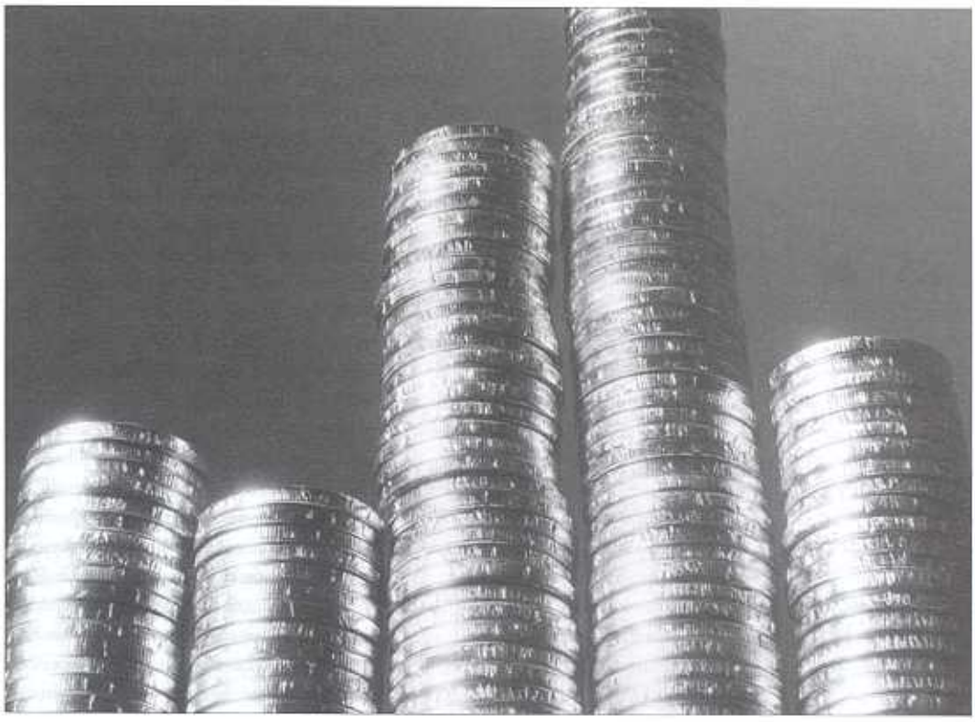
The future of equal pay claims

With the new employment tribunal powers now in force, **Anna Thomas** and **Suzanne McKie** assess their practical impact on equal value claims

- transparency versus privacy—how will tribunals use their new powers?
- practical advice for employers and employees



At the heart of the Employment Tribunals (Equal Value) Rules of Procedure, brought into force on 1 October, are new tribunal powers to insist on the early exchange of relevant factual information, facilitate the fact-finding process and penalise parties who do not comply with tribunal directions. The Employment Tribunal (Equal Value) Rules of Procedure ("the rules") together with Equal Pay Act 1970 (Amendment) Regulations 2004, also brought into force on 1 October, are the last leg of improving changes to the notorious equal pay regime, following on from Equal Pay (Questions and Replies) Order 2003 and Equal Pay Act 1970 (Amendment) Regulations 2003. The rules represent a final strike at inefficiency and delay in equal pay.

The new powers, designed to manage and facilitate early disclosure of relevant documentation and other factual information, will throw the difficult issue of the respondent's obligation to disclose confidential information in the context of equal value claims into the spotlight. The rules are likely to invite a spate of tribunal battles to thrash out the perimeters of these obligations and establish how far tribunals, armed with their new interventionist powers, will go to assist claimants during the fact-finding process. Of further importance are new powers under the rules of procedure which allow the expert (if one has been appointed by the tribunal), or the claimant or their representative (if an expert has not been appointed) to attend the employer's premises to question certain employees.

Significant changes

In reviewing the respondent's duty to disclose, the following new regulations deserve special attention. Regulation 3 introduces a general power to manage proceedings (additional to power in r 10 of the new Employment Tribunal Rules of Procedure) which includes:

- Regulation 3(1)(b) contains a power to direct that no new facts shall be admitted in evidence unless they have been disclosed to all other parties in writing before a date specified by the tribunal, unless it was not reasonably practicable for a party to have done so.
- Regulation 3(1)(d) contains a power to direct the respondent to grant the independent expert access to his premises to conduct interviews with persons identified by the expert as relevant.
- Regulation 4 introduces "stage one" knock-out hearings whenever there is a dispute as to whether work is of 'equal value', at which a tribunal may decide at a future date to determine that question itself without referral to an independent expert, or strike the claim out where it has determined that the work of the claimant and her comparator are not of equal value.
- Regulation 5 introduces standard directions to follow a stage one hearing, addressing, among other things, identification of any comparators, disclosure of job descriptions, and, importantly, a requirement that the respondent grant access to the claimant and his representatives to interview comparators where an expert has not been appointed. The regulation also allows for directions for agreed joint statements.
- Regulation 6 provides that a tribunal may, at any stage of the proceedings, direct that an independent expert assist the tribunal in establishing the facts where, for example, the parties are unable to reach the agreement required by an order or insufficient information has been disclosed.
- Regulation 10(3) allows any appointed expert to apply for any order from the tribunal which it is able to grant under its new or general powers.

Beyond the burden

It is worth remembering that although the burden of proof is normally on the employee to establish, on the balance of probabilities, that conditions giving rise to a rebuttable presumption that there is unequal pay exist, this rule is not without qualification. In particular, the case of *Handels-Og Kontorfunktionaerernes Forbund I Danmark v Dansk Arbejdgiverforening* acting on behalf of Danfoss [1989] ECR 3199 ("*Danfoss*") provides, with reference to

Art 6 of the Equal Pay Directive, that where a pay system is characterised by a "total lack of transparency", the burden of proof is on the employer to show that his pay practice is not discriminatory. Unfashionable though it is to speak of any shift in the burden, the example provided by *Danfoss* is a salutary reminder of just how far courts will go to ensure that an employer cannot rely on an opaque system of pay. Readers may be aware that the Court of Appeal have recently referred *Danfoss* to the ECJ for a preliminary ruling: *Cadman v Health & Safety Executive* [2004] EWCA Civ 1317 (15 October 2004). However, the reference is confined to whether *Danfoss* also created an enduring qualification in cases where discrimination results from use of length of service as a renumeration criterion. It will not affect the *Danfoss* ruling on burden where a pay system is opaque.

STEPS FOR EMPLOYERS

- Keep records of payments made to employees and the reasons for them. If using comparisons based on market rates or advice received from recruitment consultants, keep records of this.
- Where you have a non-transparent pay process, be prepared to explain why. Also be prepared to prove the absence of discrimination.
- When answering any questionnaire, bear in mind the data protection principles, but avoid a later drawing of an adverse inference by failing to take sufficient steps. It may be appropriate to name the comparators and provide their salaries, but resist salaries of others. In the end, the information, if relevant, will have to be disclosed by way of an order from the tribunal.
- Consider resisting disclosure of material until after the stage one hearing, other than where it relates to the applicant's chosen comparators, unless it is relevant to or will assist your application made to strike out the equal value case; this will ultimately save on costs.
- At the first stage of disclosure of information, consider the use of anonymity if at all possible. This will not be possible with the applicant's chosen comparators, but may be possible where you wish to rely on further personal data for the purposes of the material factor defence. On this point, bear in mind the data protection principles.
- Be very wary of placing pressure/restrictions on those the expert may wish to interview, as this may be revealed in the interview process.
- Consider reg 4(5)—is your best approach to ask the tribunal to hear evidence on the s 1(3) defence before it deals with any matters concerned with whether or not the applicant is doing work of equal value to her comparator(s)? The fact-finding process for the equal value point can be complex, time consuming and expensive. If your s 1(3) defence is strong it would be best to use reg 4(5).

Transparency

Now that employers can be ordered to grant access to premises to interview employees, they (and their advisers) should be reminded of the requirement of 'transparency' in pay systems. Although the notion of transparency is not a principle of EC law, the values of transparency and access to documentation run through EC case law and are given broad support from the ECJ against a variety of backdrops. In the context of equal pay, the ECJ has held that pay systems must be 'transparently' defined—which means that everyone should be able to understand each element of their pay package. *Danfoss* suggests that the rationale behind the principle is two-fold: first, to enable individuals to access information so that they can understand and compare the components of their pay and, second, to enable control by national courts.

The Equal Opportunities Commission Code of Practice on Equal Pay, admissible in evidence pursuant to s 56A of the Sex Discrimination Act 1975 (SDA 1975), notes this at para 39. The code refers to the ECJ finding that pay systems must be transparent, and goes on to define transparency as the 'principle' that pay and benefit systems should be capable of being understood by everyone: "Employees should be able to understand how each element of their pay packet contributes to total earnings in a pay period." In broad terms, therefore, the notion of transparency suggests a right to know how calculations are made, rather than a right to know the content of a particular calculation.

Employers alert to this requirement in advance of equal pay claims will be best placed to field any suggestion that the claimant or expert will need to interview comparators (or potential comparators) in order to understand or access factual information on the pay system in question.

Privacy and data protection

However, despite the above, employers will need to be reminded of their obligations to employees other than claimants, in particular to potential comparators, in equal pay claims. The budding right to privacy, to be balanced against the ideal of transparency, is manifest not only in the implied duty of confidence owed by an employer to his employee, but also in an employer's obligation as a data controller under the Data Protection Act 1998 (DPA 1998). For the purposes of DPA 1998, the definition of personal data is "information that affects [a person's] privacy, whether in his personal or family life, business or professional capacity": *Durant v FSA* [2003] EWCA Civ 1746. The following question was posed in *Durant* to assist determination of whether information is 'personal data': "is the information biographical in a significant sense, that is, going beyond the recording of [the individual's] involvement in a matter or an event which has no personal connotations?" Following this, it would seem that salary details, provided they are linked to an identifiable individual, must be personal data, and therefore can only be disclosed in accordance with data protection principles. Notably, *Durant* did not address the issue of identifiability. The Information Commissioner suggests that a name is itself only personal data where it is included in information that affects an individual's privacy, for example, if a name is recorded with other information

about the individual.

The fact that information is personal data will not prevent disclosure by the tribunal: a tribunal will merely need to have regard to data protection principles in deciding whether or not to grant an application.

The new rules: what next?

Against this background, how will tribunals decide whether and how to use their new powers? With very little case law to help, and none yet dealing with the new rules, tribunals will have to carry out a balancing exercise between the competing ideals of transparency and privacy in each case before them. In carrying out this exercise, it is suggested that tribunals are likely to consider the following:

- Whether the discovery is necessary for disposing fairly of the proceedings or, to put it another way, whether there is any prima facie prospect or relevance of the confidential material to an issue that arises in the litigation.
- The claimant's pleaded case: for example, whether the claimant is claiming that the respondent's pay system is not transparent and the basis of such claim as in *Danfoss*.
- The nature of the material sought and how far the net is cast: for example, if a claimant alleges a series of many comparators at many different levels with differing titles, the tribunal should, before disclosure, cut through to the heart of the claimant's case.
- The evidence produced by the claimant at the point of the application: for example, whether the claimant, if relying on *Danfoss* (or perhaps seeking access), has produced *sufficient* evidence to demonstrate a prima facie case, at the point of the application, that employees who are the subject of an application for disclosure are engaged in work of equal value. Applications should be made at an early stage.
- Disclosure need not necessarily be limited to salary details of comparators—applications should consider whether all salaries of male and female employees in a certain department, pool or office should be disclosed in order to defeat any s 1(3) defence. Noting *Cadman v HSE*, if an employer says the differences are historical, this might be undermined by evidence that the vast majority of female employees, both old and recent, have been paid a lower salary.
- The timing of the application: in the EAT decision in *Villalba v Merrill Lynch*, Mr Justice Burton commented (para 16) that if the application had been made at an earlier stage (ie some time before the first day of the final hearing), the applicant may well have succeeded in her application. However, by the date of the application, the tribunal has sufficient evidence before it to find that the applicant was unable to establish a prima facie case for disclosure. Had the application been made before extensive disclosure and exchange of detailed witness statements, she may have been able to persuade the tribunal of the merit of her application.
- Whether any search by the respondent would be too onerous.
- The purpose of any interview with a comparator, and whether the information sought from him or her can be obtained by other means. In particular, whether comparators can be questioned on matters relating to the material factor defence as opposed to the issue of what work was done by the applicant and the comparator.
- Whether anonymity can be preserved.

Unanswered questions

As the new regulations concern claims for equal contractual entitlements under EPA 1970 only, it seems that claimants bringing claims for like work, or work rated as equivalent, or for non-contractual entitlements under SDA 1975 (such as discretionary bonuses) will not be able to benefit from the more rigorous fact finding provisions of EPA 1970, albeit that both claims derive from Art 141 EC Treaty and Equal Pay Directive. This discrepancy is likely to be seen most clearly in cases in which claimants arguing alternative equal pay claims or bringing claims for both contractual and non-contractual entitlements, who may find the two claims founded in the same facts and sharing a comparator subject to different procedural regimes. One answer may be that tribunals will use their new-found general case management powers to bring claims for equal pay under SDA 1975 in line with equal pay regulations as far as possible, with regard to the overriding objective

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STEPS FOR EMPLOYEES

- Use the now-compulsory grievance process.
- Make use of the questionnaire procedure to request information relating to potential comparators' duties and salaries and benefits. Ask for information relating to non-comparators if it may defeat the employer's material factor defence. Always follow up with requests for written answers if the employer resists disclosure, preferably before the stage one hearing to avoid an attempt to strike out your claim.
- When pleading your equal value case, name your comparators. Be aware at this stage of your right to interview them should an expert not be appointed. Be prepared to explain your list of comparators if the case is pleaded after receipt of the response to the questionnaire. Do you not accept some of the respondent's answer. If not, why not?
- Do make applications to the tribunal—it's expected and ordinarily necessary because of the burden of proof. Do not be caught by the mistake of timing (see *Merrill Lynch*, above). However, make sure that the applications are carefully framed and not so wide ranging as to undermine your stronger arguments.
- When considering whether or not to make representations as to the use of an expert, consider whether the case is simple enough to avoid this. The use of an expert is always time-consuming, and will prolong the final stage of the hearing.