



## Equal Pay: A Legal Perspective



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## Learning objectives

- Develop knowledge and understanding of equal pay law.
- Ability to distinguish equal pay claims and claims of direct sex discrimination.
- Appreciation of the difference between equal pay claims and gender pay reporting obligations.
- Risk mitigation.

## **Introduction**

The right to equal pay for equal work between men and women was set out in the Equal Pay Act 1970. It is now contained in the Equality Act 2010 ("EQA 2010").

Equal pay law prohibits discrimination between the sexes in relation to their contractual terms. Typically, this is about matters such as pay, contractual bonus payments, shift payments, overtime and benefits (eg, company car or gym membership).

Complaints about matters other than pay and benefits are normally brought as sex discrimination claims (eg, discretionary bonus, access to training and promotion).

Equal pay claims are usually brought by women but both men and women can pursue claims under the EQA 2010.

- If employees or their lawyers are unclear about whether equal pay or sex discrimination applies, both are usually cited - possibility that a discretionary bonus payment or enhanced redundancy payment may have become contractual as a result of custom and practice.
- In recent years, a large number of claims have been brought against local authorities and the health service (eg, **Birmingham City Council v Abdulla** [2012] UKSC 47: 174 former council employees pursued equal pay claims in the civil courts outside the usual 6 month limitation period. Claims settled for circ. £757m.
- Likely increase in private sector claims – see **Asda** case.

## **Employment Tribunal statistics (2007-Q2 2017)**

- 2007/08 – 62,700 equal pay claims lodged
- 2015/2016 – 17,063 claims
- 2016/2017 – 10,467 claims
  
- 38.6% decrease in claims (2015/16-2016-17) but the overall total is likely to increase in the near future due to the gender pay reporting requirement.

**Office for National Statistics Annual Survey 2017** showed the overall gender pay gap rose from 18.2% in 2016 to 18.4% in 2017. However, the gap for full-time workers, fell to a record low of 9.1% - down from 9.4% in 2016.



## Legal Framework

- Article 141 EC Treaty of Rome – principle that women and men should get equal pay for equal work or work of equal value.
- s.66(1) EQA 2010: sex equality clause to eliminate pay discrimination.

## Claims - s.65 EQA 2010

A women must have the same terms and conditions as a man (in the same employment) if she is doing:

- **‘like work’;**
- **‘work rated as equivalent’;**
- **‘work of equal value’.**

'Like Work'

2 stage test:

- is work done "*the same or broadly similar*"? Assess skills and knowledge required to perform role;
- Whether any differences between the work done are of practical importance"?

ET to concentrate on what employees do in practice and not what the job description may indicate. Differences such as additional duties, level of responsibility, skills, qualifications and physical effort could be of practical importance. ET will require a detailed breakdown of tasks.

‘Work rated as equivalent’

- Must show that work has been rated as equivalent to that of a man under a valid job evaluation scheme (“JES”).
- JES to evaluate jobs according to demands, effort, skill, responsibilities and decision making.
- Detailed guidance on designing, implementing and monitoring JESs is available on the Equality and Human Rights Commissions website.
- Employers can commission a JES after an equal value claim has been started in an attempt to block the claim.



## 'Work of equal value'

- Whether work is of equal value, taking into account effort, demand and skill.
- Hardest type of equal pay claim. Normally, ETs ask an ACAS appointed independent expert to do an evaluation of the two jobs. This is similar to a job evaluation scheme done by an employer but the independent expert only looks at the job of the claimant and any appropriate comparator.
- ETs have power to deal with the equal value assessment themselves but businesses should consider instructing their own experts.
- Examples: speech therapist and psychologist; packer and labourer; switchboard operator in a hospital with maintenance worker.

## Comparator (s.79 EQA 2010)

- Equal pay law requires a women to compare her pay or contract terms with an actual male colleague.
- Unlike claims of direct discrimination, an equal pay claim cannot be brought on the basis of a hypothetical comparator.
- The comparator must work:
  - (1) for the same employer or an associated employer at the same establishment (s79(3) EQA); or
  - (2) at a different establishment where ‘common terms and conditions apply’ (s79(4) EQA).

## Comparator (s79 EQA 2010)

- Comparison with a predecessor is permitted (**McCarthy's Ltd v Smith** [1980] ECR 1275 ECJ).
- **Leverton v Clywd County Council** [1989] IRLR 28 (HL): a nursery nurse was permitted to compare herself with a clerical worker employed by the county council but working at a different site. Common terms would include establishments covered by the same collective agreement.
- **South Tyneside MBC v Anderson** [2007] ICR 1581: appropriate to compare female cooks and cleaners with male drivers and refuse collectors (working under common terms).

**The Material Factor Defence (s.69 EQA 2010 and Equal Pay Code of Practice, para 74)**

- Employers can defeat a claim if they can establish that the difference in pay (or other terms) is because of a material factor which does not involve sex discrimination.
- *Glasgow City Council v Marshall [2000] IRLR 272*: once a woman shows that she is being paid less for doing like work or work of equal value to that of a man, the burden of proof passes to an employer.
- The law presumes the difference in pay is because of sex. Therefore, burden on the employer to provide a non-discriminatory explanation – eg, pay variation is not tainted by discrimination.

**The Material Factor Defence (s.69 EQA 2010 and Equal Pay Code of Practice, para 74)**

Employer must prove the following:

- Any difference in pay is genuine and due to a factor which has nothing to do with a women's sex;
- There are 'material' differences between the cases (**Rainey v Greater Glasgow Health Board** [1997] IRLR HL – material means 'significant and relevant');
- Pay difference based on a mistake or misunderstanding would be lawful – so mistakenly putting an employee on the wrong pay grade is unlikely to be sex discriminatory.

**The Material Factor Defence (s.69 EQA 2010 and Equal Pay Code of Practice, para 74)**

Examples of material factors:

- Experience and qualifications;
- Market forces and other economic considerations;
- Geographical differences, eg London Weighting;
- Unsocial hours, rotating shift and night working;
- Performance.

## Sex equality clause (s.66 EQA 2010)

- Men and women must have the same terms – achieved by automatic modification of any contractual term that is less favourable.
- Covers all contractual terms, not just those directly linked to remuneration and will include salary, non-discretionary bonus, holiday pay, over time, pensions, shift payments, sick pay as well as non-monetary matters such as annual leave.
- Operates to give woman parity where she is receiving less favourable treatment in relation to contractual terms (*Evesham v North Hertfordshire Health Authority (1999) IRLR 155*).



## Pay Secrecy

Section 77 EQA 2010: any rule or provision which prevents employees from discussing their pay with other colleagues shall be unenforceable.

It also outlaws the use of “gagging clauses” in contracts.

However, employers can stipulate that employees keep pay rates confidential from certain groups outside the workplace, for example competitor organisations. If an employer takes action against an employee for disclosing or receiving pay information, the employee may claim victimisation.



## **Time Limits**

- Tribunal: any time during employment or within 6 months of the date of termination.
- ACAS Early Conciliation prior to lodging claim.
- High Court: within 6 years of the breach of contract/end of employment (*Abdulla & Others v Birmingham City Council [2010] EWHC 3303 (QB)*).

## **Remedies**

- Modification of less favourable term/s;
- Arrears of pay going back 6 years;
- Mandatory equal pay audit.



## Gender Pay Gap

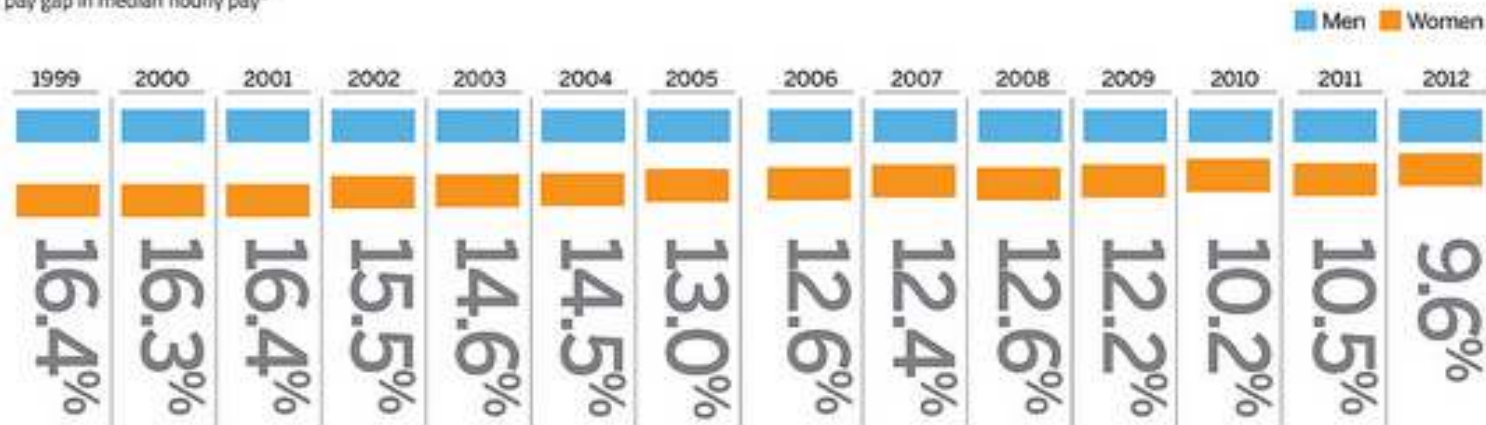
There are key differences between the gender pay gap and equal pay.

- Gender pay gap measures the difference between men and women's average pay;
- Equal pay is the legal obligation that requires employers to pay men and women the same rate of pay, including contractual benefits if they are employed to do the same job or work of equal value.
- Whilst failing to pay a women equal pay (for like work) is likely to be unlawful, having a gender pay gap is not.

## Important statistics

### The gender pay gap – full time only

The gender pay gap in median hourly pay\*



Source: Annual Survey of Hours and Earnings (2012), ONS \*Excluding overtime

### Working part-time

For their main job, women are over three times more likely to be working part-time than men.



Source: Labour Force Survey (October 2013), ONS

Why it matters: median hourly earnings (excluding overtime).

Full-time workers  
**£12.56** Per hour

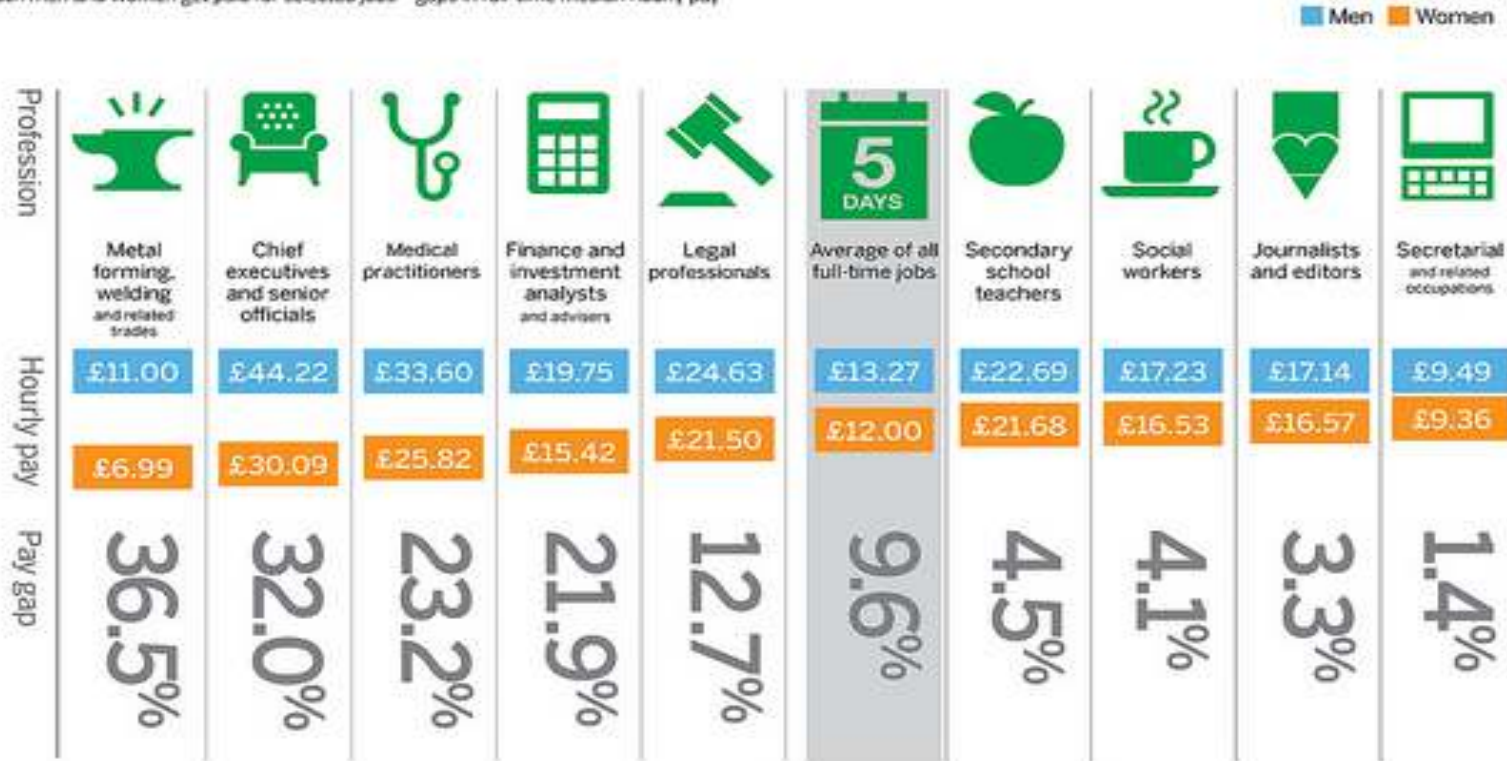
Part-time workers  
**£8.01** Per hour

Source: Annual Survey of Hours and Earnings (2012), ONS

## Gender pay gap in various occupations

### The gender pay gap

How much men and women get paid for selected jobs – gaps in full-time median hourly pay\*



Source: Annual Survey of Hours and Earnings (2012), ONS. \* Excluding overtime.

## **Gender Pay Reporting**

EQA 2010 (Gender Pay Gap Information Regulations 2017): for 2017 and all subsequent years, employers with 250 + employees will be required to publish:

- mean and median gender pay gap;
- difference in average hourly rate of pay and bonus payments between male and female employees;
- proportion of employees in each quartile (by reference to gender) of the pay distribution;
- data to be published on the employers website and downloaded onto a Government website (<https://gender-pay-gap.service.gov.uk/Viewing/search-results?s=K&y=2018>)

Employers must publish their reports by **4 April 2018** (with a snapshot date of 5 April 2017 (and 5 April for all subsequent years)).

- Regulation 14: employer to sign a written statement to confirm that the information published is accurate.
- Regulation 15: information must be published on the employer's own website for at least 3 years from the date of publication;
- Failure to comply constitutes an 'unlawful act' within the meaning of s.34 of the Equality Act 2006, which empowers the Equality and Human Rights Commission to take enforcement action.



## Practical tips

- Update/set up systems to help calculate pay data according to gender;
- Ensure pay, benefit, appraisal and rewards system are transparent and limit local management discretion over pay to tackle any pay disparity;
- Determine where men and women are doing equal work;
- Pay structure to be based on an objective evaluation of job demands and re-evaluate regularly;
- Collect data to identify equal pay gaps;
- Establish causes of any significant pay gap; assess possible reasons and identify any measures to take to try and reduce any pay gap (eg, promoting flexible working, mentoring).

## Employment law and HR services from Rahman Lowe

- Review of employment contracts and handbooks;
- Drafting bespoke contracts, policies and procedures;
- Advice on all aspects of employment law;
- Day to day HR support and assistance with litigation;
- Managing exits and reputational risk management;
- Regular updates and training on employment law.







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