

Rulings will impact on equal pay claims

Recent case law and upcoming legislation are likely to lift the veil of secrecy on pay inequality.

Recent case law is likely to have significant ramifications for both the public and private sectors on the ease with which an employee can bring an equal pay complaint, and the manner in which an employer will be expected to handle that complaint.

The Court of Appeal in *Hurst v Suffolk Mental Health Trust* and *Arnold and others v Sandwell Metropolitan Borough Council* recently ruled that there is no requirement for a woman to specify male comparators when lodging an equal pay grievance. It found that it was in the public interest to allow employees with suspicions about unfavourable treatment to have those fears investigated without first having to provide a statement listing comparators.

Although the statutory grievance procedures have now been repealed, the court's decision will still be relevant to grievances



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regarding ongoing equal pay complaints that first arose before 6 April 2009 and are therefore covered by the Employment Act 2008 transitional provisions.

Investigations

As a result, large organisations in receipt of vague accusations of possible inequality may find themselves having to conduct much wider investigations into pay practices, covering potential comparators across each of the three strands of the 'equal work' test and incurring considerable time and cost.

There is no guarantee that, even after such an investigation, the employer will have

identified all of the possible comparators upon whom the employee may seek to rely in a tribunal claim. An employer may find itself in the position of defending a claim relating to a comparator of whom it had no knowledge at the earlier grievance stage, particularly as potential comparators could include predecessors and individuals who may have transferred from a different entity under TUPE.

The findings in *Hurst* and *Arnold* will not necessarily always make it easier for employees to bring equal pay claims. For the NHS, comfort can be gained from the Newcastle Employment Tribunal's recent decision in *Hartley v Northumbria Healthcare NHS Foundation Trust*, in which the Agenda For Change (AfC) pay scales and job evaluation studies were held not to be discriminatory but, in any event, objectively justifiable. NHS equal pay claims based on circumstances arising after the introduction of AfC will now be difficult to pursue.

For private sector employers – notably City banks with a significant bonus culture – there is less consolation. In *Hurst* and *Arnold*, Lord Justice Wall expressed reluctance to give *carte blanche* to all prospective claimants.

But, merely to give a heading such as 'unfair dismissal' or 'race discrimination' in their grievances, rather than a full statement of facts, in equal pay cases 'fishing expeditions' by staff for pay-related data is likely to become more common. However, where grievances relate to discretionary bonuses, as long as the terms of the relevant scheme fall outside the employment contract, a claim will not be capable of being pursued under the Equal Pay Act.

Transparency

The transparency of pay structures in both public and private sectors will be promoted in the new Equality Bill. While it appears that private employers will not be required to publish figures showing gender pay gaps, gagging clauses in all employment contracts to prevent individuals from discussing their remuneration look set to be outlawed. The practical effect of this proposal remains to be seen.

Additional input from Kate Novak, associate.

KEY POINTS

- A woman need not specify male comparators when lodging an equal pay grievance.
- Investigations of equal pay grievances may incur more time and cost, particularly for banks and public sector employers, where pay differentials are widely publicised.
- The equal pay sections of the forthcoming Equality Bill will focus on transparency of pay structures, with public sector employers having to publish pay data.
- Remuneration gagging clauses in employment contracts will likely be outlawed.

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