

Equality Commission

FOR NORTHERN IRELAND

CODE OF PRACTICE ON EQUAL PAY



ISBN 978-1-906414-33-7

The Code of Practice came into effect by order of appointment by the Office of the First Minister and deputy First Minister on July 22 2013.

Equality Commission

FOR NORTHERN IRELAND

CODE OF PRACTICE ON EQUAL PAY

This Code is based on the law as at June 2013,
and may therefore be subject to change.

INTRODUCTION	4
The gender pay gap	4
Discrimination in pay	4
About the Code	5
SECTION ONE: Equal Pay Law	6
1 Background	6
European law	6
Domestic law	6
The Equal Pay Act (NI) 1970	6
The Sex Discrimination (NI) Order 1976	7
Protection against victimisation	8
2 The scope of the Equal Pay Act	8
Employers	8
Employees	8
Same employment	9
The pay package	9
Comparators	9
3 Equal work	10
Like work	10
Work rated as equivalent	11
Work of equal value	11
4 Other equal pay law issues	12
Pregnant women and women on maternity leave	12
Equal pay and part-time work	12
Equal pay and occupational pension schemes	12
5 Raising the matter with the employer	13
Grievance procedure	13
The Equal Pay questionnaire	14
6 Responding to requests from an employee for information	14
Transparency	14
Confidentiality	15
The Data Protection Act	15
Disclosure of information to trade unions or employee representatives	15

7 Equal Pay litigation	15
The time limits for applying to an Industrial Tribunal	15
How the Tribunal assesses equal value	17
The employer's defences	17
The job evaluation defence	17
The 'genuine material factor' defence	18
Objective justification	20
Awards of equal pay	21

SECTION TWO: Good equal pay practice **22**

Introduction	22
The essential features of an equal pay review	22
Voluntary equal pay reviews	23
A model for carrying out an equal pay review	23
STEP 1: Deciding the scope of the review and identifying the data required	23
Include broader equality grounds in the review	24
STEP 2: Determining where men and women are doing equal work	24
STEP 3: Collecting pay data to identify equal pay gaps	25
STEP 4: Establishing the causes of any significant pay gaps and assessing the reasons for these	26
STEP 5: Developing an equal pay action plan and/or reviewing and monitoring	27

SECTION THREE: An equal pay policy **28**

The organisation's intentions in respect of equal pay	28
---	----

ANNEX A	
Model Policy on Equal Pay	30

ANNEX B	
Other legislation that may impact on pay	33

INTRODUCTION

1. The Equal Pay Act (NI) 1970, as amended, (the Equal Pay Act) gives women (and men) the right to equal pay for equal work. It makes sex discrimination unlawful in relation to contractual pay and benefits. An employer can only pay a man more than a woman for doing equal work if there is a genuine and material reason for doing so which is not related to sex.
2. The Act applies to both men and women but, to avoid repetition, the Code is written as though the claimant is a woman comparing her work and pay with those of a man. The Equal Pay Act specifically deals with the pay of women compared to men (or vice versa), and not with comparisons between people of the same sex. Therefore it cannot be used by a woman to compare her pay to that of another woman.

The Gender Pay Gap in Northern Ireland

3. Although statistics no longer show significant pay disparity for women compared to men overall, closer examination shows ‘a considerably gendered picture in the labour market, in education and in societal attitudes and behaviours.’¹ In 2011 female median earnings excluding overtime were 91% of male earnings.² The size of the gap varies between the private and public sectors and across industries. Moreover, gendered patterns of employment such as gender differences in occupation, part-time work, overtime and incentives also impact on the pay gap between men and women. By helping employers to check the pay gap in their organisation and by encouraging good equal pay practice, this Code reinforces the Government’s and Equality Commission’s commitment to equality between men’s and women’s pay.

Discrimination in pay

4. Depending on the particular circumstances, a number of other pieces of legislation can give rise to claims related to pay discrimination. They include the Sex Discrimination (NI) Order 1976, the Race Relations (NI) Order 1997, the Disability Discrimination Act 1995, the Pensions (NI) Order 1995, the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations (NI) 2000, and the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations (NI) 2002. Please see Annex B for details of legislation that may be relevant.

EXAMPLE

A female part-time cleaner, for example, could claim equal pay under the Equal Pay Act with a male part-time cleaner, but she could also claim under the Part-Time Workers Regulations that she was being treated less favourably than a female full-time cleaner.

¹ *Gender Pay Gap Measurement in Northern Ireland, a discussion paper* Alan McClelland, Office of the First and the Deputy First Minister, 2009.

² *Northern Ireland Annual Survey of Hours and Earnings 2011*, Department of Enterprise, Trade and Investment, November 2011.

5. These other pieces of legislation are dealt with in Annex B and employers should be aware of the need to pay particular attention to the situation of those protected by them.

About the Code of Practice on Equal Pay

6. The Equality Commission for Northern Ireland (the Commission) has issued this Code of Practice on Equal Pay (the Code) in order to provide practical guidance on how to avoid sex discrimination in pay structures. The Code is aimed at employers, but employees³ and their representatives or advisers – for example, from a trade union, or Citizens Advice Bureau – may also find it useful.
7. The Code is admissible in evidence in any proceedings under the Equal Pay Act, before the Industrial Tribunal (the Tribunal). This means that, while the Code is not binding, the Tribunal may take into account an employer's failure to follow its provisions.
8. It is in everyone's interest to avoid litigation, and the Code recommends equal pay reviews as the best way to ensure that a pay system delivers equal pay. Employers can avoid equal pay claims by regularly reviewing and monitoring their pay practices, in consultation with their workforce. Consultation is likely to increase understanding and acceptance of any changes required. Involving recognised trade unions or other employee representatives also helps to ensure that pay systems are transparent.
9. The Code includes, as good equal pay practice, a summary of the Commission's guidance on how to carry out an equal pay review. The full guidance is in the Commission's Equal Pay Review Kit⁴.
10. Whilst every effort has been made to ensure that the explanations given in the Code are accurate, only the Courts or Tribunals can give authoritative interpretations of the law.

³ For ease of communication the word 'employee' is used throughout this document, but it is not used as a legal term. 'Employee' should be read as referring to all people who work in an organisation. Paragraph 19 sets out the application of the Act.

⁴ Equal Pay Review Kit, Step by Step Guidance, Equality Commission for NI, 2003

SECTION ONE: Equal pay law

1 Background

European Law

- 11.** The principle that a woman is entitled to equal pay for equal work is set out in European Union and domestic legislation. The domestic Courts interpret the Equal Pay Act in accordance with European laws and the decisions of the European Court of Justice. A woman bringing an equal pay claim will usually do so under the domestic legislation, but in some circumstances she can claim under European law.
- 12. Article 157 of the Treaty on the Functioning of the European Union** (previously Article 141 of the EC Treaty) requires Member States to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. The **recast Equal Treatment Directive**⁵ explains the principle of equal pay, namely the elimination of sex discrimination in pay systems.
- 13.** Pensions are treated as pay under European law. Under domestic law, complaints relating to access to, and benefits from, pension schemes are pursued via reliance on Article 157, the Sex Discrimination (NI) Order 1976 or the Pensions (NI) Order 1995.

Domestic Law

The Equal Pay Act (NI) 1970⁶

- 14.** The Equal Pay Act entitles a woman doing equal work with a man in the same employment to equality in pay and terms and conditions. The meaning of 'same employment' is explained in paragraphs 25 and 26. The Act does so by giving her the right to equality in the terms of her contract of employment (or written statement of employment particulars). The man with whom she is claiming equal pay is known as her comparator.
- 15.** Equal work is work that is the same or broadly similar, work that has been rated as equivalent, or work that is of equal value (see paragraphs 32 - 42). A woman is not entitled to equal pay for equal work if the reason for the difference in pay is genuinely for a material reason, and which is not the difference of sex (see paragraphs 84 - 94).
- 16.** Claims for equal pay are usually taken to the Industrial Tribunal⁷. If a woman succeeds in a claim:
- Her pay must be raised to that of her male comparator.
 - Any beneficial term in the man's contract but not in hers must be inserted into her contract.

⁵ Recast Directive 2006/54/EC

⁶ The full text of the Act can be found at the UK Government legislation website at www.legislation.gov.uk

⁷ See paragraph 72 in relation to the potential to take equal pay cases in the civil courts.

- Any term in her contract that is less favourable than the same term in the man's contract must be made as good as it is in his.
- She may be awarded compensation consisting of arrears of pay.

17. The woman can compare any term in her contract with the equivalent term in her comparator's contract. This means that each element of the pay package has to be considered separately and it is not sufficient to compare total pay.

A woman can claim equal pay with a male comparator who earns a higher rate of basic pay than she does, even if other elements of her pay package are more favourable than his.

18. Once a woman establishes that she and her comparator are doing equal work, it is up to her employer to show that the explanation for the pay difference is genuinely due to a 'material factor' that is not tainted by sex discrimination. This defence is known as the 'genuine material factor' defence. For example, an employer may argue that the man is paid more because he is better qualified than the woman.

The Sex Discrimination (NI) Order 1976⁸

19. The Equal Pay Act applies to **contractual** pay or benefits. The Sex Discrimination (NI) Order 1976, as amended, (Sex Discrimination Order) covers **non-contractual** issues such as recruitment, training, promotion, dismissal and the allocation of benefits; for example, flexible working arrangements or access to a workplace nursery.
20. The Sex Discrimination Order complements the Equal Pay Act by covering **non-contractual pay** matters, such as promotion and discretionary bonuses. If a woman wishes to make a claim in respect of non-contractual or discretionary payments her claim will be made under the Sex Discrimination Order. If she considers that a term in a collective agreement or an employer's rule is discriminatory and may affect her, it can be challenged under the Equal Pay Act or the Sex Discrimination Order, depending on whether it is contractual or not. If there is any doubt as to which piece of legislation a payment falls under, legal advice should be sought.

EXAMPLE

A female sales manager is entitled under her contract of employment to an annual bonus calculated by reference to a specified number of sales. She discovers that a male sales manager working for the same employer and in the same office receives a higher bonus under his contract for the same number of sales. She would bring her claim under the equal pay provisions.

However, if the female sales manager is not paid a discretionary Christmas bonus that the male manager is paid, she could bring a claim under the sex discrimination provisions rather than an equal pay claim because it is not about a contractual term

⁸ The full text of the Order can be found at the UK Government legislation website at www.legislation.gov.uk

Protection against victimisation

21. The Sex Discrimination Order also protects employees from being victimised for making a complaint (unless it is both untrue and made in bad faith) about equal pay or sex discrimination, or for giving evidence or information about such a complaint. Victimisation because a woman intends to bring a claim is also unlawful. The 'complaint' does not have to be by way of lodging a claim with the Tribunal, but also includes any discussion or correspondence about the matter between the woman and her employer. The protection against victimisation also includes not only the woman bringing the claim, but also anyone who assists her, for example, her comparator and any trade union or employee representatives.

2 The scope of the Equal Pay Act

Employers

22. The Equal Pay Act applies to all employers irrespective of their size and whether they are in the public, private or third sector. How employers meet their obligations may vary in practice. Small employers are less likely to have a human resources team, and may have fewer written policies and more informal practices than large employers. They may also have less complex pay systems and may (though not necessarily) have narrower gender pay gaps. Public sector employers should be aware of their obligations under Section 75 of the Northern Ireland Act in relation to pay. Undertaking an equal pay review is an excellent method of complying with the Section 75 duty to pay due regard to the need to promote equality of opportunity between men and women.

Employees

23. The Equal Pay Act applies to:

- All employees (including apprentices and those working from home), whether on full-time, part-time, casual or temporary contracts, regardless of length of service.
- Other workers whose contracts require personal performance of the work, including office holders.
- Employment carried out wholly or mainly in Northern Ireland.
- Employment carried out on ships registered in Northern Ireland or on aircraft registered in the UK operated by someone based in Northern Ireland unless the employee works wholly outside Northern Ireland⁹.

24. The Equal Pay Act also applies to Armed Services personnel, but there is a requirement to first make a complaint to an officer under the relevant service redress procedures and submit a complaint to the Defence Council under those procedures, before presenting a claim to the Tribunal¹⁰.

⁹ Northern Ireland includes such of the territorial waters of the United Kingdom as are adjacent to Northern Ireland and certain areas designated in relation to employment in the offshore oil and gas industry.

¹⁰ Section 6A(5) of the Equal Pay Act, read in conjunction with the Service Redress Procedures

Same employment

- 25.** A woman can only claim equal pay with a man working:
- For the same employer at the same workplace;
 - For the same employer but at a different workplace where common terms and conditions apply, for example at another branch of a store;
 - For an associated employer; for example, at her employer's parent company.
- 26.** European law¹¹ allows a comparison to be made between employees who do not work for the same employer, but who are '*in the same establishment or service*'. Civil servants working for different Departments are an example. However, a comparison can only be made where the differences in pay are attributable to a 'common source' and there is a single body responsible for, and capable of, remedying the pay inequality. This may be, for example, where pay differences arise from a sector-wide collective agreement or from legislation.

The pay package

- 27.** The Equal Pay Act covers all aspects of the pay and benefits package, including:
- Basic pay.
 - Non-discretionary bonuses.
 - Overtime rates and allowances.
 - Performance related benefits.
 - Severance and redundancy pay.
 - Benefits under pension schemes.
 - Hours of work.
 - Company cars.
 - Sick pay.
 - Fringe benefits such as travel allowances.

Comparators

- 28.** A woman can claim equal pay for equal work with a man, or men, in the same employment¹². It is for the woman to select the man or men with whom she wishes to be compared. She can claim equal pay with more than one comparator, but to avoid repetition, the Code (and the law) is written as though there is only one comparator.
- 29.** The comparator can be:
- Someone with whom she is working at the present time, subject to the usual time limits (see paragraphs 71-72).
 - Her predecessor.
- 30.** The comparator does not have to consent to being named. If the woman's equal pay claim is successful, the result will be that her pay is raised to the same level as his¹³. There will not be any reduction in the comparator's pay and benefits.

¹¹ *Lawrence and others v Regent Office Care Ltd and others* [2003] ICR 1092, ECJ

¹² See paragraphs 25-26 for an explanation of 'same employment'.

¹³ Where a job evaluation scheme has been used to determine pay, and as a result the comparator receives pay protection (is red-circled), maintaining his pay above that determined by the scheme, the woman may be entitled to benefit from the pay protection. Legal advice should be sought.

31. There are a number of ways in which a woman may obtain the information used to select a comparator. These include:
- Her own knowledge and experience.
 - The internal grievance procedure (see paragraphs 57-58).
 - The equal pay questionnaire (see paragraphs 59-61).
 - Discovery/Disclosure (that is, documents). Once a woman has filed her claim with the Tribunal, provided that she has shown that her contractual terms are less favourable than those of male colleagues, she can apply for discovery/disclosure to enable her to name appropriate comparators.

3 Equal work

32. The comparator may be doing the *same* job as the woman, or he may be doing a *different* job. She can claim equal pay for equal work with a comparator doing work that is:
- The *same*, or broadly similar (known as **like work**).
 - *Different*, but which is rated under the same job evaluation scheme as equivalent to hers (known as **work rated as equivalent**).
 - *Different*, but of equal value in terms of demands such as effort, skill and decision-making (known as **work of equal value**).

Like work

33. Like work means the woman and her comparator are doing the same or broadly similar work. Job titles could be different, yet the work being done could be broadly similar. It is the nature of the work actually being done that needs to be considered.
34. Where differences exist, the Tribunal will look at the nature and extent of the differences, how frequently they occur, and whether they are of practical importance to the terms and conditions of the job. Like work comparisons that have succeeded, in the particular circumstances of the case, include:
- Male and female cleaners doing 'wet' and 'dry' cleaning in different locations on the same site.
 - A female cook preparing lunches for directors and a male chef cooking breakfast, lunch and tea for employees.

EXAMPLE

A woman working as a primary school administrator claimed equal pay with a male secondary school administrator. The courts found they were not doing like work. Although the work was broadly similar, the latter role carried greater financial and managerial responsibilities and was in a much larger school. The primary school administrator had more routine, term-time tasks while the secondary school administrator's work was year round and more strategic. These differences were considered to be of practical importance so the equal pay for like work claim failed.¹⁴

¹⁴ *Morgan v Middlesbrough Borough Council* [2005] EWCA Civ 1432

Work rated as equivalent

- 35.** Work rated as equivalent means that the jobs being done by the woman and her comparator have been assessed under the same analytical job evaluation scheme as being equivalent. This means they have been assessed as having the same number of points, or as falling within the same job evaluation grade. Job evaluation is a way of systematically assessing the relative value of different jobs.
- 36.** To be valid, a job evaluation study must:
- Encompass both the woman's job and her comparator's;
 - Be thorough in its analysis and capable of impartial application;
 - Take into account factors connected only with the requirements of the job rather than the person doing the job (so, for example, how well someone is doing the job is not relevant); and
 - Be analytical in assessing the component parts of particular jobs, rather than their overall content on a 'whole job' basis.
- 37.** A woman can compare herself to a man whose job has been rated at a lower value, but who receives more pay.
- 38.** Criteria against which jobs may be assessed include, for example, effort, skill or decision-making.

EXAMPLE

The work of an occupational health nurse might be rated as equivalent to that of a production supervisor when components of the job such as skill, responsibility and effort are assessed by a valid job evaluation scheme.

Work of equal value

- 39.** Work of equal value means that the jobs done by the woman and her comparator are different, but can be regarded as being of equal value or worth. This can be measured by comparing the jobs under headings such as effort, skill and decision-making.
- 40.** Comparing jobs on the basis of equal value means jobs that are entirely different in their nature can be used as the basis for equal pay claims. Job comparisons can be made both within a particular pay/grading structure and between different structures or departments, for example, in a printing firm, between a bindery and a press room. Equal value is likely to be relevant where men and women are in the same employment but do different types of work.
- 41.** Equal value comparisons that have succeeded in the particular circumstances of the case include:
- Cooks and carpenters;
 - Speech therapists and clinical psychologists;
 - Kitchen assistants and refuse workers.

42. A woman can claim equal pay under more than one heading. For example, a woman working as an administrator in a garage could claim 'like work' with a male administrator working alongside her and 'equal value' with a mechanic.

4 Other equal pay law issues

Pregnant women and women on maternity leave¹⁵

43. A woman should not receive lower pay or inferior contractual terms for a reason relating to her pregnancy. During both Ordinary and Additional maternity leave a woman's entitlement to receive her usual contractual remuneration (that is, salary or other benefits with a transferable cash value such as a car allowance or luncheon vouchers) stops unless her contract provides for maternity related pay¹⁶.
44. However she is entitled to any pay rise or contractual bonus payment awarded during her maternity leave period, or that would have been awarded had she not been on maternity leave.
45. Maternity-related pay means pay other than statutory maternity pay to which a woman is entitled as a result of being pregnant or being on maternity leave.
46. Any pay increase a woman receives, or would have received had she not been on maternity leave, must be taken into account in the calculation of her maternity-related pay.
47. Women must be paid any discretionary bonus which relates to the period of compulsory maternity leave¹⁷.

Equal pay and part-time work

48. A pay practice that treats part-time workers less favourably than comparable full-time workers is likely to be indirectly discriminatory against women, as more women than men work part-time. Unless an employer can objectively justify the pay differential or practice, it will be unlawful.¹⁸

Equal pay and occupational pension schemes

49. Occupational pension schemes are also subject to the equal pay for equal work principle¹⁹. A sex equality rule operates to ensure that comparable women and men are treated equally in both access to and benefits of an occupational pension scheme. If an occupational pension scheme, or a term of it, is less favourable to a woman than it is to a male comparator, then the term is modified so it is not less favourable.
50. The exclusion of part-time workers from an occupational pension scheme has been held to be indirectly discriminatory.²⁰ If the trustees or managers of the scheme can show that the difference in treatment is because of a material

15 The Employment Rights (NI) Order 1996 sets out the statutory entitlements to leave and pay in connection with the birth or adoption of children. Information for employers on maternity rights is available at www.nibusinessinfo.co.uk and for employees at www.nidirect.gov.uk.

16 *Gillespie and others v Northern Health and Social Services Board and others*, [1996] ICR 498, ECJ

17 Women are required to take two weeks' compulsory maternity leave (four weeks for those who work in factories).

18 Information on the Part-Time Worker Regulations can be found at Annex B.

19 Pensions (NI) Order 1995

20 *Preston & others v Wolverhampton Healthcare NHS Trust & others (No.3)* [2004] ICR 993

factor which is not the difference of sex, then the sex equality rule will not apply to that difference.

51. A rule that provides for men and women to draw their benefits from the scheme at different ages, or on satisfying different conditions, is not consistent with the sex equality rule. The rule would be overridden to require benefits to be provided at the more favourable age or on the person satisfying the conditions applicable to either men or women.
52. The terms on which benefits are provided to dependants of pension scheme members, and associated discretions, are also covered by the sex equality rule.
53. Where people of the same sex are treated differently according to their family, marital or civil partnership status, a woman must select a male comparator who has the same family, marital or civil partnership status.
54. A successful claim for **access** to an occupational pension scheme can result in the granting of retrospective access in respect of any period going back to 8 April 1976.
55. Equality in pension **benefits** can be claimed for service from 17 May 1990.
56. There is an exception to the sex equality rule that allows a difference in occupational pension contributions for women and men because of prescribed actuarial factors. The European Court of Justice (ECJ)²¹ found that an exemption contained in the Gender Directive, which allowed insurance premiums to be calculated using sex based actuarial and statistical data, was invalid. As a result, it has been removed from Northern Ireland legislation.²² Although not directly affected by this judgement, sex based actuarial factors in pension schemes could be treated in the same way by the ECJ should this issue come before it.

5 Raising the matter with the employer

Grievance procedure

57. Where an employee has a concern, problem or complaint about her pay, she should raise it with her employer through the organisation's grievance procedure.
58. Guidance on grievance procedures can be found in the Labour Relations Agency's statutory Code of Practice on Discipline and Grievance Procedures.²³ Unreasonable failure by either party to follow the Labour Relations Agency's Code can be taken into account by an employment tribunal in the course of an equal pay case. The tribunal can financially penalise either party for the failure.

21 *Association Belge de Consommateurs Test-Achats ASBL and others, Case C-236/09*

22 Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2012

23 April 2011, <http://www.lra.org.uk/>

The Equal Pay questionnaire²⁴

- 59.** A woman is entitled to write to her employer asking for information that will help her establish whether she has received equal pay and, if not, what the reasons are for the pay difference.
- 60.** There is a standard form which can be used to do this – the Equal Pay questionnaire. The questionnaire can establish whether the woman is receiving equal pay. She can send the questionnaire to her employer either before she lodges her claim with the Tribunal or within 21 days of doing so. Copies of the questionnaire can be obtained from the Commission, and online from the Office of the First Minister and Deputy First Minister’s website²⁵.
- 61.** If a woman takes a case to the Tribunal, the employer’s replies to the questionnaire should simplify the proceedings because the key facts will have been identified in advance. If the employer fails, without reasonable excuse, to reply within eight weeks, or responds with an evasive or equivocal reply, the Tribunal may take this into account at the hearing. It may then draw an inference unfavourable to the employer, for example, that the employer has no genuine reason for the difference in pay.

6 Responding to requests from an employee for information

Transparency

- 62.** Transparency means that pay and benefit systems should be understood by everyone (employers, employees and their trade unions). Employees should understand how each element of their pay packet contributes to total earnings in a pay period.
- 63.** An employer should keep records that will allow him or her to explain why he or she did something, showing clearly what factors he or she relied on at the time that the decision on pay was made. As employees may bring complaints or make enquiries about pay decisions which were taken many years previously, employers should keep records that will help them to explain why pay decisions were made.
- 64.** Where the pay structure is not transparent and a woman is able to show some indication of sex discrimination in her pay, the employer carries the burden of proving that the pay system does not discriminate.²⁶
- 65.** When responding either to a grievance or to a statutory questionnaire, employers need to:
- Decide whether or not they agree that the woman and her comparator are doing equal work and, if not, they should explain in what way the work is not equal.
 - Consider the reasons for any difference in pay / benefits or other contractual terms and whether (if necessary) these can be objectively justified.
 - Explain the reasons for the difference.

²⁴ www.ofmdfmi.gov.uk/equalpay.pdf

²⁵ www.ofmdfmi.gov.uk/equalpay.pdf

²⁶ *Handels og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening [1991] ICR 74*

Confidentiality

66. The principle of transparency set out above does not mean that an individual has the automatic right to know what another individual earns. It means that a woman has the right to know how the calculations are made, not the content of the calculation. Employers should balance the ideal of transparency with the rights of individual privacy. The equal pay questionnaire cannot be used to require an employer to disclose confidential information, unless the Tribunal orders them to do so.
67. A woman can use the questionnaire to request key information and it is likely that, in many cases, an employer will be able to answer detailed questions in general terms, while still preserving the anonymity and confidentiality of employees.

The Data Protection Act

68. Much of the information requested through a grievance or questionnaire will not be confidential but some information, such as the exact details of a comparator's pay package, may be. Personal data is protected by the Data Protection Act 1998 and can only be disclosed in accordance with data protection principles²⁷. Pay records will usually be personal data and covered by the Act. The disclosure of confidential information in the employment context is also protected by the implied duty of trust and confidence owed by an employer to an employee. If in doubt about the response, an employer should seek specific advice from the Information Commissioner²⁸ and/or take legal advice.

Disclosure of information to trade unions or employee representatives

69. Under the Industrial Relations (NI) Order 1992²⁹ an employer has a duty, on request, to disclose to a recognised trade union, information to enable constructive collective bargaining. Information about pay and terms and conditions of employment usually comes within the duty to disclose, but it is important to note that the duty applies only to information for collective bargaining.
70. It is also good practice for employers who do not recognise trade unions to communicate regularly with their workforce and, where appropriate, their representatives.

7 Equal Pay litigation

The time limits for applying to an Industrial Tribunal

71. If a woman wishes to lodge a claim with the Tribunal she must do so within the prescribed time limits. **It is her responsibility to ensure that she does so.**

²⁷ Schedule 1, Data Protection Act 1998.

²⁸ Guidance can be found in the Data Protection Technical Guidance Notes: "Dealing with Subject Access Requests Involving Other People's Information", and "Subject Access Requests and Legal Proceedings" at www.ico.gov.uk

²⁹ Article 39, Industrial Relations (NI) Order 1992.

- 72.** The Equal Pay Act and the Sex Discrimination Order have different time limits.
- Claims under the Equal Pay Act can be taken at any time up to six months after leaving employment with the employer (as opposed to leaving the particular post about which the equal pay claim is made, but remaining in the same employment).
 - Where an employee has been employed on a series of temporary contracts, the six month time limit runs from the end of the relationship where they can demonstrate a stable relationship³⁰ or from the end of each contract where they cannot. This is a question of fact for the Tribunal.
 - The time limit can be extended only where the employer deliberately conceals the existence of pay inequality from the complainant, or the complainant is a minor or of unsound mind.³¹
 - In contracting out situations the time limit runs from the date of the contracting out in respect of periods of service up to that date.
 - Most cases will be brought before Industrial Tribunals, however, as equal pay is a contractual claim, it is also possible for an individual to take proceedings in the **civil courts**. The time limit for such cases is six years after the employment relationship comes to an end.³²
 - Claims under the Sex Discrimination Order can be taken within three months of the alleged act of discrimination, subject to the Tribunal's discretion to extend the time limit where it is just and equitable to do so.
 - As a result of the requirement on Armed Services personnel to use the relevant Service Redress Procedure referred to in paragraph 24, different rules apply. In the case of the Equal Pay Act, the time limit is nine months from the end of the period of service, and in the case of the Sex Discrimination Order, the time limit is six months from the date of the act complained of.
- 73.** The Tribunal has to assess the evidence about:
- The work done by the woman and her comparator.
 - The value placed on the work (sometimes with the advice of an Independent Expert³³), in terms of the demands of the jobs.
 - The pay of the woman and her comparator and how it is arrived at.
 - The reasons for the difference in pay.
- 74.** In *like work* and *work rated as equivalent* claims the procedure is the same as in any other employment case. There are special Tribunal procedures for *work of equal value* claims.³⁴

30 Section 2ZA Equal Pay Act (NI) 1970

31 Section 2ZA Equal Pay Act (NI) 1970

32 *Abdulla and others v Birmingham City Council* [2012] UKSC 47

33 From a list held by the Labour Relations Agency

34 These are to be found at Schedule 3 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005 (SI2005/150) and at Section 2A of the Equal Pay Act (NI) itself.

How the Tribunal assesses equal value

- 75.** The concept of equal pay for work of equal value means that a woman can claim equal pay with a man doing a completely different job. In comparing such jobs the Tribunal considers the demands on the jobholders, and the skills required of them are assessed using objective criteria. The Tribunal may also appoint an Independent Expert to assess the value of the jobs. The Tribunal-appointed Independent Expert may make a detailed study of an employer's pay system and the employer would be required to co-operate with any such exercise.
- 76.** Employers should be aware that they, and the woman bringing the claim, may also appoint someone with equal pay expertise to act as an expert on their behalf. It is important when dealing with experts to be clear who is the Independent Expert appointed by the Tribunal and who is acting for the parties to the claim.

The employer's defences

- 77.** The possible defences against an equal pay claim are as follows:
- The woman and the man are not doing equal work.
 - For equal value claims only - the jobs being done by the woman and the man have been evaluated and rated differently under an analytical job evaluation scheme that is free of sex bias. An analytical job evaluation scheme evaluates jobs according to the demands made on the jobholders. The difference in pay is genuinely due to a material factor, which is not the difference of sex.

The job evaluation defence

- 78.** Where employers use analytical job evaluation schemes they need to check that the scheme has been designed and implemented in such a way that it does not discriminate on grounds of sex.
- 79.** A job evaluation scheme will be discriminatory if:
- It fails to include, or properly take into account, a factor, or job demand, that is an important element in the woman's job (such as caring demands in a job involving looking after elderly people), or,
 - it gives an unjustifiably heavy weighting to factors that are more typical of the man's job (such as the physical demands of being employed as a gardener).
- 80.** A woman may also challenge a job evaluation scheme if 'mental concentration' (in her job) is awarded fewer points than 'physical effort' (in her comparator's job). She may argue it should have received the same or more points. She may also complain that 'physical effort' (in his job) has been overrated compared with the skill her job requires for 'manual dexterity'.
- 81.** Where she has received the same or more points than a man for a particular factor, she may argue that the demands of her job have been underrated, and the difference in points should have been bigger.

- 82.** The Commission has produced a guidance note recommending that matters, such as the following, should be considered as a matter of good practice. In order to check that a scheme is non-discriminatory, an employer needs to look at matters such as:
- Whether statistics recorded on pay are broken down by gender.
 - Whether the scheme is appropriate to the jobs it will cover.
 - If a proprietary scheme is used does the supplier have equal opportunities guidelines?
 - If any groups of workers are excluded from the scheme, are there clear and justifiable reasons for their exclusion?
 - Is the composition of the job evaluation panel/steering committee representative of the jobs covered by the scheme and are the members trained in job evaluation and avoiding sex bias?
 - Are the job descriptions written to an agreed format and assessed to a common standard?
 - Are trained job analysts used and have the jobholders been involved in writing their own job descriptions?
 - Where the scheme uses generic/bench mark jobs are these free from sex bias?
 - Are the factor definitions and levels exact and are detailed descriptions provided for each factor? Do the factors cover **all** the important job demands?
 - If a job evaluation scheme is to remain free of sex bias it should be monitored. The employer (and not the job evaluation supplier or consultant) will need to show that the scheme is non-discriminatory.
- 83.** Employers also need to check the outcomes of the job evaluation for sex bias. This means checking how many women and how many men have moved up or down the grades. Any ensuing pay protection (red-circling) is potentially discriminatory, as it extends the period of pay disparity. Legal advice should be sought when pay protection is contemplated.

The 'genuine material factor' defence

- 84.** The Tribunal tests for sex discrimination by:
- Establishing a difference in pay or terms between the woman bringing the claim and a man doing equal work.
 - Asking whether the difference is due to discrimination or some other factor that does not amount to sex discrimination.
- 85.** This means that an employer can pay a man more than a woman for doing equal work, but only if the reason for doing so is not related to the sex of the jobholders.
- 86.** The employer has to show that the factor, or factors, relied upon is free from both direct and indirect sex discrimination:

Direct sex discrimination occurs when the difference in pay or terms is directly related to the difference of sex.

EXAMPLE

Male maintenance workers in a bank were paid more than female administrators because the bank had always regarded and rewarded men as family breadwinners. This is directly discriminatory and cannot be justified.

Indirect sex discrimination, in relation to pay arises where, although performing equal work:

- A requirement, provision or condition adversely impacts on women; or
- although the reason for the difference is unclear, men statistically earn more than women. In such a situation, a large pool of employees has to be compared and the statistical difference has to be substantial; or
- a factor, such as a bonus, is applied to the predominantly male group, but is not offered to the predominantly female group.

Where the evidence indicates that there may be indirect discrimination, the employer must objectively justify it. Further information on objective justification can be found at paragraphs 91 to 94.

EXAMPLE

Women employed as carers by a local authority, whose work was rated as equivalent to men employed as street cleaners and gardeners, were paid at a lower rate. The difference was due to a productivity bonus scheme which did not apply to carers, who were predominantly women. As the scheme had a disproportionately adverse effect on the women, the employer would have to provide objective justification for it. That is, they would need to prove that it is a proportionate means to achieve a legitimate end.

87. Where a material factor applies at a particular point in time but subsequently ceases to apply, it will no longer provide a defence to differences in contractual terms.³⁵ Red circling is an example of this.

EXAMPLE

A process to phase out historical disparity in pay and benefits between men and women, which involves a period of pay protection for men to cushion the impact on them of the new arrangements, has the long-term objective of reducing inequality between the sexes. This is a legitimate aim. However, the employer will have to prove on the facts of the case that the approach to achieving that aim is proportionate. It may be difficult to prove that protecting the men's higher pay for any length of time is a proportionate means of achieving the aim where the reason for the original pay disparity is sex discrimination.³⁶

³⁵ *Benveniste v University of Southampton* [1989] IRLR 123 CA

³⁶ *Redcar and Cleveland Borough Council v Bainbridge and others* [2008] EWCA Civ 885

88. Whether a defence succeeds or fails will always depend on the circumstances of the case and there is no such thing as an automatic or blanket defence. The defences that are likely to succeed include allowances such as night-shift payments. Factors such as different market rates of pay for different specialisms or different levels of skills and experience have been successful in some cases but not in others.
89. The factor put forward to explain the difference in pay has to be significant. It has to be the real reason for the difference and it must not be connected with the sex of the people doing the job.
90. For example, if the employer pays the comparator more than the woman bringing the claim because people will not do the work for a lower rate of pay, they would have to bring evidence of actual difficulties in recruiting and retaining people.

Objective justification

91. Indirect discrimination may arise in equal value claims where one of the jobs is done by a much higher proportion of women than the other job. The onus lies on the employee to provide evidence of significant disparate impact.
92. In such a case, if the Tribunal accepts that the jobs are of equal value, the employer will need to provide objective justification for the pay difference. This is a higher standard of justification than that of the material factor defence.
93. Objective justification is proven where, although women are adversely affected, the difference exists to achieve a legitimate objective. The method used to achieve that objective must be appropriate and necessary.
94. An example of objective justification is a pay system that makes an additional payment to employees working unsocial hours, in which most of the employees getting the bonus are men. Here the employer would have to show that:
 - There is a real business need to encourage a particular group of employees to work unsociable hours, and
 - the additional payments meet that need, and
 - the payments are an effective way of meeting that need, and do not go beyond what is necessary to achieve it. That is without the payment, the extra work would not be done, and the payment is only made when the workers actually do the work.

EXAMPLE

If an employer can show that the only way to ensure adequate staffing of unsocial hours shifts is to pay a shift premium, then even if there is evidence that more men than women work those shifts and receive the extra payments, the material factor defence may succeed.

Awards of equal pay

- 95.** If the woman succeeds in her claim she is entitled to:
- An order from the Tribunal declaring her rights;
 - Equalisation of contractual terms for the future (if she is still in employment);
 - Compensation consisting of arrears of pay.
- 96.** Back pay can be awarded up to a maximum of six years from the date that proceedings were lodged with the Tribunal. Special rules apply where the woman is disabled³⁷ or the employer has concealed a breach of the Equal Pay Act. In addition, the Tribunal may award interest on the award of compensation. With up to six years' worth of back pay being awarded, the interest element of any award may be considerable.
- 97.** Awards for injury to feelings cannot be made.

³⁷ In the Equal Pay Act, disability refers to a minor or a person of unsound mind within the meaning of the Limitation (NI) Order 1989.

SECTION TWO: Good equal pay practice

Introduction

98. The loss to women arising out of the gender pay gap is well documented³⁸, but organisations also lose out by failing to properly reward the range of skills and experience that women bring to the workforce. The most commonly recognised risk of failing to ensure that pay is determined without sex discrimination is equal pay cases being taken against the organisation. The direct costs of a claim can include not only any eventual equal pay award to the woman bringing the claim (see paragraphs 95 to 96) but also the costs of time spent at a hearing, and the costs of legal representation.

The indirect costs are harder to quantify, but include lower productivity on the part of those employees who consider that they are not getting equal pay and on the part of managers whose time is taken up in dealing with the claim. Reputational damage as a result of litigation may also prove costly.

99. Tackling the gender pay gap reduces the risk of litigation. It can also increase efficiency by attracting the best employees, reducing staff turnover, increasing commitment, and reducing absenteeism. Pay is one of the key factors affecting motivation and relationships at work. It is therefore important to develop pay arrangements that are right for the organisation and that reward employees fairly. Providing equal pay for equal work is central to the concept of rewarding people fairly for what they do.

The essential features of an equal pay review

100. Employers are responsible for providing equal pay and for ensuring that pay systems are transparent. Pay arrangements are frequently complicated and the features that can give rise to sex discrimination are not always obvious. A structured pay system is more likely to provide equal pay and is easier to check than a system that relies primarily on managerial discretion. The Labour Relations Agency provides basic advice on the various different types of pay systems and on job evaluation.

101. The advice given in paragraphs 62 to 70 on transparency and confidentiality are also relevant to equal pay reviews. If in doubt, an employer should seek specific advice from the Information Commissioner and/or take legal advice.

102. While employers are not required, by law, to carry out an equal pay review, this Code recommends equal pay reviews as the most appropriate method of ensuring that a pay system delivers equal pay free from sex bias. Whatever kind of equal pay review process is used, it should include:

- Comparing the pay of men and women doing equal work. Here employers need to check for one or more of the following: like work; work rated as

38 The Northern Ireland Annual Survey of Hours and Earnings 2011, Department of Enterprise, Trade and Investment, November 2011 found that female median earnings excluding overtime were 91% of male earnings.

equivalent; work of equal value. ***These checks are the foundation of an equal pay review.***

- Identifying any equal pay gaps.
- Eliminating those pay gaps that cannot satisfactorily be explained on grounds other than sex.

These features are the same whatever the size of the organisation and they are essential. **A pay review process that does not include these features cannot claim to be an equal pay review.** Moreover, an equal pay review is not simply a data collection exercise. It entails a commitment to put right any sex based pay inequalities and this means that the review must have the involvement and support of managers with the authority to deliver the necessary changes.

- 103.** The validity of the review and success of subsequent action taken will be enhanced if the pay system is understood and accepted by the managers who operate the system, by the employees and by their trade unions. Employers should therefore aim to secure the involvement of employees and, where possible, trade union representatives, when carrying out an equal pay review, bearing in mind its legal duties under the Data Protection Act.

Voluntary equal pay reviews

A model for carrying out an equal pay review

- 104.** The Commission recommends a five-step equal pay review model:

- STEP 1:** Deciding the scope of the review and identifying the data required.
- STEP 2:** Determining where men and women are doing equal work.
- STEP 3:** Collecting pay data to identify equal pay gaps.
- STEP 4:** Establishing the causes of any significant pay gaps and assessing the reasons for these.
- STEP 5:** Developing an equal pay action plan and/or reviewing and monitoring.

The Equal Pay Review Kit sets out the detail of the model recommended here and provides supporting guidance notes.

STEP 1: Deciding the scope of the review and identifying the data required

- 105.** In scoping the review employers need to decide:
- Which employees are going to be included? It is advisable to include all employees who are deemed to be in the same establishment or service (see paragraphs 25 and 26).
 - What information will be needed? Employers will need to collect and compare broad types of information about all the various elements of pay, including pensions and other benefits; the personal characteristics of each employee, that is, gender; full-time or part-time; qualifications relevant to the job; hours worked and when and where they work these; length of service; role and time in grade and performance related pay ratings³⁹.

³⁹ The Equality Commission Equal Pay Review Kit Guidance Note 2: Data required for pay reviews, provides detailed guidance on the information required to carry out an equal pay review.

- It is particularly important to ensure that information is collected about part-time, temporary and casual employees. The information will vary depending upon the type of organisation, its pay policies and practices and the scope of the review.
- Who should be involved in carrying out the review? An equal pay review requires different types of input from people with different perspectives. There will be a need for knowledge and understanding of the pay and grading arrangements; of any job evaluation schemes; and of the payroll and human resource systems. It can also be helpful to have someone with an understanding of equality issues, particularly the effects of indirect discrimination in pay systems.
- When to involve the workforce? Employers need to consider when to involve the trade unions or other employee representatives.
- Is expert advice needed? Employers may also wish to consider whether to bring in outside expertise. The Labour Relations Agency can provide practical, independent and impartial advice on the employee relations aspects of equal pay reviews.

Include broader equality grounds in the review

106. This Code is concerned with an important, but narrow, aspect of sex discrimination in employment – the pay of women compared to men doing equal work (or vice versa). It does not deal with comparisons on the grounds of, for example, religion, disability or ethnicity. However, employers need to ensure that there is no discrimination in pay on other statutory equality grounds (race, religious belief/political opinion, disability, age, sexual orientation). As a matter of good practice, therefore, they may also want to look at broader equality grounds. Before deciding to do so it may be helpful to consider the quality of the information available to the employer, and whether it is adequate for the purposes of carrying out a wider review. To ensure the relevant provisions of anti-discrimination legislation are taken into account, it would be appropriate to seek advice from the Commission.

107. Public authorities, designated under Section 75 of the Northern Ireland Act 1998, are required to have due regard to the need to promote equality of opportunity across the Section 75 equality grounds.⁴⁰ This includes the performance of their duties as employers and, therefore, pay and benefits. This means that in developing pay reviews, such authorities should consider not only gender, but all statutory equality grounds. The Equality Commission can provide further advice.

STEP 2: Determining where men and women are doing equal work

108. In Step 2 employers need to check whether men and women are performing: like work; work rated as equivalent; or work of equal value.

These checks determine where men and women are doing equal work. They are the foundation of an equal pay review.

⁴⁰ Under Section 75 of this Act, public authorities are required to have due regard to the need to promote equality of opportunity between: persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; men and women generally; persons with a disability and persons without; and persons with dependants and persons without. Public authorities are also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

EXAMPLE⁴¹

– determining where men and women are doing equal work

Human Resources and the unions met to agree which areas to examine. According to the HR manager, ‘we already had an idea of where the discrepancies were’. Data collection was on the basis of figures from: the personnel database, the pay database, the performance pay database and the starters and leavers database. A small local consultancy had helped to introduce a new job evaluation scheme; however, the basis for making equal work comparisons was predominantly by existing grade. The organisation looked at global differences, differences by grade and differences by components of pay (basic pay, overtime and allowances).

- 109.** Employers who do not have analytical job evaluation schemes designed with equal value in mind will need to find an alternative means of estimating whether men and women are doing equal work. The Equal Pay Review Kit includes suggestions as to how this can be done.⁴² Employers who do use analytical job evaluation schemes need to check that their scheme has been designed and implemented in such a way, and at all times, so as not to discriminate on grounds of sex.⁴³

STEP 3: Collecting pay data to identify equal pay gaps

- 110.** In Step 3 employers need to collect and compare pay information for men and women doing equal work by:
- Calculating average basic pay and total earnings;
 - Comparing access to and amounts received of each element of the pay package. To ensure comparisons are consistent, when calculating average basic pay and average total earnings for men and women separately, employers should do this either on an hourly basis or on a full-time salary basis (grossing up or down for those who work fewer, or more, hours – excluding overtime – per week than the norm).
- 111.** Employers then need to review the pay comparisons to identify any gender pay gaps and decide if any are significant enough to warrant further investigation. It is advisable to record all the significant or patterned pay gaps that have been identified.

⁴¹ Case study taken from *Monitoring Progress Towards Pay Equality*, Neathey, Dench & Thomson, Institute for Employment Studies, EOC 2003

⁴² The Equal Pay Review Kit Guidance Note 5: Estimating equal value

⁴³ The Equal Pay Review Kit Guidance Note 4: Job evaluation schemes free of sex bias

EXAMPLE⁴⁴

– data collection and analysis

The organisation had a well-established process for undertaking equal pay audits. Data were brought together and presented in tabular form by the data analysis section of the human resources department. The data were then reviewed, analysed and commented on by the head of employee relations, who shared the data with trade union representatives. Union and management worked together to develop action points arising from the data.

STEP 4: Establishing the causes of any significant pay gaps and assessing the reasons for these

112. In Step 4 employers need to:

- Find out if there is a genuine and material reason for the difference in pay that has nothing to do with the sex of the jobholders.
- Examine their pay systems to find out which pay policies and practices are contributing to any gender pay gaps.
- Bear in mind that in small and medium-sized organisations, pay statistics may be misleading due to relatively low numbers of staff at each grade.

EXAMPLE⁴⁵

– finding out which policies and practices are contributing to the gender pay gap

The review showed a 23 per cent gap in the average basic pay of men and women across the organisation. In grades with a large enough number of staff to make a comparison, 50 per cent had variances of five per cent or greater in favour of either men or women. Starting pay was not found to be an issue, nor was performance pay. A key area of concern identified by the review was premium payments for working unsocial hours. These were paid at the rate of 20 per cent of basic salary to some grades. However, in 1998 these payments were restricted to existing staff. The period since 1998 had seen an increase in the number of female recruits into what were traditionally male areas. Due to the change in the rules they were not eligible for the premium payments. The result was that, overall in the eligible grades, men received on average two and a half times the amount of earnings from premium pay that women received.

113. Pay systems vary considerably. Pay systems that group jobs into pay grades or bands have traditionally treated jobs in the same grade or band as being of broadly equal value, either because they have been evaluated with similar scores under a job evaluation scheme, or because they are simply regarded as equivalent. However, recent years have seen a trend towards structures with fewer, broader grades or bands and greater use of performance pay and market factors. A single broad band or grade may contain jobs or roles of significantly different value because it encompasses a wide range of job evaluation scores. This, coupled with a wider use of other determinants of pay and more complex methods of pay progression,

44 Case study taken from *Monitoring Progress Towards Pay Equality*, Neathey, Dench & Thomson, Institute for Employment Studies, EOC 2003

45 Case study, in amended form, taken from *Monitoring Progress Towards Pay Equality*, Neathey, Dench & Thomson, Institute for Employment Studies, EOC 2003

means that it is important for employers to check all aspects of the pay system from a variety of standpoints: design, implementation, and impact on men and women.⁴⁶

STEP 5: Developing an equal pay action plan and/or reviewing and monitoring

114. Where the reason for the pay difference is connected with sex, employers will need to provide equal pay for current and future employees. In cases of indirect discrimination, the employer may be able to objectively justify the difference (see paragraphs 91 to 94).

115. Employers who find no gaps between men's and women's pay, or who find gaps for which there are genuinely non-discriminatory reasons, should nevertheless keep their pay systems under review by introducing regular monitoring undertaken jointly with trade unions. This will ensure that the pay system remains free of sex bias.

116. A useful way of planning and taking practical action is for employers to develop an Employment Equality Plan. This is essentially an action plan that complements an Equal Opportunities and/or Equal Pay Policy and assists in the implementation of the commitments described in them and provides a framework for taking positive or affirmative action. An Employment Equality Plan is designed to provide an employer with a practical framework to assess his or her current employment policies across all, or any, of the statutory equality grounds; to identify shortcomings in policies and practices; and to develop further action plans for taking further action to promote equality of opportunity.⁴⁷

EXAMPLE⁴⁸

– developing an action plan

Following the review, an Action Plan looking at internal processes was developed. This is ongoing and is reviewed through partnership processes. The aim is to integrate equal pay issues into employee relations work. Early action has been in relation to internal recruitment processes. This included looking at whether people were encouraged (or not) to apply for particular jobs. This lack of recognition of potential opportunities was closing off progression routes to some groups, and impacting on the organisational gender pay gap. The organisation also found that it had a body of staff (mainly women) that did not seek promotion. A challenge for the organisation was to encourage more women to aim for promotion. The remuneration manager anticipated that the gender pay gap in the main staff would fall from the 13 per cent identified in the pay review to under five per cent over the following five years. A recent repeat of the review had already shown a fall, however, the decline in the gap might not always be maintained. This is because the company's pay system is highly market sensitive and a tightening of the labour market in areas in which men are in the majority (such as Information Technology) would have a negative impact on the downward trend.

⁴⁶ The Equal Pay Review Kit Guidance Note 6: Reviewing your payment systems, policies and practices

⁴⁷ Further information and advice on developing an Employment Equality Plan is available from the Equality Commission

⁴⁸ Case study taken from *Monitoring Progress Towards Pay Equality*, Neathey, Dench & Thomson, Institute for Employment Studies, EOC 2003

SECTION THREE: An equal pay policy

The organisation's intentions in respect of equal pay

- 117.** It is good equal pay practice to provide employees with a clear statement of the organisation's intentions in respect of equal pay. Evidence of an equal pay policy may assist an employer's defence against an equal pay claim.
- 118.** It is extremely important for employers, their workforces and their respective workforces' trade union(s) to jointly participate in the development of the equal pay policy. This can be achieved through effective consultation when the policy is being developed.
- 119.** It is recommended that an equal pay policy should:
- Commit the organisation to carry out an equal pay review and to monitor pay regularly in partnership with trade union/employee representatives;
 - Set objectives;
 - Identify the action to be taken;
 - Implement that action in a planned programme in partnership with the workforce;
 - Assign responsibility and accountability for the policy to a senior manager;
 - Commit the organisation to set aside the resources necessary to achieve equal pay.
- 120.** Everyone involved in setting the pay of staff should be committed to and, if possible, trained in the identification of sex discrimination in the pay process.
- 121.** The Equality Commission has produced a model equal pay policy which may be found at Annex A.



Annex A

Model Policy on Equal Pay

This organisation supports the principle of equality of opportunity in employment and believes that, as part of that principle, pay should be awarded fairly and equitably. We believe that it is both good practice and in the organisation's best interests to have a pay system which is fair and non-discriminatory.

We recognise that in order to achieve equal pay for employees doing equal work we should operate a pay system which is transparent, based on objective criteria and free from sex bias.

Legislative framework

The right to equal pay for equal work for men and women is a fundamental principle of European Community law and is a legal right under domestic law.

The relevant European and domestic legislation is:

- Article 157 of the Treaty on the Functioning of the European Union,
 - Recast Equal Treatment Directive 2006/54/EC,
- and
- Equal Pay Act (NI) 1970,
 - Sex Discrimination (NI) Order 1976,
 - Pensions (NI) Order 1995.

Definitions

Pay: For the purpose of this policy, 'pay' is the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which an employee receives, directly or indirectly, in respect of his or her employment. It therefore includes bonuses, access to overtime, holidays, sick pay, pensions and other additional benefits.

Equal work means *like work* or *work rated as equivalent* or *work of equal value*.

Like work is work which is the same or broadly similar.

Work rated as equivalent is work which has been rated as equivalent under an accredited job evaluation scheme which is non-discriminatory.

Work of equal value is work which is of broadly equal value or worth in terms of the demands of the job when compared according to criteria such as skill, decision-making and physical effort.

Implementation

In order to put our commitment to equal pay into practice we intend to:

- carry out an equal pay review as a starting point for identifying any inequalities;
- examine our existing pay practices not only for current staff but also for new employees including those in non-standard employment (on part-time, fixed-term, term-time only or weekly-paid contracts), and those who are absent on pregnancy or maternity leave, career-breaks, sick-leave or any other form of paid and unpaid leave;
- take into account the entire pay package - basic pay, bonuses, performance pay, starting pay, sick pay, overtime rates, allowances and benefits (including pensions) - as well as the impact of promotion schemes, grading and incremental progression;
- formulate a plan of appropriate remedial action, in partnership with trade union or other employee representatives, to implement any changes to existing practices.
- inform employees at each stage of the process how any new practices will work and how their own pay is determined;
- respond to any enquiries or grievances (according to our grievance procedure) arising as a result of our policy or practices;
- carry out periodic monitoring of the impact of our practices by undertaking pay audits and monitoring any complaints;
- provide training and guidance for managers and supervisory staff involved in decisions about pay and benefits.

We intend, through this action, to avoid unfair discrimination and eliminate any unjust or unlawful practices that impact on pay. We mean to reward fairly the skills, experience and potential of all staff, thereby increasing efficiency, productivity and competitiveness and enhancing the organisation's reputation and image.

Responsibilities

Responsibility for the implementation of this policy lies ultimately with the Chief Executive/Managing Director and the Board of Directors. The Human Resources Department (Salaries & Wages Section) is responsible for the day-to-day operation of the policy and undertaking the equal pay review. Section heads and those sitting on recruitment and selection and/or promotion panels also have a responsibility to ensure that starting salaries are set in a manner consistent with the policy.

Enquiries and complaints

We recognise that employees have the right to raise issues of concern or to complain about how they are treated in relation to pay, particularly if they feel that their treatment is unfair or discriminatory. Should anyone have an enquiry regarding their pay, they may raise the issue with the Salaries and Wages/ Human Resources Department. We have established an internal grievance procedure to deal with such complaints. These will be taken seriously and dealt with promptly, confidentially and impartially. A complainant may also submit questions using an Equal Pay Questionnaire

In addition to the company's internal procedures, employees have the right to pursue complaints of discrimination to an industrial tribunal. However, employees wishing to make a complaint to a tribunal will normally be required to raise the issue under the internal grievance procedure first. Employees who raise a complaint will be protected against victimisation. Any complaint of victimisation will be investigated and may, if upheld, result in disciplinary action which can include dismissal.

This policy has been discussed and agreed with the
trade union/s and employee/staff representatives.

Signed:

..... Managing Director/Chief Executive

..... Human Resources Manager

..... Employee/Trade Union Representative

Date:

Annex B

Other legislation that may impact on pay (in alphabetical order)

The full text of legislation can be downloaded at

www.legislation.gov.uk

The Agency Workers Regulations (NI) 2011 may entitle certain agency workers to the same pay as comparable permanent workers after a qualifying period.

The Convention on the Elimination of Discrimination of All Forms of Discrimination Against Women (CEDAW). This defines what constitutes discrimination against women, including in the field of employment, and sets up an agenda for national action to end such discrimination. It was adopted by the UN General Assembly in 1979, and was ratified by the UK in 1986. An individual complaint can only be made once all domestic remedies have been exhausted.

The Disability Discrimination Act 1995 requires employers not to discriminate against disabled employees. Discrimination, which includes discrimination in relation to pay, means treating a person less favourably for a reason related to his/her disability or failing to make a reasonable adjustment to a physical feature of premises or to working arrangements, which place the disabled employee at a substantial disadvantage.

Employment Equality (Age) Regulations (NI) 2006 require employers not to discriminate on grounds of age. The Equality Commission can provide advice on specific issues relating to age.

Employment Equality (Sexual Orientation) Regulations (NI) 2003 require employers not to discriminate on grounds of sexual orientation. The Equality Commission can provide advice on specific issues relating to sexual orientation.

The Employment Rights (NI) Order 1996 requires employers to issue a written statement of terms and conditions of employment. It also provides the framework for pay and leave entitlements for working parents of newborn and newly-adopted children.

The Fair Employment and Treatment (NI) Order 1998 requires employers not to discriminate on grounds of religious belief or political opinion. The Equality Commission can provide advice on specific issues relating to religious belief or political opinion.

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations (NI) 2002 give fixed-term employees the right to the same pay and terms and conditions of employment as permanent employees doing broadly similar work, unless their less favourable treatment can be objectively justified. An employee can make a comparison with employees of the same sex, but the range of comparators is more restrictive than under the Equal Pay Act; for example, a fixed-term employee cannot select a predecessor as a comparator,

nor can she/he make a comparison with someone working for an associated employer. The Fixed-term Employees Regulations do not apply to agency workers or apprentices. The Regulations adopt a 'package approach', whereby an employer can justify the difference in treatment by showing that the value of the fixed-term employee's package of terms and conditions is at least equal to that of the permanent employee. This approach is not permissible under the Equal Pay Act.

The Freedom of Information Act 2000 deals with access to official information and gives individuals and organisations the right to request information from any public authority.

Information and Consultation of Employees Regulations (NI) 2005 give employees the right to be informed about matters affecting the organisation's economic situation, to be informed and consulted about employment prospects and decisions likely to lead to substantial changes in work, or organisational or contractual relations.

The National Minimum Wage Act 1998 and the National Minimum Wage Regulations 1999 set a minimum hourly wage for all workers aged 18 and over. There is a separate lower rate for workers under the age of 18.

The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations (NI) 2000 give male and female part-time workers a right not to be treated less favourably than full-time workers unless any difference in treatment can be objectively justified. The Regulations apply to all aspects of pay and conditions of employment (contractual and non-contractual) and will usually require that the part-time worker should be paid and receive other benefits on a pro-rata basis. The part-timer can make comparison with a full-timer of the same sex but, otherwise, the range of comparators is more restricted than under the Equal Pay Act. Although the Regulations apply to both employees and workers, a part-time worker has to name a full-time worker (not a full-time employee) as a comparator. Likewise, a part-time employee has to name a full-time employee (not a full-time worker) as comparator. In either case, the comparator has to be doing the same or broadly similar work, so there is no scope for an 'equal value' claim under the Regulations. There is also no scope for a part-timer to name a comparator working for a different employer (even an associated employer) and there are restrictions on naming a comparator based at a different site even if they are working for the same employer. Where a full-time worker or employee becomes part-time, the appropriate comparison is with their own previous full-time terms and conditions.

The Pensions (NI) Order 1995 provides for equal treatment in occupational pension schemes. It does so by incorporating an equal treatment rule into every occupational pension scheme.

The Race Relations (NI) Order 1997 requires employers not to discriminate on grounds of colour, race, nationality or ethnic or national origins. The Equality Commission can provide advice on specific issues relating to race or ethnicity.

The Trade Union and Labour Relations (NI) Order 1995 and the Labour Relations Agency codes of practice on the disclosure of information and on disciplinary practice set out the regulations on the sharing of information for the purposes of collective bargaining between the employer and recognised trade unions.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 protect the rights of workers in the event of a relevant transfer of an undertaking to a new employer. Where the Regulations apply, contracts of employment and employment relationships automatically transfer to the new employer at the date of transfer. The Regulations prohibit changes in contract terms connected with a relevant transfer. Occupational pension rights earned up to the time of the transfer are protected.

The Working Time Regulations (NI) 1998 set a maximum limit on how many hours people can work and provide a statutory entitlement to paid annual leave.

Equality Commission

FOR NORTHERN IRELAND

Equality Commission for Northern Ireland

Equality House
7-9 Shaftesbury Square
Belfast
BT2 7DP

Telephone 02890 500 600
Email information@equalityni.org
Website www.equalityni.org
Fax 02890 248 687
Textphone 02890 500 589

July 2013