EMPLOYERS’ E-GUIDE NO.2
A GUIDE TO THE LAW ON EQUAL PAY

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Men and women carrying out equal work for the same employer are entitled to the same terms and conditions of employment. This right derives from both European legislation (Article 157 of the EU Treaty (previously Article 141 of the EC Treaty)) and from the domestic Equality Act 2010 (formerly contained in the Equal Pay Act 1970).

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

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

In addition to the EA, in April 2011, the Equality and Human Rights Commission published a Statutory Code of Practice on Equal Pay. In its forward, the Code states that it is intended to be an “authoritative, comprehensive and technical guide to the Act’s provisions”. The Code is broken down into two parts, the first dealing with equal pay law and the second with good practice.

1 Establishing the right to equal pay

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

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

Once a woman has established her claim to equal pay it then falls upon the employer to show that the reason for the inequality is genuinely due to a “material factor” that is not the difference in sex. If the employer cannot show that, it will be liable to the employee.
2 The scope of the equal pay provisions

The equal pay provisions apply to both men and women.

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

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

From 1 October 2005, the equal pay provisions have also applied to officeholders.

The equal pay provisions cover all aspects of the contractual terms and conditions of employment, not just pay. It includes:

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

3 Equal pay not fair pay

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

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

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

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

5 Comparator

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

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

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

No hypothetical comparator

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

However, the EA does allow an individual to bring a direct sex discrimination claim where they are treated less favourably in respect of pay, but no actual comparator exists. The explanatory notes to the EA give the example of an employer telling a woman that she would be paid more if she were a man. If no male comparator existed, she would then be able to bring a direct sex discrimination claim using the employer’s comment as evidence in her claim.

Predecessor and successor comparators

A woman can compare herself with a predecessor in her job. If a woman has a reasonable suspicion that her predecessor was paid more than her, she can either apply to an employment tribunal for a disclosure order requiring the employer to release the relevant information, or seek the former employee’s salary details through an equal pay questionnaire. However, a woman cannot compare herself with a successor to her job.
‘Piggyback’ claims: using a comparator whose pay has risen as result of her own equal pay claim

In McAvoy and Others v South Tyneside Borough Council and Others UKEAT 0006/08 (Advisory Bulletin 554) the EAT held that a man is entitled to bring a ‘piggyback’ claim under the Equal Pay Act, comparing themselves to a comparator woman who works alongside him, where the woman has received a higher rate of pay as result of her own equal pay claim using a higher paid male comparator. In such a claim, the man is entitled to the same arrears of pay as was awarded to the woman.

Choice of comparator and presence of a ‘token’ man

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

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

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

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

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

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

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

6 Same employment

Under the equal pay provisions of the EA a comparison must be made with a man who is working in the "same employment" (s.79 EA).

For the purposes of the EA, "same employment" means employed by the same employer (or an associated employer) at the same "establishment" (see below) or employed by the same employer (or associated employer) at a different establishment but where common terms apply at both establishments.

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

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

However, if the claimant and comparator work for the same employer (or associated employer) at different establishments, a claim can be brought if they work under common terms and conditions (see City of Edinburgh Council v Wilkinson and ors, below)

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

A claim can also be brought in some circumstances where the claimant and comparator work at different establishments on different terms and conditions. A claim may be brought if the claimant can show that the comparator would have been employed on the same terms as he is currently if he were to be employed in the claimant’s establishment (British Coal Corporation v Smith [1996] IRLR 404). Further in North and ors v Dumfries and Galloway Council [2011] CSIH XA 104/9 (Advisory Bulletin 573), the Court of Session held that a female claimant did not have to show that there was a real possibility of her chosen comparator, who worked for the same employer at a different establishment, being employed at her establishment in order to satisfy the establishment test.
Meaning of an “establishment”
In *Rockfon A/S v Specialarbejderforbundet i Danmark* (Advisory Bulletin 338), the ECJ held that, in a collective redundancy context, an establishment should be interpreted as designating the unit to which the workers made redundant are assigned to carry out their duties. In *Athinaiki Chartopoia AE v Panagiotidis & Others*, [2007] IRLR 284 (Advisory Bulletin 525), the ECJ gave further guidance. It held that an establishment may consist of:

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

It need not have:

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

Schools
The current position is that a school is accepted as a separate establishment (see cases such as *Leverton* (above) in which it is seemingly accepted that a school is a separate establishment). This position is supported by the Scottish Court of Session decision in *City of Edinburgh Council v Wilkinson and ors* [2011] Scot CS CSIH 70, (Advisory Bulletin 585) that the same establishment relates to the employee’s place of work rather than being the employer’s organisation as a whole. Therefore, this case suggests that a school should be treated as a separate “establishment” from other schools or other council sites.

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

This position is further supported by the EAT in *Beddoes and ors v Birmingham City Council* UKEAT/0037-43, 0045-48, 0053-59/10 (Advisory Bulletin 578) which went further and specifically held that under the School Staffing (England) Regulations 2003, governing bodies should not be viewed as the source of school support staff’s terms and conditions This position should stand despite the enactment of revised school staffing regulations in 2009 since the case was decided.

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

**Cross-employer comparisons**

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

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

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

**Claims and cross-employer comparators following a TUPE transfer**

In *Gutridge and ors v (1) Sodexo (2) North Tees & Hartlepool NHS Trust* [2009] EWCA Civ 729 (Advisory Bulletin 555) the Court of Appeal upheld the EAT’s finding that any entitlement to equal pay under the Equal Pay Act (now the EA), takes effect immediately upon the conditions for it being met even though not enforced through the tribunals and recognised at the time. Therefore on a TUPE transfer, if there are inequalities in pay, transferring employees transfer on the pay they should have been paid in compliance with the EA, and the transferred employee is able to claim that higher rate of pay, using a comparator in the transferor’s employment who did not transfer. However, the six-month time limit for bringing an equal pay claim in respect of the period of employment with the transferor employer runs from the date of the TUPE transfer, and the transferred employee cannot claim for improvements made to the comparator’s terms and conditions after the transfer.

**7 Equal pay for equal work**

Under the EA, an equal pay claim can be brought against a comparator who is employed on “like work”, “work rated as equivalent” or “work of equal value”. In *Redcar & Cleveland Borough Council v Bainbridge and Others and Surtees and Others v Middlesbrough Borough Council* [2008] EWCA Civ 885 (Advisory Bulletin 541), the Court of Appeal held that a claimant is entitled to pursue one type of equal pay claim (for example an “equal value claim”) against the same employer, when they had already been successful in a different type of claim (for example a “like work” claim) against the same employer in respect of the same period.
Like work
Under the equal pay provisions of the EA, a woman is carrying out “like work” if, but only if, her work and that of her male comparator(s) is of the same or a broadly similar nature, and any differences are not of practical importance to the terms and conditions applicable to the jobs.

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

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

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

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

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

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

In Redcar and Cleveland Borough Council v Bainbridge [2007] EWCA Civ 910 (Advisory Bulletin 533), the Court of Appeal held that a claim can be brought against a comparator who was rated lower than the claimant in a job evaluation scheme. This allows a claim to be brought where, although the comparator’s substantive pay is less than the claimant, the actual pay is higher due to an additional payment, such as a bonus or productivity payment.
An employer is under no legal obligation to carry out a JES. However, once it conducts and accepts the results of the study, a woman is entitled to rely upon those results.

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

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

Equal value claims are very complex and, in summary, entail an assessment of the value of the relevant posts by reference to the relative worth attached to factors such as effort, skill and decision-making. In some cases, an employment tribunal will appoint an independent expert to make an assessment.

### 8 Material factor defence

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

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

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

**Objective justification**
If the inequality involves the application of a practice, provision or criterion that is detrimental to a larger proportion of women than men (i.e. indirect discrimination) then the employer must also show that the material factor defence is objectively justified. This requires the employer to show that the difference is necessary and proportionate in order to achieve a legitimate aim.
Until the enactment of the EA, the tribunals and courts had struggled to find a consistent answer to a question that faces many local authorities: is there a need to objectively justify a material factor relied upon by the employer where there is no evidence of direct discrimination, but the material factor in question is indirectly discriminatory?

Typically, the question arose when considering whether a decision not to offer a bonus payment to female dominated occupational groups such as carers needed to be justified where the material factor that explained the omission was that the type of work did not lend itself to a productivity incentive in the same way as some male dominated occupational groups, such as gardeners or refuse collectors, and was therefore not directly discriminatory.

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

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

The Sharp challenge to the orthodox approach has been rejected, however, by an EAT decision in Villalba v Merill Lynch [2006] IRLR 437 (Advisory Bulletin 516) and a Court of Appeal decision in Armstrong v Newcastle Upon Tyne NHS Hospital Trust [2005] EWCA Civ 1608 (Advisory Bulletin 510), which restated the previously well-established position that an employer does not have to objectively justify a material factor defence that is not tainted by sex discrimination.

In Middlesbrough Borough Council v Surtees UK EAT/0077/07/CEA (Advisory Bulletin 531), Mr Justice Elias, the President of the EAT, held that his earlier decision in Villalba v Merrill Lynch (Advisory Bulletin 516) went too far in saying that where the employer’s arrangements have a sufficiently strong disparate impact there is always an irrebuttable presumption of prima facie indirect discrimination that requires justification. In retreating from that earlier decision, Mr Justice Elias acknowledges, in accordance with previous decisions such as Armstrong v Newcastle Upon Tyne NHS Hospital Trust (Advisory Bulletin 510), that it must be open to an employer to show that even though there is a disparate adverse impact, it is not in any way related to any act that is tainted by discrimination.

Finally, in Gibson and ors v Sheffield City Council, Sheffield City Council v Crosby and ors [2010] EWCA Civ 63 (Advisory Bulletin 562), the Court of Appeal distinguished the case on its facts from the Armstrong judgment and held that the employer was required to objectively justify the non-payment of bonuses to
carers because an inference of indirect discrimination could be readily drawn on the clear and compelling statistical evidence that the operation of the bonus scheme had a disparate adverse effect on women.

However, the matter has finally been resolved by an amendment brought to the equal pay provisions in subsection 69(1) of the EA that makes it clear that even if there is factor explaining the difference in pay that is not directly discriminatory, if it is indirectly discriminatory, in order for the defence to succeed the employer must justify it by demonstrating it is a proportionate means of achieving a legitimate aim.

**Examples of material factors**
The following are examples of material factor defences that employers may seek to rely upon, sometimes successfully, sometimes not:

- **Market forces** – the notion that an employer must pay more in order to recruit and retain employees to certain types of job. This may occur when there is a shortage of a particular type of worker, or where the employer has a good business reason for reducing the turnover of staff in a particular job. The House of Lords in *Rainey* (see above) confirmed that market forces could amount to a material factor defence. This was affirmed in *Enderby* (see above) when the ECJ held that “the state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground”.

- It is important to note, however, that a defence that relies on a historically discriminatory practice that is enshrined in society (such as paying traditionally female jobs less) will not succeed because the material reason will not be free of discrimination.

- Employers should also keep its policy of paying additional salary on the basis of market forces under review to ensure that it continues to justify the pay differential. It is not sufficient to rely upon the market forces at the time the additional pay was awarded. In *Dow v Cumbria County Council (No. 1)* [2008] IRLR 109 (Advisory Bulletin 535) the EAT held that the employer must be able to produce evidence to prove the extent to which the differential is justified by the market forces.

- In *Newcastle upon Tyne NHS Hospitals Trust v Armstrong and ors* [2010] EWCA Civ 1203 (Advisory Bulletin 572), the Court of Appeal held that it was necessary to objectively justify the removal of bonuses from female-dominated groups of workers where the reason for the withdrawal had been the need to make an in-house bid competitive against the private sector in the course of a compulsory competitive tendering (CCT) exercise.

- **Productivity bonuses** – Such schemes have, in some cases, been held to be valid defences. As the case of *Dow v Cumbria County Council (No. 1)* (see above) demonstrates, for a scheme to be valid, it must be
possible to show that it is meeting its objective. This could be done through regularly monitoring of performance to show that improvements were being made, with bonuses being withheld as appropriate. In the *Dow* case, it was necessary to show that productivity had increased as a result of improvements in the performance of the workers themselves rather than, for example, increased mechanisation or increased management efficiency.

The reasons why a similar scheme was not introduced for other groups of staff may also be relevant when considering whether the bonus scheme was proportionate. In *Gibson and ors v Sheffield City Council* (see above) the Court of Appeal held that the payment of a productivity bonus to male dominated groups of street cleaners and gardeners but not to female dominated groups of carers was capable of being a material factor defence but that it was necessary to show objective justification because of the clear and compelling statistical evidence that the scheme was indirectly discriminatory.

- **Pay protection** – Under sub-section 69(3) of the EA, the long-term aim of reducing inequality between men’s and women’s pay is always to be regarded as a legitimate aim for the purposes of justifying pay practices that indirectly discriminate against women. Therefore, short-term pay protection schemes introduced with the aim of removing long-term inequalities in pay may be capable of being objectively justified, but only where their use is a proportionate way of achieving that aim.

- Notwithstanding the provision above, the following points that emerge from case law on pay protection may be helpful to employers in helping to determine whether the use of a pay protection policy is capable of justification.

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

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

- Whether the male employees had a contractual right to the enhanced rates of pay and whether realistically their contracts could only be varied through agreement on pay protection. However, even if that is the case, the employer must still
demonstrate that the exclusion of the women from the enhanced rates of pay was appropriate and necessary.

- Whether the employer is able to show that the constraints on its finances were so pressing that it could not afford to pay the female employees the same pay protected rate as the male employees. However, the employer will be put to strict proof on this point and in Bury Metropolitan Council v Hamilton and ors, Council of the City of Sunderland v Brennan and ors UKEAT/0412-5/09 (Advisory Bulletin 575), the EAT commented that the employer must show sufficiently detailed evidence to show the cost of extending pay protection to women, as well as the financial context in which the employer is operating so that a tribunal can properly assess the question of affordability.

- The extent to which the employer takes steps to minimise the effect of the pay protection scheme, such as limiting its length. In Redcar's case, the scheme was temporary, which was a point in its favour, as was the fact that the class of those receiving pay protection was closed and no one was to be admitted after a certain date. However, that was still not enough to justify it as an appropriate and necessary means of implementing the scheme.

- Whether the employer took into account the female employees’ views. In the Redcar case, when negotiating the pay protection arrangements with the male employees’ representatives, there was no evidence that the views of the women were taken into account. Even after the decision, no evidence, including financial considerations, was put forward to say why the women could not be included in the scheme.

- Whether the employer knew its pay protection arrangements were allowing an indirectly discriminatory pay scheme to continue. If, when the employer implemented the scheme, he had no reason to think it would be discriminatory, then he may be able to justify its use. However, in Redcar’s case the Court of Appeal found that the employer must have known that its pay protection scheme was allowing a discriminatory regime to continue as it was aware that the purpose of the Green Book scheme was the elimination of past discriminatory pay practices which it had conceded as being discriminatory, and by excluding the women from the pay protection scheme it was allowing such discrimination to continue. The Court of Appeal stressed though that not too much emphasis should be put on the employer’s knowledge, as to do so may favour employers who turn a blind eye to discriminatory pay structures, as opposed to employers who take steps to investigate and eradicate such practices.

- However, where pay protection arrangements are not linked to prior discrimination in pay, such as a result of a restructuring that
results in a re-grade because of a change in the duties and responsibilities of a post, then the pay protection arrangements should not amount to indirect discrimination (see Audit Commission v Haq and ors UKEAT/0123/10 (Advisory Bulletin 578)).

- **Geographical differences** – geographical location can be a valid material factor defence

- **Different pay structures and collective bargaining arrangements** – in *Enderby* (above), the ECJ held that an employer could not rely on the fact that the two jobs were paid according to two different non-discriminatory collective bargaining agreements. So, in local government, an employer is unlikely to be able to rely upon the difference between the “green book” and the “red book” as a material factor to defend an equal pay claim. In the *Bainbridge/Surtees* case (above) the Court of Appeal held that the separate collective bargaining processes in place were not a valid material factor defence. It found that predominantly male work groups had been paid bonuses, whereas predominantly female work groups had not, and the men’s bonuses were not explained or justified by productivity considerations. However, the Court of Appeal commented that such factors did not inevitably lead to an inference of sex discrimination, but a tribunal is entitled to infer discrimination from such facts and it will be up to the employer to show that it should not do so.

- **Union position** – In *Coventry City Council v Nicholls and Others* [2009] IRLR 345 (Advisory Bulletin 549) the EAT held that an employer could not rely on a union’s failure to agree single status to defend ongoing discriminatory pay practices, as ultimately the employer has the power to changes term and conditions, through dismissal and reengagement if necessary.

- **Skills and qualifications** – an employer may be able to rely on a requirement for different skills or qualifications if the requirement is pertinent to the job that is actually performed.

- **Length of service** – In *Danfoss* [1989] IRLR 532, the ECJ recognised that incremental pay scales may disadvantage women because they are more likely to take career breaks. Nevertheless, the ECJ held that it is permissible to reward seniority without the need to objectively justify it because experience was seen to go hand in hand with seniority, and a worker with more seniority is likely to be in a better position to perform their duties. This position was supported by the ECJ in *Cadman v Health and Safety Executive* Case C – 17/05 (Advisory Bulletin 520), although the ECJ identified “special cases” where an employee raises serious doubt over the link between experience and performance. In such exceptional cases, the employer may be required to show specific objective justification for the pay disparity.
• Following on from the Cadman case, the Court of Appeal in Wilson v Health and Safety Executive [2009] EWCA Civ 1074 (Advisory Bulletin 558), held that where an employee can show that there are serious doubts that incremental progression is non-discriminatory, an employer can be required not only to justify the adoption of, but also the use of a length of service pay criterion. This case lowers the threshold that an employee has to get over to require the employer to show objective justification but, in many cases, an employer will be able to demonstrate that better work arises from longer service and therefore justify an indirect discrimination.

• There is a material factor defence where a difference in pay is because a man joined an incremental pay grade at a higher point that a woman where he had more skills and experience. This non-discriminatory explanation for the pay differential remains valid not only on appointment but in subsequent years as salaries increase in line with standard incremental progression – see Secretary of State for Justice v Bowling UKEAT/0297/11 (Advisory Bulletin 585).

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

• TUPE – In Skills Development Scotland Co. Ltd v (1) Buchannan and (2) Holland UKEATS/0042/10 (Advisory Bulletin 580), the EAT held that it was a valid material factor defence where the reason for a difference in pay was the protection afforded under TUPE.

9 Bringing a claim

A woman is entitled to send her employer an Equal Pay Questionnaire or ask for relevant information that will help her establish whether or not she has a claim (s.138 EA). If the employer does not answer the questions within eight weeks or gives a deliberately evasive answer, an employment tribunal can infer that there is breach of the equal pay provisions.

The EA makes it unlawful for an employer to prevent or restrict an employee from having a discussion to establish if differences in pay exist that are related to protected characteristics, including gender.

10 Time limits

Under the equal pay provisions of the EA a case must be brought within six months of the qualifying date. The qualifying date depends on the circumstances of the employment and in most cases whether it is a:

• a standard case; or
• a stable employment case,
**Standard Case**
A standard case is one that is not a “disability” or “concealment” case (which are beyond the scope of this note) nor a stable employment case (see below).

In a standard case, the qualifying period is the, “the period of six months beginning with the last day of employment or appointment” (s.129 EA).

It is important to note that in a standard case the time limit runs from the end of the “contract” and not from the end of the employment relationship. Therefore, unless a case falls into the category of a stable employment case, it is possible for a standard case brought by a woman still employed by her employer to be out of time because the six-month time limit can be triggered if the contract of employment is terminated and replaced by a fresh one. It will be a matter of fact as to whether a contract has been terminated and the person engaged under a new contract.

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

In *City of Newcastle v Allan and Degnan v Redcar and Cleveland Borough Council* [2005] IRLR 504 (Advisory Bulletin 502), the EAT reviewed the case law on whether a contract has been terminated or varied for the purpose of triggering the 6-month time limit for equal pay cases. The EAT usefully cited Judge McMullen QC from the judgment in *Preston v Wolverhampton Healthcare NHS Trust (No 3)* [2004] IRLR 96 who, referring to an earlier case, suggested that when seeking to determine whether there had been a variation in the existing contract or a rescission (termination) then "In order to amount to a rescission it must be so fundamental that nobody could claim that the original contract was still in being. On the other hand, the new terms may be on such minor matters that really the only common sense of the case is that the original contract is in being, subject to slight variations". So, whether or not a change in a woman’s job triggers the six-month time limit will be determined by the facts.

However, following the Court of Appeal’s decision in *Slack & ors v Cumbria County Council* [2009] EWCA Civ 293 (Advisory Bulletin 551), many cases which involve questions of termination of a contract and replacement with a new one, may fit into the category of a stable employment case.

**Stable employment case**
A stable employment case is a case where the proceedings relate to a period during which there was a stable working relationship between the worker and the responsible person (including any times after the terms of work had expired). In a stable employment case the qualifying period and therefore the date by which a claim must be brought is “the period of six months beginning with the day the stable working relationship ended” (s.129 EA). These provisions apply where there has been a succession of short-term contracts, in respect of the same employment. This provision was introduced into the Equal Pay Act in 2003 and protects a worker who is engaged under a succession of contracts and means that they can bring an equal pay claim at the termination of the final contract,
even if the inequality related to a period of employment under a previous short-term contract – see North Cumbria University Hospitals NHS Trust v Fox and ors [2010] EWCA Civ 729 (Advisory Bulletin 568).

Previously it had been understood that a stable employment case only existed where there were a succession of short-term contracts, with breaks between them. However, in the case of Slack, the Court of Appeal held that where there was a succession of new contracts without any break between those contracts, those cases were stable employment cases. This means that many more cases may now fall into the category of a stable employment case.

**Impact of TUPE transfer**
In Guttridge and ors v (1) Sodexo (2) North Tees & Hartlepool NHS Trust [2009] IRLR 721 (Advisory Bulletin 542), the Court of Appeal upheld the EAT’s finding that following a TUPE transfer, the six-month time limit for bringing an equal pay claim in respect of the period of employment with the transferor employer runs from the date of the TUPE transfer.

### 11 Six-year limit of claim

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

In Redcar & Cleveland Borough Council v Bainbridge and Others and Surtees and Others v Middlesbrough Borough Council [2008] EWCA Civ 885 (Advisory Bulletin 541), the Court of Appeal held that employees whose jobs are rated as equivalent under a job evaluation scheme (JES) do not have the right to up to six-years’ back-pay in compensation, for the period prior to the implementation of the scheme. A JES cannot have retrospective effect. If the jobs were rated as different under a previous non-discriminatory JES, then claims cannot be brought (see section 65 EA). However, if there was no such previous JES, then a rating can be persuasive in bringing an equal value claim.

In Birmingham City Council v Abdulla and ors [2011] EWCA Civ 1412 (Advisory Bulletin 584), the Court of Appeal held that equal pay claims that are out of time for an employment tribunial claim can be heard as breach of contract claims in the High Court up to six years after the alleged breach.

However, in Ashby and ors v Birmingham City Council [2011] EWHC 424 (Advisory Bulletin 575), the High Court took a different view and accepted that where the time limit to bring an equal pay claim before an employment tribunal has elapsed, a claim may be struck out by the County Court depending on factors such as whether allowing the claim to proceed will be in the interests of justice.

### 12 Victimisation

Under section 27 of the EA it is unlawful to discriminate against someone because they bring equal pay proceedings.
In *St Helens Metropolitan Borough Council v Derbyshire* [2007] IRLR 540 (Advisory Bulletin 528), the House of Lords held that two letters sent to equal pay claimants by their employer warning them that some of their colleagues could be made redundant if their claims were successful amounted to victimisation under the Sex Discrimination Act.

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

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

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

13 Discrimination by a trade union

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

14 Validity of COT3 settlements and compromise agreements

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

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

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The EAT held that:

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

In addition to settlements agreed using the auspices of Acas, it is possible to reach a settlement to an equal pay claim through the use of a ‘compromise agreement’. In *McWilliam and ors v Glasgow City Council* UKEAT/0272/10 (Advisory Bulletin 579), the EAT held that compromise agreements which were entered into a group advisory sessions were valid agreements for the purpose of settling equal pay claims.

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

## 15 Compensation and injury to feelings

If a claimant is successful, they will be entitled to:

- An equality clause inserted into their contract of employment to ensure they get the same pay and terms and conditions of employment as their comparator.

- Back pay from the date of lodging the Tribunal application to the date of the insertion of the equality clause into their contract up to a maximum of six years (five in Scotland).

- Interest on back pay.

**Injury to feelings**

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

Employment Relations Unit
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