Case Number 507973/95

THE EMPLOYMENT TRIBUNALS

BETWEEN

Applicant	**Respondents**
Mrs M Travers	1. Planning Inspectorate 2. Minister for the Civil Service

DECISION OF THE EMPLOYMENT TRIBUNAL

HELD AT: Nottingham
(Sitting at London Central)

ON: Monday 2 December 2002

CHAIRMAN: Mr J K Macmillan

REPRESENTATION

For the Applicant: Mr J Cavanagh QC, Counsel
For the Respondent: Mr N Paines QC, Counsel

DECISION

1. The answer to test issue 1 is that where it is necessary to establish disproportionate impact in order to demonstrate a breach of the equality clause, the burden of doing so is upon the applicant. Where in the context of a genuine material factor defence under section 1(3) of the Equal Pay Act 1970 an applicant alleges that the factor has disproportionate impact and supports the allegation with particulars sufficient to demonstrate that the allegation is not vexatious or mischievous, the burden is upon the Respondent to disprove it.

2. The answer to test issue 2 is that a respondent can be required to give disclosure of any relevant statistics or documents which already exist in a paper or electronic form and to provide written answers to questions, but subject to the overriding objective and the usual considerations of relevance and proportionality.

3. Directions for the future conduct of these cases are given at paragraph 30 of the Reasons.

EXTENDED REASONS

1. Mrs Travers is a contract planning inspector who seeks a declaration of entitlement to membership of the Principal Civil Service Pension Scheme from the 14th October 1991 to date. She was excluded from membership by virtue of Rule 1.4 of the scheme which applies the scheme to all persons serving as full-time or part-time civil servants (historically not all part-time civil servants have qualified for membership of the scheme, although all now do so), with the exception of those categorised as casuals and those, like Mrs Travers, who are remunerated by fee. Her contract stipulated that she was not regarded as an employee of the Crown and that her appointment was not pensionable.

2. Her claim is one of about 170 brought by people in a wide variety of occupations seeking access to the Principal Civil Service Pension Scheme or related schemes. The cases form a sub-set of the litigation known as the part-timer worker pension cases (see ***Preston and others -v- Wolverhampton Healthcare NHS Trust and others (No 3)*** [507497/95] - and ***Preston (No 2)*** *[2001] UKHL\5)*; or perhaps more accurately litigation in parallel with those cases. They differ from the part-time worker pension cases properly so called because the basis for each applicant's exclusion from the pension schemes was not that their hours of employment fell below a qualifying hourly threshold, but the basis upon which they were employed or engaged. Amongst those claiming, in addition to the planning inspectors, are Customs and Excise staff, members of the Coastguard Auxiliary Service, persons holding part-time judicial appointments (both professional and lay) driving examiners, seasonal bee inspectors, members of the Territorial and Reserve forces etc etc. For the sake of convenience, they are referred to collectively as the atypical workers. It is known that there are other groups of atypical workers currently subsumed within the mainstream part-time worker pension cases (principally in the banking sector) but I have today heard submissions only from Mr Cavanagh QC who is instructed by a

consortium of unions representing some, but by no means all, of the applicants seeking access to the Principal Civil Service Pension Scheme and from Mr Paines QC who appears for all arms of Government who are respondents to these proceedings, other than the Lord Chancellor's Department.

3. Although as I understand it, it is common ground that the claims brought by the atypical workers are subject to the rulings which I gave on a range of test issues in the part-time worker pension cases in a decision promulgated on the 2nd August 2002, they differ from them in one fundamental respect. All of the respondents in those test issues conceded that the requirement to work full-time, or above a lower qualifying hourly threshold in order to gain membership of a pension scheme, had a disproportionately adverse impact on women. No such concession is made in respect of the atypical workers. In consequence, I have before me today not the question of whether the exclusion of the casual and the fee paid from the Principal Civil Service Pension Scheme does have a disproportionately adverse impact on women, but the much broader question of upon whom the burden of proof lies where that question is in issue.

4. The precise wording of the questions before me are as follows:-

> (1). An atypical worker can only succeed in the complaint that they have been excluded from an employer's pension scheme in breach of Article 141 EC, and/or the Equal Pay Act 1970, if the rules of the scheme which excludes them have a disproportionately adverse effect on women. Is it for the applicant to establish on the balance of probabilities that the rules have such an adverse effect on women or for the respondent to establish on a balance of probabilities that they do not have such an impact? (2). If the burden is upon the applicant, what directions may be given by a tribunal hearing such a claim requiring the respondent to make discovery of documents or answer written questions with regard to such matters as the gender profile of the workforce and other issues relevant to the question of disproportionate impact.

5. The original intention was that at the conclusion of the hearing I would also give directions for the disposal of these matters but that has proved problematic and I have only been able to give very limited directions to that end.

6. The parties are largely agreed about the answer to the second question, but there is a fundamental disagreement on the first. It can be encapsulated thus. Mr Cavanagh submits that the scheme of the Equal Pay Act 1970 generally, and the language of sec.1(3) in particular, creates a rebuttable presumption that, once an applicant has identified a comparator, (that is a male full-time colleague doing work which is the same as or broadly similar to her work or work which is of equal value to her work), who enjoys more favourable terms, the difference in the terms enjoyed by the applicant on the one hand and the man on the other, is for a reason which is related to the difference in sex between them. In consequence, unless the respondents can prove on the balance of probabilities that the reason is unrelated to the difference in sex, the applicant's claim must succeed unless the employer can objectively justify the reason. Mr Paines submits that the burden is upon the Respondents only once the applicant has established a prima facie case that the difference in terms and conditions is related to the difference in sex.

7. The problem has significant practical importance because these are claims of so called indirect discrimination where the existence of disproportionate impact in any given pool is normally established by a statistical analysis of those within the pool. In the part-time worker pension cases, it is accepted that there is indirect discrimination because the disadvantaged group (the part-timers) is predominantly female and it is now regarded as virtually axiomatic that, because of their childcare responsibilities which militate against full-time employment, part-timer workers as a group will nearly always be predominantly female, and therefore the awarding of more beneficial terms and conditions such as access to membership of a pension scheme to full-timers can be assumed to be discriminatory against women without the need for statistical evidence. In the case of atypical workers, not only does no such axiom exist, but, because of the very wide range of work patterns that might be regarded as atypical for this purpose, each group of atypical workers would have to be examined individually to establish whether that particular pattern of working did have a disproportionately adverse impact on women. That can only be done by the examination of statistics, which will normally be held by the employer, showing the composition by gender of the atypical working group in question and the remainder of that employer's workforce (I use that comparison by way of illustration only as other pools for comparison are at least arguable).

8. Therefore, if Mr Cavanagh's submission is correct, an applicant's claim will necessarily succeed (unless the Respondent can objectively justify the factor which has had disproportionate impact) once she has identified a comparator (the question of whether a comparator is necessary is currently the subject of a reference to the European Court of Justice in ***Allonby -v- Accrington and Rossendale College and others*** *[2001] WCA Civ 529* but the submissions made to me and this decision are predicated on the basis that a comparator is necessary) not only in those cases where the respondents' statistics actually demonstrate disparate impact but where there are no statistics at all, or the statistics are inadequate to provide an answer one way or the other. That in fact is the case with applicants such as Mrs Travers who have been excluded from the Principal Civil Service Pension Scheme because they are remunerated by fee. Although the Government has

maintained detailed statistics on casual civil servants since 1993, no statistics are retained at all in respect of those remunerated by fee.

9. It is common ground that under European law, it is Mr Paines' submission which is correct. Cases such as ***Enderby -v- Frenchay Health Authoriy (case C- 127/92)*** *[1994] ICR 112 ECJ* and ***Jämställdhetsombudsmannen -v- Örebro Läns Landsting (case C-236/98)*** *[2001] ICR 249 ECJ* clearly establish that it is for the applicant to raise a prima facie case that the difference in pay is for a reason related to the difference in sex between the applicant and a comparator. However, Mr Cavanagh submits that the UK statutory scheme compels the contrary conclusion and there is nothing to prevent a member state having a more favourable regime than the prescribed by the European Court. He submits that there is at least one authority directly in point which binds me, and as not infrequently happens in these cases, both he and Mr Paines largely rely on the same authorities but invite me to draw diametrically different conclusions from them.

10. I will begin by briefly examining the statutory scheme. The long title to the Equal Pay Act 1970 is *"An act to prevent discrimination, as regards terms and conditions of employment between men and women"*. As Mr Paines has regularly submitted during the hearing, the Act is plainly not about fair pay; it is about equal pay for equal work. Mr Cavanagh does not dissent from that proposition. It is therefore simply irrelevant for the purposes of this exercise and for the part-time worker pension cases generally whether, in purely abstract terms or even by what might be regarded as the pay norms of industry, a particular job might be regarded as pensionable or a particular applicant as pension worthy. This emerges with stark clarity from sec.1 of the Act:-

> *"(1) If the terms of a contract under which a women is employed at an establishment in Great Britain do not include ... an equality clause they shall be deemed to include one.*
>
> *(2) An equality clause is a provision which relates to terms ... 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 then 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 ..."*

The remainder of the subsection deals in similar terms to cases where the work is of equal value to or has been rated under a job evaluation scheme as equivalent to a mans work.

11. Mrs Travers complains that the term in her contract which specifically excludes her from entitlement to membership of the pension scheme makes her contract less favourable than the contract of a full-time salaried planning inspector. However, no actual comparator is named and the first hurdle that she must cross before she can succeed (subject to ***Allonby***) is to identify a man doing work which is the same as, or broadly similar to, or which is of equal value to, her work who is not excluded from the pension scheme. It is common ground that the burden of demonstrating the existence of such a comparator lies on her. Once an applicant has crossed that hurdle, then a respondent may (but is not obliged to) raise in answer to her claim the so called genuine material factor defence. This arises from sec.1(3) which provides:-

> *"An equality clause 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..."*

12. Mr Cavanagh submits that the language of subsection (3) clearly places the burden on the respondents to demonstrate two things: (a) that the factor relied upon as justifying the difference in pay is both genuine and material and (b) that it is not the difference of sex. In other words, that the factor is not tainted by sex discrimination which would be the case if it affected a considerably greater proportion of women than men. Mr Paines accepts that proposition with regard to genuiness and materiality but not to the difference in sex, absent the establishment by the applicant of a prima facie case. Mr Cavanagh, whilst not accepting that it is necessary for an applicant to plead in her IT1 the difference in sex, does accept as a matter of practice (though not, it would seem, of law) that the respondent should be put on notice that the applicant is alleging disproportionate impact; but once such notice is given, the burden of disproving disproportionate impact is triggered. He envisages that prior to the giving of notice, the respondent will have made all relevant discovery or provided written answers to questions designed to furnish the applicant and the tribunal with the necessary raw material from which the statistical comparison can be made.

13. Mr Cavanagh supports his basic submission with five powerful points.

(1) The question of disparate impact relates to the factor upon which the employer relies to justify the difference in pay. At the stage when the IT1 is presented, the woman cannot know what, if any, factor the respondent relies upon and therefore cannot know if it has, or might have, disparate impact.

(2) In many cases, the employee will not know exactly the scope of the disadvantaged group (that is clearly so in Mrs Travers' case; the disadvantaged group not only embraces several other occupations besides planning inspectors, but given the nature of her work as a planning inspector, it is highly likely that she will not know all of the other planning inspectors).

(3) The employee will not know the gender balance in the group.

(4) The employee may not know what jobs constitute the comparator group.

(5) The employee will almost certainly not know the gender balance of the comparator group.

14. Mr Paines relies, inter alia, on ***Barry -v- Midland Bank*** (in the Court of Appeal at [1999] ICR 319 and in the House of Lords at [1999] ICR 859). Whilst he does not submit that it is determinative of the issue, he relies on it as being one of a number of authorities, all of which support his argument. Mr Cavanagh on the other hand submits that ***Barry*** is simply not in point as the issue before the Court of Appeal was not where the burden of proof lay in establishing a genuine material factor defence (the sec.1(3) point) but whether the applicant had demonstrated that there had been a breach of the equality clause (the s.1(2) point). Mr Cavanagh submits that if the latter is the case then, as it has never been in issue that the burden of proof there lies upon the applicant, ***Barry*** cannot assist me.

15. I agree with Mr Cavanagh.

(a) The employment tribunal which heard the cased at first instance held:-

"(The Applicant's) claim under the (Equal Pay) Act of 1970 failed because section 1(1) of that Act is solely concerned with the terms on which an employee is employed ... The Applicant's terms of employment were not less favourable than those of the male comparators, as the same terms were used to calculate severance pay for full-time employees and part-time employees alike. There was no breach of the Act of 1970 ***or the equality clause implied by it."*** *[emphasis added]*

(b) The applicant appealed to the Employment Appeal Tribunal ([1997] ICR 192) and her grounds of appeal are summarised at 194G to 195A:-

"... the industrial tribunal had erred in law (1) in ruling that a difference in treatment between part-time and full-time workers would only amount to indirect discrimination contrary to Article 119 and/or less favourable treatment within the meaning of section 1(2) of the Equal Pay Act 1970 if the percentage of women who worked full-time was considerably smaller than the percentage of men who worked full-time ...(3) in concluding that the term providing for the calculation of redundancy payments by reference to current salary did not become less favourable to a woman within the meaning of section 1(2) of the Equal Pay Act 1970 when a woman changed from full-time to part-time work and had the part-time salary applied to calculate her redundancy payment payable in respect of her periods of full-time employment; and (4) in failing to construe section 1(3) of the Equal Pay Act 1970 in accordance with the requirements of Article 119 of the E.E.C. Treaty and/or in holding that any difference was genuinely due to a material factor other than sex".

(c) The appeal was dismissed on the grounds that (I quote from the head note at 193):-

"...the voluntary severance payment had been made to the applicant under or by reference to the terms of her contract of employment and those terms were not less favourable than terms of a similar kind in the contract of a male comparator in the relevant group, namely, full-time employees who became part-time before opting for redundancy, since the rules of the bank's scheme were not formulated to treat either women less favourably than men or part-time workers less favourably than full-time workers and there were no conditions or requirements for access to the scheme which women or part-time workers could not comply with; that, accordingly, there was no breach of an equality clause and no contravention of the Equal Pay Act ... and that, further, the industrial tribunal had correctly concluded that, if there was any variation between the applicant's contract and that of a male comparator, it was due to a genuine material factor other than sex within the meaning of section 1(3) of the Equal Pay Act 1970." [emphasis added]

(d) At [1999] ICR 327, Lord Justice Peter Gibson summarises the competing contentions on the appeal in the Court of Appeal. It is plain that the issue is whether there has been a breach of the equality clause. Nowhere it is specifically said, and I do not think that it can be said to have arisen by necessary inference, that an issue was whether, had there been a breach of the equality clause, the

burden of proving disparate adverse impact for the purposes of sec.1(3) was on the applicant or the respondent. There is indeed much discussion of where the burden of proof lies and the value of the statistics adduced to support the applicant's contention, but it is perfectly clear when one reads the decision of the employment tribunal and the Employment Appeal Tribunal before reading the decision of the Court of Appeal, that it was all directed at the question whether there had been a breach of the equality clause, the sec.1(2) point.

(e) To the extent that Lord Nicholls ([1999] ICR 864 to 872) - who took a different route to reach the same conclusion as the majority of their Lordships - may have expressed himself in terms which are supportive of Mr Cavanagh's contention, whilst I read them with the greatest possible respect, I do not feel that I can be guided by them to any great extent, let alone bound by them as he was a lone voice and the point was not directly in issue.

16. Of the several other cases to which my attention has been drawn during the course of argument, I propose to refer only to four; ***The Financial Times Ltd -v- Byrne & others (No. 2)*** *[1992] IRLR 163*, which Mr Cavanagh submits is binding authority directly in point in support of his contention but which Mr Paines submits Mr Cavanagh has misunderstood. He submits in the alternative that even if Mr Cavanagh's understanding of ***Byrne*** is correct, it is inconsistent with the later EAT authority of ***Tyldesley -v- TML Plastics Ltd*** *[1996] ICR 356*, which contradicts Mr Cavanagh's proposition and which is binding on me as it is later than ***Byrne*** and has been twice approved by the House of Lords, firstly in ***Strathclyde Regional Council -v- Wallace*** *[1998] ICR 205 HL* and subsequently in ***Glasgow City Council -v- Marshall*** *[2000] ICR 196 HL*.

17. It is perhaps at this point that I should say something more about the statutory scheme and in particular about sec.1(3). The respondent is only obliged to objectively justify the genuine material factor relied upon if it is a factor which is related to the difference in sex between the applicant and her comparator. If the factor is not so related, the respondent is required to demonstrate only that it is genuine and material (see ***Strathclyde Regional Council -v- Wallace***). Mr Cavanagh relies on this difference to support his submission. If the respondent is correct, he submits, in any case where genuiness and materiality are demonstrated but statistics (which only the employer can keep) either do not exist or are inadequate, the applicant loses because of the impossibility of raising a prima facie case, which impossibility is a direct consequence of the respondent's failure to do that which the Equal Opportunities Commission Code of Practice on Sex Discrimination recommends that they should. However, if the applicant's submission is correct, the respondent does not necessarily fail; instead the enquiry moves to the final stage where the respondent can still succeed if they objectively justify what has now been identified as a sexually discriminatory factor. Mr Cavanagh further submits that the speech of Lord Browne-Wilkinson in ***Wallace*** at page 214B to C wholly supports the contention that the burden lies on the respondent of establishing every aspect of the sec.1(3) defence, including the lack of discriminatory impact. That passage is one of a number upon which Mr Paines also relies in support of his submission. Mr Paines submits that if Mr Cavanagh's submissions that ***Marshall*** supports him are right, it necessarily follows that the House of Lords has reversed the conclusions to which it came in ***Wallace*** but has done so sub silentio.

18. I will now consider those authorities in turn. ***Byrne*** was an interlocutory appeal from a decision of an employment tribunal that had ruled that where a defence is raised under sec.1(3), the burden of proof is solely upon the employers. The tribunal had specifically held that:-

> *"Section 1(3) requires the employer to prove not only that the variation is genuinely due to a material factor but requires him to prove also that this is not due to the difference of sex".*

The objection was taken before the EAT (as Mr Paines does before me) that to so require is to impose upon the respondent the near philosophical impossibility of proving the existence of a negative. The judgment records that:-

> *"6….it is clear from the applicants' pleadings that the intention is to set out a positive case that there is direct or indirect discrimination.*
>
> *7. The tribunal found that the wording of sec. 1(3) is unambiguous and that where a defence is raised under that subsection it is, in the final decision, for the employers to satisfy the tribunal on the balance of probabilities that each part of that subsection is established. They say so in the passage which we have quoted. We agree"*

19. The EAT had disposed of the appeal by paragraph 13 of the judgment by simply concluding that the tribunal was correct in holding that sec.1(3) is unambiguous and that the burden is placed firmly upon the respondent in respect of all the elements in it. However, in the context of this case, the discussion which then followed about the procedure which might be adopted by the tribunal when it heard the case is of at least as much interest. In paragraph 14, Mr Bowers, who appeared for the Financial Times, is recorded as suggesting that the case should proceed along the lines of a sex discrimination case in which, at that time, the burden of proof was upon the applicant, and that the tribunal should adopt the approach laid down in ***King -v- The Great***

Britain - China Centre *[1991] IRLR 513 CA*. Paragraph 14 of the judgment records Mr Bowers' submission thus:-

> *"The burden of proof is also upon the applicant but where a prima facie case of discrimination is established, then a tribunal will be looking for an explanation or defence and will need to consider the positive case being put forward by the employer. It is in many ways the reverse of the present situation."*

20. That was in essence Mr Paines' submission to me. Although the EAT does not expressly reject that submission, it seems to me that in going on to set out what it describes as a possible course for the case to follow on its return to the employment tribunal, it does so by necessary implication as its suggestion is only compatible with the proposition that the burden is on the Respondent from the outset:-

> *"As the applicants have either proved like work, or for the purposes of the present issues are presumed to be involved in work of equal value, the burden will be upon the employer to prove the defence under sec.1(3). It will therefore be for The Financial Times to open the case. Evidence will be called seeking to establish with respect to each comparator the genuine material factor which causes the difference in pay and that that factor was not based upon sex. It was not the difference of sex. ... At the end of the employer's evidence, the applicants will decide whether or not to call evidence. They may be content to rely upon the evidence already given ..."*

21. Whilst pausing to note that there was no suggestion that no statistics were available on the question of disproportionate impact and that the applicants had expressly raised (as Mrs Travers expressly raises) the question of sex discrimination and intended to adduce evidence upon it, the judgment in ***Byrne*** clearly supports Mr Cavanagh's principal submission.

22. Is then Mr Paines correct when he submits that ***Tyldesley*** reached a different conclusion to ***Byrne*** and is to be preferred to ***Byrne*** firstly because it is later in time and secondly because it has twice been approved by the House of Lords? The first point to note is that ***Byrne*** was not referred to in either the judgment or in argument before the EAT in ***Tyldesley*** or the House of Lords in ***Marshall*** or ***Wallace***. It has therefore not been expressly disapproved of. Moreover, the central issue in the appeal in ***Tyldesley*** which led to its approval in ***Marshall*** and ***Wallace*** was not upon whom the burden or proof lay so much as when the need to prove objective justification arose. However, the conclusions reached by the Employment Appeal Tribunal remain of assistance. Quoting selectively from page 361E to 363B, they are as follows:-

> *"We agree with (Counsel for the employers) that the questions which arise for decision on this point, where a defence is raised under section 1(3) are: (1) What variation, if any, is there between a woman's contract and a man's contract? (2) To what factor is that variation genuinely due?*
> *In answering question (2), the employer must: (a) identify the* ***factor****, (which must not be the difference of sex); (b) satisfy the tribunal that it is a material factor; and (c) satisfy the tribunal that the factor is a* ***material difference*** *between the woman's case and the man's case. ... [emphasis in the original]*
> *(4) Even if* ***Enderby*** *was not a case of indirect discrimination, as understood by English law, the pre-condition of enjoying a higher salary in that case was membership of a group which comprised predominantly men. A prima facie case of unequal treatment was made out which needed to be rebutted by objective justification. No such case arises here. There was no suggestion that the requirement of particular experience of, or embracing, total quality management was one which affected a considerably higher proportion of women than men.*
> *(5) Accordingly, there was no allegation or evidence in this case of indirect discrimination which required rebuttal by objective justification.*
> *(6) In the absence of evidence or a suggestion that the factor relied on to explain the differential was itself tainted by gender, because indirectly discriminatory or because it adversely impacted on women as a group in the sense indicated by* ***Enderby****, no requirement of objective justification arises ...*
> *We agree with (Counsel for the respondents) that the industrial tribunal did not treat the case as one of indirect discrimination, but simply as one where the applicant was engaged on like work with a male comparator for which she was receiving a difference in pay. If it was not in fact a case of indirect discrimination, the question of objective justification did not arise and the industrial tribunal erred in treating it as relevant. No case of indirect discrimination contrary to section 1(1)(b) of the Sex Discrimination Act 1975 was put forward on behalf of the applicant, nor was there any basis for contending that the factor relied upon did impact adversely on women, so as to require objective justification."*

23. I cannot agree with Mr Paines' submission that ***Tyldesley*** reaches a different conclusion to that reached in ***Byrne***. It seems to me that it reaches precisely the same conclusion but this time predicated on the existence of a negative rather than a positive. In ***Byrne*** the applicants had expressly raised the issue of sex discrimination and intended to call positive evidence. The duty therefore shifted to the respondent to disprove disproportionate impact. In ***Tyldesley*** no such contention was made and therefore no such burden existed.

But ***Tyldesley*** can only be read as meaning that had such a contention been raised, it was for the respondent to deal with it and to rebut it. I therefore need not go on to consider either ***Marshall*** or ***Wallace*** in any detail, given that Mr Paines expressly submits that ***Tyldesley*** was approved by the House of Lords in both cases.

24. However, neither ***Byrne*** nor ***Tyldesley*** really answer the question which is before me. Although Mr Cavanagh's position in principle is that the burden of proof lies on the respondent, even if there is no specific allegation of disproportionate impact, he conceded that in practice (though not in law) the respondent would have to be put on notice that the point was to be taken. I do not think that he is correct. It is clear from ***Tyldesley*** that there is no obligation on the respondent to disprove disproportionate impact if the point is not raised. Indeed, in my judgement, it would be very odd if the position was otherwise. ***Byrne*** does not help me because in that case the report suggests that the applicants proposed to adduce positive evidence in support of their argument that the offending factor was discriminatory. ***Tyldesley*** is confusing in that in three separate places the EAT refer to "no suggestion"; "no allegation or evidence"; "the absence of evidence or a suggestion". There is a considerable conceptual difference between (1) an allegation or a suggestion; (2) evidence in support of that allegation or suggestion; and (3) evidence sufficient to establish a prima facie case that that which has been alleged or suggested is so. However, given in particular the reference to the agreed existence of a prima facie case of unequal treatment in ***Enderby*** in paragraph (4), the judgement in ***Tyldesley*** is noteworthy for the absence of any reference to the ***need*** for applicants to establish a prima facie case. Moreover, the suggestion in paragraphs 16 and 18 of ***Byrne*** that it would be for the respondents to go first and that at the end of their evidence the applicants may be content to rely only on the evidence given by the respondents, makes sense only if that judgment also proceeded on the premise that no prima facie case had to be raised.

25. But although the authorities demonstrate that it lies somewhere between a requirement that the applicants should allege disproportionate impact and the need to establish a prima facie case, the precise point at which the burden shifts to the Respondent remains unidentified. In my judgement, having regard to the clear words of sec.1(3) and the guidance which I derive from ***Byrne*** and ***Tyldesley***, all that is required for the burden of proof to be shifted to the respondents is a positive averment by the applicant (which might be made by way of an amendment to the Originating Application following either disclosure or the respondents' written answers to questions) that the factor of which complaint is made has disparate adverse impact on women, together with sufficient explanation of why the point is made to demonstrate that it is not being made vexatiously or mischievously. I would regard Mrs Travers' Originating Application at paragraph 7 where she pleads that: *"Since the majority of contract inspectors are either men who have retired from pensionable employment or younger women with family responsibilities, I consider that my exclusion from the pension scheme constitutes unlawful sex discrimination ..."* to be a sufficient averment for this purpose.

26. I am fortified in my view that this is the correct approach, not merely because it accords with the language of sec.1(3) but because, for the reasons which Mr Cavanagh advances, the ability to demonstrate whether a factor does or does not have disproportionate impact must necessarily lie with a respondent rather than an applicant and a respondent should not be permitted to succeed by dint of their failure to keep those monitoring statistics which the Equal Opportunities Commission Code of Practice recommends them to keep. Moreover, if the respondents fail to discharge the burden of proof placed upon them, that will not be the end of the matter as they could still succeed if objective justification can be established in accordance with the usual principles.

27. The answer to test issue 1 therefore is that where it is necessary to establish disproportionate impact in order to demonstrate a breach of the equality clause, the burden of doing so is upon the applicant. Where in the context of a genuine material factor defence under section 1(3) of the Equal Pay Act 1970 an applicant alleges that the factor has disproportionate impact and supports the allegation with particulars sufficient to demonstrate that the allegation is not vexatious or mischievous, the burden is upon the Respondent to disprove it.

28. I turn now to the second issue. Mr Paines concedes, and Mr Cavanagh accepts, that the respondents can be required to given disclosure of any relevant statistics or documents which already exist in a paper or electronic form but subject to the usual considerations of relevance and proportionality. In particular, the tribunal must have regard to the overriding objective in Regulation 10(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 and to Rule 31.7 of the CPR which are engrafted into the tribunal's Rules of Procedure by virtue of Rule 4(5)(b) (although the tribunal's Rules of Procedure appear to be confined to the ability to order discovery between parties only). Mr Paines submits that the tribunal cannot require a respondent to create a document which does not exist, nor to require the respondents to construct statistics under the disclosure power. However, the judgment of the Court of Appeal in ***West Midlands Passenger Transport Executive -v- Singh*** *[1988] ICR 614* seems to establish that such a power does exist albeit perhaps in limited circumstances. It is also conceded that in an appropriate case the tribunal would have power to order a respondent to provide written answers to questions. Again, the overriding objective must be borne in mind when deciding whether it would be appropriate to make such an order. A tribunal of course should not order a respondent to disclose information which it does not possess nor to compile statistics which it would be disproportionately expensive or time consuming to prepare. If an order for disclosure should not be made because the volume of documentation involved meant that it would be onerous or disproportionate, an order requiring the respondents to produce statistics based on such documentation should also not be made.

29. Finally, I will deal briefly with directions for the future conduct of the Principal Civil Service Pension Scheme cases. I am not able to make as many directions as I had wished, partly because Mr Cavanagh and Mr Paines do not represent all of the interested parties and partly because they have indicated that they believe that at this stage more can be achieved by sensible co-operation between the parties than by the making of orders.

30. I therefore give the following directions only:-

1. In any case in which an applicant seeks a declaration of entitlement to membership of the Principal Civil Service Pension Scheme where the respondents alleged in their Notice of Appearance that the complaint is brought out of time, show cause letters are to be sent to the applicant.

2. The cases brought against the Lord Chancellor's Department by judicial post holders, either professional or lay, are to be transferred to London Central. I have taken this step because the lay applicant, Mr John Wood-Cowling, was formerly a member of the employment tribunals in the East Midlands region, of which I am Regional Chairman, and is well-known to me. These cases should be listed for hearing on the preliminary question of whether the tribunal has jurisdiction to entertain them as judicial post holders may be expressly excluded both from the protection of the Equal Pay Act 1970 and Article 141.

3. Complaints brought by members of the Territorial and Reserve forces are to be transferred to London South as I am informed that in these cases

reliance is placed on the Part-time Workers (Prevention of Less Favourable Treatment) Regulations as well as Article 141. The nominated chairman at London South has already dealt with complaints in relation to pensions brought under these Regulations by retained fire-fighters and is therefore better placed than I am to deal with other cases so brought. The complaints by members of the Territorial and Reserve forces will have to remain stayed until the completion of the appeal process in the retained fire-fighter cases. I should add for the avoidance of doubt that if any of the other cases in the Principal Civil Service Pension Scheme sector also rely on the Part-time Workers (Prevention of Less Favourable Treatment) Regulations, they are also to be transferred to London South for future management. I rely on respondent Government Departments to draw such cases to my attention.

5. All of the remaining cases in this sector continue to be stayed, either pending the outcome of the appeal in the part-time worker test issues on opting in or pending the production by the Secretary of State of the relevant statistics for casual civil servants. Those statistics I am informed will be produced voluntarily within a reasonably short space of time.

6. I the event that it becomes necessary for a tribunal to determine whether there is disproportionate adverse impact on a female casual or fee paid civil servant, the matter will come on for hearing before a tribunal of which I will be the chairman. The parties are to keep the national pensions co-ordinator, Mr Clayton Hayward, informed of the need for any such hearing.