

EQUALITY ACT 2010 – EQUAL PAY PROVISIONS

INTRODUCTION

In substance while some terminology has changed slightly, the key concepts and means of establishing claim much the same as under the Equal Pay Act 1970. The previous case law under the EP Act is preserved (s137).

To succeed, a claimant must identify a suitable actual comparator, prove discrimination in pay and if the defences do not succeed and the discrimination cannot be justified by the employer the effect is to alter contract of employment of the claimant to give effect to the clauses enjoyed by the comparator (s66).

It remains an individual claim not a claim for a class of workers. The tribunal procedure remains largely the same with jurisdictional defences where there is a job evaluation already in place (see s131(6)).

The operative provisions provide for claims for like work, work rated as equivalent and work of equal value (s65).

Claimants can send questionnaires to their employers to seek information about pay differences (s138).

WHAT'S NEW?

Section 69 material factor defences now requires objective justification in all indirect discrimination cases.

No more Armstrong/Gibson type arguments where employers can avoid objective justification of indirect discrimination.

S 69(3) transitional measures appears to allow for pay protection arrangements

Hypothetical comparison available but only for direct discrimination in contractual claims (s71)

Pay secrecy clauses restricted (s77)

WHAT'S MISSING?

Representative actions

Mandatory pay audits

Gender pay information (s78) – government is currently considering whether to implement this provision but Conservative spokes people have not been in favour of it in the past.

Recommendations (ss124(2)(c) and 124(3)) but not for equal pay cases

HOW WILL THE ACT WORK IN PRACTICE?

Under s 69, what will material factor defence cases look like if the employer has to objectively justify every case of ID in pay?

How can the employer objectively justify differences in pay where the female claimants are doing traditionally female dominated work like cleaning, caring or school catering?

What length of protection could be justified as legitimate under s 69(3)? 3 years? 5 years?

How effective will s 71 be – ie. how often do such clear cut cases as those suggested in the examples arise?

Will the restrictions on pay secrecy clauses assist female claimants who already know the rates of pay of their comparators?

Would s 78 assist in these cases or would proper auditing for discrimination in pay be more desirable?

OPERATIVE PROVISIONS

65 Equal work

- (1) For the purposes of this Chapter, A's work is equal to that of B if it is—
 - (a) like B's work,
 - (b) rated as equivalent to B's work, or
 - (c) of equal value to B's work.
- (2) A's work is like B's work if—
 - (a) A's work and B's work are the same or broadly similar, and
 - (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.
- (3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—
 - (a) the frequency with which differences between their work occur in practice, and
 - (b) the nature and extent of the differences.
- (4) A's work is rated as equivalent to B's work if a job evaluation study—
 - (a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or
 - (b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.
- (5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.
- (6) A's work is of equal value to B's work if it is—
 - (a) neither like B's work nor rated as equivalent to B's work, but
 - (b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.

Explanatory Notes:

221. This section is designed to replicate the substance of provisions contained in the Equal Pay Act 1970

66 Sex equality clause

- (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;
 - (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).

Explanatory Notes:

226. This section is designed to replicate the substance of provisions contained in the Equal Pay Act 1970

MATERIAL FACTOR DEFENCES

69 Defence of material factor

- (1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—
 - (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
 - (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.
- (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.
- (3) For the purposes of subsection (1), 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.
- (4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of

the scheme in question show that the difference is because of a material factor which is not the difference of sex.

- (5) “Relevant matter” has the meaning given in section 67.
- (6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.

Explanatory Notes:

- 239. The Equal Pay Act 1970 .. made similar provision permitting employers ... to objectively justify differences to which an equality clause or rule would otherwise apply. The section draws those separate provisions into one section and clarifies the way in which they are to be applied. The reference in previous legislation to a difference being “genuinely” due to a material factor has not been repeated in this section because the adverb added nothing to the meaning of the requirement, which is that the employer’s obligation is to show that the reason for the difference is genuine and is not a sham. The section incorporates the effect of EU law in respect of objective justification of indirectly discriminatory factors.
- 240. The reference to an employer’s long-term objective of reducing pay inequality between men and women always being considered a legitimate aim is new.

JURISDICTIONAL DEFENCES

131 Assessment of whether work is of equal value

...

- (6) The tribunal must determine that A's work is not of equal value to B's work unless it has reasonable grounds for suspecting that the evaluation contained in the study—
 - (a) was based on a system that discriminates because of sex, or
 - (b) is otherwise unreliable.
- (7) For the purposes of subsection (6)(a), a system discriminates because of sex if a difference (or coincidence) between values that the system sets on different demands is not justifiable regardless of the sex of the person on whom the demands are made.
- (8) A reference to a member of the panel of independent experts is a reference to a person—
 - (a) who is for the time being designated as such by the Advisory, Conciliation and Arbitration Service (ACAS) for the purposes of this section, and

(b) who is neither a member of the Council of ACAS nor one of its officers or members of staff.

(9) “Job evaluation study” has the meaning given in section 80(5).

80 Interpretation and exceptions

...

(5) A job evaluation study is a study undertaken with a view to evaluating, in terms of the demands made on a person by reference to factors such as effort, skill and decision-making, the jobs to be done—

(a) by some or all of the workers in an undertaking or group of undertakings, or

(b) in the case of the armed forces, by some or all of the members of the armed forces.

CONTRACTUAL CLAIMS

71 Sex discrimination in relation to contractual pay

(1) This 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.

(2) The relevant sex discrimination provision (as defined by section 70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of section 13 or 14.

Explanatory Notes:

246 This section replaces similar provisions in the Sex Discrimination Act 1975 which ensured that the sole remedy in respect of claims made about sex discrimination in contractual pay matters was obtained through the Equal Pay act 1970. That required that the comparator be a real person. This section however contains a new provision designed to allow claims to be brought where a person can show evidence of direct sex discrimination or dual discrimination (where sex is one of the protected characteristics in the combination) in relation to contractual pay but is unable to gain the benefit of a sex equality clause due to the absence of a comparator doing equal work.

Example

An employer tells a female employee “I would pay you more if you were a man” or tells a black female worker “I would pay you more if you were a white man”. In the absence of any male comparator the woman cannot bring a claim for breach of an equality clause but she can bring a claim of direct sex discrimination or dual discrimination ... against the employer.

PAY SECRECY CLAUSES

77 Discussions about pay

- (1) A term of a person's work that purports to prevent or restrict the person (P) from disclosing or seeking to disclose information about the terms of P's work is unenforceable against P in so far as P makes or seeks to make a relevant pay disclosure.
- (2) A term of a person's work that purports to prevent or restrict the person (P) from seeking disclosure of information from a colleague about the terms of the colleague's work is unenforceable against P in so far as P seeks a relevant pay disclosure from the colleague; and “colleague” includes a former colleague in relation to the work in question.
- (3) A disclosure is a relevant pay disclosure if made for the purpose of enabling the person who makes it, or the person to whom it is made, to find out whether or to what extent there is, in relation to the work in question, a connection between pay and having (or not having) a particular protected characteristic.
- (4) The following are to be treated as protected acts for the purposes of the relevant victimisation provision—
 - (a) seeking a disclosure that would be a relevant pay disclosure;
 - (b) making or seeking to make a relevant pay disclosure;
 - (c) receiving information disclosed in a relevant pay disclosure.
- (5) The relevant victimisation provision is, in relation to a description of work specified in the first column of the table, section 27 so far as it applies for the purposes of a provision mentioned in the second column.

Explanatory Notes:

- 270 Generally, discussions about pay would take place between colleagues, but this section makes it clear that protection extends more widely so as to include; for example, disclosures made to a trade union official or anyone else, provided that it is made with a view to finding out whether any pay differences may be connected with a protected characteristic.

GENDER PAY INFORMATION

78 Gender pay gap information

(1) Regulations may require employers to publish information relating to the pay of employees for the purpose of showing whether, by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees.

(2) This section does not apply to—

(a) an employer who has fewer than 250 employees;

(b) a person specified in Schedule 19;

(c) a government department or part of the armed forces not specified in that Schedule.

(3) The regulations may prescribe—

(a) descriptions of employer;

(b) descriptions of employee;

(c) how to calculate the number of employees that an employer has;

(d) descriptions of information;

(e) the time at which information is to be published;

(f) the form and manner in which it is to be published.

(4) Regulations under subsection (3)(e) may not require an employer, after the first publication of information, to publish information more frequently than at intervals of 12 months.

(5) The regulations may make provision for a failure to comply with the regulations—

(a) to be an offence punishable on summary conviction by a fine not exceeding level 5 on the standard scale;

(b) to be enforced, otherwise than as an offence, by such means as are prescribed.

(6) The reference to a failure to comply with the regulations includes a reference to a failure by a person acting on behalf of an employer.

PROCEDURE

127 Jurisdiction

(1) An employment tribunal has, subject to subsection (6), jurisdiction to determine a complaint relating to a breach of an equality clause or rule.

(2) The jurisdiction conferred by subsection (1) includes jurisdiction to determine a complaint arising out of a breach of an equality clause or rule; and a reference in this Chapter to a complaint relating to such a breach is to be read accordingly.

(3) An employment tribunal also has jurisdiction to determine an application by a responsible person for a declaration as to the rights of that person and a worker in relation to a dispute about the effect of an equality clause or rule.

(4) An employment tribunal also has jurisdiction to determine an application by the trustees or managers of an occupational pension scheme for a declaration as to their rights and those of a member in relation to a dispute about the effect of an equality rule.

(5) An employment tribunal also has jurisdiction to determine a question that—

(a) relates to an equality clause or rule, and

(b) is referred to the tribunal by virtue of section 128(2).

(6) This section does not apply to a complaint relating to an act done when the complainant was serving as a member of the armed forces unless—

(a) the complainant has made a service complaint about the matter, and

(b) the complaint has not been withdrawn.

(7) Subsections (2) to (5) of section 121 apply for the purposes of subsection (6) of this section as they apply for the purposes of subsection (1) of that section.

(8) In proceedings before an employment tribunal on a complaint relating to a breach of an equality rule, the employer—

(a) is to be treated as a party, and

(b) is accordingly entitled to appear and be heard.

(9) Nothing in this section affects such jurisdiction as the High Court, a county court, the Court of Session or the sheriff has in relation to an equality clause or rule.

EQUAL VALUE PROCEEDINGS

131 Assessment of whether work is of equal value

(1) This section applies to proceedings before an employment tribunal on—

- (a) a complaint relating to a breach of an equality clause or rule, or
 - (b) a question referred to the tribunal by virtue of section 128(2).
- (2) Where a question arises in the proceedings as to whether one person's work is of equal value to another's, the tribunal may, before determining the question, require a member of the panel of independent experts to prepare a report on the question.
- (3) The tribunal may withdraw a requirement that it makes under subsection (2); and, if it does so, it may—
- (a) request the panel member to provide it with specified documentation;
 - (b) make such other requests to that member as are connected with the withdrawal of the requirement.
- (4) If the tribunal requires the preparation of a report under subsection (2) (and does not withdraw the requirement), it must not determine the question unless it has received the report.
- (5) Subsection (6) applies where—
- (a) a question arises in the proceedings as to whether the work of one person (A) is of equal value to the work of another (B), and
 - (b) A's work and B's work have been given different values by a job evaluation study.
- (6) The tribunal must determine that A's work is not of equal value to B's work unless it has reasonable grounds for suspecting that the evaluation contained in the study—
- (a) was based on a system that discriminates because of sex, or
 - (b) is otherwise unreliable.
- (7) For the purposes of subsection (6)(a), a system discriminates because of sex if a difference (or coincidence) between values that the system sets on different demands is not justifiable regardless of the sex of the person on whom the demands are made.
- (8) A reference to a member of the panel of independent experts is a reference to a person—
- (a) who is for the time being designated as such by the Advisory, Conciliation and Arbitration Service (ACAS) for the purposes of this section, and
 - (b) who is neither a member of the Council of ACAS nor one of its officers or members of staff.
- (9) "Job evaluation study" has the meaning given in section 80(5).

PREVIOUS LAW UNDER THE EPA PRESERVED

137 Previous findings

(1) A finding in relevant proceedings in respect of an act which has become final is to be treated as conclusive in proceedings under this Act.

(2) Relevant proceedings are proceedings before a court or employment tribunal under any of the following—

- (a) section 19 or 20 of the Race Relations Act 1968;
- (b) the [Equal Pay Act 1970](#);
- (c) the [Sex Discrimination Act 1975](#);
- (d) the [Race Relations Act 1976](#);
- (e) [section 6\(4A\)](#) of the Sex Discrimination Act 1986;
- (f) the [Disability Discrimination Act 1995](#);
- (g) [Part 2](#) of the Equality Act 2006;
- (h) the Employment Equality (Religion and Belief) Regulations 2003 ([SI 2003/1660](#));
- (i) the Employment Equality (Sexual Orientation) Regulations 2003 ([SI 2003/1661](#));
- (j) the Employment Equality (Age) Regulations 2006 ([SI 2006/1031](#));
- (k) the Equality Act (Sexual Orientation) Regulations 2007 ([SI 2007/1263](#)).

(3) A finding becomes final—

- (a) when an appeal against the finding is dismissed, withdrawn or abandoned, or
- (b) when the time for appealing expires without an appeal having been brought.

QUESTIONNAIRES

138 Obtaining information, etc

(1) In this section—

- (a) P is a person who thinks that a contravention of this Act has occurred in relation to P;
- (b) R is a person who P thinks has contravened this Act.

(2) A Minister of the Crown must by order prescribe—

- (a) forms by which P may question R on any matter which is or may be relevant;
- (b) forms by which R may answer questions by P.
- (3) A question by P or an answer by R is admissible as evidence in proceedings under this Act (whether or not the question or answer is contained in a prescribed form).
- (4) A court or tribunal may draw an inference from—
 - (a) a failure by R to answer a question by P before the end of the period of 8 weeks beginning with the day on which the question is served;
 - (b) an evasive or equivocal answer.
- (5) Subsection (4) does not apply if—
 - (a) R reasonably asserts that to have answered differently or at all might have prejudiced a criminal matter;
 - (b) R reasonably asserts that to have answered differently or at all would have revealed the reason for not commencing or not continuing criminal proceedings;
 - (c) R's answer is of a kind specified for the purposes of this paragraph by order of a Minister of the Crown;
 - (d) R's answer is given in circumstances specified for the purposes of this paragraph by order of a Minister of the Crown;
 - (e) R's failure to answer occurs in circumstances specified for the purposes of this paragraph by order of a Minister of the Crown.
- (6) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (7) A Minister of the Crown may by order—
 - (a) prescribe the period within which a question must be served to be admissible under subsection (3);
 - (b) prescribe the manner in which a question by P, or an answer by R, may be served.
- (8) This section—
 - (a) does not affect any other enactment or rule of law relating to interim or preliminary matters in proceedings before a county court, the sheriff or an employment tribunal, and
 - (b) has effect subject to any enactment or rule of law regulating the admissibility of evidence in such proceedings.

