

Issues for 2007 in Equal Pay

I. Equal pay claims – who is vulnerable?

- **NHS**

The North East Litigation.

- **Public sector**

Thousands of claims have been lodged against local authorities. The background to these claims involves two relevant Job Evaluation Schemes ('JES'):-

- the 1988 manual workers' scheme; and, in particular,

- the general scheme agreed in 1997 between trade unions and councils to equalise the pay between men and women doing similar unskilled or low-skilled jobs (the 'green book').

Local Authorities have until March 31 2007 to fully implement equal pay reviews.

- **Private sector**

Particularly large employers.

II. Equal Pay claims – The Basics

Claims under the Equal Pay Act 1970 (EPA)

1. The Equal Pay Act 1970 (implementing Article 141 of the Treaty Establishing the European Union (formerly Article 119 of the Treaty of Rome) to be read with the Equal Pay Directive) implies an *equality clause* into every contract of employment, so that men and women have the right to the same pay and other terms and conditions if they are doing:-

- Like work (s.1 (2)(a))
- Work rated as equivalent (s.1 (2)(b))
- Work of equal value (s.1 (2)(c))

2. The **comparison** has to be with a man in the same employment (s.1 (2)) (or a woman in the case of a claim by a man). See s.1 (6) for the test for that comparator. It is necessary to show either employment at the 'same establishment' or common terms and conditions (see British Coal Corporation v Smith [1996] ICR 515, HL). For cross-employer

comparisons see Lawrence v Regent Office Care [2003] ICR 1092 (ECJ) and Armstrong v Newcastle upon Tyne NHS Trust [2006] IRLR 124, CA

3. The definition of 'employment' in s.1 (6) includes a 'contract personally to execute any work or labour' and extends to office-holders (see s.1 (6A)-(6C)).
4. **All contractual terms and conditions of employment** – not just pay (see British Airways Plc v Grundy and others (EAT) (19/8/05) (Lawtel)). A claim may be related to contractual facilities and services. Pay includes allowances, benefits in kind, maternity payments and bonuses.
5. '**Genuine Material Factor**' defence ('GMF'); according to s.1 (3) EPA, there is a right to equal pay unless the inequality can be shown to be 'genuinely due to a material factor which is not the difference in sex' (s.1 (3) EPA).
6. 'Material' simply requires a causative relationship between the material factor and the difference in pay to be shown (Glasgow City Council v Marshall [2000] IRLR 272 (House of Lords ('HL'))).
7. The EAT in Redcar & Cleveland Borough Council v P Bainbridge & Others (2006) (15/11/06) held that where there is a GMF that remains valid and properly explains the difference in pay, there is no principle which justifies the courts requiring employers to manufacture some alternative means of paying the claimants. Redcar is also helpful in respect of *comparators*, confirming that a comparison with someone who, after a job evaluation, is in a lower rated job, is a lawful comparison.
8. However, there is a continuing debate as to *whether the employer needs to objectively justify a difference in pay, even where there is no evidence of sex discrimination*.
9. The *most recent* EAT decision on the issue of whether the GMF itself has to be objectively justified, has recently rejected the argument that employers are *automatically* required to objectively justify a difference in pay due to the mere fact that she is making a comparison with a man whose job is of equal value; Villalba v Merrill Lynch [2006] IRLR 427 (EAT) (cf. Sharp v Caledonia Group Services Ltd (2005)). However in Redcar there was an indication that the reasoning in Villalba is likely to be challenged in the future.

10. In Villalba, the EAT were of the view that, IF there is prima facie evidence of indirect discrimination, that is, the difference in pay has a disparately adverse impact upon women for reasons in some way connected with their sex, the employer has to go on to satisfy the Tribunal that the difference in pay is 'objectively justified'.
11. In most equal pay cases to date, claimants have not tended to *directly* allege direct or indirect discrimination, however, they do tend to rely upon statistics showing a disparate impact (described as an 'Enderby situation' i.e. of identifying pay differentials). It follows that it remains a difficult task for employers to show that the differential is not sex based in order to avoid having to objectively justify.
12. ***Length of service as a determinant of pay***, see Cadman v Health and Safety Executive (Case C-17/05) (ECJ). *Cadman* essentially decided that as a *general rule*, the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enabled workers to perform their duties and that employers did not have to establish this objective as regards a particular job *unless* the worker provided evidence capable of raising serious doubts in this regard.
13. However, in the context of *age discrimination*, there may be an issue as to the justification of using length of service as a legitimate criterion (e.g. in redundancy selection etc) on the basis that it rewards loyalty.
14. **Time limits:** claims must be brought: -
- Any time whilst still employed under those terms of a discriminatory pay clause
 - In 'standard cases' - within 6 months of the end of employment (s.2 (4) EPA)
- For the position in non-standard cases (i.e. 'concealment case', 'disability case' and 'stable relationship cases' (treating a series of intermittent or temporary contracts as if they were a single contract)) see s.2 (4) and s.2ZA EPA.
15. Useful caselaw on time limits: -
- See Jeffrey and others v Secretary of State for Education and another [2006] ALL ER (d) 99 (Jun) for guidance on determining the length of a 'stable relationship';

- For general guidance re time limits in EPA cases see Cure v Coultts & Co PLC (2005) ICR 1098; and,
- For time limits in claims against transferors see Powerhouse Retail Ltd and others v Burroughs and others [2006] IRLR 381(House of Lords).

16. **Compensation:** The principle is that a successful claimant is entitled to be put in the same position as their chosen comparator. Compensation may include: -

- **Arrears of pay:** any arrears of pay for up to 6 years before the day on which proceedings were filed; and,
- **Interest:** may also award interest on those sums.

Direct Claims relying upon European Law

17. In simple terms, if the claim relates to: -

- Pay; Article 141 (widely construed by the European Courts to include contractual *and non-contractual* aspects of remuneration;
- Non-pay issues; Equal Treatment Directive 76/207/EEC.

III. Issues for 2007

18. There are a plethora of cases and discrete issues in equal pay that will be fought in the tribunals and appellate courts throughout 2007, however I will focus on three particular issues: -

- **Anti-social hours and shift-working allowances / bonuses, bonuses based on significant overtime;**
- **Pay protection arrangements;** and,
- **Compromising equal pay claims.**

Allowances for anti-social hours, shift-working and bonuses based on overtime

19. The case of Blackburn (see below) is important, as the Tribunal have held that special bonuses payable for working anti-social hours indirectly discriminate against women.

Blackburn and another v Chief Constable of West Midlands Police [UKET]
(October 2006)

Facts:

- The Police force operated a three-shift system (early, late and night shifts);
- Officers were expected to work on a rotating shift pattern unless excused by reason of their childcare responsibilities or due to a medical condition;
- A Special Priority Payments (SPPs) scheme was introduced (concluded by the Police Negotiating Board in 2002);
- Qualification for SPPs required officers to be:-
 - Fully competent and highly committed to their duties, and
 - Fulfil one of a number of factors e.g. carried a significantly higher level of responsibility than usual for their rank or had a particularly demanding work conditions / environment;
- In 2003 the Police force agreed that SPPs scheme would cover officers who were available to be rostered for duty at any hour of day or night i.e. disruption pay, known as '24/7' working;
- Mrs Blackburn and Mrs Manely were unable to work nights for childcare reasons so were not eligible for the SPPs;
- They brought claims under the EPA. Their comparator was a male officer eligible for special payments.

Held (ET):-

The GMF defence:-

- The Tribunal rejected the employer's GMF defence that there was a material difference between work carried out at night and the work carried out during the day;

Disparate impact and objective justification:-

- The requirement to work "24/7" to be eligible for SPPs had a disparate impact upon women (upon statistical evidence); the overwhelming reason why women were unable to work 24/7 was related to childcare responsibilities as opposed to for men, being due to medical restrictions;
- The ET accepted that the desire to reward night-time working was a legitimate aim (i.e. a real need) which the 24/7 requirement corresponded with, however it was possible to achieve that aim by less discriminatory means;

- The ET considered evidence of practices in other Police forces where the 24/7 requirement was only one consideration in the scoring matrix and that where officers were excused from 24/7 working for childcare reasons they were also excused from this requirement, for the purposes of SPPs. That such a practice would have added around £20,000 to the annual wage bill, which it regarded as relatively insignificant;
- Pay practices, which derogate from the principle of equal pay require more cogent justification than had been demonstrated.

20. *The implications:* The implications of this case are likely to range from entitlement for those working in front-line police positions to top-ups to their salaries worth hundreds of thousands of pounds to a host of other cases challenging anti-social hours and shift-working allowances.
21. Following in the line of the Blackburn case, there is clearly further potential for equal pay claims where other elements of remuneration packages potentially discriminate against women such as **productivity or target-related bonuses that in practice require significant overtime**. For example, many jobs traditionally dominated by women, such as kitchen assistants, home care assistants and cleaners employed on a large scale by local authorities, do not typically attract productivity bonuses which often paid to male employers in equivalent areas such as refuse collection, transport and grounds maintenance.
22. *Evidence of practices by similar employers:* Blackburn is a useful example of how claimants seek to introduce evidence of how other similar employers have applied the requirement in question even where the comparators are within the particular Respondent's employment. In Blackburn, evidence of how a different police force had applied the SPPs was used very effectively to assist convincing the Tribunal that the criteria in question was not necessary and proportionate to achieving the aim of rewarding night-working.

Pay protection arrangements

23. The EAT case of Redcar & Cleveland Borough Council v P Bainbridge & Others (2006) EAT (15/11/06) (see in particular, 526, 550 and 550, 556.1 of the headnote) is of particular assistance in respect of the transitional arrangements such as pay protection schemes.
24. It is a particularly topical issue as there are numerous ongoing challenges to deals that have been made between unions and employers to ensure that male comparators do not lose significant percentages of their pay overnight.
25. In that case, the Council had undertaken a job evaluation process and put single status into effect (in accordance with the 1997 local government national agreement for single status). However, there was specific provision in the agreement for pay protection for up to four years for those who would otherwise have had their pay reduced as a result of the job evaluation scheme.
26. The Claimants argued that if they could establish that they were entitled to equal pay with their chosen comparators prior to the introduction of the single status agreement, then they should be entitled to recover the benefits that pay protection conferred. Whereas the Council argued that the productivity agreements produced cost savings and efficiencies, which justified the much of the difference in pay.
27. The EAT held that the ET was entitled to conclude that the employers had not established that the difference in pay on the facts was due a GMF 'other than sex' (within the meaning of s.1 (3)).
28. The EAT did however express their concern: -
 - that employers with discriminatory pay structures should be able to manage their way out of them by entering sensible JESs without opening themselves up to the risk of cascading claims;
 - that if because of the risks of such claims it is not possible to cost the JES or if the costs cannot be kept in reasonable limits that they may avoid those schemes altogether.

29. However, they stressed that it did not follow that pay protection can never be relied upon in connection with what they termed 'historic discrimination'. They pointed out that where different considerations apply in other cases it might be possible to show objective justification.
30. The EAT gave the example of where employees had not raised a right to equal pay until after the implementation of the pay protection scheme and, where employers shows a '*carefully crafted and costed scheme*' negotiated for the purpose of cushioning the effects of a drop in pay without any reason to suppose when it is implemented this would have discriminatory effects.

Compromising equal pay claims

31. The House of Lords heard the appeal in Derbyshire v St Helens Borough Council (EOC and others intervening) on 28th February and 1st March 2007 and judgment is due in the next two months. The decision is likely to give valuable guidance in this area.
32. It is clearly important for employers to understand what steps they may take to compromise a claim particularly in light of the entitlement to up to 6 years' back-pay.
33. The Council had sent letters to a group of workers inviting them to accept offers to settle ET proceedings and warning of consequences if they did not which the Claimants alleged amounted to victimisation.
34. The majority of the Court of Appeal ([2005] IRLR 801) decided that: -
 - There is a distinction to be drawn between the *commencement* and the *continuance* of proceedings;
 - That the question at issue was whether the conduct of a local authority amounted to an honest and reasonable attempt to compromise the proceedings; that there was nothing necessarily unreasonable in attempting to persuade an employee to agree a compromise;
 - The case was remitted to the ET to decide whether the Council's conduct constituted an honest and reasonable attempt to settle the proceedings;

It would appear that the majority's decision was in line with the general caselaw on compromise.

35. Mummery LJ dissenting, was of the view that the ET was entitled to find that victimisation had taken place, that it did not appear to matter the spirit in which the correspondence had been sent or the wholly proper motives behind it. That pressurising claimants to abandon or settle their claims even if done wholly reasonably can amount to detriment and less favourable treatment in the circumstances. However, in his view, it would not have been a breach of the SDA 1975 to send a similar letter to the applicant's solicitor or union.
36. Until the HL delivers its judgment, the position on whether or not employers may point out adverse consequences of not settling in a letters to claimants, even if they do so in strictly factual terms, is not clear.

IV. Practical guidance:-

Advising employers

37. Large employers, in particular those, who are considering *introducing* payments for shift-working, anti-social hours and bonuses (requiring in practice overtime) would be well advised to: -

- carry out a *gender impact assessment* (the EOC code of practice and equal pay toolkit may assist)

and,

- carefully consider whether their *objectives may be met by other less discriminatory means*;

Advising employees

38. *Test cases* - tribunals are identifying the test cases to be heard, with all other claims being stayed until those test case issues have been determined. If you are advising an individual claimant / group of claimants on potential equal pay action which is likely to

affect many others, it is advisable to check with the Tribunal Service as to whether there are pending test cases on the particular equal pay issue;

39. *Directions* – tribunals may issue directions following discussion with representatives on particular categories of cases.

40. **The future for equal pay**

It follows that in 2007 we are likely to see:-

- Moves towards a **statutory duty** to carry out equal pay audits
- **Growth in claims**, particularly in the public sector and large employers in the private sector, including challenges to:-
 - anti-social, shift-working allowances and payments requiring significant overtime;
 - Pay protection arrangements where there is 'historic discrimination'.

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