

## #metoopay

### What is Equal Pay Law?

Equal pay law simply puts into effect the principle that men and women should receive equal pay for equal work. 'Equal work' means:

- like work;
- work rated as equivalent; or
- work of equal value.

### Where does it come from?

The rules are now enshrined within the Equality Act 2010. However, the statutory origins of the UK rules are the heroic efforts of the Ford Dagenham sewing machinists, who went on strike in the late 1960s to demand equal pay with that of their male car manufacturing colleagues. Their efforts led to the 1970 Equal Pay Act, which came into force in 1975.

### How does it work?

The rules work by inserting a sex equality clause into contracts of employment. The effect of this is to automatically replace less favourable terms with equivalent more favourable terms from a comparator's contract. Equality is assessed on a clause by clause basis rather than through a holistic assessment of contracts as a whole.

The rules require a person making a claim to identify a real comparator of the opposite sex who does equal work and who is or was in the same employment as them.

There are defences an employer can rely on, including the material factor defence, i.e. the difference in terms is due to a material and non-discriminatory factor:

### Who can claim equal pay?

In Great Britain the rules apply to anyone employed under a contract to perform work personally. It also applies to certain office holders, crown employees, parliamentary staff and those in the armed forces.

### What does pay mean?

Pay includes, amongst other things, basic pay, paid holiday, sick pay, hours of work, contractual or automated pay reviews, certain types of performance pay and contractual bonuses, overtime, commission, allowances and benefits such as company cars and pension benefits.

### Is equal pay and sex discrimination the same thing?

The equal pay regime can often be confused with the rules on sex discrimination. The simplest way to think about the distinction is that equal pay focuses on contracts and the contractual terms. In comparison, the sex discrimination regime focuses on practices, behaviours and conduct, such as recruitment practices and job offers, promotions and the operation of discretion in relation to pay reviews and discretionary bonuses.

### How do you bring a claim?

Claims are usually brought in an employment tribunal, but can also be brought in the County or High Court. They have the power to make declarations, order payment of arrears of pay and award damages for breach of the equal pay rules. The employer can also be ordered to conduct a formal equal pay audit.

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### 1. Comparators

You have to compare your employment terms with someone of the opposite sex, who is employed by the same employer and who carries out similar work to you. What counts as similar, or "equal", work fall into three categories (see below) and can sometimes cover a broad range of jobs.

They do not have to work in the same place as you, but they must share common terms of employment. It must be an actual person of the opposite gender, not a hypothetical person. The person can be a current or previous employee.

### 2. Equal work

Like work - the work that you and the comparator undertake must be the same or broadly similar and should require the same type of skills and knowledge. If there are any differences they should not be of practical importance.

Work rated equivalent - the employer must have carried out and implemented a job evaluation scheme (JES) which has rated the jobs as equivalent in terms of the demands made on a worker.

Work of equal value - work that is not like work or work rated equivalent, but is equal in terms of the demands made on you and the comparator and this is assessed on factors such as effort, skill and decision-making.

### 3. Material factor defence

Employers can escape liability by relying on the material factor defence. The material factor must:

- be genuine;
- be the reason for the less favourable term;
- be a significant and relevant difference in the circumstances of you and the comparator; and
- not be discriminatory or, as it is often referred to, "tainted" by sex.

If the material factor is tainted by sex, the employer will need to show it is objectively justified and that it (i) corresponds to a real need on the part of the employer; (ii) is an appropriate means of achieving the objective pursued by the employer; and (iii) it must be necessary.

### 4. Time limits

In the employment tribunal you can bring an equal pay claim at any time during employment. However, you must bring a claim within 6 months from the end of your employment or the end of a stable work relationship (or from the discovery of a relevant fact if your employer has concealed it).

All is not lost if you miss the 6 month deadline in the tribunal. You may still be able to bring a claim in the civil courts where the time limit is 6 years. However, there are significant costs risks and it's generally recommended to bring an equal pay claim in the tribunal if you can.

### 5. Burden of proof

- You will first need to establish a comparator, equal work and a less favourable term.
- The employer may rely on a material factor defence and must show the material factor is the reason for the less favourable term and is not related to sex.
- You will then need to prove the factor has an adverse impact on your sex (tainted by sex).
- Finally, to defeat the claim the employer must show the factor tainted by sex is justified.

### 6. Remedy

If successful

- The employment tribunal or court can make a declaration of your rights under the equality clause and make a permanent change to the contractual term
- You will receive arrears of pay going back up to 6 years before the claim was brought
- Your employer can be ordered to conduct an equal pay audit

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Equal pay and the gender pay gap are not the same thing, although the two are often confused.

	Equal pay	Gender Pay Gap
What are they?	The legal requirement that men and women in the same employment, performing equal work, must receive equal pay.	A statistical measure of the difference between the average earnings of men and women across an organisation, regardless of their roles.
What is the legal position?	Paying men and women differently for doing equal work is unlawful.	It is not unlawful to have a gap between men and women.
When were they introduced?	The right to equal pay is now enshrined in the Equality Act 2010. However, the legal protection was originally introduced by the Equal Pay Act in 1970 when it was common for employers to openly pay women less than men for equal work.	The requirement for companies to report on their gender pay gap was introduced in April 2017.

### How does an equal pay claim work?

In successful claims, the law implies a sex equality clause into a woman's contract to address the pay disparity and up to six years' back pay can be awarded. However, an employer can defend its pay decisions and defeat a claim for equal pay if it is able to show the difference is due to a material factor which is not discriminatory.

### How does gender pay reporting work?

All companies with 250 or more employees are required to publish:

- the percentage difference in hourly pay and bonus pay between men and women;

- a breakdown of the proportion of men and women in each of four salary quartiles; and
- the percentage of men and women respectively who have received a bonus.

The information must be published both on the government website and on the employer's own website – the latter may be accompanied by a narrative explaining the data as well as setting out any steps the employer is taking or planning to take to reduce the gap.

### What does a large gender pay gap mean?

A large gender pay gap is not in itself unlawful and it may be explained by many different factors that are not discriminatory. If a workforce has a particularly high gender pay gap, this can indicate there may be a number of issues that are causing the gap, and an analysis of the data may help to identify what those issues are. Often a gender pay gap is explained by a lack of senior women within the business.

Even where gender pay gap figures can be accounted for, they should not be ignored. The requirement to publish the gender pay gap is about transparency, and encouraging businesses to be aware of and take steps to improve their own gender pay gap by addressing issues such as pay, promotion, recruitment, family friendly and flexible working policies.

A large gender pay gap does not necessarily indicate an equal pay issue. Nor can employers use a small gender pay gap as a defence to an equal pay claim. However, it does give us a measure of the differences in the ways men and women work: different occupations, part-time roles being predominantly female - and the lack of women in senior roles.

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# Pay transparency and how to get it

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It has long been considered taboo to openly discuss salaries at work. However, legislation and public engagement with movements such as #MeToo and #TimesUp, as well as #MeTooPay, are shifting the cultural norm of pay secrecy towards a more transparent pay culture. From journalists, politicians, activists and celebrities - *everyone is talking about pay.*

Transparency can help to hold employers to account. The Fawcett Society, a charity which campaigns for gender equality, has said that pay transparency is an important step in revealing pay discrimination. Openness around pay can also help to increase motivation, trust and ultimately lead to a more collaborative and productive workplace.

It is important to remember that there is no 'one size fits all' approach when it comes to thinking about pay transparency. It is helpful to think of pay transparency on a continuum from secrecy to complete openness in terms of statistics and culture.

Then ask yourself:

- "Where does my workplace sit on the pay transparency continuum?"

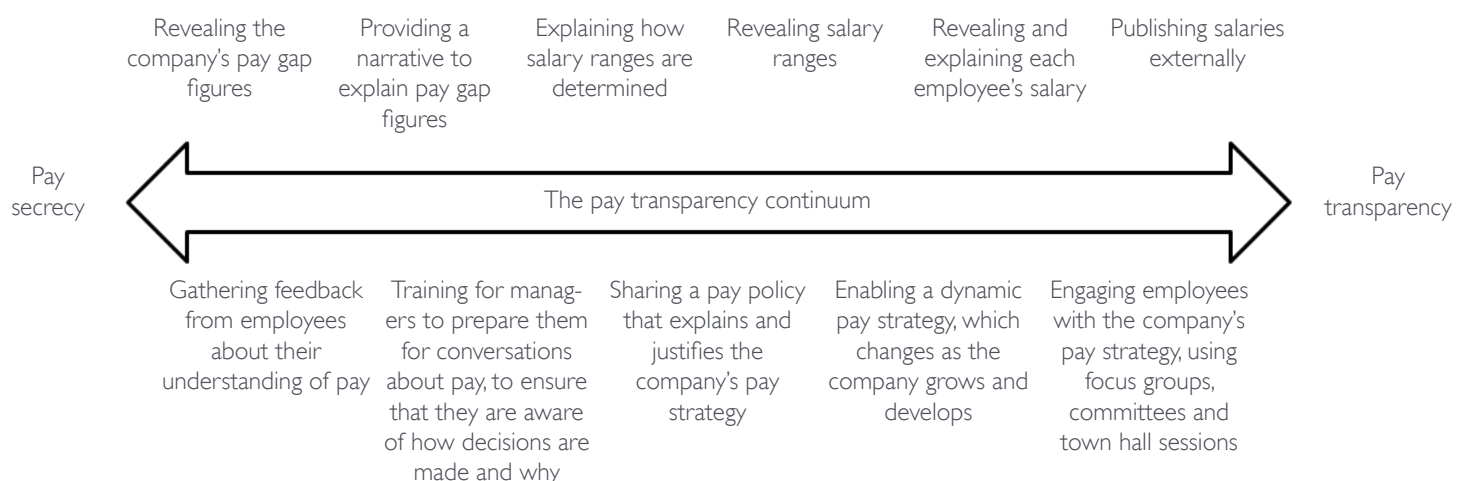
- "Where would I like my workplace to be in the future?"
  - "What is appropriate in terms of the size and future goals of my workplace?"
- The answers to these questions can help to form the starting point of your work's pay transparency strategy.

Importantly, making pay data sets available and publishing salary ranges is only one part of a successful pay transparency strategy. To achieve transparency, workplaces should also foster a culture of pay transparency at every level and consider what roles different individuals play in embedding this culture. Management plays a key role in kickstarting conversations about transparency. However, to create meaningful cultural change, every individual has a part to play in their workplace's pay transparency journey.

### Ban on pay secrecy clauses

The Equality Act 2010 makes an employment contract term that bans employees from discussing their pay unenforceable, if it prevents an employee from finding out about unequal pay. It would also be unlawful to victimise an employee from doing so.

### Utilising pay statistics



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# How to pursue an internal complaint

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## Where do I start?

### 1. Informal communication

If you have concerns that you are being underpaid compared to your male counterparts, then before raising any formal complaint you should discuss the issues with your manager or a HR representative.

### 2. Grievance

If things remain unresolved after raising your concerns informally, your next step is to make a formal complaint in writing. Your employer should have a grievance policy in place, which you should try to follow as closely as possible. If there is no policy, you can still raise a grievance. Remember to bring your complaints in good time and make it clear that you would like them to be treated as a formal grievance. Note also the time limits for bringing your claim(s) in the employment tribunal. These time limits continue to apply even if you have raised a grievance. A grievance will usually be in the form of a letter addressed to your employer and sent to a HR representative or someone senior in your organisation.

### 3. What to include in my grievance

Your grievance should be in your own words. Try to focus on your specific complaints and provide examples. If you have any documents / communications that support your complaints, you can attach these to your grievance. Be as concise as possible and try to avoid raising points that are not relevant to your actual concerns. Think about including a set of questions at the end of your grievance to focus your employer's mind. These can be requests for information or data in relation to pay, for example.

### 4. Your employer's obligations

It is important that your employer deals with your grievance fairly. The first step will usually be a meeting with you to discuss the issues you have raised so that they fully understand them and can investigate accordingly. When dealing with your grievance, your employer should:

- a. not delay;
- b. act consistently as between employees;
- c. properly investigate the complaints you have raised, which may involve meeting with other employees to discuss; and
- d. allow you to be accompanied by a companion at any grievance meeting.

### 5. The outcome

After your employer has finished investigating your grievance, they will decide on what action needs to be taken (if any). You should receive an outcome in writing setting out their decision, answers to your questions and confirmation of the action they intend to take.

### 6. Appeal and next steps

If you are unhappy with the outcome or have not been provided with sufficient information or answers, you should be given the opportunity to appeal. Your employer should review and consider your appeal without delay. Depending on the size of your organisation, the appeal should be dealt with by someone impartial who has not been involved in your original grievance. If you feel that your complaints have not been resolved after going through the appeal process, consider the possibility of bringing a claim/s in the employment tribunal.

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# The Equal Pay claim procedure

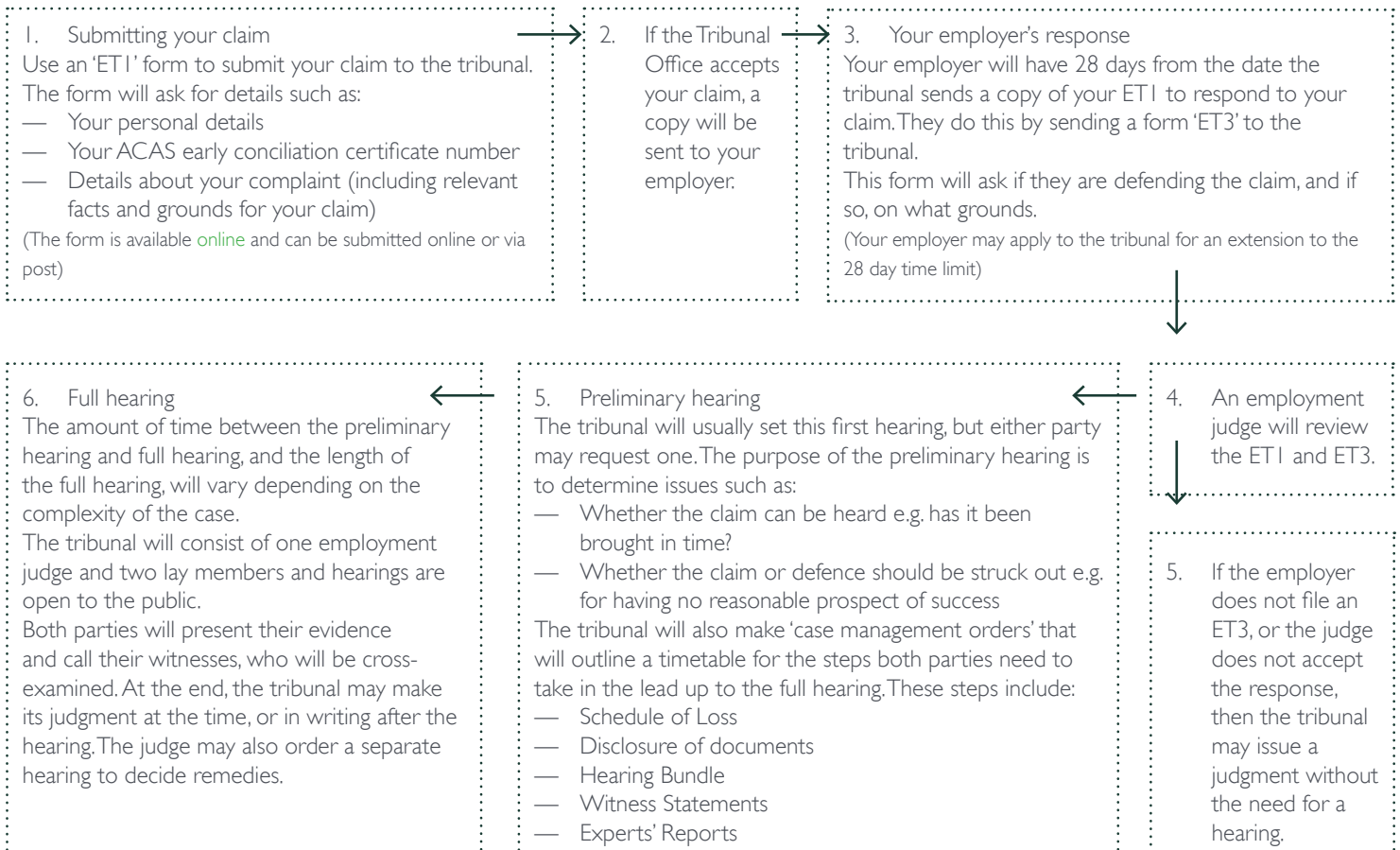
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Claims for equal pay are most commonly brought in an employment tribunal, under s.127(1) Equality Act 2010.

However, as equal pay law works by inserting an equality clause into an employment contract, a breach of equal pay is equivalent to a breach of contract. This means it is also possible to bring a civil action in the County Courts and High Court in England and Wales, or the Court of Session in Scotland, because the civil courts have jurisdiction to hear claims that relate to contracts.

Before commencing any proceedings in the tribunal or civil courts, make sure you have fully utilised your employer's internal grievance and disciplinary procedures and, in the case of a claim to the employment tribunal, have made contact with ACAS. Always keep an eye on time limits and remember that parties are encouraged to settle disputes without resorting to litigation and may also do so at any time after bringing a claim.

## Employment Tribunal:





The full process, from the date the ET1 is submitted to the date of the final hearing, takes an average of 8 months, not accounting for delay caused by complexity or extensions to deadlines. Parties generally bear their own costs of a tribunal claim, regardless of the outcome.

Note that claims relating to 'equal value' have a special tribunal procedure under 'The Equal Value Rules' to determine whether two jobs are of equal value. It may include the appointment of an independent expert and can involve up to 3 separate hearings over a 6 to 9 month period.

### Civil Courts:

Bringing a claim in the civil courts is a lengthy and costly process and most cases tend to settle without getting to trial. However, whilst employment tribunal claims are subject to strict time limits, a claimant that chooses to bring their claim in the civil courts will have the advantage of a 6 year period in which to do so.

#### Pre-action protocol

Before issuing a civil claim, parties must have exchanged sufficient information and attempted to settle the issues without going to court. This usually involves the parties writing to each other with details of the claim. Litigation should be the last resort.

#### Which Court?

##### County Court

For claims worth £100,000 or less

##### High Court

For claims worth more than £100,000

1. Issuing proceedings  
To issue proceedings you will need to file your claim form and particulars of claim at court, and pay the appropriate court fee. Once issued, these documents will then need to be served on the defendant employer, together with notes for the defendant on replying to the claim and the response pack.

2. The defence  
When the defendant has been served with the proceedings, they must file and serve their defence (and counterclaim if applicable) within:

- a. 14 days of service of the claim; or
- b. Where an acknowledgement of service has been filed, within 28 days of service of the claim.

You may then choose to file and serve a Reply to the Defence and Counterclaim

3. The court will require the parties to file a directions questionnaire to assist in allocating the claim to the correct 'track' to best manage the case. Costs budgets and a disclosure report may also be filed.

4. Directions / CMC  
Once allocated to a track, the parties must endeavour to agree 'directions' for the case i.e. the timetable for how the case will be conducted leading up to trial, before the first Case Management Conference (CMC), an informal hearing.

At the CMC, the court will try to identify the issues in dispute and consider whether these can be narrowed before trial. It will then order directions including steps and deadlines for:

- Disclosure and inspection of documents
- Witness Statements
- Appointing experts and the exchange of expert reports
- Hearing bundles
- A trial date (or window) and possible time estimate for trial

5. A pre-trial checklist will be sent to parties a few months before trial to see what directions have been complied with and obtain further information.

6. The court may also decide to hold a pre-trial review if the matter is particularly disputed or complex. At this hearing they will check parties have complied with any orders or directions and give further directions for how the trial will be conducted.

7. Trial  
The length of the trial will depend on the complexity of the case. Hearings are conducted by a Judge and are generally open to the public.

Judgment will usually be given during a short, separate hearing at a later date. Whichever party wins at trial will usually be awarded a portion of their costs of bringing/defending the claim, paid by the losing party.

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# Good employment practices to achieve equal pay

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## Does your organisation have an equal pay problem?

Identifying whether or not your organisation is currently complying with its equal pay obligations is a first step to ensuring that men and women are paid equally for their work. Many employers are simply unaware of unequal pay issues, or factors that could give rise to them.

- If you are a large organisation with 50 or more employees, consider carrying out an equal pay audit
- Smaller employers could carry out a less formal equal pay review

## Put gender on the agenda

Carrying out an equal pay audit or equal pay review is an important step in achieving equal pay. But it is only the first step. If problems are identified, appropriate action needs to be taken.

Organisations should develop plans to implement equal pay across the business and keep the plans under review. Maintaining good practice is key.

This requires buy-in at the highest levels of the business; without the support of senior management it will be impossible to enact meaningful and lasting change. For any organisation facing resistance, management should be reminded that ensuring equal pay is not just about complying with the law – it is also good for business. In addition to avoiding costly equal pay claims, paying men and women fairly enables employers to attract and retain the best talent and leads to increased efficiency and commitment. It has also become incredibly important for maintaining an employer's reputation – the furore around the BBC's pay practices is one example.

## How to ensure fairness

- Put an equal pay policy in place. The Equality and Human Rights Commission has guidance for employers that can be found [here](#).
- Be open about how your organisation structures its pay.
- Put clear and objective criteria in place for recruitment, pay reviews and promotions
- Be aware of gender bias issues and train managers so they understand how those issues could impact their decision-making
- Encourage managers to support employees with caring responsibilities regardless of gender and ensure your family friendly policies allow both women and men to reach their full potential at work
- Continue to review and monitor equal pay regularly

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# Conducting an equal pay audit

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An employer who wishes to identify whether there is pay inequality in its business, and to take targeted action to address any such inequality, may choose to conduct an equal pay audit. An audit can provide an employer with valuable insight into their pay and reward strategy, and an opportunity to put foundations in place to eliminate unjustified pay differences between men and women.

## Why have an audit?

Benefits of conducting an equal pay audit include:

- identifying pay differences between men and women doing equal work;
- investigating the causes of these; and
- eliminating unequal pay which cannot be justified.

## How do I go about it?

Below is a high-level summary of five key steps in undertaking an equal pay audit:

### 1. Decide scope

Consider whether you want to:

- undertake a full audit of all employees; or
- take a staged approach, focusing first on particular sections of the workplace where there may be higher unequal pay risks.

### 2. Determine 'equal work'

Consider how to categorise men and women doing equal work. Bear in mind that:

- Job titles are the most common indicator of 'like work', but not always conclusive. Review titles in your organisation to ensure that the same/similar titles really do indicate like work.
- For work of 'equal value', look beyond job titles. Identify genuinely comparable roles based on demands made on employees (by reference to effort, skills, decision-making etc).

### 3. Collect and compare pay data

Identify any significant pay gaps amongst employees doing equal work. This usually involves calculating:

- (a) average basic pay; and (b) total average pay of all employees in the comparison pool; and
- the difference between these amounts for the men and women in each pool.

### 4. Establish causes of differences

If significant pay gaps are revealed, identify where they are coming from. Do they lie in basic pay rates or elsewhere (for example performance-related pay or benefits)?

Generally speaking, differences of 5%+, or recurring differences of 3%+, merit further investigation.

Determine whether there are genuine reasons for pay differences which have nothing to do with gender (does the 'material factor defence' apply?). Test this reasoning on samples within the pool. Keep a record of non-discriminatory reasons to help reduce the risk of successful claims.

### 5. Develop an action plan

If differences cannot be justified, prepare a plan to address them. If not immediately rectifiable, set clear timescales to help lessen exposure over time.

If no unjustified differences are uncovered, maintain this by continuing to review and monitor pay policies.

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### Case 1

#### Facts

Cleo works for Argo Specialty Partners (“ASP”), one of the top insurance brokers in the City. She won a place on ASP’s graduate scheme straight out of university, and has worked there ever since. Her current role involves a mix of commission-based work and business development.

Julius was also in Cleo’s intake at ASP. His current role is entirely commission-based. Both Cleo and Julius are considered to be “Level 4” in terms of seniority.

During after-work drinks one night, Cleo came to learn that she earns £10,000 per year less than Julius. Cleo had presumed that they were on the same salary, since they both joined ASP at the same time and are the same level of seniority. When Cleo brought this up with her line manager, Tony, she was told that Julius’ pay was higher than hers because Julius’ remit is entirely commission-based, whereas Cleo’s is split between commission-based work and business development. “Julius obviously brings in more money”, according to Tony.

#### Analysis

Does Cleo have an equal pay claim?

Possibly.

In any event, Cleo should be sceptical of the reasons given by Tony. The key question here is whether Cleo and Julius perform work of equal value. This means analysing the demands of their respective roles, including the effort, skill and decision-making involved. Tony has seemingly equated “value” with how much commission an employee brings in. That is not the correct test.

It may also be untrue that “Julius brings in more money”. Certainly, Tony seems to have overlooked the fact Cleo’s work in business development may contribute just as much, if not more, to ASP’s revenues as Julius’. Employers should be wary of making stereotypical assumptions about the nature of roles when assessing whether they are of equal value.

### Case 2

#### Facts

Ms Port works as a chef for Starboard Cruises (“Starboard”). Starboard owns and operates a network of six cruise liners across the Mediterranean, providing all-inclusive holiday packages for 18 – 30 year-olds. According to the terms of her contract, Ms Port receives the following:

1. Basic pay: £35,000 p/a.
2. Guaranteed bonus: £10,000 p/a.
3. Unsocial hours supplement: £2,500 p/a.
4. Company speedboat: equivalent to £2,500 p/a.

Mr Stern and Mr Bow also work for Starboard as a painter and thermal engineer respectively. Mr Stern works on the same liner as Ms Port but Mr Bow is based on a different liner. Ms Port, Mr Stern and Mr Bow all perform work of equal value. Under the terms of their contracts, Mr Stern and Mr Bow both receive the following:

1. Basic Pay: £40,000 p/a.
2. Guaranteed bonus: £5,000 p/a.
3. Unsocial hours supplement: £5,000 p/a.
4. Company speedboat: none.

#### Analysis

For the purposes of an equal pay claim, can Ms Port compare her contractual terms with Mr Bow’s?

Probably.

Ms Port would be able to compare her contractual terms with Mr Bow’s if they are employed at the same establishment. What constitutes the same establishment is different in every case. For example, all the buildings and faculties within a university campus would probably be the same establishment; but not all the schools within a Local Education Authority.

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Here, it is certainly arguable that Starboard's six liners form part of the same establishment. For instance, they are all operated by the same company and provide the same services across broadly the same geographical area.

Are Ms Port's contractual terms less favourable than Mr Stern/Mr Bow's?

Almost certainly.

Generally, the correct approach is to compare each contractual term separately. It is irrelevant that Ms Port and Mr Stern/Mr Bow each make £50,000 p/a in total. Rather, one must compare the basic pay of Ms Port vs. the basic pay of Mr Stern/Mr Bow; the guaranteed bonus of Ms Port vs. the guaranteed bonus of Mr Stern/Mr Bow; and so on.

Here, Ms Port's basic pay and unsocial hours supplement are both less than that of her male comparators. Such disparities are usually sufficient to found an equal pay claim.

Very occasionally, however, separate contractual terms may be aggregated. For example, it is arguable that basic pay and guaranteed bonus should be rolled up and treated as a single term of the contract because they both deal with remuneration for normal working hours. If so, there would be no equal pay dispute because Ms Port (£35,000 + £10,000) and Mr Stern/Mr Bow (£40,000 + £5,000) each received £45,000.

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