ali v Capita Customer Management Ltd; Chief Constable of Leicestershire v Hextall*), the Court of Appeal's decision appears to be based on a concession by the employer that the equality clause had no effect, with the result that Sect. 71 could apply (although Mr Hextall went on to lose because there was no discrimination, not least due to the special provisions regarding to pregnancy/maternity).⁷⁷ The other case, however, *City of London Police v Geldart*,⁷⁸ suggests an interpretative approach to including constructive dismissal may be possible.

Sect. 71(1) states that the 'section applies in relation to a term of a person's work—a) that relates to pay, but (b) in relation to which a sex equality clause or rule has no effect'. Subsection (2) goes on to state that the 'relevant sex discrimination provision (as defined by Sect. 70)', which would otherwise be excluded by Sect. 70, 'has no effect in relation to the term except in so far as treatment of the person' amounts to direct discrimination under that provision. In *City of London Police v Geldart*, Underhill LJ described the section as 'rather opaque'⁷⁹ and considered that the demarcation by the two sections was 'drawn in rather elaborate terms'.⁸⁰ The case concerned a City of London police constable who, while on maternity leave, only received a portion of the London allowance she claimed to be entitled to leading to a direct discrimination claim (which the Court of Appeal dismissed on the basis that while she was entitled to the money, the failure to pay it was not due to her maternity leave or sex but simply her absence)⁸¹ and an indirect discrimination claim (leading to consideration of Sect. 71). In noting that Sect. 71 applies in relation to a term of a person's work (relating to pay but, in that case, for which a sex equality clause has no effect), Underhill LJ differentiated the existence and nature of terms from the breaches of them, holding that the claimant's claim:

is not that she has been discriminated against "as to [her] terms of employment" within the meaning of section 39 (2) (a): those terms afford her the same rights to London Allowance as a man. Rather, her claim is that the Commissioner has discriminated against her by failing to accord her her

⁷⁶ Namely, *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2445; *R (on the application of Buckley) v Sheffield City Council* [2013] EWHC 512; *R (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438; *R (on the application of Bapio Action Ltd) v Royal College of General Practitioners* [2014] EWHC 1416; *R (on the application of West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441; *R (on the application of T) v West Berkshire Council* [2016] EWHC 1876; *R (on the application of KE) v Bristol City Council* [2018] EWHC 2103; *Luton Community Housing Ltd v Durdana* [2020] EWCA Civ 445; and (not re s 71 RRA but still on the public sector equality duty) *R (on the application of Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058.

⁷⁷ *Ali v Capita Customer Management Ltd; Chief Constable of Leicestershire v Hextall* [2019] EWCA Civ 900, [112]–[113], the provision was only relevant in the Hextall appeal.

⁷⁸ [2021] EWCA Civ 611.

⁷⁹ *City of London Police v Geldart* [2021] EWCA Civ 611, [89].

⁸⁰ *City of London Police v Geldart* [2021] EWCA Civ 611, [87].

⁸¹ *City of London Police v Geldart* [2021] EWCA Civ 611, [72].

“contractual” rights—that is, by acting in breach of them. As a matter of formal analysis, the relevant head of section 39 (2) is (d) – “subjecting [her] to any other detriment”.⁸²

It thus fell outside the scope of Sect. 71 as it did not involve reliance on the particular kind of discrimination, that is the terms of employment, with which Sect. 71 is concerned.⁸³

The other part of the elaborately drawn pair of provisions, Sect. 70, states as regards pay that the ‘relevant sex discrimination provision has no effect in relation to *a* [emphasis added] term of A’s that—(a) is modified by, or included by virtue of, a sex equality clause... or (b) would be so modified or included but for [the material factor defence]’.⁸⁴ The opacity in Sect. 71 would seem primarily to be due to when the sex equality term has ‘no effect’⁸⁵ but that is, as exemplified in the explanatory notes, and as accepted in *BMC Software v Shaikh* and in *Geldart*, where there is no actual comparator to whom the claimant can point.⁸⁶ Both Sect. 70 and 71, however, include reference to there being ‘no effect in relation to [a/the] term’ with the description of terms being defined afterwards in the case of Sect. 70 and beforehand in the case of Sect. 71 (which may explain the differing indefinite/definite article). While in *Geldart* the term in question was not one inserted by a sex equality clause, the definition of the relevant sex discrimination provision is explicitly the same across the two sections. If it is permissible to make a distinction between Sect. 39(2) (a) terms and s.39(2)(d) re other detriment in one, it could be possible in the other. This is particularly so in light of the illogical situation created by Sect. 71 whereby the lack of an actual comparator can give rise to greater claims including constructive dismissal (as Sect. 71 would allow a direct discrimination claim) than would be the case if there was an actual comparator (which would preclude the operation of Sect. 71). This bizarre situation did not arise under the Equal Pay Act 1970 as there was no such provision as Sect. 71. The situation is a function of transposing Sect. 8(5) of the Equal Pay Act 1970 into Sect. 70 of the Equality Act 2010 without taking account of the new provision.

(c) Constructive Dismissal—an Amendment

It may well not, however, be for the courts to iron out the illogicality here through judicial interpretation—as they did in *Rowstock v Jessemey* concerning the ‘decidedly opaque’ Sect. 108(7) regarding victimisation⁸⁷—as, while this has decidedly peculiar effects, and can reasonably and pejoratively be described as

⁸² *City of London Police v Geldart* [2021] EWCA Civ 611, [90].

⁸³ *ibid.*

⁸⁴ Equality Act 2010, s.70(1).

⁸⁵ Point 4 within para [89] of *City of London Police v Geldart* [2021] EWCA Civ 611.

⁸⁶ Explanatory Notes to the Equality Act 2010, [245]-[246]; *BMC Software Ltd v Ms A Shaikh* [2017] UKEAT 0092_16_0908, [75]-[76]; *City of London Police v Geldart* [2021] EWCA Civ 611, [89].

⁸⁷ *Jessemey v Rowstock Ltd & Anor* [2014] EWCA Civ 185, [45]; see also Middlemiss (2013) and Connolly (2018).

elaborate, it is to some, perhaps a significant, degree less opaque.⁸⁸ Instead, it may be better for Parliament to amend Sect. 70, better delineating where it and Sect. 71 apply.

If an element of mutual exclusivity is to be maintained, then disapplying (or rendering of no effect) Sect. 39(2)(a) as regards terms makes perfect sense. There may also be a reason to extend that to Sect. 39(2)(b) (the way employers afford employees access, or by not affording them access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service) in so far as that may involve terms, but it would be interesting to see the explanation for that. Similarly, an argument could be made that the paragraph covering subjecting the employee to any other detriment (under s.39(2)(d)) should be treated in the same way as Sect. 39(2)(a) depending on the innate limitation of 'other' – although Underhill LJ considered the permissible relevant head in *Geldart* was Sect. 39(2)(d) so there is strong argument not to do so. The table in Sect. 70(3) which sets out the relevant sex discrimination provisions could be amended to specify the paragraphs within Sect. 39(2) (and the related public and private officeholder provisions) which are disappplied, omitting at least paragraph 39(2)(c) (dismissal). This would also accord with the Explanatory Notes which specify in paragraph 242 that the disappplied 'sex discrimination provisions prohibit sex discrimination in relation to non-contractual pay and benefits such as promotion, transfer and training and in relation to offers of employment or appointment'.⁸⁹ Dismissal is not expressly mentioned there and nor can it be said in any way to be a benefit.

Conclusion

Over fifty years on since the provisions were originally passed by Parliament, over 45 years since they came into effect and over a dozen years since they were predominantly replicated into the generally otherwise unifying Equality Act 2010, it may be time to consider whether the equal pay provisions for the protected characteristic of sex should continue to be distinct from the other protected characteristics and from the general discrimination provisions. With the increased focus on intersectionality and pay gaps, and a greater focus on proactivity rather than simple prohibition, the time for major reform may be ahead; but major reforms often take considerable time and in the interim smaller amendments may be beneficial. The Fawcett Society's proposals lay out a number of such small reforms, increasing the availability of information (requiring disclosure of comparator's pay, amending the Sect. 1 statement of particulars and deepening the gender pay gap reporting requirement to catch more firms and broadening it to ethnicity) and tweaking both the time limit (allowing for just and equitable extensions) and remedies (so that claimants could recover compensation for injury to feelings, personal injury and loss

⁸⁸ The provision in *Rowstock* being decidedly opaque as noted immediately above whereas Sect. 71 was described in *Geldart* as rather opaque (fn 82 above).

⁸⁹ It is perhaps worth noting that the notes refer to 'offers of employment' which would fall within s 39(1) which is not excluded by s 70.

of pension rights in line with discrimination claims). Alongside, or ahead of, these, in light of the decision in *BMC Software Ltd v Ms A Shaikh* it may also be necessary to amend the Equality Act so as not to limit the availability of constructive dismissal when it comes to sex based equal pay claims.

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