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Department for
Education and Employment

Towards Equal Pay for Women

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Speed and simplicity in tribunal cases

and the Burden of Proof Directive

DfEE
Department for Education and Employment

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Education and Employment

Towards Equal Pay for Women

More women than ever before are in paid employment and now make up almost half the workforce. Women make a huge contribution through their efforts and talents to the country's growing prosperity.

But this contribution is still not properly recognised through their pay. Although the gap with men has halved since the introduction of the Equal Pay Act thirty years ago, women are still likely to earn, even without any breaks for children, £200,000 less than a man over their work career.

Tackling the pay gap is a key issue for this Government. It is not just about building a fairer society. It's also about sound economics. If Britain is to continue to prosper in the new century, we must ensure we make the most of all the talents, skills and potential in our country.

That's why the Government has introduced a whole raft of measures to help women balance the demands of family and career. We're improving maternity and parental leave and providing for time off in emergencies. Help with childcare, the Working Families Tax Credit, and the National Minimum Wage are all supporting women, increasing choice and making them better off.

But these efforts will all be damaged if half the population has to continue struggling against pay discrimination. We know this is important to women because you told us. It was a continuing theme over the last few months when we toured the country and heard the views of 30,000 women of all backgrounds and experiences about your ambitions, concerns and fears.

The Equal Pay Act has had real success but there's no doubt it can be unnecessarily slow and complicated. These delays and complexity don't help women, employers or justice. So we are determined to make equal pay tribunals quicker, easier and fairer to both parties.

But to do this well, we need to hear from you on how the Equal Pay Act can be streamlined. We also want your views on how the handling of sex discrimination cases can be improved.

This Government does not believe there is a conflict between equality and prosperity. We believe instead that only by building a fairer society in which everyone has the chance to fulfil their potential can we meet the challenges of the new century. Tackling discrimination, promoting equality of opportunity and choice for women is central to this drive.

Tessa Jowell.

Tessa Jowell

Contents

Overview

1 Equality of opportunity is not just morally but also economically important. Our economic success relies more than ever before on women who now make up nearly half of the workforce compared to around a third in 1970.

2 The number of women in work is forecast to continue to rise and girls' excellent results in the education world show the talent they have to offer. There is evidence, too, that businesses are increasingly showing they value the contribution of women. Over the last year women's earnings have risen more than men's – a 3% increase for women compared to 2.1% for men - while part-time earnings, where women make up the majority, rose by 3.3%.

3 Thanks in part to the introduction in 1970 of the Equal Pay Act – which allowed women to go to law to win equal pay for the same job - the gap has narrowed. But while there should be relief that the pay gap is no longer the 37% when the Act was brought in, there must be disappointment it still stands at over 18% thirty years later.

The pay gap

- The pay gap between men and women's hourly wages is just over 18%[1] .
- Research by Government into 'Women's incomes over a lifetime' quotes a lifetime earnings gap between men and women of:
  - £241,000 for a mid-skilled childless woman; and
  - an additional gap of £140,000 for a mid-skilled mother of two (a mother gap)
- This research also shows that a woman's educational achievement has the biggest single impact on her likely lifetime's earnings. However, the hours she works, how many children she has and when she has them, and whether she divorces all have significant impacts on her lifetime income.

4 We recognise the injustice of the gender pay gap and are determined to make progress in finally closing it. We also recognise that experience has shown the Equal Pay Act has flaws. Aspects of the law have proved difficult to operate while some tribunal cases have taken years to conclude. But speeding up and simplifying tribunal procedures in equal pay claims is just one part of our plan of action. We are tackling the pay gap through a number of different approaches.

Tackling the pay gap

The reasons for the difference in pay between men and women are varied and complex. We need to focus on labour market factors which underlie the pay gap and to promote positive changes. We are taking action in these areas:

1 **Breaking down gender stereotyping** which means that many girls still turn away from science and IT, so closing off many better paid careers.

We are doing this through: better advice on careers choice; innovative approaches to work experience; and a major initiative to ensure women have the skills and opportunity to benefit from expected employment growth in Information and Communications Technology;

2 **Providing support for women returning to the labour market after having a family**

We are doing this through giving greater practical and financial support for people returning to the labour market through the New Deals for Lone Parents and for Partners. Both of these groups are overwhelmingly women, who need a hand back to work.

[1]18.4% for full-time hourly earnings without overtime, New Earnings Survey 2000.

3 Helping people balance their work and family life

We are doing this through our National Childcare Strategy which will provide 1.6 million extra childcare places by 2004, by new rights for parents to take time off to care for their children and to enable people to work part-time if they wish, as well as our campaign to promote work-life balance.

4 Raising skill levels and promoting lifelong learning

We are doing this by improving education and training opportunities for women through the new Learning and Skills Council and initiatives such as **learndirect** which gives easy and flexible access to new skills through e-learning.

5 The Government has a valuable partner in the Equal Opportunities Commission (EOC). We welcome the EOC's push to tackle the remaining disparity through its current Valuing Women campaign and the establishment of the Equal Pay Task Force which is focussing on discrimination in employer pay systems. We will continue to work together to tackle discrimination and to improve the lives of women.

"We believe there may be ways in which the law could be made to work more efficiently. Equal Pay cases take a long time to reach finality."

CBI response to Equal Pay Task Force - August 2000

The business case for equal opportunities has been well developed. A proven track record as a forward looking employer with a diverse workforce creates a positive image, one which attracts loyalty and whose business value is incalculable. Effective equal pay policies are part of this - employers need to identify and reward fairly the contributions made by all to achieve an effective, motivated and stable workforce.

Good equality practice has many business benefits, including:

- becoming an 'employer of choice' leading to easier recruitment and increased staff retention;
- making the company more attractive to customers and clients leading to increased sales and improved marketing;
- getting closer to customers, leading to better customer service and improved employee relations.

Equal pay: Summary of proposals

In 1999-2000 there were 4,926 complaints about sex discrimination, and some 2,391 complaints about equal pay, made to employment tribunals.

Employment Tribunals Service

“A complex equal value claim may take years … even less complicated cases take an average of 20 months to decide…cost the public money and hurt an individual’s chances of getting proper access to justice”

EOC: Equality in the 21st Century (November 1998)

The Equal Pay Act is the main law dealing with gender inequality over pay. Although it has contributed to change over the last 30 years experience has shown it has flaws. Some provisions can even seem a barrier to effective resolution of equality issues. Later changes (including the Equal Pay (Amendment) Regulations 1983 which provided for equal pay for work of equal value) have proved complex to operate and have attracted criticism because a number of cases have taken many years to conclude.

We propose a number of practical changes.

Proposals 1-6 are designed to speed up and simplify tribunal cases:

1 Questionnaire

Proposal: We propose, when legislative time permits, to introduce a questionnaire as used in other areas of discrimination with a time limit of say, eight weeks, for the employer to respond. In the interim we propose to explore with the EOC introducing a voluntary questionnaire.

Reason: Too often the key facts of a case are unclear or slow to emerge. A questionnaire could pave the way for establishing the necessary evidence from both parties and could lead to settlement in some cases.

2 Simplifying multiple cases

Proposal: We intend that in multiple cases the tribunal should require just one application (IT1 form) and one response from the employer (IT3 form) by enabling other applicants to be listed as a schedule to these forms.

Reason: Where a number of cases are essentially the same requiring separate forms is overly bureaucratic. This proposal would streamline the handling of such cases.

(The Department of Trade and Industry (DTI) intend to press ahead with this change in the New Year.)

3 Removal of “no reasonable grounds” defence

Proposal: We propose to remove, via regulations, the current power which enables a tribunal to dismiss a woman’s claim on the basis that, in its opinion, it has “no reasonable grounds” to presume it would succeed. In future, a tribunal would either have to consider the claim itself or appoint an independent expert to consider it.

Reason: This defence has been criticised as perpetuating stereotyped assumptions about the apparent value of traditionally “female” jobs. It should be noted that tribunals already have over-riding powers for dealing with weak cases.

4 Appointment of a qualified “Assessor”

Proposal: We propose, when legislative time permits, where the tribunal has decided to determine an equal value case itself, to permit it to appoint an “assessor" to sit on the tribunal as a formal expert adviser.

Reason: Although the tribunal can determine a case itself, in many cases some expert input is needed and an independent expert is appointed, giving the risk of delay. This proposal could significantly increase the number of cases determined by the tribunal itself thereby speeding up the process.

5 Limit on hearing expert evidence

Proposal: We propose that where the tribunal has decided to appoint a single independent expert, it should be limited to hearing expert evidence *only* from the independent expert by:

- encouraging the parties’ agreement to the selection of a single independent expert; and (in cases where this had not happened);
- limiting the parties’ right to call evidence challenging the expert’s report by removing the right to call their own expert witness.

But we also seek views on whether a safeguard is necessary given special circumstances in a case.

Reason: Delays are often caused by the parties in a case calling their own expert evidence in addition to the independent expert’s report. This proposal should enhance the status of the independent expert and increase the co-operation of the parties. The independent expert will still be able to be cross-examined by both parties.

6 Removal of unnecessary detail to rules in Equal Value Cases

Proposal: We propose to remove the unnecessarily detailed rules in Schedule 2 (Complementary Rules of Procedure for Equal Value Cases) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993 (and equivalent Scottish Regulations).

Reason: Schedule 2 is long and repetitive. Those rules specific to equal value cases can be shortened and simplified. This would make the process more user-friendly.

Proposals 7-8 have been developed in response to rulings of the European Court:

7 Relaxation of the two-year limit on back pay in equal pay cases

Proposal: We propose that the two-year time limit on back pay in equal pay cases should be replaced, via regulations, with a time limit in line with limitation periods already provided in relation to contractual matters – six years from the date of the commencement of proceedings in England and Wales, but five years in Scotland.

Reason: To reflect a European Court ruling that the two year time limit is unfair and can deny a woman the full amount underpaid.

8 Extension of protection to former employees

Proposal: We propose, via regulations, to enable tribunals to consider claims about sex discrimination taking place within six months of the end of employment. We also propose to enable tribunals to consider claims about discrimination taking place after this period if it is just and equitable, and to provide a set of factors for the tribunal to take into account when considering whether it is just and equitable.

Reason: To reflect a European Court ruling banning discrimination and victimisation which happened after the woman left her job, where the Court says the Sex Discrimination Act should allow a claim.

Other issues on equal pay cases

Directions Hearings

Ministers welcome the current approach of employment tribunals in using their discretion to hold direction hearings in most equal pay cases. They are an ideal opportunity for collecting early information about job descriptions and for setting a timetable for key stages in a case. Where appropriate, the independent expert should be present at a directions hearings when a timetable for producing the expert report could be fixed. The list of independent experts might need to be extended and we propose to invite ACAS to do this.

Remedial Action.

Losing or settling equal pay cases provides an employer with the opportunity to put things right by taking steps to prevent similar situations. ACAS can already help by working with employers and employees whether or not there has been a tribunal case.

We would welcome comments on how employers might be encouraged to take broader remedial action when unequal pay is identified by legal action.

Burden of proof: Summary of proposals

1 We think the Sex Discrimination Act (SDA) 1975 needs amending to make clearer that certain recruitment and employment practices can be discriminatory.

2 The Burden of Proof Directive (EC97/80) was agreed in Europe under the Social Chapter in 1997, and adopted by the UK shortly afterwards. The Directive is about the way sex discrimination claims are handled, and must be implemented in the UK by July 2001.

3 There are two themes to the Directive: the definition of indirect discrimination, which is often harder for both employer and individual to perceive and guard against than direct discrimination; and the sharing of the burden of proof, which concerns the way a Tribunal looks at the evidence.

4 Definition The Directive refers to disadvantage due to a “criterion, provision or practice”, based on a number of important European rulings on sex discrimination cases. This is a broader definition than the SDA’s “requirement or condition”.

For example:

- A practice of preferring for promotion people who had shown geographical mobility in previous jobs (which would disadvantage more women primarily due to their domestic responsibilities) could be sex discrimination unless the employer had a good justification unrelated to sex.

5 Sharing the burden of proof In cases where the claimant has made a prima facie case, and therefore fulfilled their part of the burden of proof, it will be up to the respondent, who is normally the employer, to disprove the claims. We think this is fair, because generally an employer will keep records which will allow him or her to explain why he or she did something, and if the reasons were not discriminatory, to show what the real reasons were.

6 Not all discrimination is direct or the result of deliberate prejudice. But employees who believe they have suffered sex discrimination may well have difficulty in successfully bringing a claim because, for example, they do not have sufficient information about their employers' actions. We think that the SDA needs to be made clear, so that claimants and respondents understand the things that they might be asked to prove in a tribunal.

7 Implications Under the Equal Pay Act it already falls to the employer to show there has been no sex discrimination if pay differs between men and women doing essentially the same job (or one of equal value) so we do not propose any changes to that Act. And the switch in the burden of proof is in line with the way in which discrimination cases are already handled and decided in the UK.

Proposals

a We think the Sex Discrimination Act 1975 will be clearer if amended so it refers expressly to "direct discrimination" and "indirect discrimination" because it currently does not.

b We also intend to introduce the word "practice" which will broaden the definition of indirect discrimination.

c We will clarify where the balance of the burden of proof lies.

8 The changes would only apply to employment and vocational training, not to the parts of the SDA dealing with discrimination in the sale of goods and access to facilities and services. Also, we are not going to cover absolutely every situation where there happens to be under-representation of women. We do not wish to go down the road of an employer having to defend any situation where the statistics show women are under-represented regardless of whether the employer has done anything to cause this. In our view, the Directive does not require us to go that far.

9 Questionnaire Three questions for consultation are outlined in the questionnaire at the end of this document.

How to make your response

A questionnaire for your response is included at the back of this document.

This is also available on the internet: **http://www.dfee.gov.uk/consultations/equalpay**

Responses can be made by e-mail: **equalpay.CONSULT@DFEE.GOV.UK**

This consultation is available in Welsh, and also in Braille and audio versions. For copies of these versions please contact: Prati Mehta (Tel: 020 7273 5325 or leave a message on 020 7273 6312).

Completed questionnaires should be returned by 19 February 2001 to:

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Equal pay - speed and simplicity in tribunal cases

Proposals

We have developed six proposals for speeding up and simplifying tribunal cases, most of which can be implemented through secondary legislation. We also comment on tribunal procedures, notably directions hearings, already being used which ensure effective case management. We also include two other proposals which have been developed in response to rulings of the European Court which can be taken forward through regulations under the EC Act.

1 Questionnaire

i Under the DDA, RRA and SDA there is provision for the Secretary of State to prescribe a form (which has become known as the questionnaire procedure) to assist a prospective claimant to decide whether to instigate proceedings and, if so, to formulate and present the case in the most effective manner. The form includes space for a reply from the respondent and is admissible in evidence in tribunal or court proceedings. There is no requirement for employers to reply but if they deliberately, and without reasonable excuse, do not reply within a reasonable period, or reply in an evasive or ambiguous way, their position may be adversely affected as it can be considered in evidence by the Tribunal who may infer that there has been discrimination.

ii The Equal Pay Act does not include provisions for a questionnaire procedure. This is not only anomalous (particularly as a claim taken under the RRA for equal pay would permit the use of its questionnaire procedure) but also means that an opportunity for gathering key information at an early stage is lost.

iii An equal pay questionnaire could pave the way for establishing the necessary evidence from both parties, e.g. identify the appropriate comparator and include questions about the duties and responsibilities of both the applicant's and the comparator's jobs. It might also assist women whose employers' policies on confidentiality make it particularly difficult to identify whether a claim exists. In some cases it might lead to settlement or withdrawal of a case. A requirement on the employer to respond to a questionnaire within, say, eight weeks, with the tribunal being able to draw inferences if it was not returned within that time unless there was a good reason, would also assist the process.

iv Introduction of an equal pay questionnaire and a time limit for the employer to respond would require an amendment to the Equal Pay Act which could not be made until legislative time permits. In the meantime, we intend to explore with the EOC introducing a voluntary questionnaire which could be monitored for effectiveness with a view to legislating in the future. It might be welcomed by the employer and employee as a means of gathering evidence and as a route to possible settlement. However, it should be noted that while a voluntary questionnaire would be admissible in evidence the tribunal would not be able to draw inferences from it or from slowness or failure to respond.

Proposal 1 - We propose, when legislative time permits, to introduce a questionnaire as used in other areas of discrimination with a time limit of say, eight weeks, for the employer to respond. In the interim we propose to explore with the EOC introducing a voluntary questionnaire.

2 For multiple cases, a single application form (IT1 form) and response from employer (IT3 form)

i The Department of Trade and Industry (DTI) are conducting a comprehensive revision of employment tribunal procedures, in order to simplify and streamline case handling by tribunals, and to make procedures more comprehensible to users. One proposal is that there should be provision for a single application form (IT1) and response form (IT3) in multiple cases, with other applicants listed as a schedule to these forms. This would reduce bureaucracy in all multiple cases and could be particularly useful in equal pay cases. It could encourage groups of applicants to decide on a named lead case and streamline the handling of the other cases where women have essentially the same claim to equal pay.

Proposal 2 - We intend that in multiple cases the tribunal should require just one application (IT1 form) and one response from the employer (IT3 form) by enabling other applicants to be listed as a schedule to these forms. As indicated, this will be taken forward by DTI.

Group actions - It is possible for a tribunal, on the application of a party or on its own motion, to combine proceedings. This can be done a) where a common question of law or fact arises in some or all of the originating applications b) where the relief claimed arises out of the same set of facts c) where there is another desirable reason for the proceedings to be combined. Courts too can make provision for Group Litigation Orders where a number of claims raise the same common issue. The parallels between courts and tribunals may be relevant. The Lord Chancellor's Department intends to issue a Consultation Paper by the New Year reviewing proposals to introduce representative claims. It will address whether or not representatives (individual or organisation) should be able to bring a claim on behalf of claimants who have an existing cause of action.

Commentators often use the terms "group action", "class action" and "representative action" without defining what exactly is meant. It is not clear what more, if anything, might be desirable for tribunal processes, and whether any "class actions" can be introduced in a way that is fair to both parties. The Lord Chancellor's Department review will not envisage representative claims on behalf of a notional or wholly unidentifiable claimant.

Currently tribunal procedures to handle groups of claims require individual applicants to be named and at least one of them to pursue a case. This seems reasonable, especially when the fact of unequal pay is at issue. We understand that some commentators call for a situation where "a discriminatory rule could be challenged even where it is not possible to find a worker who has been affected". Views are sought on precisely what class actions might entail and how these could be made fair to both parties.

Equal value - The Equal Pay Act gives a woman the right to equality where she is employed on work of equal value to that of a man in terms of the demands made on them both under such headings as effort, skill and decision-making. For example, in an early equal value case the work of a qualified female cook in a shipyard canteen was found to be of equal value to several male craft workers.

3 Removal of the "no reasonable grounds" defence

i In an equal value case, if a tribunal is satisfied that there are no reasonable grounds for finding the two jobs are of equal value it can end the case by finding against the complainant then and there. This has been criticised as perpetuating stereotyped assumptions about the apparent value of traditionally "female" work, especially where the two jobs look very dissimilar.

ii There is widespread agreement that this defence (from S2a(1)b) should be removed. This is an issue of fairness rather than speeding up and simplifying claims and relates to the way the UK implements the Equal Pay Directive 75/117/EEC. Consequently we believe that the necessary change can be achieved via regulations under the European Communities Act 1972. This defence was originally intended to provide a route for the tribunal to 'weed out' or deter weak cases, but tribunals have other procedures for dealing with cases without merit such as holding pre-hearing reviews and requiring a deposit. These provisions can be used to weed out weak equal value cases.

There would be some consequential amendments to the 1993 Tribunal Regulations[2] to remove references to the no reasonable grounds defence.

Proposal 3 - We propose to remove, via regulations, the current power which enables a tribunal to dismiss a claim on the basis that, in its opinion, it has "no reasonable grounds" to presume it would succeed. In future, a tribunal would either have to consider the claim itself or appoint an expert to consider it.

[2] *Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993, Employment Tribunals (Constitution and rules of Procedure) (Scotland) Regulations 1993*

4 Appointing an assessor

i In equal value cases, a tribunal can appoint an independent expert to prepare a detailed job evaluation report on the applicant's and the comparator's work or can decide to determine the question itself. The independent expert was introduced to the Equal Pay Act in 1983 because job evaluation is often a complex technical process, depending on "weightings" and "factors". The provision whereby the tribunal could determine the question itself was introduced in 1996 in recognition of the problems of delay following the appointment of an independent expert. However, in the majority of cases still an independent expert is appointed. Increasing the proportion of equal value cases which the tribunal can determine itself should reduce delays and simplify cases. But in many cases tribunals will require some expert input, for example, to understand the complexities of a job evaluation scheme. This is currently only available through an independent expert's report.

ii In some equal value cases an "assessor" qualified to assist with sifting and understanding the conflicting, usually technical, evidence about the jobs in question, or about the job evaluation schemes which had been used, might provide the expertise to enable the tribunal to determine the case itself. Such "assessors" could be appointed from the list of independent experts held by ACAS or from other qualified people.

iii Similar expert assistance is available to Tribunals in other areas. The Health and Safety at Work Act 1974 provides for the appointment of assessors, with relevant special knowledge or experience, to assist the tribunal with appeals and prohibition notices under this Act. The Race Relations Act also provides for assessors with special knowledge or experience of race relations problems to assist judges hearing complaints of discrimination in non-employment cases.

iv The tribunal would need to make the advisory role of the assessor clear to both sides to allay any concerns that he or she took part in the decision making process, thus affecting the balance of the tribunal's membership (i.e. legal chairman and representatives from employers' and employees' organisations).

v We consider that enabling the tribunal to appoint an "assessor" could significantly increase the number of equal value cases which the tribunal would decide to determine itself. This would require an amendment to the Equal Pay Act which could not be made until legislative time permitted. We would welcome views as to how, in the interim, the number of cases which the tribunal decides to determine itself might be increased.

Proposal 4 - We propose, when legislative time permits, that where the tribunal has decided to determine an equal value case itself, to permit it to appoint an "assessor" to sit on the tribunal as a formal expert adviser.

5 Limit tribunal to hearing expert evidence only from the independent expert

i One reason for delays following the appointment of an independent expert is that the parties frequently employ their own experts and call expert evidence in addition to the independent expert's report. Limiting the tribunal to hearing evidence only from the independent expert should enhance the status of the independent expert and increase co-operation from the employer.

ii One way of achieving this would be for the tribunal to encourage the parties' agreement to selection of a single independent expert, possibly at a directions hearing. The tribunal has wide powers as to how proceedings are run and this could therefore be done without legislative change. It would be made clear that in any event the independent expert will be able to be cross examined by both parties.

iii Where such agreement is impossible or impractical, we propose that the parties' right to call evidence challenging the independent expert's report should be limited by removing the right to call their own expert witness. The parties have, of course, every opportunity to give full information to the independent expert. We acknowledge this may be unwelcome to some, and have considered whether, as a safeguard, the tribunal should allow for either party (or both) to apply to admit their own expert evidence, limited to one expert witness per party, but no automatic right to call such a witness. As with general case management principles, the tribunal would have to be convinced that there was good cause why additional evidence was required above and beyond the independent expert's report, in that particular case, before allowing parties to call such evidence. We believe this can be done through amendment to the 1993 Tribunal Regulations.

iv The limit on the scope of the parties to call expert evidence would apply equally to both parties - thus ensuring 'equality of arms' which is an inherent element of a fair trial. Furthermore, case law indicates acceptance that one expert appointed by the court would be sufficient to ensure a fair trial. Changes since the Woolf reforms to the Civil Justice procedure also indicate that proper case-management does not affect individual rights. The principle recommendation of the Woolf report in this area was that the calling of expert evidence should be subject to the complete control of the court through the exercise of the court's case management powers.

v Views are sought on how effective limiting the parties' right to call evidence would be in practice and whether the following proposal adequately ensures the rights of both parties to make their case.

Proposal 5 - We propose that where the tribunal has decided to appoint an independent expert, it should be limited to hearing expert evidence *only* from the independent expert by:

- encouraging the parties' agreement to selection of a single independent expert; and (in cases where this had not happened);
- limiting the parties' right to call evidence challenging the expert's report, by removing the right to call their own expert witness.

But we seek views on whether a safeguard is necessary so that parties could apply to the tribunal to admit their own expert evidence, limited to one expert witness per party to the action.

6 Removal of unnecessary detail to rules in equal value cases

i Detailed rules of procedure for employment tribunals are set out in schedule 1 of the 1993 Tribunal Regulations. Complementary rules of procedure for use only in proceedings involving an equal value claim are set out in schedule 2. The majority of schedule 2 is a repeat of schedule 1. Even where a difference between the schedules is very minor, the entire rule is given together with the amendment. The main difference between them is Rule 8A of schedule 2 which sets out detailed rules of procedure relating to an independent expert's report.

ii We believe that the tribunal rules could be simplified and made clearer for users by amalgamating schedules 1 and 2. Minor amendments could quite easily be made to schedule 1 to include references to matters which only arise in equal value claims, though a rule equivalent to Rule 8A would still be needed with, for example, provisions on:

- the appointment of experts
- the role of experts (and terms of appointment)
- delay and the consequences of delay
- ordering clarification/further information in relation to the report
- the acceptance or rejection of the report.

iii However, rules 8A(4) and (5) about requirements for the report could be streamlined (e.g. replacement of the requirement to provide a summary to the parties with a rule that a summary may be required) .

iv Removing schedule 2 and incorporating in schedule 1 those rules specific to equal value cases which are essential for the independent expert procedure would reduce unnecessary regulation. It will be taken forward as part of DTI's comprehensive revision of tribunal procedures. Views are sought on how Rule 8A might be streamlined.

Proposal 6 - We propose to remove the unnecessarily detailed rules in Schedule 2 (Complementary Rules of Procedure for Equal Value cases) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993 (and equivalent Scottish Regulations).

Other issues on equal pay cases

Directions hearings

A key approach to assist equal pay cases is the use of directions hearings to settle matters of case management at the outset. Ministers welcome the current approach whereby employment tribunals are using their discretion to hold directions hearings in almost all equal value cases and many equal pay cases. In particular, Ministers welcome the strong focus in directions hearings on the setting of a timetable for key stages of evidence, such as deadlines for the production of, and comment on, job descriptions of the applicant and the comparator and, where deemed appropriate, the production of the independent expert's report with the co-operation of the employer.

There is widespread agreement on the importance of collecting information about job descriptions of the claimant and comparator at an early stage in equal value cases. Directions hearings provide an ideal opportunity for this. It is envisaged that the emphasis on good case management for tribunal cases will mean that this information is collected in the majority of cases. In those cases, where it is possible and appropriate, the independent expert should be present at a directions hearing when the timetable for producing the expert report could be fixed.

Independent experts

We also recognise that the greater focus on the independent expert, and the proposed introduction of "assessors", will require the list of independent experts to be extended and expanded. Providing information about independent experts' qualifications and experience would give reassurances to the parties and would assist them to agree, as proposed above, on an independent expert. Accordingly, we propose to invite ACAS to take appropriate steps to expand, and improve information on, the list.

Remedial action

Losing or settling an equal pay case provides an employer with an opportunity to put things right by taking steps to prevent similar situations arising. For many employers a tribunal case would be a sufficient incentive to ensure that equal pay cases would not be brought by other employees. Other employers might need help and encouragement to take broader remedial action when unequal pay is identified.

ACAS provides valuable help. It can work with employers and their employees to take a co-operative and joint problem-solving approach to tackle the issues that confront them. This can include agreeing a job evaluation scheme for the workplace. ACAS can offer this assistance whether or not there has been a tribunal case. It might also be feasible for advisory material to be issued to employers who lose or settle cases, possibly by the EOC, who are notified of the outcome of all tribunal cases involving equal pay or by the tribunal itself when issuing final documents in cases. We welcome comments on how employers might be encouraged to take broader remedial action when unequal pay is identified by legal action.

Other proposals

We are taking the opportunity of seeking views on two further proposals which have been developed in response to rulings by the European Court. Both these proposals can be taken forward via regulations under the EC Act.

7 Relaxation of the two year limit on back pay in equal pay cases

i Under section 2(5) of the Equal Pay Act a woman (or man) may claim arrears of pay for up to two years before the date on which she (or he) made an application to an employment tribunal. This two-year time limit on back pay has been found to be contrary to EC law *(Levez v. T.J.Jennings (Harlow Pools) Ltd)* and must therefore be amended.

ii We have considered two main options:

a whether the tribunal should have the power to relax the time limit in exceptional circumstances in the interests of justice and equity; OR

b whether another time limit should be set, for example in line with limitation periods already provided for in relation to contractual matters - six years from the date of commencement of proceedings in England and Wales, but five years in Scotland.

iii We have also been mindful of the case of *Preston and others v. Wolverhampton Healthcare NHS Trust and others*. In this case the European Court found that the two-year retrospective time limit for entitlement to membership of an occupational pension scheme in the Occupational Pension Schemes (Equal Access to Membership) Regulations was contrary to European Law. A final ruling on this case by the House of Lords is anticipated.

iv We favour option b as this would ensure that applicants with equal pay claims would be on the same footing as those with claims for unlawful deductions from wages or claims about inequalities of pay because of race or disability. We recognise that employers might have concerns about the relaxation of the time limit and that some might prefer option a. However, in practice, a six-year time limit (or five in Scotland) is unlikely to impact on a great number of cases. There are no figures showing which equal pay claims would require longer backdating than the current two years, but it is doubtful there are many.

v We acknowledge that the final ruling in the *Preston* case could mean that there might be different backdating periods for access to an occupational pension scheme and equal pay. However different considerations apply to these different rights - one is about access to a pension scheme while the other relates to a contractual right to pay.

Proposal 7 - We propose that the two year time limit on back pay in equal pay cases should be replaced, via regulations, with a time limit in line with limitation periods already provided for in relation to contractual matters - six years from the date of commencement of proceedings in England and Wales, but five years in Scotland.

8 Extension of protection to former employees

i Current anti-discrimination employment law protects individuals from discrimination prior to the formal contract, i.e. where employers are recruiting they cannot, except in very limited circumstances, discriminate against women or men in the way that they offer employment. It also of course protects workers during the contractual relationship. This protection is both against discrimination and against victimisation for having made a complaint of discrimination, whether successful or not.

ii As the law stands there is also some protection for the ex-employee, as under the Equal Pay Act a woman may bring a claim within six months of the time when she was last employed in that job, and under the Sex Discrimination Act she may bring a claim within three months of the act complained of. However, this is a limited protection.

iii In the case of *Coote v Granada Hospitality Ltd* the ECJ ruled that the refusal of a reference due to a former employee, because the employee had alleged discrimination whilst she was employed, amounted to discrimination contrary to the Equal Treatment Directive, regardless of whether the decision was taken before or after the end of employment. (Existing employment law already requires an employer who provides a reference to use reasonable care in its preparation and to ensure its accuracy.) Bearing this case in mind, we propose to enable tribunals to consider former employees' claims about discrimination taking place within six months of the end of employment, where the discrimination has arisen directly out of the former employment. Six months aligns with other employment and discrimination law and is a period during which employers are likely to have kept records. We also propose to enable tribunals to consider claims about discrimination taking place after this period if it is just and equitable. We can provide a set of factors for the tribunal to take into account when considering whether it is just and equitable. These factors might include: length of time since employment; nature of discrimination; and alleged detriment.

Proposal 8 - We propose, via regulations, to enable tribunals to consider claims about discrimination taking place within six months of the end of employment. We also propose to enable tribunals to consider claims about discrimination taking place after this period if it is just and equitable and to provide a set of factors for the tribunal to take into account when considering whether it is just and equitable.

6 month time limit for bringing a case – We are aware that issues have arisen concerning the time limits for bringing a case to a tribunal. We favour waiting for the final outcome of the *Preston* case before considering whether changes should be proposed to the requirement in the Equal Pay Act that a person has to have been in the employment within the last 6 months in order to bring a case. In considering the outcome of the *Preston* case we would need to look at any implications raised by the *Levez* case in relation to deceit on the part of the employer. We will consult on this at a later date.

The burden of proof - consultation about the directive

Introduction

1 The purpose of the Burden of Proof Directive is to promote fairness between the parties in sex discrimination cases, and to have greater precision and clarity.

2 In proposing changes to our law as it requires, we have thought carefully about the risks of provoking questionable Tribunal cases. We do not expect an employer who is not discriminating and can demonstrate this, to be at greater risk of losing a case.

The Burden of Proof Directive (EC97/80)

3 This was agreed in Europe under the Social Chapter in 1997, and adopted by the UK shortly afterwards. The Directive must be implemented in the UK by July 2001.

Extent of change

4 Under the Equal Pay Act it already falls to the employer to show there has been no sex discrimination in pay between men and women doing essentially the same job (or one of equal value) so we do not propose any changes to that Act.

5 We do however think the Sex Discrimination Act 1975 will be clearer if amended on issues of recruitment and employment practice, and on how a Tribunal should handle the evidence.

Explanation

6 Not all discrimination is direct or the result of deliberate prejudice. But employees who believe they have suffered sex discrimination may well have difficulty in successfully bringing a claim. This may be because, for example, they do not have sufficient information about their employers' actions. Or it may be because of something inadvertently done by the employer.

Any action which has more of an adverse effect on women than on men, and which an employer cannot justify, using good reasons unrelated to gender, could be indirect sex discrimination.

For example:

- A practice of preferring for promotion people who had shown geographical mobility in previous jobs (which would disadvantage more women due to their domestic responsibilities); OR
- A practice of filling new posts by word of mouth from among an existing largely male workforce even if experience in the business was not required; OR
- A practice of only hiring people over a certain height as security staff, where the employer claims that being under the stated height is not in theory an absolute bar to employment, but in fact always hires employees over the stated height (which would discriminate against women).

7 A number of important European rulings on sex discrimination cases[3] have resulted in a definition of indirect discrimination in the Directive. It refers to disadvantage due to a "criterion, provision or practice".

8 This concept of indirect discrimination is already part of UK law, although the term is not used in the SDA. A completely neutral requirement or condition, applied equally to women and men, may affect one sex considerably more than another, to their disadvantage, because they find it harder to comply with the requirement or condition. This may well be unintentional.

9 But our case law has led to a situation that an individual could only bring a Tribunal claim if the employer is actually specifying a requirement and is imposing it absolutely. We believe it is necessary to remove this rigidity.

10 UK law also allows for the employer to justify the requirement or condition - to show it is objectively necessary irrespective of sex. This will remain. But if there is no objective justification for such a requirement irrespective of sex, it will constitute indirect discrimination.

[3] *e.g. Enderby v Frenchay Health Authority*

For example: if a shift pattern was changed in a way that made it very difficult for women to arrange childcare (because more women than men have childcare responsibilities), or to travel to work (because fewer women than men own cars), this could be indirect discrimination. Then an employer would have to show they could justify the change.

Sharing the Burden of Proof

11 Processing evidence in tribunal hearings can be complex. Tribunals have been using 1991 guidance on how to handle the body of evidence in cases where there is a case to answer in discrimination cases[4]. This needs consolidating.

12 We therefore wish to amend parts of the Sex Discrimination Act which relate to employment and vocational training. In cases where the claimant has made a prima facie case which has fulfilled their part of the burden of proof, it will be up to the respondent, who is normally the employer, to disprove the claims. This means that when there is a case for the employer to answer the burden of proof is shared between employer and employee. In practice this will make little difference to the way in which discrimination cases are already handled and decided in the UK.

Proposals

a We think the Sex Discrimination Act (SDA) 1975 will be clearer if amended so it refers expressly to "direct discrimination" and "indirect discrimination" because it currently does not.

b We also intend to introduce the word "practice" into the definition of indirect discrimination.

c We will clarify in the SDA where the balance of the burden of proof lies.

13 The changes would only apply to employment and vocational training, not to the parts of the SDA dealing with discrimination in the sale of goods and access to services and facilities. Also, we are not going to cover absolutely every work circumstance where there happens to be under-representation of women. We do not wish to go down the road of an employer having to defend any situation where the statistics show women are under-represented regardless of whether the employer has done anything to cause this. In our view, the Directive does not require us to go that far.

Note: Race Relations Act and Disability Discrimination Act: The Government wants protection from race and disability discrimination to be as comprehensive as protection from sex discrimination. There are relevant new European Directives recently agreed. Any changes which may be required to UK law, including on race and disability, will be the subject of later consultation.

Questionnaire: This includes three questions for consultation.

[4] *King v Great Britain China Centre*

Burden of proof

Question 1

Do you agree that the Sex Discrimination Act should refer expressly to “direct discrimination” and “indirect discrimination”?

Yes No

Comments

Question 2

Do you agree that introducing the word “practice” as in proposal (b) on page 16 implements the Directive’s definition of indirect discrimination? If not, can you identify any cases where an individual might win a Tribunal case under a wider alternative definition but would fail to do so under our proposal?

Yes No

Comments

Question 3

Do you agree that our proposal to amend the Sex Discrimination Act fairly implements the shift in the burden of proof required by the Directive?

Yes No

Comments

We would welcome any other comments you may have on the proposals about the burden of proof

Thank you for taking the time to reply. Unless requested, we do not intend to acknowledge individual responses.

Towards Equal Pay Your response

Please use this form when responding to the consultation paper and send your comments by 19 February 2001 to:
DfEE Consultation Unit, Level 1b, Castle View House, Runcorn, Cheshire, WA7 2GJ
Tel: 01928 794341 Fax: 01928 794311 E-mail: Equalpay.CONSULT@DFEE.GOV.UK

Your response may be made public unless you indicate otherwise. Is your response confidential? ○ Yes ○ No

About you

Name:

Organisation/Title:

Address:

What best describes the capacity in which you are replying:

○ a private individual ○ on behalf of your organisation
○ as an employer ○ other (please specify)

Proposals to simplify and speed up equal pay tribunal cases

Proposal 1 - We propose, when legislative time permits, to introduce a questionnaire as used in other areas of discrimination with a time limit of say, eight weeks, for the employer to respond. In the interim we propose to explore with the EOC introducing a voluntary questionnaire.
Do you agree with this proposal

○ Yes ○ No

Comments

Proposal 2 - We intend that in multiple cases the tribunal should require just one application (IT1 form) and one response from the employer (IT3 form) by enabling other applicants to be listed as a schedule to these forms. This will be taken forward by DTI.

Do you agree with this proposal

○ Yes ○ No

Comments
Views are sought on precisely what group, class or representative claims might entail and how these could be made fair to both parties

Proposal 3 - We propose to remove, via regulations, the current power which enables a tribunal to dismiss a claim on the basis that, in its opinion, it has “no reasonable grounds” to presume it would succeed. In future, a tribunal would either have to consider the claim itself or appoint an expert to consider it.

Do you agree with this proposal?

Yes No

Comments

Proposal 4 - We propose, when legislative time permits, that where the tribunal has decided to determine an equal value case itself, to permit it to appoint an “assessor” to sit on the tribunal as a formal expert adviser.

Do you agree with this proposal?

Yes No

Comments

We would welcome any comments on making the use of an assessor effective. We also welcome views on how, meanwhile, the number of cases which the tribunal determines itself can be increased

Proposal 5 - We propose that where the tribunal has decided to appoint an independent expert, it should be limited to hearing expert evidence only from the independent expert by:

- encouraging the parties’ agreement to selection of a single independent expert; and (in cases where this had not happened);
- limiting the parties’ right to call evidence challenging the expert’s report, by removing the right to call their own expert witness.

But we seek views on whether a safeguard is necessary so that parties could apply to the tribunal to admit their own expert evidence, limited to one expert witness per party to the action.

Do you agree with the proposal to limit expert evidence to the single independent expert?

Yes No

Comment

Views are sought on how to encourage the parties to agree on one expert; whether the proposal adequately ensures the rights of both parties; and whether the safeguard is necessary.

Proposal 6 - We propose to remove the unnecessarily detailed rules in Schedule 2 (Complementary Rules of Procedure for Equal Value cases) of the 1993 Tribunal Regulations.

Do you agree with this proposal?

Yes No

Views are sought on how Rule 8A might be streamlined when it is merged with Schedule 1.

Proposal 7 - We propose that the two year time limit on back pay in equal pay cases should be replaced, via regulations, with a time limit in line with limitation periods already provided for in relation to contractual matters - six years from the date of commencement of proceedings in England and Wales, but five years in Scotland.

Do you agree with this proposal?

Yes No

Comments

Proposal 8 - We propose, via regulations, to enable tribunals to consider claims about discrimination taking place within six months of the end of employment. We also propose to enable tribunals to consider claims about discrimination taking place after this period if it is just and equitable and to provide a set of factors for the tribunal to take into account when considering whether it is just and equitable.

Do you agree with this proposal?

Yes No

Comments

We would welcome any other comments you may have on the equal pay proposals, for example how employers might be encouraged to take broader remedial action when unequal pay is identified by legal action.