

# Equal pay



► **Inside**

What is equal work?

What can be claimed?

Comparators

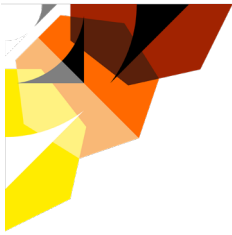
Material factor defence

Employment tribunal procedure

Questionnaires

Equal pay audits

Gender pay gap reporting



Equal pay law first developed in the UK in the 1970s after a campaign by trade unions and women's groups. The principle that men and women who do equal work should receive equal pay is implemented through the Equality Act 2010.

This inbrief provides a general summary of the main features of equal pay law and highlights some practical issues for employers.

We refer in this inbrief to a woman bringing an equal pay claim by comparing herself with a male colleague, but the principles apply equally in reverse- a man can also bring an equal pay claim based on a comparison with a female colleague.

The Equality Act 2010 now refers to equal pay as "equality of terms", but everyone still tends to refer to it as equal pay.

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### Equal pay or sex discrimination?

Equal pay law is essentially a type of sex discrimination law. It can sometimes be difficult to determine which law applies to a particular set of facts.

Equal pay law covers pay or other terms that are regulated by a contract of employment. For example, matters such as basic pay, automatic pay progression, sick pay, hours of work, performance-related pay and holiday pay would all tend to be contained in a contract, and so fall within equal pay law.

Sex discrimination law covers matters which are not included in the contract. For example, issues such as the terms of a job offer, promotions, discretionary pay rises and discretionary bonuses.

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### What is equal work?

A woman performing "equal work" to a man is entitled to equal pay.

There are three situations where employees could be performing "equal work". They are:

- ▶ **Where a man and a woman are doing "like work"**. This means that they are carrying out jobs that are the same or broadly similar, and any differences are not of practical importance. An example of broadly similar work might be male and female shop assistants working in different sections of the same department store.
- ▶ **Where a man and a woman are doing "work rated as equivalent"**. Work will be rated as equivalent if the employer has carried out and implemented a job evaluation study, and this places the jobs of the man and the woman at the same grade or rating. Job evaluation studies are most

common in the public sector, but increasing numbers of private employers are carrying them out.

- ▶ **Where a man and a woman are doing "work of equal value"**. This means that the work is not essentially the same job, but it has the same demands in terms of factors such as effort, skill and decision making. Examples of jobs that could be of equal value might include a cook and a joiner, or a packer and a labourer.

The concept of "equal work" is not related to individual performance in a role, but rather the demands of that role.

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### What can be claimed?

If a claim for equal pay is successful, the woman's contract is treated as if it had always contained the same pay or other relevant term as the man's contract. A woman can claim up to six years' worth of compensation, going back from the date when her claim was issued.

Each term of the contract is considered separately and contractual benefits are not generally assessed as a whole package. If the terms of a man's and a woman's contract are broadly worth the same, but there are differences in relation to some terms (for example, bonus provisions), the woman may be able to bring an equal pay claim in relation to those of her terms which are less favourable than those in the man's contract.




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## Comparators

A woman bringing an equal pay claim must be able to compare her terms with those of a man. This man is known as a "comparator".

Unlike other types of discrimination, a woman cannot compare herself with a hypothetical comparator. She must compare herself with a real employee of the opposite sex who works or worked for the same employer in the "same employment".

This covers employees who work at the same place of work. This does not mean that the comparator must necessarily work in the same department or building as the woman. A single place of work can include a complex, campus or group of buildings which are treated as a whole.

A woman can rely on a comparator working at a different place of work only if common terms apply at both (or would apply if both places of work were at the same location). The terms do not have to be completely identical, but must be broadly similar. An example might be where terms for two locations are set under the same collective agreement, such as in two factories that form part of the same company.

In rare circumstances, a woman can bring a claim based upon a comparator working for a different employer. This can only be done where the terms and conditions are attributable to a single source. There must be a single body which is responsible for the unequal terms and which has the ability to restore equal treatment. To date, these sorts of claims have been confined to the public sector. An example might be a woman employed by an NHS hospital comparing herself with a male comparator employed by a different

NHS hospital, where the Department of Health set the terms of employment for all NHS staff.

A woman can use a comparator who was employed in the past (a predecessor) but cannot compare herself with someone who is employed after her (a successor).

Under the Equality Act, if a woman cannot find an actual comparator, she can bring a sex discrimination claim instead. However, this applies to claims about pay only, not other contractual terms.

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## Material factor defence

In some circumstances, an employer can lawfully give a man better pay or other contractual terms than a woman who is performing equal work.

An employer can defend an equal pay claim if it can prove that the difference is due to a "material factor" other than sex. Essentially, this defence means an employer must show that the man has better terms for a particular reason which has nothing to do with the fact that the claimant is a woman and the comparator a man.

In most cases, the employer does not need to show that it has a "good" reason - simply that it is genuine, material and relevant to the job in question. An employer can also rely on more than one factor. Examples of material factors include market forces, geographical location, mistake or flexibility. Circumstances vary from employer to employer - what might be a material factor for one employer may not be for another, and factors which have succeeded in some cases have failed in others.

However, if the material factor itself has a discriminatory effect, there is a further hurdle that an employer must get over if it is to establish the defence.

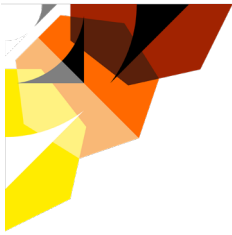
The employer must show that the material factor is objectively justified.

This means that there must be a legitimate aim underlying the reason and it must be a proportionate way of meeting this aim.

There are various situations in which an employer's reasons for differences in pay might have an effect which discriminates against women. For example, an employer may argue that it needs to provide a bonus to those in a particular job because it involves working anti-social hours. However, this may disadvantage women because, due to childcare responsibilities, they would be disproportionately unable to work those hours and receive that bonus. This can also arise where an employer relies on market forces to set pay for different jobs, but this is based on historic discrimination about low-paid "women's work" as compared to "men's work".

Where an employer wishes to give different pay rates or other terms for similar jobs, it is important to check that this will not disproportionately disadvantage either women or men.

Problems can also arise where two companies merge, but pay rates between the two workforces are different. It may not be permissible to reduce terms after a TUPE transfer, but this could leave women and men with different pay or benefits for doing the same job. Various cases have established that this can be a material factor defence to an equal pay claim. However, if practical and commercially viable, the simplest solution may be to harmonise pay and terms at the higher of the comparable rates.



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### Maternity leave

A woman on maternity leave is in a special position which cannot be compared to that of a man and she cannot claim the same pay as a man at work. The reverse also applies, and a man cannot claim equal pay based upon a woman's more favourable terms enjoyed as a result of maternity leave.

Instead, there is special protection under the Equality Act for women on maternity leave. There is a right to pay rises which take place while a woman is on maternity leave. There is also a pro rata entitlement to any bonuses paid while a woman is on maternity leave, based on her time at work during the assessment period and her two weeks of compulsory maternity leave. Employers cannot use the material factor defence to defend against a claim in respect of these entitlements.

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### Employment tribunal procedure

Equal pay claims are often slow, complex and costly for employers. They tend to involve considerable time and effort from managers and HR advisors in gathering evidence.

Cases in which a woman claims that she does work of equal value to a man are particularly lengthy. These cases involve multiple stages, and will often require the appointment of an independent expert who must determine whether the work of the woman and man is equal in terms of demand, skill and effort.

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### Time Limits

The normal time limit for bringing an equal pay claim in the employment tribunal is six months after the employment has ended. Where there is a TUPE transfer, the six months for bringing a claim against the old employer will start to run from the date of the transfer.

This time limit will typically start to run from when the employee leaves employment, but it can also begin from the date of a fundamental change in their employment under a new contract.

This six month time limit for bringing a claim in the employment tribunal may be extended if there is an Acas early conciliation process, but otherwise cannot normally be extended.

However, employees and workers may also be able to bring a claim for equal pay in the civil courts where the time limit for presenting a claim is six years.

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### Questionnaires

A woman can submit questions to her employer in order to help her decide whether or not she might have an equal pay claim. This isn't a formal statutory process, but can still be useful if a woman believes she might be paid unequally.

This questions and answers process has no set timeframes or format. If the employer fails to respond or gives evasive replies, adverse inferences can be drawn by the tribunal. However, where the reasons for pay decisions are clear from other evidence, the questions and answers process is unlikely to carry much weight.

A "pay secrecy clause" in a contract is also unenforceable if it prevents an employee from making a "relevant pay disclosure". This is a disclosure made for the purpose of discovering if there is a connection between pay and having a particular protected characteristic (such as sex or race). This rule is designed to help employees to find out if there is any pay discrimination.

Documenting pay decisions and the reasoning behind them is extremely important for evidential purposes, should an employer have to deal with such questions and/or an equal pay claim. Tribunal claims can be brought going back six years meaning the individuals who took relevant decisions may not remember their reasoning or may have left the employer.

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### Equal pay audits

An equal pay audit involves comparing the work, pay and benefits of men and women in the workplace, identifying any pay gaps and developing explanations for them.

An employer who loses a claim relating to equal pay will be required to carry out an equal pay audit, unless a specific exception applies. This process must include identifying and explaining differences in pay and formulating a plan to prevent equal pay breaches continuing or occurring. The audit also has to be published on the employer's website, meaning the employer is likely to face further claims if identified differences in pay are not adequately dealt with.

One exception to this general requirement is where an employer has already carried out an audit satisfying certain conditions in the three years prior to the tribunal's judgment. There are potentially a number of advantages to carrying out a voluntary audit. It does not have to be published and, if carried out properly, it can also be used to defend any future claim.

However, if an employer fails to deal with any differences discovered, the results of a voluntary audit could instead be used to support future equal pay claims, so an employer would have to be prepared to act on what they discover before taking this step.

If an equal pay audit ordered by a tribunal is not carried out satisfactorily, the employer can face a financial penalty of up to £5,000. In the case of continued non-compliance, such a fine could potentially be levied an unlimited number of times, until the audit is completed.

### Gender pay gap reporting

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 were introduced with the stated aim of helping to reduce the ongoing pay gap between men and women in the workplace.

This legislation requires employers with 250 or more employees to report on the gender pay gap in their organisation. The figures must be published annually, and are based on a snapshot date in April of each year.

For further information, please see our separate inbrief "Gender pay gap reporting".

For more information on this subject please contact:



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