

Equal Pay Legislation at the Work Place in the United Kingdom: A Critique

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Abstract

Equal Pay amongst workers has been a major factor of debate between employers and employees. The advocacy of workers in most developed countries is that workers' salaries should be equal amongst their comparators. This has led to the clamour for equality of terms in the contract of employment between workers carrying out the same kind of work, and equality of terms of contract of employment for workers whose work is rated as equivalent to other comparators. This study is aimed at critically examining some equal pay legislations, most especially in the United Kingdom and how such legislation have partially failed to bring about equal pay at the work place. The study considered different key concepts, such as, equal pay, equality of terms, comparator, like work, work rated as equivalent and work of equal value. In considering these concepts in relation to equal pay, reference has been made to different legislations such as the Equal Pay Act of 1970, Equality Act of 2010, Pensions Act of 1995, Sex Discrimination Act of 1975 and the Equal Pay (amendment) regulation of 1983. In order to achieve the aim of this study, some cases were also critically analyzed to answer the question whether or not these legislations and cases have brought about equal pay at the work place, especially between male and female comparators. In addition to the above, this study criticizes the United Kingdom's legislation on equal pay and basically sex discrimination at the work place in the United Kingdom, whereby men tend to get paid higher wages than their female comparators carrying out the same kind of work. This has given rise to the clamour for equal pay amongst workers in the United Kingdom. This study establishes that equal pay legislation in the United Kingdom has, to an extent, partially failed to bring about equal pay between employees carrying out like work and work rated as equivalent, while considering factors such as the different duties carried out by workers, and at different hours of the day and also the different responsibilities carried out by workers. Hence, a need to reform such laws.

Introduction

Over the years there has been a clamour for equal pay in the work place especially in the United Kingdom. This is due to different campaigns and demonstrations recorded in the United Kingdom over forty years ago,¹ because women tend to be paid less than their male comparators for equal work done. Therefore, the Equal Pay Act of 1970² emerged though the Act still has its lapses thereby not eradicating the problems encountered by women at the work place in the United Kingdom. This study will critically discuss the equal pay legislation and its failure over the years. Furthermore, this study seeks to criticize the failures recorded by the United Kingdom's legislation's as it relates to payment of workers' wages and salaries, who do equal work but get paid different amount in salaries because of their sex. In addition, how equal pay legislation has failed in different ways to bring about equality of pay between men and women at the work place will be considered. This study aims at achieving the sole goal of pointing out the shortcomings of the Equal Pay Act 1970 and proffering solutions and developing an equal pay action plan to remedy any pay discrimination.

To start with, the first point to clarify is the term "equal pay." The term "pay" is a concept which simply connotes the basic or minimum wage or salary, consideration, either in cash or in kind, that a worker receives, directly or indirectly from his or her employer.³ Consequent upon the above definition, equal pay simply means all sorts of benefits due to an employee which must be equal to the services rendered and what is obtainable elsewhere. It can include Christmas bonuses, travel facilities and remuneration provisions.⁴ Equal Pay is not specifically defined under the Equality Pay Act.⁵ The Act has made provisions, which tend to suggest that the aim and objectives the Equality Pay Act intend to achieve is to give women and men a right to receive equal remuneration at the work place for equal work done. Thus, it is stated in the opening paragraph of the act as follows;

¹Andrew Miller, 'winning equal pay: the value of womens work TUC history and work- Related Learning outcome (<http://www.unionhistory.info/equalpay/TeachersNotes.pdf>) accessed 17 March 2016.

²Equal Pay Act 1970

³*Barber v. Guardian Royal Exchange [1991] 1 QB 344*

⁴*Lavena v. Denda [2000] ICR 648*

⁵Equality Act 2010

“An Act to make provision to require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities; to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics; to enable certain employers to be required to publish information about the differences in pay between male and female employees; to prohibit victimisation in certain circumstances; to require the exercise of certain functions to be with regard to the need to eliminate discrimination and other prohibited conduct; to enable duties to be imposed in relation to the exercise of public procurement functions; to increase equality of opportunity; to amend the law relating to rights and responsibilities in family relationships; and for connected purposes.”⁶

It is important to state that, the equality pay act is enacted generally to combat discrimination at the work place, these discrimination could be exhibited in different forms as stated in the excerpt above especially as it relates to individuals making key decisions in the exercise of their functions at the work place, thereby bringing to the barest minimal socio-economic inequalities and the prohibition of victimisation at the work place.

Furthermore, this study examines who a comparator is and the role a comparator plays under the Equality Act. In addition to this, principles such as like work, work rated as equivalent, equal value of work and finally the material factor defense of an employer to a claim of pay discrimination at the work place will be examined. These principles and concepts will be critically examined alongside the Equality Act of 2010⁷ which has replaced previous legislations such as the Equal Pay Act 1970,⁸ the Sex Discrimination Act 1975⁹ and the equality provisions in the Pensions Act 1995.¹⁰

Equality of terms

Equality of terms suggests that where the terms and conditions that govern an employment are the same or are a collective agreement, such employment contract will be considered as being common with another establishment.¹¹ The provisions that govern equality of terms can be found under sections 64-70 of the Equality Act.¹² These sections only apply to persons employed on a work that is equal to the work done by a comparator of the opposite sex. This alone tends to show a failure of the Equality Act to bring about equal pay. A comparator, in this instance, is regarded as a person who is employed by the same employer or an associated employer and both work at the same establishment. These equality terms only apply if the employers concerned are companies, statutory agencies, whether or not they are under the control of the Government.¹³ This is because there is a distinction between body corporates and companies. This situation stands also as a limitation under the Equality Act, and it could be argued that this limitation is incompatible with the requirement of EC Laws. If two employees are employed by the same employer or associated employer, but they work at different establishments, they are comparators, that is if common terms of employment apply at those establishments. Section 80 of the Equality Act¹⁴ suggests that if work is not done at the same establishment, it is to be treated as being done at the establishment with which it has the closest connection.

A major problem with equality of terms is the determination as to whether terms and conditions are common between two establishments. Having a common employer is not considered as the same as being in the same employment or having pay and conditions attributed to a single source, this is because there must be a single source responsible for the difference in pay. Thus, in the case of *Robertson v. Department for Environment Food and Rural Affairs*,¹⁵ male civil servants sought equal pay with senior secretaries employed in a different government department. The claim failed because although the claimants were in common employment, responsibilities for terms and conditions of employment had been transferred to the individual governmental departments, and thus there was no single source of the pay structure. If a claimant seeks to rely on a comparator who is employed at a different establishment, there must exist the element of real possibility of the comparator doing the same or a broadly similar job. The claimant must show that the terms and conditions in which he or she would be employed are broadly similar to those in which he or she is currently employed.

⁶ Ibid at 5 (preamble)

⁷ Ibid at 5

⁸ Ibid at 2

⁹ Sex Discrimination Act 1975

¹⁰ Pensions Act 1995

¹¹ *Barclays Bank Plc V. Jams* [1990] ICR 333

¹² Ibid at 5

¹³ *Astra Emir Selwyn's Law of Employment* (17th edn, Oxford University Press 2012)

¹⁴ Ibid at 5

¹⁵ *Robertson v. Department for Environment Food and Rural Affairs* [2005] EWCA CIV 138

The case of *North v. Dumfries and Galloway Council*,¹⁶ female school workers, such as classroom assistants, learning assistants and nursery nurses sought to compare themselves with male manual workers employed as grounds men, road workers, refuse drivers, refuse collectors and a leisure attendant. The comparators were employed by the same local authority, but at depots rather than schools. The court in sessions held that in order to show common terms and conditions, it had to be shown that were the comparators to be transferred to the claimant's place of employment, their terms and conditions would be unchanged by their hypothetical move, which was not the case here; therefore, on that premise, the claim failed.

At this point, it should be noted that where a claim is brought for equal pay, the remuneration of the claimant and the comparator must be attributed to a single source. This has basically been resolved under the Equality Act, whereby the Act eradicates the requirement of the need of a single source of pay, provided such comparator was in the same employment. This is specifically evident in the case of *North Cumbria Acute Hospitals NHS Trust v. Potter*.¹⁷ An equality clause is only applicable when there is an actual comparator of the opposite sex, this basically is another failure of equal pay legislation. Thus, a woman who believes that she is poorly paid has no remedy in the absence of a male comparator. Elias J. in *Walton Centre for Neurology NHS Trust v. Bewely*,¹⁸ held that if there is sufficient numerical data to show the claim that women as a class get less paid than their male counterparts, an equal value claim may succeed under the provisions of Article 57 of the treaty,¹⁹ even in the absence of a male comparator. Furthermore, a claim for sex discrimination may also succeed under section 71 of the Equality Act.²⁰

The Equality term or clause does not only apply in respect of remuneration, it goes further to state other benefits that are part of the contract of employment and which do follow the equality clause or terms such as holiday entitlement and the sex equality clause. The sex equality clause is to be treated as being included in the terms under which persons are employed. Therefore, any clause in a contract that seems less favorable than that of a comparator of the opposite sex is to be modified to ensure that it is not less favorable. In the same vein, a term that contains a benefit in the contract of a comparator of the opposite sex is to be included. If the contract of employment does not contain any term equivalent to that enjoyed by the comparator, the equality clause implies such terms in the contract of employment.

Comparator

As earlier pointed out, a comparator is one who is employed by the same employer or an associate employer and they both (claimant and comparator) work at the same establishment. Section 79²¹ of the Equality Act provides that a woman can claim equal work with a man in the same employment and the woman reserves the right to select a man or men with whom she wishes to be compared with. Furthermore, the European Union Laws accord a woman the right to compare herself to a man who is not in the same establishment, but where the European Union Laws have faulted in according such rights to the woman is that a woman can only exercise such rights or claim only when the difference in pay can be proved that it is attributable to a common single source. This has been the problem with bringing claims of equal pay under the European Union Laws.

It is for the claimant to choose a comparator²² when the issue of equal pay comes up. It simply suggests that there is every possibility that a comparison will take place.²³ A claimant for equal pay may, at times, freely choose with whom she is to be compared for the purposes of like work, but must name someone for the claim to be valid. Over the years, the search for a precise comparator has been very difficult most especially in the areas where women are generally underpaid; this has been a backdrop to achieving equality of pay between men and women at the work place most especially in the United Kingdom. It has been a major concern for women who are underpaid to get their case heard especially in an establishment where a statute was not needed to determine the pay rate between men and women. This, however, includes textile establishment, catering establishment, and retail businesses which, to an extent, are the sole preserve of women. Therefore, men are not usually employed on like work under this category. The above problem further led to women comparing their wages with a man who had been employed in the past but who was no longer employed at the time of the tribunal application, which was finally resolved at the European Court of Justice in the case of *McCarthys Ltd v. Smith*.²⁴

¹⁶*North v. Dumfries and Galloways Council* [2011] IRLR 239

¹⁷*North Cumbria Acute Hospitals NHS Trust V. Potter* [2009] IRLR 900

¹⁸*Walton Centre for Neurology NHS Trust v. Bewely* [2008] ICR 1047

¹⁹*Ibid* at 14

²⁰*Ibid* at 5

²¹*Ibid* at 5

²²*Amey Services Ltd V. Cardigan* [2008] IRLR 279

²³John Bowers, *A Practical Approach to Employment Law* (8th edn, Oxford University Press, 2009)

²⁴*McCarthys Ltd v. Smith* [1980] IRLR 210

The claimant who is a woman was a stockroom manageress who sought to compare her wages with her predecessor in the past. The Court of Appeal interpreted restrictively the English statute; its use of the present tense in its view precluded the claimant's desired comparison. The European court, on the other hand, decided that the claimant could compare herself with the predecessor under the EC treaty. It further mentioned that:

*'the concept (of equal pay) is not exclusively concerned with the nature of the service in question and may not be restricted by requirement of contemporaneity';*²⁵

The Equality Act has set out basically three ways in which an individual's work can be determined to be equal to that of another employee. They are; like work, work rated as equivalent and work of equal value.

Like work

Like work simply suggests that where the work done by a claimant and a comparator is the same or broadly similar,²⁶ if their work is broadly similar and the differences that do exist are not so much of a practical importance, such relates to the terms of the work. Practical importance means that something individuals do in their job as part of their practice which may include additional responsibilities or duties. This may also include new skills they bring to bear in the course of their duties, which are not just something they do on a normal routine in their job description. In an event that two employees would be compared using these criteria, it will be of utmost importance to consider the frequency in which different work occur in practice and the nature and the extent of such differences. In essence, the term "like work" means work which is the same or broadly similar. Jobs which are the same or broadly similar should have the same pay, irrespective of whether they are done by a man or by a woman. The breadth of like work means that any differences must be of practical importance. Jobs that are not similar could also be seen as like work. For example, Lecturers of different Modules but are within the same establishment or employment. Thus, workers piece rate can often be compared to each other under the category of like work. The above principle of like work is backed by section 65²⁷ of the Equality Act.

Where there are differences in work done, the employment tribunal must, as a matter of fact, examine if it is reasonable to expect such differences to be reflected in wage settlement or pay. These differences include different duties, different hours and different responsibilities.

- Different Duties: Where there is a difference in the contractual obligations, different duties may negate equal pay but it must be ascertained what happens in practice, and whether some other form of payment can be made for the different contractual obligations. If employees receive different training and thus could be called upon to perform different duties, they are not employed on the same work as women.²⁸
- Different hours: This principle of different hours only applies when there is a difference in pay for hours worked; this principle applies only to men. Thus, if men and women work different hours to different employees, the difference between the former and latter has nothing whatsoever to do with the sex of the employees, and therefore the basic rates can change between the employees concerned. Furthermore, there will not be a breach of the equality clause if the employer makes a payment to employees who work on a rotating 24/7 shift pattern, even though women with child-caring responsibilities are unable to work those hours.²⁹
- Different Responsibilities: The Court considers the different responsibilities of employees in the determination of like work as it relates to equal pay. In the case of *Eaton Ltd v. Nuttall*,³⁰ a man and a woman worked on like work, but the man received higher pay because his responsibilities were greater. He handled more expensive products, and consequently a mistake by him would have had more serious financial consequences. The EAT held that, it was proper to consider the additional responsibilities which the job entailed.

Work rated as equivalent

This principle of equal pay is backed by section 65(4)³¹ which suggests that, a woman's work is rated as equivalent to a man's if the employer's job evaluation study affords the same value to their work in terms of the demands made on the workers by reference to factors such as efforts, skills and decision-making. This principle of work rated as equivalent is only relevant where an employer has conducted a job evaluation scheme (JES).

²⁵Ibid at 22

²⁶Meena Tostivin Ashurst, 'Equal Pay- The rise of the Equal Pay Claim' (2007) 67 Tolley's Employment Law Newsletter

²⁷Ibid at 5

²⁸*Angestelltenbetriebsrat der Wiener V. Wiener* [2000] ICR 1134

²⁹*Blackburn v. Chief Constable of West Midland Police* [2009] IRLR 135

³⁰*Eaton Ltd v. Nuttall* [1977] 1 WLR 549

³¹Ibid at 5

This is usually carried out to rank jobs within grades or a pay structure. This can be a technical and complex exercise, generally, employees will have the knowledge whether or not a job evaluation scheme has been conducted on their jobs, thus affording an employee to institute claims where the job evaluation scheme rates her job and her comparator's job as equivalent, but she is not receiving the same pay or other benefits. Sometimes in 1975, equal pay directives stated that the principle of equal pay meant for work rated as equivalent required the removal of all forms of discrimination on the grounds of sex with regards to all payments and remunerations.³² The problem that arose then was that United Kingdom Laws did not comply with such a directive which has been a problem over time. Though, this has been challenged in the European Court of Justice in the case of *European Community Commission v. United Kingdom*.³³ It was held that United Kingdom had not complied with the directive, and as a result, the United Kingdom Laws on work rated as equivalent were amended introducing a third option of bringing an equal value claim.³⁴ In 1996, further amendments were made in order to give employment tribunals the power to determine the question as to whether work is of equal value without referring the matter to an independent expert.³⁵ However, the tribunal did not dismiss the claim at a preliminary hearing on the basis that independent expert's report was not necessary. Thus, opportunity has to be given to the parties to bring forth their pieces of evidence.³⁶

In the case of *Redcar and Cleveland Borough Council Bainbridge*,³⁷ a job evaluation scheme was conducted and men were graded lower than women in the establishment; nevertheless, the men received higher pay than the women. It was obvious that the jobs were not rated as being equivalent, the court of appeal did not find it difficult to determine that the principle of equal pay was breached. Relying on European Laws, the Court of Appeal gave interpretations of the Equal Pay Act by adding some phrases thus:

*'A woman is to be regarded as employed on work rated as equivalent with that of any man if, but only if her job and their job have been given an equal value or her job has been given a higher value.'*³⁸

Under the Equality Act, there is no doubt that such a finding may be a breach of the Equality clause and, subsequently, amounts to sex discrimination under section 39.

Work of equal value

This is defined as work that has no similarity or equivalent to another comparator's work, but such work is rated as work of equal value with regards to the terms of demand such as efforts, skills and decision making this includes works such as clerical assistant and warehouse operatives.³⁹ Section 65(6) of the Equality Act provides for work of equal value. Under this provision, 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 demand made on her. This simply means that a woman can be carrying out a job that is different from her male comparator but the jobs can be regarded as having the same value with specific regards to factors such as the work performed, the training and skills necessary to get the job done, the condition of work and the decision making which form part of the role of the employee. The Equality Act does not provide much guidance on the meaning of equal value, as such this has posed a problem in bringing about equality of men and women in the work place most especially in the United Kingdom. It is, therefore, clear that work value is to be determined in relation to demands made on a claimant and her comparator and not in relation to economic value to the employer.⁴⁰ The above further suggests that job characteristics rather than personal characteristics of an individual that holds the jobs are the basis to be used in the comparison. Also, analytical job evaluation techniques such as the point method are preferable to non-analytical job evaluation techniques.

The equality act however fails to answer some key questions when the need to compare jobs of equal value arises. Such questions include: what factors should be compared? Are such comparisons restricted in efforts, skills and decision making? Can other factors such as responsibility be taken into consideration when evaluating the work value of an employee against a comparator?

³² Julia Eichinger 'Equal pay for equal work of equal value' (2009) institute of Australian and European labour and social law Vienna business School. ERA seminar. era-comm.eu accessed 17th September 2018

³³ *European Community Commission V. United Kingdom [1982] 1 IRLR 333*

³⁴ The Equal Pay (amendment) Regulations 1983 (SI 1983/1974) reg. 2

³⁵ J. Lunn, 'Equal Pay Legislation- time for reform?' (2001) 151 NLJ 806

³⁶ *Wood v. William Ball [1999] IRLR 773*

³⁷ *Redcar and Cleveland Borough Council v. Bainbridge [2009] ICR 133*

³⁸ *Ibid* at 31

³⁹ "Equality and human rights commission." www.equalityhumanrights.com accessed 21st may, 2018

⁴⁰ Steven L. Willborn, 'Equal Pay for work of Equal Value: comparable worth in the United Kingdom' (1986) 34 The American Journal of Comparative Law 415

The Equality Act gives procedural answers to these questions, thereby making provisions for the appointment of independent experts, who will have a lot of discretion in the valuation of a claimant and her comparator's work.

In a situation where a job evaluation study rates an applicant's job lower than a comparator, the case of *Hayward v. Cammell Laird Shipbuilders Ltd*⁴¹ is a good example. The claimant in this case is a canteen worker who was paid lower than certain skilled workers, but enjoyed superior sickness benefits, paid meal breaks and extra holidays. An independent expert concluded that her work was of equal value to the male comparators, but an employment tribunal dismissed her claim, holding that the terms and conditions as a whole must not be less favorable. Though her cash pay was less than her comparators, her other terms and conditions, which were more favorable, had to be taken into consideration. However, the House of Lords upheld her claim, holding that the employment tribunal should have considered each individual term which was not less favorable. The 'term by term' means of evaluation, if taken literally, could result in an equal claim ending up with unequal pay, which defeats the purpose of the legislation.

In the case of *Degnan v. Redcar Borough Council*,⁴² the Court of Appeal avoided such outcome by stating that the term in question must be the same subject-matter. Thus, basic rates, bonuses and attendance allowance constitute all part of one term which is remuneration, therefore preventing a female claimant from cherry-picking the most advantageous part of a remuneration package of a number of male employees. Though in *Knowsley Hospital NHS Trust v. Brownbill*,⁴³ the Court of Appeal made it clear that the Dagnan case turned on its own special facts and did not give rise to an exception to the principle in the Hayward's case.

Material Factor Defence

This could be perceived in the following ways:

- i. It could be a material difference between the claimant's suit and her comparator, or
- ii. Not be a factor which is directly discriminatory, or
- iii. A factor which is indirectly discriminatory.

Material factor defence is also perceived as where an employer provides in the contract of employment some criterion which tends to place a woman at a disadvantaged position when placed side by side with her comparator, or where two groups of employees doing work of equal value receive different pay and there is a sufficiently substantial disparity in the gender breakdown of the two groups. The burden is usually on the employer to show that its pay practices are not discriminatory, especially where the pay system is totally lacking transparency.⁴⁴ Section 69 of the Equality Act provides an employer with a defence to a claim of equal pay under the act, the employer under this section must be able to show that the variation in pay or other contractual terms is honestly due to a material factor other than discrimination of sex.⁴⁵ If the employee can show that she is not being paid equally for equal work, there is still the possibility that her claim will fail. The basic or main reason is because the employer can establish a 'material factor defence'. Therefore, the burden is on the employer to show that the difference in pay has nothing to do with the sex of the claimant. The employer has to show the reason for the difference in pay, and satisfy the tribunal that the reason for the difference in pay is significant, relevant and genuine. These reasons may include personal factors such as hours of work, geographical location, qualification, experience and 'red circling.' It may also include external factors such as legal requirements, different collective bargaining arrangements, market forces and starting salary. Therefore, if the employer can show a material factor defense, then the claim for equal pay will fail.

Before 2010, cases held that length of service is an appropriate method of achieving the legitimate aim of rewarding experience required, which helps a worker perform his duties better.⁴⁶ Though this point is disadvantageous to women, as women generally work for shorter periods of time than men, an employer will have to show good and convincing reasons if the pay scale is unnecessarily too long. Long service increment must be shown to reward greater skills or experience, or to achieve other aims such as retention of employment.⁴⁷

⁴¹*Hayward v. Cammell Laird Shipbuilders Ltd* [1988] 2 WLR 1134

⁴²*Degnan v. Redcar Borough Council* [2005] IRLR 615

⁴³*Knowsley Hospital NHS Trust v. Brownbill* [2011] IRLR 815

⁴⁴ "University and College union", www.ucu.org.uk accessed 21st may, 2018

⁴⁵Schofield Peter, 'A material factor defence to claim for equal pay' (1984) 47 The Modern Law Review 740

⁴⁶*Cadman v. Health and Safety Executive* [2007] ALL ER (EC) 1

⁴⁷*Wilson v. Health and Safety Executive* [2010] CMLR 24

Conclusion

This study has tried to critically examine some United Kingdom legislations such as the Equality Act, the Equal Pay Act, the Sex Discrimination Act and the Pensions Act, and how these legislations have, to an extent, failed to bring about equality of pay between women and men at the work place especially in the United Kingdom. In order to achieve the aim of this study, the essay examined the principle of equal pay, and the factors used in the determination of equal pay. The study also examined who a comparator is, and the role a comparator plays in equal pay claims. In addition to this, the study discussed the principle of the material factor defence. In doing this, some key lapses of the United Kingdom Legislation were highlighted.

It is therefore pertinent to note that Equal pay cases are complex and lengthy, thus the need for a reform of the United Kingdom Laws such as the equality act, equal pay act, equal pay amendment regulation of 1983 and the sex discrimination act in order to speed up cases lingering in court and resolve some other gray areas in the United Kingdom legislations as it relates to equal pay.

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