

Gender-Neutral Job Evaluation Schemes

An Introduction to the Law



**Equality and
Human Rights**
Commission

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About this publication

What is its purpose?

This publication provides an introduction to the key principles of the law and outlines cases that illustrate the standards job evaluation schemes must meet to provide an employer with a defence to an equal pay claim.

Who is it for?

This publication was developed for the benefit employers, human resources personnel and unions in England, Scotland and Wales.

What is inside?

This publication:

- explains how job evaluation can give an employer a defence to an equal pay claim;
- sets out the standards that the job evaluation must meet to provide that defence;
- explains where to find out more information about how to carry out a job evaluation
- summarises of the key legal cases on which those standards are based

When was it published?

This guide was first published in March 2014. The law referred to herein is stated as at 31 January 2014.

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Introduction

The Equality Act 2010 makes unlawful direct and indirect pay discrimination between men and women. The Act includes special provisions known as 'equal pay provisions' dealing with this kind of pay discrimination. These provisions replace the similar provisions in the Equal Pay Act 1970.

The Act also makes unlawful direct and indirect pay discrimination because of protected characteristics other than sex, such as ethnicity, age or disability. The equal pay provisions do not apply to these claims. The Equality and Human Rights Commission's *Core Guidance: Pay and Benefits* explains what the Equality Act says about this kind of pay discrimination. The principles of objectivity and avoiding bias relevant in equal pay cases will also help to reduce the risk of pay discrimination because of other characteristics.

The Commission's guidance booklet *Gender-Neutral Job Evaluation Schemes: An Introductory Guide* explains that a job evaluation (JE) scheme can provide an employer with a 'first-line defence' against an equal pay claim if that scheme meets certain standards.

This Guidance gives more detail about the law on which those standards are based. It also explains the role that JE plays in equal pay cases. It will help you to understand the points in the design and implementation of a JE scheme, and its outcomes, at which discrimination can occur. It includes summaries of the relevant legislation and key legal cases.

You should read this Guidance if:

- you have already read the Commission guidance booklet *Gender-Neutral Job Evaluation Schemes: An Introductory Guide* and understand what JE is; and
- you want to know more about the cases and legislation setting out the standards for JE explained in that introductory guidance booklet.

This Guidance is not intended to provide detailed advice on how to plan, design and implement a JE free from gender bias. The Commission's *Equal Pay Audit Toolkit* provides such a step-by-step guide.

Equal pay: the legal basics

The term 'equal pay' is used specifically to mean making sure that women and men who do equal work receive the same rewards under their contracts of employment. Equal pay applies to everything that the employee receives as part of his or her contract, not only money paid to him or her, and includes workplace benefits such as holiday entitlement, a company car and pension contributions.

Equal pay legal provisions are now called 'equality of terms' provisions and are covered in Chapter 3 of Part 5 of the Equality Act 2010. Although there are some amendments and additions to the new legislation to take into account case law on technical points, the principles and main provisions remain essentially the same as those of the Equal Pay Act 1970. These are explained in more detail in the *Code of Practice on Equal Pay, paras 41–47*. Cases decided under the 1970 Act are still relevant in interpreting the equal pay provisions in the 2010 Act.

To make an equal pay claim, an employee can compare himself or herself only to an employee of the opposite sex in the same employment.¹ This employee of the opposite sex is called a 'comparator'.

An equal pay claim cannot be brought where there is no comparator doing equal work. However, an employee can bring a claim of direct sex discrimination based on a hypothetical comparator.

There are three types of equal pay claim:

- a 'like work' claim, under which the employee and the comparator are doing work that is the same or broadly similar, provided that, where there are any differences in the work, these are not of practical importance;²
- a 'work rated as equivalent' claim, under which the employee and the comparator are doing work that is different, but which is rated under the same JE scheme as being work of equal value;³ and

¹ Equality Act 2010, s 79. The 'same employment' is explained at paras 53–59 of the Equal Pay Statutory Code of Practice.

² Equality Act 2010, s 65(1)(a).

³ Equality Act 2010, s 65(1)(b).

- an 'equal value' claim, under which the employee and the comparator are doing work that is different, but which is of equal value in terms of factors such as effort, skill and decision-making.⁴

Job evaluation schemes are relevant in the last two types of claim: 'work rated as equivalent' and 'equal value' claims.

⁴ Equality Act 2010, s 65(1)(c).

The role of job evaluations in equal pay cases

Equal pay legislation gives job evaluations (JE) two distinct roles in equal pay cases, as follows.

Enabling an employee to bring a ‘work rated as equivalent’ claim

An employee can bring an equal pay claim even though his or her work is different from that of the comparator if:

- it has been ‘rated as equivalent’ under a JE study; or
- it would have been ‘rated as equivalent’ had the evaluation not been made using a ‘sex-specific’ system.⁵

A system will be ‘sex-specific’ if, for the purposes of evaluating one or more of the demands made on a worker, it sets values for men that are different from those that it sets for women.⁶

Providing a ‘first-line defence’ to an equal value claim

An employer has a ‘first-line defence’ to an ‘equal value’ claim if:

- it can show that the job of the claimant has been given a different (lower) value than the job of the comparator under a JE study;⁷ *and*
- the court or employment tribunal has no ‘reasonable grounds for suspecting that the evaluation contained in the study was based on a system that discriminates on grounds of sex or is otherwise unreliable’.⁸

It is the responsibility of the employer to show that there is a valid JE scheme that satisfies the requirements of s.80 (5) of the Equality Act 2010. Once the employer does so, the burden passes to the employee: the employee must show that there are reasonable grounds for suspecting that the scheme is discriminatory or otherwise

⁵ Equality Act 2010, s 65(4).

⁶ Equality Act 2010, s 65(5).

⁷ Equality Act 2010, s 131(5).

⁸ Equality Act 2010, s 131(6).

unsuitable to be relied upon jobs (*Brennan & ors v Sunderland City Council & ors* UKEAT/0286/11/SM).

What standards must a job evaluation meet to provide a defence to an equal value claim?

To provide a valid defence, a job evaluation (JE) must be:

- analytical;
- thorough and impartial;
- reliable; *and*
- gender neutral.

Each of these standards is discussed next.

Summaries of the cases cited in this text are supplied in alphabetical order in the Appendix to this Guidance.

Analytical

A JE scheme should evaluate each job in terms of the demands made on the worker under factors such as 'effort', 'skill' and 'decision-making'. Evaluation on a 'whole job' basis, with jobs being assessed in terms of their overall content, will not meet this standard.

- The Equality Act 2010 uses the term 'job evaluation study' and describes it as a 'study undertaken with a view to evaluating, in terms of the demands made on a person by reference to factors such as effort, skills and decision-making the jobs to be done by some or all of the workers in an undertaking or group or undertakings'.⁹ For the purposes of this Guidance, we will use the terminology 'JE scheme' which is the same as a JE study.
- In *Bromley and ors v H & J Quick Ltd* [1988] ICR 623, the Court of Appeal ruled that, to provide a defence, a JE must be 'analytical', with the jobs of each worker covered by the scheme valued in terms of the demands made by them under various headings. This means that the scheme must analyse the various

⁹ Equality Act 2010, s 80(5).

characteristics of each job rather than compare and order jobs as a whole without separating them into their constituent parts.

Thorough and impartial

The JE must objectively assess the value placed on the work performed and, so far as possible, not leave room for the results of the evaluation to be influenced by subjective views. A JE that does not have rigorous safeguards against subjectivity will not meet this standard.

- In *Eaton Ltd v Nuttall* [1977] IRLR 71, the Employment Appeal Tribunal explained that, to be valid, a JE must be thorough in terms of analysis or capable of impartial application, and so only take into account matters that are relevant to the nature of the work. A subjective judgement, such as how well someone is doing the job, rather than assessment of the actual requirements of the job, is not thorough in analysis or impartial.

Determining whether a JE scheme is 'valid' will involve an analysis of:

- whether it either has any defects; *and*
- the effect of these defects on its ability to be either thorough in analysis or capable of impartial application, or both (*Diageo plc v Thomson* [2004] EATS/0064/03).

The process involved in carrying out an evaluation can be relevant in deciding whether it is valid. In *Diageo plc v Thomson* the absence of a central evaluation panel, the use of only one trained evaluator and the lack of standard monitoring or auditing meant that the job evaluation scheme was insufficiently rigorous.

Reliable

The JE must be reliable in every other way. This is a broad category.

The Equality Act says that that JE will not provide a defence to an equal value claim where the employment tribunal 'has reasonable grounds for suspecting that the evaluation contained in the [JE] is ... unreliable'.¹⁰

¹⁰ Equality Act 2010, s 131(6)(b).

How might a job evaluation be 'unreliable'?

Examples include where:

- the procedures and practices used in evaluating the jobs are out of date or have been manipulated in some way that renders the outcomes unreliable (*Diageo plc v Thomson*);
- the job evaluation results are out of date (*Dibro Ltd v Hore & ors* [1990] IRLR 129 (EAT));
- jobs are 'slotted in' to a new pay and grading structure on a 'whole job' basis, with no reference to the demands made on jobs under the JE scheme factors (*Bromley v H&J Quick Ltd*);
- the JE process is incomplete.

A JE process will not be considered as being complete until the parties who agreed to carry it out (for example the employer and the union) accept it as a valid JE. Once a JE is complete, however, it is valid even if it is not then used as the basis for setting pay because the results are not to the liking of the employer and other employees (*Arnold v Beecham Group Ltd* [1982] IRLR 307 (EAT)).

Gender neutral

The JE should be objective, be non-discriminatory, recognise the skills of men and women equally, and be applied in a consistent and unbiased way. A JE that is gender biased or discriminatory at any of the planning, design, implementation or evaluation stages will not meet this standard.

- The Equality Act 2010 says that a JE will not provide a defence to an equal value claim where the employment tribunal 'has reasonable grounds for suspecting that the evaluation contained in the [JE] was based on a system that discriminates because of sex'.¹¹
- The 2010 Act explains that 'a system discriminates because of sex if a difference (or coincidence) between values that the system sets on different demands is not justifiable regardless of the sex of the person on whom the demands are made'.¹²

¹¹ Equality Act 2010, s 131(6)(a).

¹² Equality Act 2010, s 131(7).

- A JE scheme will not provide a defence if the claimant can show that the scheme was not gender neutral. In *Rummler v Dato-Druck GmbH* [1987] IRLR 32 (ECJ), it was made clear that for a JE scheme, as a whole, to be objective and non-discriminatory, it must recognise the skills of both women and men equally.
- The 'system that discriminates because of sex', or a 'sex-based system', includes the evaluation results (or job scores) and their translation into salary grades and pay. In *Springboard Sunderland Trust v Robson* [1992] IRLR 261 (EAT), it was confirmed that it is necessary to have regard to the full results of the JE, including the allocation to grade or pay scale at the end of the evaluation process.

How might a job evaluation be discriminatory?

Examples of ways in which a JE might be discriminatory include the following:

- The JE scheme demonstrates gender stereotyping or assumptions about women's and men's work. The system as a whole must not discriminate against women or men. The scheme must have criteria that do not differ according to the gender of the person undertaking the work (*Rummler v Dato-Druck GmbH*).
- In either its design or implementation, the scheme fails to include, or properly to take into account, a factor or job demand that is an important element in, for example, a woman's job (such as interpersonal skills or finger dexterity).
- The scheme gives an unjustifiably heavy weighting to factors more typical of male-dominated jobs (such as adverse working conditions, which are highly visible and typical of male-dominated manual jobs) and/or deliberately gives low weighting to factors more typically female-dominated jobs (*Brennan & ors v Sunderland City Council & ors* UKEAT/0286/11/SM).
- The 'physical effort' of a male dominated job is overrated compared to that of a female dominated job. For example, lifting heavy weights may be assessed as more demanding than manoeuvring immobile patients.

Even where a woman's job receives the same or more points than that of a man for a particular factor, she may still claim that the demands of her job under this factor have been undervalued and that the difference in points under the factor should have been bigger.

Finding out more information about how to carry out a job evaluation

For a step-by-step guide on how to plan, design and implement a JE free of gender bias, see the Commission's *Equal Pay Audit Toolkit*, available online at www.equalityhumanrights.com/advice-and-guidance/tools-equal-pay/

For information about equal pay law and practice generally, see the Commission's *Code of Practice on Equal Pay*, available online at www.equalityhumanrights.com/uploaded_files/EqualityAct/equalpaycode.pdf

Other useful resources

Advisory, Conciliation and Arbitration Service (ACAS) (2005) *Job Evaluation: An Introduction*, available online at www.acas.org.uk/media/pdf/4/0/B01_1.pdf

ACAS (2011) *Job Evaluation, Considerations and Risks*, available online at www.acas.org.uk/media/pdf/9/t/job-evaluation-considerations-risks-accessible-version-July-2011.pdf

Armstrong, M., Cummins, A., Hastings, S. and Wood, W. (2005) *Job Evaluation: A Guide To Achieving Equal Pay* (London: Kogan Page Ltd)

International Labour Organisation (ILO) (2008) *Promoting Equity: Gender-Neutral Job Evaluation for Equal Pay – A Step-by-Step Guide*, available online at www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_101325.pdf

Standards Australia (2012) *Australian Standard on Gender-Inclusive Job Evaluation and Grading*, AS 5376–2012, Australian government guide available online at www.wgea.gov.au/sites/default/files/Guide_to_Australian_Standard.pdf

Appendix: Tribunal and court decisions on job evaluations

***Arnold v Beecham Group Ltd* [1982] IRLR 307 (EAT)**

Miss Arnold was a catering supervisor; Mr Young was a vending supervisor. A JE undertaken in 1978 placed Miss Arnold in a lower grade to Mr Young. However, under a new JE undertaken in 1980, she was given the same grade as Mr Young. When the details became known to the supervisory staff, there were strong objections to it. An agreement was reached on a wage settlement, which was based on the 1978 evaluation rather than that completed in 1980.

The employment tribunal rejected Miss Arnold's claim for equal pay. However, the Employment Appeal Tribunal (EAT) allowed her appeal. It said that, to be valid, there must be a completed JE scheme, and that a scheme is not completed unless and until the parties who agreed to the scheme have accepted its validity.

In this case, the evidence showed that the employer and the employees had accepted the JE as valid. That meant that the JE had been completed. The fact that it had been decided not to rely on the 1980 JE in subsequent pay negotiations did not change that.

This meant that Miss Arnold could rely on the JE and was entitled to equal pay with Mr Young in accordance with the 1980 evaluation.

Key point:

- Once a JE is agreed as valid, an employer cannot then ignore it in setting employees' pay.

***Brennan & ors v Sunderland City Council & ors* UKEAT/0286/11/SM (ET)**

Mrs Brennan and her colleagues (mainly cleaning and catering staff in schools, or care staff) challenged the implementation of the local government JE scheme by Sunderland City Council.

The employment tribunal found that Sunderland City Council used the JE scheme to get around pay protection for the male comparators by restoring to them the remuneration that they had previously received by way of bonus.

The tribunal criticised the initial evaluations and subsequent job redesign exercises, because they were prompted by the primary purpose of protecting bonuses given to male employees. For example, assistant cooks with the authority to instruct and advise catering assistants were graded at level 1 on the 'responsibility for supervision' factor. This contrasted with the treatment of all of the male comparator job groups, which rewarded a minimum grade of level 2 for the same factor for similar job demands.

Key points:

- Job evaluation schemes must not be used to perpetuate existing discrimination.
- Deliberately low scoring of female workers' responsibilities will make the scheme invalid.
- Evaluation panel members must check their actions for gender bias.
- It is for the claimant to establish that there are reasonable grounds for suspecting that a JE is discriminatory or otherwise unsuitable to be relied on.

Bromley & ors v H & J Quick Ltd [1988] IRLR 249 CA

Mrs Bromley and her colleagues were administrative staff working for a car sales firm. The company had earlier undertaken a JE exercise with the help of external consultants. Mrs Bromley claimed equal pay with her male workshop colleagues. During the JE exercise, some jobs were evaluated by a joint panel of management and employees, while others (including those of the claimant and three of the comparators) were 'slotted in' to the rank order by management on a 'whole job' basis.

The Court of Appeal ruled that, to be a valid JE under section 1(5) of the Equal Pay Act (now s 80(5) of the Equality Act 2010), the JE had to be undertaken on an 'analytical' basis, with each job being evaluated in terms of the demand made on the worker under various headings such as 'skill', 'effort' and 'decision-making'.

In this case, the JE was not valid because the claimant's and most of the comparators' jobs were not evaluated under the JE factor headings. This meant that the scheme did not comply with the requirement to be analytical and could not provide a defence to the claims.

/Continued...

Key points:

- A JE that compares jobs on a 'whole job' basis, with each job simply being assessed in terms of its overall content, is not sufficiently analytical to meet the requirements of section 80(5) of the Equality Act 2010.
- To meet those requirements, a JE has to be undertaken on an 'analytical' basis, with each job being evaluated in terms of the demand made on the worker under various factor headings such as 'skill', 'effort' and 'decision-making'.
- Grouping jobs together that are not 'materially different' can be acceptable, because a single evaluation would then apply to the whole group of jobs.

***Dibro Ltd v Hore & ors [1990]* IRLR 129 (EAT)**

Ms Hore and others were assemblers who claimed equal pay with male operators on the ground that they were employed on work of equal value. The employer commissioned a JE after the claims were raised. That JE rated the comparators' jobs as being of a higher value than the claimants' jobs.

The employment tribunal refused to accept that JE because it was carried out after the claims were raised. The EAT ruled that, provided that the job evaluation scheme is analytical and valid relating to facts and circumstances existing at the time, it is irrelevant if it comes into existence after proceedings began. The JE was admissible evidence.

The EAT said that the issue in an equal value complaint is whether, when the proceedings were initiated, the job being carried out at that time by the applicant was of equal value with that of the job being carried out at that time by the comparator. Therefore a JE advanced by the employer must compare the jobs as they were being carried out at the date on which the proceedings were issued; it should not compare a job, or jobs, that may have been changed since the initiation of proceedings.

Key points:

- To provide a valid defence, a JE needs to be up to date.
- If the jobs evaluated by a JE have changed since the date of evaluation, the JE will not provide a defence to an equal value claim.
- It is always open to an employer to arrange for an up-to-date analytical JE to be carried out whether or not the jobs are subject to an equal pay claim. Such an

evaluation can provide a defence to a claim even if it comes into existence after the start of legal proceedings so long as it evaluates the jobs as they were at the time those proceedings were initiated.

***Eaton Ltd v Nuttall* [1977] IRLR 71 (EAT)**

Mrs Nuttall, a female production scheduler, compared her work to that of a male production scheduler. Her male comparator handled items worth between £5 and £1,000 each; Mrs Nuttall handled items worth below £2.50. This difference in value and monetary responsibility meant that the repercussions for anything going wrong were greater for the male comparator. On the facts, the EAT found that Mrs Nuttall was not engaged in 'like work.'

The EAT ruled that a 'valid' JE must be 'thorough in analysis' and 'capable of impartial application'.

The judge in the case explained that:

It should be possible by applying the JE to arrive at the position of a particular employee at a particular point in a particular salary grade without taking other matters into account except those unconnected with the nature of the work [such as merit or seniority].

... A scheme which does not satisfy that test and requires the management to make a subjective judgment concerning the nature of the work before the employee can be fitted into the appropriate place in the appropriate salary grade would seem to us not be valid for the purposes of [what is now section 65(4) of the Equality Act 2010].

Key points:

- A job evaluation scheme is valid only if it satisfies the test of being thorough in analysis and capable of impartial application.
- The standard set out in *Nuttall* still applies in equal pay cases and the 'very helpful' test set out by the judge was approved much more recently in the EAT case of *Diageo v Thomson* (see below).

***Rummler v Dato-Druck GmbH* [1987] IRLR 32 (ECJ)**

Mrs Rummler claimed that the JE scheme used by her employer was not gender neutral and that her job had been undervalued. The scheme included an 'exertion' (physical effort) factor, which she argued failed to take into account the fact that it

took a greater amount of physical effort for her, as a woman, to lift a weight than her male colleagues.

The European Court of Justice (ECJ) stated that European equal pay law does not preclude the use of a factor that favours one gender as long as, overall, the scheme does not discriminate on grounds of gender.

It said that:

Where a job classification system is used in determining remuneration, that system must be based on criteria which do not differ according to whether the work is carried out by a man or a woman and must not be organised, as a whole, in such a manner that it has the practical effect of discriminating generally against workers of one sex.

Key points:

- A JE must not discriminate on grounds of sex.
- A JE must be looked at in its entirety in deciding whether it is discriminatory. It will not be discriminatory solely because one of the criteria used is based on characteristics more commonly found among one gender, so long as the JE also takes into account other criteria favouring the opposite gender.

Springboard Sunderland Trust v Robson [1992] IRLR 261 (EAT)

Mrs Robson was a team leader who compared her work to that of Mr Render, an induction officer, claiming that she was entitled to equal pay because the jobs were 'work rated as equivalent'. The JE awarded Mrs Robson 400 points, but after an appeal this was increased to 410 points. Mr Render's job was awarded 428 points, which put both of them in the salary grade 4 bracket. Mrs Robson was nonetheless paid a grade 3 salary.

The issue was whether the jobs were of 'equal value'. Mrs Robson argued that they were, because both jobs were given the same salary grade. The employer argued that they were not, because the jobs received different scores under the JE.

The EAT upheld the decision of the majority of the employment tribunal that the jobs were equal despite the difference in points scored under the JE. The formula for conversion of points to salary grades was part of the JE scheme. If a narrow view were taken of looking at the points only, this would lead to a large number of minor variations needing to be treated separately.

Key points:

- In deciding whether work is rated as equivalent, it is necessary to have regard to the whole of the JE scheme, including the allocation of the jobs to a scale or grade at the end of the JE process.

***Diageo plc v Thomson* [2004] EATS/0064/03 (EAT)**

Mrs Thomson was a regional office manager with responsibilities for local personnel and finance functions, as well as oversight of administrative activity. She discovered that a male scientist was receiving more pay than she was. The company agreed to re-evaluate her job. Two managers carried out the re-evaluation, but only one had received training in using and implementing the Hay system. The evaluators awarded Mrs Thomson a salary increase, but her salary remained lower than that of her male colleague. She submitted an equal pay claim in which she challenged the procedures used to evaluate her job.

Diageo had introduced the Hay evaluation system for its managerial jobs in the mid-1970s, together with company-wide procedures, which included local evaluation panels and a central evaluation panel to check the evaluation outcomes. By the time of the claim, the company had decided to introduce a new single JE scheme, but this had not yet been implemented.

The EAT agreed with the finding of the employment tribunal that a panel of two, with only one trained evaluator, and an absence of contemporary evaluation records and central monitoring rendered the JE insufficiently thorough in its analysis. It was therefore not a 'valid' defence to the equal pay claim.

Key points:

- Using an old JE scheme is risky, because it could perpetuate existing discrimination.
- Contemporary evaluation records are a vital part of JE analysis.
- All members of the JE panel should have received recent JE training.

More about this publication

Why has the Commission produced it?

The Equality and Human Rights Commission has responsibility for the promotion and enforcement of equality and non-discrimination laws in England, Scotland and Wales. This publication was produced to foster a better understanding of (and adherence to) these laws, in line with its mission.

What formats are available?

This Guide is currently available, in English, as a PDF file from the Equality and Human Rights website, www.equalityhumanrights.com.

Who can I talk to about it?

Questions or comments may be sent to correspondence@equalityhumanrights.com.

Where can I find more information?

Lawyers, human resources personnel, courts and tribunals are advised to consult the Equal Pay Statutory Code of Practice for additional technical guidance. This document is available from the Equality and Human Rights Commission website (www.equalityhumanrights.com).

The Equality and Human Rights Commission also offers specific tools and guidance for employers on implementing job evaluation free from gender bias. Visit www.equalityhumanrights.com/advice-and-guidance/tools-equal-pay.

Further information

Gender-Neutral Job Evaluation Schemes: An Introduction to the Law was published by the Equality and Human Rights Commission. This publication and related equality and human rights resources are available from the Commission's website (www.equalityhumanrights.com).

For specific advice, information or guidance on equality, discrimination or human rights issues, please contact the Equality Advisory and Support Service, a free and independent service.

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