

# Guide to Equal Pay

For many employers the concept of 'Equal Pay' suggests bureaucracy, regulation and the hand of central government. This paper describes how many organisations are placing pay equality at the heart of their reward strategy and realising the benefits of taking proactive steps.

## Equal Pay - The Background

High profile equal pay settlements in the public sector have created a lot of interest in the media. UK Local Authorities are going to have to find an estimated £5bn to resolve the historical pay inequities revealed via the adoption of appropriate mechanisms of 'job evaluation'. Now the issue of pay gaps is relentlessly moving in the direction of the private sector too.

So, how prepared are employers outside of the public sector? Whereas specific obligations exist to focus on the audit and assessment of pay equity in the public sector, no such obligation exists in the private sector - yet.

Research by the Chartered Institute of Personnel and Development (CIPD) found that fewer than one in five private sector organisations (18%) currently measure their gender pay gap, compared to a much higher figure of 51% in the public sector.

The CIPD Labour Market Outlook in 2009 highlighted that the main reason for not completing an audit is that employers think the information is unnecessary (62%)

Those who do collect this information are most likely to do so because it provides useful insight and benchmarking data (60%) and informs pay reviews before they take place (43%).

Little has changed within the private sector since these findings were presented, however the cost of litigation and successful equal pay cases within high profile public sector bodies will encourage previously murky pay practices to be exposed by the intervention of 'no win-no fee' lawyers intent simply on claiming a slice of the historical inaction over equal pay. In many cases it may feel like an equal pay audit is simply a 'stamping on an ants nest' approach to reward management, but the case for taking action of pay equity is part of an effective total reward package.

In simple employee relations terms, when employees do not feel valued it destroys the way they feel about their employer and damages the trust between employers and workers and this undermines staff commitment, motivation and retention.

## Equal Pay – the Legislative Framework

The law on equal pay in the UK is principally contained in the Equal Pay Act 1970, although this has been amended by the Sex Discrimination Act 1975. Subsequently the law was strengthened by the Equal Pay (Amendment) Regulations 1983 (SI 1983/1794) which introduced the concept of equal pay for work of equal value and by the Employment Act 2002 which attempted to make it easier to bring up equal pay claims.

The principle of equal pay for equal work originated in Europe and can be found within Article 141 (formerly 119) of the Treaty of Rome which states that men and women should receive equal pay for equal work. UK courts and tribunals must therefore interpret the Equal Pay Act 1970 and other legislation in a way that is consistent with Article 141.

## Recent Developments - the Equality Act 2010

This major piece of legislation was created to streamline equality laws in the UK. The condensing of nine separate legislative frameworks into one single law is a significant contribution to promoting equity across a wide range of areas.

Specific elements of the Act have yet to be fully realised, via secondary legislation (due in April 2011 following a consultation exercise). The change in Government has had a notable impact here, but if we focus on the equal pay aspect of the Act, there are a number of key components that could affect employers;

### 1. Streamlining of the Public Sector Equality Duty.

Employers in the public sector have both general and specific duties in relation to addressing equality in both service provision and employment. The Equality Act is likely to result in a streamlining of these duties into one with associated changes in both timeframes and the scale of reporting requirements. The Equality Act does however extend the coverage of reporting categories to what is termed 'Protected groups'. This means that whilst gender based Equal Pay remains a specific legislative issue, the requirement under the Public Sector duty will require audits to be extended to include disability, race and to an extent, age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment.

As a result we can expect an extension in the requirement to collect data at the employee level to provide meaningful statistics for the protected groups. This will be an issue for public sector employers to manage as well as the wider scope of audit and impact assessment exercises.

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Thus an extension in data collation at an employee level to provide meaningful statistics for the protected groups will be an issue for public sector employers as well as the wider scope of audit and impact assessment exercises.

## 2. The Act makes it clear that public bodies could use procurement to drive equality. It enables Ministers to set out how public bodies should go about doing so.

The implication of this original proposal could include such requirements as pre-qualification questionnaires assessing the suitability of potential suppliers to be invited to tender, including requiring disclosure of breaches of the equality legislation.

This could mean that a key part of the selection criteria for contracts may be a requirement to comment on the progress being made to gender pay equality via the introduction of such elements as pay audits and rigorous job evaluation.

Significantly the Coalition government, however, propose not to enforce this element and this will be subject to the secondary legislation.

## 3. The Act bans pay secrecy or 'gagging' clauses which stop employees discussing their pay with their colleagues

Within the private sector the most notable impact could come from this aspect of the legislation. The implication of this is the promotion of transparency and openness of pay decisions with reference to such things as 'job size', 'grades', 'internal relativities'. With many private sector bodies operating closely controlled and individually assessed pay processes, this aspect has the potential to place much greater scrutiny on pay practices where a previously un-identified equality issue is revealed.

It is important to keep abreast of these developments as they progress via the Equalities and Human Rights Commission and Government Equalities Office announcement.

## Equal Pay – the challenge

Should an Equal Pay case be lodged against an employer, the employer must be able to show:

- That the person bringing the claim and the comparator are not engaged in 'like work', or
- That a bona fide and non-discriminatory job evaluation scheme has been conducted and the work is not 'rated as equivalent', or
- That the work is not of 'equal value', or
- That any difference is genuinely due to a material factor.

Once a person has established that there is a case for equal pay, it is then for the employer to respond and argue that any difference in pay is for some reason other than the protected characteristic (defined as Race, Disability, Sex, Gender Re-Assignment, Age, Religion or Belief or Maternity) of the employees. The 'genuine material factor' defence is the reason put forward by the employer to explain why the comparator, although doing equal work, is paid more than the applicant. To be successful this factor must be significant and relevant; that is, it must be an important cause of the difference and apply to the jobs in question. The difference in pay must be genuinely due to the material factor, which must not be tainted by discrimination.

For example, if the reason given for paying the comparator more is that he has certain skills which the applicant does not have, then the employer would have to demonstrate that these skills are necessary for the job, and genuinely applied during the performance of the job, and are not simply rewarded because past pay agreements recognised and rewarded skills which are no longer applicable. This is often clearly demonstrated by appropriate mechanisms of job evaluation.

There are two different thresholds in cases where a 'genuine material factor' defence is used. When there is no significant difference in the pay groups of the claimant and their comparator, and there are no other elements of pay discrimination, then the employer only has to show that the reason for the difference is 'genuine' and 'material'. This is a fairly easy requirement for the employer to meet.

However, where there is a significant difference in the proportion of protected characteristics in the applicant and comparator groups or there is discrimination in the average pay, then the employer will have to meet the higher test of 'objective justification' of the difference in pay. This involves showing that the difference in pay is due to the use of a factor which:

- Corresponds to a 'real need' of the business
- Is necessary and appropriate to that need
- Is proportionate to that need.

Examples of genuine material factor defences that employers have used to defeat equal pay claims include:

- Market forces and skills shortages
- 'Red circling' following the implementation of a job evaluation scheme i.e. the protection of earnings to those who are deemed to be historically 'over-paid'
- Geographical differences e.g. London weighting
- Different skills, qualifications and experience, as demonstrated by job evaluation.

The genuine material factor defence will fail, however, where the reason itself is discriminatory. For example, the House of Lords refused to accept an employer's material factor defence based on market forces where the market itself discriminated against the applicant female catering workers. The market perception was that the catering workers should be paid less because they were women.

The remedy where a claim under the Equality Act is successful at Tribunal, equal pay is achieved by raising the pay of the disadvantaged or claimant group to that of the comparator group. This means that any beneficial term which is in the comparator contract but missing from the claimants' is to be treated as if it is in the contract, and/or any term in the contract which is less favourable to than the same term in the comparator contract is improved so that it is as good.

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## The Reward Case for Equal Pay

So far we have noted a litigious framework where lawyers are rubbing their hands with glee at the fees to be generated by successful claims and a heavily legislative framework that employment tribunals can hit employers with regarding failure to comply.

What is rarely promoted are the benefits that a pro-active embrace of pay equity at the heart of a reward strategy can provide for an employer. The explicit incorporation of principles of pay equity into reward strategies promotes good employee relations and boosts performance. Failing to address equal pay will block the realisation of the workforce's potential. Promoting the business benefits of paying employees fairly to change the mindsets of employers is essential to driving progress.

### The Foundation of Reward

Without the bedrock of pay equity, many forward thinking reward strategies can crumble due to the unstable foundations that underpin the reward environment. These foundations should incorporate the following key elements:

#### Equal Pay Audit

The Equal Pay Audit is an assessment of all policies, practices and procedures from the perspective of pay equity. All elements of 'pay' under contractual terms and conditions need to be included here, not all of them obvious (such as holiday entitlement).

Most commonly applied to gender pay, the most pro-active organisations extend the audit to include the full range of 'protected groups' under the Equality Act. Whilst often statistical in nature, the report will set the basis for the foundations of a reward strategy.

### Job Evaluation

Job evaluation leading to the creation of a measure of internal job relativities is one of the fundamental elements of any organisation's reward system and can contribute fundamentally to total reward strategy. No longer is the process a bureaucratic system of measurement with little or no added value. Job evaluation can, via the definition of the most appropriate mechanisms of role sizing, contribute to role competence profiling thus supporting recruitment, performance appraisal and training and development profiling. These measures can include; job family development and evaluation or detailed individual role evaluation, depending on the business environment.

Having assessed the foundations, the 'pillars' of sustainable reward can be constructed including moving focus from internal relativities to external market positioning, flexible benefits and performance based pay.

With flawed or no foundations, pay decisions can be riddled with inconsistencies leading at least to mistrust and de-motivation amongst employees at worst to equal pay litigation leading to resource hungry legal process and potential pay out to aggrieved staff groups. All this without the consideration of losing out on government contracts due to murky pay practices.

The conclusion to this is that an Equal Pay Audit can and should form the basis and foundation for the development or review of total reward strategies.

## The Equal Pay Audit

The audit process need not be a resource hungry intensive exercise, the launch of specialist software packages helps to take the pain out of data analysis. Typically, the raw data does require interpretation and to some extent, expert assessment to identify an action plan if any issues are identified in the data analysis process. Organisations are encouraged to follow the five-step approach to Equal Pay Audit as developed by the Equal Opportunities Commission (now incorporated in the Equalities and Human Rights Commission).

### The Five-Step Approach

**Step 1:** *Deciding the scope* of the review and identifying the data required



**Step 2:** *Identifying* where protected groups are doing equal work



**Step 3:** *Collecting and comparing* pay data to identify any significant equal pay gaps



**Step 4:** *Establishing the causes* of any significant pay gaps and assessing the justifications for these



**Step 5:** *Developing an Equal Pay Action Plan* for reviewing and monitoring

**Step 1:** *Deciding the scope* of the review and identifying the data required.

The scope of the exercise is commonly concentrated on gender but should be extended to include the Equality Act 'protected groups'. The scope often focuses on base pay but should extend to include all quantifiable elements relating to contractual earnings including bonus payments, shift payments, ex gratia awards, market pay supplements, pension contributions etc. The wider the scope, the more thorough the analysis.

**Step 2:** *Identifying* where men and women are doing equal work.

This stage requires an understanding of basic legislation but it is important for those who compare jobs under an audit to choose the most appropriate measure of equal work. Equal pay cases can be submitted under the following measures of equal pay:

- Like work, where work is of a broadly similar nature and extant differences are not of practical importance in relation to the terms and conditions of employment, this type of measure takes information such as job descriptions and job titles.

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- Work of equal value in terms of the demands made upon her, for instance effort, skill and decision-making and work rated as equivalent, as derived by an objective Job Evaluation Scheme.

In undertaking an audit, an employer can choose any of the above measures to form the basis of comparison of roles one against the other. The strongest case for or defence against equal pay cases will be brought by reference to the 'work rated as equivalent' measure under a scheme of job evaluation as implemented within an organisation. The choice of measure to define equal work identifies the roles that form an 'equal pay work group'. It is within this equal pay work group that a valid comparison can be drawn one against another and therefore equal pay should be assessed.

**Step 3: Collecting and comparing** pay data to identify any significant equal pay gaps

Gathering HR and payroll data is necessary to drive the statistical analysis, which forms the basis of the interpretation. Specialist software packages are now available to support the transition between source data on payroll or HR systems to equal pay review software thus easing the process. As a general rule any quantifiable pay element within the defined 'equal pay work group' that presents a gap in average earnings of greater than 3% requires investigation.

**Step 4: Establishing the causes** of any significant pay gaps and assessing the justifications for these.

Having identified the equal pay work groups and any identified pay gaps, the causes and potential defence to the pay gaps can be analysed. This stage will often require investigation into various policies and practices that define the pay decisions such as:

- Investigating external market pay policies
- Identifying starting salaries by category
- Analysing any promotion or performance recognition decisions
- A review of the architecture of any pay structures e.g. impact of broad banded grades.

**Step 5: Developing an Equal Pay Action Plan** for reviewing and monitoring

The statistical analysis and interpretative investigation will normally lead to an action plan in the form of a formal report with time activities to be reviewed regularly. Many public sector organisations make this an open document available to staff and customers as a formal record of action on equal pay. Any action plan can tie into the reward strategy development by ensuring the foundations are strong thus allowing attention to move to other reward initiatives.

An audit is a formal review process influencing the strategic dimension. A variant of the audit, often required in the public sector, is called the 'Equality Impact Assessment' or 'EqIA'.

## The Equality Impact Assessment

An Equal Pay Audit is an analysis at a specific point in time, a 'line in the sand' of equal pay. An EqIA is a predictive analysis that presents a 'before' and 'after' equal pay report examining any proposals to change reward policies and practices.

Using appropriate software as per the full Audit, the EqIA can identify whether proposals will create or resolve any equality issues prior to organisations implementing these initiatives. The EqIA process is a safeguard, an equality 'healthcheck'. Using data sourced in a similar way to the full audit, the EqIA is often presented as an independent, expert review of proposals to receive a 'stamp of approval' from an independent expert giving clarity to staff representatives and management.

## How can NorthgateArinso Reward Solutions help?

NorthgateArinso Reward Solutions is a specialist in the field of technology driven reward solutions. We offer a wide range of both software and expert consultancy services including services relating to the equal pay agenda.

We offer a comprehensive range of services and solutions in the arena of equal pay. We employ expert consultants who have many years of direct experience of undertaking equal pay audits, independent equality impact assessments and translating action plans into reward strategies.

We complement this with leading software packages include the 'Equal Pay Reviewer' and flexible web based job evaluation tools, developed in accordance with the EOC, (CEHR) five-step guide to equal pay audit and job evaluation good practice.

In the specific area of equal pay, we can provide a detailed supporting role or an 'arms length' service including:

### Software only service

We provide the advanced 'Equal Pay Reviewer' software tool and offer training in its operation for clients to undertake the auditing themselves.

### 'Light touch' support

In addition to the software, we can offer a supporting role in preparing, analysing and delivering Equal Pay Audits, ensuring that those within the organisation are supported by our consulting team, keeping the organisation on track throughout the process.

### Full Consultancy service

Working closely with client organisations, we can offer a full consultancy service, providing expert analysis and advice in all aspects of the equal pay audit, presenting and communicating action plan options to senior level and undertaking expert independent equality impact assessments.

Our services extend to a full range of consultancy and software relating to job evaluation, reward strategy design and external salary market assessment.

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