

EMPLOYERS' E-GUIDE NO.2

A GUIDE TO THE LAW ON **EQUAL PAY**

Updated February 2009, Employment Relations Unit

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Introduction

Men and women carrying out equal work for the same employer are entitled to the same terms and conditions of employment. This right derives from both European legislation (Article 141 of the EC Treaty and the Equal Pay Directive) and from the domestic Equal Pay Act 1970 (EqP Act).

In general terms, the EqP Act gives women and men the right to equal pay for equal work unless there is a genuine and material reason for the inequality that is not related to sex. The EqP Act achieves this by implying an "equality" clause into every contract of employment that enables a contract to be modified once a successful claim is made out.

The Sex Discrimination Act 1975 covers claims of less favourable treatment on the grounds of sex in non-contractual matters that arise in the workplace – e.g. discrimination in recruitment, training, promotion, dismissal and non-contractual benefits; and claims of sexual harassment and less favourable treatment on pregnancy and maternity grounds.

1 Establishing the right to equal pay

In order to establish the right to equal pay under the EqP Act, a woman must identify a "comparator" of the opposite sex, who works in the "same employment" and then establish that she and the comparator are:

- Employed on "like work"; or
- Employed in jobs that are of "equal value"; or
- Employed in jobs that have been "rated as equivalent"

Once a woman has established her claim to equal pay it then falls upon the employer to show that the reason for the inequality is genuinely due to a "material

factor” that is not the difference in sex. If the employer cannot show that, it will be liable to the employee.

2 The scope of the Equal Pay Act

The Equal Pay Act (EqP Act) applies to both men and women.

The EqP Act applies to anyone engaged under “a contract personally to execute any work or labour”. This is a wider definition than that of an “employee” found in the Employment Rights Act 1996 and extends the scope of the EqP Act to the vast majority of workers, including the self-employed. For the avoidance of doubt, it includes:

- Part-timers
- Fixed-term workers
- Temporary workers
- Casual or bank workers
- Zero-hours contract workers

From 1 October 2005, the EqP Act also applies to officeholders.

The EqP Act covers all aspects of the contractual terms and conditions of employment, not just pay. It includes:

- Basic pay
- Hours of work
- Non-discretionary bonuses, such as attendance allowance and target/productivity bonus
- Overtime rates and allowances
- Performance-related pay and benefits
- Severance and redundancy terms
- Access to pension schemes
- Benefits under a pension scheme
- Sick pay
- Annual leave entitlement
- Fringe benefits, such as company cars, travel allowances, luncheon vouchers

3 Equal pay not fair pay

The EqP Act is concerned with equal pay, and not fair pay. A woman cannot bring a claim:

- If she believes she is worth more than a comparator if she is receiving the same pay for the same work
- If she is receiving the same pay for work of greater worth than a comparator. In this case, the woman must identify a comparator who carries out the same work but is paid more
- That she should receive 75% of a comparator’s pay because her work is worth 75% of his

4 Term-by-term comparison

The equality clause operates in respect of each individual term of the contract. It is not a defence to claim that the overall package is comparable.

A woman cannot “cherry pick” elements from within the same term of the contract. In *Degnan v Redcar and Cleveland Borough Council* [2005] IRLR 615 (Advisory Bulletin 502), the Court of Appeal held that an attendance allowance and a bonus payment were both part of basic pay and could not, therefore, form the basis of separate claims.

5 Comparator

A woman can compare herself with a man (or men) working:

- For the same employer at the same workplace
- For the same employer but at a different workplace where common terms and conditions apply
- For an associated employer (this does not mean other bodies on the Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification) Order 1999)

Under Article 141 of the EC Treaty and the Equal Pay Directive, a woman may also be able to compare herself with a man (or men), where there is a “single source” for her and the man (or men’s) terms and conditions, meaning that there is a body which is responsible for the inequality in terms and conditions and which could restore equal treatment (see cross-employer comparisons at 6, below).

No hypothetical comparator

An equal pay claim must be brought against a real comparator of the opposite sex. It cannot be brought against a hypothetical comparator, unlike a claim brought under the Sex Discrimination Act.

Predecessor and successor comparators

A woman can compare herself with a predecessor or successor in her job. If a woman has a reasonable suspicion that her predecessor or successor was paid more than her, she can either apply to an employment tribunal for a disclosure order requiring the employer to release the relevant information, or seek the former/successor employee’s salary details through an equal pay questionnaire.

Comparators following a TUPE transfer

In *Sodexo Ltd v (1) Ms E A Guttridge and Others (2) North Tees and Hartlepool NHS Foundation Trust* [2008] IRLR 752 (Advisory Bulletin 542), the EAT held that following a TUPE transfer, for the purposes of a claim based on inequalities in pay prior to the transfer that remain in place after the transfer, a transferred employee in the transferee employer may rely on a comparator who did not transfer and remained in the transferor employer. However, a transferred employee cannot claim for improvements made to the comparator’s terms and conditions, after the transfer.

Choice of comparator and presence of a “token” man

It is up to the woman to select her comparator(s). The employer or the employment tribunal cannot interfere with her choice.

A woman will still be able to bring a claim against her chosen comparator(s) even if there is a “token” man who is paid the same as her (*Pickstone v Freemans plc* [1988] IRLR 357 House of Lords).

The chosen comparator does not have to be representative of a group of workers who are undertaking a particular type of work. For instance, if there is an “odd man out” amongst a larger group of workers carrying out the same tasks that is receiving higher pay than everyone else – perhaps because of pay protection arrangements – a woman can choose him even though he is not typical of the rest of the group. However, in practice, an employer may be able to defend the claim on the basis that some special circumstances not related to sex explain the disparity in pay and thereby make out a material factor defence (see *Thomas v National Coal Board* [1987] IRLR 451 EAT).

There is nothing to stop a woman naming more than one comparator in order to increase her chance of success. For instance, in *Enderby v Frenchay Health Authority* ([1993] IRLR 591 ECJ), the female senior NHS speech therapists named both male senior pharmacists and male clinical psychologists as comparators.

In *Redcar & Cleveland Borough Council v Bainbridge & Others and Surtees and Others v Middlesbrough Borough Council* [2008] EWCA Civ 885 (Advisory Bulletin 541), the Court of Appeal held that a woman is allowed to pursue equal pay claims against the same employer using different comparators in respect of the same period of time.

In *Bailey v Home Office* [2004] IRLR 921 (Advisory Bulletin 500), the Court of Appeal held that it was admissible for a woman in a group of workers that was approximately 50% female to bring an equal pay claim against a comparator from a predominantly male group of workers. It is not necessary for the claimant to belong to a predominantly female group of workers.

In *Tyne and Wear Passenger Transport Executive (t/a Nexus) v Best and others* (UKEAT/0627/05/RN) (Advisory Bulletin 524), the EAT held that in an equal pay claim based upon indirect discrimination, in the absence of some provision, criterion or practice that might lead to a disparate impact on women, it was necessary for there to be at least a bare majority of women in the disadvantaged group. Even if a bare majority was not required, the proportion of women in the disadvantaged group had to be substantial and approaching a majority (see Advisory Bulletin 524).

6 Same employment

Under the EqP Act a comparison must be made with a man who is working in the “same employment” (s.1 EqP Act). “Same employment” is defined in the EqP Act:

“Men shall be treated as in the same employment with a woman if they are employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant class” (s.1(6)).

However, under European legislation in some cases it may be possible to make cross-employer comparisons (see cross-employer comparisons below).

Terms and conditions

Where the claimant and the chosen comparator work for the same employer (or associated employer) at the same establishment, a claim can be brought regardless of the terms and conditions that apply to the claimant and comparator. Therefore, a claim can be brought across different national collective agreements, for instance *Red Book v Green Book*.

If the claimant and comparator work for the same employer (or associated employer) at different establishments, a claim can be brought if they work under common terms and conditions. It is generally accepted that employees will have common terms and conditions if they work under the terms of the same collective agreement. It is not necessary for the comparator to be employed on exactly the same terms and conditions. It will be sufficient if they are employed on similar terms that derive from the same collective agreement. The leading case on this point concerns a local authority. In *Leverton v Clwyd County Council* [1989] IRLR 28, the House of Lords held that a woman employed as a nursery nurse could use as a comparator clerical staff employed by the council at different locations because they were both working under national terms and conditions (the old “purple book”), even though there were significant differences in their respective hours of work and annual leave entitlements.

A claim can also be brought in some circumstances where the claimant and comparator work at different establishments on different terms and conditions. A claim may be brought if the claimant can show that the comparator would have been employed on the same terms as he is currently if he were to be employed in the claimant’s establishment (*British Coal Corporation v Smith* [1996] IRLR 404).

Meaning of an “establishment”

In *Rockfon A/S v Specialarbejderforbundet i Danmark* (Advisory Bulletin 338), the ECJ held that, in a collective redundancy context, an ‘establishment’ should be interpreted as designating the unit to which the workers made redundant are assigned to carry out their duties. In *Athinaiki Chartopoiia AE v Panagiutidis & Others*, [2007] IRLR 284 (Advisory Bulletin 525), the ECJ gave further guidance. It held that an establishment may consist of:

- a distinct entity
- with a certain degree of permanence and stability
- assigned to perform one or more given tasks
- which has a workforce, technical means and an organisational structure allowing for the accomplishment of those tasks

It need not have:

- legal autonomy
- economic, financial, administrative or technological autonomy
- management that can independently effect collective redundancies
- geographical separation from other parts of the undertaking.

Schools

The current position is that a school is accepted as a separate establishment (see cases such as *Leverton* (above) in which it is seemingly accepted that a school is a separate establishment).

There is an on-going argument that a woman employed at a community school is not in the 'same employment' as a comparator employed by the local authority because of the intervention of the Governors in setting terms and conditions. To date, this argument has failed. In *South Tyneside MBC v Anderson and Others* [2007] IRLR 715 (Advisory Bulletin 531), the Court of Appeal upheld the EAT's decision that school support staff employed on White Book terms and conditions could compare their pay with staff employed on the White Book in other areas of the local authority because the LEA is the employer of staff employed in a community school.

However, in voluntary aided and foundation schools, the employer is the Governing Body and, therefore, employees are not in the 'same employment' as employees in the local authority (see *Dolphin v Hartlepool BC and South Tyneside MBC v Middleton* (Advisory Bulletin 519)).

Cross-employer comparisons

Although the EqP Act requires the comparator to work for the same employer, under European legislation a comparison can also be made between employees who do not work for the same employer where the differences in pay are attributable to a "common source" and there is a single body that is responsible for, and capable of addressing, the inequality in pay.

Although this does potentially allow a cross-employer comparator to be cited, in practice the ability to bring such a claim is limited. In *Lawrence v Regent Office Care Ltd* [2002] IRLR 822 ECJ (Advisory Bulletin 458), the ECJ held that a group of outsourced female workers could not use a group of male county council workers as comparators even though they had been rated as equivalent under a JES before the women were transferred from the county council to the private contractor.

Similarly, civil servants unsuccessfully sought to make a comparison between different government departments (see *Robertson v DEFRA* [2005] IRLR 363 Court of Appeal (Advisory Bulletin 500)).

Claims and comparators following a TUPE transfer

In *Sodexo Ltd v (1) Ms E A Guttridge and Others (2) North Tees and Hartlepool NHS Foundation Trust* [2008] IRLR 752 (Advisory Bulletin 542), the EAT held that any entitlement to equal pay under the EqP Act, takes effect immediately upon the conditions for it being met even though not enforced through the tribunals and recognised at the time. Therefore on a TUPE transfer, if there are inequalities in pay, transferring employees transfer on the pay they should have been paid in compliance with the EqP Act, and the transferred employee is able to claim that higher rate of pay, using a comparator in the transferor's employment who did not transfer. However, the six-month time limit for bringing an equal pay claim in respect of the period of employment with the transferor employer runs from the date of the TUPE transfer.

7 Equal pay for equal work

Under the EqP Act, a claim can be brought against a comparator who is employed on "like work", "work rated as equivalent" or "work of equal value". In *Redcar & Cleveland Borough Council v Bainbridge and Others* and *Surtees and Others v Middlesbrough Borough Council* [2008] EWCA Civ 885 (Advisory Bulletin 541), the Court of Appeal held that a claimant is entitled to pursue one type of equal pay claim (for example an "equal value claim") against the same employer, when they had already been successful in a different type of claim (for example a "like work" claim) against the same employer in respect of the same period.

Like work

Under the EqP Act, a woman is carrying out "like work" if, but only if, her work and that of her male comparator(s) is of the same or a broadly similar nature, and any differences are not of practical importance to the terms and conditions applicable to the jobs.

When considering whether or not any differences are of practical importance, an employment tribunal should consider the frequency with which the difference occurs, its nature and its extent. For instance, in *British Leyland v Powell* [1978] IRLR 57, the EAT suggested the extent of the difference could be assessed by determining whether the two jobs would be considered as part of the same category of job or grade under a job evaluation scheme. In another, the EAT in *Capper Pass v Allan* [1980] ICR 194 suggested that, if the differences justified putting them into different grades, that would prevent the two jobs from being considered as "like work".

An employment tribunal would normally expect an employer to provide a detailed analysis of the two jobs in question if the employer seeks to argue that the chosen comparator is not employed on "like work". However, in *Shields v E Coomes (Holdings) Ltd* [1978] IRLR 263, the Court of Appeal held that it was important to

concentrate on the actual work undertaken rather than on how a job is described in a job description.

Case law suggests that the following examples can amount to differences that are of sufficient practical importance to render two jobs not being considered “like work”:

- The amount of differing or additional duties actually carried out
- The degree of flexibility in the job, although this argument is unlikely to work if the woman is actually denied the opportunity to work more flexibly
- The presence of greater responsibility
- The extent of physical effort, although an employer must consider the ability of a woman to carry out physical tasks if given the opportunity

By contrast, it was held that the time of day when a task is carried out is not a difference of significant practical importance.

Work rated as equivalent

A woman can bring an equal pay claim if she can show that she is paid less than her chosen comparator who is employed on work that has been rated as equivalent under the same job evaluation study (JES). There is no need in such a case to also show that the work is “like work”.

In *Redcar and Cleveland Borough Council v Bainbridge* [2007] EWCA Civ 910 (Advisory Bulletin 533), the Court of Appeal held that a claim can be brought against a comparator who was rated lower than the claimant in a job evaluation scheme. This allows a claim to be brought where, although the comparator’s substantive pay is less than the claimant, the actual pay is higher due to an additional payment, such as a bonus or productivity payment.

An employer is under no legal obligation to carry out a JES. However, once it conducts and accepts the results of the study, a woman is entitled to rely upon those results.

A JES should be a fair and rational basis for comparing jobs. It should be “equality-proofed” – like the NJC for Local Government Services’ scheme – to ensure that the basis of the comparison is not tainted by discrimination. If a JES is tainted by sex discrimination, a woman can bring a claim asserting that her job would have been rated as equivalent to her chosen comparator(s) if the JES had not been discriminatory.

Work of equal value

A woman can also bring an equal pay claim in circumstances where her work is totally different to her chosen comparator and it has not been rated as equivalent under a JES by establishing that her job is of equal value to that of her comparator(s).

Equal value claims are very complex and, in summary, entail an assessment of the value of the relevant posts by reference to the relative worth attached to factors

such as effort, skill and decision-making. In some cases, an employment tribunal will appoint an independent expert to make an assessment.

8 Material factor defence

Once a woman has established a prima facie claim to equal pay against her comparator, then it is presumed that the difference in pay is due to the difference in sex. The equality clause will then operate to amend her contract of employment to match that of her comparator unless the employer is able to show that the difference is genuinely due to a material factor that is not the difference in sex.

Genuine reason

In order for the defence to be successful it must genuinely be the reason for the difference in pay. It cannot be a sham or pretence, but must explain the inequality (see *Strathclyde Regional Council v Wallace* [1998] IRLR 146).

Material

In *Rainey v Greater Glasgow Health Board* [1987] IRLR 26, the House of Lords held that “material” meant “significant and relevant”. This is understood to mean that the factors to be considered go beyond the personal qualities of the individuals concerned, but should include broader factors such as economic and administrative considerations that affect the business.

Objective justification

If the inequality involves the application of a practice, provision or criterion that is detrimental to a larger proportion of women than men (i.e. indirect discrimination) then the employer must also show that the material factor defence is objectively justified. This requires the employer to show that the difference is necessary and proportionate in order to achieve a legitimate aim.

It has been generally accepted that if the reason for the inequality is not tainted by sex discrimination, there is no need for the employer to objectively justify the material factor defence. In *Strathclyde Regional Council v Wallace* IRLR [1998] 146, the House of Lords held that “there is only a burden on the employer to “justify” the factors giving rise to a difference in pay where the employer is relying on a factor which is gender discriminatory”.

However, in *Sharp v Caledonia Group Services Ltd* [2006] IRLR 4 (Advisory Bulletin 506), the EAT – relying on the ECJ decision in *Brunnhofner* [2001] IRLR 571 (Advisory Bulletin 440) – suggested that an employer should be required to objectively justify the material factor defence in all equal pay cases. This suggested that an employer will have to objectively justify the material factor defence even if it is not tainted by sex discrimination.

The *Sharp* challenge to the orthodox approach has been rejected, however, by an EAT decision in *Villalba v Merrill Lynch* [2006] IRLR 437 (Advisory Bulletin 516) and a Court of Appeal decision in *Armstrong v Newcastle Upon Tyne NHS Hospital Trust* [2005] EWCA Civ 1608 (Advisory Bulletin 510), which restated the previously well-

established position that an employer does not have to objectively justify a material factor defence that is not tainted by sex discrimination.

Finally, in *Middlesbrough Borough Council v Surtees* (Advisory Bulletin 531), Mr Justice Elias, the President of the EAT, held that his earlier decision in *Villalba v Merrill Lynch* (Advisory Bulletin 516) went too far in saying that where the employer's arrangements have a sufficiently strong disparate impact there is always an irrebuttable presumption of prima facie indirect discrimination that requires justification. In retreating from that earlier decision, Mr Justice Elias acknowledges, in accordance with previous decisions such as *Armstrong v Newcastle Upon Tyne NHS Hospital Trust* (Advisory Bulletin 510), that it must be open to an employer to show that even though there is a disparate adverse impact, it is not in any way related to any act that is tainted by discrimination.

Examples of material factors

The following are examples of material factor defences that employers may seek to rely upon:

- Market forces – the notion that an employer must pay more in order to recruit and retain employees to certain types of job. This may occur when there is a shortage of a particular type of worker, or where the employer has a good business reason for reducing the turnover of staff in a particular job. The House of Lords in *Rainey* (see above) confirmed that market forces could amount to a material factor defence. This was affirmed in *Enderby* (see above) when the ECJ held that “the state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground”. It is important to note, however, that a defence that relies on a historically discriminatory practice that is enshrined in society (such as paying traditionally female jobs less) will not succeed because the material reason will not be free of discrimination. Employers should also keep its policy of paying additional salary on the basis of market forces under review to ensure that it continues to justify the pay differential. It is not sufficient to rely upon the market forces at the time the additional pay was awarded. In *Dow v Cumbria County Council (No. 1)* (Advisory Bulletin 535) the EAT held that the employer must be able to produce evidence to prove the extent to which the differential is justified by this forces.
- Productivity bonuses – Such schemes have, in some cases, been held to be valid defences. As the case of *Dow v Cumbria County Council (No. 1)* (Advisory Bulletin 535) demonstrates, for a scheme to be valid, it must be possible to show that it is meeting its objective. This could be done through regularly monitoring of performance to show that improvements were being made, with bonuses being withheld as appropriate. In the Dow case, it was necessary to show that productivity had increased as a result of improvements in the performance of the workers themselves rather than, for example, increased mechanisation or increased management efficiency.

The reasons why a similar scheme was not introduced for other groups of

staff may also be relevant when considering whether the bonus scheme was proportionate.

- Pay protection - Where a woman can show that an element of a comparable man's pay is discriminatory, such as some bonus payments, the policy of protecting that discriminatory pay may, in itself, be discriminatory.

In order to avoid liability to pay woman the same pay protected rate of pay, an employer must objectively justify the difference in pay. In *Redcar & Cleveland Borough Council v Bainbridge and Others* and *Surtees and Others v Middlesbrough Borough Council* [2008] EWCA Civ 885 (Advisory Bulletin 541), the Court of Appeal held that except in limited circumstances, discriminatory pay protection arrangements could not be justified. It will be up to the employment tribunal to determine on the facts in each case whether or not a pay protection scheme is justified, and to determine that question the following factors will be relevant:

- (i) Whether the male employees had a contractual right to the enhanced rates of pay and whether realistically their contracts could only be varied through agreement on pay protection. However, even if that is the case, the employer must still demonstrate that the exclusion of the women from the enhanced rates of pay was appropriate and necessary.
- (ii) Whether the employer is able to show that the constraints on its finances were so pressing that it could not afford to pay the female employees the same pay protected rate as the male employees. However, the employer will be put to strict proof on this point.
- (iii) The extent to which the employer takes steps to minimise the effect of the pay protection scheme, such as limiting its length. In *Redcar's* case, the scheme was temporary, which was a point in its favour, as was the fact that the class of those receiving pay protection was closed and no one was to be admitted after a certain date. However, that was still not enough to justify it as an appropriate and necessary means of implementing the scheme.
- (iv) Whether the employer took into account the female employees' views. In the *Redcar* case, when negotiating the pay protection arrangements with the male employees' representatives, there was no evidence that the views of the women were taken into account. Even after the decision, no evidence, including financial considerations, was put forward to say why the women could not be included in the scheme.
- (v) Whether the employer knew its pay protection arrangements were allowing an indirectly discriminatory pay scheme to continue. If, when the employer implemented the scheme, he had no reason to think it would be discriminatory, then he may be able to justify its

use. However, in Redcar's case the Court of Appeal found that the employer must have known that its pay protection scheme was allowing a discriminatory regime to continue as it was aware that the purpose of the Green Book scheme was the elimination of past discriminatory pay practices which it had conceded as being discriminatory, and by excluding the women from the pay protection scheme it was allowing such discrimination to continue. The Court of Appeal stressed though that not too much emphasis should be put on the employer's knowledge, as to do so may favour employers who turn a blind eye to discriminatory pay structures, as opposed to employers who take steps to investigate and eradicate such practices.

- Geographical differences –geographical location can be a valid material factor defence
- Different pay structures and collective bargaining arrangements – in *Enderby* (above), the ECJ held that an employer could not rely on the fact that the two jobs were paid according to two different non-discriminatory collective bargaining agreements. So, in local government, an employer is unlikely to be able to rely upon the difference between the "green book" and the "red book" as a material factor to defend an equal pay claim. In the *Bainbridge/Surtees* case (above) the Court of Appeal held that the separate collective bargaining processes in place were not a valid material factor defence. It found that predominantly male work groups had been paid bonuses, whereas predominantly female work groups had not, and the men's bonuses were not explained or justified by productivity considerations. However, the Court of Appeal commented that such factors did not inevitably lead to an inference of sex discrimination, but a tribunal is entitled to infer discrimination from such facts and it will be up to the employer to show that it should not do so.
- Skills and qualifications – an employer may be able to rely on a requirement for different skills or qualifications if the requirement is pertinent to the job that is actually performed
- Length of service – In *Danfoss* [1989] IRLR 532, the ECJ recognised that incremental pay scales may disadvantage women because they are more likely to take career breaks. Nevertheless, the ECJ held that it is permissible to reward seniority without the need to objectively justify it because experience was seen to go hand in hand with seniority, and a worker with more seniority is likely to be in a better position to perform their duties. This position was supported by the ECJ in the recent referral in *Cadman v Health and Safety Executive* (Advisory Bulletin 520), although the ECJ identified "special cases" where an employee raises serious doubt over the link between experience and performance. In such exceptional cases, the employer may be required to show specific objective justification for the pay disparity.

- Costs – although the ECJ held in *Bilka-Kaufhaus* [1986] IRLR 317 that economic considerations could constitute a valid defence if the policy could be objectively justified, it is generally accepted that simply relying on an inability to rectify inequality in pay because of financial constraints will not succeed.

9 Bringing a claim

A woman must raise a statutory grievance under the Employment Act 2002 (Dispute Resolution) Regulations 2004 before she can submit a claim to an employment tribunal. In *Highland Council v TGWU* [2008] IRLR 272 (see Advisory Bulletin 538) the EAT held that the grievance must specify the comparator(s) to be relied on at tribunal, at least by reference to job or job type. However, in the case of *Suffolk Mental Health Partnership NHS Trust v Hurst and ors; Mid Staffordshire NHS Foundation Trust v Kaur and ors* and *Arnold and ors v Sandwell Metropolitan Borough Council* (UKEAT0332/0365/0366/08) (Advisory Bulletin 545) the EAT held that the statutory grievance requirements will be met where the information in the grievance is minimal, provided it states it is about equal pay. Bearing in mind the conflicting decision in the *Highland* case the respondents have been given leave to appeal. However, the point will become redundant for new claims, on the repeal of the statutory grievance procedures on 6 April 2009.

A woman is entitled to send her employer an Equal Pay Questionnaire to find out relevant information that will help her establish whether or not she has a claim.

10 Time limits

An employment tribunal claim must be brought at any time within 6 months of the end of the relevant contract of employment. It is important to note that the time limit runs from the end of the “contract” and not from the end of the “relationship”. So, where a person moves from one contract to another with no break in the employment relationship, the time will start to run from the date of the termination of the relevant contract. It will be a matter of fact as to whether a contract has been terminated and the person engaged under a new contract.

In *City of Newcastle v Allan and Degnan v Redcar and Cleveland Borough Council* [2005] IRLR 504 (Advisory Bulletin 502), the EAT reviewed the case law on whether a contract has been terminated or varied for the purpose of triggering the 6-month time limit for equal pay cases.

As a preliminary point, it is worth noting that special circumstances arise under the EqP Act in a case involving a “stable employment case”. The special provisions, contained in s.2ZA only apply where there has been a succession of short-term contracts concluded at regular intervals in respect of the same employment. This provision protects a worker who is engaged under a succession of contracts and means that they can bring an equal pay claim at the termination of the final contract even if the inequality related to a period of employment under a previous short-term contract. The “stable employment relationship” provisions do not,

however, apply when considering the position of a worker moving between one permanent contract to another.

Where the “stable employment relationship” provisions do not apply, the time limits are considered under the general provisions applicable to a “standard case”.

It is clear from the case law that in order for the time limit to be triggered there needs to be a termination of the existing contract of employment, rather than a variation to the existing contract.

In *Degnan*, the EAT usefully cited Judge McMullen QC from the judgment in *Preston v Wolverhampton Healthcare NHS Trust (No 3)* [2004] IRLR 96 who, referring to an earlier case, suggested that when seeking to determine whether there had been a variation in the existing contract or a rescission (termination) then “In order to amount to a rescission it must be so fundamental that nobody could claim that the original contract was still in being. On the other hand, the new terms may be on such minor matters that really the only common sense of the case is that the original contract is in being, subject to slight variations”. So, whether or not a change in a woman’s job triggers the six-month time limit will be determined by the facts.

The case of *Dow v Cumbria County Council (No.2)* (Advisory Bulletin 535) considered the significance of issuing a new ‘contract of employment’ to bring about even minor changes. The EAT held by a majority that if a change is not of a fundamental nature, the only proper inference is that there was a variation unless there was, objectively viewed, an express agreement that the mechanism to be adopted was the termination and new contract route. Where both parties have signed a new contract, which was issued before the changes took effect, there is conclusive evidence that the termination route has been chosen. This would mean that a new period of employment for the purposes of the time limit in the Act would have commenced.

In *Sodexo Ltd v (1) Ms E A Gutridge and Others (2) North Tees and Hartlepool NHS Foundation Trust* [2008] IRLR 752 (Advisory Bulletin 542), the EAT held that following a TUPE transfer, the six-month time limit for bringing an equal pay claim in respect of the period of employment with the transferor employer runs from the date of the TUPE transfer.

11 Six-year limit of claim

A successful claimant can bring a back-pay claim for up to six years from the date of her application to the employment tribunal (or to the date that the inequality began if that is a later date).

In *Redcar & Cleveland Borough Council v Bainbridge and Others* and *Surtees and Others v Middlesbrough Borough Council* [2008] EWCA Civ 885 (Advisory Bulletin 541), the Court of Appeal held that employees whose jobs are rated as equivalent under a job evaluation scheme (JES) do not have the right to up to six-years’ back-pay in compensation, for the period prior to the implementation of the scheme. A JES cannot have retrospective effect. If the jobs were rated as different under a

previous non-discriminatory JES, then claims cannot be brought (see section 2A of the EqP Act). However, if there was no such previous JES, then a rating can be persuasive in bringing an equal value claim.

12 Victimization and injury to feelings

Under section 4 of the Sex Discrimination Act 1975, it is unlawful to discriminate against someone because they bring proceedings under the Equal Pay Act.

In *St Helens Metropolitan Borough Council v Derbyshire* [2007] IRLR 540 (Advisory Bulletin 528), the House of Lords held that two letters sent to equal pay claimants by their employer warning them that some of their colleagues could be made redundant if their claims were successful amounted to victimisation under the Sex Discrimination Act.

The correct approach was to consider whether the alleged acts caused a detriment to the applicants by asking the three questions posed by SDA:

- Did the employer discriminate against the woman in any of the ways prohibited by the SDA, including subjecting her to any other detriment?
- In doing so, did the employer treat her less favourably than he treats or would treat other persons? and
- Did the employer treat the woman less favourably by reason that she had asserted or intended to assert her equal pay claim or discrimination claims or done any of the other protected acts set out in s.4(1) of the SDA?

Although the House of Lords held that the 'honest and reasonable' employer defence is not contained within the SDA or the corresponding European Directive and should be 'laid to rest', the principle set out in *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830 that an employer could take reasonable action to defend its position when faced with litigation, the threat of litigation or in attempting to settle a discrimination claim, still stands. However, this case draws a precariously thin line between legitimate behaviour and victimisation.

Injury to feelings

In *Council of City of Newcastle upon Tyne v Allan*; *Degnan v Redcar & Cleveland Borough Council* (Advisory Bulletin 502), the EAT held that compensation for non-economic loss, such as injury to feelings, is not recoverable under the EqP Act.

13 Discrimination by trade union

In *Allen v GMB* [2008] EWCA Civ 810 (Advisory Bulletin 541), the Court of Appeal held that a union had discriminated against its female members by manipulating them into accepting an offer in settlement of their right to back pay that was significantly lower than the true value in order to fund, in part, pay protection for bonus-earning male colleagues.

14 Validity of COT3 settlements

In *Wilson v Stockton-on-Tees Borough Council; Clarke v Redcar & Cleveland Borough Council* [2006] IRLR 324 (Advisory Bulletin 516), the EAT held that COT3 agreements were valid.

In *Redcar*, the tribunal held that the COT3 agreements were not void for unconscionable conduct on the part of the employers, but even if there had been such conduct, the claimants had affirmed the COT3 by receiving and cashing the settlement cheques. In *Stockton*, the tribunal also found that the claimants were bound by the COT3 agreement, even though the claimants “were not aware of the possibility that they could receive a more substantial amount if the case was taken to a tribunal and they were successful”.

The EAT held that:

- the Acas officer has no responsibility to see that the terms of the settlement are fair on the employee
- the expression “promote a settlement” must be given a liberal construction capable of covering whatever action is applicable in the particular case
- the Acas officer must never advise on the merits of the case
- the Acas officer is not obliged to go through the framework of the legislation
- it might defeat the Acas officer’s very function if she was obliged to tell a claimant, in effect, that they might receive considerably more money by pursuing a claim to tribunal
- it is not for the tribunal to consider whether the Acas officer correctly interpreted her duties; it is sufficient that the officer intended or purported to act under the relevant legislation

Future-proof COT3 agreements

For those authorities who have not yet implemented, it is possible to build in a future-proofing clause into an Acas brokered COT3 agreement that would compromise a claim based on not only past inequality but also future inequality caused by pay protection arrangements. Of course, employees may require additional compensation in consideration of compromising a greater potential claim.

Employment Relations Unit
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