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EQUALITY ACT 2010

CODE OF PRACTICE ON EQUAL PAY

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Equality Act 2006

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Foreword

When the Equality Act (the Act) received Royal Assent in April 2010, it was a moment to celebrate. However, getting the legislation onto the statute books was not an end in itself. What matters is that it should lead to real change: more responsible behaviour from companies, more thoughtful planning of public services, and, above all, greater confidence that people will be treated fairly as they go about their everyday lives.

The Equality and Human Rights Commission has a key role to play in bringing the Act to life. We have a set of powerful tools to enforce the law. We can, for example, take organisations to court and intervene in individual discrimination cases. But we only want to intervene when things go wrong as a last resort. Our first priority is to provide information, support and encouragement so that organisations can get it right in the first place.

That is why we are publishing guidance that will give individuals, businesses, employers and public authorities the information they need to understand the Act, exercise their rights, and meet their responsibilities.

This document is the Statutory Code of Practice on equal pay. This is the authoritative, comprehensive and technical guide to the Act's provisions intended to ensure that women and men receive the same pay and other contractual benefits when they are doing equal work. It draws on case law and precedent to illustrate where and how the Act's provisions on equal pay can be brought to bear in real-life situations. It will be invaluable to lawyers, advocates, human resources personnel, courts and tribunals; everyone who needs to understand the law in depth.

We have produced this code separately, rather than incorporating its contents into the Employment Code of Practice, because this is what a range of different organisations told us during consultation that they would find most helpful. We hope that it will enable them, and many others, to understand the Equality Act 2010 and use it to good effect.

Trevor Phillips, Chair, Equality and Human Rights Commission

Introduction

1. The Equality Act 2010 (the Act) gives women (and men) a right to equal pay for equal work. It replaces previous legislation, including the Equal Pay Act 1970 and the Sex Discrimination Act 1975, and the equality provisions in the Pensions Act 1995.

2. The provisions explained in this code are those set out in the Act under the heading 'Equality of terms'. They apply to pay and all the other terms of a person's contract of employment, but this code uses the language of 'equal pay' in the interests of both continuity and brevity.

Part 5
Chapter 3
Equality
Act 2006

Powers of the Commission

3. The Equality and Human Rights Commission (the Commission) was set up under the Equality Act 2006 to work towards the elimination of unlawful discrimination and promote equality and human rights.

Section (s.)
8, 9 and 10
Equality
Act 2006

The Commission has powers to carry out inquiries, for example into the extent and causes of pay gaps in particular sectors or areas, and to conduct investigations of an employer it suspects of having unlawfully discriminatory pay practices.

s.16 and
20 Equality
Act 2006

The Commission uses its powers of investigation and inquiry strategically to promote equality and human rights, and to tackle entrenched discrimination and pay inequality.

4. As part of an investigation or inquiry the Commission can require the employer to provide information about its policies or practices. This could include information about the pay of its employees. The employer cannot refuse to provide such information unless the Commission's request is unnecessary given the purpose of the inquiry or investigation or otherwise unreasonable.
- It has previously used these powers to require companies in the financial services sector to provide data on pay gaps between men and women.¹
5. The Commission has powers to assess and enforce compliance with the gender equality duty, including the duty to have due regard to the need to eliminate unlawful discrimination. It may also issue guidance.
6. The Commission may provide assistance to individuals taking legal action to enforce their right to equal pay, and may institute or intervene in legal proceedings to support an individual or help interpret and clarify the law.
- Schedule 2
Equality
Act 2006
- s.31, 32
Equality
Act 2006
- s.28, s.30
Equality
Act 2006

¹ Financial Services Inquiry, Sex Discrimination and Gender Pay Gap Report of the Equality and Human Rights Commission, September 2009.

Purpose of the equal pay provisions of the Act

7. The full-time gender pay gap has narrowed since 1975 when equal pay legislation first came into force but there remains a gap of over 16 per cent between women's and men's pay.²
8. Historically, women have often been paid less than men for doing the same or equivalent work and this inequality has persisted in some areas.
9. The Act's provisions on equal pay and sex discrimination are intended to ensure that pay and other employment terms are determined without sex discrimination or bias.
10. There are sound business as well as legal reasons for implementing equal pay. Pay systems that are transparent and value the entire workforce send positive messages about an organisation's values and ways of working. Fair and non-discriminatory systems represent good management practice and contribute to the efficient achievement of business objectives by encouraging maximum productivity from all employees.
11. Although this code relates to equal pay between women and men, pay systems may be open to challenge on grounds of race, age or other protected characteristics under the Equality Act 2010. Regard should therefore also be had to the Employment Code of Practice.

² There are several ways of measuring the pay gap. The figure quoted is the mean gender pay gap between full-time employees' earnings in the UK, based on the Office for National Statistics (ONS) Annual Survey of Hours and Earnings 2009. The hourly pay gap is bigger if women working part time are included.

Purpose of the Code

12. The purpose of Part 1 of this code is to help employers, advisers, trade union representatives, human resources departments and others who need to understand and apply the law on equal pay, and to assist courts and tribunals when interpreting the law. Employees may also find it useful.
13. It is in everyone's interests to avoid litigation and Part 2 of the code - good equal pay practice - provides guidance on how to prevent or eliminate discriminatory pay practices and ensure that there are no unjustifiable pay inequalities.
14. The Equality and Human Rights Commission recommends that all employers regularly review and monitor their pay practices, although this is not a formal legal requirement. Involving trade unions or other employee representatives can help make pay systems more transparent. This code (Part 2) suggests that equal pay audits may be the most effective means of ensuring that a pay system delivers equal pay.
15. The Commission has extensive practical guidance available on its website to help employers to implement equal pay for women and men in their organisations.

Status of the Code

16. This is a statutory code issued by the Commission under s.14 Equality Act 2006. It was approved by the Secretary of State and laid before Parliament on 27 July 2010. The code does not itself impose legal obligations. However it helps explain the legal obligations under the Equality Act 2010. Tribunals and courts considering an equal pay claim are obliged to take into account any part of the code that appears relevant to the proceedings. If employers and others who have obligations under the Act's equal pay provisions follow the guidance in the code, it may help to avoid an adverse decision by a tribunal or court in such proceedings.
17. This code applies to England, Scotland and Wales.

Large and small employers

18. The equal pay for equal work provisions of the Act apply to all employers regardless of size,³ but the way employers discharge their obligation to avoid sex discrimination in pay may in practice vary according to the size of the organisation. Small employers are less likely to have a human resources team, and may have fewer written policies and more informal practices than large employers. They may also have less complex pay systems and may (though not necessarily) have narrower gender pay gaps.

³ Except the reserve power in s.78 to require employers to report on their gender pay gap applies only to employers with 250 or more employees.

Public sector employers

19. Employers in the public sector, and organisations in the private and voluntary sectors that exercise public functions, are subject to the gender equality duty in respect of those functions. They must have due regard to the need to eliminate discrimination and promote equality, and certain listed authorities have a particular duty in relation to reducing gender pay inequality.⁴ This is explained in the Commission's Gender Equality Duty Code of Practice 2006.⁵

Men and women

20. The equal pay provisions in the Equality Act 2010 apply to both men and women but to avoid repetition and for clarity, this code is written as though the claimant is a woman comparing her work and pay with those of a man, referred to as the male comparator.

Use of the words 'employer' and 'employee'

21. The equal pay provisions of the Act apply to some people who are 'workers' but not employees in the legal sense – such as office-holders, police officers and those serving in the armed forces. In this code, these people are also referred to as 'employees' for convenience.

⁴ Sex Discrimination Act (SDA) 1975 Public Authorities (Statutory Duties) Order 2006. Reg 2(5): 'A listed authority shall when formulating its objectives for the purposes of paragraph (4) consider the need to have objectives that address the causes of any differences between the pay of men and women that are related to their sex.'

⁵ The Equality Act 2010 contains a single public sector equality duty which will apply to all characteristics except marriage and civil partnership. However, at the time of issue of this code, this duty has not been commenced. The Gender Equality Duty Code of Practice 2006 has effect until replaced by any new public sector equality duty code.

Similarly, people who recruit or ‘employ’ these people are referred to as ‘employers’.

References in the Code

22. In this Code, ‘the Act’ means the Equality Act 2010. References to particular sections (marked as ‘s.’) and schedules of the Act are shown in the margins. Other legislation or regulations are also referenced in the margins.

Further information

Practical guidance on key issues in equal pay can be found on the Commission’s website (www.equalityhumanrights.com).

Contact details for the Commission:

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Part 1: Equal pay law

Overview of equal pay law

23. The principle that women and men are entitled to equal pay for doing equal work is embedded in British law and European Union law. Eliminating discrimination in pay is crucial to achieving gender equality and dignity for women.
24. Courts and tribunals will interpret equal pay law purposively because the legislation is grounded in European Union law, and in particular treaty provisions that have a broad social purpose.

British domestic law must conform to European Union law, which imposes specific obligations in respect of equal pay which can have direct effect. So, in considering equal pay claims under the Equality Act 2010, the British courts must take into account the relevant provisions of the Treaty,⁶ relevant Directives and decisions of the Court of Justice of the European Union (formerly the European Court of Justice). If domestic law does not give full effect to these rulings then a woman may be able to rely on European Union law in British Courts.⁷

⁶ Article 157 of the Treaty of the Functioning of European Union, formerly Article 141 of the EC Treaty.

⁷ See for example *Levez v TH Jennings (Harlow Pools) Ltd (No.2)* [1999] IRLR 764 EAT.

25. Pay is defined broadly under European Union law and includes pensions. Article 4 of the recast Equal Treatment Directive⁸ requires that:

‘For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.’

26. The equal pay provisions in the Act apply to all contractual terms not just those directly related to remuneration, such as holiday entitlement. This is why the Act calls them ‘equality of terms’.

27. Although the law on equal pay may seem complicated its purpose is simple – to ensure that where women and men are doing equal work they should receive the same rewards for it.

Sex equality clause

28. A woman doing equal work with a man in the same employment is entitled to equality in pay and other contractual terms, unless the employer can show that there is a material reason for the difference which does not discriminate on the basis of her sex.

29. Where there is equal work, the Act implies a sex equality clause automatically into the woman’s contract of employment, modifying it where necessary to ensure her pay and all other contractual terms are no less favourable than the man’s. s.66

⁸ The recast Equal Treatment Directive (No 2006/54) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation consolidates a number of Directives on gender equality.

30. Where a woman doing equal work shows that she is receiving less pay or other less favourable terms in her contract, or identifies a contract term from which her comparator benefits and she does not (for example he is entitled to a company car and she is not), the employer will have to show why this is. If the employer is unable to show that the difference is due to a material factor which has nothing to do with her sex, then the equality clause takes effect.
31. These equal pay provisions apply to all contractual terms including wages and salaries, non-discretionary bonuses, holiday pay, sick pay, overtime, shift payments, and occupational pension benefits, and to non-monetary terms such as leave entitlements or access to sports and social benefits.
32. Other sex discrimination provisions apply to non-contractual pay and benefits such as purely discretionary bonuses, promotions, transfers and training and offers of employment or appointments to office. s.70

Example: A female sales manager is entitled under her contract of employment to an annual bonus calculated by reference to a specified number of sales. She discovers that a male sales manager working for the same employer and in the same office receives a higher bonus under his contract for the same number of sales. She would bring her claim under the equality of terms (equal pay) provisions.

However, if the female sales manager is not paid

a discretionary Christmas bonus that the male manager is paid, she could bring a claim under the sex discrimination at work provisions rather than an equal pay claim because it is not about a contractual term.

33. Where an equality clause cannot operate, because for example the woman cannot identify an actual male comparator for an equal pay claim, but she has evidence of direct sex discrimination, she can bring a discrimination claim (see paragraph 61). s.71

What is equal work?

34. A woman can claim equal pay and other contract terms with a male comparator doing work that is: s.65(1)
- The same or broadly similar, provided that where there are any differences in the work these are not of practical importance (known as **'like work'**)
 - Different, but which is rated under the same job evaluation scheme as being work of equal value (known as **'work rated as equivalent'**)
 - Different, but of equal value in terms of factors such as effort, skill and decision-making (known as **'work of equal value'**).

The comparator must be in the 'same employment' as the claimant, the meaning of which is explained at paragraph 51.

Like work

35. There are two questions to ask when determining 'like work'. s.65(2)
s.65(3)

The first question is whether the woman and her male comparator are employed on work that is the same or of a broadly similar nature. This involves a general consideration of the work and the knowledge and skills needed to do it.

If the woman shows that the work is broadly similar, the second question is whether any differences between her work and that done by her comparator are of practical importance having regard to:

- the frequency with which any differences occur in practice, and
- the nature and extent of those differences.

36. It is for the employer to show that there are differences of practical importance in the work actually performed. Differences such as additional duties, level of responsibility, skills, the time at which work is done, qualifications, training and physical effort could be of practical importance.

A difference in workload does not itself preclude a like work comparison, unless the increased workload represents a difference in responsibility or other difference of practical importance.

Examples of 'like work'

Like work comparisons that have succeeded, in the particular circumstances of the case, include:

- Male and female drivers where the men were more likely to work at weekends.⁹
- A woman cook preparing lunches for directors and a male chef cooking breakfast, lunch and tea for employees.¹⁰
- Male and female supermarket employees who perform similar tasks, requiring similar skill levels, although the men may lift heavier objects from time to time.
- Male and female laboratory assistants where the man spent some time on the shop floor.¹¹

The differences were not found to be of practical importance in relation to their pay.

37. A detailed examination of the nature and extent of the differences and how often they arise in practice is required. A contractual obligation on a man to do additional duties is not sufficient, it is what happens in practice that counts.

Example: A woman working as a primary school administrator claimed equal pay with a male secondary school administrator. The courts found they were not doing like work. Although the work was broadly similar, the latter role carried greater financial and managerial responsibilities and was in a much larger school. The primary school administrator had more routine, term-time tasks while the secondary school administrator's work was year round and more strategic. These differences were considered to be of practical

⁹ Hatch v Wadham Stringer Commercials (Ashford) Ltd ET Case No 40171/77.

¹⁰ Capper Pass Ltd v Allan [1980] ICR 194 EAT.

¹¹ Crook v Dexter Paints Ltd COET 2089/166.

importance so the equal pay for like work claim failed.¹²

However where men but not women were obliged under their contracts to transfer to different duties and work compulsory overtime, this did not amount to a difference of practical importance because the flexibility was not used in practice.¹³

Work rated as equivalent

38. A woman's work is rated as equivalent to a man's if the employer's job evaluation study gives an equal value to their work in terms of the demands made on the workers, by reference to factors such as effort, skill and decision-making. s.65(4)
39. Job evaluation is a way of systematically assessing the relative value of different jobs. Work is rated as equivalent if the jobs have been assessed as scoring the same number of points and/or as falling within the same job evaluation grade. A small difference may or may not reflect a material difference in the value of the jobs, depending on the nature of the job evaluation exercise. s.80(5)
40. A job evaluation study will rate the demands made by jobs under headings such as skill, effort and decision-making. Because the focus is on the demands of the job rather than the nature of the job overall, jobs which may seem to be of a very different type may be rated as equivalent.

¹² Morgan v Middlesbrough Borough Council 2005 EWCA Civ 1432.

¹³ Electrolux Ltd v Hutchinson and others [1976] IRLR 410 EAT.

Example: The work of an occupational health nurse might be rated as equivalent to that of a production supervisor when components of the job such as skill, responsibility and effort are assessed by a valid job evaluation scheme.

41. To be valid, a job evaluation study must :
- encompass both the woman’s job and her comparator’s
 - be thorough in its analysis and capable of impartial application¹⁴
 - take into account factors connected only with the requirements of the job rather than the person doing the job (so for example how well someone is doing the job is not relevant), and
 - be analytical in assessing the component parts of particular jobs, rather than their overall content on a ‘whole job’ basis.¹⁵
42. If a job evaluation study has assessed the woman’s job as being of lower value than her male comparator’s job, then an equal value claim will fail unless the Employment Tribunal has reasonable grounds for suspecting that the evaluation was tainted by discrimination or was in some other way unreliable. s.131(5) and (6)
43. Job evaluation studies must be non-discriminatory and not influenced by gender stereotyping or assumptions about women’s and men’s work. There has historically been a tendency to undervalue or overlook qualities inherent in work traditionally undertaken by women (for example, caring). A scheme which s.65(5)

¹⁴ Eaton Ltd v Nuttall 1977 ICR 272 EAT.

¹⁵ Bromley v Quick [1988] IRLR 249 CA.

results in different points being allocated to jobs because it values certain demands of work traditionally undertaken by women differently from demands of work traditionally undertaken by men would be discriminatory. Such a scheme will not prevent a woman claiming that her work would be rated as equivalent to that of a male comparator if the sex-specific values were removed.

Example: A job evaluation study rated the jobs of female classroom teaching assistants and their better paid male physical education instructors as not equivalent. This was because the study had given more points to the physical effort involved in the men's jobs than it had to the intellectual and caring work involved in the jobs predominantly done by women. Because it uses a sex-biased points system, this job evaluation would not prevent the women succeeding in an equal pay claim.

44. A woman's work can be treated as rated as equivalent if she can show that the work would have been assessed as being of equal value, had the evaluation not been itself discriminatory in setting different values for the demands being made of men and women. s.65(4)(b)
45. A woman may also bring a claim of equal pay where her job is rated higher than that of a comparator under a job evaluation scheme but she is paid less. However, this will not entitle her, if an equality clause applies, to better terms than

those her comparator has.¹⁶

Detailed guidance on designing, implementing and monitoring non-discriminatory job-evaluation schemes is available from the Commission's website. The Advisory, Conciliation and Arbitration Service (ACAS) and trade unions can also advise on job evaluation.

Work of equal value

46. A woman can claim equal pay with a man if she can show that her work is of equal value with his in terms of the demands made on her. s. 65(6)(a)

47. This means that the jobs done by a woman and her comparator are different but can be regarded as being of equal worth, having regard to the nature of the work performed, the training or skills necessary to do the job, the conditions of work and the decision-making that is part of the role. s.65(6) (b)

48. In some cases the jobs being compared may appear fairly equivalent (such as a female head of personnel and a male head of finance). More commonly, entirely different types of job (such as manual and administrative) can turn out to be of equal value when analysed in terms of the demands made on the employee.

Guidance on how to tell if jobs are of equal value is available from the Commission.

The Employment Tribunal Equal Value Rules of Procedure¹⁷ apply to equal pay claims where a woman is claiming work of equal value.

¹⁶ Evesham v North Hertfordshire Health Authority and another [2000] ICR 612 CA.

49. A woman can claim equal pay using any or all of these methods of comparison. For example, a woman working as an office manager in a garage could claim 'like work' with a male office manager working alongside her and 'equal value' with a male garage mechanic.

Who is the comparator?

50. A woman can claim equal pay for equal work with a man or men in the same employment. It is for her to select the man or men with whom she wishes to be compared. s.79

European Union law also allows a woman to compare herself to a man who is not in the same employment but where the difference in pay is attributable to 'a single source' which has the power to rectify the difference (see paragraph 57).

In the same employment

51. A woman can compare herself with a man employed: s.79

- by the same or an associated employer at the same establishment or workplace, or
- by the same or an associated employer at a different establishment or workplace, provided that common terms and conditions apply either generally between employees or as between the woman and her comparator.

52. An associated employer means a company over which another company has control, or s.79(9)

¹⁷ Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, schedule 6.

companies over which a third party has control (for example, the employer's parent company).

53. The definition of establishment is not restricted to a single physical location. For example, a woman may claim equal pay with a man doing equal work employed by the same council but working in a different geographic location.¹⁸
54. Where the woman and her comparator work at different establishments, she has to show that common terms and conditions apply. An example of common terms and conditions is where they are governed by the same collective agreement, but the concept is not limited to this type of arrangement.¹⁹
55. A woman can also compare herself with a comparator working at a different establishment if she can show that, had he been employed at the same establishment as her, he would have been working under the same common terms and conditions as those he and others in the comparator group are currently working under. The woman does not have to be working to the same common terms as him, and does not have to show that the comparator ever would, in reality, be employed at the same establishment as her.²⁰
56. The Equality Act does not specify the geographical scope of the equal pay provisions

¹⁸ City of Edinburgh Council v Wilkinson and ors, EAT, 20/5/2010.

¹⁹ Per Lord Bridge in Leverton, relied on in Barclays Bank plc v James [1990] IRLR 90 EAT; British Coal Corporation v Smith and others [1996] ICR 515 HL; South Tyneside Metropolitan Borough Council v Anderson [2007] IRLR 715 CA.

²⁰ British Coal Corporation v Smith and others [1996] ICR 515 HL.

but in most cases the woman and her male comparator will be based in Great Britain.

Comparing across employers: single source

57. Under European Union law differences in pay must be attributable to a single source which is capable of remedying an unlawful inequality. If this is different from the 'same employment' test in British domestic law, European Union law may be applied to produce a remedy. In practice, a woman and her comparator whose pay can be equalised by a single source are likely to be in the same employment.²¹

Example: A woman teacher can compare herself to a man employed by a different education authority where the difference in their pay is due to terms and conditions set by a national scheme and can be remedied by a national negotiating body.

Choice of comparator

58. A woman must select the man or men with whom she wishes to make a comparison, although she does not have to identify them by name at the outset.

The selected comparator could be representative of a group of workers or he could be the only person doing the particular type of work.

²¹ Lawrence and ors v Regent Office Care Ltd and ors [2003] ICR 1092 ECJ.

59. A woman can select more than one comparator and from her point of view this may be prudent. Multiple comparators may be necessary for a term-by-term comparison of a woman's contract. However, an Employment Tribunal can strike out a claim with a particular comparator, or could in exceptional cases require a claimant who unreasonably cites too many comparators to pay some costs.
60. The chosen comparator does not have to be working at the same time as the woman, so he may for example be her predecessor in the job. s.64(2)
61. Where a woman has evidence of direct sex discrimination in relation to her contractual pay but there is no actual comparator doing equal work, so that a sex equality clause cannot operate, she can claim sex discrimination based on a hypothetical comparator. s.71

Example: A woman's employer tells her that she would be paid more if she were a man. There are no men employed on equal work so she cannot claim equal pay using a comparator. However, she could claim direct sex discrimination as the less favourable treatment she has received is clearly based on her sex.

Part-time work and equal pay

62. A pay practice that treats part-time workers less favourably than comparable full-time workers is likely to be indirectly discriminatory against women, as more women than men work part time. Unless an employer can objectively justify the pay

differential or practice, it will be unlawful. It is unlikely that an employer could justify a different basic hourly rate for full-time and part-time workers.

In most cases where a part-time worker is paid less (pro-rata) than a full-time worker, the Part-time Workers (Prevention of Less Favourable Treatment) Regulations would also apply.²² These prohibit less favourable treatment of part-time workers (male or female) unless it can be objectively justified.

Equal pay and occupational pension schemes

General

63. Occupational pension schemes are also subject to the equal pay for equal work principle. Most occupational pension schemes are trust-based schemes where the scheme is legally separate from the employer and is administered by trustees, who are bound to implement equal treatment between women and men. The benefits will be in the form of pensions and lump sums.
- Pensions Act 1995

Sex equality rule

64. The sex equality rule operates to ensure that comparable women and men are treated equally in both access to and benefits of an occupational pension scheme. If an occupational pension scheme, or a term of it, is less favourable to a woman than it is to a male comparator, then the term is modified so that it is not less favourable.
- s.67(1) and (2)

²² SI 2000/1551. Implementing the Part-time work Directive (97/81/EC).

65. The exclusion of part-time workers from an occupational pension scheme has been held to be indirectly discriminatory and unlawful.²³
66. Also, a discretion that is capable of being exercised in a way that would be less favourable to the woman than to her male comparator is modified so as to prevent the exercise of the discretion in that way. s.67(3) and (4)
67. However, if the trustees or managers of the scheme can show that the difference in treatment is because of a material factor which is not the difference in sex, then the sex equality rule will not apply to that difference. s.69(4)
68. The effect is that men and women are treated equally to comparable members of the opposite sex in relation both to the terms on which they are permitted to join the scheme and to the terms on which they are treated once they have become scheme members.
- So a rule that provides for men and women to draw their benefits from the scheme at different ages, or on satisfying different conditions, is not consistent with the sex equality rule. The rule would be overridden to require benefits to be provided at the more favourable age or on the person satisfying the conditions applicable to either men or women.
69. The terms on which benefits are provided to dependants of members, and associated discretions, are also covered by the sex equality rule. s.67(5) and (6)

²³ Preston and ors v Wolverhampton Healthcare NHS Trust and ors (No 3) [2004] ICR 993; Bilka-Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317 ECJ.

70. Where people of the same sex are treated differently according to their family, marital or civil partnership status, a woman must select a male comparator who has the same status. So if a scheme provides a particular benefit only to members who are married or in civil partnerships, a woman who is not married or in a civil partnership cannot choose as a comparator a man who is married or in a civil partnership for a claim in relation to that benefit. s.67(7) and (8)
71. A successful claim for access to an occupational pension scheme can result in the granting of retrospective access in respect of any period going back to 8 April 1976. s.67(9)
72. Equality in pension benefits can only be claimed for service from 17 May 1990. s.67(10)
73. There is an exception to the sex equality rule that allows a difference in occupational pension contributions for women and men because of prescribed actuarial factors. For example, an employer may have to pay higher contributions for female than male employees because of their longer life expectancy.²⁴ Schedule 7 Part 2

Defences to an equal pay claim

74. The possible defences that an employer may raise in response to an equal pay claim are:
- the woman and her comparator are not doing equal work;
 - the chosen comparator is not one allowed by law (for example he is not in the same

²⁴ Neath v Hugh Steeper Ltd [1995] IRLR 91 ECJ.

employment);

- the difference in pay is genuinely due to a material factor, which is not related to the sex of the jobholders.

Material factor defence

75. Once a woman has shown that she is doing equal work with her male comparator, the equality clause will take effect unless her employer can prove that the difference in pay or other contractual terms is due to a material factor which does not itself discriminate against her either directly or indirectly because of her sex. s.69

76. The employer must identify the factor(s) and prove²⁵:

- it is the real reason for the difference in pay and not a sham or pretence
- it is causative of the difference in pay between the woman and her comparator
- it is material: that is, significant and relevant, and
- it does not involve direct or indirect sex discrimination.

Example: If an employer argues that it was necessary to pay the comparator more because of a skill shortage, they will have to provide evidence of actual difficulties in recruiting and retaining people to do the job being done by the higher-paid man. The employer will also need to monitor the discrepancy to ensure it is still justified.

²⁵ Glasgow City Council v Marshall [2000] IRLR 272, HL.

77. Personal differences between the workers concerned such as experience and qualifications may be material factors.

Other examples of possible material factors are:

- geographical differences, for example London weighting
- unsocial hours, rotating shifts and night working.

78. Whether the defence is made out will depend on the specific circumstances in each case.

79. If the material factor accounts for only part of the variation in pay, the woman is entitled to a pay increase to the extent that that the defence is not made out.²⁶

80. To be a valid defence, the material factor must not be directly discriminatory and if it is indirectly discriminatory, the difference in terms must be justified.

81. For example, if an employer argues that the difference in pay is due to market forces, but gender segregation in the workforce means that women are still concentrated in lower paid jobs, this defence may be discriminatory. An employer cannot pay women less than men for equal work just because a competitor does so.²⁷

²⁶ Enderby and Others v Frenchay Health Authority and Anor [1993] IRLR 591ECJ.

²⁷ Ratcliffe and others v North Yorkshire County Council [1995] IRLR 439 HL. For information about gender segregation in the workforce and the undervaluing of women's work see, for example, the Women and Work Commission report Shaping a Fairer Future, 2006.

82. A material factor will be directly discriminatory where it is based on treating women and men differently because of their sex. s.69(1)
(a)

A directly discriminatory material factor cannot provide a defence to an equal pay claim, and it is not open to an employer to provide objective justification.

Example: Male maintenance workers in a bank were paid more than female administrators because the bank had always regarded and rewarded men as family breadwinners. This is directly discriminatory and cannot be justified.

83. Even if the employer can show that a material factor is not directly discriminatory, a woman claiming equal pay may be able to show that it is indirectly discriminatory.
84. Indirect discrimination arises where a pay system, policy or arrangement has a disproportionate adverse impact on women compared to their male comparators. If the employer cannot objectively justify it, the defence will not be made out. s.69(2)
85. Statistical analysis which demonstrates a difference in the terms offered to men and women doing equal work but where one job is predominantly carried out by one sex, is one way of showing disproportionate adverse impact but it is not the only way.
86. Where the disadvantaged group is predominately women, and the group of advantaged comparators

is predominantly men, it will be difficult for the employer to prove an absence of sex discrimination.²⁸

Example: Women employed as carers by a local authority, whose work was rated as equivalent to men employed as street cleaners and gardeners, were paid at a lower rate. The difference was due to a productivity bonus scheme which did not apply to carers, who were predominantly women. As the scheme had a disproportionately adverse effect on the women, the employer would have to provide objective justification for it. That is, they would need to prove that it is a proportionate means to achieve a legitimate end.²⁹

87. An employer can justify an indirectly discriminatory factor by showing that it is a proportionate means of achieving a legitimate aim. s.69(1) (b)

Example: If an employer can show that the only way to ensure adequate staffing of unsocial hours shifts is to pay a shift premium, then even if there is evidence that more men than women work those shifts and receive the extra payments, the material factor defence may succeed.³⁰

²⁸ Lord Justice Pill in *Gibson and others v Sheffield City Council* [2010] IRLR 311 CA; *Enderby and Others v Frenchay Health Authority and Anor* [1993] IRLR 591ECJ.

²⁹ *Gibson and others v Sheffield City Council* [2010] IRLR 311 CA.

³⁰ *Blackburn v Chief Constable of West Midlands Police* [2008] ICR 505 CA.

Example: A firm of accountants structures employees' pay on the basis of success in building client relationships. It uses as one of the key indicators of that success the number of functions attended out of hours. Due to childcare responsibilities, fewer women than men can participate in these functions and women's pay is much lower. The firm cannot show that attendance at these functions produces better client relationships or other business outcomes that warrant the pay premium, taking into account the disadvantage to women. It is unlikely in these circumstances to be able to justify the payment.

88. There is no list of aims that are accepted to be legitimate, and whether or not an employer's pay practice pursues a legitimate aim will depend on the facts and circumstances in a particular case. However, the Act does specify that, for the purpose of justifying reliance upon a material factor, 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.

s.69(3)

The employer must be able to show that the measure was in fact adopted to reduce inequality.

89. Even where the aim is legitimate, the employer must be able to show that the means it adopts to achieve the aim is proportionate in the circumstances.

Example: A process to phase out historical disparity in pay and benefits between men and women, which involves a period of pay protection for men to cushion the impact on them of the new arrangements, has the long-term objective of

reducing inequality between the sexes. This is a legitimate aim. However, the employer will have to prove on the facts of the case that the approach to achieving that aim is proportionate. It may be difficult to prove that protecting the men's higher pay for any length of time is a proportionate means of achieving the aim where the reason for the original pay disparity is sex discrimination.³¹

90. Where a material factor applies at a particular point in time but subsequently ceases to apply, it will no longer provide a defence to differences in contractual terms.³²

Example: An employer recruits a new employee at a lower than normal rate of salary due to severe financial constraints at the time of recruitment. Later, the employer's financial position improves. Once the reason for the difference in pay ceases to exist the employer cannot continue to rely upon that factor to explain differences in pay or other contractual terms.

Pregnancy, maternity leave and equal pay

91. A woman should not receive lower pay or inferior contractual terms for a reason relating to her pregnancy and a maternity equality clause is implied into her contract to ensure this. There is no need to show equal work with a comparator in this situation. s.73

³¹ Redcar and Cleveland Borough Council v Bainbridge & Others [2008] EWCA Civ 885.

³² Benveniste v University of Southampton [1989] IRLR 123 CA.

92. The maternity equality clause applies to: s.74,
s.74(10)
and s.18
- the calculation of contractual maternity-related pay
 - bonus payments during maternity leave, and
 - pay increases following maternity leave.

Maternity leave includes compulsory, ordinary and additional maternity leave.³³

93. During maternity leave a woman's entitlement to receive her usual contractual remuneration (that is, salary or other benefits with a transferable cash value such as a car allowance or luncheon vouchers) stops unless her contract provides for maternity-related pay.³⁴

94. However she is entitled to any pay rise or contractual bonus payment awarded during her maternity leave period, or that would have been awarded had she not been on maternity leave. s.74

95. Maternity-related pay means pay other than statutory maternity pay to which a woman is entitled as a result of being pregnant or being on maternity leave.³⁵ s.74(9)

³³ The statutory maternity leave scheme is set out in Part VIII of the Employment Rights Act 1996 (ERA) and in the Maternity and Parental Leave etc Regulations 1991 SI 1999/3312.

³⁴ Gillespie and ors v Northern Health and Social Services Board and ors 1996, ECJ. Note that the law on women's entitlement to full pay during their maternity leave may continue to evolve.

³⁵ Earnings-related Statutory Maternity Pay must also be recalculated to reflect a pay rise awarded to a woman after the end of the calculation period but before the end of her maternity leave. Alabaster v Barclays Bank 2005 ICR 1246. This is explained in the HMRC Employer Helpbook for Statutory Maternity Pay.

96. Any pay increase a woman receives or would have received had she not been on maternity leave must be taken into account in the calculation of her maternity-related pay. s.74(3)

Example: Early in her maternity leave a woman receiving maternity-related pay becomes entitled to an increase in pay. If her terms of employment do not already provide for the increase to be reflected in her maternity-related pay, the employer must recalculate her maternity pay to take account of the pay increase.

97. Similarly any pay or bonus related to time before the maternity leave starts, during compulsory maternity leave or after maternity leave ends must be paid without delay. So if a woman becomes entitled to a contractual bonus for work she undertook before she went on maternity leave, she should receive it when it would have been paid had she not been on maternity leave. s.74

Example: A woman goes on maternity leave on 1 June. The contractual bonus for the year ending 30 April is payable on 1 July. Her employer says he will pay the bonus to her when she is back in a few months. The law requires the employer to pay the bonus on 1 July as it would if the woman was not on maternity leave. If this does not happen, she can claim equal pay relying on the maternity equality clause provisions.

98. On her return to work a woman should receive any pay increases which would have been paid to her had she not been on maternity leave. s.74(8)

99. Unfavourable treatment because of pregnancy or maternity in relation to non-contractual pay and benefits is covered by the employment discrimination provisions in the Act and explained in more detail in the Employment Code of Practice. s.76

Example: A woman who has been approved for a promotion tells her employer that she is pregnant. The employer responds that he will not now promote her because she will be absent on maternity leave during a very busy period. This would be pregnancy discrimination at work and any claim would be brought by the woman under those provisions of the Equality Act. s.18

However, if the same woman is promoted and her increased salary takes effect after the commencement of her maternity leave, her maternity-related pay will need to be recalculated to take account of the salary increase, and the salary increase will be payable to the woman on her return to work from maternity leave. If this does not happen, she can claim equal pay relying on the maternity equality clause provisions.³⁶

Maternity equality in pension schemes

100. An occupational pension scheme is treated as including a maternity equality rule if it does not have such a rule already. The effect of this is to ensure that a woman on paid maternity leave is s.75(1) to (6)

³⁶ There is further guidance on pregnancy and maternity at work in the Code of Practice on Employment.

treated as if she were at work for pension purposes.

101. The only time a woman on maternity leave may be treated differently is when she is on a period of unpaid additional maternity leave, when she is not entitled to accrue occupational pension benefits as of right.³⁷ s.75(9)

Pay transparency

102. The Court of Justice of the European Union has held that pay systems that are not transparent are particularly at risk of being found to be discriminatory. Transparency means that pay and benefit systems should be capable of being understood by everyone (employers, workers and their trade unions). It should be clear to individuals how each element of their pay contributes to their total earnings in a pay period.

Where the pay structure is not transparent and a woman is able to show some indication of sex discrimination in her pay, the employer carries the burden of proving that the pay system does not discriminate.³⁸

³⁷ However, this is a developing area of domestic and EU law, so advice should be sought on whether pension accrual should be maintained throughout the entire maternity leave period.

³⁸ Handels og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss) [1989] IRLR 532, [1991] ICR 74.

Discussing equal pay issues with colleagues or trade union representatives

103. The Act introduces limits to the enforceability of what are often called ‘gagging clauses’ or ‘secrecy clauses’ that some employers use to restrict discussions about pay packages and differentials. Restricting use of these clauses is intended to promote openness and dialogue about pay and bring an end to opaque pay structures.
104. Any term of a contract which prohibits or restricts a person from making a ‘relevant pay disclosure’ to anyone, including a trade union representative, or from seeking such a disclosure from a colleague, including a former colleague, is unenforceable. s.77
105. Colleague is not defined in the Act but is likely to have similar scope to the definition of a comparator, as the intention is to protect the seeking of pay information for the purpose of identifying pay discrimination.
106. A relevant pay disclosure is one which is: s.77(3)
- about pay, and
 - made for the purpose of finding out whether or to what extent there is a connection between pay and having (or not having) a protected characteristic.
107. The pay discussions that are protected in this way are those aimed at establishing whether or not there is pay discrimination. This provision is not confined to the protected characteristic of sex.

Example: A discussion between a woman and a man for the purpose of establishing whether the man is being paid more than the woman could involve a relevant pay disclosure. However, two male colleagues simply comparing their respective salaries are unlikely to be making a relevant pay disclosure, unless they are investigating pay disparities which may be linked to race or another protected characteristic.

108. Involvement in a relevant pay disclosure can include but is not limited to:
- asking a colleague to provide information about his/her pay and/or benefits
 - providing information to a trade union representative about pay and/or benefits, and
 - receiving information from a colleague about pay and/or benefits.
109. If an employer takes action against an employee for making or seeking to make such a disclosure, or for receiving information as a result of such a disclosure, the employee may claim victimisation.

Example: A female airline pilot believes she is underpaid compared with a male colleague. She asks him what he is paid, and he tells her. The airline takes disciplinary action against the man as a result. The man can bring a claim for victimisation against the employer for disciplining him.

Example: A female estate agent believes she may have received a smaller bonus than she should have. She asks her male colleagues what bonus payments they received. She then approaches her employer and complains about the discrepancy. She is reprimanded for discussing her pay and told she will not receive a bonus at all next year. She can claim victimisation, as well as making a discrimination or equal pay claim in respect of the bonus if she now has or can obtain sufficient evidence to do so.

Example: A male construction engineer employed by a road haulage company discloses information about his pay to a competitor company in breach of a confidentiality obligation. He would not be protected from disciplinary action, as the disclosure was unlikely to have been made for the purpose of finding out whether or to what extent there was pay discrimination in his workplace.

110. Guidance on protected pay discussions and disclosures is available on the Commission's website.

Equal pay – obtaining information

111. A woman who believes she is not receiving equal pay can write to her employer asking for information that will help to establish whether this is the case and if so, the reasons for the pay difference. s.138
112. A trade union equality representative or other trade union representative can assist in this process.

113. There is a procedure set out in the Act and there are forms prescribed by the accompanying Order that can be used by people to seek information. However, there is no restriction on the form or manner in which questions can be posed or answers given. A question or reply is admissible as evidence in Tribunal proceedings whether or not they are contained in the statutory question or reply form. So if similar questions are asked in a letter rather than using the form, that letter and any response that the employer provides can still be put before the Employment Tribunal for them to consider provided it is sent within the relevant time limits.
114. If the employer fails to answer the questions within eight weeks or answers in an evasive or equivocal way, an Employment Tribunal can draw an inference, including an inference that the employer is in breach of the equal pay provisions. Standard forms and guidance on their use are available on the Government Equalities Office website. s.138(4) and (5)
115. A woman can use the statutory question and reply process to request key information and in many cases an employer will be able to answer detailed questions in general terms, while still preserving the anonymity and confidentiality of other employees.
116. The statutory question and reply process cannot be used to require an employer to disclose an employee's personal details, unless an Employment Tribunal orders the employer to do so, or the employee concerned consents to such information being disclosed.

117. Guidance on using the Data Protection Act 1998 and Freedom of Information Act 2000 in employment discrimination cases, including equal pay, is available on the Commission's website.

118. The Information Commissioner also has helpful guidance ('When should salaries be disclosed?') on its website.

Using the grievance procedure

119. Before making a complaint to the Employment Tribunal about equal pay, a woman should consider trying to resolve the issue with her employer.

If informal resolution is not possible, a woman should lodge a formal written grievance.

120. It is not necessary for the woman to name her male comparator at the grievance stage.

121. The ACAS Code of Practice on disciplinary and grievance procedures includes guidance for employees and employers on raising and dealing with complaints about pay or contractual terms.

122. Employees may seek advice and help from employee or trade union representatives.

123. Employers and employees can also seek advice from an ACAS conciliator. ACAS advisors can provide guidance on implementing equal pay too. ACAS can be contacted at www.acas.org.uk.

124. If Employment Tribunal proceedings are commenced and there has been an unreasonable failure by either party to adhere to the ACAS Code this could affect any compensation awarded. s.207A Trade Union Labour Relations (Consolidation) Act 1992
125. The time limit for making a complaint to the Employment Tribunal is not extended to take account of the time taken to complete a grievance procedure.
126. It can be unclear whether a particular term or benefit is contractual or not and in this case a woman would be well advised to make a claim for both equal pay and sex discrimination.
127. When responding either to a grievance or to a statutory question form, employers need to:
- decide whether or not they agree that the woman and her comparator are doing equal work, and, if not, explain in what way the work is not equal
 - consider the reasons for any difference in pay/benefits or other contractual terms and whether (if necessary) these can be objectively justified, and
 - explain the reasons for the difference.

Burden of proof

128. A woman claiming equal pay must prove facts from which an Employment Tribunal could decide that her employer has paid her less than a male comparator in the same employment doing equal work. It is then for her employer, if the claim is denied, to prove that the difference in pay and/or other terms is for a material reason other than

sex. If the employer proves that there is a non-discriminatory material factor which has resulted in the difference in pay the woman's claim will fail.

129. If the woman asserts that the material factor is indirectly discriminatory it is for her to provide evidence of this, statistical or otherwise. The employer will then need to objectively justify the difference in terms (that is, prove that it is a proportionate means of achieving a legitimate aim).

Employment Tribunals

130. If an equal pay claim is made, the Employment Tribunal will assess the evidence about: s.131(5),
(6) and (7)
- the work done by the woman and her comparator
 - the application and validity of the job evaluation study if the claim is for work rated as equivalent
 - the value placed on the work (sometimes with the advice of an independent expert), in terms of the demands of the jobs if the claim is for work of equal value
 - the pay and/or other contract terms of the woman and her comparator and how they are determined, and
 - the reasons for the difference in pay and/or contract terms if the employer raises a material factor defence.

131. There are special Tribunal procedures for work of equal value claims.³⁹ These can be obtained from www.employmenttribunals.gov.uk s.131

132. Once a woman has lodged an equal pay claim, she can seek relevant information about pay and other contractual terms from her employer in a number of ways. These include:

- disclosure
- requests for additional information, and
- requests for written answers.

Procedure

133. A claim relating to a breach of an equality clause or rule is usually made to an Employment Tribunal. Where a claim is made to the civil court, the court may refer it to the tribunal which has more expertise in employment matters. s.127(1) and s.128

134. Members of the armed forces must make a service complaint before an Employment Tribunal can consider an equal pay or pensions claim from them, and cannot withdraw the service complaint if they wish the Employment Tribunal to hear their claim. s.127(6)

Time limits for equal pay claims

135. A complaint to an Employment Tribunal about equal pay must be made within six months of the end of what is known as the 'qualifying period'. In a 'standard case', this is six months from the last day of employment. This is different from sex s.129 and s.123

³⁹ The Employment Tribunals (Equal Value) Rules of Procedure, Schedule 6 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861).

discrimination claims for which the time limit is ordinarily three months from the last act of discrimination.

136. The date from which the six-month time limit starts to run is affected by the circumstances set out below. s.129(3)

137. In a stable work case (that is, where there have been breaks in what would otherwise have been continuous employment with the same employer), the six months would start to run from the date on which the stable employment relationship ended, not on the date a particular contract ended. s.130(3) and (10)

Whether it is a stable work case will depend on the facts.

For example, where a woman is on a series of contracts in what is essentially the same job (for example a teaching assistant on a series of annual contracts) or a progression within the same job (for example an administrative assistant who progresses to administrative officer), time will not start to run with the issue of a new contract.

Where a woman reduces her hours following a period of maternity leave and is issued with a new contract, this will not trigger the time limit as it is a stable employment relationship.

Example: Ms Smith had been continuously employed since 1980 by the local council as a cook in a residential home. In 2007, she wanted to reduce her hours of work. It was agreed to vary her contractual hours from 37 to 30 hours per week and reduce her days from five to four per week. She was issued with a letter headed

‘Contract of employment’ which stated that this superseded any previous contract. While this signed document did amount to a new contract, an uninterrupted succession of contracts is a stable employment relationship. She had done the same work for the same council over many years without any break in the work. The only variation made in the new contract was the reduction of working hours. Because Ms Smith had a stable employment relationship with the council the time limit would not be triggered until the end of this stable employment.

Example: Ms Auster was employed by her local council as a relief home carer from November 2000. In April 2009, she was appointed as a permanent home carer. With this change of status she became entitled to sick pay. Otherwise her terms of employment were unchanged. She signed a new contract stating that previous contracts were superseded. There was no gap or break in the continuity of her work for the council but because her status changed and some of her employment terms, a stable working relationship cannot necessarily be said to exist.⁴⁰

138. A variation in terms and conditions will not start the six-month time limit running, providing the variation is not so significant as to amount to a termination of the previous contract.⁴¹
139. Where a woman is transferred to a new employer under the Transfer of Undertakings (Protection of

⁴⁰ Cumbria County Council v. Dow (No.2) [2009] IRLR 463, CA.

⁴¹ Potter and others (appellants) v. North Cumbria Acute Hospitals NHS Trust and others (respondents) (No.2) [2009] IRLR 900, EAT.

Employment) Regulations 2006, and the equal pay claim relates to her employment with the transferor, if the liability for that claim passes under the Regulations, the equal pay claim must be lodged against the transferee within six months of the date of the transfer.

If the new employer, the transferee, fails to honour her pre-existing contractual right under the equality clause, she will have a separate claim against the transferee in respect of this breach. The six-month time limit for bringing that claim will not start to run until the end of her employment with the transferee.⁴²

140. **Example:** Ms Jones worked for an NHS Trust as a domestic cleaner in a hospital. In January 2001, under a contracting-out arrangement, Ms Jones was transferred to the employment of a private cleaning company. She continued to work as before at the same hospital. In September 2006, she brought an equal pay claim against the cleaning company, relying on male comparators who had not transferred over to the company and were still employed by the NHS Trust. Ms Jones was paid £2 an hour less than men doing equal work for the Trust. Her claim relating to her employment with the Trust before the transfer is time-barred, as the six-month time limit ran from January 2001, the date of the transfer. The cleaning company, as transferee, is obliged to honour the equality clause, where it passes to them, and, if they fail to do so, she could bring a claim against them up to six months after the end of her employment with them.

141. Where the fact of the pay inequality was deliberately concealed and the woman could not s.130(4)

⁴² Sodexo Ltd v Guttridge [2008] IRLR 752, CA.

reasonably have been expected to discover it, the time starts to run from the date she actually discovered or could reasonably have discovered the inequality. This is referred to as a concealment case.

142. Where the woman has an incapacity the time starts to run from the end of the incapacity. s.130(7)

‘Has an incapacity’ in England and Wales means the woman has not attained the age of 18 or lacks capacity within the meaning of the Mental Capacity Act 2005. s.141(7)

In Scotland it means she has not attained the age of 16 or is incapable within the meaning of the Adults with Incapacity (Scotland) Act 2000.

143. Members of the armed forces have nine months from their last day of service to make their application to the Employment Tribunal provided that they raise a service complaint as mentioned at paragraph 134. s.129(4)

144. Civilians working with the armed forces are not governed by these rules and must make an application to an Employment Tribunal on the same basis as other people.

145. It is the claimant’s responsibility to ensure their claim is made in time. Individuals and their representatives should be alert to the importance of observing these time limits, and err on the side of caution if there is any ambiguity or uncertainty about when time starts to run.

It should be noted that using an employer’s grievance procedure does not extend the time limit for lodging a claim, nor does serving a statutory question and reply form.

Equal pay awards and remedies

146. If an equal pay claim is heard by an Employment Tribunal and upheld, the Tribunal may: s.132
- make a declaration as to the rights of the woman and/or her employer in relation to the claim brought. For example, a pay rise to the level of the comparator's pay (including any occupational pension rights) or the inclusion of any beneficial term not in the woman's contract, and
 - order the employer to pay arrears of pay or damages to the person who has brought the claim.
147. A declaration may be made even if the Employment Tribunal decides not to award any compensation.
148. An Employment Tribunal cannot make an award for injury to feelings for breach of an equality clause.
149. In England and Wales, the Tribunal can award arrears of pay or damages going back not longer than six years before the date that proceedings were started in the Employment Tribunal. s.132(4)
- This is extended to the day on which the breach first occurred where incapacity or concealment applies (see paragraphs 141 and 142).
- In Scotland, the Employment Tribunal can award arrears of pay or damages going back not longer than five years from the date that proceedings were brought in the Employment Tribunal. This is extended to 20 years where the employee had a relevant incapacity or there was a fraud or error. s.132(5)

150. As in other discrimination cases, equal pay awards can be made subject to interest. An award of arrears of pay will generally only attract interest for about half the arrears period. Interest will be calculated as simple interest accruing day to day in accordance with prescribed statutory rates. Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996
151. In cases involving occupational pension entitlements, an Employment Tribunal may make a declaration as to the rights of the parties concerned. The rules as to what compensation can be ordered or may be agreed are complicated so it is important to seek advice. s.133
152. Where an Employment Tribunal makes a declaration about the terms on which a member of an occupational scheme must be treated, the employer must provide such resources to the scheme as are necessary to secure that person's rights without further contribution by her or any other members. s.133(8)

Protection against victimisation

153. It is unlawful for an employer to victimise a worker for bringing an equal pay or discrimination claim or for giving evidence about such a complaint. s.27

Victimisation arises if a person is subjected to a detriment, because that person has done a protected act, or is believed to have done a protected act.⁴³

⁴³ For a fuller explanation of Victimisation see 'Other unlawful acts' in the Code of Practice on Employment.

A protected act includes the following:

- bringing proceedings under the Act
- giving evidence or information in connection with such proceedings
- doing any other thing for the purposes of or in connection with the Act, and
- making an allegation that someone is in breach of the Act.

This means that protection from victimisation does not start only when a claim is filed with the Employment Tribunal. Protected acts can include any discussion or correspondence about the matter between the woman and her employer.

154. Workers who seek or make a relevant pay disclosure, or who receive information that is a relevant pay disclosure, are protected from victimisation. For explanation of what is a 'relevant pay disclosure' see paragraph 106. s.77(4)
155. There is no requirement for a comparator in a victimisation complaint.
156. In considering whether an act has caused detriment, the focus is on the effect on the alleged victim, rather than any intent or purpose on the part of the employer.

Example: A group of women employed by a local authority brought equal pay claims. Some of the women settled, the others proceeded with their claim. Shortly before the Tribunal hearing, the employer wrote to the latter group warning of the potential consequences of the case for the

council's finances. The women experienced this as pressure to drop the case and were distressed by the letter. The House of Lords found that this did amount to victimisation.⁴⁴

157. The protection against victimisation includes not only the woman bringing the claim, but also any person who assists her, for example, a comparator.

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⁴⁴ Derbyshire and others v St Helens Metropolitan Borough Council [2007] UKHL 16.

Part 2: Good equal pay practice

Introduction

158. Despite the implementation of equal pay and sex discrimination legislation in the 1970s, there is still a significant gender pay gap. It could take an estimated 20 years to close the gap without further corrective action. This section of the code of practice therefore provides information and guidance on steps that employers can take which go beyond compliance with legal requirements. These steps, taken in consultation with the workforce and trade union or other employee representatives, should help accelerate the achievement of substantive gender equality at work.
159. The financial loss to women arising out of unequal pay is well documented, but organisations also lose out by failing to properly value and reward the range of skills and experience that women bring to the workforce.

The most commonly recognised risk of failing to ensure that pay is determined without sex discrimination is the risk of time-consuming and costly litigation equal pay litigation. The direct costs to an organisation of a claim can include not only any eventual equal pay award to the woman or women bringing the claim but also the costs of time spent responding to the claim, and the costs of legal representation.

The indirect costs are harder to quantify, but could include lower productivity on the part of those employees who consider that they are not getting

equal pay and on the part of managers whose time is taken up in dealing with staff dissatisfaction and other repercussions.

160. Tackling unequal pay can also increase efficiency and productivity by attracting the best employees, reducing staff turnover, increasing commitment, and reducing absenteeism. Pay is one of the key factors affecting motivation and relationships at work. It is therefore important to develop pay arrangements that are right for the organisation and that reward employees fairly. Providing equal pay for equal work is central to the concept of rewarding people fairly for what they do.
161. Employers should not discriminate on any protected ground in their pay arrangements – see Employment Code of Practice. The information on good practice set out here focuses on eliminating gender pay inequalities, which are the subject of this code of practice. However, the methods used to identify and remedy unlawful gender pay discrimination can also be used to remedy unlawful pay discrimination on other grounds.

Reviewing or auditing pay

162. Employers are responsible for providing equal pay for equal work and for ensuring that pay systems are transparent. Where a pay system lacks transparency the employer must be able to prove there is no sex discrimination behind a pay differential.⁴⁵

⁴⁵ See Part 1 of the code, paragraph 102. The key legal authority for this is known as Danfoss, the full case name is Handels og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss) [1989] IRLR 532, [1991] ICR 74. See also Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT.

Pay arrangements are often complicated and the features that can give rise to discrimination in pay are not always obvious. A structured pay system, based on sound, bias-free job evaluation, is more transparent and more likely to provide equal pay than a system that relies primarily on managerial discretion.

ACAS can advise on how to structure a pay system.

163. Most employers believe that they provide equal pay for equal work, irrespective of the sex of the job holders or whether they work full or part time. An equal pay audit is the most effective way of establishing whether an organisation is in fact providing equal pay.

Organisations subject to the gender equality duty must pay due regard to the need to eliminate sex discrimination in pay. Although conducting an equal pay audit is not mandatory, it demonstrates appropriate action to identify and eliminate gender pay discrimination.⁴⁶ It provides a risk assessment tool for pay structures.

The Commission recommends all employers carry out regular equal pay audits. A model for carrying out an equal pay audit is described below.

164. A number of common pay practices, listed below, pose risks in terms of potential non-compliance with an employer's legal obligations:
- Lack of transparency and unnecessary secrecy over grading and pay.
 - Discretionary pay systems (for example, merit pay and performance-related pay) unless they

⁴⁶ See Gender Equality Code of Practice England and Wales, EOC 2006, paragraphs 3.40-3.52, which has effect until replaced by any new public sector equality duty code.

are clearly structured and based on objective criteria.

- Different non-basic pay, terms and conditions for different groups of employees (for example, attendance allowances, overtime or unsocial hours payments).
- More than one grading and pay system within the organisation.
- Long pay scales or ranges.
- Overlapping pay scales or ranges, where the maximum of the lower pay scale is higher than the minimum of the next higher scale, including ‘broad-banded’ structures where there are significant overlaps.
- Managerial discretion over starting salaries.
- Market-based pay systems or supplements not underpinned by job evaluation.
- Job evaluation systems which have been incorrectly implemented or not kept up to date.
- Pay protection policies.

There is detailed guidance on the Commission’s website about the law and risk management in relation to these issues. In many cases, this will involve carrying out a few straightforward checks or reviewing a relevant policy.

165. Risks of equal pay challenges generally arise not out of any intention to discriminate, but through pay systems not being kept under review and up to date. ACAS provides basic advice on the various different types of pay systems and on job evaluation.

The benefits of conducting an equal pay audit

166. The benefits to an organisation of carrying out an equal pay audit include:
- identifying, explaining and, where unjustifiable, eliminating pay inequalities
 - having rational, fair and transparent pay arrangements
 - demonstrating to employees and to potential employees a commitment to equality, and
 - demonstrating the organisation's values to those it does business with.
167. An equal pay audit may be the most effective method of ensuring that a pay system is free from unlawful bias. An audit should include:
- comparing the pay of men and women doing equal work – ensuring that this considers work that is the same or broadly similar (like work), work rated as equivalent and work that can be shown to be of equal value or worth
 - identifying and explaining any pay differences, and
 - eliminating those pay inequalities that cannot be explained on non-discriminatory grounds.
168. A process that does not include these features cannot claim to be an equal pay audit. The Commission's extensive guidance for employers on conducting equal pay audits is available on its website.
169. An equal pay audit is not simply a data collection exercise. It entails a commitment to put right any unjustified pay inequalities. This means that the audit must have the involvement and support of managers who have the authority to deliver the necessary changes.

170. The validity of the audit and the success of subsequent action taken will be enhanced if the pay system is understood and accepted by the managers who operate the system, by the employees and by their unions. Employers should therefore aim to secure the involvement of employees and, where possible, trade union and other employee representatives, when carrying out an equal pay audit.

A model for carrying out an equal pay audit

171. The Commission recommends a five-step equal pay audit model.

Step 1: Decide the scope of the audit and identify the information required.

Step 2: Determine where men and women are doing equal work.

Step 3: Collect and compare pay data to identify any significant pay inequalities between roles of equal value.

Step 4: Establish the causes of any significant pay inequalities and assess the reasons for them.

Step 5: Develop an equal pay action plan to remedy any direct or indirect pay discrimination.

The Commission's Equal Pay Resources and Audit Toolkit provides detailed guidance on how to conduct an audit.

Step 1: Decide the scope of the audit and identify the information required

172. This is a particularly important aspect of the audit, especially if it is the first audit that an organisation has undertaken. It is worth investing time and thought at this stage. In scoping the audit, employers need to decide:
- Which employees are going to be included? It is advisable to include all employees who are deemed to be in the same employment or whose pay can be attributed to a single source (see paragraphs 51-57 of Part 1 of the code). If a comprehensive audit is not possible, or is deemed unnecessary, then a sample of roles may be audited but the basis for selecting the sample must be clear.
 - What information will be needed and what tools are available? Employers will need to collect and compare two broad types of information about their employees: the jobs they do, and what they are paid (ensure that this information is collected about part-time as well as full-time workers):
 - All the various elements of their pay, including pensions and other benefits.
 - The sex of each employee; their job, grade or pay band.
 - In addition, where there is gender pay inequality, it will be helpful to collect data on: qualifications related to the job; hours of work; length of service; any performance ratings and so on.
173. The Commission has produced guidance that explains an employer's legal obligations regarding data protection when carrying out an equal pay audit, which is available on its website.

174. The key tool for conducting pay audits is the Commission's equal pay audit kit and its five-step process. Guidelines on conducting equal pay audits have also been published by various bodies including Local Government Employers, and the Joint Negotiating Committee for Higher Education Staff, the TUC and individual trade unions. These contain useful additional sector specific advice.
175. The employer needs to consider carefully what resources are needed.
- Who should be involved in carrying out the audit? An equal pay audit requires different types of input from people with different perspectives, including those with knowledge and understanding of :
 - the organisation's pay and grading arrangements
 - any job evaluation system(s) in use
 - payroll and human resource information systems, and
 - key equality issues, such as occupational segregation and the systemic tendency to undervalue work done by women.
 - When should the workforce be involved? Employers need to consider when to involve the trade unions or other employee representatives.
 - Is expert advice needed? Employers may also wish to consider whether to bring in outside expertise. ACAS, the employment relations experts, offer practical, independent and impartial help to help bring pay systems up to date.

Step 2: Determine where women and men are doing equal work

176. In Step 2 an employer needs to check whether women and men are doing:
- like work – that is work that is the same or broadly similar, or
 - work rated as equivalent under a valid job evaluation scheme, or
 - work of broadly equal value or worth, considering factors such as effort, skill and decision-making.

These checks determine where women and men are doing equal work. They are the foundation of an equal pay audit.

Employers who do not have analytical job evaluation schemes designed with equal value in mind will need to find an alternative means of assessing whether men and women are doing equal work. The Commission's Equal Pay audit toolkit includes suggestions as to how this can be done.

Employers who do use analytical job evaluation schemes need to check that their scheme has been designed and implemented in such a way as not to discriminate on grounds of sex. The Commission's toolkit provides helpful guidance on this.

Step 3: Collect and compare pay data to identify any significant pay inequalities between roles of equal value

177. Once employers have determined which male and female employees are doing equal work, they need to collate and compare pay information to identify any significant inequalities by:

- calculating average basic pay and total earnings, and
- comparing access to and amounts received of each element of the pay package.

178. To ensure comparisons are consistent, when calculating average basic pay and average total earnings for men and women separately, employers should do this either on an hourly basis or on a full-time equivalent salary basis (grossing up or down for those who work fewer, or more, hours per week – excluding overtime - than the norm).

179. Employers then need to review the pay comparisons to identify any gender pay inequalities and decide if any are significant enough to warrant further investigation. It is advisable to record all the significant or patterned pay inequalities that have been identified. The Commission's toolkit gives detailed advice and guidance on collecting and comparing pay information and when pay gaps may be regarded as significant.

180. Modern software allows for speedy and in-depth investigation of pay inequalities on any protected ground and also provides an essential tool for equality impact assessments.

Step 4: Establish the causes of any significant pay inequalities and assess the reasons for them

181. In Step 4 employers need to:

- find out if there is a real, material reason for the

difference in pay that has nothing to do with the sex of the jobholders, and

- examine their pay systems to find out which pay policies and practices may have caused or may be contributing to any gender pay inequalities.

182. Pay systems vary considerably. Pay systems that group jobs into pay grades or bands have traditionally treated jobs in the same grade or band as being of broadly equal value, either because they have been evaluated with similar scores under a job evaluation scheme, or because they are simply regarded as equivalent. However, recent years have seen a trend towards structures with fewer, broader grades or bands and greater use of performance pay and market factors.

A single broad band or grade may contain jobs or roles of significantly different value because it encompasses a wide range of job evaluation scores. This, combined with a wider use of other determinants of pay and more complex methods of pay progression, means employers should check all aspects of the pay system from a variety of standpoints: design, implementation, and differential impact on men and women.

183. The Commission has produced a series of checklists and guidance notes to help employers deal with the more common causes of unequal pay in the workplace (see paragraph 164).

Step 5: Develop an equal pay action plan to remedy any direct or indirect pay discrimination

184. Where the reason for the pay difference is connected with the employee's sex (or another protected ground), employers will need to remedy

this and provide equal pay for current and future employees doing equal work.

If the pay differential arises from a factor that has an adverse impact on women, then it has to be objectively justified. For example, if an employee is entitled to a premium for working unsocial hours and fewer women than men can do this because of their caring responsibilities, it will be indirectly discriminatory and the employer will have to be able to prove it is justified. Further explanation of what this means is in Part 1 of the code (paragraph 83-89) and in other Commission guidance.

185. Employers who find no inequalities between men's and women's pay, or on other protected grounds, or who find pay differences for which there are genuinely non-discriminatory reasons, should nevertheless keep their pay systems under review by introducing regular monitoring undertaken jointly with trade unions. This will ensure that the pay system remains free of bias.

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