Office of Manpower Economics

Discrimination Law and Pay Systems

March 2013
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1. **Scope and Executive Summary**

**Purpose and Scope**

1.1. This report for the Office of Manpower Economics (OME) on Discrimination Law and Equal Pay provides the legal context, overview of the legal framework, examples of recent case law and the implications for organisations in setting pay policy and pay systems.

1.2. The objectives of the report are:

- to inform Review Body members and OME staff on recent developments in the case and other law relating to equal pay and discrimination with regard to pay, enabling them to fulfil their remits to have regard to equality legislation.

- to increase understanding of Review Body members and OME staff of how developments in equal pay case law might affect public sector pay structures and pay determination.

1.3. Discrimination and equal pay issues remain key matters for employers to address. Public sector employers have specific duties under the Equality Act 2010 (the Act) and are subject to additional duties imposed by European legislation and case law. The recent changes in legislation, case law (both in the UK and Europe) and Government policy regarding discrimination and equal pay law mean that this is an opportune time to review current pay structures and policies to ensure continuing compliance with equality legislation.

**Executive Summary**

1.4. The underlying principle of a complicated legal framework is that pay and reward structures should not be discriminatory in their approach or application.

1.5. From an equal pay perspective:

- men and women performing work of “equal value” should receive equal pay;

- the breadth of the comparison is significant. A term by term comparison of contractual elements of pay can be made, with the potential for comparisons across sites and, under the European provisions, potentially across employers (although as we note in the report single source comparisons are difficult to successfully make);

- any gaps in pay must be objectively justified; and

- in the absence of such objective justification potential liability for the differences in pay (up to 6 years) and equalisation moving forward.

1.6. From a discrimination perspective:

- pay and reward systems must not be applied in a discriminatory way;

- potential for discrimination arises if detriment is suffered due to a protected characteristic; and
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• if successful can result in liability for uncapped awards of compensation.

1.7. Equal Pay - If it is accepted that employees are doing work of equal value, the critical issue for employers will be the extent to which any gaps in pay can be legally justified. Whilst the availability of any objective justification will be very fact specific, the following guidelines are apparent from the case law:-

• **The application of performance pay** - Performance can be an objective justification for a gap in pay. Critically, however, to be effective the performance appraisal and management system must be robust both in the way that it is designed and the way it is applied.

• **Market Forces** - Market forces due to a skills shortage or market changes in the rates of pay can be a valid objective justification. Employers will need evidence of the market forces necessitating the additional pay. The nature of that “evidence” would depend on the particular circumstances. A robust recruitment process which assesses the current market rate by collating pay data and benchmarking salaries on a regular basis would be best practice.

• **Red circling** - Provided that the reason behind the red circling is not discriminatory, it can be an objective justification for a gap in pay (for example when following a reorganisation or TUPE transfer). The reason for the red circling should be reviewed periodically and will not justify a gap in pay indefinitely. There is no prescriptive time limit on the justification as it will be very fact specific. Employers should be mindful of events that give an opportunity to address any inequalities in pay. A failure to act and simply rely on the red circling can result in later difficulties and challenge.

• **Skills and Experience** - Skills and experience are potentially valid objective justifications but should be reviewed regularly. However, they must be necessary for the particular role in question. They will also not justify a gap indefinitely. Over a period of time employees will be deemed to be experienced in the role and not adding any more value which might justify the gap.

1.8. **Sex and Age Discrimination** - issues can often arise in incremental pay scales. Current issues are:

• Shorter pay scales accurately reflecting the time needed to be fully skilled in role are preferable.

• Requirements for progression such as qualifications or experience should be examined carefully to ensure necessary for the role in question.

• The impact of the promotion process should be reviewed to ensure that this is being applied fairly.

1.9. In contrast to the other protected characteristics, it is possible to objectively justify direct age discrimination. To succeed an employer must demonstrate that it was fulfilling a particular business need and that the treatment in question achieved that aim (examples have been held to include, rewarding loyalty and service, facilitating planning, and motivation). Assumptions that longer
service or experience automatically justify a higher rate of pay should be avoided; supporting evidence will be required. Whilst recent decisions have recognised that cost issues and savings can be important factors, cost on its own will not be sufficient to justify age discrimination.

1.10. There are a number of anticipated developments which will necessitate employers taking more proactive action in all issues surrounding pay. The proposal to give additional powers to employment tribunals to order pay audits and publish results to the workforce will be significant. Case law developments and the outcome of the review of the Public Sector Equality Duty will continue to add meaningful insights on how the Act applies in practice.
2. **Legal framework**

2.1. Issues of equal pay and discrimination are governed by a combination of European and UK legislation, Statutory Codes of Practice and case law. In England, Scotland and Wales, the Act is the governing domestic legislation. The Act does not apply in NI although similar provisions are in force. We have focussed in this report on the provisions of the Act. Whilst the legal framework may appear to be complex, the underlying objective is that a pay or reward system should be fair, transparent and not treat one group less favourably than another.

2.2. In sections 3 and 4 of this report we consider the practical application of the Act to issues of pay and reward. As we illustrate below, the legal framework makes a clear distinction between:

- *Equal Pay claims* - which relate to the “terms” in the contract of employment; and
- *Discrimination claims* - which broadly arise as a result of the way in which pay schemes are applied and operated.

2.3. Whilst the legislation makes this distinction, from a practical and people perspective the issues are very often interlinked with claims being brought under both regimes. The critical issue remains to ensure that pay and reward systems are fair, free from bias and discrimination. The legal framework is illustrated on the following page. The Act prohibits discrimination on a variety of protected characteristics. However, for the purpose of this report, we have focussed on equal pay and the protected characteristics of sex and age.

2.4. It is important to note that equal pay case law has established that the objective of the legislative framework is to ensure that there are no pay inequalities arising from either direct or indirect discrimination on the grounds of sex. Broader and more general inequality or fairness issues may be important to employers when considering issues such as employee engagement (and can give rise to other claims such as unfair dismissal and wrongful dismissal) but these have not been addressed in this report.

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**European Law**

**Article 157 TFEU**

**EU Equal Treatment Directive**

- The principle of equal pay for equal work is enshrined in Article 157 of the Treaty on the Functioning of the European Union. It sets out the principle that “men and women should receive equal pay for equal work or work of equal value”.

- Article 157 can have significant practical implications in the UK. It has direct effect and can be relied upon by individuals whether their employer is a public body or private organisation. UK law must be interpreted in accordance with its provisions. Ordinarily employees achieve this by bringing their claim under the UK provisions but argue that these have to be interpreted in accordance with Article 157 provisions.

- As we note in this report there are some critical differences between the provisions in Article 157 and the Act, both in terms of scope and interpretation. We have highlighted these in the relevant sections below.

**UK Legislation**

**Equality Act 2010 (the Act)**

This is the key statutory discrimination provision in the UK and incorporates Article 157 into national law. Effective from October 2010, the Act governs both:

- Equal Pay; and
- Discrimination - providing protection from discrimination in the workplace because of a “protected characteristic” (these include sex, race, age, disability, marriage and civil partnership, pregnancy and maternity, religion or belief, gender reassignment and sexual orientation).

**Statutory Codes of Practice**

**Statutory Code of Practice on Equal Pay**

**Statutory Code of Practice in Employment**

The two statutory codes of practice were introduced pursuant to the Act and set out practical guidance for both employers and employees on the application of the Act. Whilst not legally binding they will be actively considered by the courts and tribunals.

**Case Law**

Underpinning the application of the legislative framework is a body of case law which can be binding on subsequent courts and tribunals. The tribunals will therefore consider the previous decisions of the courts and tribunals both in the UK and the ECJ.

**Public Sector Equality Duty**

- The general Public Sector Equality Duty was introduced in 2011. This requires public authorities to take a proactive approach to discrimination issues and provides that authorities are required to have due regard to the following when exercising this duty:

  o Eliminating conduct that is prohibited by the Act, including breaches of non-discrimination rules in occupational pension schemes and equality clauses or rules;
  o Advancing equality of opportunity between those who share a protected characteristic and people who do not share it; and
  o Fostering good relations between those who share a protected characteristic and those who do not share it.

- The Government announced in May 2012 that it was reviewing the Public Sector Equality Duty to see if it is operating in the way it was intended. The review is due to be completed by April 2013. Pending this we suggest that public sector employers continue to operate a proactive approach to discrimination issues, providing support to associated organisations as to how to apply this in the context of pay and reward. We consider some best practice recommendations at section 9 below.
### 3. Equal pay on a page

**The Act** brought together all of the statutory provisions relating to discrimination and equal pay, repealing and replacing all the previous legislation. It provides that men and women should have “equal pay” if they perform “equal work”. The law considers work to be equal if it is “like work, work rated as equivalent or work of equal value”. It achieves this by implying into the contract of employment a “sex equality clause” and by modifying the specific contractual term so that it is equal to that of the comparator.

#### What is “pay”?

Pay is not just basic salary but refers to any contractual entitlement.

This would therefore cover contractual entitlements such as:

- Base pay
- Shift allowance
- Contractual bonus payments
- Sick pay
- Holiday entitlement and pay
- Pension

#### Who is the comparator?

The comparator must be:

- Someone of the opposite sex
- Current or previous employee
- Must be actual, not hypothetical

The comparators do not have to work at the same place. However, under the domestic regime they must have the same employer (or an associated one) and either work at the same “establishment” or if they work at a different “establishment” there must be common terms and conditions.

#### How is “like work”, “work rated as equivalent” or work of equal value assessed?

In essence:

“like work” is work which is “the same or broadly similar”.

“work rated as equivalent” is a claim which would arise from a job evaluation scheme.

“work of equal value” is potentially very broad and perhaps more difficult in practice to visualise. This is work which whilst not similar, is equal in terms of the “demands made” on both individuals when considering things such as effort and skill.

#### What is compared?

A comparison is not made of the total remuneration package. Critically each term of the contract can potentially be compared and, for example, the fact that the woman may receive a higher base pay does not prevent her claiming that she should be paid an allowance which is only paid to the man.

#### Must organisations always pay the same?

The law does allow for differences in pay if they are because of a “material factor” which does not relate to the individual’s sex.

Typical examples of material factors include, skills and experience, performance, location, and market forces.

#### Issues to note

Must consider all contractual reward—not just base pay;

Term by term comparison - each term of the contract is considered;

No defence to value the overall package.

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Potential Liability

Claims for equal pay can be brought in either the Employment Tribunal or the High Court. Claims in the Employment Tribunal can be brought whilst in employment or within 6 months from termination of employment. The recent case involving Birmingham City Council confirmed that claims in the High Court can now be made up to 6 years following termination of employment. If successful, an Employment Tribunal (and the High Court) can make a declaration that the terms should be equalised going forward and can order arrears of damages. There is no maximum award of damages and it is the sum to reflect the difference in “pay” for up to 6 years.

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2 Birmingham City Council v Abdulla and others [2012] UKSC 47 (Supreme Court)
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4. Discrimination law on a page

The Act brought together and harmonised all of the statutory legislation in relation to discrimination. It consolidated the concepts of “prohibited conduct” and “protected characteristics”.

<table>
<thead>
<tr>
<th>Prohibited Conduct</th>
<th>Protected Characteristics</th>
<th>Potential Claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Direct discrimination</td>
<td>• Sex</td>
<td>Claims are brought in the Employment Tribunal.</td>
</tr>
<tr>
<td>• Indirect discrimination</td>
<td>• Race</td>
<td>Compensation may be awarded in successful claims to reflect losses and injury to feelings. There is no maximum award of compensation, although awards are referable to an employee’s economic loss.</td>
</tr>
<tr>
<td>• Victimisation</td>
<td>• Age</td>
<td></td>
</tr>
<tr>
<td>• Harassment</td>
<td>• Religion or belief</td>
<td></td>
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<tr>
<td>• Association and perception</td>
<td>• Sexual orientation</td>
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<tr>
<td>• Inciting and causing</td>
<td>• Pregnancy/maternity</td>
<td></td>
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<td></td>
<td>• Marriage/civil partnership</td>
<td></td>
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<tr>
<td></td>
<td>• Disability</td>
<td></td>
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<tr>
<td></td>
<td>• Gender reassignment</td>
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</tbody>
</table>

How is this relevant to pay and reward?

Issues of discrimination can arise in the context of pay and reward in a number of ways.

Claims of sex discrimination might arise in relation to:

- Genuinely discretionary payments which would not fall within the equal pay provisions in the Act, such as variable bonus schemes
- Allegations in relation to progression through pay bandings
- Application of pay freezes and red circling
- Access to and provision of non contractual benefits
- Opportunities for promotion
- Treatment of maternity returners

Claims of age discrimination might arise in relation to:

- Rewards/ additional payments to reflect length of service
- Differences in pay scales for new and existing staff
- Pay protection and salary freezes

Section 71 of the Act - Direct Sex Discrimination

The new wording in section 71 potentially broadens the scope for bringing direct sex discrimination claims in respect of contractual pay issues.

It states that “equal pay” claims which would normally have to be brought under the equal pay regime may be held to be direct sex discrimination if the introduction of an “equality clause” would have no effect and not address the issue.

This potentially enables employees to bring claims on the basis of a hypothetical comparator. For example: An employer tells a female employee, ‘I would pay you more if you were a man’. If there is no male comparator the woman cannot bring an equal pay claim but she may bring a claim of direct sex discrimination against the employer.
5. The practical application of the Act

5.1. The Act consolidated all of the previous statutory provisions regarding equal pay and all other strands of discrimination law. It is the governing statute in England, Scotland and Wales and in most respects it replaced the provisions contained in the Equal Pay Act 1970, with broadly similar terms.

5.2. Whilst the underlying objective of the legislation may be the same, the legal framework makes a very clear distinction between claims of equal pay and those of discrimination.

The Act provides that:

- Claims that concern contractual terms in relation to “pay” (see section 5.6 below) are “equal pay claims”; and
- Claims in respect of how those terms are applied, are “sex discrimination claims”.

5.3. As a result of that distinction, it is necessary to consider where issues of discrimination might arise and where these may be different to issues of equal pay. We consider these in more detail at section 6 below.

5.4. Practically, the critical issue is therefore to seek to ensure as far as possible that pay decisions are fair, free from bias and discrimination. In practice this means that any differences in pay and treatment are carefully considered and capable of justification within the relevant legal framework. For example:

- Pay rises should be awarded fairly – any differences should be potentially justified legally
- Performance related pay – different bonus awards should have a legitimate rationale
- Where there are different levels of pay for two roles in the same job band – there should be a permitted rationale
- Allowances – the roles that are eligible for allowances should be justifiable on the basis of the nature of the role

5.5. We consider below how the legal framework addresses these issues.

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4 We note below any particular differences. As noted above, the Act does not apply in NI.
5.6. *The Equal Pay regime*

As illustrated in our “equal pay on a page” the key practical questions are:

- How do you choose a comparator?
- What is compared?
- What do we mean by “like work”, “work rated as equivalent”, or “work of equal value”?
- Are there any defences?

We consider each of these below.

**Comparator**

- **How do you choose a comparator for an equal pay claim?**

The key principles are that the comparator:

- Must be someone of the opposite sex;
- Must be an actual and not a hypothetical employee (except for a direct sex discrimination claim under section 71);
- Must be a current or previous employee; and
- Must have the same employer and either work at the same establishment or if they work at a different one, there must be common terms and conditions (or a single source under A157).

- **Some practical issues that often arise relate to:**

  - Who chooses the comparator?
  - Can there be more than one?
  - Can a comparison be made with successors and predecessors?
  - Do they have to be working at the same place?
  - What is an “establishment”?

- **Who chooses the comparator?**

Subject to the above principles, a woman claiming equal pay is entitled to select the comparator of her choice. The fact that an employer is able to point to another man who is
doing the same job as her and paid the same, would not prevent the woman pursuing a claim using a different comparator.\(^5\)

- **Can there be more than one comparator?**
  
  Again subject to the above principles, it is possible to choose several comparators and this may be particularly important to claims of “equal value” where the claimant is unable to rely on an analytical job evaluation (see section 5.8 below).

- **Can a comparison be made with successors and predecessors?**
  
  The Act has attempted to resolve some of the debate which existed under the Equal Pay Act 1970 as to whether successors and predecessors can be comparators. It expressly provides that a comparator’s work need not be contemporaneous with the claimant. This broad wording suggests that potentially both a predecessor and a successor could be a comparator.

  The position is clear in relation to a predecessor in role. Case law in Bewley has established that a woman can use her predecessor as a comparator, although she is limited to making a comparison with the terms and conditions that existed at the time of the predecessor’s termination. She is not entitled to claim in respect of speculative pay rises that he may subsequently have received.\(^6\)

  The position is not as clear in relation to successors. The Bewley decision referred to above would seem to be authority for the fact that a woman cannot use a successor as a comparator for a basic equal pay claim. Whilst this case considered the provisions of the old Equal Pay Act, as the key basis for the decision was the European Directive, it is thought that the same approach would now apply under the Act.

  Practically, however given the potential additional scope for direct sex discrimination claims (under section 71(2) of the Act (see above)) to be made in respect of successors in role, we suggest that employers should consider why a successor should be appointed on a higher salary. This is best practice and matters such as experience or market forces might be acceptable explanations for the differential. We recommend that this should be actively considered at the time of appointment.

- **Does the comparator have to be working at the same place?**

  This is a particularly important issue. The general principle is that the comparator does not have to be working at the same place as the claimant. The test is that the claimant and her

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5 Pickstone – v – Freemans Plc 1988 ICR 697HL (HL)

6 Walton Centre for Neurology and Neuro-Surgery NHS Trust – v – Bewley 2008 ICR 1047 (EAT)
comparator must be, or have been, in the “same employment”\(^7\).

They are in the “same employment” if they are employed by the same employer, or by associated employers;

- at the “same establishment”; or

- at “different establishments” where “common terms” apply (either generally or specifically between the two parties).

It is important to note that if the claimant and comparator are employed at the same “establishment” it is not necessary to consider whether common terms apply. Indeed, that is also the case if the employees are employed by associated employers at the same establishment. In those circumstances, a comparison can be made without further consideration.

- **Who is the employer or associated employer?**

  The Act provides that an employer is “associated” if one company directly has control over the other or if both are companies of which a third person (directly or indirectly) has control. A broader definition is applied under EU law which allows comparisons to be made between workers in “the same establishment or service” where terms and conditions are attributable to a single source. We consider this in more detail below.

- **The key question - what is an “establishment”?**

  This is the critical question and is one that can only be properly answered when all the issues detailed below have been considered. Historically, the courts have been undecided as to what amounts to an establishment and have reached some inconsistent decisions which have made it very difficult in practice for employers. What is clear is that “establishment” is not limited to a single physical location although there have been conflicting decisions as to how widely it may be interpreted.

  The recent decision of *City of Edinburgh Council – v – Wilkinson and others 2012 IRLR 202*\(^8\) has provided helpful guidance. This case concerned 52 equal pay claims from women employed by the council in a variety of roles in schools, hostels, libraries and social work. They claimed equal pay with a group of male employees who whilst also employed by the council worked at different places carrying out roles such as road workers, refuse collectors, .

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\(^7\) Section 79(4) Equality Act 2010

\(^8\) *City of Edinburgh Council – v – Wilkinson and others 2012 IRLR 202* (see annex 1) (Court of Session)
gardeners and grave diggers. The court had to consider initially whether the two groups were employed at one establishment. When considering the critical issue of “what is the establishment”, it decided that the focus should be on the place of work. Whilst confirming that an “establishment” will depend on the particular facts, the court provided some very helpful examples:

- It noted that whilst a laboratory assistant may work at a particular bench, in a particular building, the “establishment” in those circumstances would be the university campus.
- It also commented that a school within an education authority would be an “establishment” in its own right, regardless of the fact that the education authority may hold central management powers. In that situation each school would be a particular establishment, not the education authority as a whole.
- The court also commented that a mobility clause in a contract did not mean that the locations covered by the mobility clause should be considered as one establishment. In that situation, there would be many different “establishments”. For example, it considered an employee whose role involved him leaving a base, such as a headquarters, in order to visit various locations as part of the role. In that situation, the base would be the “establishment” at which the employee was employed.

The approach taken in Wilkinson to focus on the place of work and not focus on issues of central control was confirmed in another case in the education sector9. This case concerned the definition of “establishment” under the collective consultation obligations and reached a similar conclusion that the issue on which to focus was the physical place of work.

Whilst the Wilkinson case provided some very helpful guidance, as we consider below it is also important to consider the potential for claims under Article 157. This does potentially have a wider scope particularly in relation to employment and pay decisions which are referable to a single source (see below).

- **What if the comparators work at different places?**

  If the comparators are employed at different establishments it is then necessary to consider if “common terms”10 are observed either generally or between the two specific comparators.

  The wording at section 79(4) of the Act is slightly different to the old provision under the Equal Pay Act which had reference to common terms for employees of the “relevant class”.

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9 Renfrewshire Council v Educational Institute of Scotland UKEATS/0018/12 (see annex) (EAT)

10 Section 79(4) of the Act
Much of the case law concerns the old Equal Pay Act and whilst the guidance to the Act expresses the view that this case law applies equally to the Act, it will be necessary to await further decisions of the courts and tribunals in respect of the new wording to see if in practice there is a change in approach.


- Common terms can be demonstrated where the claimant and comparators terms were determined under the same collective agreement\footnote{Leverton – v – Clywd Council 1989 IRLR 28 (HL)}.

- “Common terms” do not have to be identical, only broadly similar. This can be illustrated where there were common terms observed generally for most employees across the employer’s site\footnote{British Coal – v – Smith [1996] ICR 515 (HL)}.

- The fact that a particular group of employees, such as senior managers, had discrete terms which had not been harmonised to Whitley Council terms, did not prevent a tribunal from concluding that common terms and conditions were observed generally\footnote{North Cumbria Acute Hospital NHS Trust – v – Potter and others [2009] IRLR 176 (EAT)}.

- It is not necessary for there to be a hypothetical possibility of the chosen male comparator actually working at the claimant’s place of work in order for the common terms “relevant classes” test to be met\footnote{Dumfries and Galloway Council – v – North and others [2009] ICR 1363 (EAT)}. The court in Dumfries rejected this very narrow interpretation of the statute. It held that the correct test was for the claimant to demonstrate that, no matter how unlikely it was that the comparator would work at her establishment, if he did so he would remain on broadly the same terms and conditions of employment as other members of his “class of employee”.

EU law has a broader definition which allows comparisons to be made across different employers if the difference in pay can be said to be attributable to a “single source”.

In practice, this requires an employee to be able to show that there is a “single source” which is responsible for the continuing inequality in pay and which has the power to restore equal treatment\footnote{North Cumbria Acute Hospitals NHS Trust - v – Potter [2009] IRLR 176 (EAT)}. In the Potter case, although when the claims were brought by the nurses and
medical secretaries they (and the majority of their chosen comparators) were employed by the Trust, when their pay rates were set they were employed by a number of NHS bodies which predated the Trust’s formation. It was held that whilst the Trust had inherited the pay inequality, it had demonstrated its responsibility and power to restore equal treatment by carrying out a pay harmonisation shortly afterwards and therefore the pay was attributable to a “single source”.

Unfortunately, the ability to make a successful argument that a single source applies will be very fact specific which means that it is difficult to draw out guidelines to assist.

For example, comparisons have been permitted between teachers employed by different local authorities, where it was held that there was a single source as there was a statutory body which set pay levels for all Scottish teachers, irrespective of their employer17. That approach has been rejected in a case involving female support staff in voluntary aided schools and employed by the governing bodies who sought equality with male workers employed at different establishments by the council. In that case, it was not held that the local authority was the single source.18

The single source argument also failed in the case of Armstrong and Newcastle upon Tyne NHS Hospital Trust. This involved employees who were employed by the same Trust, although as a result of a number of mergers and outsourcing arrangements, at different hospitals19. The case concerned a local bonus scheme and whilst there was evidence that the Trust had centrally taken part in pay negotiations relating to both groups of workers, the final decisions had been made by the hospitals themselves. The court concluded that the groups were not in “the same employment” as they worked at different establishments at which common terms and conditions were not observed. It then considered whether there was a “single source”. The critical question was whether it was the Trust or the individual hospitals that were responsible for setting terms and conditions. The court held that there was no clear test - it was a question of fact and degree.

The Armstrong decision dealing with departmental bonuses was greatly influenced by an earlier decision which held that civil servants in one government department could not compare themselves with civil servants in another department, simply on the basis that they were all employed by the crown. Whilst this case was very fact specific with delegated powers

17 South Ayrshire Council – v – Morton 2002 IRLR 256 (Court of Session)

18 Dolphin and ors-v- Hartlepool Borough Council and ors [2009] IRLR 168 (EAT)

19 Armstrong – v – Newcastle Upon Tyne NHS Hospital Trust [2006] IRLR 124 (see appendix) (CA)
being given to DEFRA under statute, it was held that there was no “single source”\textsuperscript{20}. 

\textsuperscript{20} DEFRA-\textit{v-} Roberston and ors 2005 ICR (CA)
5.7. **What is “Pay” and what is compared?**

**Key issues**

- Employers need to consider all aspects of *contractual* pay. The Act covers more than “pay” – allowances, holiday, contractual bonuses, sick pay all potentially covered;

- It applies to each “term” of the contract;

- Not valued as a whole package - as such it is not possible to justify a difference in “pay” by claiming that the individual is not worse off overall; and

- Term by term comparison - as such each term of the contract is considered.

When considering what is compared and what is “pay”, it is necessary to consider the differences under the various statutes. These are illustrated below.

<table>
<thead>
<tr>
<th>What is pay?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Equal Pay Provisions of the Act</strong></td>
</tr>
<tr>
<td>Pay means “all <em>contractual terms</em> under which a person was employed whether concerned with pay or not”. This is not simply a case of looking at the document headed up “contract of employment”. Terms can be incorporated into the contract in a variety of ways.</td>
</tr>
<tr>
<td>To fall within the scope of the equal pay provisions in the Act, <strong>the pay benefit or facility must be part of or regulated by the contract of employment.</strong></td>
</tr>
</tbody>
</table>
In essence, to fall within the scope of the equal pay sections of the Act the pay, benefit or facility in question must be part of or regulated by the employee’s contract of employment. As such whilst most equal pay claims concern issues such as salary, commission and contractual bonus payments, the tribunals can and do hear complaints about matters such as holiday, access to sport and social facilities etc.

It is important to note that the “equality clause” operates in respect of each individual term in the contract of employment. As such, an equal pay claim is brought in respect of a particular term and cannot be defeated simply by valuing the overall reward package. The courts have clearly stated that contractual provisions relating to, for example, pay, holiday, bonus, company car etc cannot be grouped together as “pay” simply because they reflected the total remuneration for the role.

Whilst the right is to have equality in respect of each “term”, the courts have, however, sought to limit the claimant’s ability to “cherry pick” terms and comparators. In the case of Degnan it held that a fixed bonus and an attendance allowance were one single “term” dealing with basic pay. The claimant was therefore not allowed to pick a comparator who had a higher “allowance” and a different comparator who had a higher “bonus” and seek equality in respect of each. Subsequent case law has held that Degnan did not set a binding principle and that much would depend on the particular circumstances of the case. The case of Brownbill concerned an enhanced payment for working unsocial hours. Even though the unsocial hours formed part of the normal working hours, the court held that payments for these were not part of the same term relating to basic pay. We would suggest that if the bonus was not for a fixed sum (as in the Degnan case) but was a performance driven bonus a different approach is likely and these would not be held to be one single “term”.

The different interpretations of “pay” under the National and European provisions noted above raise practical questions for individuals bringing their complaints. The courts have confirmed in those circumstances that the claimant brings her claim on the basis of the domestic legislation but bases her case on the argument that the Act is to be read subject to the broader concept of pay required by Article 157. On that basis, it is clearly important for employers to be aware of the broader definition of “pay” under Article 157.

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21 Hayward – v – Cammell Laird Ship Builders Ltd 1988 ICR 464 (appendix) (HL)
22 Hayward – v – Cammell Laird Ship Builders Ltd 1988 ICR 464 (HL)
23 Degnan and others – v – Redcar and Cleveland Borough Council [2005] EW CA Civ 726 (CA)
25 Biggs – v – Somerset County Council 1996 IRLR (EAT)
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- Our experience would suggest that “pay” might include allowances such as meal subsidy, overtime, standby allowance, call-out/attendance allowance, and allowances relating to difficult circumstances such as adverse weather and shift premiums.

- In light of the above, we comment below on what “pay” may be compared and how:

  o **Contractual pay and wages** - contractual payments under the contract are clearly covered by the equal pay provisions of the Act. Allowances, as described above, would be covered by the equal pay provisions of the Act if they are “contractual”. It is important to note that this is not just limited to those set out in an employee’s “contract of employment”- the true nature of the payment must be considered.

  o **Bonus and share options** – if they are a contractual entitlement under the contract, then bonus and share options can be compared for equal pay purposes under the Act. The courts have confirmed that in deciding whether or not a bonus scheme is “contractual” (and therefore capable of comparison) it will look to the true nature of the scheme not just the labels given to it\(^{26}\). The fact that a scheme is labelled “discretionary” will not be the deciding factor. The courts focus on the practical application of the scheme, behind the labels and consider the real status. As such, if the reality is that a bonus or payment is made year on year for the same amount, it is much more likely to be held to be “contractual”.

  o **Pay increases** – in practice, once again, the key issue will be whether or not the pay increase forms part of the contract of employment. Pay progression systems can raise a number of potential issues. Contractual pay progression systems fall within the equal pay provisions of the Act. In a case involving the Home Office, which primarily concerned the impact of job evaluation schemes and the steps necessary to establish a material factor defence, an equal pay claim was successful where the claimants and the male comparators, who worked in the same prison, were subject to different contractual pay progression systems. Progression for women was dependent on performance rating whereas the male comparators received guaranteed pay increments\(^{27}\). This contractual scheme was held to fall within the equal pay provisions.

By contrast, where a pay progression complaint is linked to how the scheme has been applied, for example claiming that the employer did not progress women through the scheme at the same rate as men, the claim would be of sex discrimination (further analysis see section 6 below). The allegation in these circumstances would be in relation

\(^{26}\) Hoyland – v – Asda Stores 2006 (Court of Session)

\(^{27}\) Home Office – v – Bailey 2005 ICR 1057 (see annex) (CA)
to the way in which the policy was applied to women.

Under Article 157, the key issue will be whether or not the increase in level of pay occurs as a result of an automatic increase. In that situation this would constitute “pay” and fall within the principle of equal pay for equal work28.

- **Sick Pay** - contractual sick pay provisions will fall within the equal pay provisions of the Act. Following rulings of the European Court of Justice (ECJ)29, the same is true of statutory sick pay.

- **Redundancy, termination and unfair dismissal payments** - contractual redundancy payments fall within the equal pay provisions of the Act. Again, we expect that the courts would consider the nature of the payments rather than the label given. As a result of numerous rulings of the ECJ, it would also appear that non-contractual redundancy payments constitute “pay” under Article 157 despite the fact that these are received at the end of the employment. The same approach has been taken with regards to unfair dismissal compensation30. The court held in that case that unfair dismissal compensation is “pay” for these purposes as it is intended to give the employee what he would have earned had he not been unlawfully terminated. As such, if these payments can be attributed to ‘one source’ then a claim could be brought under Article 157. Interestingly, there is as yet no conclusive authority on whether pay in lieu of notice is “pay” for the purposes of Article 15731.

- **Pensions** – There has been considerable debate as to whether pension payments are social security payments (in which case not covered by Article 157 or the Act) or payments because of the employment relationship and as such covered. ECJ case law has established that a public sector pension scheme falls within the scope of equal pay if the benefits payable under the scheme are paid because of the employment relationship. The court has upheld a broad ‘employment related’ test32. The relationship between pensions, equal pay and age discrimination is complex and should be assessed on the facts of each case as potential pension specific defences and exceptions exist.

28 *Hall and another v Revenue Commissioners and anor* 1999 ICR 48 (ECJ)

29 *Kuhn v FWW Spezial- Gebäudereinigung GmbH and Co KG* 1989 IRLR 493 (ECJ)

30 *R v Secretary of State for Employment, ex parte Seymour-Smith and another* 1999 ICR 447 (ECJ)

31 *Clarke v Secretary of State for Employment* 1997 ICR 64 (CA)

32 *Bestuur van het Algemeen Burgerlijk Pensioenfonds v Beune* [1995 IRLR] 103 (ECJ)
5.8. **What is “Like Work”, “Work rated as equivalent” and “Work of Equal Value”?**

- As we note above, the law provides that men and women should receive equal pay if they are doing “like work, work rated as equivalent or work of equal value”. We consider below what this means in practice.

- **What is 'Like Work’**

  Two areas to consider:

  - The claimant’s work must be the same or if not the same, “broadly similar” to the comparator; and
  - Any differences must not be of “practical importance” in relation to terms and conditions of employment (section 65(2) of the Act).

- How is this assessed in practice?
  
  - There is clearly no requirement for the roles to be identical and tribunals have confirmed that the correct approach involves a general consideration of the work and skills required.
  
  - It is for the employer to show that there are differences of practical importance in the work actually performed.
  
  - When considering any differences in the roles tribunals are directed to consider (section 65(3) of the Act):
    
    - Frequency with which differences occur; and
    - Nature and extent of the differences.

- We consider below some examples of what might be considered to be differences of “practical importance”. The decisions clearly demonstrate that the focus is on how important the differences are in what the employee actually does, rather than what that they might theoretically be required to do under the contract of employment. It follows that unless enforced, job descriptions and job specifications may be of little importance if they do not reflect what happens in practice.

- It is important to note that even where work is held to be “like work” it is still open to the employer to justify any gap because of a “material factor” and we consider that defence further in section 5.11 below.

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33 *Capper Pass Ltd v Allan [1980] ICR194 (EAT)*
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- Examples of differences and when they may impact “like work” are considered below:
  
  o **Differing or additional duties** – potentially these can be relevant although much will depend on what happens in practice; a mere contractual obligation to do additional duties will not be sufficient. The key will be the frequency with which those additional duties are in practice performed. A primary school school administrator was held not to be completing “like work” with a secondary school administrator. The crucial difference in their roles was that as the sole administrator in a small primary school the claimant had to carry out routine tasks which involved her being on duty at the school throughout the day during term time. By contrast, her comparator had a more strategic role, in a much larger school, spending time on matters which were less term time related and more apt to year round work. These duties were held to be sufficiently different that the court held that they were not carrying out “like work”34.

  o **Time when work is carried out** – on its own the time at which work is carried out will not defeat a claim for “like work”. As a result, women quality control inspectors who worked day shifts were found to be entitled to the same basic pay or day shift premium as their male counterparts, who were also obliged to work nights and some Sundays. Similar reasoning was held where canteen workers on day shift claimed equal pay for doing “like work” with male comparators working exclusively on a night shift35. Even if a “like work” argument succeeds it is still possible to defend an equal pay claim by objectively justifying the difference in pay. We consider the material factor defence in detail below and it is possible that a payment to reflect the inconvenience of a night shift might be a potential justification.

  o **Flexibility** - this is often unlikely to amount to a difference of practical importance to defeat a “like work” comparison. A case involving West Midlands Police36 demonstrates the interaction between the concept of “like work” and material factor defence. The claimants claimed that due to childcare responsibilities they were unable to work 24/7 and were therefore unable to claim “special priority payments”. The tribunal held that they were employed on like work; it found that “there were nothing of a substantive nature which occurs with such frequency or severity ....after 10pm such that a difference arises of practical importance to a night duty officers pay and conditions”. When considering the defence of material factor though it was accepted that the aim of the payment was to reward the flexibility of working nights and whilst fewer women could do so, the court

34 Morgan – v – Middlesbrough Borough Council 2005 EWCA SIV 1432 (CA)

35 Dugdale and ors-v- Kraft Foods Ltd 1977 ICR 48 (EAT)

36 Chief Constable of West Midlands Police v Blackburn and Manley UKEAT/0007/07 J. (see annex) (EAT)
accepted that it was an appropriate means of achieving a legitimate aim.

- **Responsibilities** – additional responsibilities can amount to a difference of practical importance. For example, additional obligations to supervise, take responsibility and control were properly taken into account when considering the difference between the duties of a female community worker responsible for setting up an adventure playground and those of a playgroup leader\(^{37}\).

Interestingly, greater geographical responsibility alone is unlikely to defeat a “like work” claim. In reaching the decision that a housing officer responsible for advising tenants living in a particular area of Birmingham, and her comparator who was a Welfare Advisor dealing with referrals from Occupational Therapists over the whole city of Birmingham were engaged on broadly similar work, the tribunal specifically rejected the argument that the comparator’s responsibilities were greater because he covered a wider geographical area\(^{38}\).

- **Skills** – skill levels can be an important consideration when deciding if the work is “like work” and the comparator’s additional skills can defeat a “like work” claim\(^{39}\). The EAT held that a role involving computers where the comparator’s work was more complex and required a greater understanding of clients’ applications was not like work\(^{40}\). Once again, skills may well be a material factor defence too.

- **Qualifications and training** – the key issue is whether professional qualifications may defeat a “like work” claim. The ECJ has held that where two groups of workers, psychologists and doctors, who may appear to be employed to do the same job, but are recruited on the basis of different training and can be asked to do different jobs because of that training, are not doing ‘same work’ for the purpose of Article 157. Whilst this would probably be the same approach for a “like work” claim, it is important to bear in mind the breadth of an equal value claim. Given the breadth of such a claim, it is possible that an initial comparison might be possible on a “value” basis. It would then be necessary to consider the material factor defence (see further below).

- **Claimant doing more work than comparator** - the fact that a woman does more work (i.e. has a larger role) than her male comparator will not prevent the woman successfully

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\(^{37}\) *Waddington – v – Leicester Council for Voluntary Service 1977 ICR (EAT)*

\(^{38}\) *Iqbal – v – Birmingham City Council (ET)*

\(^{39}\) *Brodie and another – v – Light Engineering Co Ltd 1976 IRLR 101 (ET)*

\(^{40}\) *Falconer – v – Campbell Lee Computer Services Ltd EAT 0045/04 (EAT)*
arguing that she does “like work”\textsuperscript{41}. In this case the claimant was comparing herself with her predecessor in role who was paid more than her. The employer tried to argue that because the claimant did not have a deputy (which her male comparator had when he undertook the role), she therefore did more work than him, and the roles were therefore not “like work”. The argument failed in this case although it may be possible to argue that a role is not “like work” if the comparator has a larger role than the claimant.

5.9. **What is work rated as equivalent?**

A woman can claim equal pay under the Act if she is employed on work that has been "rated as equivalent" to her work under a job evaluation study.

Section 65(4) of the Act states that A's work is rated as equivalent to B's if a job evaluation study:

- Gives an equal value to A's job and B's job in terms of the demands made on a worker (section 65(4)(a)); or
- Would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex specific system (section 65(4) (b)).

- The ability to pursue a claim under this part of the Act is dependent upon a job evaluation study having been undertaken. The Act does not specify the requirements that a job evaluation study must satisfy in order to support, or indeed defend, an equal pay claim. The person seeking to rely on the job evaluation study has the burden of showing that it satisfies the requirements which the courts have held to mean that a valid job evaluation study is one which is both “thorough in analysis” and “capable of impartial application”. An appendix to the EAT's decision in the case of Eaton Ltd v Nuttall\textsuperscript{42} sets out that the five main methods of job evaluation used in practice are as follows:
  - Points assessment
  - Factor comparison
  - Job ranking
  - Paired comparison
  - Job classification

The first two methods involve breaking the jobs down into component factors and are termed “analytical” evaluations. The remainder are “non analytical methods” which compare the jobs

\textsuperscript{41} Sita (UK) Ltd – v – Hope EAT 0787/04 (EAT)

\textsuperscript{42} Eaton Ltd v Nuttall 1977 ICR 272 (EAT)
as a whole, without breaking them into component factors.

- Job evaluation sets a framework in which to place a role in the hierarchy of the organisation and provides an analytical basis for assessing the required knowledge and skills, the responsibilities and the demands of each job. Where it is linked to reward, job evaluation can create a framework to assist decisions on pay so these are made as far as possible on an objective basis and help ensure that differences in pay between different roles can be objectively justified.

- In broad terms, job evaluation seeks to place a value on the size of a role by reference to a set of factors which will have a scale from top to bottom. These are designed to assess overall job weight. There are a number of schemes in use – but the common feature is that in using job evaluation, very different jobs can be compared based on a balanced set of criteria.

- It may mean for example that very technical roles will score highly on areas such as complexity or intellectual demand, but lower on interpersonal dimensions or people responsibilities. A customer facing role may reflect the reverse but the overall score may be the same.

- Once a rank order of jobs has been derived, from the smallest to the highest job, an equitable grade structure can be derived and mapped to pay. In some organisations, a job evaluation exercise may only evaluate a benchmark sample and therefore not every single role in the organisation is evaluated which means there is some degree of subjective assessment in the slotting process into grades.

- When roles change, they are typically re-evaluated to ensure that the new size is reflected. However, large scale job evaluation exercises are infrequent and often only take place when the organisation has gone through significant change. Individual re-evaluations will typically occur where there has been a change to the scope of a role.

- Although there may still be an element of subjectivity, organisations should be comfortable that analytical job evaluation schemes comply with the requirements laid down for job evaluation systems by the Equality and Human Rights Commission (EHRC) and hence are able to provide a robust defence against equal pay claims. Such a defence would be possible both in relation to a “job rated as equivalent” claim and also (as we note below) an “equal value” claim. In such circumstances the employer would argue that the scheme had rated the comparator job differently to that of the woman and therefore higher pay can be justified.

- Whilst there is no legal obligation to carry out a job evaluation study, their use has been encouraged by both the EHRC and also ACAS. Whilst a job evaluation study might provide a procedure enabling the employee to challenge the results, case law has held that tribunals are not permitted to go behind the results of an evaluation and substitute their own assessment in
the absence of discrimination or of a clear and fundamental mistake in the process.\(^{43}\)

- The requirement for the job evaluation to be thorough in analysis, and capable of impartial application as cited in the Eaton case is critical for it to be effective in order to help defence of equal pay claims. A recent case Russell and others v South Lanarkshire Council\(^{44}\) found that the job evaluation scheme used by the respondent could not be used to successfully defend the equal pay claims. The reason cited was around the robustness of the scheme as it did not measure all of the tasks that the claimants carried out. It was not capable of reflecting the demands of conducting more than one task at the same time and also did not take into account all of the evaluated tasks.

5.10. **What is work of “equal value”?**

The Act provides that a woman can claim equal pay with a man if she can show that her work is of “equal value”. This is work which is not “like work” or “work rated as equivalent”, but which is nevertheless equal “in terms of the demands made” when considering factors such as effort, skill and decision-making (section 65(6) of the Act).

A very broad definition is adopted of “value” and “demands”.

It is ultimately a decision for the tribunal.

- Potentially, this area is the one which causes the greatest difficulties for employers. The right to equal pay for work of “equal value” is broad and in essence exists where a woman can show that in terms of the demands made on her, for example, in relation to such things as skill, decision making and effort, her work is of “equal value” to that of a man in the same employment. As a result, “equal value” claims can be based on two, or more, jobs that may be entirely different. Often the only thing that the claimant and the comparator have in common is the identity of their employer, or associated employer or generic career band.

- In practice, the question of whether or not the jobs are of “equal value” for the purposes of the Act is ultimately a decision for the tribunal with or without the assistance of an independent expert. Experts vary in the ways in which they measure “equal value” although most adopt a points based system identifying factors such as experience, knowledge, initiative, physical effort, communication skills etc and awarding points for each factor, or for elements grouped

\(^{43}\) Greene-v-Broxtowe District Council 1977 ICR 241 (EAT)

\(^{44}\) Ms Russell and others v South Lanarkshire Council [ET S/107667/2005] [2012] (ET)
under a factor heading.

- The ECJ has provided some guidance on how to assess the respective “values” of different jobs. It noted in a case involving bank workers in Austria that it is a “qualitative” assessment, looking exclusively at the nature of the work actually performed. It commented that factors such as nature of the work, the training requirements and working conditions can be relevant. In the particular case, it felt that as the comparator was dealing with important customers and could enter into binding commitments his work was not of equal value to someone who was less client facing and had no such authority\textsuperscript{45}.

- A number of decisions in the courts have considered whether or not the work must be of precisely equal value. It would seem not, although whilst it is ultimately a decision for the tribunal it is clear that “equal value” does not in fact mean “nearly equal”. For example, a female speech therapist whose role an independent expert had scored at 54 points was able to compare herself, on an equal value basis, with somebody whose role had scored 56.5\textsuperscript{46}. By contrast, in another case it was held that it was not enough for the claimant to establish that the jobs were “substantially equal”\textsuperscript{47}. The “sex equality clause” only bites where the claimant and her comparators are employed on “equal work”. As such it is not possible to argue that a proportion of the job is comparable and claim a proportion of the comparator’s pay to reflect this. As we consider below, it might be possible however for a woman in those circumstances to bring a discrimination claim by virtue of section 71 of the Act.

- As we note above an effective way of blocking an equal value claim is to point to an existing job evaluation study that rates the work of the claimant and the comparator as being of unequal value. To be able to do so the evaluation must not be based on a discriminatory system and must not be otherwise unreliable.

5.11. \textit{Material Factor Defence}

- The law provides that men and women should receive equal pay if they are doing work of equal value, like work or work rated as equivalent. The key defence to a claim is if the employer can demonstrate that, on the balance of probabilities, the difference in pay is due to a material factor which does not itself discriminate either directly or indirectly on the grounds of sex.

- The challenge for employers is to be able to articulate the reason behind any differences in pay—what is the differentiator? This will differ depending on the particular case. For example, there may be a situation where, due to a skill shortage, different rates of pay have had to be applied.

\textsuperscript{45} \textit{Brunnhofer-v-Bank der oesterreichischen Postsparkass AG} 2001 IRLR 571 (ECJ)

\textsuperscript{46} \textit{Southampton and District Health Authority and another – v – Worsfold} EAT 598 (EAT)

\textsuperscript{47} \textit{Hovell – v – Ashford and St Peter’s Hospital NHS Trust} 2009 ICR 1545 (CA)
Provided that the reason behind this can be articulated, and that it is not itself discriminatory, this may be permissible under the legal framework.

- The steps necessary to establish this defence are set out in the decision tree below.
How to establish a material factor defence

Step 1
Are the men and women performing “like work” or “work rated as equivalent” or “work of equal value”?

Step 2
Is there a material factor (or material factors) which has caused the pay difference?

Step 3
Is this the real reason for the difference in pay and is it material i.e. significant and relevant?

Step 4
Is the material factor tainted by discrimination (i.e. potentially discriminatory)?

What additional issues need to be considered if the material factor seeking to explain the pay gap is potentially discriminatory?

(A) Indirect discrimination - no clear PCP
- If the statistics relating to the pay differential are so “clear as to speak for themselves”, claims for indirect discrimination may be made
- Same comparative exercise as detailed in (A) between the men and women who can comply with the PCP and those who cannot.
- Objective justification is potentially possible - see below

(B) Direct discrimination
- Is there direct or circumstantial evidence that the individual is paid less because of their gender

(C) Material factor defence fails in the event of direct or circumstantial evidence that the treatment is because of gender. It is not possible to objectively justify direct sex discrimination

Equality clause will be implied into the woman’s contract

Step 5
If it is tainted

Step 6
Is it possible to objectively justify the indirect discrimination? The three key questions are:

1. Does the potential discrimination correspond to a legitimate or real need on the part of the employer? Is there a business rationale for the pay decision reached? (Cost alone is unlikely to be considered sufficient)

2. Is the practice an appropriate and proportionate way of achieving the objective?

3. Are there any alternatives available to pursue business needs which are less discriminatory

Objective justification - successful defence: No equality clause will be implied into the women’s contract
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**Potential material factors**

1. **Market Forces**
   - Is the inequality in pay due to external market forces? This may arise:
     1. At appointment: for example where the particular skills required, the demands of a particular role or its location, necessitates an additional payment to attract or secure a candidate.
     2. During the course of employment, for example, because of a skills shortage or for retention purposes.
   - To be able to rely on this the employer must be able to show real evidence and be able to demonstrate a clear and transparent rationale to support the decision to pay the additional amount.
   - Market forces justifications will not apply indefinitely. As such, the validity of the differential should be monitored throughout the employment.

2. **Performance-related pay**
   - Is the inequality in pay attributable to a difference in performance? To be able to rely on this factor, the employer must be able to demonstrate that the difference in performance results from an assessment based on objective criteria and not as a result of subjective assessment by a line manager. Fair and unbiased application of the appraisal process is crucial.

3. **Experience**
   - Experience can justify a gap in pay. The experience can either be in terms of carrying out the role in question or experience gathered in another role (either in or outside of the organisation). The experience would need to be necessary for the role and adding value for the employee. Once again the “value added” must be monitored as in most roles there will come a point at which the individual is experienced and is adding no extra value.

4. **Length of service**
   - It may be possible to argue that the pay differential is due to length of service. However, the employer must be able to demonstrate that the longer service enables the comparator to perform the role more effectively.
   - Practically, it will be more difficult to rely on this factor in more junior or clerical and administrative roles (for example, roles that can be mastered within a few months/years) compared to senior or complex roles where length of service arguably enables an employee to perform the role more effectively.

5. **Responsibility and potential**
   - Responsibility may constitute a material factor justifying a pay differential. Careful consideration would need to be taken regarding the nature of the responsibility and the extent to which it is put into practice in the day to day role. Potential to progress may also be an objective justification, although this must be evidenced by a robust assessment process.

6. **Skills and qualifications**
   - Different skills and qualification can explain the difference in pay.
   - However, the skills must be relevant to the role and duties being considered. As such, the role does not require an individual to hold a particular qualification, a male comparator should not receive higher pay for holding that qualification compared to a female comparator who does not.

7. **Location**
   - Location can be a justification for a pay differential. For example, does the comparator earn more for carrying out the role in London compared to a female claimant in Scotland?

8. **Grading systems**
   - Is the reason for the difference in pay because a comparator has been assigned to a different grade, or at a different level within the same grade? This can be as a result of a fine adjustment of a JE scheme.

9. **Different pay structures**
   - The law does provide that different pay structures arising out of the provisions of a collective agreement can be a potential material factor defence.
   - Even if it can, this is not an absolute defence as a tribunal/court is likely to look at the negotiations that gave rise to the pay differential to ensure that there was no inherent sex discrimination (for example, part-time employees not being entitled to the same pay increments as full-time employees).

10. **Flexibility**
    - Potentially gaps which can be shown to exist as a result of a willingness to be flexible in terms of his working hours (for example, working at weekends), work arrangements, location of the role or job duties can be justified. This is potentially a difficult argument as flexibility may be tainted by discrimination as women are less likely to be able to work flexibly, for example, because of childcare responsibilities. Careful consideration of whether the flexibility is necessary for the role will need to be undertaken.

11. **Unsocial hours**
    - Gaps in pay can be justified when a higher rate of pay or a shift premium is paid because of the inconvenience of working unsocial hours. However, any higher rate of pay or enhanced premium should only be paid in respect of the unsocial hours (not ordinary basic rates of pay). In addition, as with ‘Flexibility’, any such premium paid or enhanced premium should only be paid in respect of the unsocial hours (not ordinary basic rates of pay). In addition, as with ‘Flexibility’, any such premium paid may well be tainted by discrimination given that women are less likely to be able to work these hours. As such, there needs to be careful consideration of whether the unsocial hours are necessary for the role.

12. **Productivity bonuses**
    - Is a specific payment or allowance made for carrying out a particular type of work? If so, employer must consider what reasons there are for other (lower paid) employees not receiving the same bonus.

13. **TUPE**
    - Is the reason for the difference in pay as the result of an individual becoming an employee as a result of the acquisition of a business from a third party company? If the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE) applied to the acquisition, there will be restrictions on amending terms and conditions in connection with a TUPE transfer in which case the employer may be able to rely on this factor as a defence to any inequality in pay. However, this factor will not be available indefinitely.

14. **Salary protection**
    - Is the reason for the difference because jobs have been regraded or because an employee has been moved from higher-paid to lower-paid work? Pay protection occurs to protect an employee, or a group of employees, from an immediate salary reduction for a period of time, for example, because of a re-grading exercise, redeployment as a result of redundancy or ill health. The validity of this factor shall need to be monitored.

15. **Mistake/administrative error**
    - Has the difference in pay arisen because of an administrative error (i.e. the comparator being put in a higher pay grade in error) or a mistake in calculation? If so, such a factor should only be considered a justification for a limited period or until the error/mistake has been noticed.
In practice, the employer must identify the factor behind the difference in pay and prove:

- it is the real reason;
- it is causative of the difference in pay;
- it is material – i.e. significant and relevant; and
- it does not involve direct or indirect discrimination (“sex tainted”).

The success of the material factor defence will depend on the particular facts of the case. There is no one specific factor which is determinative and the courts will look to the substantive cause.

Some potential justifications are set out in the diagram above and we comment on these further below:

- **Market forces**

  Market forces are relevant in a number of areas, for example:

  - Market forces impact on specific roles/skill sets;
  - Market forces impact on new/recent recruits;
  - Regional pressures; or
  - Roles where there are hazards, challenges or risks that command a pay premium.

  Market forces are capable of being a potential justification for a gap in pay. Case law recognises that there are occasions when a lack of particular skills in the market necessitates an additional level of pay being awarded. In the Rainey case⁴⁸, the House of Lords accepted that the need to attract a sufficient number of recruits within a short period of time constituted a material factor justifying the higher rate of pay paid to the comparator who was recruited from the private sector. Equally, if comparable organisations are driving up the market rate for a particular role, an employer might be able to justify a higher salary being paid in such competitive situations. Any differences in pay need to be applied without reference to gender and must be applied consistently in order for this material factor defence to succeed.

  The crucial issue for the employer is to be able to articulate the specific aspects of a role which lead to different rates of pay, despite the prima facie evidence of equal value. It may be that a market premium has been applied to certain roles of a similar value (but very different skill set) to others. This often applies in technical roles such as medical or IT where there is currently a scarcity of skills in the UK. There are particular hotspots in roles operating in the digital or e-commerce arena where there is market pressure leading to significant premiums being paid over a given period of time. Companies seek to mitigate this through paying non-consolidated market premia which are removed after a period of time. Critically, as we note below, whilst such a skill shortage may be a “justification” for

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⁴⁸ *Rainey v Greater Glasgow Health Authority Board* 1987 ICR 129 (HL)
the payment, it is important for employers to keep any such payments under review and to cease paying them when able to do so.

The employer would need evidence that it was necessary to pay the additional amount due to market forces. The nature of that “evidence” would depend on the particular circumstances but employers should ensure that there is a robust recruitment process in place which assesses the current market rate by collating pay data and benchmarking salaries on a regular basis. It would not be sufficient to simply state that this was the position without being able to show that steps have been taken to ensure that this was the case. Depending on the circumstances it might be preferable to make a specific payment to reflect the market forces allowance. This enables the payment to be more transparent and potentially enables review should the position change.

- **Performance**

Performance issues have been recognised by the courts as being a valid basis on which to award pay and potentially to justify a pay gap. It is necessary however to ensure that any performance process is fairly and consistently applied and that it does not discriminate against those with a protected characteristic such as gender or race. Robust performance mechanisms are key to ensure that this can be substantiated. It is also a recommendation under the Statutory Code of Practice to undertake an equal pay audit each year which would assess the impact of performance and see if the gaps are capable of justification by performance.

Potential can also be a justification for a pay gap if it can be demonstrated that the higher pay is being paid because the individual has been identified as a future talent for a more responsible position.

- **Length of service**

Potentially this can be a defence to a claim, if it can be shown that the longer service improves performance or adds value to the role. However, care needs to be taken to ensure that reliance on length of service does not create issues for employers in terms of age discrimination. Employers should therefore take care in making assumptions regarding the age of employees and assuming that this equates to longer service or increased experience. It should also be aware of the potential implication to women of rewarding on the basis of length of service. Women have successfully argued that this amounts to indirect discrimination given the additional childcare responsibilities which invariably fall on women and which result in a break in their continuity of service. In such cases the employer would have to objectively justify the use of the criterion. Employers who adopt a length of service criterion will need to review their policies to ensure that a length of service criterion genuinely serves a purpose or has a legitimate aim (for example...
in terms of the skills required or the need to reward loyalty) and that any discriminatory effect is proportional.

Length of service would not justify a gap in pay indefinitely. As is also the case with experience, there comes a point in time when the employee’s additional time in the role does not add any additional value. At that point, length of service would cease to be a valid justification. Much will depend upon the particular role and the skills required to perform the In the case of Wilson\(^5\), whilst it was accepted that the employer’s desire to reward length of service justified some initial differences in pay, the tribunal found that it could not justify rewarding it over a 10 year period.

- **Experience/Time in role**

In some cases, pay for individuals can be attributed (at least in part) to their additional experience or time in role. This is quite often linked into length of service. Whilst this is a potential material defence, it is critical that the value of an individual’s additional experience or time in role to their actual and current job is adequately assessed and quantified\(^5\). As we note above, it needs to be regularly assessed and will not be a valid justification indefinitely. Once again, much will depend upon the role and the skills required to perform it.

Care also needs to be taken to ensure that potential age discrimination issues do not arise when considering time in role and assumptions made regarding age and experience.

- **Red circling**

By “red circling” we mean giving a guarantee to an employee or a group of employees that their pay will not be reduced for a number of years. Red circling pay (also referred to as “ring fencing”, protecting pay or pay protection) is a common practice in the following situations:

- **Re-deployment/Re-structuring**

  This occurs when an employee changes role, usually following a re-deployment or restructuring exercise.

- **Particular Skills**

  Where individuals are being paid a higher salary because of their particular skill set, which had been necessary for their original role, but which is no longer so in their current position. Whilst this may be a justification for ring fencing initially, these cases should be periodically reviewed and steps taken to realign individuals’ salaries to their current roles as this will not remain a material factor defence indefinitely.

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\(^5\) Wilson v Health and Safety Executive 2010 ICR 302 (CA)  
\(^5\) Cadman – v – Health and Safety Executive [2006] IRLR 969 (ECJ)
TUPE

Red circling is a recognised common industrial relations practice following a TUPE transfer. Indeed, it is a specific legal requirement under the TUPE provisions that employees transfer across on their current terms and conditions of employment. Any attempt to vary these terms for a reason connected with the transfer can give rise to separate legal risk. Recent case law has confirmed that a TUPE transfer remains a potential justification for a gap in pay, provided that it stems from the TUPE transfer and there has been no subsequent change or restructuring which might have given the employer an opportunity to address the pay gaps.

Difficulties can arise when by continuing with the pay protection the employer is continuing to discriminate against women. Case law does suggest that this will depend upon the particular facts of the case and it does not necessarily mean that the defence will fail. In two decisions of the Court of Appeal concerning temporary pay protection arrangements, introduced to cushion the impact of a job re-grading exercise on a predominantly male group of employees, the pay protection was held to be unlawful as it perpetuated historical indirect discrimination. By contrast, a pay protection policy which was held to favour men, was objectively justified as it was shown that the reason that it benefitted men was because they had, for non discriminatory reasons progressed to higher grades prior to the restructuring.

Assuming that the basis of the red circling/pay protection is not "sex tainted", this practice will amount to a material defence, provided that there is no later event such as a further re-structuring or re-grading of pay scales that enables the employer to address any inequalities of pay. The Skills Development case concerned a TUPE transfer where the claimants and their comparator transferred from different employers to the same employer, on different salaries. Although the tribunal held that the employer had no defence to the equal pay claims (brought six years later), as it should have done more to reduce the pay disparity, by freezing the comparator's pay rather than including him in "across the board" pay rises, the EAT disagreed. It said that the TUPE transfer was, and remained, the root cause of the pay disparity, and had nothing to do with sex.

52 Skills Development Scotland Co Ltd v Buchanan and another UKEAT/0042/10 (EAT)
53 Redcar & Cleveland Borough Council v Bainbridge and others; Surtees and others v Middlesbrough Council [2008] EWCA Civ 885 (see appendix) (CA)
54 Haq and others v Audit Commission 2012 EWCA Civ 1621 (CA)
55 Skills Development Scotland Co Ltd v Buchanan and another UKEAT/0042/10 (EAT)
It also said that having established that the employer's explanation was significant and relevant, and not a sham or pretence, the question was whether it was directly or indirectly sex discriminatory. In this case it confirmed that it was not. In our experience, however, in practice there are often subsequent events which break the link and employers miss the opportunity to address the underlying issue.

The general position however is that these defences cannot be used indefinitely, particularly where a variety of re-organisation/re-structuring exercises may have been undertaken. Unfortunately, there is no clear time frame within which the defences can be relied upon. It will be very fact specific and will vary on a case by case basis. Consistency of approach to red circling and/or the approach to harmonise terms and conditions should always be monitored and reviewed. As is often the case with employment law issues, an inconsistent approach can lead to inferences of discriminatory practice (even if indirect) being raised. Reviewing the approach will ensure that, where appropriate, employers can be clear that red circling continues to be a valid approach to take.

- **Skills, Qualifications and Vocational Training**

  The difference in skill level, formal qualifications and training can be a material factor defence for a pay disparity between the claimant and her male comparator. However, the skills and qualifications need to be directly relevant to the job being done and evidence is needed from the employer to demonstrate this\(^\text{56}\), for example, by reference ideally to role specification or job description.

- **Collective Bargaining**

  Collective bargaining arrangements can objectively justify gaps in pay, although the ECJ has held that good industrial relations cannot of itself justify gaps in pay which are indirectly discriminatory. It held that the fact that pay rates have been collectively bargained may be "one factor among others" which is considered when justification is being assessed and that it is for national courts to determine the extent to which good industrial relations may be taken into account in this regard\(^\text{57}\).

  It has been established by the EAT in a case involving Coventry City Council\(^\text{58}\) that blaming the Unions "intransigence" which hampered negotiations is unlikely to succeed. The Tribunal found that whilst this might have been a mitigating factor, it

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\(^\text{56}\) *Hawker Fusegear Ltd v Allen EAT 794/94 and Glasgow City Council and ors v Marshall and ors 2000 ICR 196 (HL)*

\(^\text{57}\) *Kenny and others v Minister for Justice, Equality and Law Reform, Minister for Finance, Commissioner of An Garda Síochána C-427/11*

\(^\text{58}\) *Coventry City Council –v- Nicholls 2009 IRLR 345*
did not explain or justify the gaps and emphasised that the power ultimately lies with the employer to remedy.

- Whether or not a material factor will objectively justify a gap in pay is ultimately evidenced based and a matter for the courts and tribunals.

- To be successful, the reason must explain the particular gap in pay. As such, simply because a factor is potentially capable of constituting a material factor for the purposes of the Act, does not mean it will succeed. It must be of actual significance and relevance to the particular case. For that reason it is difficult to give clear guidelines as to what factors are unlikely to succeed. We would suggest that cost issues alone are difficult. Whilst there is case law to suggest\(^\text{59}\) that financial constraints could be capable of justifying a gap in pay, provided that the constraints existed throughout the period of disparity (in this case they did not and the defence failed), we would suggest that more general principles from the broader discrimination cases is that cost, on its own will not justify a gap in pay.

\(^{59}\) Benveniste –*v-* University of Southampton [1989] CR 617 Court of Appeal
6. **Sex Discrimination**

6.1. Sex discrimination issues are relevant to pay and reward issues. They can arise in the following ways:

- In the way in which schemes operates in terms of the payments made or allocated; or
- In the rules regarding access to benefits or calculation of benefits; and
- When considering the validity of a material factor defence (the reason itself must not be “sex tainted” and the practical application of the material factor must be neutral).

6.2. As we note above, the Act distinguishes between issues of “equal pay” (which concern a contractual term) and those which relate to the way in which a term might operate (which would be claims of “sex discrimination”). As we illustrated on page 4, there are a number of other ways in which a sex discrimination claim may arise in practice:

- Claims in relation to non-contractual payments such as bonuses or other performance related payment would be brought via a sex discrimination claim;
- Allegations in relation to progression through a pay scale would be brought on the basis of a discrimination claim;
- Access to promotion; and
- Access to benefits.

6.3. It is important to have a robust framework of policies and guidelines in place to ensure that access to such benefits is fair, objective and free from bias. Policies should be supported by providing practical training to those involved in the decision making process. Providing regular and appropriate training is recommended under the Statutory Code of Practice and certainly reflects best practice.

6.4. A blatant example of a direct discrimination claim would be if, for example, an employer were to say “I would pay you more if you were [female/black]”. Discrimination is not usually so obvious, and more often claims of indirect discrimination are made. Potentially, however, the new provision contained at section 71 of the Act may lead to more claims of direct sex discrimination. These claims are more attractive to employees as the burden of proof switches more easily to the employer to show that no discrimination has arisen. Practical examples of when this might arise are:

- Where the woman wants to make a comparison with her successor in role. Whilst not possible under the equal pay provisions of the Act a pay differential between a female and her successor could be used as evidence to support a claim of direct sex discrimination.
- Potentially, it might also be possible to claim direct discrimination where the comparator is
employed on work of greater value. Whilst this again would not be possible under the provisions of the Act that deal with equal pay, such a matter could be used to support a claim of direct sex discrimination under the new S71 provision. In that situation the 'sex equality clause' would not apply and have no effect (as the roles were not equal) but might fall within S71. The employer would need to be able to demonstrate why the man is paid a higher salary. In practice, providing employers understand why roles are paid at different rates and be able to articulate it, such a claim should not succeed.

As this is a new provision we shall need to await more examples from the courts and tribunals to see how this may be interpreted and of how this may progress through the courts.
7. Age Discrimination

7.1. Age is one of the protected characteristics under the Act. It is important to note that both direct and indirect age discrimination can potentially be objectively justified if it can be shown that the treatment complained of or provision, criterion or practice (PCP) is a proportionate means of achieving a legitimate aim.

In relation to pay the key issues are that employers must not:

**Directly discriminate** by treating a job applicant or employee less favourably than others because of age without objective justification; or

**Indirectly discriminate** by applying a provision, criterion or practice (PCP) that disadvantages job applicants or employees of a particular age group without objective justification.

7.2. In practice, the Act does however permit discrimination on the grounds of age in the following circumstances:

* Service related benefits

The Act contains an exception permitting employers to provide benefits which reward long service. Without this exception, service-related benefits would potentially be indirectly discriminatory against younger workers who have not had the opportunity to qualify for them. In practice, there is an additional consideration if the qualifying period of service for the benefit is more than five years. This is illustrated below.
## Service-related benefits

Any benefits based on length of service, such as pay increments, extra holiday, seniority payments or service awards, are potentially discriminatory against younger workers.

### If the qualifying period of service is less than 5 years

**This is permitted.** Although workers will be treated differently on the basis of the length of their service, this falls within the statutory exception and will not be discriminatory on the grounds of age\(^{60}\).

The EHRC code specifically refers to an employer adopting a 5 point pay scale to reflect the growing experience during the first 5 years as being permitted by the Act\(^ {61}\).

“Service” can be either:

1. the length of time that an employee has worked for the employer at any level; or
2. the length of time that an employee has worked for the employer at or above a particular level\(^ {64}\).

**Business needs include:**

- rewarding experience;
- encouraging loyalty; and/or
- increasing staff motivation\(^ {65}\).

### If the qualifying period of service is more than 5 years

**This is permitted if......** the employer can show that it “reasonably appears” that the award of the benefit “fulfils a business need”\(^ {62}\).

Under the EHRC Code, an employer will need to be able to evidence the fact that it had a reasonable belief that a business need was being fulfilled, such as information it may have gathered through “monitoring, staff attitude surveys or focus groups”\(^ {63}\).

It is important to note that: this exception does not apply to service-related termination payments or any other benefits which are provided only by virtue of the worker ceasing employment. We consider these further below\(^ {66}\).

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\(^{60}\) Para 10(1), Sch. 9, the Act

\(^{61}\) EHRC Code 14.22

\(^{62}\) Para 10(2), Sch.9, the Act

\(^{63}\) EHRC Code para 14.24

\(^{64}\) Para 10(3), Sch. 9, the Act

\(^{65}\) EHRC Code, para 14.23

\(^{66}\) EHRC Code, para 14.25\)
**Retirement Ages**

On 6 April 2011, the national default retirement age (DRA) of 65 was repealed, with the effect that retirement dismissals are potentially discriminatory regardless of the age of the employee in question. In practice this left employers with the following options:

### Operate without a DRA

And then when looking at retirement...

- Consider each employee on a case-by-case basis
- Have appropriate discussions if and when performance and/or health issues arise

### Continue to use a DRA

If the employers chose this option they must ensure that they can show the following.....

**1. Is a legitimate aim being met?**

The legitimate aim must have a social policy or public interest element (i.e. related to employment policy, the labour market or vocational training).

**Examples of legitimate aims derived from case law include:**

- workforce planning;
- promoting the recruitment and retention of younger employees;
- protecting the dignity of the older workforce;
- protecting against incompetence;
- ensuring a high quality of service; and
- having an age-balanced workforce.

**2. Is the DRA proportionate?**

Retaining a DRA must be an appropriate means of satisfying the legitimate aim.

**Considerations for proportionality:**

1. Does the DRA achieve the legitimate aim?
2. Is there a less discriminatory alternative to using a DRA?
3. Is the specific DRA chosen by the employer appropriate and necessary?

**3. Does that particular DRA meet the legitimate aim?**

The legitimate aim that an employer is relying must be relevant to its business.
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- **Redundancy payments**
  Employers are permitted to offer employees enhanced redundancy payments which take account of age and length of service. If the enhanced payments closely reflect the statutory scheme i.e. use the same age bands – currently under 22, 22 to 40 and 41 and over and contain only the following changes:
  - Disapplying (or increasing) the statutory cap on a week’s pay (currently £430);
  - Multiplying the amount allowed per year of service by a factor of more than one; and/or
  - Multiplying the overall amount by a factor of more than one.
  then they are permissible under the Act:

If, however, the proposed scheme does not reflect the statutory provisions, the employer has to be able to objectively justify it by demonstrating that it is a "proportionate means of achieving a legitimate aim". The EAT has suggested that the tapering of redundancy payments calculated using age and length of service once an employee reached 57 was potentially justifiable in order to prevent employees nearing pension age from receiving a windfall.

It is important however for the employer to consider the legitimate aim and proportionality requirements when implementing the scheme. Failing to do so, can result in the employer not being able to objectively justify an enhanced payment scheme.

- **Cost reduction**
  The courts have been asked to consider whether potential cost savings can be a proportionate means of achieving a legitimate aim and therefore defeat a claim of age discrimination. In a recent decision involving Cumbria Primary Care Trust, the Trust successfully defeated a claim of age discrimination when it served notice of redundancy in order to avoid an employee receiving an enhanced pension. The claimant was entitled to take early retirement on his 50th birthday at which time he would have received an enhanced pension. His position was identified as redundant in the previous year and notice of termination was served, prior to undertaking any formal consultation, on a date to ensure that the notice expired before he reached 50. His claim of discrimination failed as the court held that the dismissal was not aimed solely at saving costs; he was going to be dismissed anyway and the timing was simply to ensure that he did not receive an undeserved windfall. The Court of Appeal confirmed

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60 s162 of the Employment Rights Act 1996
61 Paragraph 13, Schedule 9, EqA 2010
62 Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd UK EAT/0156/08 (EAT)
63 Galt and others v National Starch and Chemical Ltd ET/2101804/07 (ET)
64 Woodcock v Cumbria Primary Care Trust 2012 EWCA Civ 330 (CA)
in this case that avoidance of cost by employers will not, in itself, be a legitimate aim. This confirmed an earlier decision of the EAT.65

65 Cross v British Airways
8. **What are the expected changes to the regime?**

8.1. We expect the following changes shall be introduced over the coming months:

- Additional powers to tribunals to order equal pay audits;
- Changes to the Public Sector Equality Duty;
- An increased number of claims are likely to be raised as a result of the Birmingham City Council case.  

We comment on these below.

8.2. The Government has announced that additional powers are to be given to tribunals to order an employer to undertake an equal pay audit and publish the results to its workforce, where there has been a finding of sex discrimination on issues of pay. This will be a significant change in approach for the tribunals and will result in discretionary pay being brought within scope. As the proposals currently stand employers will be able to resist a compulsory order from the tribunal to undertake an audit if they have themselves completed one within the past 3 years. We anticipate that proactive employers will not wish to risk being forced to undertake an audit and will therefore seek to undertake one voluntarily. Indeed, the Statutory Code of Conduct recommends that they are undertaken regularly.

8.3. We await the outcome of the Public Sector Equality Duty review which is due in April 2013. The terms of reference refer to the following:

- Examining evidence about the effectiveness of the general duty (under section 149 of the Act) and the specific duties (implemented under section 153 of the Act) from public bodies who have an obligation to fulfil the PSED and from those organisations upon whom the duty has impacted.
- Exploring the impact of the PSED in terms of costs, burdens and benefits.
- Considering how the duty functions in the context of the UK government's equality strategy and its new approach to achieving change, including transparency, devolving power to people and integrating equality considerations into policy and programmes.

We expect that the underlying principles will remain and that these will reflect the recommendations contained in the Statutory Codes of Practice. Technical guidance on the duty was published by the Equality and Human Rights Commission on 15 January 2013.

8.4. The recent Birmingham City Council case confirmed that claims of equal pay are not limited to the tribunal and may be brought in the High Court, where the time limit is considerable longer at 6

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66 *Birmingham City Council v Abdulla and others [2012] UKSC 47 (see annex) (Supreme Court)*
years. Whilst very fact specific the case may result in more claims being raised. Although it did not change the statutory regime, it was high profile and confirmed that proceedings are not limited to the tribunal which has a shorter time period in which to issue proceedings.
9. **Practical and best practice recommendations**

9.1. We have indicated throughout the report areas of best practice which we summarise below.

<table>
<thead>
<tr>
<th>Area of focus</th>
<th>Recommended approach</th>
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<tbody>
<tr>
<td>Equal pay audits</td>
<td>Organisations should comply with the Statutory Code of Practice on Equal Pay and undertake an audit on a regular basis. This enables employers to establish the extent of any pay gaps, assess the potential justifications for the gap and develop an action plan to address.</td>
</tr>
<tr>
<td>Job evaluation process</td>
<td>Best practice will be to draw on a robust, recognised process that is proven to value jobs on a fair basis. As roles change, individual jobs should be re-evaluated by an internal team with the appropriate knowledge and insight into the role. A large-scale evaluation process should take place when there is a significant organisational change. There should be a review of evaluation system and process every 5-10 years.</td>
</tr>
<tr>
<td>Market benchmarking</td>
<td>While salary is historically the focus of benchmarking, a total remuneration benchmarking approach inclusive of incentives, allowances and pension will provide a picture of the overall remuneration package provided to individuals. This is particularly important as organisations operate a two-tier system with new joiners in different, less generous pension arrangements. Organisations should adopt a consistent approach undertaken by function and a sample of roles. This should benchmark total remuneration inclusive of allowances and pension.</td>
</tr>
<tr>
<td>Clear pay progression structure</td>
<td>Organisations should adopt a framework for moving individuals through pay ranges that is reflective of clear factors such as performance and market position (rather than length of service) and actively and consistently apply it.</td>
</tr>
<tr>
<td>Training on equality and diversity</td>
<td>Adoption of an organisation wide approach to equality and diversity. In particular it is critical that the HR function is aware of equal pay and diversity issues and receives regular training in the risks and mitigating steps.</td>
</tr>
<tr>
<td>Strong performance management approach</td>
<td>The performance management process should be a robust mechanism and recognise individual contribution and competence and be mindful of the limitations of valuing length of service. Individuals with responsibility for performance management should be trained in the process. Ratings and outcomes should be subject to moderation. From an equal pay point of view, there may be a need to consider the</td>
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</table>
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<table>
<thead>
<tr>
<th>Objective justifications for any pay gap between men and women and one justification is performance. Therefore having a robust performance management mechanism in place is vital.</th>
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<tbody>
<tr>
<td>Effective controls and guidelines on starting salaries</td>
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<tr>
<td>There should be clear guidelines for arrangements for pay on recruitment including dealing with any buy-out arrangements and assessing market forces justifications. Appropriate training should also be undertaken by those involved in the recruitment process on diversity and pay issues.</td>
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<tr>
<td>Process for decision-making on additional pay</td>
</tr>
<tr>
<td>A governance structure that ensures decisions made about additional pay goes through due process, and is therefore capable of justification. This may include additional pay such as a market premium due to a skill shortage or where, in recruitment situations, a salary above the top end of the band may be offered.</td>
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</tbody>
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Annex 1- Summary of the key cases

We set out in the main body of the report the background to some of case law and set out below a high level summary of some further key cases.

**City of Edinburgh Council – v – Wilkinson and others 2012 IRLR 202**

This case looked at the meanings of “establishment” and employment on common terms and conditions. The claimants were a group of women employed by a local council to work in schools, hostels, libraries and as social workers. They made an equal pay claim on the basis that male council employees carrying out manual jobs such as refuse collection, gardening, grave digging and road working did work of equal value. Both the claimants and the comparator group were employed under terms contained in a single collective agreement. This agreement contained certain separate provisions for different classes of employees, which were derived from the separate sets of terms and conditions that had previously applied to each group.

The two questions that were to be decided were: i) were the male and female employees employed in the same establishment; and ii) were the male and female employees employed under the same terms and conditions. On appeal, it was held that the claimants and the comparator group had not been employed at the same establishment. “Establishment” was deemed to mean the place of work of each individual, i.e. a complex or group of buildings such as a university campus. In this case, the male and female employees carried out their work at entirely different locations.

The court went on to find that the claimants and their male comparators were employed under the same terms and conditions. The fact that the agreement contained different provisions for the male and female employees did not prevent it from being a single collective agreement, as without different terms a claimant would not be able to demonstrate a difference in treatment.

**Renfrewshire Council v Educational Institute of Scotland UKEATS/0018/12**

This case considered the meaning of “establishment” in the context of collective redundancy under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

The key issue to be decided upon was which body constituted the “establishment” referred to in TULRCA. The claimant group of redundant teachers claimed that the establishment at which they worked was the Education and Leisure Service of Renfrewshire Council (the Council), while the Council contended that the “establishment” was in fact the individual school at which each teacher worked.

After an appeal of the initial decision, it was decided that the original finding that an individual school could not be a distinct entity for the purposes of TULRCA was perverse. The judge decided that establishing where an individual was assigned to carry out their duties was a factual question and that the term “establishment” connotes physical presence.

**Armstrong – v – Newcastle Upon Tyne NHS Hospital Trust [2006] IRLR 124**

This case considered the meaning of a “single source of employment” in the context of selecting a comparator group. It involved an equal pay claim by female claimants on the ground that male employees of the same NHS Trust were entitled to bonuses, whilst the claimants were not.

The male and female employees in question had previously been employed by separate NHS Trusts, which subsequently merged. Some of the original terms and conditions of the separate Trusts continued to apply to each of the claimants and their comparators, despite both being employed by the same body. The claimants argued that there was a single source of employment following the merger and that the pay differences between
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themselves and the male employees could be attributed to this single source.

The key question for the court to decide was held to be whether the Respondent Trust had been responsible for setting the terms of employment of employees whose employment had commenced before the merger. It concluded that the fact that the Trust had been involved in the harmonisation of terms applicable to the male and female employees to some extent was not enough to render the Trust a single source of employment. Therefore, it decided that the claimants had not used an appropriate comparator group as the pay differences between themselves and the male employees could not be attributed to a single source.

*Hayward v Cammell Laird Ship Builders Ltd 1988 ICR 464*

This case looked at what was meant by a “term” of a contract being less favourable in the context of an equal pay claim. It involved a female employee’s claim for equal pay on the ground that her basic pay was lower than that of male comparators carrying out work of equal value.

The claimant argued that “pay” meant her basic salary, which was lower than that of her comparators, whereas the Respondent claimed that “pay” should be considered to be an employee’s entire package of benefits considered as a whole. When using this approach, taking into account the claimant’s paid meal breaks, additional holidays and better sickness benefits, the claimant’s remuneration was not less favourable than that of her comparators.

On appeal, it was held that a “term” of the claimant’s contract for the purpose of assessing whether she was treated less favourably should be taken to be a distinct provision of the contract, i.e. an individual benefit provided for by the contract. A tribunal should, therefore, not “lump together” all of the terms of a contract and simply look at the total remuneration package.

*Home Office v Bailey 2005 ICR 2057*

This equal pay claim considered the impact of a job evaluation scheme (JES) in the context of deciding whether work carried out by female employees (in administrative/executive grades) and their male comparators (in prison officer/governor grades) was “equivalent”. The claims were made by female employees who were not entitled to an enhanced rate of basic pay that traditionally applied to a predominantly male group of employees working in the same prison.

Ten years after the implementation of the enhanced pay programme, the prison carried out a JES which allowed the majority of the claimants to demonstrate that their work was of equal value to their male comparators’. Where two of the claimants were unable to demonstrate this using the JES results, it was held that a tribunal should not alter the JES results to allow a female claimant scoring less than her male counterpart to succeed in her claim.

The judge went on to find that although the Respondent could justify the unequal pay resulting from the enhanced pay programme at the time of its introduction by using the genuine material factor defence, it could not necessarily justify continuing inequality on the same basis. Therefore, it would be necessary for the Respondent to provide evidence of the unequal treatment being justified throughout the period of its application, not just at the time at which it was first introduced.

*Chief Constable of West Midlands Police v Blackburn and Manley UKEAT/0007/07*

This case considered the issue of “like work “ and also whether bonuses awarded to a male comparator for working anti-social night shifts were indirectly discriminatory against female claimants who were unable to work night shifts due to childcare commitments.

On appeal, it was held that the payment of additional remuneration to those employees willing to undertake night work was objectively justified for the purposes of the material factor defence under the Equal Pay Act.
Discrimination Law and Pay Systems

The Judge found that the employer had the legitimate aim of specifically rewarding officers working nights and that this aim could not be achieved if it implemented less discriminatory measures, such as paying female employees with childcare commitments the same amounts.

Redcar & Cleveland Borough Council v Bainbridge and others; Surtees and others v Middlesbrough Council [2008] EWCA Civ 885

This equal pay claim looked at the scope of the material factor defence in relation to temporary pay protection arrangements. The claim was brought by a group of female council workers whose roles had been deemed by a job evaluation scheme to be equivalent to those of a group of predominantly male workers. The comparator group benefitted from a temporary pay protection scheme which had been introduced following a job re-grading which impacted those male employees.

In assessing whether the Council had a material factor defence to the indirectly discriminatory application of the pay protection scheme, the court found that the Council had a legitimate aim in wanting to provide a cushion for employees who were going to suffer a pay cut following the re-grading. However, the Council had not considered the possibility or likely costs of extending the pay protection to the claimant group. In light of this, it was held that the unequal treatment of the claimants and their male comparators was not proportionate as less discriminatory means of satisfying the legitimate aim had not been considered.

Birmingham City Council v Abdulla and others [2012] UKSC 47

This case considered whether equal pay claims brought outside of the six month employment tribunal time limit should be struck out by the courts. A large number of former employees of the Council brought equal pay compensation claims in the High Court after learning that some of their ex-colleagues had succeeded in similar claims.

The Council applied for the claims to be struck out on the basis that they “could be more conveniently disposed of by an employment tribunal”, due to their complexity and the more appropriate experience, rules and procedures of the tribunals. As the claims had been brought more than six months after the claimants’ employment had ceased, they would be out of time if the High Court claims were struck out and the claimants forced to bring tribunal claims.

The Council’s application was rejected, with the courts refusing to strike out the equal pay claims. In deciding not to strike out, it was held that equal pay claimants were given the option of bringing their claims in either the tribunals or the courts. The reasoning behind a claim being brought in a court as opposed to a tribunal was held to be irrelevant when deciding whether a claim should be struck out. As the claims would be out of time in a tribunal, the Council’s submission that they could be more conveniently disposed of by a tribunal was rejected.

Rainey v Greater Glasgow Health Board [1984] IRLR 88

The background facts to Rainey were that a rate of pay on the Whitley Scale was agreed for prosthetists employed by the NHS. R joined at that rate. Since it was not possible to staff the NHS prosthetic fitting service at the agreed rates of pay, prosthetists in the private sector were offered jobs either on the Whitley Scale or on their existing levels of pay. R’s comparator and 19 other male prosthetists joined at the higher rate. All but one of those on the lower rate were women. The EAT dismissed R’s appeal on the basis that the difference in pay between R and her comparator was due to a different method of recruitment into the NHS and not to a difference of sex within s.1.1(3) EqPA.