

EQUALITY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Work

Chapter 3: Equality of terms

Section 71: Sex discrimination in relation to contractual pay

Effect

245. This section deals with sex discrimination in relation to contractual pay in circumstances where a sex equality clause would not operate. This could be because there is no comparator doing equal work with whom a claimant can compare his or her pay or other terms. The section ensures that indirect sex discrimination in respect of contractual pay can be challenged only by means of an equality clause. However, the section for the first time enables a person who is treated less favourably than others by being paid less because of the person's sex or a combination of two protected characteristics including sex to pursue a claim for direct or dual discrimination where an equality clause does not operate.

Background

246. The section replaces similar provision in the Sex Discrimination Act 1975 which ensured that the sole remedy in respect of claims made about sex discrimination in contractual pay matters was obtained through the Equal Pay Act 1970. This required that the comparator be a real person. This section however contains a new provision designed to allow claims to be brought where a person can show evidence of direct sex discrimination or dual discrimination (where sex is one of the protected characteristics in the combination) in relation to contractual pay but is unable to gain the benefit of a sex equality clause due to the absence of a comparator doing equal work.

Example

- An employer tells a female employee "I would pay you more if you were a man" or tells a black female employee "I would pay you more if you were a white man". In the absence of any male comparator the woman cannot bring a claim for breach of an equality clause but she can bring a claim of direct sex discrimination or dual discrimination (combining sex and race) against the employer.