

# The Court of Appeal confirms the causative approach to the ‘material factor test’ in equal pay claims in *Walker v Co-Operative Group Ltd & Anor* [2020] EWCA Civ 1075

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## Factual background

1. The Claimant, Mrs Walker, was appointed as the Group Chief HR Office of the Co-op in February 2014, with a base salary of £215,000. Her salary was increased to £425,000 in March 2014 to reflect her new executive role. However, she was paid less than both the Chief External Affairs Office and Group General Counsel, which were executive roles within the same tier as the Claimant. These roles were both undertaken by men. The Claimant therefore brought a claim for equal pay on this basis.
  
2. The Respondent sought to justify the differential in pay by establishing the defence of material factor under s69 Equality Act 2010. This provision gives a Respondent a defence to an equal pay claim if they show that the difference in the treatment is because of a material factor which does not involve treating an individual less favourably because of their sex, and, if it puts an individual at a particular disadvantage when compared to persons of the opposite sex, is a proportionate means of achieving a legitimate aim. The Respondent identified four material factors as to why the positions of Chief External Affairs Office, and Group General Counsel were paid more highly than the Claimant’s role. These were:
  - (i) the importance of the roles to the immediate survival of the Co-op;
  - (ii) the executive experience of the individuals in the roles;
  - (iii) the flight risk of the roles; and
  - (iv) the market forces justifying higher pay.

3. The Employment Tribunal accepted that when the Respondent fixed the salaries in February and March 2014 the four material factors applied to the Claimant and the comparators, and that the factors did not seem to be related to sex. However, the Tribunal went on to find that by February 2015 the Claimant's job role had been rated as more important than the comparator roles. Therefore, the Tribunal held that at the time the Claimant gained the right to equal pay with her comparators due to the increased importance of her role, the explanations for the pay differentials were historical and no longer material. The claim was therefore upheld.

### **EAT judgment**

4. The Employment Appeal Tribunal disagreed with the trial judge and allowed the Respondent's appeal. Lord Summers considered that, as there were no new decisions about pay after March 2014, there was no reason to find that the material factors did not apply, and there was inadequate evidence to support the decision that the material factors ceased to apply in any event.

### **Court of Appeal judgment**

5. In considering the Claimant's appeal against the EAT's decision, Bean LJ set out that the basis of the Claimant's equal pay claim was that her work was rated as equivalent to her two comparators in February 2015. Whilst he concluded that the Employment Tribunal was entitled to make this finding, he emphasised that this did not mean that the Claimant's case was bound to succeed.
6. Bean LJ referred to the leading case of **Glasgow City Council v Marshall [2000] 1 WLR 333** in which Lord Nicholls of Birkenhead discussed whether the material factor must be material in a 'justificatory sense' or a 'causative sense', and concluded that he preferred the causative interpretation as it accords with the purpose of the Equality Act. Considering this judgment, Bean LJ identified that the key question was whether '*all the material factors which, as the ET found, explained the pay differential between Mrs Walker and either Mr Asher or Mr Folland in February 2014 had ceased to operate as an explanation for the difference in February 2015*'. He concluded on the facts of the case that at least one material factor remained causative of the differential in pay in February 2015, and therefore upheld the decision of the Employment Appeal Tribunal.

7. The Court of Appeal in its judgment therefore wholeheartedly confirmed the causative analysis of material factors in equal pay cases.

## Comment

8. In further observations, Males LJ drew attention to some important practical considerations that are useful to bear in mind to avoid falling into error when considering material factor defences;
  - (a) The starting point for an equal pay claim is proving that the claimant (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does. Consideration needs to be given to the point in time that A's work is comparative to B's work.
  - (b) The material factor defence does not arise until the point that the work of A and B is said to be comparative, and the Tribunal must assess the reason for the pay differential at this point.
  - (c) The only issues to consider in the material factor defence are causation and materiality. The employer must prove the reason for the difference is not 'difference of sex' and the employer must prove that the factor relied upon is significant and relevant. The employer is not required to prove that the pay disparity is justified

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