Fact Sheet on Equal Pay


- The concept of ‘pay’ normally connotes some tangible benefit, whether expressed in financial terms or otherwise. It does not extend to non-economic loss, such as injury to feelings. It can include under occupational pension schemes, severance payments, and one-off payments made by employers in recognition of special events.

- The EPA incorporates an equality clause into an employee's contract, which applies equally for the benefit of women and men.

- Any term in a contract of employment that purports to exclude or limit any provision of the EPA is unenforceable.

What does the EPA cover?

Discrimination

- Where a female employee receives less pay purely due to the fact of her/his sex, this will amount to direct discrimination. Even if a material factor is established the employer’s defence (see below) to an equal pay claim will fail in this instance.

Victimisation

- This occurs where an individual is treated less favourably than another individual whose circumstances are the same because s/he has taken action to assert their statutory rights or assisted a colleague with information in that regard under the EPA and that individual suffers a detriment, in that s/he:
  - brought proceedings against the discriminator under the EPA;
  - gave evidence or information in connection with proceedings brought by any person against the discriminator under the EPA; or
  - alleged that the discriminator or any other person has committed an act that (whether or not the allegation so states) would amount to a contravention of the EPA.

- Detriment means that the treatment is of a kind that a reasonable person would or might take the view that in all the circumstances s/he had been disadvantaged. An unjustified sense of grievance cannot amount to a detriment. It is not necessary to demonstrate some physical or economic consequence.

When does the EPA apply?

- The EPA applies to women and men of any age, including children.
The EPA applies to people who are "employees" in the sense required for some other employment rights, such as the right not to be unfairly dismissed, but also to other people who are engaged under a contract personally to execute work or labour.

The employee must be employed in Great Britain, though not necessarily work in Great Britain, in order for the EPA to apply.

The EPA will imply an equality clause into a woman's employment contract where the woman is employed on:

- "like work" with a woman in the same employment ie work that is the same or broadly similar in nature; or
- "work rated as equivalent" with that of a woman in the same employment ie different but graded as equivalent under a job evaluation scheme; or
- "work of equal value" to that of a woman in the same employment ie different but equal in terms of demands such as effort, skill and decision-making.

If one of the above conditions applies to a female employee, the equality clause will modify the employee’s contract of employment to ensure that it is no less favourable than an employee of the opposite sex with a similar contract.

A woman cannot use the equality clause to claim that s/he is entitled to be paid more than an employee of the opposite sex, as it only applies to any less favourable terms.

Permitted comparator

- The comparator must be an actual female and not a hypothetical female.
- Both the employee and the female comparator must be employed at the same time.
- There must be a common employer (or an associated employer) and either a common workplace or, where the female comparator is at a different workplace, common terms and conditions of employment, which means that the terms and conditions must be substantially comparable on a broad basis.
- European law allows a comparator to be made between employees who do not work for the same employer but only where the differences in pay are attributable to a ‘common source’ and where a single body is responsible for and capable or remedying.
- The employee can compare him/herself with either a predecessor or successor.

Like work

- When considering like work a 2 stage test must be applied:
  - whether or not the work the female employee does is the same or broadly similar to the work her/comparator does;
  - whether the differences between the work they do are of any practical importance in relation to terms and conditions of employment. If the differences are insignificant, then the female employee will be regarded as being employed on like work for the purposes of the EPA.
- The employee must prove that s/he does the same work or work of a broadly similar nature. Conversely, the employer must show that the differences in terms and conditions of employment have practical importance.

Same or broadly similar work

- In deciding whether or not the work of a woman and her/comparator is the same or broadly similar there has to be a consideration of the type of work involved and the skill and knowledge required to do it.
In comparing the work of a wo/man and her/his comparator, the relevant test is to examine what they do in practice. It is irrelevant that the nature of their work is defined differently in their employment contracts or job descriptions if there is no real difference in what they do in practice.

**Work rated as equivalent**

- Under the EPA, a wo/man is regarded as being employed on work of equivalent value to her/his comparator if their jobs have been given equal value under a job evaluation scheme. The scheme is adequate if it is analytical and completed, it does not have to be acted upon by the employer.
- In order for a wo/man to rely on a job evaluation scheme to make an equal pay claim, the scheme must be a valid one. A valid scheme is one that has been accepted as a valid scheme by the parties to it.
- Under the EPA, a wo/man can also make an equal pay claim on the grounds that her/his work is rated as equivalent if her/his job would have been given an equal value with that of a member of the opposite sex but for the fact that the job evaluation scheme was discriminatory.

**Work of equal value**

- The key point about equal value is that jobs, which at first sight may be very different, can turn out to be of equal value when analysed in terms of the demands made on the employee. The key is not to assume that jobs that are of different types (e.g., manual and administrative) cannot be of equal value.
- Comparing jobs on the basis of equal value means jobs that are entirely different in their nature can be used as the basis for equal pay claims. Job comparisons can be made both within a particular pay/grading structure and between different structures or departments. Equal value is likely to be relevant where men and women are in the same employment but do different types of work.
- An employee can only bring a claim for equal pay on the ground that her/his work is of equal value to her/his comparator provided that her/his chosen comparator is not employed on like work or work rated as equivalent.
- A wo/man is also effectively debarred from bringing an equal value claim where her/his work and that of her/his comparator have been given different values under a valid non-discriminatory job evaluation scheme.
- The employee must demonstrate that s/he has reasonable grounds for claiming that her/his work is of equal value. If an employer seeks to defend the employee’s claim, a tribunal will normally commission an independent expert who will evaluate the jobs, and the tribunal will make a decision based on this. However, the tribunal can now determine whether the comparable jobs are of equal value without first obtaining a report where that decision is supported by a job evaluation study (see below on New Law on Procedure). The parties are free to commission their own independent reports.

**Employer’s defence**

- If an employee establishes that s/he is paid less than a person of the opposite sex employed on like work, work rated as equivalent, or work of equal value, there is a presumption of discrimination.
- Once there is a presumption of discrimination, the employer will have a defence to an equal pay claim if it can establish that the difference in pay is due to a genuine material factor other than sex.
The requirement of genuineness

- The requirement of genuineness is satisfied if the employer’s purported reason is not a sham or a pretence, e.g., extra pay for long service or additional qualifications could be justified.

The material factor

- The employer’s explanation for a difference in pay will constitute a material factor if it is significant and causally relevant.

- A difference in pay which is related to economic factors affecting the running of an employer’s business or factors related to administrative efficiency will be a material factor.

- Even if an employer can establish a material factor to justify the difference in pay, the defence will not succeed if the material factor is influenced by discrimination.

Procedure

- The purpose of the procedure is to streamline proceedings and avoid the lengthy delays previously characteristic of these claims by imposing a timetable for dealing with claims. The effect should be that proceedings where no independent expert is appointed will normally take 25 weeks and proceedings where an independent expert is appointed will take 37 weeks from the time of the claim.

- The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004 provide for the proceedings to be managed in 3 stages with “standard orders” being given at each stage encouraging the early exchange of relevant factual information, regulating the work of the independent expert and restricting the role of expert witnesses.

Expert evidence

- While the parties are free to commission their own independent expert reports an expert cannot be called without the permission of the tribunal and, under rule 11(6) of Schedule 6 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, where two or more parties want to submit expert evidence on a particular issue, the tribunal has the power to insist that a single joint expert be instructed. The joint expert will be selected by the tribunal if the parties cannot agree on who it should be. The new rules on procedure also provide that an expert’s overriding duty is to the tribunal, not the person from whom s/he has received instructions or by whom s/he is paid.

European law

- Article 141 of the Equal Pay Directive establishes the right to equal pay for equal work. In addition to the rights under the EPA, all employees can also rely on Article 141.

- Under the EPA, an employee can only bring an equal pay claim with regard to benefits s/he is entitled to under the employment contract.

- Under Article 141, pay means any benefit that the employee receives as a result of her employment. This includes not only wages, but also, e.g., sick pay, redundancy payments and compensation for unfair dismissal.

- Payment under occupational pension schemes constitutes “pay” within Article 141. Therefore individuals who are denied access to pension schemes come within the scope of the EPA and are entitled to make a claim.

- Article 141 takes precedence over anything in the EPA which is inconsistent with it and it disapplies any provisions of national law, which operate as a barrier or illegitimate restriction on the available remedy.
Under national law, a male comparator should be employed at the same time as the female employee. However, under Article 141, there is no requirement for contemporaneous employment and therefore an equal pay claim may arise where a woman is paid less than a man who was employed to do equal work prior to her employment.

Under Article 141, when considering whether or not a female employee is in the same employment as her comparator, a comparison can be made with other undertakings in the same sector or undertakings in a separate sector. This goes much further than the EPA, which only permits a comparison with an associated employer.

Questionnaires

Employees, workers and job applicants can question an employer regarding an act of discrimination. The response is admissible as evidence. The employer is not compelled to respond but inferences may be drawn if there is no response or it is vague. The response must be provided within 8 weeks to prevent inferences being made.

Remedies

Employees can claim for arrears of remuneration or damages. Normally an individual is not entitled to be awarded any payment in respect of a time earlier than 6 years before the date on which the proceedings were commenced. However, in certain circumstances the period can be longer.

Time limits

Any claim under the EPA must be brought before a tribunal during the woman’s employment or within 6 months (ie 6 months less 1 day) after the ‘qualifying date’. The time limit is a strict one and there is no discretion to extend time.

Ascertaining the correct qualifying date is not only necessary to ensure that an employment tribunal has jurisdiction to determine a claim, but can have significant consequences for the amount of compensation recovered by a successful claimant.

The determination of the qualifying date is dependent on the type of case being pursued and there are 4 different types.

Concealment case

This is where an employer deliberately concealed a qualifying fact.

Disability case

This is where the employee was under a disability at the relevant time.

Stable employment case

This is where the proceedings relate to a period during which a stable employment relationship subsists between the woman and the employer, which can include successive contracts, notwithstanding that the period includes any time after the ending of a contract of employment when no further contract of employment is in force.

In a stable employment case, the qualifying date is 6 months after the day on which the stable employment relationship ended.

Standard case

This is a case that does not fall within the definition of the 3 above.
In a standard case, the qualifying date is the date falling 6 months after the last day on which the wo/man was employed in the employment.

**Codes of practice**

- The Equality and Human Rights Commission’s [Code of Practice on Equal Pay](#) provides guidance and recommends good practice to employers with regard to pay practices.
- The Code recommends that employers should identify and eliminate any discriminatory elements in its pay systems and provides guidance on adopting an equal pay policy.
- The Code is not compulsory. However, it is advisable to follow the Code, as it is admissible as evidence in equal pay claims.

**PLEASE NOTE**

The material contained in this fact sheet is provided for general purposes only and does not constitute legal or other professional advice. Appropriate legal advice should be sought for specific circumstances and before action is taken.

**FOR MORE INFORMATION**

If you have any questions about anything in this Fact Sheet, or for advice about employment law generally, please contact [Marc Jones](#) on [01895 201719](#), or email [marc.jones@turbervilles.co.uk](mailto:marc.jones@turbervilles.co.uk).

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