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e-qual pay post

Welcome to the Summer issue of *e-qual PayPost*.

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EAT adopts liberal approach to same establishment test

The decision of the Employment Appeal Tribunal in *City of Edinburgh Council v Wilkinson* considered what was meant by working in the "same establishment" for the purposes of identifying an appropriate comparator in an equal pay claim. The guidance it gives will make it considerably easier for claimants with larger employers to find appropriate comparators.

In this case, the council employed Mrs Wilkinson and 51 of her colleagues in a range of jobs (in schools, hostels, libraries and social work) all working at different locations in and around Edinburgh. Under their contracts of employment, they were all assigned to work at a particular location but their contracts contained mobility clauses requiring them to work at any of the council's workplaces across the city. The claimants argued that they did work of equal value to male comparators employed by the council in a different range of jobs (refuse collectors, gardeners, grave-diggers and road workers). The nature of these jobs meant that they were also required to carry out their work at different locations across the city.

The EAT agreed with the employment tribunal's decision that both the claimants and the comparators worked in the same local authority service, but disagreed with the ET's decision that each location in which the council operated should be treated as a different establishment. Instead the EAT held that a broader approach should be taken to the question of working in the same establishment to ensure that employers did not defeat the purpose of the Equal Pay Act 1970 by assigning women to one location and men to another and then arguing they worked at different establishments and therefore their pay could not be compared.

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The EAT held that if staff worked in the same service it was not appropriate just to look at where the claimant worked. The tribunal should look at the employer as a whole and identify whether groups of staff could be treated as working at different establishments. In other words, did the establishment have a clear identity separate from the rest of the employer? The fact that both the claimants and the comparators in this case could be directed to work anywhere within the council meant that there was no separate distinct group of staff which could be treated as a separate establishment.

"Stable employment relationship" has wide meaning

North Cumbria University Hospitals NHS Trust v Fox (formerly known as the Potter case) has been to the Court of Appeal again - this time to consider whether Agenda for Change constitutes a new contract of employment, therefore affecting the limitation period within which equal pay claims can be brought. The approach it has taken will mean a green light for many public sector equal pay claims that might otherwise have been out of time.

In order for the courts to have jurisdiction, a claim for equal pay must normally be brought within six months of the end of the woman's employment. In Fox, the trust argued that the implementation of Agenda for Change (the NHS-wide job evaluation scheme which involved wide-spread changes to terms and conditions) meant that employees had effectively entered into a new contract of employment which had superseded their old one. That meant that new claims lodged more than six months after that point were out of time.

The Court of Appeal rejected this argument, saying that assimilation under Agenda for Change fell within the "stable employment relationship" exception to the basic time limit rule. The ruling in *Slack v Cumbria County Council* had made it clear that the test for identifying a stable employment relationship was much wider than had previously been thought. It was not confined to cases where it was needed to bridge gaps between a series of fixed-term contracts, but involved applying a broad, non-technical test which assessed the character of the work and employment in practical terms. It concluded that the term "employment" should be gauged by looking at the actual nature of the work rather than the legal terms under which it is carried out. Therefore, so long as there was no fundamental change in the employment relationship, time started to run when the relationship ended, not when one contract was superseded by another.

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Equal pay included in autumn implementation of Equality Act

The provisions on equal pay (or equality of terms to use the new terminology) are among the provisions of the Equality Act 2010 which are being brought into effect in October 2010. A new code of practice on equal pay was laid before Parliament last month and will come into force at the same time. The substantive provisions will not change significantly, but there will be some relatively minor differences. These include provisions limiting the use of gagging clauses to prevent employees comparing pay, and introducing the right to bring a sex discrimination claim where there is direct discrimination in relation to pay but no actual comparator.

The provisions implementing a public sector equality duty across all the main strands will not be commenced in October. Until this happens - and the implementation timetable is currently uncertain - the 2006 Code of Practice on Gender Equality will continue to apply. When implemented, the new equality duty is likely to require public sector bodies with over 150 employees to publish statistics about their gender pay gap. It is unlikely that a similar provision applying to larger employers in the private sector will be commenced by the current Government.

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In the employment tribunal

Employment tribunals have continued to be busy with equal pay claims over the past few months. The news for employers has not been particularly good.

Of particular note are the successful equal pay claims brought by 4,000 female employees of Birmingham City Council (*Barker and others v Birmingham City Council*) which have reportedly left the council with a bill of £200 million. In these cases, the tribunal rejected the council's genuine material factor defences in relation to the awarding of bonuses to employees in male-dominated comparator groups, (refuse workers, grave-diggers, road workers, road cleansers and gardeners), but not to female employees in roles such as cleaners and carers. The council tried to justify the disparity in pay by relying on market forces, a skills shortage and a bonus scheme that it claimed was justified on grounds of productivity. The tribunal found that there was no evidence to support the defences. It is understood that the council is appealing at least part of the judgment.

In another first instance decision (*Buchanan v Skills Development Scotland Co Ltd*) the Edinburgh employment tribunal has found that an employer could not rely on TUPE to defend an equal pay claim. In this case, the comparator's higher pay dated from when he and the claimants were transferred to the present employer. The tribunal found that the employer was not obliged to continue to increase the comparator's salary after a certain period had lapsed since the transfer.

Genuine material factor defences are also currently being considered in the context of NHS equal pay claims in a national test case (*Freslov and others v Sussex Partnership and others*). We understand that the tribunal will consider whether the employment of claimants and their comparators prior to Agenda for Change on terms under separate collectively-bargained agreements (ie, different Whitley Councils), constitutes a successful genuine material factor defence. A pre-hearing review is due to be listed no earlier than May 2011.

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Comparison of discrete components required

Last week's EAT decision in *Brownbill v St Helens and Knowsley Hospital NHS Trust* ruled that an employment tribunal should not have aggregated the terms of female claimants' contracts when comparing them to the contractual terms of their male comparators. It found that the correct approach was to compare discrete components of their contracts. In its decision the EAT made it clear that a "broadly equitable outcome" had not been the intention of the legislation, and that amalgamating the terms was considered "to obscure historic discrimination".

We understand that the respondent is considering whether to appeal this decision.

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