Greater scrutiny of equal pay: financial services employers should be vigilant

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Equal pay for men and women has been enshrined in UK law since May 1970. Since then, and particularly since the turn of the century, equal pay claims have tended to take the form of mass claims in the public and retail sectors. In recent years, however, there has been renewed focus on individual equal pay claims, driven by factors including gender pay legislation, the #MeToo movement and a rise in equal pay campaigns in the UK and worldwide.

The authors also anticipate that the Financial Conduct Authority (FCA) will step up its scrutiny of equal pay. The FCA Handbook states that remuneration policies should be gender-neutral (see, for example, SYSC 19D.2.2A, introduced in December 2020) and both the FCA and the Prudential Regulation Authority (PRA) appear to be honing in on diversity and inclusion (D&I). This fits with their broader emphasis non-financial misconduct. Notable developments include:

- The FCA and PRA discussion paper on driving change in D&I in financial services (DP21/2). Published in 2021, it is an exploratory paper setting out points of discussion and questions for stakeholders focussed on driving D&I improvements. The paper highlights continuing gender pay gaps across financial services and the under-representation of women, particularly in senior roles. It goes on to explore options for addressing such under-representation — including greater D&I reporting and audits. The FCA has yet to respond to the stakeholder input provided.
- The letter to the chairs of remuneration committees in 2021, which also emphasised the FCA and PRA's focus on D&I.

This suggests that D&I compliance, including equal pay, should be front-of-mind for regulated firms.

Anecdotally, the authors have seen an increase in grievances involving equal pay across the financial and professional services sectors. This has also manifested itself through more reported equal pay claims in financial services, with two recent high-profile Employment Tribunal claims grabbing the headlines:

- Sommer v Swiss Re (Ms H Sommer v Swiss Re Corporate Solutions Services Ltd: 2201980/2021 and 2200317/2022), in which Sommer lost her equal pay claim against Swiss Re as the tribunal found that her comparators were not doing equal work.
- Macken v BNP Paribas (2208142/2017), in which Ms Macken won her equal pay claim against the bank, resulting in compensation of more than £2 million and an order from the tribunal that the bank conduct an equal pay audit.

These types of cases almost always start with an internal grievance outlining allegations of unequal pay. This article explores some of the main concerns for those involved in a grievance regarding equal pay, with a particular focus on financial services.

Equal pay: the basics

Before diving into the detail it is worth setting out in simplified terms some of the core principles of equal pay, as they define the main concepts that will need to be considered when handling a grievance involving equal pay.

In a nutshell, a woman has a right to equal pay with a man (and vice versa) where they are doing "equal work", unless there is a non-discriminatory "material factor" that explains the difference. In some cases — where the reason for the difference is indirectly discriminatory — the difference must not only be explained, but also objectively justified.

As well as pay, the right extends to any contractual terms such as pension contributions, holiday allowance, special allowances, or overtime. It should not be assumed that a grievance just relates to salary, particularly given the complexity of remuneration structures in financial services. In theory an employee can also cherry pick more favourable terms, although there is conflicting case law about the extent to which that is possible.

The first stage is for an employee to show that they do equal work to a comparator of the opposite sex. There are three potential "gateways" to demonstrating equal work:

1. *Like work* — work that is the same or broadly similar based on a general consideration of the work and the knowledge and skills needed to do it, and where any differences between the work done are not of practical importance looking at the frequency with which they occur and the nature and extent of the differences.
2. *Work rated as equivalent* — this is where different jobs or work have been rated as equivalent based on factors such as effort, skill and decision-making under a scheme that qualifies as an analytical job evaluation scheme under the Equality Act 2010. The EAT explored job evaluation schemes in detail in a judgment published in October this year, in which the EAT held that Tesco had failed to implement a compliant job evaluation scheme.

3. *Work of equal value* — equal value is work that is not like work or rated as equivalent but that nonetheless can be regarded as being of equal value in terms of the demands of the role. Equal value claims are generally lengthy and technically complex.

Assuming an employee satisfies one of these gateways and can demonstrate less favourable terms, the employer must then show that any difference in terms is due to a material factor that is not directly or indirectly discriminatory (and not justified). Material factors are likely to be a focal point of any equal pay grievance, so it is important to note that a valid material factor:

- must be "material", i.e., a significant and relevant factor;
- must cause the difference or part of the difference in pay; and
- must explain the difference with particularity, i.e., it should in theory be possible to point to the factor that caused each element of the pay difference, if there are multiple factors.

Challenges

Clearly, there are no "basics" of equal pay. Equal pay grievances often lead to litigation, and it is an increasingly common area of claim for employees who remain in employment, which can make settlement harder to negotiate. It is also increasingly common in financial services, where total reward is high and often highly variable, in a very competitive environment.

Employers should consider carefully how to address equal pay grievances so that the process and outcome is satisfactory for both employer and employee.

Assessing equal work

The first challenge is how to assess equal work as part of an internal grievance. Many employers use job evaluation for the purpose of broad banding, but it is rare in the financial and professional services sector to go so far as to rate specific roles as equivalent under an analytical scheme. Employers are therefore generally left with a choice between "like work" and "work of equal value". If a chosen comparator is very obviously doing like work, it makes sense to move straight to considering whether there is a material factor(s) that explains the difference in pay.

In many cases, the comparison will not be so straightforward. Someone may have the same job title, but with different duties, responsibilities or skills, and an assessment will need to be made as to whether those differences are of practical importance. This is where Sommer's claim failed, as the insurer was able to establish that there were differences of practical importance between her underwriter role and those of her identified underwriter comparators, and in particular that she lacked the broad range, experience or accumulated knowledge of her comparators.

The comparison becomes more complex if an employee selects a comparator with a wholly different job title, or from a different team, and asserts that their work is of equal value. Claims of that nature are less common, but the authors have seen numerous examples of back office staff claiming that they do work of equal value to front office staff.

That poses the question of whether it is realistic to assess equal value as part of an internal grievance. Equal value is a notoriously complex assessment. It is one which can leave parties tied up in the Employment Tribunal for years and often requires dedicated equal value experts. It is difficult to square that with the requirement for grievances to be decided without unreasonable delay.

In a recent high-profile investigation into equal pay, the Equality and Human Rights Commission (EHRC) recommended that the employer should "consider how it can best assess whether comparators are doing work of equal value when considering pay complaints".

The suggestion being that a proper grievance should involve some consideration of equal value. Tellingly, perhaps, the EHRC did not offer any practical suggestions as to how such an assessment could be made in an internal grievance. As a practical matter, therefore, a grievance panel will need to consider whether the demands of different roles are broadly comparable despite differing duties, and decide how far to take the analysis of equal value, potentially drawing on reward experts in complex cases.

Confidentiality

The second challenge is balancing the competing interests of the employee's desire for a fulsome response to their grievance and the comparator's right to protection of their personal information. There is increasingly a culture of employees sharing salary information or conducting anonymous salary surveys, but in most cases an employee will not know what their comparator is paid. Individual salary information is both personal data under the UK General Data Protection Regulation (UK GDPR) and something that employees will likely expect be kept confidential.

Salary and total compensation figures are particularly sensitive in financial services, where pay and performance are so closely connected. Employers should be cautious about disclosing this information as it is difficult to establish a clear lawful basis for doing so. In the authors' experience, financial services employers are in practice reluctant to disclose this information, and will respond to grievances in a way that discloses as little specific information about comparators as possible.

Material factors

The third challenge is investigating material factors. This is often where equal pay claims stand or fall. A particular challenge is evidencing that the factor exists and that it explains some or all of the difference in pay. If there are multiple factors, in principle each element of the difference in pay should be explained by reference to the relevant factor.

In practice a case may involve investigating decisions that were taken many years ago. Records may be incomplete, and pay decision makers may have left the firm. Having detailed pay records is a very helpful place to start, as it can highlight potential decision points and where pay discrepancies have arisen.

It is still necessary to identify the material factor and explain the difference in pay. It may be possible to reach a reasonable conclusion on an internal grievance based on a broad recollection of historic pay decisions, but in defending a tribunal claim an employer will need to demonstrate clear and preferably contemporaneous evidence, or at the very least compelling witness evidence, normally from the decision maker.

Equal pay cases present particularly unique challenges for employers in discharging the burden of proof and establishing clear evidence of the reasons for pay decisions, often many years after the event. The importance of clear records of pay decisions cannot, therefore, be understated.

A material factor must not be directly discriminatory. In addition, an employee may argue that a factor is indirectly discriminatory because it puts women at a particular disadvantage. If established, the burden will be on the employer to show objective justification.

Expertise

The fourth challenge is whom to appoint to hear the grievance in this highly technical area. A lay manager is likely to need a detailed briefing, and/or significant support from in-house or external legal counsel throughout. An alternative is appointing an external HR or legal expert with experience of equal pay to conduct the investigation, either in conjunction with an internal manager or producing a report for an internal manager to reach a decision on. In financial services an external expert is in turn likely to need support from internal banking experts in assessing the work performed by the employee and their comparator(s), given the complexity of the roles in the industry. In any case, the role of internal or external legal expert should be defined carefully to maintain the protection of privilege.

Remediation

Finally, a note on remediation. If an equal pay grievance is upheld, an employer should award back pay for the shorter of the employee's employment, the period of the discrepancy in pay or the six-year limitation period (five years in Scotland). In cases where no inequality is established, the EHRC suggests that employers should also consider whether an employee's pay is "fair". While not a statutory concept, it is an opportunity to consider whether pay can be adjusted on the basis of "fairness". That could be, for example, on the basis that a material factor is legally sound but appears unjust (there is no requirement for a material factor to be a "good" reason).

A broader question is whether employers should conduct pre-emptive, or reactive, pay equity analyses or equal pay audits. These can be highly valuable exercises, but should be approached with caution and with legal privilege at front of mind. Equal pay audits are increasingly on the radar for employers and claimants following Macken's successful claim, after the tribunal ordered the employer to conduct an audit.

A tribunal must order an audit where an employer loses an equal pay case unless one of four exceptions applies, and these exceptions will be construed very narrowly.

There is clearly now a prospect of onerous tribunal awards and potential regulatory attention where equal pay claims are fought and lost by employers, and sometimes negative publicity. This makes it even more important to resolve equal pay grievances where possible before they escalate into public litigation.

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Complaints Procedure

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