

Equal Pay

Discrimination in the Work Place



The Equal Pay Act 1970 provides that discrimination between the sexes in the terms of their contracts of employment is unlawful. This typically occurs in matters such as salary, contractual bonus payments and benefits. The Sex Discrimination Act 1975 applies to less favourable treatment on the grounds of sex in terms of any other matters relating to employment. This can include discretionary bonuses.

The Act sets out that women can claim equal pay with colleagues of the opposite sex where they are in the same employment and doing:

- Work which is the same or broadly similar ("like work")
- Work rated as equivalent under an analytical job evaluation scheme ("work rated as equivalent")
- Work which is different but which is of equal value in terms of demands of the jobs ("work of equal value")

Equal Pay

"Pay" means all contractual terms including wages, contractual bonus, shift payments, overtime length, length of service increments, sick pay, holiday pay, health insurance and occupational pensions.

Like Work

To establish like work, the woman must be able to show that she was undertaking work which is of the same or broadly similar nature and where the differences are not "of practical importance in relation to terms and conditions of employment". This is a question of fact for the tribunal. The courts have said that this requirement should be interpreted broadly.

Work Rated as Equivalent

If a job evaluation study has been carried out in respect of a woman and her comparator and has resulted in the jobs being rated as equivalent (or would have been had the study not been discriminatory), then this would be sufficient to establish that work is rated as equivalent.

Work of Equal Value

Alternatively, a woman can then rely on showing that the work is of equal value. These claims are more difficult and complex to succeed in and usually require the appointment of experts to assess the jobs that the individuals carry out and to grade those jobs according to a set of factors. Each job is ultimately given a score, and provided the woman's score is equal to or more than her comparator's, equal value is made out.

Making a claim

First of all, a woman must identify a valid male comparator either employed in the UK by her employer, or within her employer's group and who is either employed at the same location or in a different location but where common terms and conditions of employment are observed.

In identifying comparators, a woman should consider as many individuals as possible – there is no restriction on the number of comparators who can be named, although the more there are, the more complex the case becomes. In fact, a comparator does not even need to be contemporaneously employed – they can be a predecessor or successor.

Once a woman has made out that her work is equal to her comparator, the burden then shifts to the employer to prove that the reason for the difference is not due to sex. The employer has to establish that there is a "genuine material factor" not related to sex, which explains the difference. The extent of that burden on the employer is currently unclear. Our case of *Sharp v Caledonia Investments Limited* is currently pending before the Court of Appeal. We hope that the Court will agree with the

Employment Appeal Tribunal that it is not sufficient for an employer to simply show a genuine reason for the difference but that they must go further and actually justify the difference in all cases. Previously they only had to do so where the reason put forward by the employer was tainted by discrimination. If the Court of Appeal approve the ruling, this will place a much more onerous obligation on an employer.

Time Limits

The time limit for bringing an equal pay claim is different to most employment claims. An equal pay claim can be brought at any time whilst still employed or within 6 months of the end of employment. Further, a written grievance would need to be raised with the employer before a claim can be lodged in the tribunal, which then buys a further three months within which to lodge the tribunal claim. A woman therefore potentially has up to 9 months from the date of her dismissal, within which to bring her claim.

This is different to sex discrimination claims, which must be brought within 3 months of the act complained of, or dismissal. There is first a requirement to lodge a grievance in respect of that act. Lodging a grievance buys a further 3 months within which to lodge the employment tribunal claim. If a claim is being lodged in respect of a bonus which is discretionary, it is important to plead the claim under both the Equal Pay Act and the Sex Discrimination Act, in which case, a claim must be brought within 3 months.

Questionnaire

Where a woman believes that she may have a claim for equal pay, a useful tool for obtaining relevant evidence is to lodge an equal pay questionnaire. The focus of the questionnaire is

on establishing whether she is receiving less favourable pay and contractual terms and conditions than a colleague or colleagues of the opposite sex, and whether the employer agrees that she and her comparator are doing 'equal work'.

The woman can send the questionnaire to her employer either before she files her claim with the Employment Tribunal or within 21 days of doing so. Whilst the employer is not obliged to respond, a tribunal can draw inferences from a failure or delay in responding, which can include an inference that there has been discrimination in pay. If an employer does provide a response, it should do so within 8 weeks.

Where a woman succeeds in her claim for equal pay, then she may be entitled to backdated pay for up to 6 years, provided she can show that she was doing equal work for that period. As a result, equal pay claims can be of significant value.

The act works to imply an equality clause into the woman's contract of employment, levelling her pay to her comparator in relation to each term of the contract of employment. This means that her contract of employment is permanently altered to the new rate of pay.

Equal pay claims are probably the most complex of all employment claims. It is therefore important to take advice at an early stage both in terms of prospects of success and the appropriate procedure to follow.

For information on sex discrimination claims, please see our factsheet "Is Gender on the Agenda".

To find out more

To find out more about how we may be able to help you, please call

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