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STANDING UP FOR YOU

Summary of the law on equal pay

Our pledge to you

Thompsons Solicitors has been standing up for the injured and mistreated since Harry Thompson founded the firm in 1921. We have fought for millions of people, won countless landmark cases and secured key legal reforms.

We have more experience of winning personal injury and employment claims than any other firm – and we use that experience solely for the injured and mistreated.

Thompsons will stand up for you by:

Staying true to our principles – regardless of how difficult our job is made by government, employers or the insurance industry

Remaining committed to the trade union movement, working closely with them and with professional associations for the benefit of working people everywhere

Thompsons pledge that we will:

Work solely for the injured or mistreated

Refuse to represent insurance companies and employers

Invest our specialist expertise in each and every case

Fight for the maximum compensation in the shortest possible time

Standing up for you

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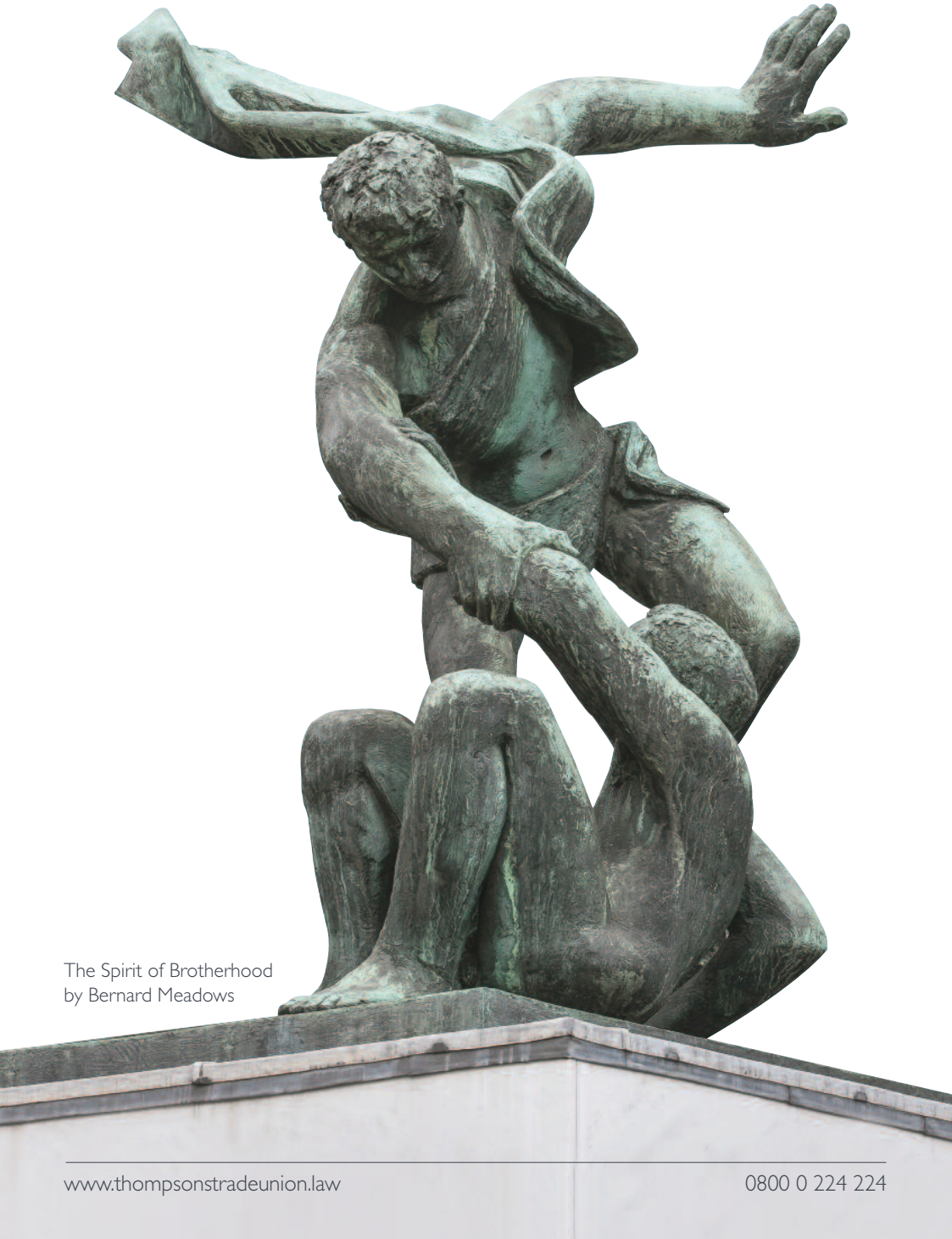

The Spirit of Brotherhood
by Bernard Meadows

About this booklet

This booklet deals with equal pay claims under the Equality Act 2010. It applies in England, Wales and Scotland (except where indicated) only.

- The law
- Comparators
- Claims
- Defences
- Time limits

What does the law say?

The right to equal pay for equal work between men and women is set out in Article 141 of the EU Treaty. In the UK, it is found in the Equality Act 2010.

The Act implies a sex equality clause into everyone's contract of employment, modifying any term that is less favourable to someone of the opposite sex. The European Commission and the Equality and Human Rights Commission publish codes of practice, which although not legally binding, may be used in evidence in equal pay claims.

What does the law require?

The law requires a four stage approach:

- Selecting an appropriate comparator of the opposite sex.
- Proving that the comparator is employed to carry out equal work.
- Comparing the claimant's and the comparator's terms and conditions of employment.
- Assessing whether the employer can explain any discrepancy in pay ("the material factor defence") and whether the difference is due to sex discrimination.

Who is the comparator?

Claimants have to name a comparator of the opposite sex who is employed:

- By the same or an associated employer at the same establishment or workplace.
- By the same or an associated employer at a different establishment or workplace but where common terms and conditions apply.
- By the same or an associated employer where there are no common terms and conditions but the employer who decides pay is a "single source".

The comparator/s usually have to be working at the same time as the claimant.

However, if a woman has evidence of direct sex discrimination in relation to her contractual pay but cannot find an actual comparator doing equal work, (for example where the comparator is someone who did the job before her), she can claim sex discrimination instead of using the sex equality clause.

What claims can be made?

The Equality Act 2010 provides three ways for a claimant to show that their work is equal to that of their comparator – if they are engaged in "like work", "work rated as equivalent" under a job evaluation scheme or "work of equal value".

What is involved in a "like work" claim?

The claimant must be doing the same or broadly similar work to that of their comparator.

A Tribunal is unlikely to decide that the claimant is doing like work if there are significant differences such as different duties, greater responsibility or greater physical effort. But Tribunals will look closely at extra duties stipulated in a comparator's job description to ascertain whether or not they are actually being done.

What is involved in a "work rated as equivalent" claim?

The claimant's and comparator's jobs must be rated the same under a job evaluation scheme carried out by the employer.

This measures the demands made on the two workers under headings such as effort, skill and decision making.

The job evaluation scheme must be free from discrimination and must be analytical.

What is involved in a "work of equal value" claim?

These claims are the most difficult to assess. In the absence of a job evaluation scheme, the Tribunal has to decide whether the claimant's and the comparator's jobs are of equal value, taking into account the nature of the work, the skills necessary to do it and the level of decision-making attached to the job.

Normally, Tribunals ask an independent expert to do an evaluation of the two jobs. This is similar to a job evaluation scheme done by an employer but the independent expert only looks at the job of the claimant and the comparator.

Employees cannot bring work of equal value claims if the two jobs have been properly rated in a non-discriminatory analytical job evaluation scheme. Instead, they would have to make a work rated as equivalent claim.

What terms and conditions are compared?

Most terms of the claimant's contract and the comparator's contract are compared separately, except for some terms relating to pay. For instance, sometimes basic pay and bonuses paid for basic hours of work will be lumped together as one term.

The "sex equality clause" applies to all elements of contractual pay including basic pay, overtime and bonuses. It also includes allowances and fringe benefits, sick pay, holiday pay, redundancy payments, severance payments, pay progression, pension benefits and access to pension schemes.

Under European law, non-contractual benefits such as travel concessions and discretionary bonuses may also be covered.

What defences are available?

If the claimant can show that their work is of equal value to that of their comparator but that they are being paid less, then the onus shifts to the employer to prove that the variation is due to a material factor which is not related to the sex of the job holder.

If the employer can show that there is no direct or indirect sex discrimination, then a Tribunal will accept their explanation for the difference provided it is genuine and relevant.

However, if there is evidence of indirect sex discrimination in the pay system, the employer has to justify the difference by showing that it is a proportionate means of achieving a legitimate aim. The reason put forward for the difference in pay must be the actual reason and not a sham or pretence (although it can be given in hindsight). In other words, the employer does not have to have thought of it at the time, provided it really does explain the difference. The reason must also be "significant and relevant" and it must be the cause of the difference in pay between the claimant and their comparator.

Examples of material factor defences that employers have used to defeat equal pay claims include:

- Market forces and skills shortages.
- Red circling.
- Geographical differences.
- Different skills, qualifications and experience.

The material factor defence will fail, however, if the reason itself is "tainted with discrimination" and is not justifiable. For example, the House of Lords refused to accept an employer's material factor defence based on market forces when the market itself discriminated against the claimants – female catering workers. The evidence in that case indicated that the market valued the work of catering workers at a lower rate because catering workers are, for the most part, women.

Can employers impose pay "secrecy"?

No, the Equality Act 2010 states that employers cannot stop their employees from having a discussion with each other or their trade union representative about whether there are differences in their pay related to protected characteristics.

It also outlaws the use of "gagging clauses" in people's contracts. However, employers can stipulate that employees keep pay rates confidential from certain groups outside the workplace, for example competitor organisations. If an employer takes action against an employee for making or seeking to make a disclosure or for receiving information as a result of a disclosure, the employee may claim victimisation.

What is gender pay reporting?

From April 2018, businesses with more than 250 employees will be required to publish gender pay gap information, including the difference between the pay of men and women and the difference between the bonus payments they receive.

How do claimants obtain information from their employer?

Anyone who believes he or she is not receiving equal pay can write to their employer asking for information. A trade union representative can help with this.

Making a subject access request under the Data Protection Act may help get information about pay decisions. A freedom of information request to a public body may help get statistical or equalities information.

Employers frequently refuse to give information due to its confidentiality or because the comparator has not given permission. Only a court or Tribunal order issued after a claim has started can force the employer to disclose confidential information.

What is the time limit for bringing a claim?

Tribunal applications must be lodged within six months less one day of the termination of any contract of employment.

Claims can also be brought in a civil court within six years (five years in Scotland) from the last day that any inequality in pay occurred in a particular contract. However, although the time limit is much longer, claimants should note that free, independent experts are not available in these courts.

There is an exception to this rule where there is a series of contracts for more or less the same job. For example, a series of fixed term or temporary contracts.

A contract can end for the purposes of equal pay law when a job is transferred as part of a transfer of employment under the Transfer of Undertakings Regulations 2006. The equal pay claim must be lodged against the transferee within six months of the date of the transfer.

A contract can also end by agreement. For example, redeployment to a different job with the same employer. In certain cases the law treats contracts as ended where there is a substantial change in the job and terms of employment. As it is not always clear when a contract ends, it is important to get advice quickly.

What remedies are available?

There are two remedies available to a Tribunal in an equal pay case:

- Declaration.
- Compensation.

Declaration

The Tribunal may make a declaration as to the rights of the claimant and/or their employer in relation to the claim brought. For example, a pay rise to the level of the comparator's pay or the inclusion of any beneficial term not in the claimant's contract, and order the employer to pay arrears of pay or damages to the person who has brought the claim.

Compensation

If a claimant is successful, they will be entitled to:

- An equality clause inserted into their contract of employment to ensure they get the same pay as their comparator.
- Back pay to the date of the insertion of the equality clause into their contract, up to a maximum of six years (five years in Scotland) before the date of lodging the Tribunal application.
- Interest on back pay.

Claimants cannot recover compensation for injury to feelings in equal pay cases.

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