

# Supplement to the Equal Pay Statutory Code of Practice

This Supplement does not form part of the statutory Code of Practice. It is intended to assist those using the Code by identifying developments in the law since the Code was approved. It should be read alongside the Code.

References to paragraph numbers below ('Para. #') are references to paragraphs in the Statutory Code.

Para.	Note
<b>5</b>	<b>Powers of the Commission</b>  The Gender Equality Duty has been repealed and replaced by the Public Sector Equality Duty. See paragraph 19 below.
<b>19</b>	<b>Public sector employers</b>  The Gender Equality Duty has now been repealed and the particular duty in relation to reducing gender pay inequality imposed upon certain listed authorities has been revoked. These duties have been replaced by the Public Sector Equality Duty in s.149 of the Equality Act 2010 which applies from 5 April 2011. A number of listed public authorities are also subject to specific equality duties. <sup>1</sup> The content of these duties is different as between England, Scotland and Wales but all have relevance to equal pay.  The Commission has produced Technical Guidance to explain the three aims (referred to as 'needs' in Scotland) of the Public Sector Equality Duty, to outline the requirements of the Equality Act 2010 and the specific duty

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<sup>1</sup> Equality Act 2010 (Specific Duties) Regulations 2011, SI 2011/2260; Equality Act 2010 (Specific Duties) (Wales) Regulations 2011, SI 2011/1064 and Equality Act 2010 (Specific Duties) (Scotland) Regulations 2011, SSI 2012/162.

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<b>Para.</b>	<b>Note</b>
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regulations and to provide practical approaches to complying with the Public Sector Equality Duty in England, Scotland and Wales. It is available from the Commission's website: [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

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**24 Further information**

**(Intro)**

Free information about the Equality Act is available through the Equality and Human Rights website. Visit: [www.equalityhumanrights.com](http://www.equalityhumanrights.com).

For 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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**48 Work of equal value**

The Employment Tribunals (Equal Value) Rules of Procedure, Schedule 6 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861 have been replaced by the Employment Tribunals (Equal Value) Rules of Procedure, Schedule 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237.

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**51 In the same employment**

The 'same employment' test sets a low threshold. It is intended to filter out those cases in which geography plays a significant part in determining the terms and conditions of employment.<sup>2</sup>

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<sup>2</sup> *North v Dumfries & Galloway Council* [2013] UKSC 45.

Para.	Note
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<b>52</b>	<b>In the same employment</b>
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A ‘*company*’ for these purposes does not just mean a limited company. A limited liability partnership (LLP) also falls within the definition and can be an ‘associated employer’. For example, women employed by an LLP set up and controlled by a local authority could use men who were employed directly by that local authority as comparators.<sup>3</sup>

<b>55</b>	<b>In the same employment</b>
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In order to show that there are common terms and conditions, women can use as comparators men employed by the same employer in other places of work even though in practice those men would never be employed to do their current jobs in the same place as the women.

The correct question to ask is whether the claimants have established that *if* their comparators were employed at the same establishment, those comparators would be employed under broadly similar terms to their current ones. It is not necessary that the claimant establish that there was a ‘*real possibility*’ that her comparator might be employed at the same establishment as her nor even that it was feasible for them to be employed there.<sup>4</sup>

<b>57</b>	<b>Comparing across employers: single source</b>
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Identifying whether or not there is a ‘*single source*’ responsible for the pay of a claimant and her comparator is a decision of fact and degree for the Employment Tribunal.

The central question is whether there is a body which is responsible for the inequality and that could restore equal treatment. The focus should be on the powers and responsibilities of the alleged single source rather than on those of the claimant's immediate employer.<sup>5</sup>

<sup>3</sup> *Fox Cross Claimants v Glasgow City Council* UK EATS/0027/12.

<sup>4</sup> *North v Dumfries & Galloway Council* [2013] UKSC 45.

<sup>5</sup> *Fox Cross Claimants v Glasgow City Council & Others* UK EATS/0027/12.

Para.	Note
<b>111 – 116</b>	<b>Equal pay – obtaining information</b> <p>The questions procedure was abolished on 6 April 2014.<sup>6</sup> It will continue to apply to breaches of the Equality Act that happened before 6 April 2014.<sup>7</sup> It will remain good practice for persons who think that they may have an equal pay claim to seek relevant information before issuing a formal claim. This may prevent the complaint escalating to a formal claim.</p> <p>Acas has produced non-statutory guidance for employees asking, and employers answering, questions after 6 April 2014. It is available at <a href="http://www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf">http://www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf</a>.</p>
<b>119</b>	<b>Using the grievance procedure</b> <p>From 6 May 2014 a claimant will have to comply with the early conciliation procedure before issuing a claim in the Employment Tribunal. (See paragraph 133 below.)</p>
<b>127</b>	<b>Using the grievance procedure</b> <p>The statutory question procedure and form has been abolished. (See paragraphs 111-116 above.)</p>

<sup>6</sup> S.138 of the Equality Act 2010 was repealed by s.66 of the Enterprise and Regulatory Reform Act 2013 which was brought into effect from 6 April 2014 by the Enterprise and Regulatory Reform Act 2013 (Commencement No.6, Transitional Provisions and Savings Order 2014).

<sup>7</sup> S.66(2) of the Enterprise and Regulatory Reform Act 2013.

Para.	Note
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<b>131</b>	<b>Employment Tribunals</b>
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The Employment Tribunals (Equal Value) Rules of Procedure, Schedule 6 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861 have been replaced by the Employment Tribunals (Equal Value) Rules of Procedure, Schedule 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237.

<b>133</b>	<b>Procedure</b>
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*Equal Pay Claims in civil courts*

Footnote 39: The Supreme Court has now confirmed that the High Court and the County Court or (in Scotland) the Court of Session or the sheriff court have jurisdiction to hear equal pay claims.<sup>8</sup>

*The early conciliation procedure*

From 6 May 2014, all claimants (with very limited exceptions) are required to comply with the Early Conciliation Procedure before they can issue a claim in the Employment Tribunal. The rules require that before instituting proceedings a claimant must present a completed early conciliation form to Acas in a prescribed form or telephone Acas giving their details and those of their employer.<sup>9</sup> Acas will then offer a free conciliation service for the parties in dispute. The limitation period for a claim may be extended to allow for conciliation.<sup>10</sup>

It will not be necessary to comply with this procedure where another person has complied with the requirement for early conciliation in relation to the same dispute and an employee wishes to institute proceedings on the same claim

<sup>8</sup> *Birmingham City Council v Abdulla* [2012] UKSC 47.

<sup>9</sup> The Employment Tribunals (Early Conciliation Rules of Procedure, Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014, SI 2014/254.

<sup>10</sup> Section 140B, Equality Act 2010 (requirement to contact Acas before instituting proceedings).

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form (in which case the requirement for early conciliation will be treated as complied with for the purposes of any provision extending the time limit).<sup>11</sup>

The prescribed notification form and guidance on the early conciliation procedure are available from the Acas website:

<http://www.acas.org.uk/index.aspx?articleid=4028>

### *Employment Tribunal Fees*

Claimants must pay fees in respect of all claims to the Employment Tribunal brought after 29 July 2013. The amount of fees payable will depend on whether the claim is Type A or Type B. Most claims about equal pay will be Type B claims. The Government has published online guidance on the fees payable to issue a claim. Visit: <https://www.gov.uk/employment-tribunals/apply-to-the-tribunal>.

When making certain applications, employers may also have to pay fees. If a claimant is successful at a hearing, the Employment Tribunal is very likely to order that the employer reimburse the fees. There are remission arrangements in place which mean that if a worker's income is below a certain level the fee will be reduced or waived entirely. Different rules apply where there are multiple claimants.<sup>12</sup>

### *Other employment tribunal powers*

From 6 April 2014, the Employment Tribunal may impose financial penalties of between £100 and £5,000 (payable to the Government) on employers if they lose and the case has 'aggravating features'.<sup>13</sup> These awards are likely to be imposed sparingly and in instances where the employer's conduct has been particularly reprehensible.

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<sup>11</sup> The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254.

<sup>12</sup> Employment Tribunals and Employment Appeal Tribunal Fees Order 2013, SI 2013/1893 as amended by the Courts and Tribunals Fees (Miscellaneous Amendments) Order 2014, SI 2014/590 (L.6) for claims after 6 April 2014.

<sup>13</sup> Section 16, Enterprise and Regulatory Reform Act 2013.

Para.	Note
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The Government also intends to introduce legislation in October 2014 which will require an Employment Tribunal to order, subject to certain exceptions, an employer to undertake an equal pay audit where the Tribunal finds that the employer has breached an equality clause and/or discriminated because of sex in relation to pay.<sup>14</sup>

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**135 Time limits for equal pay claims**

Where a claimant is required to notify Acas of their claim before starting proceedings in the Employment Tribunal and to comply with the Early Conciliation Procedure, special rules apply in relation to time limits. Time limits are extended in certain circumstances where a claimant has notified Acas that he or she intends to bring an Employment Tribunal claim. For more information see the Acas guidance on the early conciliation procedure:

<http://www.acas.org.uk/media/pdf/h/o/Early-Conciliation-explained.pdf>

The rules are not straightforward and legal advice should be taken where there is any doubt about how the rules apply.

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**139 Time limits for equal pay claims**

The rule that in order to be in time a claim has to be lodged within six months of a transfer may also apply where the transfer is not one covered by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Where NHS trusts were dissolved and employees transferred to Health Boards under a Staff Transfer Order which had much the same effect as a TUPE transfer, claims had to be made within six months of the dissolution.<sup>15</sup>

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**157 Protection against victimisation**

Where it arises out of and is closely connected to the employment relationship, the protection from victimisation (and other forms of discrimination under the

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<sup>14</sup> Section 139A, Equality Act 2010 (inserted by section 98(1), (2), of the Enterprise and Regulatory Reform Act 2013).

<sup>15</sup> *Foley v NHS Greater Glasgow & Clyde and Others* [2012] UK EATS/0007/12.

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<b>Para.</b>	<b>Note</b>
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Equality Act 2010) extends beyond termination of the employment relationship. This applies, for example, to a refusal to provide a reference after termination of the employment relationship because a woman has undertaken a protected act such as lodging a complaint about equal pay).

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<b>163</b>	<b>Reviewing or auditing pay</b>
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The Gender Equality Duty has been repealed and replaced by the Public Sector Equality Duty. (See paragraph 19 above.)

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<b>P. 58</b>	<b>Contacts</b>
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