

Summary of the law on EQUAL PAY



Women working full-time earn on average 17% less per hour than full-time men. The gap for part time women is even more shocking – a staggering 36%.

This booklet deals with equal pay claims under the 1970 Equal Pay Act.

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- WHO IS THE COMPARATOR
- WHAT CLAIMS CAN BE MADE
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- TIME LIMITS

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What does the law say?

The right to equal pay between men and women for work of equal value is set out in Article 141 of the EU Treaty. In the UK, it is found in the Equal Pay Act 1970.

The effect of a successful claim is that an “equality clause” is inserted into the claimant’s contract, following which, the employee is entitled to equality of pay and other terms and conditions with someone of the opposite sex, in a comparable job.

The European Commission and the Equality and Human Rights Commission (which includes the Equal Opportunities Commission) publish codes of practice, which although not legally binding, may be used in evidence in equal pay claims.



What does the law require?

The Equal Pay Act requires a four stage approach:

- Selecting an appropriate comparator of the opposite sex
- Proving that the comparator is employed to carry out equal work
- Comparing the claimant's and the comparator's terms and conditions of employment
- Assessing whether the employer can explain any discrepancy in pay ("the genuine material factor defence")



Who is the comparator?

Claimants have to name a comparator of the opposite sex who is employed “in the same employment” as them. So the comparator must either work at the same establishment as the claimant or work at one where “common terms and conditions apply”. In other words, where the man would be employed on the terms incorporating the same collective agreements if he worked at the same workplace as the claimant.

In either case, the claimant and the comparator must be employed by the same employer or by associated employers. A claimant can use a comparator employed by a different employer if the inequality in pay comes from a single source such as a piece of legislation that is binding on both employers.

The claimant and the comparator have to be employed at the same time at some point usually within the last 6 years. A claimant can rely on a comparator who has subsequently left but cannot use someone who started recently in relation to any earlier period. There may be exceptions to this if the claim is based on the claimant and comparator doing the same job (“like work”).



What claims can be made?

The Equal Pay Act provides three ways for a claimant to show that their work is equal to that of their comparator – if they are engaged on “like work”, “work rated as equivalent” under a job evaluation scheme or “work of equal value”.

What is involved in a “like work” claim?

The claimant must be doing the same or broadly similar work to that of their comparator.

A Tribunal is unlikely to decide that the claimant is doing like work if there are significant differences such as different duties, greater responsibility or greater physical effort. But Tribunals will look closely at extra duties stipulated in a comparator’s job description to ascertain whether or not they are actually being done.

What is involved in a “work rated as equivalent” claim?

The claimant’s and comparator’s jobs must be rated the same under a job evaluation scheme carried out by the employer. This measures the demands made on the two workers under headings such as effort, skill and decision making.

The job evaluation scheme must be free from discrimination and must be analytical.



What is involved in a “work of equal value” claim?

These claims are the most difficult to assess. In the absence of a job evaluation scheme, the Tribunal has to decide whether the claimant’s and the comparator’s jobs are of equal value.

Normally Tribunals ask an independent expert to do an evaluation of the two jobs. This is similar to a job evaluation done by an employer but the independent expert only looks at the job of the claimant and the comparator.

Employees cannot bring equal value claims if the two jobs have been properly rated in a discriminatory analytical job evaluation scheme. Their route to a claim is by a work rated as equivalent claim.



What terms and conditions are compared?

Each term of the claimant's contract and the comparator's contract are usually compared separately, except for some terms relating to pay. For instance, sometimes basic pay and bonus paid for basic hours of work will be lumped together as one term.

The "equality clause" applies to all elements of contractual pay, including basic pay, overtime and bonuses. It also includes allowances and fringe benefits, sick pay, holiday pay, redundancy payments, severance payments, pay progression, pension benefits and access to pension schemes

Under European law, non-contractual benefits, such as travel concessions and discretionary bonuses may also be covered.



What defences are available?

If the claimant can show that their work is of equal value to that of their comparator but that they are being paid less, then the onus shifts to the employer to prove that the variation is “genuinely due to a material difference which is not the difference of sex”.

If the employer can show that there is no direct or indirect sex discrimination, then a Tribunal will accept their explanation for the difference provided it is genuine and relevant.

However, if there is evidence of sex discrimination in the pay system, the employer has to try to justify the difference. This involves showing that it:

- Corresponds to a “real need” of the business
- Is reasonably necessary and appropriate to that need
- Is proportionate to that need

The reason put forward for the difference in pay must be the actual reason (although it can be given in hindsight). In other words the employer does not have to have thought of it at the time, provided it really does explain the difference. The reason must also be “significant and relevant”.



Examples of genuine material factor defences that employers have used to defeat equal pay claims include:

- Market forces and skills shortages
- Red circling
- Geographical differences
- Different skills, qualifications and experience

The genuine material factor defence will fail, however, if the reason itself is 'tainted with discrimination'.

For example, the House of Lords refused to accept an employer's material factor defence based on market forces, when the market itself discriminated against the claimant – female catering workers. The evidence in that case indicated that the market valued the work of catering workers at a lower rate because catering workers were on the whole women.



What is the time limit for bringing a claim?*

Tribunal applications must be lodged within six months less one day of the termination of any contract of employment. A contract can be terminated as a matter of law by a substantial change in terms and conditions and the job a person does, even if both the employer and employee agreed to the change. A contract can end for the purposes of Equal Pay law where there is a transfer of employment under the Transfer of Undertakings Regulations 2006. At the moment it is not always clear when a contract ends for the purpose of the Equal Pay Act 1970, so it is important to get advice quickly after any transfer or substantial change in terms.

However, under the statutory grievance procedure, where the action complained of started before 6 April 2009, employees have to lodge a grievance with their employer, and wait for 28 days to enable the employer to respond before submitting a Tribunal claim. The time limit for submitting the originating application is then extended by three months to allow the grievance procedure to run its course. Where the action complained of started on or after 6 April 2009, the employee should still raise a grievance but even if they do, the time limit is not extended.

*REFERS TO LEGAL CHANGES EFFECTIVE FROM 6 APRIL 2009.



What is the equal pay questionnaire?

Under the Equal Pay Act, claimants can serve a list of questions on their employer using the questionnaire procedure. This may include questions about the identity and pay of possible comparators, and may ask for explanations of any pay differences. If an employer fails to answer a questionnaire within eight weeks, a Tribunal may use this fact to draw inferences of discrimination.



What compensation is available?

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

- An equality clause inserted into their contract of employment to ensure they get the same pay as their comparator
- Back pay from the date of lodging the Tribunal application to the date of the insertion of the equality clause into their contract up to a maximum of six years (five in Scotland)
- Interest on back pay

Claimants cannot recover compensation for injury to feelings.









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