

Defending equal pay claims: Equal pay for equal work?

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Equal pay claims can be costly and time consuming to defend. Their complicated nature means that the Employment Tribunal has a modified set of rules for dealing with proceedings that involve claims that work is of equal value. The term equal pay is frequently misunderstood by employees who view it as referring to general principles of fairness rather than as a concept relating to the equality of terms with a comparator (using the terminology of the Equality Act 2010 (EA 2010)) of the “opposite sex”, who is carrying out equal work.

We take a look in more detail below at equal pay claims brought under the EA 2010.

What does “equal work” mean?

There are three ways in which work carried out by one person can be deemed to be work equal to that of a comparator. They are where:

1. it is like work;
2. it is rated as equivalent using a job evaluation study or scheme; or
3. it is of equal value.

Like work

Work will be like work where it is of a broadly similar nature and any differences are not of practical importance. Although the job description may be relevant, the focus needs to be on what work is carried out in practice.

Job evaluation studies or schemes

Within the public sector, there has been considerable work undertaken in conducting job evaluation studies to ensure comparability of pay. Whilst there is no obligation on employers to carry out a job evaluation, a non-discriminatory job evaluation which rates jobs as having different value can provide an absolute defence in an equal pay claim.

Once there is a job evaluation in place, one issue that can arise is how long it can be relied upon. There is no set rule for this; it will depend entirely on whether there have been changes to the respective roles over time. In the Acas Booklet 'Job evaluation: considerations and risks', Acas suggests that a job evaluation should still be relevant for up to 10 years but that this will depend upon whether there have been any significant and permanent changes to duties. Duties may change incrementally over time or there may be a more deliberate adjustment that arises as a result of a reorganisation.

Work of equal value

This is the category that requires the modified tribunal process. Work can only be of equal value if it is neither like work nor work rated as equivalent (although claims may still be brought in the alternative).

Equal value will be assessed by reference to factors such as effort, skill and decision making. An expert is often appointed to assist in the carrying out of this determination.

The need for a comparator

There is a need for an actual comparator of the opposite gender and it can be an existing or a previous employee. The comparator must be working “in the same employment”.

This means, for example, where they are engaged in equal work in the same employment, that a male employee (A) who is paid less than another male employee (B) cannot frame his complaint for pay comparability with B as an equal pay claim. However, if a female employee (C) in the same employment is also engaged in equal work and succeeds in an equal pay claim comparing herself to B, then A can “piggyback” on her claim and seek to compare himself to C.

“In the same employment”

The comparator doesn’t have to be employed by the same employer; they could also be employed by an associated employer. Employers will be associated where one is a company of which the other (directly or indirectly) has control or both are companies of which a third party (directly or indirectly) has control. With the increased use of wholly-owned trading companies within the public sector, the inclusion of associates becomes more relevant.

However, the individual and their comparator need to be employed at the same establishment or at different establishments where common terms apply. Here, common terms does not mean common terms between the individual and their comparator. The issue is whether, if the comparator was employed at the same establishment as the individual, would they have been employed on the same terms and conditions as their actual terms and conditions.

Material factor defences

Of course, identifying a disparity in contractual terms with a comparator of the opposite sex in the same employment carrying out equal work is only part of the process. It does not mean that sex is the reason for the disparity; there are many reasons why employees may have different terms and conditions. Where an employer can point to a material factor that is not directly or indirectly discriminatory, this will provide a defence to an equal pay claim. Examples could include market forces, length of service or different hours of work.

Does gender pay gap reporting relate to equal pay claims?

No – they both cover very different issues. An equal pay claim (despite the name) is not just limited to complaints about pay; it can cover wider contractual terms and conditions. However, as set out above, it is intended to ensure fairness in those terms and conditions where men and women are carrying out equal work. Gender pay gap reporting, on the other hand, is concerned only with pay (although not just limited to basic pay), and whilst it is looking at a gender comparison, this is not limited to those carrying out equal work; it is concerned with the difference between the average pay for all relevant male employees and the average pay for all relevant female employees in the organisation.

It is entirely possible for an organisation to have a high gender pay gap but to have no equal pay issues under the EA 2010. Similarly, it is possible for an organisation to have a low (or even negative) gender pay gap, and still have equal pay issues.

If you would like further information on equal pay or gender pay reporting within your organisation, then please feel free to contact us.

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