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**‘EQUAL PAY’ 2018**

A SIMPLE GUIDE

**By:**

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1. **Introduction**

The equal pay legislation has been operative since 1975, and, indeed, the legislation itself predates our EU membership. It will be recalled that the right to equal pay for men and women was always a part of the EU treaties, including the Treaty of Rome, 1957. Also in 1975 we had the Sex Discrimination Act, which aims to prevent unlawful discrimination between men and women, including over terms and conditions of employment. So, to an extent there is some duplication in the legal protections. It is also an obvious point, but one worth making, that the equal pay legislation is about ‘equal not fair pay-the latter gaining support in many jurisdictions for various other groups. It might also be noted that unlike legislation for NMW/NLW there is no inspectorate and recently the powers of tribunals to make recommendations etc. have been reduced.

Both pieces of legislation use the technique of comparing one sex with the other, meaning that there were always problems for potential claimants in some workplaces, which are dominated by one sex or the other. In addition, one sex or the other dominates some occupations, for example in health care, cleaning, banking, construction etc.

We are now nearly 50 years on from the Equal Pay Act, and yet we know that pay gaps remain (See below) and are, legally, hard to challenge. The problem the law has faced is that it focuses overwhelmingly on the workplace and work performance issues. This, positively, has enabled some progress to be made for women, who, for example, have the same qualifications, performance record etc. as their male comparator. Similarly, early case law made full use of the ‘work of equal value’ provisions in the Act (As amended) such that highly skilled cooks could compare themselves with engineers, plumbers etc. and other craft occupations. (Hayward v. Cammell Laird, 1988). However, the most difficult and contentious issue has been extraneous factors, such as working part-time, taking career breaks, elder care and maternity itself and the often associated factor of taking longer or failing to access more senior posts. Research report after research report from various research bodies has illustrated the typical loss of earnings for a woman over a lifetime. The reality remains that pay structures and practices reward continuous employment, not necessarily with one employer, on a full time basis far better than those who work flexibly or have breaks in employment.

It might finally be noted that cases typically take a very long time, awards are often not enforced and the number of cases being brought has slowed to a trickle!

**What do we know about pay?**

The latest ONS data gives us some interesting insights into where the pay of men and women is in the run up to equal pay reporting requirements.

The gap overall is 18.4%; between full timers it is 9%. It is larger (23.7%) for the private sector than the public sector (19.4%)

There are huge sectorial differences, for example in Education it is 26.3% for the Primary School Sector, and 14.8% for Higher Education.

The gap for Financial Services is 36%. However, it is much lower for,

* Real estate activities (13%)
* Agriculture (11%)
* Arts/creative industries (11%)
* Admin (10%)
* Hotels and food services (5%)
* Transport (3%)

And it increases across the board for age with the largest gap for FT employees in the 50-59-age bracket (c.25%)

On the other hand, if women work in STEM occupations, they are 30% better off than women in similar skilled occupations

**Why is the gap important?**

If the gap were closed it would give a bonus of £150 billion to GDP-but there are, of course other reasons!

Possible impact of pay gap reporting

Note, that both the public and private sectors are covered, though with different legal bases. The public sector is covered by the Equality Act obligations to comply with various equality duties; the private sector by the 2017 Gender Pay Gap Information Regulations. Both require the same calculations. The private sector regulations also cover the voluntary sector.

All organisations employing 250 or more employees must report on,

* The mean and median overall gender pay gap (Most see the median gap is the more reliable)
* The mean and median bonus gap and the proportion that received a bonus
* Distribution of men and women in different pay quartiles.

As is known, data must be reported on the government’s online reporting service and the organisation’s own website. Reports can contain additional data, and provide a narrative to explain them.

Organisations that have already reported have been subject to considerable scrutiny and sometimes-adverse publicity. Which? Many commentators consider that the data will be used in equal pay claims as indicating a context, though the Equal Pay provisions and reporting provisions are for very different purposes.

**What if you don’t report?**

On 23rd March 2018, in the run up to the closing date for reporting (For most 4th April), the EHRC produced a document, closing the Gap: What the EHRC Can do. In this it outlines the powers it has under the Equality Act to take action against employers. It has been especially feisty where it is suspected that the data is not accurate!

**Causes of unequal pay?**

Women tend to dominate lower paid occupations, relatively few reach very senior roles, few are in the higher paid occupations, especially science and engineering, and there is the major issue of caring and related duties.

The Government’s Equality Office (GEO) fronts this legislation, not EHRC, and its recommendations for change include;

* To explore the data and clearly identify the barriers to equal pay
* Increased mentoring schemes
* Improved on the job training, especially for part-timers
* Establish talent management pathways
* Develop partnerships with other organisations for training purposes
* Promote flexible working-though research data shows the major (financial and other) sacrifices that often have to be made to sustain a career!
* Involve staff and their networks in any programmes

For further information, check out www-gender-pay-gap-campaign.gov.uk and the Employer Tool kit

1. **Impact of legislation**

The legal strategy of the Equal Pay legislation

This is based on:

* Comparison-both in terms of sex, but also within an ‘establishment’
* An entitlement to equal pay where the work is ‘like’, rated equivalent or have ‘equal value’.
* An implied term of equal pay (Though no one seems to sue for breach of it)
* An opportunity of the employer to justify the difference in pay
* And now we have publicly available data on the ‘gender pay gap’ but where the aim is to provide overall pay data for a workforce, both in terms of pay and enhanced pay (Bonuses) rather than deal with individuals.
* There is great debate about the different approaches of the equal pay and the pay reporting requirements and therefore the extent to which the latter data can support claims for the former remains, as yet, unclear.

**What has been clarified?**

During the 1970 and 1980s we had considerable case law, especially from the then ECJ dealing with many of the issues of the definitions of law and the scope of the legislation itself. We know, for example,

* That the notion of the ‘establishment’ goes wider than an individual employer and can enable comparisons to be made across employments so long as they have terms of work set by a common source. (Collective agreement, pay review body etc.) This has had, of course, particular relevance for the public sector and where collective bargaining remains strong.(Leverton v. Clwyd CC (1989);British Coal v Smith,(1996);Lawrence v. Regent Office Care(2002)
* That the definitions of ‘like’ work or work ‘broadly similar’ have excluded minor differences, and contrived differences, such as alleging a man was required to do extra duties when in fact they didn’t, are ruled out (Shields v. Coomes, (1978)
* Job evaluation schemes have to be carried our fairly for the employer to argue that people are not ‘equivalent’. The task must be done professionally and be clearly criteria-driven. There have been highly contested cases on rating given to physical strength and other physical features or activities. (Rummler v. Dato Druck (1987)
* Hourly rates should be the same for full and part-time workers; pay includes pensions and enhanced pay. If the exclusion or non-availability of a benefit disproportionate affects women more than men (For example, because they are part-timers), the practice can be challenged (Bilka Kaufaus v. Weber von Hart z (1986)
* Where claims are brought individually, issues of qualifications, performance etc. can be used to explain unequal pay. A contentious issue has been so-called ‘market forces’, e.g. having to pay more where a vacancy is hard to fill and the preferred candidate would only accept the job at a higher pay (Rainey v. Greater Glasgow HB (! 987) or where, traditionally some professional groups are paid at a lower rate than other. For example, speech therapists paid less than pharmacists, arguably as more of the former are women (THE ECJ held that the statistical gap was sufficient for a prima facie assumption of inequality, so then the employer has to justify it, Enderby v. Frenchay HA (1993). Where there is evidence that discretionary payments, e.g. for flexibility that benefit men disproportionately, they can be challenged (Danfoss, (1989).
* Currently, a key issue has been the workings of pay scales-rewarding long unbroken service, plus the award of enhanced pay. (McNeil v. HMRC, 2018) Both of these topics are discernible from the Pay Reporting data

**What can we conclude?**

First, that many of the potential barriers to claims have been overcome and that claims based on equal value have proved very helpful to some groups. Second, that the legal rules are relatively ‘settled’. However, the pay gap remains in percentage terms much as it was in the UK in 1975. One of the reasons has been the willingness of courts to accept arguments by employers that the ‘societal reasons’ for unequal pay are the explanation. These include market forces arguments, the typical pattern of women’s as opposed to men’s working lives, the relative paucity of women in top roles and, maybe seeing equality as the ceiling coupled with a reluctance to pay women more than men?. And then there is the fear of inflation. But what of HR practices?

**The possible effect of pay gap reporting**

Even though many private sector organisations are not (yet?) covered by the reporting obligations and anyway there is no direct penalty for not reporting, we have seen considerable media interest. It is likely that pressure will grow and then change from aiming to find the facts to ask ‘why’! Why after 50 years is the gap pretty much as it was when legislation was first introduced? Is it the fault of somewhat cumbersome, complex and hard to enforce law?

Is it the fault of HR practices that have pay scales that are ‘too long’, benefit long serving workers and which provide high levels of enhanced pay insufficiently criteria referenced and often the result of long-standing traditions and organisational culture? Or perhaps, promotion practices? Or traditional expectations of staff to be visible and ever-present? This might, in turn depend on who is going to check out your website where the data is reported. Rivals? Potential claimants? ‘Ambulance-chasing’ lawyers? Potential recruits, especially women?

How important to an employing organisation is equal pay? Things have been quiet for some time but maybe, now is the time to check practices. No-one says this is easy but as we have already seen with some prominent UK businesses, much harm can be done to reputation with a huge pay gap!

**Evidence of measures to close the gap that have worked**

The Equality and Human Rights Commission has recently funded a study undertaken by IES (www.ies.org) on what works, in terms of closing the gap. The report concludes that the process of gap closing has ‘plateaued’. A major reasons, they say, is that ‘There is too much emphasis on the formal stuff’, e.g. policy documents and other indicators suggesting HRM ‘Does the easy stuff’. In reality, the gap is a consequence of social factors but also many organisational factors.

The report covers many well-known UK employers, some of whom have made real progress, such as Ernst and Young, PWC, Fujitsu, Sodexho, Virgin and TSB, but ones who have been less successful, such as Inn on the Park and Cleveland Police.

The report shows evidence of complacency, with comments like ’We are IK except at senior levels’ (The report reminds us that we are 30th out of 33 OECD states with the largest gaps).

**What is recommended?**

* An emphasis on fairness is key
* An holistic approach is vital, i.e. multiple actions at different levels
* Must have women in decision-making roles
* De-couple discussions on pay at the recruitment stage. This means recruit to the role then discuss pay.
* Get women to change roles in organisations to get wider experience
* Develop a ‘business plan’ to close the gap

I might add-be careful with flexible working, family friendly policies etc. to check that they are not penalising people who take them up. Explain the consequences of, say part-time or job-share work.

Any other ideas?