

EQUALITY ACT 2017
STATUTORY CODE OF PRACTICE ON
EQUAL PAY
GD No. 2020/xxxx

Equality Act 2017 Code of Practice – Equal Pay

This statutory Code of Practice is issued under section 157 of the Equality Act 2017 (“the Act”) and applies the provisions of the Act to ensure or facilitate compliance with the Act (including any enactment made under the Act) or to promote equality of opportunity.

Before issuing this Code, the Council of Ministers published its proposals for the Code and consulted such persons as it thought appropriate in accordance with section 157(4) of the Act.

The Equality and Human Rights Commission Equal Pay Statutory Code of Practice and Supplement to it have, with the consent of the Commission, been used as the basis for this Code, with such modifications as required for its legal and local application in the Isle of Man.

Case law and precedent from England and Wales have been retained to assist users of this Code with understanding the operation of the Equality Act 2017 in practice and in the knowledge that such case law may be persuasive in the Isle of Man Employment and Equality Tribunal. Case law relating to European legislation which does not apply to the Isle of Man has been omitted from this Code¹.

This Statutory Code of Practice is available in alternative formats on request. Please contact equality@gov.im or telephone 01624 687580.

¹ For example, under EU law, Article 157 of the Treaty on the Functioning of the European Union allows a woman to compare herself to a man who is not in the same employment but where the difference in pay is attributable to ‘a single source’ which has the power to rectify the difference.

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Foreword

This document is the statutory Code of Practice on equal pay. It is intended to accompany the earlier Code of Practice on Employment². This Code is the authoritative, comprehensive and technical guide to the Act's provisions on equal pay which aims to ensure that women and men receive the same pay and other contractual benefits when they are doing equal work.

Jane Poole-Wilson
Member of the Legislative Council and Equality Champion

² GD No. 2019/0086

Abbreviations

The Act	the Equality Act 2017
DfE	the Department for Enterprise
DHSC	the Department of Health and Social Care
EA	the Employment Act 2006
EET	the Employment and Equality Tribunal
EET Rules 2018	the Employment and Equality Tribunal Rules 2018
Equality Act	the Equality Act 2017
IRO	Industrial Relations Officer
MIRS	the Manx Industrial Relations Service
MLR	the Maternity Leave Regulations 2007
s.	section
ss.	sections
Tribunal	the Employment and Equality Tribunal

Abbreviations in the footnotes³

CA	Court of Appeal (England & Wales)
EAT	Employment Appeal Tribunal (England & Wales)
ECJ	European Court of Justice
EWCA Civ	England and Wales Court of Appeal (Civil Division)
HL	House of Lords
IRLR	Industrial Relations Law Reports
SD	Statutory Document

³ The footnotes mainly refer to established case law which the Employment and Equality Tribunal may find persuasive.

Introduction

1. The Equality Act 2017 (the Act) gives women (and men) a right to equal pay for equal work. It replaces previous legislation, including the Employment (Sex Discrimination) Act 2000, and the equality provisions in certain pensions and social security legislation.
2. The provisions explained in this code are those set out in the Act under the heading 'EQUALITY OF TERMS'. They apply to pay and all the other terms of a person's contract of employment, but this code uses the language of 'equal pay' in the interests of both continuity and brevity.

Part 5
Division 3

Purpose of the equal pay provisions of the Act

3. Historically, women have been paid less than men for doing the same or equivalent work. The Earnings Survey Report 2019 indicates that in 1988, the average earnings of full-time female employees was 30% below average earnings of full-time male employees. In 2000 when the Employment (Sex Discrimination) Act 2000 introduced the Island's first equal pay provisions, this gap reduced to 17%. By 2019, this gender pay gap has widened again to 25%.⁴
4. Data obtained for the 2019 Earnings Survey Report and indicates that the sectors on the Isle of Man with the widest gender pay gaps are general manufacturing, utilities, medical & health services, tourist accommodation, banking, and wholesale and retail distribution.

⁴ [Isle of Man Earnings Survey Report 2019](https://www.gov.im/media/1369003/2020-02-04-earnings-survey-2019-report.pdf). Isle of Man Government, Cabinet Office, Economic Affairs. <https://www.gov.im/media/1369003/2020-02-04-earnings-survey-2019-report.pdf>

5. The Act's provisions have broadened existing equal pay protection with the added provision of equal pay for work of equal value on 1 January 2020. The Act's equal pay provisions as well as sex discrimination are intended to ensure that pay and other employment terms are determined without sex discrimination or bias.
6. There are sound business as well as legal reasons for implementing equal pay. Pay systems that are transparent and value the entire workforce send positive messages about an organisation's values and ways of working. Fair and non-discriminatory systems represent good management practice and contribute to the efficient achievement of business objectives by encouraging maximum productivity from all employees.
7. Although this code relates to equal pay between women and men, pay systems may also be open to challenge on grounds of race, age or other protected characteristics under the Equality Act 2017.

Purpose of the Code

8. The purpose of Part 1 of this code is to help employers, advisers, trade union representatives, human resources professionals, and others who need to understand and apply the law on equal pay, and to assist the Employment and Equality Tribunal when interpreting the law. Employees may also find it useful.
9. It is in everyone's interests to avoid litigation and Part 2 of the code – 'good equal pay practice' - provides guidance on how to prevent or eliminate discriminatory pay practices and ensure that there are no unjustifiable pay inequalities.
10. All employers should regularly review and monitor their pay practices, although this is not a formal legal requirement. Involving trade unions or other employee representatives can help make pay systems more transparent. Part 2 of this code suggests that equal pay audits may be the most effective means of ensuring that a pay system delivers equal pay.

11. There will be further guidance available on the Isle of Man Government website equality pages to help employers implement equal pay for women and men in their organisations.

Status of the Code

12. This is a statutory code issued by the Council of Ministers under s.157 of the Equality Act 2017. The code does not itself impose legal obligations. However it helps to explain the legal obligations under the Act. When considering an equal pay complaint the Employment and Equality Tribunal is obliged to take into account any part of the code that appears relevant to the proceedings. If employers and others who have obligations under the Act's equal pay provisions follow the guidance in the code, it may help to avoid an adverse decision by the Tribunal in such proceedings.
13. This code applies to the Isle of Man.

Large and small employers

14. The equal pay for equal work provisions of the Act apply to all employers regardless of size, but the way employers discharge their obligation to avoid sex discrimination in pay may in practice vary according to the size of the organisation. Small employers are less likely to have a human resources team, and may have fewer written policies and more informal practices than large employers. They may also have less complex pay systems and may (though not necessarily) have narrower gender pay gaps.

Part 11

Public sector employers

15. Public authorities⁵ and other bodies exercising public functions are subject to the public sector equality duty in

⁵ The following are public authorities for this purpose —

- (a) Departments;
- (b) Statutory Boards;
- (c) local authorities;
- (d) a joint committee of two or more local authorities;
- (e) a joint board being a body corporate established under an Act of Tynwald and consisting of members appointed by two or more local authorities or by the Department of Infrastructure and one or more local authorities;
- (f) the Chief Constable;

respect of those functions. They must have due regard to the need to: —

- eliminate any conduct that is prohibited under the Act including discrimination, harassment and victimisation;
- advance equality of opportunity between persons who share a relevant protected characteristic and those who don't; and
- foster good relations between persons who share a relevant protected characteristic and those who don't.

16. The Cabinet Office will publish technical guidance to explain the obligations of the public sector equality duty and to provide practical approaches to complying with the Public Sector Equality Duty in the Isle of Man.

Men and women

17. The equal pay provisions in the Equality Act apply to both men and women but to avoid repetition and for clarity, this code is written as though the complainant is a woman comparing her work and pay with those of a man, referred to as the male comparator.

Use of the words 'employer' and 'employee'

18. The equal pay provisions of the Act apply to some people who are 'workers' but not employees in the legal sense – such as office-holders and police officers. In this code, these people are also referred to as 'employees' for convenience. Similarly, people who recruit or 'employ' these people are referred to as 'employers'.

References in the Code

19. In this Code, 'the Act' means the Equality Act 2017. References to particular sections (marked as 's. or ss.')
- and schedules of the Act are shown in the margins. Where legislation other than the Act is referenced the

-
- (g) the Manx Museum and National Trust;
 - (h) the Public Services Commission;
 - (i) the Attorney General's Chambers; and
 - (j) the General Registry.

name of the legislation is also given in the margins.

Further information

20. Copies of the Act and orders and regulations made under it can be downloaded from the Isle of Man Government's Legislation website <https://www.legislation.gov.im/cms/>
21. Separate codes and other information covering other aspects of the Act can be downloaded from the Isle of Man Government website <https://www.gov.im/about-the-government/equality-act/>
22. Advice, information and guidance on equality and discrimination issues can be obtained by contacting:

Equality Adviser
Cabinet Office,
Government Offices,
Bucks Road,
Douglas,
Isle of Man.
IM1 3PN

Tel: 01624 687580

Email: Equality@gov.im

Part one: Equal pay law

Overview of equal pay law

23. The principle that women and men are entitled to equal pay for doing equal work is contained in the Equality Act. Eliminating discrimination in pay is crucial to achieving gender equality.

24. The equal pay provisions in the Act apply to all contractual terms not just those directly related to remuneration, such as holiday entitlement and pensions. This is why the Act calls them ‘equality of terms’. s. 72(2)(a)

25. Although the law on equal pay may seem complicated its purpose is simple – to ensure that where women and men are doing equal work they should receive the same rewards for it.

Sex equality clause

26. A woman doing equal work with a man in the same employment is entitled to equality in pay and other contractual terms, unless the employer can show that there is a material reason for the difference which does not discriminate on the basis of her sex.

27. Where there is equal work, the Act implies a sex equality clause automatically into the woman’s contract of employment, modifying it where necessary to ensure her pay and all other contractual terms are no less favourable than the man’s. s.58

28. Where a woman doing equal work shows that she is receiving less pay or other less favourable terms in her contract, or identifies a contract term from which her comparator benefits and she does not (for example he is entitled to a company car and she is not), the employer will have to show why this is. If the employer is unable to show that the difference is due to a material factor which s.61

has nothing to do with her sex, then the equality clause takes effect.

29. These equal pay provisions apply to all contractual terms including wages and salaries, non-discretionary bonuses, holiday pay, sick pay, overtime, shift payments, and occupational pension benefits, and to non-monetary terms such as leave entitlements or access to sports and social benefits.
30. Other sex discrimination provisions apply to non-contractual pay and benefits such as purely discretionary bonuses, promotions, transfers and training and offers of employment or appointments to office. s.62

Example: A female sales manager is entitled under her contract of employment to an annual bonus calculated by reference to a specified number of sales. She discovers that a male sales manager working for the same employer and in the same office receives a higher bonus under his contract for the same number of sales. She would bring her complaint under the equality of terms (equal pay) provisions.

However, if the female sales manager is not paid a discretionary Christmas bonus that the male manager is paid, she could bring a complaint under the sex discrimination at work provisions rather than an equal pay complaint because it is not about a contractual term.

31. Where an equality clause cannot operate, because for example the woman cannot identify an actual male comparator for an equal pay complaint, but she has evidence of direct sex discrimination, she can bring a discrimination complaint (see paragraph 57). s.63

What is equal work?

32. A woman can claim equal pay and other contract terms with a male comparator doing work that is: s.57(1)
- the same or broadly similar, provided that where there are any differences in the work these are not of practical importance (known as '**like work**');
 - different, but which is rated under the same job

evaluation scheme as being work of equal value (known as '**work rated as equivalent**');

- different, but of equal value in terms of factors such as effort, skill and decision-making (known as '**work of equal value**').

The comparator must be in the 'same employment' as the complainant, the meaning of which is explained at paragraph 48.

Like work

33. It is for the employer to show that there are differences of practical importance in the work actually performed. Differences such as additional duties, level of responsibility, skills, the time at which work is done, qualifications, training and physical effort could be of practical importance. s.57(2) & (3)

A difference in workload does not itself preclude a like work comparison, unless the increased workload represents a difference in responsibility or other difference of practical importance.

Examples of 'like work'

Like work comparisons that have succeeded, in the particular circumstances of the case, include:

- Male and female drivers where the men were more likely to work at weekends.⁶
- A woman cook preparing lunches for directors and a male chef cooking breakfast, lunch and tea for employees.⁷
- Male and female laboratory assistants where the man spent some time on the shop floor.⁸

The differences were not found to be of practical importance in relation to their pay.

34. A detailed examination of the nature and extent of the differences and how often they arise in practice is required. A contractual obligation on a man to do additional duties is not sufficient, it is what happens in

⁶ Hatch v Wadham Stringer Commercials (Ashford) Ltd ET Case No 40171/77.

⁷ Capper Pass Ltd v Allan [1980] ICR 194 EAT.

⁸ Crook v Dexter Paints Ltd COET 2089/166.

practice that counts.

Example: A woman working as a primary school administrator claimed equal pay with a male secondary school administrator. It was found they were not doing like work. Although the work was broadly similar, the latter role carried greater financial and managerial responsibilities and was in a much larger school. The primary school administrator had more routine, term-time tasks while the secondary school administrator's work was year round and more strategic. These differences were considered to be of practical importance so the equal pay for like work complaint failed.⁹

However where men but not women were obliged under their contracts to transfer to different duties and work compulsory overtime, this did not amount to a difference of practical importance because the flexibility was not used in practice.¹⁰

Work rated as equivalent

35. A woman's work is rated as equivalent to a man's if the employer's job evaluation study gives an equal value to their work in terms of the demands made on the workers, by reference to factors such as effort, skill and decision-making. s.57(4)
36. Job evaluation is a way of systematically assessing the relative value of different jobs. Work is rated as equivalent if the jobs have been assessed as scoring the same number of points and/or as falling within the same job evaluation grade. A small difference may or may not reflect a material difference in the value of the jobs, depending on the nature of the job evaluation exercise. s.72(5)
37. A job evaluation study will rate the demands made by jobs under headings such as skill, effort and decision-making. Because the focus is on the demands of the job rather than the nature of the job overall, jobs which may seem to be of a very different type may be rated as equivalent.

⁹ Morgan v Middlesbrough Borough Council 2005 EWCA Civ 1432.

¹⁰ Electrolux Ltd v Hutchinson and others [1976] IRLR 410 EAT.

Example: The work of an occupational health nurse might be rated as equivalent to that of a production supervisor when components of the job such as skill, responsibility and effort are assessed by a valid job evaluation scheme.

38. To be valid, a job evaluation study must :
- encompass both the woman’s job and her comparator’s
 - be thorough in its analysis and capable of impartial application¹¹
 - take into account factors connected only with the requirements of the job rather than the person doing the job (so for example how well someone is doing the job is not relevant), and
 - be analytical in assessing the component parts of particular jobs, rather than their overall content on a ‘whole job’ basis.¹²
39. If a job evaluation study has assessed the woman’s job as being of lower value than her male comparator’s job, then an equal value complaint will fail unless the Employment and Equality Tribunal has reasonable grounds for suspecting that the evaluation was tainted by discrimination or was in some other way unreliable. s. 121(5) and (6)
40. Job evaluation studies must be non-discriminatory and not influenced by gender stereotyping or assumptions about women’s and men’s work. There has historically been a tendency to undervalue or overlook qualities inherent in work traditionally undertaken by women (for example, caring). A scheme which results in different points being allocated to jobs because it values certain demands of work traditionally undertaken by women differently from demands of work traditionally undertaken by men would be discriminatory. Such a scheme will not prevent a woman claiming that her work would be rated as equivalent to that of a male comparator if the sex-specific values were removed. s.57 (5)

¹¹ Eaton Ltd v Nuttall [1977] ICR 272 EAT.

¹² Bromley v Quick [1988] IRLR 249 CA.

Example: A job evaluation study rated the jobs of female classroom teaching assistants and their better paid male physical education instructors as not equivalent. This was because the study had given more points to the physical effort involved in the men's jobs than it had to the intellectual and caring work involved in the jobs predominantly done by women. Because it uses a sex-biased points system, this job evaluation would not prevent the women succeeding in an equal pay complaint.

41. A woman's work can be treated as rated as equivalent if she can show that the work would have been assessed as being of equal value, had the evaluation not been itself discriminatory in setting different values for the demands being made of men and women. s.57(4)(b)

42. A woman may also bring a complaint of equal pay where her job is rated higher than that of a comparator under a job evaluation scheme but she is paid less. However, this will not entitle her, if an equality clause applies, to better terms than those her comparator has.¹³

Detailed guidance on designing, implementing and monitoring non-discriminatory job-evaluation schemes will be published on the Isle of Man Government website equality pages. Trade unions can also advise on job evaluation.

Work of equal value

43. A woman can claim equal pay with a man if she can show that her work is of equal value with his in terms of the demands made on her. s. 57(6)
44. This means that the jobs done by a woman and her comparator are different but can be regarded as being of equal worth, having regard to the nature of the work performed, the training or skills necessary to do the job, the conditions of work and the decision-making that is part of the role.

¹³ Evesham v North Hertfordshire Health Authority and another [2000] ICR 612 CA.

45. In some cases the jobs being compared may appear fairly equivalent (such as a female head of personnel and a male head of finance). More commonly, entirely different types of job (such as manual and administrative) can turn out to be of equal value when analysed in terms of the demands made on the employee.

Guidance on how to tell if jobs are of equal value will be published on the Isle of Man Government website equality pages.

The Employment and Equality Tribunal Equal Value Rules of Procedure¹⁴ apply to equal pay complaints where a woman is claiming work of equal value.

46. A woman can claim equal pay using any or all of these methods of comparison. For example, a woman working as an office manager in a garage could claim 'like work' with a male office manager working alongside her and 'equal value' with a male garage mechanic. Or male and female supermarket employees who perform similar tasks, requiring similar skill levels, although the men may lift heavier objects from time to time.¹⁵

Who is the comparator?

47. A woman can claim equal pay for equal work with a man or men in the same employment. It is for her to select the man or men with whom she wishes to be compared. s.71

In the same employment

48. A woman can compare herself with a man employed: s.71
- by the same or an associated employer at the same establishment or workplace, or
 - by the same or an associated employer at a different establishment or workplace, provided that common

The Rules of procedure form the Annex of the Employment and Equality Tribunal Rules 2018 (SD 2018/0314) (as amended by the Employment and Equality Tribunal (Amendment) Rules 2019 (SD 2019/0506).

¹⁵ Asda Stores Ltd v Brierley & Ors [2019] EWCA Civ 44 (31 January 2019) (Supreme Court Appeal Hearing pending 13 July 2020)

terms and conditions apply either generally between employees or as between the woman and her comparator.

The 'same employment' test sets a low threshold. It is intended to filter out those cases in which geography plays a significant part in determining the terms and conditions of employment.¹⁶

49. An associated employer means a company over which another company has control, or companies over which a third party has control (for example, the employer's parent company). s.71(10)

A '*company*' for these purposes does not just mean a limited company. If a UK case law principle is followed¹⁷ it is likely that a corporate body (which would include a limited partnership) would also fall within the definition of a 'company' and could be an 'associated employer'.

50. The definition of establishment is not restricted to a single physical location. For example, a woman may claim equal pay with a man doing equal work employed by the same employer or an associated employer but working in a different location.
51. Where the woman and her comparator work at different establishments, she has to show that common terms and conditions apply. An example of common terms and conditions is where they are governed by the same collective agreement, but the concept is not limited to this type of arrangement.¹⁸
52. A woman can also compare herself with a comparator working at a different establishment if she can show that, had he been employed at the same establishment as her, he would have been working under the same common terms and conditions as those he and others in the comparator group are currently working under. The woman does not have to be working to the same common terms as him, and does not have to show that the

¹⁶ North v Dumfries & Galloway Council [2013] UKSC 45

¹⁷ Fox Cross Claimants v Glasgow City Council UK EAT 0027/12

¹⁸ Per Lord Bridge in Leverton, relied on in Barclays Bank plc v James [1990] IRLR 90 EAT; British Coal Corporation v Smith and others [1996] ICR 515 HL; South Tyneside Metropolitan Borough Council v Anderson [2007] IRLR 715 CA.

comparator ever would, in reality, be employed at the same establishment as her.¹⁹

In order to show that there are common terms and conditions, women can use as comparators men employed by the same employer in other places of work even though in practice those men would never be employed to do their current jobs in the same place as the women.

The correct question to ask is whether the complainants have established that if their comparators were employed at the same establishment, those comparators would be employed under broadly similar terms to their current ones. It is not necessary that the complainant establish that there was a '*real possibility*' that her comparator might be employed at the same establishment as her nor even that it was feasible for them to be employed there.²⁰

53. The Equality Act does not specify the geographical scope of the equal pay provisions but in most cases the woman and her male comparator will be based in the Isle of Man.

Choice of comparator

54. A woman must select the man or men with whom she wishes to make a comparison, although she does not have to identify him or them by name at the outset.

The selected comparator could be representative of a group of workers or he could be the only person doing the particular type of work.

55. A woman can select more than one comparator and from her point of view this may be prudent. Multiple comparators may be necessary for a term-by-term comparison of a woman's contract. However, the Employment and Equality Tribunal can strike out a complaint with a particular comparator, or could in exceptional cases require a complainant who unreasonably cites too many comparators to pay some costs.

¹⁹ British Coal Corporation v Smith and others [1996] ICR 515 HL.

²⁰ North v Dumfries & Galloway Council [2013] UKSC 45.

56. The chosen comparator does not have to be working at the same time as the woman, so he may for example be her predecessor in the job. s.56(2)
57. Where a woman has evidence of direct sex discrimination in relation to her contractual pay but there is no actual comparator doing equal work, so that a sex equality clause cannot operate, she can make a complaint of sex discrimination based on a hypothetical comparator. s.63

Example: A woman's employer tells her that she would be paid more if she were a man. There are no men employed on equal work so she cannot claim equal pay using a comparator. However, she could claim direct sex discrimination as the less favourable treatment she has received is clearly based on her sex.

Part-time work and equal pay

58. A pay practice that treats part-time workers less favourably than comparable full-time workers is likely to be indirectly discriminatory against women, as more women than men work part time. Unless an employer can objectively justify the pay differential or practice, it will be unlawful. It is unlikely that an employer could justify a different basic hourly rate for full-time and part-time workers.

In most cases where a part-time worker is paid less (pro-rata) than a full-time worker, the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2007 may also apply. These prohibit less favourable treatment of part-time workers (male or female) unless it can be objectively justified.

Equal pay and occupational pension schemes

General

59. Occupational pension schemes are also subject to the equal pay for equal work principle. Most occupational pension schemes are trust-based schemes where the scheme is legally separate from the employer and is

administered by trustees, who are bound to implement equal treatment between women and men. The benefits will be in the form of pensions and lump sums.

Sex equality rule

60. The sex equality rule operates to ensure that comparable women and men are treated equally in both access to and benefits of an occupational pension scheme. If an occupational pension scheme, or a term of it, is less favourable to a woman than it is to a male comparator, then the term is modified so that it is not less favourable. s.59(1) and (2)
61. Under UK case law the exclusion of part-time workers from an occupational pension scheme was held to be a breach of the implied equality clause.²¹
62. Also, a discretion that is capable of being exercised in a way that would be less favourable to the woman than to her male comparator is modified so as to prevent the exercise of the discretion in that way. s.59(3) and (4)
63. However, if the trustees or managers of the scheme can show that the difference in treatment is because of a material factor which is not the difference in sex, then the sex equality rule will not apply to that difference. s.61(4)
64. The effect is that men and women are treated equally to comparable members of the opposite sex in relation both to the terms on which they are permitted to join the scheme and to the terms on which they are treated once they have become scheme members.

So a rule that provides for men and women to draw their benefits from the scheme at different ages, or on satisfying different conditions, is not consistent with the sex equality rule. The rule would be overridden to require benefits to be provided at the more favourable age or on the person satisfying the conditions applicable to either men or women.

²¹ Preston and ors v Wolverhampton Healthcare NHS Trust and ors (No 3) [2004] ICR 993;

65. The terms on which benefits are provided to dependants of members, and associated discretions, are also covered by the sex equality rule. s.59(5) and (6)
66. Where people of the same sex are treated differently according to their family, marital or civil partnership status, a woman must select a male comparator who has the same status. So if a scheme provides a particular benefit only to members who are married or in civil partnerships, a woman who is not married or in a civil partnership cannot choose as a comparator a man who is married or in a civil partnership for a complaint in relation to that benefit. s.59(7) and (8)
67. A successful complaint for both access to and the membership terms of an occupational pension scheme can result in the granting of retrospective access in respect of any period going back to 6 April 2006. s.59(9)(a) - (b)
68. There is an exception to the sex equality rule that allows a difference in occupational pension contributions for women and men because of prescribed actuarial factors. Schedule 7 Part 2

Defences to an equal pay complaint

69. The possible defences that an employer may raise in response to an equal pay complaint are:
- the woman and her comparator are not doing equal work;
 - the chosen comparator is not one allowed by law (for example he is not in the same employment);
 - the difference in pay is genuinely due to a material factor, which is not related to the sex of the jobholders.

Material factor defence

70. Once a woman has shown that she is doing equal work with her male comparator, the equality clause will take effect unless her employer can prove that the difference in pay or other contractual terms is due to a material factor which does not itself discriminate against her either directly s.61

or indirectly because of her sex.

71. The employer must identify the factor(s) and prove²²:
- it is the real reason for the difference in pay and not a sham or pretence
 - it is causative of the difference in pay between the woman and her comparator
 - it is material: that is, significant and relevant, and
 - it does not involve direct or indirect sex discrimination.

Example: If an employer argues that it was necessary to pay the comparator more because of a skill shortage, they will have to provide evidence of actual difficulties in recruiting and retaining people to do the job being done by the higher-paid man. The employer will also need to monitor the discrepancy to ensure it is still justified.

72. Personal differences between the workers concerned, such as experience and qualifications, may be material factors.

Other examples of possible material factors are:

- unsocial hours;
- rotating shifts; and
- night working.

73. Whether the defence is made out will depend on the specific circumstances in each case.

74. If the material factor accounts for only part of the variation in pay, the woman is entitled to a pay increase to the extent that that the defence is not made out.²³

²² Glasgow City Council v Marshall [2000] IRLR 272, HL.

²³ Enderby and others v Frenchay Health Authority and Anor [1993] IRLR 591ECJ.

75. To be a valid defence, the material factor must not be directly discriminatory and if it is indirectly discriminatory, the difference in terms must be justified.
76. For example, if an employer argues that the difference in pay is due to market forces, but gender segregation in the workforce means that women are still concentrated in lower paid jobs, this defence may be discriminatory. An employer cannot pay women less than men for equal work just because a competitor does so.²⁴
77. A material factor will be directly discriminatory where it is based on treating women and men differently because of their sex. s.61(1)
(a)
- A directly discriminatory material factor cannot provide a defence to an equal pay complaint, and it is not open to an employer to provide objective justification.
- Example:** Male maintenance workers in a bank were paid more than female administrators because the bank had always regarded and rewarded men as family breadwinners. This is directly discriminatory and cannot be justified.
78. Even if the employer can show that a material factor is not directly discriminatory, a woman claiming equal pay may be able to show that it is indirectly discriminatory.
79. Indirect discrimination arises where a pay system, policy or arrangement has a disproportionate adverse impact on women compared to their male comparators. If the employer cannot objectively justify it, the defence will not be made out. s.61(2)

²⁴ Ratcliffe and others v North Yorkshire County Council [1995] IRLR 439 HL. For information about gender segregation in the workforce and the undervaluing of women's work see, for example, the Women and Work Commission report Shaping a Fairer Future, 2006.

80. Statistical analysis which demonstrates a difference in the terms offered to men and women doing equal work but where one job is predominantly carried out by one sex, is one way of showing disproportionate adverse impact but it is not the only way.
81. Where the disadvantaged group is predominately women, and the group of advantaged comparators is predominantly men, it will be difficult for the employer to prove an absence of sex discrimination.²⁵

Example: Women employed as cleaners by a government department whose work was rated as equivalent to men employed as caretakers by the same government department, were paid at a lower rate. The difference was due to a productivity bonus scheme which did not apply to cleaners, who were predominantly women. As the scheme had a disproportionately adverse effect on the women, the employer would have to provide objective justification for it. That is, they would need to prove that it is a proportionate means to achieve a legitimate end.²⁶

82. An employer can justify an indirectly discriminatory factor by showing that it is a proportionate means of achieving a legitimate aim. s.61(1) (b)

Example: If an employer can show that the only way to ensure adequate staffing of unsocial hours shifts is to pay a shift premium, then even if there is evidence that more men than women work those shifts and receive the extra payments, the material factor defence may succeed.²⁷

²⁵ Lord Justice Pill in *Gibson and others v Sheffield City Council* [2010] IRLR 311 CA; *Enderby and Others v Frenchay Health Authority and Anor* [1993] IRLR 591ECJ.

²⁶ *Gibson and others v Sheffield City Council* [2010] IRLR 311 CA.

²⁷ *Blackburn v Chief Constable of West Midlands Police* [2008] ICR 505 CA.

Example: A firm of accountants structures employees' pay on the basis of success in building client relationships. It uses as one of the key indicators of that success the number of functions attended out of hours. Due to childcare responsibilities, fewer women than men can participate in these functions and women's pay is much lower. The firm cannot show that attendance at these functions produces better client relationships or other business outcomes that warrant the pay premium, taking into account the disadvantage to women. It is unlikely in these circumstances to be able to justify the payment.

83. There is no list of aims that are accepted to be legitimate, and whether or not an employer's pay practice pursues a legitimate aim will depend on the facts and circumstances in a particular case.

However:

- the Act does specify that, for the purpose of justifying reliance upon a material factor, the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim. The employer must be able to show that the measure was in fact adopted to reduce inequality; and
- the Department for Enterprise may make regulations about what constitutes (or does not constitute) a proportionate means of achieving a legitimate aim.²⁸

s.61(3)

s.61(7)

s.61(8)

84. Even where the aim is legitimate, the employer must be able to show that the means it adopts to achieve the aim is proportionate in the circumstances.

²⁸ As of the date of publication of this code no Regulations had been made.

Example: A process to phase out historical disparity in pay and benefits between men and women, which involves a period of pay protection for men to cushion the impact on them of the new arrangements, has the long-term objective of reducing inequality between the sexes. This is a legitimate aim. However, the employer will have to prove on the facts of the case that the approach to achieving that aim is proportionate. It may be difficult to prove that protecting the men's higher pay for any length of time is a proportionate means of achieving the aim where the reason for the original pay disparity is sex discrimination.²⁹

85. Where a material factor applies at a particular point in time but subsequently ceases to apply, it will no longer provide a defence to differences in contractual terms.³⁰

Example: An employer recruits a new employee at a lower than normal rate of salary due to severe financial constraints at the time of recruitment. Later, the employer's financial position improves. Once the reason for the difference in pay ceases to exist the employer cannot continue to rely upon that factor to explain differences in pay or other contractual terms.

Pregnancy, maternity leave and equal pay

86. A woman should not receive lower pay or inferior contractual terms for a reason relating to her pregnancy and a maternity equality clause is implied into her contract to ensure this. There is no need to show equal work with a comparator in this situation. s.65

²⁹ Redcar and Cleveland Borough Council v Bainbridge and others [2008] EWCA Civ 885.

³⁰ Benveniste v University of Southampton [1989] IRLR 123 CA.

Equality Act 2017 Code of Practice – Equal Pay

87. The maternity equality clause applies to: s.66,
s.66(10)
and s.19
- the calculation of contractual maternity-related pay;
 - bonus payments during maternity leave, and
 - pay increases following maternity leave.
- Maternity leave includes compulsory, ordinary and additional maternity leave.³¹
88. During maternity leave a woman's entitlement to receive her usual contractual remuneration (that is, salary or other benefits with a transferable cash value such as a car allowance or luncheon vouchers) stops unless her contract provides for maternity-related pay.
89. However she is entitled to any pay rise or contractual bonus payment awarded during her maternity leave period, or that would have been awarded had she not been on maternity leave. s.66(6),
(7)
90. Maternity-related pay means pay to which a woman is entitled as a result of being pregnant or being on maternity leave. s.66(9)
91. Any pay increase a woman receives or would have received had she not been on maternity leave must be taken into account in the calculation of her maternity-related pay. s.66(3)

Example: Early in her maternity leave a woman receiving maternity-related pay becomes entitled to an increase in pay. If her terms of employment do not already provide for the increase to be reflected in her maternity-related pay, the employer must recalculate her maternity pay to take account of the pay increase.

³¹ The statutory maternity leave scheme is set out in Part VII of the Employment Act 2006 (EA) and in the Maternity Leave Regulations 2007 (SD 76/07), and the Maternity Leave (Amendment) Regulations 2007(SD 463/07).

92. Similarly any pay or bonus related to time before the maternity leave starts, during compulsory maternity leave or after maternity leave ends must be paid without delay. So if a woman becomes entitled to a contractual bonus for work she undertook before she went on maternity leave, she should receive it when it would have been paid had she not been on maternity leave. s.66

Example: A woman goes on maternity leave on 1 June. The contractual bonus for the year ending 30 April is payable on 1 July. Her employer says he will pay the bonus to her when she is back in a few months. The law requires the employer to pay the bonus on 1 July as it would if the woman was not on maternity leave. If this does not happen, she can claim equal pay relying on the maternity equality clause provisions.

93. On her return to work a woman should receive any pay increases which would have been paid to her had she not been on maternity leave. s.66(8)
94. Unfavourable treatment because of pregnancy or maternity in relation to non-contractual pay and benefits is covered by the employment discrimination provisions in the Act. s.68

Example: A woman who has been approved for a promotion tells her employer that she is pregnant. The employer responds that he will not now promote her because she will be absent on maternity leave during a very busy period. This would be pregnancy discrimination at work and any complaint would be brought by the woman under those provisions of the Equality Act. s.19

However, if the same woman is promoted and her increased salary takes effect after the commencement of her maternity leave, any maternity-related pay she may be receiving will need to be recalculated to take account of the salary increase, and the salary increase will be payable to the woman on her return to work from maternity leave. If this does not happen, she can claim equal pay relying on the maternity equality clause provisions.

Maternity equality in pension schemes

95. An occupational pension scheme is treated as including a maternity equality rule if it does not have such a rule already. The effect of this is to ensure that a woman on paid maternity leave is treated as if she were at work for pension purposes. s.67(1) to (6)
96. The only time a woman on maternity leave may be treated differently is when she is on a period of unpaid additional maternity leave, when she is not entitled to accrue occupational pension benefits as of right. s.67(9)

Pay transparency

97. Pay systems that are not transparent (interpreted by UK case law), are particularly at risk of being found to be discriminatory.³² Transparency means that pay and benefit systems should be capable of being understood by everyone (employers, workers and their trade unions). It should be clear to individuals how each element of their pay contributes to their total earnings in a pay period.

Discussing equal pay issues with colleagues or trade union representatives

98. The Equality Act introduces limits to the enforceability of what are often called 'gagging clauses' or 'secrecy clauses' that some employers use to restrict discussions about pay packages and differentials. Restricting use of these clauses is intended to promote openness and dialogue about pay and bring an end to opaque pay structures.
99. Any term of a contract which, prohibits or restricts a person from making a 'relevant pay disclosure' to anyone, including a trade union representative, or from seeking such a disclosure from a colleague, including a former colleague, is unenforceable. s.69

³² BMC Software Limited v Shaikh [2019] EWCA Civ 267

100. 'Colleague' is not defined in the Act but is likely to have similar scope to the definition of a comparator, as the intention is to protect the seeking of pay information for the purpose of identifying pay discrimination.

101. A relevant pay disclosure is one which is: s.69(3)

- about pay, and
- made for the purpose of finding out whether or to what extent there is a connection between pay and having (or not having) a protected characteristic.

102. The pay discussions that are protected in this way are those aimed at establishing whether or not there is pay discrimination. This provision is not confined to the protected characteristic of sex.

Example: A discussion between a woman and a man for the purpose of establishing whether the man is being paid more than the woman could involve a relevant pay disclosure. However, two male colleagues simply comparing their respective salaries are unlikely to be making a relevant pay disclosure, unless they are investigating pay disparities which may be linked to race or another protected characteristic.

103. Involvement in a relevant pay disclosure can include but is not limited to:

- asking a colleague to provide information about his/her pay and/or benefits;
- providing information to a trade union representative about pay and/or benefits, and
- receiving information from a colleague about pay and/or benefits.

104. If an employer takes action against an employee for making or seeking to make such a disclosure, or for receiving information as a result of such a disclosure, the employee may claim victimisation.

Example: A female airline pilot believes she is underpaid compared with a male colleague. She asks him what he is paid, and he tells her. The airline takes disciplinary action against the man as a result. The man can bring a complaint of victimisation against the employer for disciplining him.

Example: A female estate agent believes she may have received a smaller bonus than she should have. She asks her male colleagues what bonus payments they received. She then approaches her employer and complains about the discrepancy. She is reprimanded for discussing her pay and told she will not receive a bonus at all next year. She can claim victimisation, as well as making a discrimination or equal pay complaint in respect of the bonus if she now has or can obtain sufficient evidence to do so.

Example: A male construction engineer employed by a road haulage company discloses information about his pay to a competitor company in breach of a confidentiality obligation. He would not be protected from disciplinary action, as the disclosure was unlikely to have been made for the purpose of finding out whether or to what extent there was pay discrimination in his workplace.

Equal pay – obtaining information

105. It is good practice for persons who think that they may have an equal pay claim to seek relevant information before issuing a formal complaint. This may prevent the complaint escalating to a formal complaint.

For example, a woman who believes she is not receiving equal pay can write to her employer asking for information

that will help to establish whether this is the case and if so, the reasons for the pay difference.

The Manx Industrial Relations Service has produced [non-statutory guidance](#) for employees asking, and employers answering, questions.³³

106. A trade union equality representative or other trade union representative can assist in this process.

Using the grievance procedure

107. Before making a complaint to the Employment and Equality Tribunal about equal pay, consideration should be given to try and resolve the issue with the employer.

If informal resolution is not possible, a formal written grievance should be lodged.
108. It is not necessary for the comparator to be named at the grievance stage.
109. The Isle of Man Government Code of Practice on Disciplinary and Grievance Procedures includes guidance for employees and employers on raising and dealing with complaints about pay or contractual terms.
110. Employees may seek advice and help from employee or trade union representatives.
111. Employers and employees can also seek advice from industrial relations officers (IROs) of the Manx Industrial Relations Service. IROs can provide guidance on implementing equal pay too. Details of how to contact MIRS can be found at www.mirs.org.im.
112. The time limit for making a complaint to the Employment and Equality Tribunal is not extended to take account of the time taken to complete a grievance procedure.
113. It can be unclear whether a particular term or benefit is contractual or not and in this case a woman would be well

³³ See '[Asking and responding to questions of discrimination in the workplace](#)'

advised to bring a complaint of both equal pay and sex discrimination, noting the shorter time limit for submitting a claim to the Tribunal for a sex discrimination claim than an equal pay claim.

114. When responding either to a grievance or to a request for information from a woman who believes she is not receiving equal pay employers need to:
- decide whether or not they agree that the woman and her comparator are doing equal work, and, if not, explain in what way the work is not equal;
 - consider the reasons for any difference in pay/benefits or other contractual terms and whether (if necessary) these can be objectively justified, and
 - explain the reasons for the difference.

Burden of proof

115. A woman claiming equal pay must prove facts from which the Employment and Equality Tribunal could decide that her employer has paid her less than a male comparator in the same employment doing equal work. It is then for her employer, if the complaint is defended to prove that the difference in pay and/or other terms is for a material reason other than sex. If the employer proves that there is a non-discriminatory material factor which has resulted in the difference in pay the woman's complaint will fail.
116. If the woman asserts that the material factor is indirectly discriminatory it is for her to provide evidence of this, statistical or otherwise. The employer will then need to objectively justify the difference in terms (that is, prove that it is a proportionate means of achieving a legitimate aim).

The Employment and Equality Tribunal

117. If an equal pay complaint is made, the Employment and Equality Tribunal will assess the evidence about:
- the work done by the woman and her comparator;
 - the application and validity of the job evaluation study if the complaint is for work rated as equivalent;
 - the value placed on the work (sometimes with the
- s. 121(5), (6) and (7)

advice of an independent expert), in terms of the demands of the jobs if the complaint is for work of equal value;

- the pay and/or other contract terms of the woman and her comparator and how they are determined: and
- the reasons for the difference in pay and/or contract terms if the employer raises a material factor defence.

118. There are special Tribunal procedures for work of equal value complaints.³⁴

119. Once a woman has lodged an equal pay complaint, she can seek relevant information about pay and other contractual terms from her employer in a number of ways. These include:

- disclosure;
- requests for additional information; and
- requests for written answers.

Procedure

120. A complaint relating to a breach of an equality clause or rule is determined by the Employment and Equality Tribunal. Where a claim is made in the High Court, the court must either strike out a claim or counter-claim relating to an equality clause or rule or refer the claim to the Tribunal. Where a claim is referred to the Tribunal, the Tribunal must, for the purposes of ascertaining whether the claim should be accepted, establish whether the claim was submitted within the appropriate time limit. For this purpose the date the proceedings were commenced in the High Court is the appropriate date. s.118(1) and s.119

³⁴ The Rules of procedure form the Annex of the Employment and Equality Tribunal Rules 2018 (SD 2018/0314) (as amended by the Employment and Equality Tribunal (Amendment) Rules 2019 (SD 2019/0506).

Time limits for equal pay complaints

121. A complaint to the Employment and Equality Tribunal about equal pay must be made within six months of the end of what is known as the ‘qualifying period’. In a ‘standard case’, this is six months from the last day of employment. This is different from sex discrimination complaints for which the time limit is ordinarily three months from the last act of discrimination. s.120 and s.113 (1)(b)
122. The date from which the six-month time limit starts to run is affected by the circumstances set out below. s.120(3)
123. In a stable work case (that is, where there have been breaks in what would otherwise have been continuous employment with the same employer), the six months would start to run from the date on which the stable employment relationship ended, not on the date a particular contract ended. s.120(4)(b) and (5)

Whether it is a stable work case will depend on the facts.

For example, where a woman is on a series of contracts in what is essentially the same job (for example a teaching assistant on a series of fixed term contracts) or a progression within the same job (for example an administrative assistant who progresses to administrative officer), time will not start to run with the issue of a new contract.

Where a woman reduces her hours following a period of maternity leave and is issued with a new contract, this will not trigger the time limit as it is a stable employment relationship.

Example: Ms Smith had been continuously employed since 1980 as a cook in a residential home. In 2007, she wanted to reduce her hours of work. It was agreed to vary her contractual hours from 37 to 30 hours per week and reduce her days from five to four per week. She was issued with a letter headed ‘Contract of employment’ which stated that this superseded any previous contract. While this signed document did amount to a new contract, an uninterrupted succession of contracts is a stable

employment relationship. She had done the same work for her employer over many years without any break in the work. The only variation made in the new contract was the reduction of working hours. Because Ms Smith had a stable employment relationship with her employer the time limit would not be triggered until the end of this stable employment.

Example: Ms Auster was employed as a relief home carer from November 2000. In April 2009, she was appointed as a permanent home carer. With this change of status she became entitled to sick pay. Otherwise her terms of employment were unchanged. She signed a new contract stating that previous contracts were superseded. There was no gap or break in the continuity of her work for her employer but because her status changed and some of her employment terms, UK case law has held that a stable working relationship cannot necessarily be said to exist.³⁵

124. UK case law has stated that a variation in terms and conditions will not start the six-month time limit running, providing the variation is not so significant as to amount to a termination of the previous contract.³⁶

125. Where the fact of the pay inequality was deliberately concealed and the woman could not reasonably have been expected to discover it, the time starts to run from the date she actually discovered or could reasonably have discovered the inequality. This is referred to as a concealment case. s.120(4)(c)

³⁵ Cumbria County Council v. Dow (No.2) [2009] IRLR 463, CA.

³⁶ Potter and others (appellants) v. North Cumbria Acute Hospitals NHS Trust and others (respondents) (No.2) [2009] IRLR 900, EAT.

126. Where the woman has an incapacity, the time starts to run from the end of the incapacity. s.120(4)(e)

‘Has an incapacity’ means the woman has not attained the age of 18 or is unable to make a decision for herself because of a temporary or permanent impairment of, or a disturbance in the functioning of, the mind or brain. s.136(6)

127. It is the complainant’s responsibility to ensure their complaint is made in time. Individuals and their representatives should be alert to the importance of observing these time limits, and err on the side of caution if there is any ambiguity or uncertainty about when time starts to run.

It should be noted that using an employer’s grievance procedure does not extend the time limit for lodging a complaint.

Equal pay awards and remedies

128. If an equal pay complaint is heard by the Employment and Equality Tribunal and upheld, the Tribunal may: s.122

- make a declaration as to the rights of the woman and/or her employer in relation to the complaint brought. For example, a pay rise to the level of the comparator’s pay (including any occupational pension rights) or the inclusion of any beneficial term not in the woman’s contract, and
- order the employer to pay arrears of pay or damages to the complainant.

129. A declaration may be made even if the Tribunal decides not to award any compensation.

130. The Tribunal cannot make an award for injury to feelings for breach of an equality clause.

131. The Tribunal can award arrears of pay or damages going back up to two years before the date that proceedings were started in the Tribunal. s.122(3)

This is extended to the day on which the breach first occurred where concealment or incapacity applies.

In the case of a complaint which is based on the complainant's work being of equal value to that of another person, the Tribunal may not make an order in respect of any day before 1st January 2020.

This means that the Tribunal cannot award any arrears of pay or damages going back before 1st January 2020. For example, where a complainant is successful in proceedings started in the Tribunal on 1st July 2020, the Tribunal only has the power to award arrears of pay or damages back to 1st January 2020. s.122 (4)

132. In cases involving occupational pension entitlements, the Employment and Equality Tribunal may make a declaration as to the rights of the parties concerned. The rules as to what compensation can be ordered or may be agreed are complicated so it is important to seek advice. s.123

133. Where the Tribunal makes a declaration about the terms on which a member of an occupational scheme must be treated, the employer must provide such resources to the scheme as are necessary to secure that person's rights without further contribution by her or any other members. s.123(8)

Protection against victimisation

134. It is unlawful for an employer to victimise a worker for bringing an equal pay or discrimination complaint or for giving evidence about such a complaint. s.28

Victimisation arises if a person is subjected to a detriment, because that person has done a protected act, or is believed to have done a protected act.

A protected act includes the following:

- bringing proceedings under the Act;
- giving evidence or information in connection with such proceedings;
- doing any other thing for the purposes of or in connection with the Act; and
- making an allegation that someone is in breach of the Act.

This means that protection from victimisation may start before a complaint is filed with the Employment and

Equality Tribunal. Protected acts can include any discussion or correspondence about the matter between the woman and her employer.

135. Workers who seek or make a relevant pay disclosure, or who receive information that is a relevant pay disclosure, are protected from victimisation. For explanation of what is a 'relevant pay disclosure' see paragraph 101. s.69(4)
136. There is no requirement for a comparator in a victimisation complaint.
137. In considering whether an act has caused detriment, the focus is on the effect on the alleged victim, rather than any intent or purpose on the part of the employer.

Example: A group of women employed by an employer brought equal pay complaints. Some of the women settled, the others proceeded with their complaints. Shortly before the Tribunal hearing, the employer wrote to the latter group warning of the potential consequences of the case for the employer's finances. The women experienced this as pressure to drop the case and were distressed by the letter. UK case law has established that this action by the employer did amount to victimisation.³⁷

138. The protection against victimisation includes not only the woman bringing the complaint, but also any person who assists her, for example, a comparator.

Where it arises out of and is closely connected to the employment relationship, the protection from victimisation (and other forms of discrimination under the Equality Act) extends beyond termination of the employment relationship. This applies, for example, to a refusal to

³⁷ Derbyshire and others v St Helens Metropolitan Borough Council [2007] UKHL 16.

provide a reference after termination of the employment relationship because a woman has undertaken a protected act (such as lodging a complaint about equal pay).

Part two: Good equal pay practice

Introduction

139. The introduction of equal pay provisions in the Employment (Sex Discrimination) Act 2000 did not go so far as to allow for work of equal value. Despite the previous equal pay provisions, there remains at the time of this Code, a significant gender pay gap in the Island.³⁸ This section of the code of practice therefore provides information and guidance on steps that employers can take which go beyond compliance with legal requirements. These steps, taken in consultation with the workforce and trade union or other employee representatives, should help accelerate the achievement of substantive gender equality at work.

140. The financial loss to women arising out of unequal pay is well documented, but organisations also lose out by failing to properly value and reward the range of skills and experience that women bring to the workforce.

The most commonly recognised risk of failing to ensure that pay is determined without sex discrimination is the risk of time-consuming and costly equal pay litigation. The direct costs to an organisation of a complaint can include not only any eventual equal pay award to the woman or women bringing the complaint but also the costs of time spent responding to the complaint, and the costs of legal representation.

The indirect costs are harder to quantify, but could include lower productivity on the part of those employees who consider that they are not getting equal pay and on the part of managers whose time is taken up in dealing with staff dissatisfaction and other repercussions.

³⁸ [Isle of Man Earnings Survey Report 2019](https://www.gov.im/media/1369003/2020-02-04-earnings-survey-2019-report.pdf). Isle of Man Government, Cabinet Office, Economic Affairs. <https://www.gov.im/media/1369003/2020-02-04-earnings-survey-2019-report.pdf>

141. Tackling unequal pay can also increase efficiency and productivity by attracting the best employees, reducing staff turnover, increasing commitment, and reducing absenteeism. Pay is one of the key factors affecting motivation and relationships at work. It is therefore important to develop pay arrangements that are right for the organisation and that reward employees fairly. Providing equal pay for equal work is central to the concept of rewarding people fairly for what they do.
142. Employers should not discriminate on any protected ground in their pay arrangements. The information on good practice set out here focuses on eliminating gender pay inequalities, which are the subject of this code of practice. However, the methods used to identify and remedy unlawful gender pay discrimination can also be used to remedy unlawful pay discrimination on other grounds.

Reviewing or auditing pay

143. Employers are responsible for providing equal pay for equal work and for ensuring that pay systems are transparent. s.131
Where a pay system lacks transparency the employer must be able to prove there is no sex discrimination behind a pay differential.³⁹

Pay arrangements are often complicated and the features that can give rise to discrimination in pay are not always obvious. A structured pay system, based on sound, bias-free job evaluation, is more transparent and more likely to provide equal pay than a system that relies primarily on managerial discretion.

144. Most employers believe that they provide equal pay for equal work, irrespective of the sex of the job holders or whether they work full or part time. An equal pay audit is the most effective way of establishing whether an organisation is in fact providing equal pay.

Organisations subject to the Public Sector Equality Duty (see paragraph 15) must pay due regard to the need to eliminate sex discrimination in pay. Although conducting an

³⁹ See Part 1 of the code, paragraph 97. See *BMC Software Limited v Shaikh* [2019] EWCA Civ 267. See also *Barton v Investec Henderson Crosthwaite Securities Ltd* 2003 ICR 1205, EAT.

equal pay audit is not mandatory, it demonstrates appropriate action to identify and eliminate gender pay discrimination. It provides a risk assessment tool for pay structures.

It is recommended as good human resources practice and to minimise legal risk that all employers carry out regular equal pay audits. A model for carrying out an equal pay audit is described below.

145. A number of common pay practices, listed below, pose risks in terms of potential non-compliance with an employer's legal obligations:

- lack of transparency and unnecessary secrecy over grading and pay;
- discretionary pay systems (for example, merit pay and performance-related pay) unless they are clearly structured and based on objective criteria;
- different non-basic pay, terms and conditions for different groups of employees (for example, attendance allowances, overtime or unsocial hours payments);
- more than one grading and pay system within the organisation;
- long pay scales or ranges;
- overlapping pay scales or ranges, where the maximum of the lower pay scale is higher than the minimum of the next higher scale, including 'broad-banded' structures where there are significant overlaps;
- managerial discretion over starting salaries;
- market-based pay systems or supplements not underpinned by job evaluation;
- job evaluation systems which have been incorrectly implemented or not kept up to date; and
- pay protection policies.

146. Risks of equal pay challenges generally arise not out of any intention to discriminate, but through pay systems not being kept under review and up to date.

The benefits of conducting an equal pay audit

147. The benefits to an organisation of carrying out an equal pay audit include:
- identifying, explaining and, where unjustifiable, eliminating pay inequalities;
 - having rational, fair and transparent pay arrangements;
 - demonstrating to employees and to potential employees a commitment to equality; and
 - demonstrating the organisation's values to those it does business with.
148. An equal pay audit may be the most effective method of ensuring that a pay system is free from unlawful bias. An audit should include:
- comparing the pay of men and women doing equal work – ensuring that this considers work that is the same or broadly similar (like work), work rated as equivalent and work that can be shown to be of equal value or worth;
 - identifying and explaining any pay differences; and
 - eliminating those pay inequalities that cannot be explained on non-discriminatory grounds.
149. A process that does not include these features cannot claim to be an equal pay audit. The DfE has the power to make regulations to determine the content of an equal pay audit.
150. An equal pay audit is not simply a data collection exercise. It entails a commitment to put right any unjustified pay inequalities. This means that the audit must have the involvement and support of managers who have the authority to deliver the necessary changes.
151. The validity of the audit and the success of subsequent action taken will be enhanced if the pay system is

understood and accepted by the managers who operate the system, by the employees and by their unions. Employers should therefore aim to secure the involvement of employees and, where possible, trade union and other employee representatives, when carrying out an equal pay audit.

A model for carrying out an equal pay audit

152. The following five-step equal pay audit model is recommended:

Step 1: Decide the scope of the audit and identify the information required.

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

Step 3: Collect and compare pay data to identify any significant pay inequalities between roles of equal value.

Step 4: Establish the causes of any significant pay inequalities and assess the reasons for them.

Step 5: Develop an equal pay action plan to remedy any direct or indirect pay discrimination.

Useful guidance is available from the Equality and Human Rights Commission for both smaller and larger organisations on how to conduct an audit.⁴⁰

⁴⁰ <https://www.equalityhumanrights.com/en/advice-and-guidance/how-can-i-achieve-equal-pay>

Step 1: Decide the scope of the audit and identify the information required

153. This is a particularly important aspect of the audit, especially if it is the first audit that an organisation has undertaken. It is worth investing time and thought at this stage. In scoping the audit, employers need to decide:

- Which employees are going to be included? It is advisable to include all employees who are deemed to be in the same employment. If a comprehensive audit is not possible, or is deemed unnecessary, then a sample of roles may be audited but the basis for selecting the sample must be clear.
- What information will be needed and what tools are available? Employers will need to collect and compare two broad types of information about their employees: the jobs they do, and what they are paid (ensure that this information is collected about part-time as well as full-time workers):
 - all the various elements of their pay, including pensions and other benefits; and
 - the sex of each employee; their job, grade or pay band.
- In addition, where there is gender pay inequality, it will be helpful to collect data on: qualifications related to the job; hours of work; length of service; any performance ratings and so on.

154. An employer should have regard to its' legal obligations regarding data protection when carrying out an equal pay audit.

155. The key tool for conducting pay audits is the Equal Pay Audit Kit and its five-step process.⁴¹

⁴¹ Guidelines on conducting equal pay audits have also been published by various UK bodies including the Equality and Human Rights Commission, Local Government Employers, and the Joint Negotiating Committee for Higher Education Staff, the TUC and individual trade unions. These contain useful additional sector-specific advice.

156. The employer needs to consider carefully what resources are needed.
- Who should be involved in carrying out the audit? An equal pay audit requires different types of input from people with different perspectives, including those with knowledge and understanding of :
 - the organisation’s pay and grading arrangements;
 - any job evaluation system(s) in use;
 - payroll and human resource information systems; and
 - key equality issues, such as occupational segregation and the systemic tendency to undervalue work done by women.
 - When should the workforce be involved? Employers need to consider when to involve the trade unions or other employee representatives.
 - Is expert advice needed? Employers may also wish to consider whether to bring in outside expertise.

Step 2: Determine where women and men are doing equal work

157. In Step 2 an employer needs to check whether women and men are doing:
- like work – that is work that is the same or broadly similar; or
 - work rated as equivalent under a valid job evaluation scheme; or
 - work of broadly equal value or worth, considering factors such as effort, skill and decision-making.

These checks determine where women and men are doing equal work. They are the foundation of an equal pay audit.

Employers who do not have analytical job evaluation schemes designed with equal value in mind will need to find an alternative means of assessing whether men and women are doing equal work.

Employers who do use analytical job evaluation schemes need to check that their scheme has been designed and

implemented in such a way as not to discriminate on grounds of sex.

Step 3: Collect and compare pay data to identify any significant pay inequalities between roles of equal value

158. Once employers have determined which male and female employees are doing equal work, they need to collate and compare pay information to identify any significant inequalities by:
 - calculating average basic pay and total earnings; and
 - comparing access to and amounts received of each element of the pay package.

159. To ensure comparisons are consistent, when calculating average basic pay and average total earnings for men and women separately, employers should do this either on an hourly basis or on a full-time equivalent salary basis (grossing up or down for those who work fewer, or more, hours per week – excluding overtime - than the norm).

160. Employers then need to review the pay comparisons to identify any gender pay inequalities and decide if any are significant enough to warrant further investigation. It is advisable to record all the significant or patterned pay inequalities that have been identified.

161. Modern software allows for speedy and in-depth investigation of pay inequalities on any protected characteristic and also provides an essential tool for equality impact assessments.

Step 4: Establish the causes of any significant pay inequalities and assess the reasons for them

162. In Step 4 employers need to:

- find out if there is a real, material reason for the difference in pay that has nothing to do with the sex of the jobholders; and
- examine their pay systems to find out which pay policies and practices may have caused or may be contributing to any gender pay inequalities.

163. Pay systems vary considerably. Pay systems that group jobs into pay grades or bands have traditionally treated jobs in the same grade or band as being of broadly equal value, either because they have been evaluated with similar scores under a job evaluation scheme, or because they are simply regarded as equivalent. However, recent years have seen a trend towards structures with fewer, broader grades or bands and greater use of performance pay and market factors.

A single broad band or grade may contain jobs or roles of significantly different value because it encompasses a wide range of job evaluation scores. This, combined with a wider use of other determinants of pay and more complex methods of pay progression, means employers should check all aspects of the pay system from a variety of standpoints: design, implementation, and differential impact on men and women.

164. Further guidance will be published on the Isle of Man Government equality webpages to help employers deal with the more common causes of unequal pay in the workplace.

Step 5: Develop an equal pay action plan to remedy any direct or indirect pay discrimination

165. Where the reason for the pay difference is connected with the employee's sex (or another protected characteristic), employers will need to remedy this and provide equal pay for current and future employees doing equal work.

If the pay differential arises from a factor that has an adverse impact on women, then it has to be objectively justified. For example, if an employee is entitled to a premium for working unsocial hours and fewer women than men can do this because of their caring responsibilities, it will be indirectly discriminatory and the employer will have to be able to prove it is justified. Further explanation of what this means is in Part 1 of the code (paragraphs 78 to 85) and in other guidance published on the equality pages of the Isle of Man Government website.

166. Employers who find no inequalities between men's and women's pay, or on other protected grounds, or who find pay differences for which there are genuinely non-discriminatory reasons, should nevertheless keep their pay systems under review by introducing regular monitoring undertaken jointly with trade unions. This will ensure that the pay system remains free of bias.