

EQUALITY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Work

Chapter 3: Equality of terms

Section 64: Relevant types of work

Effect

217. Chapter 3 of Part 5 of the Act contains provisions designed to achieve equality between men and women in pay and other terms of employment where the work of an employee and his or her comparator – a person of the opposite sex - is equal. It does so by providing for a sex equality clause to be read into the employee's contract of employment. This is designed to ensure parity of terms between the employee and his or her comparator. A similar provision – referred to as a sex equality rule – is implied into the terms of pension schemes.
218. This section explains that the sections mentioned which impose the equality clause and equality rule apply to employees, office-holders and, by virtue of subsection (3) of section 83, members of the armed forces, where one person's work is equal to the work of another.

Background

219. This is a new provision that is designed to clarify to whom the equality clause and equality rule provisions of the Act apply. It should be read together with section 79. The references to comparator (and its definition in section 79) clarify, but do not widen the choice of comparator available in previous legislation for the purpose of a claim for breach of an equality clause or rule. As was the case under previous law, a comparator has to be a real person and not a hypothetical one. Section 64(2) is a new provision which is intended to ensure that the effect of pre-existing case law *Macarthy's Ltd v Smith* (C 129/79; [1981] 1 All ER 111; [1980] ECR 1275) is maintained: that a comparator need not be someone who is employed at the same time as the person making a claim under these provisions, but could be a predecessor in the job.

Examples

- A female employee can compare her work with that of a male colleague employed by the same employer.
- A male police officer can compare his work with that of a female police officer in the same force.

Section 65: Equal work

Effect

220. This section sets out when the work of two people, whose work is being compared, is taken to be equal so that an equality clause or equality rule can operate. For work to be equal, a claimant must establish that he or she is doing like work, work rated as equivalent or work of equal value to a comparator's work. The section also sets out the factors which determine whether a person's work is within one of these categories. The fact that a discriminatory job evaluation study has been carried out which gives different values to the work of men and women is not an obstacle to the operation of an equality clause if an evaluation that set the same values for men and women would have found the jobs to be of equal value.

Background

221. This section is designed to replicate the substance of definitions contained in the Equal Pay Act 1970.

Examples

- Male and female supermarket employees who perform similar tasks which require similar skills will be doing like work even though the men may lift heavier objects from time to time. This is because the differences are not of practical importance in relation to their terms of employment.
- A job evaluation study rated the jobs of women and their better paid male comparators as not equivalent. If the study had not given undue weight to the skills involved in the men's jobs, it would have rated the jobs as equivalent. An equality clause would operate in this situation.

Section 66: Sex equality clause

Effect

222. This section requires that a sex equality clause be read into the terms under which people are employed. The effect of this is that any term in the contract which is less favourable than that of the comparator of the opposite sex is modified so as to ensure that both have the same effect. Where the comparator benefits from a term which is not available to the employee, the effect of the sex equality clause is to include such a term in the employee's contract of employment.

223. A sex equality clause will operate similarly on the terms of a person who is an appointee to an office or a member of the armed forces, as it does in relation to an employee.

224. Subsection (3) is intended to ensure that the provisions relating to equality of terms at work and the provisions governing pension schemes in sections 67 and 68 operate effectively together so that action can be taken against an employer as it could against a trustee, to ensure, for example that a defence that operates in relation to one, will operate in relation to the other.

225. Where a job evaluation study has rated the work of an employee and comparator as equivalent, the equality clause will give the employee the benefit of all of the comparator's terms, including those which have not been determined by the rating of the work.

Background

226. This section is designed to replicate the effect of definitions contained in the Equal Pay Act 1970.

Example

- A male employee's contract includes a term that he can use his employer's car for private purposes. His female comparator who does equal work does not benefit from this term. A sex equality clause will have the effect of including in her contract a term corresponding to that of her male comparator.

Section 67: Sex equality rule

Effect

227. This section requires that every occupational pension scheme is to have a sex equality rule read into it.
228. The rule requires that men and women are treated equally to comparable members of the opposite sex in relation both to the terms on which they are permitted to join the scheme, and to the terms on which they are treated once they have become scheme members.
229. The rule, insofar as it applies to the terms on which a person is treated once he or she has become a member of the scheme, does not apply to pensionable service before 17 May 1990. This was the date of the European Court's decision in *Barber v Guardian Royal Exchange Assurance Group* (C 262/88; [1991] 1 QB 344; [1990] ECR I-1889), which established that occupational pensions were pay for the purposes of what was Article 119 of the Treaty of Rome (now Article 157 of the Treaty on the Functioning of the European Union). Where the application of the rule relates to the terms on which a person becomes a member of the scheme, it has effect from 8 April 1976. This was the date of the judgment in *Defrenne v Sabena* (C 43/75; [1981] 1 All ER 122; [1976] ECR 455), where the Court, in holding that the principle of equal pay was directly effective, indicated that what was Article 119 of the Treaty of Rome should not be applied to periods of service prior to the judgment.
230. Where there has been a breach of a term modified by a sex equality rule, proceedings may be brought against the person responsible for the breach under Part 9 of the Act.

Background

231. The section replaces equivalent equal treatment provisions in section 62 of the Pensions Act 1995.

Example

- A scheme rule requires employees to work full time before they may join the scheme. There may be a breach of the equality rule because the scheme rule may have an adverse impact on female employees, who are less able to comply with the requirement to work full-time.

Section 68: Sex equality rule: consequential alteration of schemes

Effect

232. This section gives trustees and managers of an occupational pension scheme the power, by resolution, to alter scheme rules to conform to the sex equality rule in section 67.
233. They may use the power if:
 - they lack the power to alter rules; or
 - procedures for altering rules, including obtaining consent from another person (for example the employer), are unduly complex or would take too long.
234. In line with section 67, where the operation of an equality rule relates to the terms on which a person becomes a member of the scheme, any alteration made relying on this

section may only have effect from 8 April 1976. Where the alteration relates to a term on which a member of the scheme is treated, reliance on this section may have effect only from 17 May 1990.

Background

235. The section replaces equivalent equal treatment provisions in section 65 of the Pensions Act 1995.

Example

- The scheme rules of a large scheme require consultation with all the members before an amendment to the rules may be made. This is impracticable, particularly as some deferred members cannot be traced. Scheme trustees may make the necessary alterations to scheme rules relying on this power.

Section 69: Defence of material factor

Effect

236. As a general rule, if the work of a worker and a comparator of the opposite sex is equal but their terms are not, the sex equality clause takes effect. Section 69 provides that neither a sex equality clause nor a sex equality rule will apply if the employer can show that the difference in terms is due to a material factor which is relevant and significant and does not directly or indirectly discriminate against the worker because of her sex.

237. If there is evidence that the factor which explains the difference in terms is not directly discriminatory but would have an adverse impact on people of her sex (that is, without more, it would be indirectly discriminatory), the employer must show that it is a proportionate means of meeting a legitimate aim or the sex equality clause will apply. For these purposes, the long-term objective of reducing pay inequality will always count as a legitimate aim.

238. Subsection (4) deals with the application of the material factor defence to occupational pension schemes.

Background

239. The Equal Pay Act 1970 and Pensions Act 1995 made similar provision permitting employers and trustees to objectively justify differences to which an equality clause or rule would otherwise apply. This section draws those separate provisions into one section and clarifies the way in which they are to be applied. The reference in the previous legislation to a difference being “genuinely” due to a material factor has not been repeated in this section since the adverb added nothing to the meaning of the requirement, which is that the employer’s obligation is to show that the reason for the difference is genuine and not a sham. The section incorporates the effect of EU law in respect of objective justification of indirectly discriminatory factors.

240. The reference to an employer’s long-term objective of reducing pay inequality between men and women always being considered a legitimate aim is new.

Examples

- An employer introduces a bonus payment to encourage staff doing the same work to work a new night shift to maximise production. Only a small number of female staff can work at night and the bonus payments go almost entirely to male employees. Despite the disparate effect on the female employees, the employer’s aim is legitimate and the payment of a bonus to night workers is a proportionate way of achieving it.
- A firm of accountants structures employees’ pay on the basis of success in building relationships with clients (including at after-hours client functions). Because of domestic

responsibilities, fewer women than men can maintain regular client contact and women's pay is much lower. The employer is unable to show the way it rewards client relationship building is proportionate, taking into account the disadvantage to women employees.

- In imposing a new pay structure which seeks to remove pay inequalities between men and women employees, and to accommodate the interests of all the various groups, an employer includes measures which seek to protect the pay of the higher paid group for a short period of time. The intention to remove pay inequalities is a legitimate aim, and the question will be whether the imposition of the particular temporary pay protection arrangements is a proportionate means of achieving it.

Section 70: Exclusion of sex discrimination provisions

Effect

241. This section ensures that the sex discrimination provisions of the Act do not apply where an equality clause or rule operates (or would operate in the absence of a defence of material factor or the exceptions set out in Part 2 of Schedule 7).
242. The sex discrimination provisions prohibit sex discrimination in relation to non-contractual pay and benefits such as promotion, transfer and training and in relation to offers of employment or appointment.
243. The equality of terms provisions operate only in relation to the terms of a contract of employment, the terms of appointment to a personal or public office and the terms of service of members of the armed forces.

Background

244. This provision brings together sex discrimination and equality of terms provisions previously found in the Equal Pay Act 1970 and the Sex Discrimination Act 1975 and explains how they work together.

Example

- A female sales manager is entitled under her contract to a bonus every year in proportion to the number of sales her team achieves. She discovers that a male sales manager for the same firm doing the same job has a contract which includes a larger bonus payment in relation to the same number of sales. Her claim will be dealt with under the equality clause provisions.

Section 71: Sex discrimination in relation to contractual pay

Effect

245. This section deals with sex discrimination in relation to contractual pay in circumstances where a sex equality clause would not operate. This could be because there is no comparator doing equal work with whom a claimant can compare his or her pay or other terms. The section ensures that indirect sex discrimination in respect of contractual pay can be challenged only by means of an equality clause. However, the section for the first time enables a person who is treated less favourably than others by being paid less because of the person's sex or a combination of two protected characteristics including sex to pursue a claim for direct or dual discrimination where an equality clause does not operate.

Background

246. The section replaces similar provision in the Sex Discrimination Act 1975 which ensured that the sole remedy in respect of claims made about sex discrimination in contractual pay matters was obtained through the Equal Pay Act 1970. This required that the comparator be a real person. This section however contains a new provision

designed to allow claims to be brought where a person can show evidence of direct sex discrimination or dual discrimination (where sex is one of the protected characteristics in the combination) in relation to contractual pay but is unable to gain the benefit of a sex equality clause due to the absence of a comparator doing equal work.

Example

- An employer tells a female employee "I would pay you more if you were a man" or tells a black female employee "I would pay you more if you were a white man". In the absence of any male comparator the woman cannot bring a claim for breach of an equality clause but she can bring a claim of direct sex discrimination or dual discrimination (combining sex and race) against the employer.

Section 72: Relevant types of work

Effect

247. This section sets out the types of work that are covered by the provisions for pregnancy and maternity equality set out in the sections which follow.

Background

248. This section replaces various provisions in the Equal Pay Act 1970, which set out who is covered by the pregnancy and maternity equality requirements.

Section 73: Maternity equality clause

Effect

249. This section requires that a woman's contract must be read as including a maternity equality clause. Section 74 sets out how a maternity equality clause modifies a woman's pay. No comparator is required in these cases.

250. A maternity equality clause is capable of affecting the terms of an occupational pension scheme but only in the way a maternity equality rule (as described in section 75) would. This ensures that the provisions relating to pregnancy and maternity equality of terms at work and the provision governing pension schemes in section 75 operate effectively together.

Background

251. This section reflects provisions of the Equal Pay Act 1970.

Section 74: Maternity equality clause: pay

Effect

252. This section sets out how and when a maternity equality clause affects a woman's pay while she is on maternity leave.

253. Firstly, the maternity equality clause is designed to ensure that any pay increase a woman receives (or would have received if she had not been on maternity leave) is taken into account in the calculation of her maternity-related pay where her terms do not already provide for this.

254. Secondly, a maternity equality clause will operate to ensure that pay, including any bonus, is paid to the woman at the time she would have received it if she had not been on maternity leave.

255. Thirdly, a maternity equality clause will provide for a woman's pay on her return to work following maternity leave to take account of any pay increase which she would have received if she had not been on statutory maternity leave.

Background

256. This section is designed to replicate the effect of provisions previously in the Equal Pay Act 1970.

Examples

- Early in her maternity leave, a woman receiving maternity-related pay becomes entitled to an increase of pay. If her terms of employment do not already provide for the increase to be reflected in her maternity-related pay, the employer must recalculate her maternity pay to take account of the increment.
- A woman becomes entitled to a contractual bonus for work she undertook before she went on maternity leave. The employer cannot delay payment of the bonus and must pay it to her when it would have been paid had she not been on maternity leave.

Section 75: Maternity equality rule

Effect

257. This section introduces a maternity equality rule into all occupational pension schemes.

258. The effect of the rule is that any period when a woman is on maternity leave should be treated as time when she is not, in particular in relation to any rule of an occupational pension scheme which can be applied in respect of:

- scheme membership,
- accrual of scheme rights, and
- determination of benefits.

259. The section makes similar provision in relation to any discretion under scheme rules which can be exercised in a way that treats a period of maternity leave differently from time when a woman is not on maternity leave.

260. The woman's contributions to the scheme during maternity leave need be determined only by reference to the amount she is paid during maternity leave.

261. The provisions of the section apply only to women on unpaid ordinary maternity leave where the expected week of confinement began on or after 6 April 2003.

262. The provisions of the section apply only to a woman on unpaid additional maternity leave where the expected week of confinement began on or after 5 October 2008 and they do not apply to the accrual of scheme rights.

263. Where there has been a breach of a term modified by a maternity equality rule, proceedings may be brought against the person responsible for the breach under Part 9 of the Act.

Background

264. This section replaces the previous provisions on "unfair maternity provisions" in paragraph 5 of Schedule 5 to the Social Security Act 1989 and replicates aspects of Regulations 9 and 18A of the Maternity and Parental Leave etc Regulations 1999.

Examples

- A woman who is on maternity leave will be entitled to continuing membership of the scheme throughout the period of maternity leave whether or not she is paid.
- A woman who is paid whilst on maternity leave will be entitled to accrue rights in a scheme as though she were paid her usual salary but she will only be required to make contributions based on her actual pay.

Section 76: Exclusion of pregnancy and maternity discrimination provisions

Effect

265. This section provides that the pregnancy and maternity discrimination provisions of the Act do not apply where a maternity clause or rule operates.
266. The maternity discrimination provisions prohibit discrimination in relation to non-contractual pay and benefits such as promotion, transfer and training and in relation to offers of employment or appointment.
267. The maternity equality clause provisions operate only in relation to terms of a contract of employment, the terms of appointment to a personal or public office and the terms of service of members of the armed forces and do so by including an equality clause to modify terms governing maternity-related pay.

Background

268. This provision explains the relationship between the two sets of provisions and is intended to ensure that they provide seamless protection against pregnancy and maternity-related inequality.

Example

- A woman who is in line for promotion tells her employer that she is pregnant. The employer tells the woman he will not promote her because she is likely to be absent on maternity leave during a very busy period. This will be direct pregnancy discrimination.

Section 77: Discussions about pay

Effect

269. This section is designed to make unenforceable terms of employment, appointment or service that prevent or restrict people from disclosing or seeking to disclose their pay to others, or terms that seek to prevent people from asking colleagues about their pay, where the purpose of any disclosure is to find out whether there is a connection between any difference in pay and a protected characteristic. Any action taken against an employee by the employer as a result of conduct protected by this section is treated as victimisation within the meaning of section 27, as applied in the sections listed in the table in subsection (5).
270. Generally, discussions about pay would take place between colleagues, but this section makes it clear that protection extends more widely so as to include,; for example,; disclosures made to a trade union official or anyone else, provided that it is made with a view to finding out whether any pay differences may be connected with a protected characteristic.

Background

271. This section is new. It is intended to ensure that there is greater transparency and dialogue within workplaces about pay.

Examples

- A female employee thinks she is underpaid compared with a male colleague. She asks him what he is paid, and he tells her. The employer takes disciplinary action against the man as a result. The man can bring a claim for victimisation against the employer for disciplining him.
- A female employee who discloses her pay to one of her employer's competitors with a view to getting a better offer could be in breach of a confidentiality clause in her contract. The employer could take action against her in relation to that breach.

Section 78: Gender pay gap information

Effect

272. This section enables a Minister of the Crown to make regulations requiring private and voluntary sector employers with at least 250 employees in Great Britain to publish information about the differences in pay between their male and female employees. The regulations may specify, among other things, the form and timing of the publication, which will be no more frequently than annually. The regulations may also specify penalties for non-compliance. Employers who do not comply with the publication requirements could face civil enforcement procedures or be liable for a criminal offence, punishable by a fine of up to £5,000.

Background

273. This is a new provision. The Government wants larger private and voluntary sector employers in Great Britain to publish information on what they pay their male and female employees, so that their gender pay gap (the size of the difference between men and women's pay expressed as a percentage) is in the public domain.

274. The Government's aim is for employers regularly to publish such information on a voluntary basis. To give voluntary arrangements time to work, the Government does not intend to make regulations under this power before April 2013. The power would then be used only if sufficient progress on reporting had not been made by that time.

Section 79: Comparators

Effect

275. This section sets out the circumstances in which employees and others are taken to be comparators for the purposes of Chapter 3. A person who claims the benefit of a sex equality clause or sex equality rule must be able to show that his or her work is equal to that of the chosen comparator. The application of Article 157 of the Treaty on the Functioning of the European Union, which has direct effect, will ensure that existing case law on the breadth of possible comparisons is carried forward, so that, for example, in relevant circumstances the concept of a comparator will include a predecessor doing the same job.

276. If two persons share the same employer and work at the same establishment, each may be a comparator for the other.

277. If two persons work at different establishments but share the same employer and common terms and conditions of employment apply, each may be a comparator for the other.

278. A person can also be a comparator for another in either of the above circumstances if one is employed by a company associated with the other's employer. Subsection (9) defines when employers are taken to be associated.

279. A person holding a personal or public office may be a comparator for another person holding a personal or public office if the same person is responsible for paying both of them.
280. A person holding the office of constable is treated for the purposes of Chapter 3 as holding a personal office for the purpose of determining who can be that person's comparator.
281. The section also defines when staff of the Houses of Parliament may be taken to be each other's comparators.

Background

282. These provisions generally reflect the effect of provisions in previous legislation.

Example

- A woman is employed by a company at a factory. A man works for the same company at another factory. Common terms of employment apply at both establishments. The woman may treat the man as a comparator, if they are doing equal work (as defined in section 65).

Section 80: Interpretation and exceptions

Effect

283. This section explains the meaning of terms used in Chapter 3 of Part 5 of the Act. It also gives effect to Schedule 7, which sets out exceptions to the equality of terms provisions.