



Equal pay

An overview of current legislation and recent case law

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Introduction

The Equal Pay Act 1970 first came into force in 1975, but despite forty years of equal pay legislation, the ambitions of the original legislators have not yet been realised. A report of the Equality and Human Rights Commission published in 2011 reveals that the mean average gender pay gap was 15.5 per cent for hourly earnings (excluding overtime) and 21.5 per cent for gross weekly earnings. The median gap was lower (10.2 per cent and 18.4 per cent respectively) due to the highest paid jobs being dominated by men. For part-time women those gaps are particularly disheartening - at 34.5 per cent and 38.5 per cent respectively.

Despite the continuation of a significant pay gap, limited progress has been made and the general trend has been for the discrepancy to reduce year on year. In 1974 the mean gap for full-timers was 36.2 per cent and there has been slow progress towards the current position since then. For part-timers progress towards equality has been slower.

Unsurprisingly in light of these figures, equal pay continues to be the subject of significant litigation, particularly in the public sector. Job evaluation schemes in the sector have meant that local authorities (Single Status agreements) and the NHS (Agenda for Change) have borne the brunt of class litigation so far, with thousands of

claims progressing slowly through the tribunal system. More recently the education sector has also seen a rise in these claims.

In 2010 the Equality Act consolidated much of UK discrimination legislation and became the new home of the equal pay provisions. It made limited changes to the substance of the law in this area. These notes consider the core principles of the equal pay provisions, recent case law, legislative developments and proposals for the future.

Note: The legislative provisions apply to both men and women, but for clarity (adopting the approach of the Equality Commission in its Code of Practice on Equal Pay) these notes refer to a claimant as a woman comparing her pay to a male comparator.

Equal pay – the legal framework

On 1 October 2010 the Equality Act repealed and replaced the Equal Pay Act 1970. Sections 64-80 of the new Act broadly replicate the old equal pay provisions. The core structure of the provisions remains the same, with some limited changes.

The principle at the heart of the legislation is a straightforward one: that men and women should receive equal pay for equal work. The Act implies what is known as a “sex equality clause” into every contract of employment. Basically this means that women and men in the same employment have a right to receive the same pay where they do equal work and, if the contract does not provide for equal pay, the disadvantaged worker will be able to bring a legal claim as if it did.

In order to bring a claim an employee needs to point to particular term of her contract which is less beneficial than that of a comparator of the opposite sex. For example, a term which states that a woman is entitled to half pay when on sick leave and a man is entitled to full pay. Tribunals are not generally concerned with the overall pay and benefits package, but instead look at equal pay on a term-for-term comparison. However, if the overall package is favourable this may support a material factor defence (see below).

A “maternity equality clause” gives women the right to a pay rise, or a bonus (pro rated) that would not otherwise have been provided to her during her maternity leave. There is no need for a women to point to a comparator in relation to the maternity equality clause and there is no material factor defence available to an employer (see below).

Equal work

In order to benefit from the implied “sex equality clause” a woman needs to show she does either:

- like work to that of a man - that is, the work is "the same or broadly similar" and any differences are "not of practical importance in relation to the terms of their work" having regard to "the frequency or otherwise with which such differences occur in practice, and the nature and extent of the differences";
- work rated as equivalent to that of a man - that is, in a job which a job evaluation study of part or all of her employer's workforce has shown to have an equal value to the man's; or
- work of equal value to that of a man - that is, in a job which is equal in value to the man's in terms of the demands made on her under such headings as effort, skill and decision-making.

Comparators

To succeed in a claim for equal pay, the employee needs to compare her pay to that received by someone of the opposite sex in the same employment. The comparator must work:

- for the same employer or an associated employer; and
- at the same establishment; or
- at a different establishment where common terms and conditions apply.

The comparator does not have to be working at the same time as the women, so she will be able to compare herself to a predecessor.

Unlike the position with sex discrimination a woman cannot generally compare herself to a hypothetical comparator. She needs to choose an actual man (or a number of men) and compare herself to them.

When the Equality Bill was in its drafting stage, the Government considered introducing hypothetical equal pay comparators. However it ultimately decided against this. Instead the Equality Act 2010 has introduced the more limited potential for a woman who is unable to point to a comparator under the equal pay provisions to bring a claim for **direct** sex discrimination in relation to her contractual pay. This was not possible under the old sex discrimination legislation.

This potential claim would arise where there is a difference in contractual pay and the woman believes that if there had been a male comparator he would have been paid more. The sex discrimination claim will not lie where there is indirect pay discrimination – where an actual comparator will still be needed.

Same employment

Under EU law (Article 157 of the Treaty on the Functioning of the European Union) a woman is able to compare herself to employees who do not work for the same employer where the differences in pay are attributable to a single source. There needs to be a single body, responsible for and capable of remedying the pay inequality. Article 157 has direct horizontal and vertical effect in the UK. This means it can be relied on by individuals as against private as well as public employers without the need for implementation in to UK law. So, if claimants cannot meet the test for “same employment” the Equality Act, they may nevertheless be able to proceed if they meet the “single source” test under EU law.

In *Lawrence v Regent Office Care Ltd* (2003) the European Court of Justice (ECJ) held there can be a cross-employer comparison under EU law where the difference in pay is attributable to a single source or entity. However, in this case catering assistants whose jobs had been contracted out sought to compare themselves to road sweepers and gardeners who remained in the employment of the Council. The ECJ said that because the work of the caterers was contracted out there was no single source which could restore equality. It will often be difficult to show a single entity is responsible for pay disparity where it is not also the employer.

The two regimes are separate and it is not necessary for a claimant to meet the requirements of both. In the recent case of *Beddoes and others v Birmingham City Council* (2011) the Employment Appeal Tribunal (EAT) confirmed that, in claims under UK (as opposed to EU) law, there is no need to show a single source is responsible for determining pay if the conditions in the Equal Pay Act/Equality Act 2010 have otherwise been met. In this case, the claimants were non-teaching school workers employed by the Council. Although their terms were determined by the school governors (not the Council) school workers could still compare themselves to other employees of the Council. It was not necessary to show that a single source determined pay.

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More than the comparator?

A woman cannot compare herself to a man and claim that she should receive more pay than he does (*Evesham v North Hertfordshire Health Authority* (1999) IRLR 155). The legislation only allows her to achieve equal pay.

An employer cannot defeat an equal value claim by arguing that the woman does more work than the male comparator (*SITA v Hope* (2005) UKEAT 07887/04):

“On any purposive construction of the Act, the fact that a promoted woman undertakes more duties than her male predecessor cannot result in a conclusion that the two are not undertaking like work in order to justify her being paid less.”

Which claim?

The equal pay provisions apply to all contractual benefits including non-monetary benefits (such as access to sports facilities). If a complaint relates to a non-contractual benefit, such as a discretionary bonus, it should generally be made under the sex discrimination provisions.

The first decision for a claimant who feels they are not receiving equal reward for their work is which claim to bring. The following table demonstrates the types of claims which are likely to fall in each category. However, claimants will often bring claims under both sets of provisions in the alternative.

	Equal pay	Sex discrimination
Offer of employment which, if accepted, would have less favourable pay		X
Less favourable contractual pay and benefits	X	
Automatic pay increments	X	
Paid holiday entitlement	X	
Less favourable discretionary pay rise		X
Lack of promotion to higher paid grade		X
Access to pension	X	
Payment of a non-discretionary bonus	X	

In addition claimants now need to consider whether their claims lies under the pre-October 2010 provisions or under the new Equality Act. The Act's transitional provisions are not entirely clear. However, it indicates that pay discrimination which straddles 1 October 2010 and which is unlawful both before and after 1 October 2010 is now actionable under the Equality Act. If the period for which pay was unequal wholly predates 1 October 2010, then the claim should be brought under the Equal Pay Act 1970. Claimants' advisors are likely to advise that claims are pleaded in the alternative if there is any doubt.

Defence of material factor

Where the Tribunal finds that there is equal work (like work, work rated as equivalent or work of equal value) an employer will only have a defence if it can show that the pay differential is because of a “material factor” which is not itself discriminatory (section 69 Equality Act 2010).

The defence was referred to as the “genuine” material factor defence under the Equal Pay Act 1970 but the word “genuine” was removed by the Equality Act. This is unlikely to have any practical impact on the application of the provision. The first step remains for the employer to provide a factual explanation for the pay discrepancy (*Sunderland v Brennan* (2011)). That should be the true explanation and not a sham.

Examples of possible material factors include:

- performance of the individuals;
- geography;
- market forces;
- special duties;
- additional responsibility; and
- greater skill or experience.

This defence has been further re-worded in the Equality Act 2010 to clarify its application in the light of recent case law. There are two elements to the defence:

- The material factor must not be directly discriminatory and must not involve treating the claimant less favourably because of her sex than the employer treats the comparator.
- If the factor means that one sex is put at a particular disadvantage when compared with persons of the opposite sex doing equal work the employer will need to show it is justified as a proportionate means of achieving a legitimate aim.

The second element codifies the idea derived from case law, that if a material factor is “tainted by sex” (with the result that female employees are at a disadvantage) it must be justified. There are different ways in which a factor could be shown to disadvantage women:

- if it is directly discriminatory;
- if an apparently gender neutral pay policy or practice in fact has a disparate impact on women (such as an anti-social hours bonus which women were less likely to be able to achieve because of childcare responsibilities);
- if cogent statistical evidence demonstrates that women are adversely affected as a group when compared to men; and
- if, comparing a large group of comparable employees, average pay for women is less than that for men and the pay system is not transparent.

Case law under the Equal Pay Act 1970 had suggested that in some circumstances, where there was a statistical difference in the impact of a pay policy, there would be no need for justification if the employer could show it was not tainted by sex. The Equality Act 2010 suggests that justification will now be necessary for all these categories.

So, for example, in *Gibson v Sheffield City Council* (2010) a predominantly male group (street cleaners and gardeners) was better paid than a predominantly female group (carers). The Court of Appeal found that the difference required objective justification.

Examples of justification which have succeeded in the context of equal pay include:

- a particular pay system (unless average pay for women is lower and the system is not transparent);
- a collective agreement, or collective bargaining structures (though not if they incorporate discriminatory practices or assumptions); and
- external economic considerations, such as market forces – that is where the employer had to pay more in order to attract or keep staff (though not if the market is tainted with discrimination).

In each case the means used to achieve the aim should be proportionate. It will be important to balance the discriminatory effects of the pay practice against the need to apply it.

If the defence is established only in relation to part of the difference in pay the claimant will succeed in her claim to the extent that it is not made out.

Employment Tribunal case report – *Mallabar v Worcester College of Technology* (2011)

Background

Miss Mallabar and her chosen comparator Mr Hodgkinson were appointed as full time law lecturers in 2001 and 2000 respectively (though the claimant had been lecturing in the College on an hourly paid basis for two terms before that). Mr Hodgkinson was appointed at spinal column point 10 on the pay scale whereas the claimant was appointed at point 6. Once on the column there was automatic annual progression up the scale. The claimant could not make up the pay differential and she claimed it was a breach of the equality clause under the Equal Pay Act 1970.

Were they engaged in like work or work of equal value?

The Tribunal accepted that the claimant and her comparator were engaged in like work (albeit in different academic years) during the first and second years of their employment because they both undertook lecturing duties and had no course leader responsibilities. In their respective third years of employment the claimant had responsibility for the ILEX course and her comparator had responsibility for the HND course. The Tribunal found this was like work because it was broadly similar. If it was not like work it would certainly have been of equal value (the claimant's responsibilities were in fact greater).

Was there a material factor to justify the difference in pay?

The pay differential arose purely as a result of the different starting salary offered to the claimant and her comparator. The issue was therefore whether there was a genuine material factor to explain the difference.

The former Vice-President gave evidence that it was College policy to award additional points on the pay scale for post-graduate qualifications, previous teaching experience, and relevant industrial experience. The Tribunal accepted that a policy of awarding points for qualifications might be a material factor in justifying a one spinal point

advantage. However the key issue in this case was the points awarded in respect of industry experience: Mr Hodgkinson was awarded 6 points for his experience, whereas the claimant received none. The Tribunal considered the application forms of the two employees and found that Mr Hodgkinson had exaggerated his individual experience during his interview and the claimant in fact appeared to have greater relevant experience. The Tribunal considered that the (all male) interview panel had favoured Mr Hodgkinson and had consciously or subconsciously inflated his skills and experience and undervalued those of the claimant. It had been highly subjective, lacked transparency and was unjustifiable on an objective analysis.

The Tribunal did not accept that the interviewers had been “hoodwinked” by Mr Hodgkinson but considered they had failed to properly question him in order to be able to attribute appropriate weight to his previous experience. The reason for the main element of the pay differential was found to be a sham. The pay difference was tainted by direct sex discrimination and could not be justified.

Comment

This case demonstrates the importance of transparency. The employer had no written pay policy and no paper trail to explain its decision. On the basis of the evidence available there was no reasonable explanation for why the female employee was paid so much less.

Employment Tribunal case report – *Schafer v Royal Holloway and Bedford New College (2011)*

Background

The claimant is engaged as a Professor of Drama and Theatre Studies with the respondent. Prof Schafer and her chosen male comparators were all distinguished scholars in the College during the relevant period from June 2003 to June 2009. The claimant was paid less than her colleagues and alleged this was in breach of the equality clause under the Equal Pay Act 1970.

Were they engaged in like work?

The task of comparing the work of five distinguished academics of senior standing was not straightforward. The Tribunal considered voluminous bundles of evidence in relation to the career, pay and research of each professor. It accepted that they were carrying out work which was broadly similar.

There were differences in relation to the non-academic contributions (administration and management) and in relation to academic leadership but these were held not to be of practical importance in relation to their terms and conditions. They were found to be engaged on like work.

Was there a material factor to justify the difference in pay?

Having found there was like work, the Tribunal turned to the genuine material factor defence.

It considered four different elements which made up the professors' pay: starting salary, annual pay review increases, head of department allowances; and retention payments.

Annual pay review

In relation to the annual pay review system, it found that it had no material impact on the disparity in pay. However, the Tribunal was heavily critical of the system operated by the respondent. It failed to meet any of the Tribunal's standards for a fair performance-driven pay review. Such a review should show clearly defined performance measurements leading to robustly calculated performance ratings which in turn have a direct, uniform, programmatic impact on base pay.

Starting salary

In relation to the difference in starting salary between the claimant and one of the comparators, the Tribunal found that this did have the potential to disadvantage women to the extent it rewards career and geographical mobility. Nevertheless in this instance it was justified. At the time of the appointment in issue the respondent had “a serious business need to appoint a heavyweight scholar who would turn around the English Department”.

Head of Department allowances

In relation to the Head of Department allowances, the Tribunal found that three of the comparators had continued receive that allowance, rolled up into their salary, even when they ceased to hold that role. The claimant had not. The Tribunal accepted that the allowance was a genuine reason for part of the difference in pay and found that it was not discriminatory. Although the system was criticised for its subjectivity and lack of transparency, its unfair application was not related to the sex of the individuals concerned. The small number of individuals who had retained the allowance did not enable any conclusions to be reached about a statistically disparate impact (10 men and 4 women had retained the allowance). The Tribunal commented however that if there had been a disparate gender impact, it would not have been justified – the practice was subjective, arbitrary, not reasonable, not proportionate and did not meet a business need.

Retention payments

Over the relevant period, pay differentials had also been created by the College’s practice of awarding “retention payments” to prevent the comparator academics moving to other institutions. The Tribunal accepted that these payments were a genuine reason for the differences in pay but concluded that this apparently neutral practice had a disparate impact on women. It accepted that women disproportionately carry the burden of caring and other caring responsibilities; that success and esteem require a noticeable degree of presence in the workplace; and that a financial benefit – such as a retention payment – which is linked to career or geographical mobility (or perceived mobility) operated to the disadvantage of women. The material factor was therefore tainted by sex.

The Tribunal accepted that retention payments could in principle be justified as an appropriate and necessary mechanism for retaining valued staff. It considered whether each of the six payments could be justified on the facts.

- It concluded two payments, made when there was imminent risk of a valued employee moving to another institution at a critical point in the academic year, were justified and proportionate.
- It found one payment was not justified where it was the second such payment in two years and was made after the relevant professor had just undergone an unsuccessful interview for a post at another institution.
- It found that it required further submissions in relation to the proportion of three further payments which could be justified by the need to retain the academics within the institution.

Comment

The respondent in this case was in evidential difficulty as most of the pay awards were made without any transparent policies in place and the former Principal who had been primarily responsible for them did not provide evidence. While readily accepting the principle that the respondent could validly make a pay award to retain key staff, it was heavily critical of the processes by which the pay awards were made. The Tribunal in this case showed itself willing to scrutinise closely, and individually, the payments made and justification for each of them.

Pay protection and the material factor defence

A number of recent decisions have considered the validity of pay protection schemes. Where an employer undertakes a job evaluation scheme this may result in some roles being down-graded. Where this is the case employers sometimes ring-fence or red-circle the pay of the employees (usually men) in those roles to protect them from the impact of an immediate pay cut.

This had led female employees who would, but for historic discrimination, also have been paid the same higher salary, to claim an additional amount equal to the temporary pay protection. Case law has demonstrated that if pay protection has the effect of perpetuating historical pay discrimination it is likely to be difficult to justify.

The Equality Act 2010 expressly states that the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim. However the question of whether the pay protection is a proportionate means to achieve that aim in a particular case will depend on the facts.

The recent joined decision in *Bury Metropolitan BC v Hamilton and Sunderland CC v Brennan* (2011) considered whether an amount equivalent to the pay protection given to predominantly male groups (gardeners, road sweepers, drivers, and refuse collectors) should also be awarded to female employees in groups which had historically suffered from lower pay (caterers, cleaners, carers, school support staff). The historic disparity had originated in a "productivity bonus" which had long since ceased to be connected to productivity and had in fact become a part of standard pay. The EAT held that "employers will not be able to justify withholding pay protection payments from claimants without advancing cogent and specific reasons for what is in effect a continuation (albeit limited) of past discrimination."

In this case the Council had argued that it could not afford to provide equivalent amounts to women. The EAT stated that an employer "cannot prove unaffordability by mere assertion." The employer should provide sufficiently detailed evidence, both of the costs themselves and of the financial context, to enable the Tribunal to reach an informed view. Moreover the employer could not argue that it could not provide the same pay to women on the basis that the amount payable was not yet practically ascertainable. It was sufficient that it should be "conceptually knowable." Mr Justice Underhill commented: "No doubt it is not ideal for an employer to be faced with a unquantifiable contingent liability, but that too is a far from uncommon situation; in the real world it is dealt with by making prudent provisions and if appropriate by setting money aside."

In contrast in *Audit Commission v Haq* (2011) the EAT found that a pay protection arrangement was not discriminatory. In this case the male employees had, prior to a reorganisation, held more senior roles than the claimants. The position had not been historically discriminatory and the pay protection arrangement did not therefore perpetuate a problem. It simply reflected the fact that, before the restructure, the men had been at a higher point on the pay scale.

Piggyback claims

What do you do if you are a male employee and your female colleagues are bringing equal pay claims comparing their pay to other employees who are all male? If they win, you will be paid less than your female colleagues, but you can't bring a claim yourself without a comparator of the opposite sex. Can you bring an equal pay claim contingent on the fact that if your female colleagues win their claim, they will then be paid more than you? In *Hartlepool v Lewellyn* (2009) the EAT confirmed lower paid male employees could bring such claims (known as "male contingent" or "piggyback" claims) comparing themselves to female comparators who were themselves claiming in relation to higher paid male comparators.

The men could claim for the same period of arrears as the female claimants although the male claims will only crystallise once the female claimant has received an award or settlement.

If the employer settled the women's claims, the male "piggyback" claims would still arise. The settlement with the women would be a benefit. If the employer fail to afford that benefit to comparable male employees it would amount to a detriment. A claim would lie for direct discrimination unless a similar settlement was made with them.

Time limits

If an employee wishes to bring a claim for equal pay in the Employment Tribunals, he or she must start the claim before the end of the “qualifying period”. Basically this means the claim can be made at any time during the employment to which the claim relates or, as a general rule, within six months of the date of termination.

The way the six-month time limit is calculated will depend on the type of case:

- In a standard case it will be six months from the end of the employment.
- In cases where there is “stable work” (formerly “stable employment” under the Equal Pay Act) the date will be six months from the date on which the stable employment relationship ended. The Court of Appeal has held that a succession of contracts with the same employer, albeit on different terms, may amount to a stable employment for this purpose. This means the clock may not start ticking where there has been a change in a woman’s terms of employment and claims are less likely to become time-barred following such changes.
- If the employer deliberately concealed any relevant fact from the employee, and she did not discover the fact (or could not have reasonably discovered it) during the employment, the relevant date will be six months after the fact is discovered (or could have been discovered with reasonable diligence).
- If the employee “had an incapacity” (Equality Act 2010) or was “under a disability” (Equal Pay Act 1970) the time runs until the six months after the end of the incapacity.

Tribunals have no discretion to extend the period. However, these time limits do not apply in the civil courts where, as contractual claims for breach of the equality clause, they are subject to a longer six-year limitation period. The Equality Act addresses this overlap in justification and states that if a claim could more conveniently be dealt with by an Employment Tribunal, the civil court may strike out the claim. It can also refer questions relating to an equality clause to an Employment Tribunal and stay the court proceedings pending the outcome.

In *Abdulla v Birmingham City Council* (2011) the Court of Appeal held that claims which would have been time-barred in the Employment Tribunal could still proceed in the courts. Claimants will generally still prefer to bring claims in the Employment Tribunals where possible. The cost implications of proceeding in the civil courts will be far more risky. The losing party in the civil courts will usually bear the winner’s costs.

TUPE and equal pay

An employee seeking to bring an equal pay claim for a breach of the sex equality clause occurring during their period of employment with a transferor must do so within six months of the TUPE transfer.

If the new employer continues to breach the equal pay legislation, the time limit for an equal pay claim in respect of that ongoing breach by the transferee is six months from termination of that employment.

An employee can compare herself to comparators employed by the transferor in respect of the period post-transfer (*Guttridge and others v Sodexo Ltd and North Tees and Hartlepool NHS Foundation Trust* (2009)). This has the potential to create difficulties for the transferee who will not necessarily have access to information about a comparator employed by the transferor.

Arrears

Successful claimants can claim arrears of pay in respect of the period up to six years before the date on which proceedings were begun. In cases of concealment or disability, this time limit may be extended. A different backdating period applies in relation to access to occupational pension schemes.

Pay secrecy

A new provision in the Equality Act 2010 means that contractual secrecy clauses which seek to prevent employees discussing their pay will be unenforceable in relation to “relevant pay disclosures.” A relevant pay disclosure is a disclosure made to a colleague or former colleague to find out whether there is a connection between pay and a particular protected characteristic (ie. whether pay is discriminatory).

Seeking or making relevant pay disclosures or receiving information from such a disclosure are protected acts for the purpose of a victimisation claim under the Equality Act.

Gender pay reporting

The Equality Act contains a power to require public sector employers and employers with 250+ employees to report on their gender pay gap. The current Government has no current plans to use the power in the Act. Instead has introduced a scheme (“Think, Act, Report”) to encourage businesses to increase transparency on a voluntary basis.

The future

The Government published its *Consultation on Modern Workplaces* earlier this year covering flexible parental leave, flexible working, annual leave and equal pay.

Recognising that there is still significant work to be done to close the gender pay gap it proposes legislation to require Tribunals to order an employer to conduct and publish an equal pay audit if it is found to have discriminated on grounds of pay.

It sets out circumstances in which an audit might not be ordered. These are where:

- An audit has already been conducted in the last three years;
- The employer has another appropriate means in place of ensuring the pay structure is non-discriminatory;
- The Tribunal does not consider it would be productive to order an audit in the particular circumstances. An audit should have the potential to benefit either the employer or its employees. The Government proposes to provide guidance on when this exception would apply.

The Government is consulting on a range of possible sanctions if an employer fails to conduct an audit including:

- allowing a Tribunal to take the failure into account in a future claim (by drawing an inference as to the reason for that failure);
- making the failure itself an act of unlawful discrimination;
- a criminal fine; or
- a civil financial penalty.

The proposals consider the risk that the possible penalty of an audit may lead some employers to settle equal pay claims, even unmeritorious ones, rather than risk losing them. The Government considers this risk to be “slight.” Employers may feel it is more of a problem. The consultation closed on 8 August 2011.

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