LAW PUNDITS

Gender Discrimination

LP Learn Material

Equal Pay

European law

The right to equal pay for equal work is a fundamental principle of European law and is enshrined in Article 157 of the Treaty on the Functioning of the European Union (TFEU).

However, TFEU Article 157 does not give rise to any free-standing cause of action: claims for equal pay must either be brought under the Equal Pay Act 1970 or the Sex Discrimination Act 1975. Generally, claims in relation to contractual entitlements fall under the EPA whereas those relating to non-contractual benefits fall under the SDA.

Remedies under the EPA and the SDA are mutually exclusive.

Implied equality clause

The EPA implies into every worker's contract an equality clause giving them the right to equal pay for equal work. Equal pay claims are thus contractual claims for breach of the implied equality clause. An equality clause is defined as a provision which relates to terms (whether to do with pay or not) of a contract under which a woman is employed. It takes effect where a woman is employed to do:

- 'like work' with a man in the same employment, or
- 'work rated as equivalent' with that of a man in the same employment, or
- work which is, in terms of the demands made on her (such as in terms of effort, skill and decision), of 'equal value' to that of a man in the same employment

The effect of an equality clause is that:

- if any term in the woman's contract is or becomes less favourable than a term of a similar kind in the contract under which the man is employed, that term of the woman's contract is treated as being modified so as not to be less favourable, and
- if at any time the woman's contract does not include a term corresponding to a term benefiting the man in his contract, the woman's contract is treated as including such a term

For example, if a woman is employed on work of equal value to that of a man but is paid at a lower hourly rate, her contract is treated as modified so that she is entitled to be paid at the higher rate. Similarly, if the man's contract entitles him to be paid during any period of sick absence but the contract of the woman employed on work of equal value does not contain such a clause, her contract is treated as including such a term.

The equality clause cannot be relied on to put a claimant in a more favourable position than a comparable man. For example, where a qualified woman employee is paid at the same rate as a male trainee, she cannot rely on the equality clause to be paid any extra payment. The principle is of equal pay for equal work, not better pay for better work.

The orthodox view is that workers can have individual terms of their contract made not less favourable than a comparable term in the contract of a worker of the opposite sex, even though their overall benefit packages are comparable.

However, it has been held that where there was inequality of pay in respect of certain individual elements of remuneration, such as bonuses and attendance allowances, there was no unequal pay because there was a global term relating to 'provision of monetary payment for the performance of the contract by employees during normal working hours' which produced no inequality in the overall monetary payment for work during normal working hours.

The Court of Appeal has now clarified that *Degnan* was applying the principles in *Hayward* to the particular facts of *Degnan* and was not seeking to create an exception. Where discrete terms of remuneration can be identified then it is these terms which fall for comparison. *Hayward* and European jurisprudence focuses upon equality of terms and not total pay actually received.

Like work

A woman is to be regarded as employed on like work with men if, but only if, her work and their work are of the same or a broadly similar nature, and any differences are not of practical importance in relation to terms and conditions of employment. Regard must be had to the frequency with which any differences occur in practice as well as to the nature and extent of such differences.

A woman and a man may still be employed on like work even when they are employed under different job descriptions, if the work is broadly similar and any differences are of no practical importance.

Where a promoted woman undertakes *more* duties and/or responsibilities than her male predecessor, this does not mean she is not undertaking 'like work', ie it will not stop her using him as a valid 'like work' comparator.

A cook in a director's dining room has been held to be engaged on like work with that of assistant chefs in a factory canteen.

Each case is likely to turn on its own particular facts and circumstances, but a two-stage test is required. The first stage is to determine whether the work is the same or broadly similar. The second stage is to determine whether, if it is, there are any important differences in what is done in practice.

The fact that work may be done at different times during the day may not prevent it from being like work.

However, it has been held that a female day-shift canteen worker was not engaged in like work with a male canteen worker on permanent night shifts.

Work rated as equivalent

A woman is to be regarded as employed on work rated as equivalent with that of a man if, but only if, her job and his job have been given an equal value, in terms of the demand made on a worker under various headings, such as effort, skill and decision, on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings. Work is also rated as equivalent if it would have been given an equal value

but was not because the evaluation was made on a system that set different values for men and women on the same demand under any heading.

The principal methods of job evaluation are set out in an Acas advisory booklet, *Job evaluation: considerations and risks*. The methods include job ranking, paired comparisons and job classification, but these are generally non-analytical methods and are unlikely to be sufficient for the purposes of the EPA 1970. The methods also include analytical job evaluation methods such as points rating and also various tailor-made schemes which are specifically designed for individual employers. These analytical methods are more likely to satisfy the requirements of the EPA 1970.

Helpful guidance was also given by the Equal Opportunities Commission (the functions of the Equal Opportunities Commission were taken over by the Equality and Human Rights Commission (EHRC) on 1 October 2007).

In order for jobs to be equivalently rated, a job evaluation must have been carried out and must have been completed, which will not occur until the parties who have agreed to the study have accepted its validity.

There is no obligation on an employer to carry out an evaluation but, once it has been carried out and completed, it may be relied on in an equal pay claim even though the employer has not implemented it.

Where a valid job evaluation has been completed and two jobs rated differently, it is not permissible for an employment tribunal to find that the difference is insignificant.

When considering whether two jobs are rated as equivalent, it is necessary to look at the final result of the job evaluation. Two jobs were properly treated as rated equivalent where they had been marked with different scores but the overall grade allocated to them as a result of the job evaluation was the same.

A woman is also entitled to base a 'work rated as equivalent' equal pay claim on a comparison with a higher paid man whose job was placed in a **lower** grade by a job evaluation study.

Work of equal value

Where there is no like work or work rated as equivalent, a woman may still claim equal pay if her work is of equal value to that of a man, in terms of the demands made on her. Headings such as effort, skill and decision are relevant to this.

Two jobs which appear at first sight to be very different may still be rated as equivalent. For example, a female cook working as a canteen assistant was engaged in work of equal value to that of male skilled tradesmen.

A woman may also claim equal pay, relying on Community law, where her work is of greater value than that of a man but she is paid less.

A woman will not generally be able to succeed in an equal value claim where a valid job evaluation has taken place and has concluded that her job is not rated as equivalent.

Man in the same employment

The comparison required is with a man in the same employment. However, the woman can generally choose which man she wishes to be compared with. There is no requirement that the man she chooses must be a fair representative of any particular group of workers.

She must find an actual male comparator with more favourable terms than hers.

A woman may compare herself with her male predecessor.

The man in question need not be her immediate predecessor.

A woman may not compare herself with her male successor because such a comparison is too hypothetical.

Men are to be treated as being 'in the same employment' if they are employed by the same employer as the woman or by any associated employer:

- at the same establishment, or
- at establishments in Great Britain at which common terms and conditions of employment are observed either generally or for the relevant classes of employee

In determining whether the claimant and her comparator are employed at the same 'establishment', the following issues are pertinent:

- 'establishment' is not defined in the EPA 1970, nor is it used expressly in TFEU Article 157
  References: TFEU, Article 157
- in *Defrenne*, the ECJ said that what is now TFEU Article 157 protects those in the same establishment *or service*, ie those two concepts were equated
  References: Defrenne v Sabena [1981] 1 All ER 122
- to regard a particular group of employees as being a single establishment for comparison purposes in an equal pay claim, it would need to have a clear identity, eg if the group worked together to achieve a common purpose
  References: City of Edinburgh Council v Wilkinson UKEATS/0002/09/BI
- confining the concept of establishment to circumstances where employees work at a single geographical location may be unduly restrictive
  References: City of Edinburgh Council v Wilkinson UKEATS/0002/09/BI
- where the employer is a single undertaking, it will also *prima facie* be regarded as a single establishment, unless facts demonstrate that there are subsets of its operation which ought properly to be regarded as separate establishments
  References: City of Edinburgh Council v Wilkinson UKEATS/0002/09/BI

Employers are treated as 'associated employers' if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control.

Comparators at a different establishment

The requirement for there to be common terms only applies where the employees to be compared work at different establishments and not where they are all employed in the same establishment.
References: Lawson v Britfish [1988] IRLR 53

Where the requirement for common terms does apply, there is no need for the terms to be identical; it may be enough that terms are broadly similar.
References: British Coal v Smith [1996] IRLR 404

Cases in which the chosen comparator is at a different establishment can be divided into two categories:

- type A cases: cases such as *Leverton* and *South Tyneside*, where the claimants and their comparators, although employed in different establishments, have terms and conditions of employment which derive from the same collective agreement (eg where they were all on 'White Book' terms)

- type B cases: cases such as *British Coal*, where the claimants' terms derive from one source/collective agreement, and the comparators' terms derive from a separate source/separate collective agreement

In neither type of case is it necessary to show that the claimant herself was on the *same* terms as her comparator, as the terms must necessarily be different in some respect if she is to show a breach of the equality clause. Nor is the claimant required to show that all terms other than that said to constitute the discrimination are the same as between her and the comparator:

What must be shown to establish that the claimant and the comparator are in 'the same employment' would appear to differ as between type A and type B cases:

- in type A cases, it is sufficient (see paragraph 26 of *South Tyneside*) that the claimant and her comparator, albeit working at different establishments:

  - have the same or an associated employer, and
  - have terms and conditions which derive from the same collective agreement (or have some other common source)

- in type B cases, the claimant must establish (see paragraphs 39 and 42-44 of *British Coal*) either:

  - that the male comparators at other establishments were on broadly similar terms and conditions to one or more men in the same 'class of employee' actually employed at the claimant's establishment (eg gardeners employed at the other establishment were on terms broadly similar to gardeners employed at the claimant's own establishment), or

  - where there are no men employed at the claimant's establishment in the same 'class of employee' as the comparators chosen in other establishments, the claimant must establish that broadly similar terms and conditions *would apply* if men were employed at the claimant's establishment in the particular jobs concerned (eg if the comparators chosen from other establishments were gardeners, and no gardeners are employed at the claimant's establishment, the claimant must show that *if* a gardener were to be employed at her own establishment, he would be

employed on broadly similar terms and conditions to the gardeners at the other establishments)

In type B cases only, where there are no men in the claimant's establishment who hold the same type of job as the chosen comparator(s) in the other establishment(s), it would be sufficient for the claimant to show that it is likely that those comparators would, wherever they worked, always be employed on the same terms and conditions. If that were shown, it would be legitimate to assume that they would be employed on those terms and conditions were they to be employed in the claimant's establishment (see the EAT judgment in *City of Edinburgh Council v Wilkinson*, which (a) disapproved the earlier EAT decision in *Dumfries and Galloway Council v North*, and (b) was itself later endorsed as correct by the Court of Session in *their* judgment in *North v Dumfries and Galloway Council*).

Claims under TFEU Article 157

Where a claim is brought under TFEU Article 157, the definition of associated employer should be extended to cover public sector as well as private sector employers.

Under TFEU Article 157, there is no need for the relevant employees to be employed by the same employer, or even associated employers, but any differences in pay must still be attributable to a 'single source'. The rationale for this is that, without a single source, there would be no single body responsible for any inequality in pay or capable of remedying it.

When ascertaining whether there is such a single source:

- it is not a matter of enquiring as to who was responsible historically for creating the inequality in the first place
- rather, it must be determined whether there is a single source which is responsible for *perpetuating* the inequality (or which was perpetuating it when the claimant last worked), and which is able to put it right

By contrast, there is no need for a single source to be shown in order to claim under the Equal Pay Act.
References: North Cumbria Acute Hospitals NHS Trust v Potter [2009] IRLR 176

Application of the Acas Code of Practice on Disciplinary and Grievance procedures

Where specified types of claim are brought by an employee, and the circumstances of that claim are such that a relevant Acas Code of Practice could apply, then the tribunal may increase or decrease any award made by up to 25%, if there has been an *unreasonable* failure to follow the Code of Practice.

Schedule A2 sets out the types of claim which are covered by this provision, which includes equal pay and sex discrimination claims. The relevant code of practice is the Acas Code of Practice on disciplinary and grievance procedures. The Code of Practice creates obligations on both employers and employees, making it clear that it could be either party who defaults. The employment tribunal is not *required* to make the adjustment, but may if it is just and equitable to do so.

The Code of Practice applies to:

- disciplinary action, including warnings, but not informal disciplinary action or oral warnings
- conduct or poor performance dismissals but not any other type of dismissal, eg for redundancy
- grievances, which are defined in the Code of Practice as 'concerns, problems or complaints that employees raise with their employers'

For further details on the Acas Code of Practice, see Acas disciplinary and grievance code -- application, Acas disciplinary and grievance code -- procedural requirements and Acas disciplinary and grievance code -- effect of non-compliance.