

An Employer's Guide to Equal Pay

What is the Equal Pay Act?

The Equal Pay Act 1970 was introduced to try and eliminate discrimination with regard to pay and other terms and conditions between men and women. The provisions of the Act are now contained in the Equality Act 2010 (the Act), the main parts of which came into force in October 2010.

Who has rights under the Equal Pay Act?

Rights under the Act apply equally to men and women who are employed at an establishment in Great Britain. For the purposes of this guidance note reference is only made to a female seeking equal treatment with a male comparator.

Under the Act, “employed” is defined as a woman who is working under a contract of service, a contract of apprenticeship, or a contract personally to execute any work or labour. The Act also covers paid office-holders, but not job applicants.



What amounts to “pay”?

For the purposes of the Act, “pay” includes both pay and other contractual terms and conditions such as piecework, output and non-discretionary bonus payments, automatic pay progression, paid holidays and sick pay. European Law has extended the concept to include redundancy payments, travel concessions, employer’s pension contributions and occupational pension benefits. Although a male and female employee may receive the same basic rate of pay, if other contractual benefits are not provided on an equal basis, there is scope for an equal pay claim.

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How does the Equal Pay Act work?

The Act implies an **equality clause** into any contract of employment that does not already include one. An equality clause is a clause whereby a woman, is promised equal treatment with any man in the same employment (the “comparator”), who is engaged in equal work.

Equal work is either:

- a) **Like work** – when the female employee is doing work of the same or a broadly similar nature to the work that which the comparator is doing
- b) **Work rated as equivalent** – although the work may be different, the jobs of both the female employee and her comparator have been given an equivalent rating in an analytical job evaluation study or job evaluation scheme
- c) **Work of equal value** – both the jobs of the female employee and her comparator are equal in value in terms of the effort, skill and decision-making required

The effect of the clause means that the contractual terms of employment of the female employee become no less favourable than the comparator’s terms. If his contract is or becomes more favourable than hers,

then her contract is, by means of the equality clause, immediately brought up to the same standard either by modifying the corresponding term of her contract (if there is one) or by inserting a corresponding term.

The equality clause operates to bring the lower standard up to the higher, it cannot be used to bring the higher down to the lower. Nor, indeed, can it be used to give the female employee a higher rate of pay than that enjoyed by her chosen comparator.

Who is the comparator?

It is for the female employee to choose a comparator who is either:

- ⦿ Employed by the same employment as her (or by an associated employer)
- ⦿ Where an employer operates more than one establishment in Great Britain, the female employee may compare herself with a comparator employed at another establishment, provided that common terms and conditions apply either generally or to the relevant classes of employees at both establishments (the “relevant class” being the class of employee which includes the comparator). Case law provides that common terms mean broadly similar; they do not have to be identical. For example, establishments covered by the same collective agreement for terms and conditions could be said to be “common”

(Employers are “associated” where one is a company controlled by the other employer, e.g. a subsidiary or where both employers are companies controlled by a third person e.g. sister companies).

The comparator does not have to be representative of employees doing that particular type of work. This could have the result that if a female colleague succeeds

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in an equal pay claim to have her salary increased, male colleagues of the female employee may now 'piggyback' her claim using her as a comparator to then have equality of pay with the female colleague on her newly amended wage.

The comparator could also be someone who previously performed within the same establishment or service prior to the female employee's period of employment and did equal work for the employer, but it cannot be someone who is a successor to the female employee.

As a consequence of developments in case law, the requirement that comparators be in the **same employment** have resulted in a 'single source' test for equal pay comparisons. While case law seems to suggest that the 'single source' will often be the same employer, it was decided in *Lawrence v Regent Office Care Ltd* that it is necessary in all circumstances to consider whether the terms and conditions being compared are traceable to one source which is responsible for the inequality and which can restore equal treatment. For instance, the Court of Appeal recently affirmed in *City of Edinburgh v Wilkinson & Others* that a Council is the 'single source' for the purposes of equal pay comparisons between a white collar claimant and a bonus earning manual worker, because the Council was responsible for setting the pay terms of both types of employees.

Comparable terms

Where remuneration is made up of several elements, all terms must be comparable. It is not a case of comparing the 'total remuneration package', but instead of comparing each distinct provision of the contract dealing with pay and benefits in kind.

Thus, a female employee is entitled to the same rate of basic pay and overtime as



her male comparator, even if she is more favourably treated in other respects, such as additional holidays and better sickness benefits (although this scenario might be relevant when the issue of the **material factor defence** arises, which is discussed below).

Having selected her comparator, the female employee must then demonstrate that they are both engaged in equal work.

Like work

A female employee will be regarded as employed on like work with a comparator if, but only if, her work and his is of the same or a broadly similar nature, and the differences (if any) between the things that she does and the things that he does are not of practical importance in relation to the performance of her employment contract.

In comparing her work with his, the Tribunal should not take too pedantic an approach, but should instead consider the matter in broad, general terms, looking at the nature and extent of the differences, as well as the frequency or otherwise with which such differences occur in practice. However, this will be determined by looking at the actual work undertaken and the similarity of both what is done and the skill and knowledge required to do it. Relevant considerations might include, for example, training and qualifications, experience and skill and the exercise of responsibility.

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Work rated as equivalent

A female employee may claim work rated as equivalent with her comparator if a non-discriminatory analytical job evaluation study has been carried out in respect of his work and hers, and her job has been rated as equivalent to (or higher than) his in terms of the demands made on a worker under various headings (e.g. effort, skill, or decision-making).

Job evaluation methods

The principle methods of job evaluation are set out in the [ACAS Advisory Booklet](#) "Job Evaluation: Consideration and Risks" and are known as job ranking, paired comparisons, job classification, points rating and factor comparison.

For the purposes of a claim that work is rated as equivalent, the comparison of jobs must be done by reference to the same job evaluation study that both parties must have agreed to the carrying out of and both accept as valid, even if it has not yet been implemented.

Work of equal value

A female employee may claim that her work is of equal or greater value to that of a comparator in the same employment in terms of the demands made on her, under such headings as effort, skill and decision-making. An equal value claim applies only where a female employee cannot rely upon a claim that her work is either like work or work rated as equivalent.

Furthermore, a female employee will not be able to succeed in an equal value claim if a valid analytical job-evaluation study has concluded that she and her male comparator do work which is not of equal value. In reality, claimants often claim both like work and equal value when their jobs have not been rated by a valid job evaluation study.



The material factor defence

Although a female employee may establish that she is engaged on like work, work rated as equivalent, or work of equal value, the Act provides that she will not be able to successfully claim work rated as equivalent with her comparator if the employer can show that the variation between the two contracts is genuinely due to a material factor which is not based on difference of sex. Such factors may be, but are not limited to, past performance, length of services, different grades or different hours.

The Act stipulates that in the case of equality claimed on the basis of like work or work rated as equivalent, the material factor must be a material difference between the female employee's case and the comparator's. However, in the case of equality claimed on the basis of work of equal value, the Act requires that factor may be a material difference between the female employee's case and the comparator's.

What is meant by 'material'?

It was held in *Rainey v Greater Glasgow Health Board* that "material" means significant and relevant. Consideration of an individual's case must necessarily involve consideration of all of the circumstances of that case which may go beyond the personal qualities demonstrated by the person by way of skill, experience

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or training. Extrinsic factors may, in certain circumstances, justify a difference in pay, such as the scarcity of suitably qualified employees to fill a particular post.

The material difference must not itself be the result of sex discrimination.

Objective justification

The material factor defence should be **objectively justified**. Objective justification requires the employer to show that the difference is both 'appropriate' and 'necessary'. A test of proportionality must be met: the grounds put forward by the employer to explain the inequality must correspond to a real need, be appropriate to achieving the objectives pursued and be necessary to that end. The UK courts have held that objective justification is only required where the material difference is found to be tainted by sex discrimination; further in the decision in *Glasgow City Council v Marshall* specified that if the factor does not have an indirect discriminatory effect, then the factor need only explain the difference.

Sex discrimination and equal pay

To determine whether there is a sex taint in the difference in pay, the Tribunal may look at whether there are statistics which show a difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men.

A collective agreement or collective bargaining structures may provide the material factor defence, but if the arrangements incorporate discriminatory practices or assumptions, objective justification will also be required. A decision will then be needed to show that this was reasonably necessary to achieve the employer's aims.

Similarly, external economic considerations (such as market forces requiring the need to pay more to attract candidates for a particular job) may also provide a material factor defence. However, if the market itself is tainted by discrimination (e.g. because pay-rates for a certain job are fixed by reference to what is seen as "woman's work") the objective justification will again be required.

Pay secrecy

One of the provisions introduced by the Equality Act 2010 is a provision making pay secrecy clauses unenforceable. This was aimed at combating the continuing gender pay gap and allowing for greater transparency. Clauses in a contract of employment preventing employees from discussing their pay or bonuses with colleagues cannot be enforced.

In addition to this, employees who seek or make a relevant pay disclosure, i.e., ask for or provide information to a colleague about their pay for the purposes of finding out if there is discrimination in pay, then the disclosure is to be treated as a protected act for the purposes of the protection against victimisation. Note that for these purposes, discrimination in pay is not limited to discrimination based on sex.

Remedies for unequal pay

Any claim for Equal Pay whether for arrears of remuneration or damages, may be brought before an Employment Tribunal. The Act explains that a Tribunal may hear a case in a number of circumstances, including where:

- ◉ An employee presents a claim for breach of contract (given that the employee's right to equal pay takes effect by the operation of an equality clause in her contract of employment, the remedies available to the employee and employer are the usual contractual remedies)

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- ⦿ An employer applies to the Tribunal for an order declaring its and the employee's rights in relation to an equality clause

Time limits for an equal pay claim

If the female employee is still in the same job to which her claim relates, then she is entitled to bring an equal pay claim. When she is no longer working for her employer, the Act stipulates that she must bring a claim before an Employment Tribunal within six months of the termination of her employment. However, since July 2003, this time limit has been qualified in certain circumstances determined in the Act, such as when there has been a deliberate concealment of facts relevant to the employer's failure to comply with the equality clause.

An employee who believes that they may have a claim for equal pay may serve on their employer an equal pay questionnaire requiring the employer to provide information to assist the employee in deciding whether or not she has a claim. Although there is no obligation on an employer to provide a response to the questionnaire, failure to do so within the 8 week time limit or providing evasive replies may lead the Tribunal to draw an inference that there has been a breach of the equal pay legislation.

The female employee can make a breach of contract claim in the civil courts for the arrears

due to the inequality of pay. Civil court claims can be made up to six years from the date on which the alleged breach of contract occurred.

Compensation – arrears of pay

The Act specifies that the period in respect of which arrears of pay may be recovered under the Act is up to six years in England and Wales and up to five years in Scotland. This time limit is also subject to certain qualifications, such as where there has been a concealment of facts by the employer relevant to its failure to comply with the equality clause, and without knowledge of which the female employee could not reasonably have been expected to initiate proceedings.

In *Preston v Wolverhampton Healthcare NHS Trust* it was ruled that where a claim is made in respect of a refusal, on grounds of sex, to allow access to an occupational pension scheme, then an individual is entitled to complain of denial of access going back to 1976.

If the claim is successful, the amount awarded will be the difference in remuneration between that of the female employee and her male comparator. The Employment Tribunal also has the power to award interest on sums awarded under the Act.



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