

EXPLANATORY MEMORANDUM

The Equal Pay Act 1970 (Amendment) Regulations 2004
S.I. 2004, No. 2352

Laying Authority and Purpose

1. This explanatory memorandum is laid before Parliament by Command of Her Majesty.

Department Responsible

2. Department of Trade and Industry

Description

3. These regulations amend Section 2A of the Equal Pay Act 1970 Act and alter the tribunal procedure in cases where there is a question of whether the claimant and the comparator are doing work of equal value, including those cases where there has already been a job evaluation study (JES) which rated the claimant's work as unequal to that of the comparator. The regulations also allow the employment tribunal to choose to determine the question of equal value itself or to appoint an independent expert to prepare a report on that question.

Legislative Background

4. Section 2A of the Equal Pay Act 1970 requires the employment tribunal to follow a particular procedure when determining proceedings where there is a question as to whether the claimant and the comparator are doing work of equal value. Section 2A partly implements Council Directive 75/117/EEC⁽¹⁾, which provides among other matters for claims to equal pay for work of equal value.
5. Under section 2A (prior to amendment by these Regulations), the tribunal is able to appoint an independent expert to prepare a report on the question of whether the jobs of the claimant and her comparator are of equal value in all cases except where there are 'no reasonable grounds' for determining that the work is of equal value. In particular, where the claimant's job and that of the comparator had already been evaluated as having different values under a job evaluation study (JES), there are taken to be no reasonable grounds for determining that the work is of equal value unless there are reasonable grounds to determine that the JES was made on a system which discriminates on grounds of sex.
6. These Regulations remove the 'no reasonable grounds' defence, so that the tribunal is able to decide to appoint an independent expert or to determine the question of equal value itself in all cases. The tribunal is not able to strike out the claim simply because it considers that there are no reasonable grounds to determine that the work of the claimant and the comparator are of equal value. However, section 2A will continue to provide guidance on the approach to be taken where a claimant brings an equal value claim but there has already been a JES which rated the claimant's work as unequal to that of the comparator. In such circumstances, it is intended that the JES is presumed to be accurate (so the tribunal makes a determination that the work is not of equal value) unless the tribunal has reasonable grounds for suspecting that the JES discriminated on the grounds of sex, or there are other reasons why it is not suitable to be relied upon.
7. Under section 2A (prior to amendment), once a tribunal has decided to require an independent expert to prepare a report, it may not go on to determine the question of equal

⁽¹⁾ OJ No. L45, 19.2.75, p. 19.

value unless it has received the report. These Regulations amend section 2A so that the tribunal is able to withdraw the requirement on the independent expert and go on to determine the question itself, if it sees fit. The Regulations also allow the tribunal to make requests connected to withdrawing the requirement: for example, that the independent expert provide it with documentation.

8. These changes to the equal value procedure are reflected in the Employment Tribunals (Equal Value) Rules of Procedure, which will also come into force on 1 October 2004.

Extent

9. The instrument applies to England, Wales and Scotland.

European Convention on Human Rights

10. The Minister for Industry and the Regions and Deputy Minister for Women and Equality has made the following statement regarding Human Rights:

In my view the provisions of these Regulations are compatible with the Convention rights (as defined in section 1 of the Human Rights Act 1998).

Policy background

11. The Government set out its policy for tackling unnecessary complexity and delay in equal value cases in the consultation *Equal pay for women: speed and simplicity in equal value cases 2000-2001*, including proposals to remove the “no reasonable grounds” defence in section 2A(1)(b) of the Equal Pay Act. Draft regulations were first consulted on in October 2002 and responded to concerns that the defence allowed tribunals to strike out equal value claims in too many circumstances. Section 2A of the Equal Pay Act also provides guidance on the approach to be taken where a claimant brings an equal value claim but there has already been a job evaluation study (JES) which rated the claimant’s work as unequal to that of the comparator. In such circumstances, it is intended that the job evaluation scheme is presumed to be accurate unless the tribunal suspects that the job evaluation study is sex discriminatory or unsuitable to be relied upon.

12. A public consultation in 2004 proposed making minor modifications to the draft regulations in response to detailed comments received through the earlier consultation. The consultation also included proposals to streamline equal value tribunal procedures. A total of 28 replies were recorded. A Government response to the consultation has been published on the Women and Equality Unit’s website. The changes are not, in themselves, of special legal or political importance.

13. Equal value tribunal cases are relatively few in number. Independent experts from the Acas panel were appointed in only 21 cases in 2001-02, and in 15 cases in 2002-03. However, a number of these cases involved hundreds, and sometimes thousands, of claimants.

Impact

14. A full regulatory impact assessment of the effect that these Regulations will have on the costs of business has been placed in the libraries of both Houses of Parliament, and can be obtained from the Women and Equality Unit, Department of Trade and Industry, 35 Great Smith Street, London SW1P 3BQ.

Contact

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Department of Trade and Industry.

7th September 2004

FULL REGULATORY IMPACT ASSESSMENT

Equal value tribunal cases

Purpose and intended effect of measure

Objective

1. The Equal Pay Act allows a worker to claim their job is worth as much as a job done by a fellow worker but of a different kind – for instance comparing a psychologist with a physiotherapist. This is a claim for equal pay for work of equal value. The purpose of reforming the way in which Employment Tribunals deal with equal value cases is to make the system work more effectively and to tackle lengthy delays, especially in the large-scale and more complex cases. The aim is to enable the key facts to be established more quickly and help the Tribunals determine whether jobs are of equal value. This in turn should also encourage the earlier settlement of more cases. We also intend to amend the Equal Pay Act to remove the “no reasonable grounds” defence in section 2A(1)(b) of the Equal Pay Act 1970 and limit the circumstances in which a tribunal could refuse to consider an equal value claim.

2. The new rules of procedure will replace those that are set out in Schedule 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. The new rules will reinforce non-legislative action by the Tribunal Presidents such as the appointment of specialist tribunal panels; the use of case management discussions; and the provision of specialist training in a complex and technical area of law. It is intended that the regulations will come into force on 1 October 2004, at the same time as the new dispute resolution and revised Employment Tribunal regulations. The equal value rules of procedure are very much a sub-set of the new Employment Tribunal (Constitution and Rules of Procedure) Regulations and therefore this RIA should be read in conjunction with the RIA for the tribunal regulations.

Devolution: The new legislation will apply to the whole of Great Britain but not to Northern Ireland.

Background

3. Equal pay cases can be notoriously slow and complex, particularly the large-scale equal value cases. An “independent expert” procedure was introduced into the Equal Pay Act in 1983 to assist the Tribunal, so the Tribunal can appoint an independent expert to prepare a detailed report on the applicant’s and the comparator’s work or it can determine the question of equal value itself. Employers often have job evaluation schemes in which the claimant’s and comparator’s jobs have been allocated a value and pay scale. Assessing whether such job evaluation schemes are “gender neutral” can be a difficult or technical process depending on job “weightings” and “factors”. Such schemes and the difficulty of getting all relevant

data means that where an independent expert is brought in there have often been lengthy delays.

4. The employment tribunals are responsible for appointing an independent expert on each occasion they consider it appropriate. The regional offices of the Employment Tribunals Service meet all their fees and expenses. The Employment Tribunals Service spent over £170,000 on independent experts in 2002-03. Acas is required to designate a list of experts and ensure they are available to employment tribunals. Currently there are 17 independent experts on the Acas panel. Acas's involvement in the process, thereafter, is limited to providing a certain level of support by way of circulating information about equal pay legislation. Acas also arranges for the experts to meet together from time to time, to enable them to update on case histories, share expertise and receive briefings from relevant third parties.

Independent experts: fees and expenses	
April 03 – January 04	£98,251
April 02 – March 03	£176,401

5. Although relatively few in number, the equal value cases cause disproportionate problems for the tribunal system, in terms of listing etc. Independent experts were appointed in 21 cases in 2001-02, and in 15 cases in 2002-03. The average time taken for equal value cases, when last estimated in 2000, (from the tribunal's decision to refer the case to an independent expert to the tribunal's ruling) was just under 20 months - with the time ranging from 5 months to 49 months. Some take far longer. Anecdotal evidence suggests that equal value cases are, if anything, becoming more complex with an increasing tendency to appoint teams of independent experts.

Equal pay cases		
Main complaint	April 03 – January 04	2309
	April 02 - March 03	3077
All equal pay complaints	April 03 - January 04	3140
	April 02 - March 03	5053

6. The number of equal pay cases received in the year 2002 -2003 was just over 3,000 which represents 3% of the total number of cases. There are a number of multiple cases included in this total - for example, Newcastle received 669 cases, with 3 multiples of 458, 140 and 31 cases. The scale of equal value cases varies enormously - from un-represented individuals and small firms to very large public sector cases. For example, one recent multiple case lasted over 5 years, was made up of 93 cases, 4 Independent Experts were involved and over £35,000 was spent on producing their reports. In two on-going multiple equal value cases, well over a thousand claims are involved.

Risk assessment

7. The aim is to reduce the inefficiencies and delays resulting from the current system. Failure to act could result in justice being either delayed or denied. Although the total number of cases each year may be few, some of these involve multiple cases affecting hundreds of employees.

Options

8. The Government has considered a number of different ways of tackling the delays in equal value cases, ranging from doing nothing to more radical approaches involving primary legislation. It has also considered a number of non-regulatory approaches including providing more training for Tribunal Chairmen, promoting more specialisation amongst tribunal chairmen, and encouraging the independent experts to develop a Guide to Good Practice and working with Acas to ensure greater availability and more effective use of independent experts. In order to reinforce the non-regulatory action, it has been considered necessary to simplify the existing complex rules to enable tribunals to manage these cases more effectively. This Regulatory Impact Assessment considers the costs and benefits of the option to revise tribunal procedures to support non-legislative improvements.

9. An option was floated in consultation in 2000-01 to appoint independent assessors to sit with and advise the tribunal panel. We have decided against pursuing this option, which would require primary legislation. The Government and the Presidents of the Employment Tribunals in England and Wales, and in Scotland would prefer to achieve improvements through specialist tribunals. Consultation responses included concerns that assessors would upset the balance of the tripartite nature of the tribunal panel, as well as concerns about justice being seen to be done. We think there is a risk that more cases would be taken to appeal as a result of the involvement of an assessor because their advice would not be given at the hearing and they would not be cross-examined. We also have concerns that involving an assessor adds a further layer in the process. Finally, assessors would have to be drawn from the same relatively small pool of expertise as the independent experts.

Benefits

10. Better employment relations and its impact on productivity. Employment disputes can give rise to tensions in the workplace. This may impact on the productivity of the business.

Reduced costs for advice organisations

11. The proposals should benefit organisations such as the Equal Opportunities Commission and trade unions that advise individuals. Supporting individuals through a very lengthy tribunal process can be very expensive for employee advisors.

Reduced costs for employers

12. A tribunal application costs an employer around £2,000 on average in management time and legal fees (if represented). In a long drawn out case involving an expert's report and challenges, this cost would multiply many times over. Equal pay cases, especially if they reach a hearing, tend to take longer to hear and require greater legal representation than the average Tribunal case. The very complex, large-scale equal value cases can result in very high legal expenses and increasingly in the costly use of experts in the field of job evaluation.

13. Separate statistics for equal value cases are not available, but discrimination cases tend to attract higher legal fees for respondents. The mean in 1998 was £1,861 (about £2,250 in 2003 prices) and that includes those that did not seek legal advice (31%). If a respondent incurred legal costs the most common amount was £2,000-3,999 (or about £2,400-£4,800 in 2003 prices). If a case goes to a Hearing then this increases legal fees by about 50%. Please note this is all cases not discrimination cases.

14. Management time is also higher in discrimination cases with an average of 50 hours of directors' and senior managers' time and 22 hours of other staff at a cost of about £25 for directors and senior managers and £15 for other staff. If a case goes to a Hearing this can push up staff time by 42% for directors and senior managers and by about two thirds for other staff (this is all jurisdictions). Speeding up the equal value tribunal cases should result in significant savings in management time and legal and expert costs for the employers involved in such cases.

Savings to the taxpayer

15. Speeding up tribunal procedures reduces the costs of the employment tribunals system. For example, limiting the hearing of oral expert evidence should result in savings because the length of oral hearings will be reduced. The partial RIA for the general tribunal regulations estimated that a Tribunal Chairman cost the ETS about £70 per hour². Some equal value cases are listed for a 6 week Hearing. Assuming that a tribunal chairman costs around £500 a day, reducing a 6 weeks Hearing to 3 weeks would result in savings to the taxpayer of £7,500 on chairman fees alone. There could be some savings in independent expert fees but we expect these to be minimal.

Business sectors affected

16. Employees and employers in all sectors are liable to become involved in Employment Tribunal cases and therefore affected by proposals to improve the rules of procedure. Although the scale of the equal value cases varies enormously, in practice, it is likely that the large-scale and very complex cases will involve large organisations, very often from the public sector.

Issues of equity and fairness

17. Women would be the major beneficiaries of the proposed regulations as they are more likely to bring a claim, though men can and do also benefit from bringing a claim. Speeding up and simplifying the equal value cases could have a positive impact on the gender pay gap, which currently stands at 18%. Women with higher earnings are also likely to have a higher pension, reducing the significant proportion of women on the minimum pension.

Assumptions

18. In order to estimate costs and benefits we have to make assumptions about the number of equal value cases in future. Information on the number and length of equal value cases is not collected on a regular basis. We estimate that the number of equal value cases involving independent experts is likely to remain flat at around 15 – 20 a year. The new dispute resolution at work regulations will reduce the number of overall tribunal claims but we estimate that the number of large-scale equal value test cases are less likely to decrease. Complex cases involving large organisations have usually arisen after disputes have failed to be resolved internally. In addition, the persistence of the gender pay gap makes it likely that trade unions will continue to bring equal value cases.

Costs

² The cost of the 118 full-time Chairmen was £12,943,000 for 2002-03 or £109,686 each. This makes a cost of about £70 per hour.

(i) Compliance costs

19. It is difficult to quantify the overall cost of the legislation because there are no robust statistics on the number of equal value cases. It is thought that any costs incurred in implementing the new procedures will be more than offset by efficiency savings arising from improved efficiency in the tribunals.

Illustration of possible costs:

Implementation costs

20. There are likely to be one-off implementation costs as a result of the new rules. For example, in order to comply with new legislation, people have to become familiar with it and this bears a cost. However, because there are very few equal value cases requiring the Independent Experts, the burden on the Employment Tribunals Service, Acas and employers will be similar to present costs. We envisage that employers and staff in the Employment Tribunals Service will read the instructions once they are involved in a claim, and this will take no longer than at present. Specialist Tribunals should result in a saving because in future only Tribunal Chairmen and side members specialising in such cases will require a detailed knowledge of the procedures rather all Chairmen as at present.

21. Business will need to be aware of the processes of the Employment Tribunal system once a claim is made against them. Their role will be clearly laid out once they are asked to respond to a claim. This is the case at the moment and we envisage that reading the instructions will take no longer than it does at present. We therefore envisage no additional compliance costs to business.

Policy costs

Practice directions

22. We propose to use practice directions rather than detailed rules to ensure consistency of approach and flexibility. The Partial RIA for the revised Employment Tribunal (Constitution and Rules of Procedure) Regulations estimated that there would be costs of around **£53,000** per practice direction. In addition it assumed that there would be a familiarisation cost to ETS and Acas staff of about **£24,000** for each practice direction. We estimate each practice direction takes staff and Tribunal Chairmen in the ETS one hour to become familiar with and Acas staff half an hour. It is likely that the cost would be less for practice directions for equal value cases because not all staff and tribunals would have to familiarise themselves with the detail.

23. Employees would benefit from a reduction in time spent in dealing with the case. SETA 98 has some estimates of applicant time (78 hours average for discrimination cases) but it is hard to know how to value this time, depending whether applicants use leisure hours or work hours.

Costs of amendment to the “no reasonable grounds” defence

24. This defence is rarely used. It is estimated that in 2001/2002 the number of times this defence succeeded did not reach double figures. There should be minimal costs to employers and to tribunals arising from the changes. A very small number of cases may proceed further than they would have prior to the change. However,

anecdotal evidence suggests that tribunals generally go on to hear a case if they suspect that there are problems with an employer's job evaluation scheme.

Consultation with small business: the Small Firms' Impact Test

25. By their very nature, the large-scale cases will involve large organisations. However, small firms are sometimes involved in equal value cases and they are likely to benefit from our proposals to simplify and speed up equal value cases. The new rules should ensure that all equal value cases are dealt with far more quickly, for example tribunals will have powers to manage the cases more effectively and can use standard directions.

25. When we consulted on the policy proposals in 2000/01, our plans to reform the very complex rules were supported by the Federation of Small Businesses: "We welcome any government plans that make laws simpler, speedier and fairer. Simplifying the paperwork surrounding equal pay laws will certainly help small employers, especially where this leads to claims being settled rather than going down the tribunal route".

We have consulted the Small Business Service.

Competition Assessment

26. We have applied the Competition Filter and believe that the competition impact is likely to be negligible. The proposals seek to make the Tribunal more efficient for all firms concerned and apply only when a firm is involved in an Employment Tribunal case. There are no anticipated anti-competitive effects.

Enforcement and sanctions

27. If awards are made but not paid, penalties can be enforced through the civil courts in England and Wales. In Scotland they can be enforced without recourse to the civil courts.

Monitoring and review

28. Monitoring of the number of equal pay cases taken and the percentage that were successful/settled/withdrawn is on-going by the Employment Tribunal Service, as is the monitoring of the speed with which tribunals are able to deal with cases that are brought. However, separate information on equal value cases or the number of cases dismissed under the "no reasonable grounds" defence is not available.

29. Therefore, we will be seeking the opinion of the Equal Opportunities Commission on the noticeable benefits or otherwise of the reforms to the equal value procedures. The EOC has a formal responsibility to advise the Government on the working of the Equal Pay Act and it carries out periodic reviews of the legislation.

Consultation

30. The Women and Equality Unit has consulted a number of other government organisations including Acas, the Employment Tribunals Service, the Small Business Service and other Whitehall Departments. Draft rules and regulations on new tribunal procedures for equal value cases were published in a consultation document on 18 March 2004³. The measures set out in the consultation document have also

³ An electronic version of the consultation document can be downloaded at http://164.36.253.98/research/index.htm#towards_eqpay

been subject to an initial “pre-consultation” with the Presidents of the Employment Tribunals in England and Wales and Scotland and other informed stakeholders with a detailed knowledge of equal value cases, including the Equal Opportunities Commission. Views received have been fully considered and taken into account in finalising the draft revised Regulations and Rules.

31. Consultation on the proposal to remove the “no reasonable grounds” defence included a written consultation exercise on speeding up and simplifying equal pay tribunal cases which was completed in February 2001 supplemented by discussions with stakeholders. Of the 53 responses to the consultation, the majority (73%) were in favour of the proposal to remove the “no reasonable grounds” defence in section 2A(1)(b) of the Equal Pay Act 1970. Draft regulations were consulted on in October 2002. A number of minor modifications have been made to the regulations in response to detailed comments received during the consultation.

Summary and recommendation

32. This Regulatory Impact Assessment finds that the proposals are likely to result in modest savings to the Exchequer. There are likely to be considerable benefits to all parties involved, including employees. The benefits stem primarily from increased efficiency in the way equal value tribunal cases are conducted.

Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed: *Jacqui Smith*

Date 7th September 2004

**Jacqui Smith
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