

## The Equality Act 2010: Implications for Employers and Equal Pay Claims

### Introduction

The long-anticipated and much debated Equality Act finally became law on 1<sup>st</sup> October 2010. Simplifying and consolidating over 100 pieces of existing equality legislation, the law protects employees against direct and indirect discrimination, harassment and victimisation at work.

Whilst regulation relating to the gender pay gap is awaiting government clarification, and is not due to come into force until 2013, there are two key changes to be aware of which have now been incorporated within the Act:

- Hypothetical comparators
- Pay secrecy



### Hypothetical Comparators

Under previous laws relating to equal pay and contractual terms and conditions a claimant had to identify a comparator in order to make a discrimination claim. However, the Equality Act now allows a claim of direct pay discrimination to be made, even if no "real person" comparator can be found. For example, a claimant who can show evidence that they would have received better remuneration from their employer if they were a different sex may be able to make a claim, even if there is no-one of the opposite sex doing equal work in the organisation.

### Pay Secrecy

In relation to pay secrecy the Act includes provisions that mean any terms placed within an employment contract that try to prevent or restrict employees talking about their contractual terms with regard to a "*relevant pay disclosure*" are unenforceable.

A "*relevant pay disclosure*" is one that is made in order to find out whether a "*protected characteristic*" such as gender has a connection with the amount the employee is earning. Asking about or receiving information regarding pay in relation to discrimination is now a "*protected act*", which is covered by the victimisation section of the Equality Act 2010.

The Act has not outlawed pay confidentiality clauses completely. Discussions that take place between colleagues regarding salary that are not seen to be for the purpose of finding out if pay discrimination is taking place are not protected under the Act. Although the Act does not require pay secrecy clauses to be removed from contracts, it is recommended that employers who do use them make sure they are no longer enforced in such a way as to breach the conditions of the Act.

### Dual Discrimination

Although the government is still considering whether to implement the provision of "*dual discrimination*" into the Act it is widely expected that it will be introduced around April 2011.

Under previous law relating to discrimination the position was that if a case for unlawful discrimination under more than one heading occurred (for example race and gender) each claim had to be considered separately. This meant that a case such as discrimination against a black woman could fail. The following example shows how combining factors creates the basis for making a valid claim:



*"A black woman has been passed over for promotion to work on reception because her employer thinks black women do not perform well in customer service roles. Because the employer can point to a white woman of equivalent qualifications and experience who has been appointed to the role in question, as well as a black man of equivalent qualifications and experience in a similar role, the woman may need to be able to compare her treatment because of race and sex combined to demonstrate that she has been subjected to less favourable treatment because of her employer's prejudice against black women."*

Source: Official explanatory notes Equality Act 2010

This provision is likely to have important implications for the management of equal pay audits. Most audits conducted to date are likely to have considered each factor (race, gender, age, etc) independently, whereas going forward employers will need to consider the implications of combining factors to get a complete picture.

### **Implications for Employers**

Whilst many employers have been acting within the spirit of the law prior to the official 1<sup>st</sup> October launch, it seems a pertinent time to review processes and practices for any potential areas of inequality. Unfortunately inequalities can exist even within companies who have best-in-class equal opportunities policies - regular reviews of actual practice are required to ensure protection.

As has been seen in recent high profile cases such as Birmingham City Council, where 5,000 female council workers won a sex discrimination claim for being excluded from bonus payments offered to male colleagues on the same pay grade, claims can be extremely costly; even more so if followed by a subsequent "piggyback claim".

Employers can help avoid any such potential claims by carrying out an equal pay audit as part of their review process; analysing pay practices and identifying any pay differences that might be due to discrimination on the basis of "protected characteristics" outlined in the Equality Act.

PAYdata offer a number of services and different levels of assistance depending on your exact requirements. To discuss your needs and get a better understanding of how PAYdata can help you identify any potential areas of inequality within your business, contact Tim Kellett on +44 (0)1733 364070.

### **Useful Links:**

PAYdata -  
<http://www.paydata.co.uk/services/equal-pay-audits>

Direct.gov.uk - [http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/DiscriminationAtWork/DG\\_10026557](http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/DiscriminationAtWork/DG_10026557)

Equality & Human Rights Commission -  
<http://www.equalityhumanrights.com/>

ACAS -  
<http://www.acas.org.uk/index.aspx?articleid=3017>

Government Equalities Office -  
[http://www.equalities.gov.uk/equality\\_bill.aspx](http://www.equalities.gov.uk/equality_bill.aspx)