KEEPING PAY EQUAL

Online supplement
Equal Pay and the Law

Guidance on Local Grading and Pay Reviews
Trade Union Side of the
Local Government Services NJC
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LOCAL GOVERNMENT GRADING AND PAY REVIEWS

SUPPLEMENT TO PART 2 – EQUAL PAY AND THE LAW

Who is the Supplement for?

This Guidance is a supplement to NJC Trade Union Side Guidance on Equal Pay and the Law which is in Part 2 of the NJC Trade Union Side Guide on Pay and Grading Reviews in local government organisations.

The Supplement is intended for lay representatives and paid officials, particularly those closely involved in or supporting union representatives carrying out local grading and pay reviews, such as members of the local negotiating team and full-time officials.

The content goes into more detail on some of the topics covered in Part 2, particularly in relation to the law. It assumes that you have a working knowledge of equal pay and discrimination law i.e. that you are familiar with the key legal concepts and broadly how they apply in practice.

There are some new topics in the Supplement (not included in Part 2) but most sections have a related section in Part 2 which should be read first.

How to obtain case judgments

Using the references given for the cases mentioned in Part 2, you can access the full judgments online apart from employment tribunal (ET) judgments.

HM Courts and Tribunals announced in June 2016 that new ET judgments would be available online but that no decision had yet been taken on converting existing judgments. The online service covers judgments in both England and Wales and Scotland and includes some transcripts going back to 2015.

About 100 decisions from 2016 are already up there, and you can search by name, date, judge or jurisdiction code.

Here is the link: https://www.gov.uk/employment-tribunal-decisions

For earlier ET judgments, currently you have to make a written request to the Bury St Edmunds Tribunal office or (for Scottish ET judgments) the Glasgow office but check online in case the position changes.

Legislation is available online. Public libraries may also have statutes, law reports, guides to the law and publications that report and comment on cases.

For information on employment rights case law, the Income Data Services Handbooks are an authoritative source; and for equal pay cases and equalities issues, Equal Opportunities Review is an excellent source of information. (IDS publications and EOR are not free – check if your union has a subscription.)
Which judgments do tribunals and other courts have to follow?

Not all judgments have the same status. Employment tribunal (ET) judgments (England, Wales and Scotland) are not binding on other tribunals. They are (as lawyers put it) no more than persuasive. In other words, they do not have to be applied by other tribunals, even if the facts and circumstances of two cases seem to be identical. Exceptionally, some important equal pay tribunal cases (which have not been appealed) have been cited approvingly by judges in the appellate courts (i.e. the Employment Appeal Tribunal and above).

The decisions of the higher courts are binding authority on the lower courts (i.e. employment tribunals) and create ‘precedents’ which tribunals should follow (where they tally with the particular circumstances of the case). These decisions are known as ‘case law’ i.e. judge-made law as opposed to statute (law made by the Parliament/Assembly).

Judgments of the Employment Appeal Tribunal (EAT) are binding authority on employment tribunals (ETs) in Great Britain. Decisions of the Court of Appeal are binding on ETs and the EAT (in England and Wales) while decisions of the Inner House of the Court of Session are binding on the EAT and ETs in Scotland. Decisions of the Supreme Court (and its predecessor, the House of Lords) are binding on all domestic (UK) courts, including those in Northern Ireland.

Judgments of the Court of Justice of the European Union (formerly the ECJ) are binding authority on UK courts (including employment tribunals).

What route can equal pay claims take?

Most equal pay claims are dealt with in the employment tribunal but in some circumstances cases can be taken to the county court or High Court (England & Wales) or sheriff court (in Scotland). Appeals from the judgments of these courts go to the High Court and (in Scotland) the Court of Session (Outer House); and from there to the Supreme Court.

Judgments of employment tribunals can only be appealed to the EAT on a point of law – basically, the party who wants to the appeal (the appellant) has to show that the ET got the law wrong in some way.

In certain circumstances, tribunals in the UK can refer cases to the Court of Justice of the European Union (CJEU) but usually references to the CJEU are made by the higher courts where (for instance) a ruling is sought on the interpretation or application of EU law to the case in question.

What about in Northern Ireland?

The Equality Act 2010 does not apply in Northern Ireland - there is separate legislation on equal pay and sex discrimination. Equal pay claims are made to the Industrial Tribunals, as are discrimination claims apart from those relating to religion or belief and political opinion. They are dealt with by the Fair Employment Tribunal. Decisions of both bodies can be appealed (on points of law) to the Court of Appeal.
What is the impact of the Scotland Act 2016?

At the time of writing, in Scotland, the employment tribunals and the EAT were ‘reserved tribunals’ although all powers over their management and operation are devolved to the Scottish Parliament, under the Scotland Act 2016. This means that (with some exceptions) employment law will continue to be made by the Westminster Parliament and apply in England, Wales and Scotland; likewise, judgments of the EAT in England and Scotland will continue to be binding authority in ETs in both countries and Wales.

The legislation on equal pay, set out in the Equality Act 2010, will continue to apply in Scotland (it remains ‘reserved’ under the Scotland Act 2016). However, the 2016 Act gives powers to the Scottish Parliament to impose new statutory requirements on public bodies in Scotland (and cross-border public authorities with Scottish functions), including the introduction of gender quotas and the consideration of socio-economic inequality when making strategic decisions.

Given its powers under the Scotland Act, the Scottish Government has announced its intention to abolish employment tribunal fees. Please check with your union’s Scottish office for updates.

How does the Equality Act 2010 (EqA) work in relation to equal pay?

As explained in Part 2, the old provisions of the Equal Pay Act 1970 are included (with some changes) in Part 5 of the EqA 2010, ‘Equality of Terms’ (sections 64-71).

Who is covered by the Equality Act?

This section expands on the Part 2 content.

**What about those on zero-hours contracts?** According to the (former) BIS – the Department of Business, Innovation & Skills - ‘zero hours contract’ is a non-legal term used to describe many different types of casual agreements between an employer and an individual.’ (BIS, 2015).

BIS (2015) explains that ‘generally speaking, a zero hours contract is one in which the employer does not guarantee the individual any hours of work. The employer offers the individual work when it arises, and the individual can either accept the work offered, or decide not to take up the offer of work on that occasion.’

Self-employed people are not covered by the EqA 2010 or Article 157 TFEU. Nevertheless, there can be argument about whether a person is ‘in employment’ or is self-employed.

Article 157 provides a right to equal pay to ‘workers’. A worker is a person who ‘performs services for an under the direction of another person in return for which he receives remuneration’. ‘Worker’ is not intended to include an independent provider of services ‘who is not in a relationship of subordination with the person receiving the service’. (There is now apparently little difference between Article 157 and the EqA 2010 in the definition of ‘worker’ and a person who is ‘employed’.)

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1 ‘Zero hours contract’ is not defined in the 2015 Regulations prohibiting exclusivity terms in zero hours contracts.
If a person on a zero hours contract does not have a ‘contract of employment’, she would be covered by the EqA 2010 if she is otherwise ‘employed’ i.e. she has a contract (written or oral) to personally do the work (basically, where she cannot send someone else to do the work in her place).

The distinction made between employed and self-employed workers can be a problem for casual workers.

**What about casual workers?**

In general, casual workers are classified as independent contractors rather than employees because there is no obligation on the employer to offer them work and no obligation on the part of person to accept work that is offered. In legal terms, there is no 'mutuality of obligation'.

Casual work is typified by breaks between periods of work. This can cause problems for casual workers who regularly work for the same employer and claim that they are employees or contracted personally to do the work. For example, in *Windle v Secretary of State for Justice* (2016 EWCA Civ 459) the claimants were court interpreters. They had to show that they worked in a subordinate position, carried out the work personally and were integrated into the employer’s business. The interpreters’ claim fell - the Court of Appeal decided that because they were under no obligation to accept any next assignment, this pointed towards them not being in a subordinate position.

The outcome of cases where the employment status of the claimant is at issue will depend on the particular facts of each case but Windle is unhelpful in ruling that ‘mutuality of obligation’ between assignments is a relevant factor to be taken into account in assessing the extent of subordination. This was already the position in relation to unfair dismissal claims (under ERA 1996), but the Court of Appeal have extended it to discrimination claims (under the EqA 2010) including equal pay claims. The judgment could make it harder for zero hours workers and other casual workers who do not have a contract of employment to show that they have a contract personally to do work. (At the time of writing, it was not known if *Windle* would be appealed to the Supreme Court – please check for updates.)

The statutory definition of ‘fixed-term contracts’(see below) could cover ‘seasonal’ or ‘casual’ employment contracts that last for a short period or cover a specific task, for example, a summer deck-chair attendant. A casual worker may also be able to be classed as an employee in certain other circumstances – please refer to other union guidance for further information.

**Note:** Unlike temporary employees, there is no reference in the Green Book to casual workers.

**Fixed term employees and equal pay**

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the FTE Regs) provide protection to an employee who is employed under a fixed-term contract.

The Regulations apply to ‘employees’ not ‘workers’. (They exclude employees working under a contract of apprenticeship or an apprenticeship agreement.)

Under the Regs, a fixed-term employee has the right ‘not to be treated less favourably than the employer treats a comparable permanent employee as regards the terms of his
contract, or by being subjected to any other detriment by any act, or deliberate failure to act, of the employer’ (Reg 3(1)). TheRegs cover pay and pensions.

In Coutts and Co plc and anor v Cure and anor (2005 ICR 1098 EAT), the EAT held that non-payment of a (non-contractual) bonus to a fixed-term employee amounted to a detriment. The comparator (a permanent employee) and the claimant must be employed by the same employer; engaged in the same or broadly similar work; and work at the same establishment.

The fixed-term employee must show that the less favourable treatment was ‘on the ground that’ she (or he) ‘is a fixed-term employee’ – Reg 3(3)(a). But her claim will fail if the less favourable treatment ‘is justified on objective grounds.’ This will include situations where, taken as a whole, the fixed-term employee’s contract is at least as favourable as the comparable employee’s contract. The ‘total package’ approach is different from the EqA ‘term by term comparison approach.

A claim under the FTE Regs will fail if the employer shows the treatment was for a reason other than on the ground that she is a fixed-term employee.

Note: The Green Book Part 2:9 states that ‘temporary employees shall receive pay and conditions of service equivalent to that of permanent employees.

Agency workers and equal pay

The Agency Workers Regulations 2010 seek to protect agency workers in their relationship with ‘temporary work agencies’ and ‘hirers’ (the end-users of an agency worker’s services). Temporary work agencies (TWA) and hirers must ensure that an agency worker who has completed a 12 weeks qualifying period receives the same pay as he or she would be entitled to for doing the same job, at the time the qualifying period commenced, had he or she been recruited directly by the hirer – Reg 5(1). Pay is pay for work done and includes basic pay, overtime payments, allowances for working shifts or unsocial hours, payments for annual leave and bonus payments. (But any bonus, incentive payment or reward that is not directly attributable to the amount or quality of the work done is excluded.) Most benefits in kind fall outside the scope of ‘pay’.

Where the ‘Swedish derogation’ applies, i.e. where the agency worker has a permanent contract of employment with the TWA which satisfies certain conditions and she is paid a minimum amount between assignments, she is not entitled to parity of pay under the Regulations.

The EqA 2010 definition of who is ‘employed’ for equal pay purposes applies to agency workers but she may have difficulty finding a comparator with whom she is ‘in the same employment’. The ‘common terms’ argument might assist here (see the earlier sections in Part 2 on who is covered by the EqA equality of terms provisions).

The EqA 2010 s.41 prohibits (specified) discrimination by ‘principals’ (end-users) against agency workers but there is no similar provision in respect of equal pay.

There has been considerable litigation over the question of when agency workers are employees of the end-user. The leading case is James v Greenwich London Borough Council 2007 ICR 577 EAT (approved by the Court of Appeal, 2008, ICR 545). The threshold for establishing employment status is high.
Part time workers and equal pay

Union representatives need to take careful account of the differences between the Part-time (Prevention of Less Favourable Treatment) Regulations 2000 (the PWT Regs) and the EqA 2010 in advising members who work part-time which route might be best to use in challenging less favourable treatment.

Most part-time workers in local government are women and will be covered by the EqA 2010 equality of terms provisions for equal pay purposes – as will men working part-time where the comparator is a female employee. An exception to this is where part-time workers do not have a contract of employment or apprenticeship or a contract personally to do work (see earlier sections of Part 2).

A part-time worker cannot claim equal pay (i.e. under the EqA equality of terms provisions) on the basis that he or she is a part-time worker – she can only make an equal pay claim on the basis of her sex, i.e. she is paid less than a person of the opposite sex. (The comparator can work full or part-time.)

The Part-time (Prevention of Less Favourable Treatment) Regulations 2000 (the PWT Regs), give part-time workers (men and women) a right not to be treated less favourably than full-time workers unless any difference in treatment can be objectively justified.

Under the Regulations, a part-time worker can compare her or his treatment only with a full-time comparator (of either sex).

The part-time worker and her comparator must be engaged in ‘the same or broadly similar work’ having regard, where relevant, to whether they have a similar level of ‘qualification, skills and experience – Reg 2(4)(a) (ii). This is a different test to that used by the EqA 2010. Where a female part-time worker is doing the same or broadly similar work to a full-time male worker in the same employment but is paid less, she may be better advised to pursue an equal pay claim, depending on whether it can be shown that she is doing equal work with her comparator.

Under the PTW Regs, it is not entirely clear that the comparison of contractual terms has to be made on a term by term basis (as it must for equal pay claims – as explained in Part 2).

The claimant and comparator must be in the same employment but this does not include an associated employer (as it does under the EqA 2010).

**Note:** This is a very brief outline of the PTW Regs – please refer to other union guidance for more detailed information.

Part-time workers and training courses

Paid time-off for training (for example) is ‘pay’ within the meaning of Article 157 (Arbeiterwohlfahrt der Stadt Berlin eV v Bötel 1992 IRLR 423, ECJ; Davies v Neath Port Talbot Borough Council 1999 ICR 1132, EAT).

Part 2 of the Green Book states:

‘8.1 Part time employees shall have applied to them the pay and conditions of service pro-rata to comparable full time employees in the same authority, except for:

a) training and development - where part time employees should have access equal to that of full time employees and when on training courses outside their contracted daily hours shall be paid on the same basis as full time employees’
b) the car allowance scheme - which applies to part time employees in full on the same basis as full time employees.’

(Note that this provision applies to female and male part-time employees.)

Part-time workers who attend ‘full-time’ training courses (or comparable activity) organised by a recognised union are entitled to paid time-off (by the employer) for all hours in attendance, where the training relates to the employment relationship.

Job evaluation and the role of union negotiators

Part 1 of the Guide stressed the importance of union representatives being involved in the job evaluation process in organisations at every stage.

What if the JE process is not finished?

This question was answered briefly in Part 2 – also see Part 1.

If the JE exercise is completed and the employer then decides to abandon using the results to design or implement the grading and pay structure, the evaluation results would be useful in indicating which jobs were of equal value, should claims need to be pursued. This could happen if, for example, the alternative JE study used by the employer was discriminatory or otherwise unreliable.

What is ‘pay’ under the Equality Act?

What if pay and /or benefits are non-contractual?

It may not always be clear whether an element of pay (such as a performance-related payment) is contractual or not. Under the previous legislation, to protect her position, a claimant doing equal work with her comparator (but receiving less performance-related pay) would submit an equal pay claim and a sex discrimination claim. If the tribunal established (for example) that the payment was contractual, the sex discrimination claim could fall away. Pleading in the alternative (as the lawyers call it) is still possible under the EqA 2010 although the equality of terms provisions seems to be stricter about excluding sex discrimination claims (see section 70).

Union representatives should get legal advice on how claims should be framed where there is doubt about which route applies - sex discrimination or equality of terms. (It is important to bear in mind that different time limits apply to equal pay and sex discrimination claims).

Maternity pay

Maternity pay (contractual and statutory) is in scope of Article 157, however the ECJ has held that women taking maternity leave are in a special ‘protected’ position, so their situation is not comparable with that of men or women actually at work. Therefore they are not entitled under Article 157 or the recast Directive to full pay during maternity leave, although they must receive pay rises awarded during maternity leave. (Gillespie v Northern Health and Social Services Board 1996 IRLR 214 ECJ). See the Part 2 section on maternity leave for information on the provisions of the EqA 2010.

The ECJ has held that a public employer’s scheme to make subsidised nursery places available to employees did not constitute ‘pay’ under Article 157 (Lommers v Minister van
Landbouw, Natuurbeheer en Visserij 2002 IRLR 430, ECJ but that they were a ‘working condition’ under the (then) EU Equal Treatment Directive, now part of the recast Directive. (By ‘working condition’ the ECJ meant that the nursery places facilitated the exercise of the occupational activity of the employees concerned.)

What is the remedy in successful equal pay cases?

The Act entitles the claimant to equality in pay and other contractual terms of employment. This means:

- The less favourable term of her contract is modified so as to not be less favourable than the corresponding term in his contract. (So, for example, if her basic hourly rate of pay was lower, it would have to raised to his hourly rate of pay)

- If she does not have a term which corresponds to a term in his contract (that benefits him), the terms of her contract are modified so as to include such a term.

Generally, successful claimants will be entitled to back pay – the pay she should have been receiving - and possibly interest on the arrears.

Issues for union representatives to consider in settling members’ claims or potential claims are outlined later in the section ‘Settling equal pay claims’

Can the employment tribunal (ET) make recommendations to the employer to put right wider pay discrimination?

In some circumstances, the tribunal can order the employer to carry out an equal pay audit (outlined in Part 2).

However, the power of the tribunal to make recommendations (beyond those affecting the successful claimant/s) was removed by the Deregulation Act 2015. Tribunals can no longer make wider recommendations to ‘obviate or reduce the adverse effect of a contravention’ of the EqA, Part 5 (Work) - which covers equal pay and employment related discrimination claims. For example, where the tribunal found that a system for assessing performance indirectly discriminated against the complainant, it could not recommend that the employer investigate the effects on other female employees (unless they were part of a multiple claim).

In an indirect discrimination case, the tribunal cannot make a recommendation if it is satisfied that the ‘provision, criterion or practice’ (PCP) which caused the problem was not applied with the intention of discriminating against the complainant (EqA 2010, s.124).

Can the court order an unenforceable term in a contract to be modified or removed?

An enforceable term in a contract of employment is a term that ‘constitutes, promotes or provides for treatment prohibited by the Act’.

The county court or (in Scotland) sheriff may order an unenforceable term to be removed or modified (s.143) on ‘the application of a person who has an interest in the contract’. But this is rarely done because every person who would be affected by the removal or modification of the term has to be given notice of the application and the opportunity to make representations.

(This power does not apply to any term that may breach the Public Sector Equality Duty – there are separate provisions on enforcing the PSED.)
Who can be a comparator for an equal pay claim?

Is it possible to have a hypothetical comparator?

Not for an equal pay claim - there is a possibility that a claimant could use a hypothetical comparator if she was subject to direct discrimination in relation to pay, for instance, if an employer said ‘I would pay you more if you were a man’. This would be a discrimination claim (EqA, s.71(2)).

Indirect discrimination claims in relation to non-contractual terms can have hypothetical comparators.

Are there circumstances where there is no need for a comparator in an equal pay case?

Only in limited circumstances.

To bring an equal pay case, in certain circumstances, women on maternity leave are not required to have a male comparator (EqA 2010, ss.72–76).

Secondly, a comparator is not required where a discriminatory provision derives from national law (for example, an indirectly discriminatory rule in the Teachers’ Superannuation Scheme), and a statistical analysis demonstrates adverse impact on one sex (Allonby v Accrington and Rossendale College and ors, 2004 ICR 1328, ECJ).

In most indirect discrimination claims, the claimant must have a comparator but she does not necessarily have to show that a ‘provision, criterion or practice’ (PCP) of the employer is causing the disadvantage – in some cases, statistical evidence which demonstrates adverse impact is sufficient to establish prima facie sex discrimination.

If the claimant has longer service than the comparator and she wins her equal pay case, what happens to her pay?

Usually the claimant has more than one comparator because there is no guarantee at the outset which ones will be found by the tribunal to be doing equal work with her.

In Evesham v North Hertfordshire Health Authority and another (2000, ICR 612, CA), the claimant’s work was rated higher (under a JE scheme) than the comparator’s work but she was paid less. However, her pay could only be raised to the level of his pay – this is the effect of the modification of the term in her contract to be no less favourable (but not more favourable) than the term in his contract.

The Evesham case highlights the importance of choosing the right comparator/s. The claimant, a speech therapist, cited a sole male clinical psychologist as her comparator who had much shorter service than her and this was reflected by the fact that he was on a low point on his payscale. If she had chosen a clinical psychologist with commensurate years of service to her, she might have achieved a higher rate of pay (provided, of course, her job had been rated as equivalent to his).

‘Same establishment’ and the EqA 2010

Part 2 cited the case of City of Edinburgh v Wilkinson and ors (2014 CHIS 27). On the face of it, Wilkinson is an unhelpful judgment which could narrow the scope for ‘same
establishment’ claims. However this case was taken under the Equal Pay Act 1970 – the EqA 2010 is worded differently in respect of these provisions.

There is also a new and (at the time of writing) untested provision in the EqA 2010, section 80(3): ‘If work is not done at an establishment, it is to be treated as done at the establishment with which it has the closest connection’.

Having wider scope for ‘same establishment’ claims could be important if Brexit results in closing off the Article 157 route (‘same service’ claims).

What does ‘single source’ mean and how does it affect Article 157 claims?

This section supplements Part 2 by outlining the history of the ‘same service - single source’ litigation.

The ECJ ruled that Article 119 (now 157) permits equal pay comparisons with persons employed in the ‘same establishment or service as the claimant’ (Defrenne v Sabena 1976 ICR 547, ECJ) whether public or private (Macarthys Ltd v Smith, 1980 ICR672, EAT).

In Scullard v Knowles & Southern Regional Council for Education and Training (1996 IRLR 344), the EAT permitted Ms Scullard, a unit manager employed by a (then) Training & Education Regional Council, to name as her comparators male unit managers employed by other such bodies, all of which were independent of the Secretary of State for Employment but funded by the Department of Employment. Initially, this judgment raised the prospect that ‘same service’ claims might enable cross-employer claims in local government. (The 1997 national single status agreement did not prescribe national grades – authorities were required to carry out local grading and pay reviews. This meant that it was possible for men and women employed by different authorities but doing equal work to be paid differently.) At the time, it was also hoped that Article 157 claims might stop private contractors from cutting the pay of their ex-local authority employees. However, Scullard was followed by a clutch of judgments which have limited the use of Article 157 to challenge pay inequality in cross-employer cases.

The ‘same service’ argument was deployed by UNISON in Lawrence & others v Regent Office Care Ltd and ors (2003 ICR 1092 ECI). The claimants included female school meals staff who transferred from North Yorkshire County Council to a private contractor. They ended up working on less favourable terms and conditions than men still employed by the Council whose jobs had been ‘rated as equivalent’ in value to their jobs by the local government Manual Workers’ job evaluation scheme. The union argued that even though the women were no longer working for the council but for a different employer, they were entitled to equal pay because they were still working in the ‘same service’.

The ECJ held that where differences in pay cannot be attributed to a single source, equal pay claims will not be in scope of Article 141 (now 157). To put it more simply, in the words of the original tribunal’s decision, ‘the person who discriminates has to be in control both of the women’s wages and the comparator’s wages’. In this case, the employers argued successfully that there must be a common source from which the terms and conditions of both the claimant and comparator derive (as when different employers are required to apply the same collective agreement, or where terms and conditions have been laid down by statute or a regulation).

Furthermore, it was argued that unless the difference in pay can be traced to a single source, the employer who is accused of sex discrimination (because he pays women workers less
than the male comparator’s employer) is not in a position to explain the difference or to explain why that difference is objectively justified. The Advocate-General’s opinion (adopted by the ECJ) put it in this way: ‘...Article 141 is addressed to those who may be held responsible for [the pay difference] i.e. the legislature, the parties to a collective works agreement and the management of a corporate group...On the other hand, if differences in pay arise [where] respective employers are separately responsible for the terms and conditions ...within their own undertaking or establishment, they cannot possibly be held individually accountable for any differences in the terms and conditions ...between those undertakings’.

If the women’s and the comparators’ (different) employers were party to the national agreement, grading and pay would be determined by local collective agreements rather than a ‘single source’, suggesting that claims across authorities under Article 141 would be ruled out. Even if the claim for equal pay was in relation to a contractual term derived from Part 2 of the national agreement which is binding on all NIC (or SJC) authorities, individual employers are responsible for pay disparity and putting it right, not the NJC/SJC.

The ECJ judgment in Lawrence appears to severely limit scope for comparisons between claimants employed by a local authority which has opted out of the national agreements and comparators employed by an NJC/SJC authority (or vice versa).

Subsequent Article 157 cases confirmed that the ‘single source’ test sets a high bar for claimants.

In Allonby v Accrington & Rossendale College and ors (2004 IRLR 224 ECJ), the ECJ ruled that a female lecturer employed through an agency could not claim equal pay with male lecturers employed directly by the College. Ms Allonby had been employed originally as a part-time lecturer on a series of short term contracts. As a cost-cutting measure, her contract was not renewed and she was re-engaged as a sub-contractor of an agency, as a self-employed person. She was paid on a fee per assignment basis by the agency. Her comparator was paid by the College under conditions determined by the College. Her fee and some other benefits were then reduced compared with directly employed lecturers. The fact that her fee was influenced by the amount the College paid the agency was not held to meet the ‘single source’ requirement – it was ‘not a sufficient basis for concluding that the college and ELS [the agency] constitute a single source to which can be attributed the differences identified in Ms Allonby’s conditions of pay and those of the male worker paid by the college’. Accordingly, her equal pay claim failed.

In Dolphin and ors v Hartlepool Borough Council and ors (EAT 0559/05), female support staff in voluntary-aided schools, employed by the governing bodies of those schools, sought equal pay with male workers employed by the Council at different establishments. The EAT upheld the tribunal’s decision that the claimants could not show they were in the ‘same service’ as the men by virtue of there being a ‘single source’. Although the governing bodies and the Council applied the same pay scales, the voluntary-aided schools were run by the governing bodies as separate entities and operated autonomously in engaging staff as an employer and being responsible for staff terms and conditions. Consequently, the Council was not the ‘single source’ responsible for setting their terms and conditions and for restoring equality.

In Robertson & others v Department for Environment, Food and Rural Affairs (2005 EWCA Civ 138), the Court of Appeal upheld a judgment of the EAT that a group of male civil servants were not entitled to compare their pay with women civil servants working in another government department. Technically, they had the same employer (the Crown), but responsibility for pay negotiation had been delegated by the Crown to each department or agency. The employment tribunal had decided that the Treasury had material control over the terms and conditions to such a degree that it could properly be regarded as being a ‘single
source’. The EAT and the Court of Appeal disagreed. The Court held that working for the same employer is not sufficient to establish common employment for the purposes of an Article 141 claim. Neither the Treasury nor the Cabinet Office was involved in negotiations within different departments and there was no coordination between the different sets of negotiations. Therefore the Crown could not be said to be the body (the ‘single source’) which was responsible for the inequality and which could restore equal treatment. This was not altered by the theoretical legal possibilities that the Crown retained the power to regulate civil servants’ pay after delegation and to revoke the delegation of pay bargaining any time.

In Armstrong and ors v Newcastle upon Tyne Hospital Trust (2006 IRLR 124 CA), the claimants also lost their case. The history is complicated but essentially domestic ancillary workers (mostly women) had lost their bonus payments as a result of a tendering exercise while the comparators (porters, mostly male) did not. The original employer (with four hospitals) split into two hospital trusts which later merged to form the Newcastle upon Tyne Hospital Trust (NHT). The claimants who worked at different hospitals (‘establishments’) to the porters were unable to show that they were in the same employment under the Equal Pay Act 1970. The ET held that common terms and conditions did not apply – the bonus agreements adopted at the various hospitals were subject to collective negotiation on a departmental basis. Also, the ET did not accept that the claims fell within Article 141 – the bonus schemes at the different hospitals being ‘different employment regimes’. On appeal, the claimants argued that the NHT was ‘a single source’. It had stopped bonuses for new starters and could have entered negotiations to harmonise the bonus arrangements and other terms. The Court of Appeal noted that the employer (NHT) had taken part in some departmental negotiations and there was some evidence of harmonisation of conditions. But, influenced by Robertson, the Court held that the ET had been entitled to find that the NHT had not assumed responsibility for the terms and conditions of all the employees for the purposes of the ‘single source’ test.

It is clear from these judgments that in cross-employer cases (leaving aside cases where the employers are associated under the EqA 2010) claimants are likely to find it very difficult to meet the Article 157 single source test.

The EHRC Code of Practice on Equal Pay (2011) explains that ‘identifying whether there is a single source responsible for the pay of a claimant and her comparator is a decision of fact and degree for the ET’ (para 57). The tribunals will focus on what happens in practice between the employers, rather than on powers or controls that one employer could (in theory) exercise over another employer. The Beddoes case (below) provides an interesting twist to this, where the exercise of an employer’s (theoretical) powers would produce ‘fanciful’ results.

An example of a successful ‘single source case’ (decided just before Lawrence) is South Ayrshire Council v Morton (2002 IRLS 256 CS). The Court of Session (Inner House) upheld the tribunal’s decision in a test case (involving 600 claimants) that a female primary school head teacher employed by a local education authority in Scotland was entitled to bring an equal pay claim relying on Article 141 to compare her pay with that of a male secondary school head teacher employed by a different local education authority in Scotland. (The claimants conceded that the authorities were not associated employers under the Equal Pay Act.) The tribunal decided the claimant and comparator were in the ‘same service’, as education authorities had ‘a sufficient community of interest for the whole structure of education to be regarded as a ‘service’ and there was a ‘single source’ - the claimants and comparators were subject to a uniform system of national pay and conditions set by a statutory body whose decision was binding on their employers. In practice, there was very little scope for an individual authority to vary a teacher’s salary set by the Scottish Joint Negotiating Committee (SJNC). The formal autonomy of each education authority in respect of its employees was curtailed to a large extent by the SJNC.
In Beddoes and ors v Birmingham City Council and ors (EAT 0037-43/10), the claimants – mainly catering and cleaning staff - were employed by the Council at different schools. Their chosen comparators worked at the same establishments so the cases were taken under the Equal Pay Act 1970. Nevertheless the Council mounted an Article 141 argument that there was no ‘single source’ – that each governing body was ultimately responsible for setting employees’ terms and conditions although formally the Council was the employer. The EAT held that Regulation 15 of the School Staffing Regulations (England) 2003 did not preclude the Council from being the single source for the claimants’ and comparators’ terms and conditions and so the Court of Appeal’s (obiter)\(^2\) reasoning in Anderson (see below) – though not on the ‘single source’ point - was applicable. If the idea that the governors could bind the Council to an ‘inappropriate grade’ was legally and factually fanciful, it could not be relied on to support the argument that the governors, rather than the Council, were the true ‘source’ of the claimants’ terms and conditions. In any event, the Council had conceded that the claimants and comparators were employed by it at the same establishment, so even if its argument on the applicability of the single source test had been upheld, its appeal would still have failed.

As mentioned, the claimants’ case was argued within the terms of the Equal Pay Act. Consequently, there was no requirement for them to satisfy a test in EU law. This case is a good illustration of the ways in which domestic and EU law interact - in Morton, (unlike Beddoes) the claimant could not have pursued her case under the Equal Pay Act 1970 because she and her comparator were not in the ‘same employment’, but she argued successfully that section 1(6) of the Act was incompatible with EU law (Article 157) and was allowed to rely on a comparator employed by a different local authority.

**What scope is there for future Article 157 claims?**

Leaving aside Brexit, the Lawrence judgment and those following in its wake seem to have all but closed the door on cross-employer claims under Article 157 and arguably the shedding of local authority services and devolution of public sector pay bargaining have reduced the scope for these claims.

However, as (non-council) organisations are increasingly moving into the provision of local services, the potential for Article 157 claims should not be disregarded, particularly where large organisations are involved and pay inequalities arise between male and female employees working under different terms and conditions at different establishments but in the same service. It is worth investigating whether there is a single source which has responsibility for pay inequality and is capable of rectifying it. This could possibly derive from common management of a corporate group, for example. As we have seen, the actual factual position matters as opposed to a hypothetical situation. Of course, it also has to be shown that the claimants and comparators are doing equal work. Where union representatives identify pay inequality which could be subject to challenge under either the EqA 2010 or Article 157, legal advice should be sought in accordance with your union’s protocols.

**Is there a legal definition of ‘job evaluation’?**

**Challenging JE validity**

\(^2\) Short for ‘obiter dictum’ – literally it means ‘something said by the way’ - a statement of the law by the judge which does not form part of the decision – it is of persuasive authority only. However, notice is generally taken when the remarks are made by a senior judge.
Experience shows that it can be extremely difficult to challenge the validity of a JE study.

These cases tend to be technically complex and lengthy. Claimants may well prefer to settle than pursue long-running litigation which has an uncertain outcome (as in Russell – see Part 2). The risk of losing the case may be heightened where the tribunal has to grapple with highly technical, contested issues, as in MacDonald and ors v Glasgow City Council UKEAT 0011/14/1205. This case involved a challenge to the JE scheme used by the Council for the single status Workforce Pay and Benefits Review (WPBR). It was said to be an unusual scheme because it had two factor plans or ratings, referred to as ‘core or grade’ and ‘work context and demand’. On the evidence before it, the ET found that there were no grounds for suspicion of sex discrimination or other unsuitability and, on appeal, the EAT found no error of law in its decision. (At the time of writing, UNISON was seeking to appeal the EAT judgment)

What if the employer wants to use two JE schemes?

Two schemes and equal pay risks

This paragraph follows on from the Part 2 section and gives a hypothetical example of a possible equal pay challenge and a material factor defence.

The pay modelling process would identify a potential equal pay risk where, for example, using the NJC JES, a cluster of jobs done mainly by women score the same or very similarly to a group of jobs carried out by men, but because the male jobs are in existing and/or proposed new grades for which the other JE scheme is or is to be used, their jobs are also evaluated under that scheme and allocated to a higher grade than the women’s jobs. To challenge that outcome, it would need to be shown that the claimants (the women) were doing work of equal value to the comparators. The tribunal would most likely require a report on the worth of the jobs from a member of ‘the panel of independent experts’ convened by ACAS. The independent expert is free to devise a methodology for assessing the worth of the jobs - of course, the same methodology must be used for both sets of jobs.

In a two-scheme scenario, the employer could have a material factor defence to an equal value claim. For example, the employer could argue that in setting the payline for all jobs, labour market factors were taken into account, and a tighter labour market in respect of the comparators’ jobs was reflected in the higher payline set for those jobs compared to the claimants’ jobs. (Labour market defences are sometimes successful, sometimes not – see Part 2.) If, however, the allocation of the men’s jobs to a higher grade was done to preserve or protect their (originally) higher pay, the reason would be tainted by sex discrimination. If the allocation of the men’s jobs was not done for a discriminatory reason but statistics showed a disparate impact on women employees, i.e. prima facie indirect sex discrimination, the employer would have to show that the choice of JE study and consequent allocation of the claimants’ jobs to a lower grade than their comparators was a proportionate means of meeting a legitimate aim. If cost considerations alone were the reason, this would not justify indirect discrimination (see the Part 2 section on cost as a defence to a claim).

What is indirect sex discrimination for equal pay purposes?

Case law on indirect sex discrimination has come mainly from the ECJ. What might be the effect of Brexit? According to some experts in equality law, ‘...it has been so long accepted
by the UK courts our view is that it is unlikely that Brexit will lead the courts to interpret the concept of gender taint differently\textsuperscript{3}

How can it be shown that the employer’s material factor defence is indirectly discriminatory? Part 2 mentioned the \textit{Enderby} route. The judgment in this ECJ case allowed for a wider definition of sex discrimination under EU law than existed at the time under the provisions of the Sex Discrimination Act 1975. In short, \textit{Enderby v Frenchay Health Authority and anor} (1994 ICR 112 ECJ) established that it was not necessary for claimants to identify a discriminatory ‘provision, criterion or practice’ (PCP) for there to be indirect sex discrimination if there is cogent, relevant and sufficiently compelling statistics demonstrating that women are adversely affected as a group with regard to pay when compared to men. (It is not necessary for the disadvantaged group to be ‘almost exclusively’ women.)

Much legal argument has taken place over what is the statistical evidence necessary to show indirect discrimination, for example, over the pools for comparison (i.e. establishing which groups of female and male workers should be compared) and how the statistics were to be analysed. In cases where there is no PCP and the equal pay claim relies solely on statistical evidence of disparate impact, ‘those statistics must be so clear as to speak for themselves’ \textit{(Villalba v Merrill Lynch and Co Inc and ors 2007 ICR 469 EAT).}

New provisions in the Equality Act 2010 (section 69) also indicate a common sense approach ought to be taken to the analysis and interpretation of statistics – in effect, not losing sight of the wood for the trees.

\textbf{What does the test of objective justification involve?}

In regard to historical explanations for pay disparity, the objective justification put forward by the employer must have applied at the time the claimant was affected, not when the policy/practice was introduced. (An exception is a length of service criterion – if it is indirectly discriminatory, the employer has to show objective justification for its adoption as well its continued use \textit{(Wilson v Health and Safety Executive 2010 ICR 302, CA.)}

\textbf{Can budget constraints justify indirect discrimination?}

As explained in Part 2, ‘costs alone’ cannot be used by the employer to justify indirect discrimination.

There was speculation that the door might be opened to ‘costs alone’ as justifying indirect discrimination as a result of remarks made by the then EAT President Mr. Justice Underhill in \textit{Woodcock v Cumbria Primary Care Trust} (2011 ICR 143, EAT) - an age discrimination case. However, the accepted position remains that while ‘costs plus’ (other considerations) may be considered in the balancing exercise, ‘costs alone’ will not suffice in justifying indirect pay discrimination.

This issue was at the forefront of the local authority equal pay cases where discrimination had began in the past and continued – male workers’ protection payments included their historic bonus pay, but the employer did not ‘level up’ the protection payments to women doing equal work. On this subject, in \textit{Redcar and Cleveland Borough Council v Bainbridge} (2009 ICR 133 CA), the Court of Appeal said:

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‘We accept that a large public employer might be able to demonstrate that the
constraints on its finances were so pressing that it could not do other than it did
and that it was justified in putting the need to cushion the men’s pay reduction
ahead of the need to bring the women up to parity with the men. But we do not
accept that that result should be a foregone conclusion. The employer must be put
to proof that what he had done was objectively justified in the individual case.’

In putting forward cost as objective justification, the employer must supply sufficiently
detailed evidence, both of the costs themselves and the financial context, to the tribunal
(Bury Metropolitan Council v Hamilton, 2011 IRLR 358 EAT; Council of the City of Sunderland
v Brennan, 2011 EqLR 214 EAT).

Can ‘good industrial relations’ reasons justify indirect discrimination?
In the Irish case of Kenny v Minister of Justice (2013 EqLR 380 CJEU), a predominantly male
group of police officers had been redeployed to clerical work but were paid more under the
terms of a collective agreement than the female claimants doing like work. The employer
argued this was necessary to achieve operational efficiency and objective justification was
provided by the need to promote good industrial relations. The question of whether the
claimants were doing equal work was not determined (being a question for the national
court) but the CJEU went on to consider objective justification and held that the interests of
good industrial relations could be taken into consideration as ‘one factor’ among others in
deciding whether objective justification was made out, but it emphasised that this was
subject to the overall principle of non-discrimination.

It seems that ‘good industrial relations’ could not, on its own, provide objective justification.
Moreover, if the ‘good industrial relations’ were themselves tainted by sex discrimination,
no weight could be attached to that factor in providing objective justification.

On collective bargaining and objective justification, see the case of British Airways plc v
Grundy (No. 2) (2008 IRLR 815, CA) mentioned in Part 2 - in the section on the material
factor defence: different pay structures and collective bargaining.

What are the main material factor defences?

Before turning to the main defences, a couple of related questions are addressed.

When is a term a separate term?

As explained in Part 2, equal pay cases involve a term by term comparison. But it can be
tricky disentangling terms in a contract of employment that could be closely related.

In Degnan and ors v Redcar and Cleveland Borough Council (2005 IRLR 615 CA), the Court of
Appeal agreed with the EAT that a weekly attendance allowance paid to the comparators
but not the claimants was part of the same term that provided for the hourly rate of pay – it
was not a separate term. This was upheld by the Court of Appeal as it was a payment for the
performance of the (employment) contract during normal working hours. The attendance
allowance was paid by this employer for turning up for work and so was inseparable from
basic pay. It is important to note that Court of Appeal later held (In Brownbill) that the
Degnan judgment ‘turned on its own particular facts’ and did not give rise to an exception
to the principle in Haywood (the precedent case on the term by term comparison –
mentioned in Part 2).
In *Brownbill and ors v St. Helens and Knowsley Hospital NHS Trust* (2010 ICR 1383 EAT), the EAT found that terms providing for enhanced rates of pay for unsocial hours working were contingent on work being done during unsocial hours (even though those hours were part of the claimants’ normal working hours). Therefore those terms were not part of the same term relating to basic pay. Overall, the women claimants were paid more than their comparators but because the unsocial hours payments were separate terms, and the male comparators’ terms in regard to unsocial hours payments were more favourable, they were able to pursue an equal pay claim in respect of those terms.

**Does the employer’s material factor defence have to wait until the claimants have shown they are doing equal work with the comparators?**

Not necessarily - in some cases, a tribunal might consider the material factor defence first, on the assumption that the work done is equal although that question has not actually been determined. This could happen, for example, in an equal value case, where, if it proceeds, the tribunal is likely to appoint an independent expert. Dealing with the material factor defence as a preliminary matter may be the most efficient way to handle the case.

**What if the employer’s pay system is not transparent?**

Where the pay system lacks transparency, the tribunal will require the employer to show there is no discrimination behind the claimants’ and comparators’ difference in pay (*Handel-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening – acting for Danfoss A/s*, 1991 ICR 74, ECJ – known as the ‘Danfoss’ case).

The issue of transparency could arise in situations where (prior to pay claims being launched) the employer will not fully disclose to the recognised union how jobs have been evaluated and/or graded. For example, the employer may have used a commercial JE scheme whose owner maintains strict confidentiality in respect to key aspects of its methodology (see the Part 2 section on disclosure of information – freedom of information requests). Unwillingness to share pay-related information with recognised union representatives could also be an issue with non-SJC/NJC and private sector employers in local government who do not necessarily have an organisational culture of openness or joint working with the unions in respect of grading and pay reviews.

**What happens if the material factor defence does not account for all of the pay difference?**

Once it is established that the claimant and comparator are doing equal work, she is entitled to equal pay if the employer’s material factor defence fails. If the material factor accounts for some but not all of the pay difference, arguably she is entitled to parity with her comparator in respect of the difference that is not accounted for by the material factor. For example, if it were found that ‘market forces’ was the material factor which accounted for a proportion of the pay difference, the claimant would be entitled to equal pay but reduced by that proportion (although in practice it might be very difficult for the tribunal to work out how to calculate such an award). The notion of a proportionate award was raised in *Cumbria County Council v Dow and ors (No.1)* (2008 IRLR 91, EAT) but it must be stressed that this specific question was not argued in this case.

**Material factor defences**

**Market forces**

Despite the claimants’ success in *Ratcliffe* – where market rates for ‘women’s work’ (in catering) were considered to be sex-tainted (see Part 2) - this line of argument has not been
run successfully in any major equal case since then. A possible reason is that the House of Lords judgment lacks detailed reasoning so it does not give pointers (to claimants or judges) as to what might be required to succeed in other sex-tainted labour market scenarios. Cuts have also reduced terms and conditions across the board (affecting both sexes) in lower graded jobs. At a practical level, it may be hard to gather data to make out a prima facie case that women doing equal work are paid less than men in particular occupations where sex segregation is much less obvious than it was in school catering.

Ratcliffe-type arguments were dealt a blow by the Lawrence case (outlined earlier). The judgment indicated that the ECJ was unlikely to boldly go into the arena of tackling sex discrimination in the wider labour market in the absence of EU legislation giving it scope to do so.

Professional training

Professional training can be a material factor explaining the difference in starting pay because (unlike performance) it is a factor which is objectively known at the time the employee begins the job (Brunnhofer v Bank der österreichischen Postparkasse AG 2001 IRLR 571, ECJ). However, it should be noted that Brunnhofer involved a ‘like work’ claim where the jobs had not been evaluated. Within a job-evaluated pay structure (at least one using a union-approved JE scheme), it would be difficult to justify paying new starters (within the same grade) differently on this basis - for example, starting the claimant on the bottom pay point in the grade but starting the comparator on a higher rate of pay - because the NJC scheme (for example) treats levels of formal training and qualifications as indicators not determinants of the knowledge demands of jobs. Where an employer had to pay a higher salary to recruit a person (or persons) with a sought-after professional specialization than that paid to another (or others) of the opposite sex doing equal work, the employer would most likely rely on market forces as being the material factor which explained the pay difference.

However, difference in starting rates of pay is a common cause for pay differences between individuals doing equal work. Where an equal pay audit reveals a significant difference in (FTE) average basic pay between female and male employees doing equal work (for example, within the same grade in a job-evaluated structure), one of the first checks to run is on gender differences in starting salaries. If disparate impact on women is detected and the employer had to defend an equal pay claim, it would have to objectively justify the indirect discrimination (an issue that did not arise in the Bowling case – mentioned in Part 2 - it is also worth noting that a seven-point incremental scale (with annual progression) could be open to challenge on the grounds of indirect age discrimination)

Experience

There could also be potential for variation in rates of pay for new starters with competency-based pay structures where an individual recruit’s ‘greater experience’ was equated with that person having a higher level of competence than other new starters. This could give rise to (most likely) ‘like work’ claims from an employee of the opposite sex being paid less. If the pay structure had S/NVQ-related ‘gateways’ or ‘competency thresholds’ in the grade, the employer might have a material defence where it was shown that the comparator had a higher level S/NVQ qualification than the claimant/s. But where salary progression depended on internal assessments of competency, gauging a new starter’s ‘greater experience’ could be less straightforward and more subjective

It is possible for the employer to defend a claim on the basis that the comparator has ‘more recent experience’ than the claimant, as in Moss v Reliance Mutual Insurance Society Ltd, (UKEAT 0135/14). In this like work case, the claimant (an actuary) had less recent experience
than her comparator. The EAT noted that market forces was probably just as apposite (if not more so) as a material factor in explaining the difference between her salary and that of her comparator but accepted that her lack of recent experience was a material factor. The claimant attempted to argue that the ‘recent experience’ factor was tainted indirectly by sex discrimination, but as she had not raised that point at the tribunal, she was not permitted to argue it at the EAT. (As a rule, it is not permissible to raise a fresh legal argument on appeal to the EAT.) Had she raised that argument ‘below’ (i.e. at the tribunal), the tribunal would had to have considered whether the requirement to have recent experience put her and other women actuaries at a particular disadvantage compared with men doing like work – in other words, whether it was an indirectly discriminatory factor – and if so, whether paying more for recent experience was a proportionate means of achieving a legitimate aim. This can only be an exercise in conjecture in the absence of relevant facts and statistical evidence but it may have counted against the claimant that she had chosen to take a two-year career break following redundancy, which on the face of it, had nothing to do with caring responsibilities which may affect more women than men.

**Note:** Potential equal pay issues relating to professional training and experience would probably come to light as individual complaints – pay differences affecting a small number of individuals would probably not show up in an equal pay audit (which checks average pay by grade and gender) unless instances of these pay practices were widespread and affected mostly one sex.

**TUPE protection**

As explained in Part 2, TUPE protection can provide a material factor defence to an equal pay claim.

**Time limits, TUPE and back pay**

The relationship between TUPE and time limits for lodging claims was explained briefly in Part 2.

Things get complicated in relation to back pay. If the claim is not made within six months of the date of transfer, there still may be options for recovering up to six years back pay (five in Scotland) from the transferee in relation to the transferor’s failure to honour the sex equality clause (assuming that the claimant and comparator were in fact doing equal work for all of the period for which back-pay is claimed and the claim succeeds).

The main option is for claimants to bring a civil action for damages based on a breach of the equality clause. This would involve making a claim (in England) to the county court or the High Court. The time limit for these claims is six years. The Supreme Court cleared the way for such claims which are out of time in the employment tribunal in *Abdulla and ors v Birmingham City Council* (2012 ICR 1419, SC). The major downside of this route is that (unlike in the employment tribunal where costs orders are used sparingly) in the ordinary courts, as a general rule, ‘costs follow the event’ and the unsuccessful litigant normally has to foot the legal bill for the litigation, including the winning side’s costs.

The other option is procedural and is only available in exceptional cases – seeking to amend the claim in order to join the transferee as a respondent – this is called ‘an application for joinder’ – legal advice must be sought to explore this possibility.

*Are equal pay issues affected by the 2014 changes to the TUPE Regulations?*
The 2006 TUPE Regulations were amended in 2014 by the Coalition Government acting on the belief that they were ‘gold-plated’ i.e. that they exceeded what was required under EU law. In the end, the amendments were not as draconian as many feared. (The full title of the amended Regulations is the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014.)

The 2014 Regulations only apply in respect of transfers occurring on or after 31 January 2014.

The Government decided against allowing contractual variations for the purpose of post-transfer harmonisation - but see the next sub-heading.

There are some express exceptions which permit the variation of the transferred employees’ terms and conditions, for example, where the reason is unrelated to the transfer, or where it is agreed between the parties and is for an ETO reason (an economic, technical or organisational reason entailing changes in the workforce) - Reg 4(5)(a).

**The 2014 TUPE changes and collective agreements**

Where the employee’s terms and conditions are incorporated from a collective agreement, changes can be made to those terms and conditions provided at least one year has passed since the transfer and the employee is left in a no less favourable position overall (Reg 4(5B)).

The 2014 Regulations freeze the applicability of provisions of collective agreements incorporated into a transferred contract, in that any ‘rights, powers or liabilities’ in relation to any provision of a collective agreement between the previous employer (the transferor) and its recognised union/s do not transfer to the new employer (the transferee) after the date of transfer, if the transferee is not a participant in the collective bargaining for that provision – Reg 4(2).

**Do the TUPE Regs apply to all public sector employers?**

The TUPE Regulations apply to the public sector with the exception of the transfer of ‘public administrative functions’ i.e. intra-government transfers and reorganisations of public administrative functions. In these situations, ‘TUPE equivalent’ protection applies. ‘Public administrative function’ is not defined in statute but examples of such transfers that have taken place under ‘TUPE equivalent’ regulations include rent officers (in 1999) and public health staff who transferred from the Department of Health to Public Health England in 2013.

*The Code of Practice on Workforce Matters in Local Authority Service Contracts* (2003) was revoked by the Conservative Government on 23 March 2011. The *Code* was intended to avoid a ‘two-tier workforce’ in local government by allowing for the extension of similar rights to TUPE to the transferee’s existing workforce. The 2003 *Code* now only applies to procurement contracts entered into before that date. A further *Code* of the same name extending its reach beyond local authorities to the rest of the public sector was published in 2005 but it was withdrawn in 2010.

Northern Ireland

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4 This could be revisited by a Conservative government post-Brexit as the UK would no longer be bound by the Acquired Rights Directive.
Although the 2006 TUPE Regulations apply to the UK, in Northern Ireland, different (equivalent) provisions apply in regard to service provision changes. Also, at the time of writing, the 2014 Regulations had not been enacted in Northern Ireland.

Unions and indirect discrimination against members

Under the EqA 2010, a trade union is a ‘trade organisation’ which must not discriminate against or victimise persons in ways specified in section 57. (The same provisions apply to an organisation of employers). For example, a union must not discriminate against or victimise a member in the way it affords the member access (or does not afford access) to opportunities to receive a benefit, facility or service. This applies not only to representation of individual members but also in relation to advice given to members (individually and collectively) about the acceptance or rejection of employers’ offers.

Consulting union members on offers following local grading and pay reviews

Inevitably, negotiated agreements involve compromises which may affect some groups of members differently from others. However, it is critically important that a union does not indirectly discriminate against groups of members contrary to its own rules and to the EqA 2010 s.57.

This was the issue in Allen and ors v GMB (2008 ICR 1407 CA). In a very difficult financial climate and faced with conflicting pressures, the union had sought to strike a balance in reaching an agreement with the employer by giving priority to members who needed pay protection and to achieving pay equality in the future rather than to maximising claims for past pay inequality. Consequently, groups of women manual workers received compensation (back pay) worth substantially less than the value of a successful equal pay claim and APT&C female staff received no back pay (as the employer believed their equal pay claims were without merit). The tribunal found (upheld by the Court of Appeal) that there were deficiencies in the approach taken by the union to advising these groups of women members. The Court of Appeal held that the union had indirectly discriminated against the claimants in that the way the union had sought to persuade them to make sacrifices was not a proportionate means to achieve a legitimate aim.5

Although such legal challenges against unions are very rare and the Allen case is historic, it serves as a reminder of the importance of getting it right when it comes to consulting on pay offers from the employer. In future local grading and pay negotiations, it is quite possible that there could be conflicting interests among different groups of members. In these circumstances, union representatives must take great care not to subject a member (or members) to detriment, for example, by putting a group of women members under pressure or discrediting them if they choose to reject a proposed deal and/or to pursue litigation when other members are prepared to accept an employer’s settlement offer.

Following the Allen case, union head offices issued detailed guidance on the steps to be taken when consulting on employers’ offers arising from local single status reviews. Union representatives should check with your union head office for the latest guidance on consulting on pay offers.

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5 However, the tribunal’s decision that the union had victimised the claimants because they sought the services of a no-win no-fee lawyer was overturned by the EAT (GMB v Allen and ors 2007 IRLR 752, EAT) and not pursued in the Court of Appeal.
What could happen if a collective agreement is discriminatory?

The EqA 2010 s.145 states that ‘a term of a collective agreement is void in so far as it constitutes, promotes or provides for treatment of a description prohibited by this Act’. A person can complain to an employment tribunal that a term is void as a result of s.145, when that person thinks it might in the future have a discriminating effect on them. The person must be potentially personally affected by the term. (The person can be someone who is, or is seeking to be an employee of the employer concerned.)

If the tribunal finds the complaint to be well founded, it must make an order declaring that the term is void. The order can be backdated.6

The tribunal does not have the power to amend or modify a discriminatory term in a collective agreement – it can only declare it void. The tribunal cannot address the disadvantage experienced by the complainants and ‘give effect’ to equal pay – this has to await the outcome of negotiations and (where the term is incorporated into their contracts of employment) variation of their contracts.

Although section 145 challenges are rare, a successful complaint could cause reputational damage to the union (for agreeing to a discriminatory term). It could also result in significant industrial relations problems. If the void term affects individuals’ pay and grading arising from a locally agreed package to implement a local grading and pay review, for example, it is conceivable that the agreement could unravel and have to be wholly renegotiated, with a fresh consultation with members being necessary on the proposed replacement deal.

The potentially serious consequences of successful s.145 complaints serve to highlight why equality impact assessment (EIA) of proposed pay and grading packages is so important.

Disability discrimination and trade unions

While there is not a separate statutory code of practice on employment and disability, it should be noted that as organisations, trade unions are covered by the Disability Discrimination Act 1995 Revised Code of Practice: Trade Organisations, Qualifications Bodies and General Qualifications Bodies (2008).

Although this Code pre-dates the EqA 2010 (which replaced the Disability Discrimination Act 1995), it has not been repealed or updated.

For the purposes of this Guide, relevant sections of the Code include those on compromise (now called ‘settlement’) agreements, variation of contracts and collective agreements and rules of undertakings (paragraphs 11.12 – 11.14). The latter concerns the right of a certain disabled people to ask a tribunal to declare void a discriminatory term in a collective agreement.

6 Similar provisions apply to ‘a rule of an undertaking’ i.e. a rule made by an employer. Where the rule is contractual, that provision in the contract of employment becomes unenforceable, if the claimant succeeds in her complaint.
What are the time limits for equal pay cases?

This section briefly covers some issues on time limits which may be relevant in respect of local grading and pay reviews.

**Standard equal pay cases**

For standard equal pay cases (i.e. those not involving concealment or incapacity or ‘stable work’ cases – see below), the claim must be brought in the employment tribunal before the end of the ‘qualifying period’ which is the period of six months beginning with the last day of the (claimant’s) employment.

The end of employment starts the clock running but this is generally not the case where there is a variation in terms and conditions of employment. The difference between a termination and a variation of contractual terms will depend on the particular facts in each case and the tribunal will look at (for example) the intentions of the parties and the contractual documentation (Cumbria County Council v Dow (No.2) 2008 IRLR 109 EAT; Slack and ors v Cumbria County Council and ors 2009 ICR 1217 CA).

The importance of members having the benefit of union advice is illustrated by the fact that members can lose the right to bring a claim where they freely sign a new contract of employment but are unaware that this triggers the time limit for claims in respect of their previous contract.

**Concealment and incapacity**

‘Concealment’ cases are those where the facts giving rise to a potential claim are hidden from the claimant.

There are special provisions under the EqA 2010 to cover situations where incapacity has prevented the claimant from bringing an equal pay claim in time.

**Stable work cases**

In a ‘stable work’ case – where there have been breaks in what otherwise would have been continuous employment with a single employer – the qualifying period for bringing the claim is ‘six months beginning with the day on which the stable employment relationship ended’ (EqA 2010, s.129(3). This is helpful for claimants who are term-time workers, for example.

The concept of a ‘stable employment relationship’ not only covers situations where there are breaks as described but also situations where there is an uninterrupted succession of contracts of employment, as was the case in Slack (mentioned above) and North Cumbria University NHS Hospitals Trust v Fox (2010 IRLR 804 CA). The latter case concerned nurses whose terms of employment changed following the implementation of the Agenda for Change JE scheme. There was no change in the nature of their jobs or any practical break in the employment relationship, consequently the Court held that this was a stable employment relationship and so the ‘stable work’ time limit applied. In the Slack case, the claimants had signed new contracts of employment bringing their old contracts to an end, but as in Fox, the Court held there was a stable employment relationship.

**Note:** This section does not deal fully with time limits - please refer to other union guidance for more information.
Settling equal pay claims

Settlement agreements

A major incentive for the employer to settle claims is that lawfully made settlement agreements ‘compromise’ claims i.e. bring an end to the individual’s right to take legal action on the claim. A claimant can settle her claim in this way for any amount of compensation. This could be for a lesser amount than a tribunal might award, taking into account, for instance, the uncertainty of the outcome at the tribunal and the length of time and stress pursuing the claim could entail.

Where a union member’s (or members’) claim (or potential claim) could be settled by negotiation between the union and the employer (with or without the assistance of ACAS), it is very important that the deal on offer is fully explained by the union to those members, so each claimant is able to make an informed decision as to her/his options. (Please refer to your union’s guidance for more information.)

Conciliation of equal pay cases

The purpose of ACAS conciliation, whether Early Conciliation (before the claim has been lodged), or afterwards (‘individual conciliation’ also known as ‘post-ET1 conciliation’), is to assist the parties to resolve the issue and settle the claim without recourse to the tribunal. It is important to emphasise that neither the claimant nor employer is legally obliged to take part in either type of conciliation. But the claimant must notify ACAS that she intends to bring a claim and if Early Conciliation is refused or is unsuccessful, as a rule, she must quote her EC certificate number when filing her claim form - known as the ET1).\(^7\)

Most parties agree to participate in conciliation – this is usually conducted over the telephone or by email with the ACAS conciliator acting as the impartial go-between. Union members can ask their union representative to participate on their behalf. It is important to note that there is no legal obligation on the ACAS conciliator to advise the parties (or their representatives) as to the merits of the claim, what a tribunal might award if the claim was successful, or whether a settlement offer is fair. Under ACAS’ procedure, conciliators must not give such advice. However, conciliators may (and do) give generalised guidance as to how tribunals have dealt with similar cases. This underlines why it is imperative that union representatives provide members with information specific to their claim in order that they can make an informed judgement whether to accept a settlement offer.

Pay discrimination and protected characteristics (other than sex)\(^8\)

Equal pay audits

This section adds to Part 2 ‘EPAs – protected characteristics (other than sex)’.

Pay discrimination could be shown across a pay structure overall in relation to different protected characteristics as well as within particular grades.

\(^7\) Employment Tribunals Act 1996, sections 18A and 18B
\(^8\) ‘Other than sex’ – this is not to imply that other protected characteristics under the EqA 2010 are less important - it reflects the different way in which the law treats sex-related pay inequality from other causes of pay discrimination.
If the pay disparity is between employees doing equal work, and it adversely affects BAME women (or women belonging to a specific BAME group) for example, an equal pay challenge can only be made on the basis of gender - the law only permits comparisons of ‘equality of terms’ between persons of the opposite sex. If the statistics show disparate impact in respect of BAME women and/or BAME men within a grade or across the pay structure, the legal route to challenging this is a section 19 indirect discrimination claim (explained below).

Disparate impact may be experienced by employees with more than one protected characteristic but it can only be legally challenged (within one claim) on the basis of a singular protected characteristic (explained below). This means it may be necessary to do an in-depth statistical analysis to ‘isolate’ the protected characteristic which is most affected by the disparate impact. Where there is evidence of ‘combined’ or ‘dual discrimination’ (within a grade), an option would be to consider taking claims (as appropriate) under both limbs of the Act – equality of terms and indirect discrimination.

In relation to indirect discrimination claims, careful thought would need to be given to the ‘pool for comparison’. The selection of the appropriate pool is important because the claimant (B) must either:

- identify a PCP (provision, criterion or practice) that the employer (A) ‘applies, or would apply to persons with whom B does not share that characteristic’ and ‘it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage, when compared with persons with whom B does not share it’; and the PCP ‘puts, or would put B at that disadvantage’; or
- produce statistical evidence of indirect discrimination (explained in part 2)

If the tribunal finds there is indirect discrimination, the employer has to show it is a proportionate means of meeting a legitimate aim.

While the reality of many people’s lives is that they experience ‘double disadvantage’ at work, at the time of writing, as a rule, the law does not allow for ‘combined discrimination’ claims, i.e. that a person is discriminated against because of a combination of two protected characteristic. Provision exists for this in the EqA at section 14: Combined discrimination: dual characteristics – but this section has not been enacted.

**Indirect race discrimination and pay inequality**

What is the basis for the comparison when the claim is that the employer’s pay arrangements were indirectly discriminatory on racial grounds?

In *Wakeman and ors v Quick Corporation and anor* (1999 IRLR 424, CA) - mentioned in Part 2- the Court held that the tribunal had been entitled to look at the pay package as a whole – a different approach to the term by term comparison required for equal pay cases. However, as a rule, it is advisable for claimants to follow the term by term approach although, as such claims would be discrimination claims, faced with prima facie evidence of (for instance) a lack of pay transparency and less favourable treatment, a tribunal could draw an inference of discrimination and require the employer to prove that the reason for the less favourable treatment was not the claimant’s protected characteristic.

**Religion or belief – indirect discrimination and pay inequality**

The case of *Naeem v Secretary of State for Justice* (2015 EWCA Civ 1264) - outlined in Part 2- highlighted the importance of pinpointing the ‘provision, criterion or practice’ (PCP) alleged to be causing the disparate impact.
The Prison Service argued that the PCP was the whole system for establishing basic pay (including performance appraisals and ongoing changes to the system to reduce the time period for progression) but the Court of Appeal disagreed, holding that the PCP was specifically the linking of basic pay to LOS. That criterion applied to both groups. The claimant showed that this PCP put him and Muslim chaplains at a ‘particular disadvantage’ (s.19) but in the Court’s view, it did not necessarily follow that indirect discrimination was made out. It was necessary to establish the underlying reason for the different average lengths of service which created the pay disparity.

Drawing on judgments in equal pay cases (Armstrong and ors v Newcastle upon Tyne Hospitals Trust (2006 IRLR 124 CA) and Gibson v Sheffield City Council 2010 ICR 708 CA), the Court of Appeal held that an employer can rebut a claim of indirect discrimination by showing that an apparently disparate impact is the result of wholly non-discriminatory factors. The material factor was held to be non-discriminatory and therefore the employer did not have to justify it.

Measuring pay gaps (other than gender)

As explained in Part 1, an ‘equal pay gap’ is not the same thing as a ‘gender pay gap’.

The gender pay gap is the difference between the average earnings of female and male workers in an organisation (or across a sector or economy).

Within an organisation, pay gaps can be calculated in relation to groups of employees who share a protected characteristic under the Equality Act 2010 (other than sex) provided the data is available.

The following definitions of pay gaps have been used by researchers:

- The disability pay gap - the difference between disabled men’s or women’s earnings as a percentage of non-disabled men’s or women’s earnings. Disability is defined as either causing limitations to daily activity or limitations to employment.
- The ethnic pay gap - the difference between the earnings of men or women from various ethnic minority groups as a percentage of White British men’s or women’s earnings.
- The age pay gap - the difference between the earnings of men or women from various age groups as a percentage of the earnings of men aged between 40 and 44.⁹

Gender pay gap reporting

At the time of writing, it was expected that the Equality Act (Gender Pay Gap Information) Regulations 2016 will come into force at some time in 2017/18.

The Regulations apply to organisations in England within the private and charitable sector with over 250 employees (but not public authorities of any size). The Government has said it will extend the gender pay gap reporting requirements to public authorities but this has yet to happen by separate regulation. (If it happens, it could follow the Government’s intended evaluation of the Public Sector Equality Duty scheduled for 2016.)

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Organisations covered by the Regulations must report:

- The percentage difference in mean pay of female and male employees
- The percentage difference in median pay of female and male employees
- The proportion of male and female employees who received a bonus
- The number of male and female employees employed in each pay quartile

The definition of pay is that used by the Office of National Statistics (not as pay is defined by Article 151, TFEU). The ONS definition excludes overtime pay, expenses, the value of salary sacrifice schemes, benefits in kind, redundancy pay, arrears of pay and tax credits. It includes basic pay, paid leave, maternity pay, sick pay, area allowances, shift premium pay, bonus pay, car allowances (paid through the pay roll) and on-call allowances etc.

Pay is to be calculated before deductions for PAYE, national insurance, pension schemes, student loan repayments and voluntary deductions. Mean and median pay differentials are to be calculated as a percentage based on the gross hourly rate of pay of male and female employees. The pay quartiles are to be calculated based on the employer’s pay range (expressed in hourly rates of pay). For gender pay gap reporting purposes, this will create four pay bands – band A is the lowest hourly rate to the first quartile, and so on; band D is from the third quartile to the highest pay.

Employers must publish the information on their website and upload the information to a government-sponsored website. There is no requirement on the employer to explain any gender pay gap identified and (at the time of writing) no enforcement mechanism. (It remains to be seen if publication will have any embarrassment effect on employers reporting large gaps.) Aside from forcing those large employers (in scope of the Regulations) that have no gender pay monitoring to begin to do it in the hope that this could be a precursor to further action on pay inequality, these minimalist provisions are unlikely to have any material effect on reducing gender pay gaps. Nevertheless, union representatives should raise these requirements with affected employers and check that they are complying – at least the Regulations provide a context for initiating a conversation on gender pay inequality where this has been resisted before. Publication of gender pay reporting will also provide union representatives with a source of information on the performance of comparator and/or competitor employers in the sector – assuming there is widespread compliance with the Regulations.

The Equality Framework for Local Government (EFLG)

The Equality Framework for Local Government is an equalities performance standard for use in local government organisations (England) promoted by the Local Government Employers (LGE). It is supported by the National Assembly for Wales in so far as it integrates with and supports existing policies and initiatives. It is referred to in Part 4.11 of the Green Book.

The EFLG replaced an earlier standard developed by the local government employers’ organisation in consultation with the ECHR and the (then) Commission for Racial Equality, Disability Rights Commission and the Audit Commission.

The purpose of the EFLG is to help organisations improve their performance in relation to people - local residents, service users and employees - with characteristics protected by the Equality Act 2010. By using the EFLG, the LGE advise that organisations can also be helped to deliver on the public sector equality duty (PSED).

Organisations using the EFLG self-assess against five performance areas. (See the LGE website for details). Organisations are also free to add equality strands that are relevant locally to the statutory protected characteristics.
The Framework has three levels of performance:

1. Developing – understanding the importance of equality
2. Achieving – delivering better outcomes
3. Excellent – making a difference

These levels apply to five performance areas:

- Knowing your communities
- Leadership, partnership and organisational commitment
- Involving your communities
- Responsive service and customer care
- A skilled and committed workforce

A skilled and committed workforce

This performance area comprises ten main elements including equal pay. To take the equal pay element as an example, to self-assess as level 2 ‘developing’, an organisation will have ‘...made significant progress on its equal pay review [local grading and pay review] and is working towards agreement with unions’.

To self-assess as level 3 ‘achieving’, the organisation has reached agreement with the unions and/or its staff about the implementation of equal pay’.

To self-assess as level 4 ‘excellent’, ‘action is underway to ensure equal pay is fully implemented’.

The EFLG comes with built-in self-assessment questions. For example, at level 3, on equal pay, the questions are: ‘Overall, is there evidence that men and women are receiving equal pay for equal work (subject to any major industrial, legal or other barriers)? Is the situation being monitored/audited regularly?’

There are questions relating to pay and JE outcomes and monitoring by protected characteristic under the ‘workforce monitoring’ element. Under the performance area of ‘Leadership...,’ there are also questions that are relevant to commitment to equalities.

The EFLG is a voluntary standard. Union representatives (in England and Wales) should know if their local government employers have signed up to using the EFLG because union representatives should have been consulted or involved during those organisations’ self-assessments, at least on the workforce elements.

Union representatives can use the EFLG self-assessments to highlight:

- Areas for improvement that would assist the organisation in moving to a higher level of performance
- Gaps between what the organisation claims it does and what happens in practice. If, for example, a council self-assesses at level 3 but does not carry out regular equal pay audits, this should be pursued with the employer

The organisation’s EFLG self-assessments could be useful in indicating its compliance with the Public Sector Equality Duty (see Part 2 and the final section of the Supplement).
Accessing data for local grading and pay reviews

Disclosure of information by questionnaire

A person who believes that she or he has been discriminated against contrary to the EqA 2010 can no longer issue a ‘statutory questionnaire’ to the employer because the Coalition Government repealed section 138 of the Act (with effect from 6 April 2014) and the Equality Act 2010 (Obtaining Information) Order 2010. Statutory questionnaires could be used for obtaining information on equality of terms (equal pay) and prohibited conduct (discrimination). An informal procedure is meant to have taken its place.

The remainder of this section on ‘Accessing data...’ expands on the topics covered under this heading in Part 2.

Pay policy statements (England and Wales)

The Localism Act 2011 does not require authorities to use their pay policy statements to publish specific numerical data on pay and reward. However, the Department for Communities and Local Government (February, 2012) advises that authorities should consider how the information in their pay policy statements fits with data on pay and reward that they publish separately. This includes that data required to be published under the Local Government Transparency Code (2015) and by the Accounts and Audit (England) Regulations (2015) and relevant Welsh legislation.

Disclosure of information to trade unions for collective bargaining purposes

The Trade Union and Labour Relations (Consolidation) Act 1992 places ‘a general duty on an employer who recognises an independent trade union to disclose, for the purposes of all stages of collective bargaining’ (about matters, and in relation to descriptions of workers, in respect of which the union is recognised by that employer) information requested by representatives of the union’. It must be information that ‘without which the union representative would be impeded to a material extent in bargaining and which it would be in accordance with good industrial relations practice to disclose for the purposes of collective bargaining’ [ACAS Code of Practice 2: Disclosure of Information to Trade Unions for Collective Bargaining Purposes (1998), paragraphs 4-5).

The ACAS Code gives the following examples of information which ‘could be relevant for collective bargaining purposes’ under the heading, pay and benefits: ‘principles and structure of payment systems; job evaluation systems and grading criteria; earnings and hours analysed according to work-group, grade, plant, sex, out-workers and home-workers, department or division, giving, where appropriate, distributions and make-up of pay showing any additions to basic rate or salary; total pay bill; details of fringe benefits and non-wage labour costs’ (paragraph 11). The other criteria are conditions of service, manpower, performance and financial information. The examples given in the Code of information that should be provided for negotiations are not meant to be exhaustive but illustrative.

If the union considers that the employer has failed to disclose information that he (sic) is required to disclose by section 181 of TULR(C)A 1992, the union can make a complaint to the Central Arbitration Committee (CAC). The CAC may ask ACAS to conciliate. If conciliation does not settle the matter, the CAC will hear and determine the complaint.

If the complaint is upheld, the CAC will specify what the employer failed to disclose to the union and a timescale for rectifying this. If the employer fails to disclose the information
specified, the union can complain again and also present a claim for improved terms and conditions. If that complaint is upheld, the CAC may issue an award which has the effect of being part of the contract of employment, with terms based on the claim made by the union or other terms and conditions which the CAC considers appropriate (paragraph 8).

This little used provision has the advantage of being free to use. The CAC panel has wing members with worker and employer experience which is helpful to parties in deciding matters affecting industrial relations.

There are limits on what the employer has to disclose. For example, the employer may argue that confidentiality prohibits disclosure. If this is established, then the employer is not required to disclose the information sought.

The union should identify (as precisely as possible) and request the information from the employer in advance of negotiations whenever practicable, giving the employer a reasonable period of time in which to respond. (If two or more recognised unions seek the information, they should coordinate their requests to the employer whenever possible.)

**Examples of freedom of information requests (related to grading and pay)**

Employees, members of the public, union and legal representatives have made use of the Freedom of Information Act 2000 (FOIA) to seek information about the outcomes of job evaluation exercises and pay and grading reviews.

This section outlines two FOI cases where the Information Commissioner’s decisions were upheld and the requesters succeeded: *South Lanarkshire Council v Scottish Information Commissioner* (a judgment of the Supreme Court) and *Huntingdonshire District Council v the Information Commissioner* (decided by the Regulatory Tribunal).¹⁰

The cases have important learning points for union representatives interested in pursuing FOI requests.

**The South Lanarkshire case**

In *South Lanarkshire Council v Scottish Information Commissioner*, the Supreme Court ruled that the Council was obliged to disclose details of how many employees were employed at ten particular points on its pay scales. It also held that the Scottish Information Commissioner had been right to reject the argument that disclosure of the information requested would contravene the Data Protection Act 1998.

The information was sought by an external consultant in order to discover if the grading structure favoured work traditionally done by men. It is important to note that the request was not seeking the identities of the employees concerned – the request was for anonymised information – statistical data about the number of employees on the ten pay points. Nor did it seek disclosure of the actual salary levels of any named persons who could be comparators in an equal pay claim. Nevertheless, the Council refused the request on the basis that to supply personal data would contravene the DPA 1998. (Personal data cannot be disclosed by law.)

¹⁰ The Information Commissioner’s Office website maintains a database of FOI request decisions.
The Information Commissioner decided that the information should be disclosed: the requester had a legitimate interest in obtaining the data and it was proportionate to disclose it to the requester in this case. The Supreme Court held that given the restricted nature of the information sought, the Information Commissioner was entitled to reach the decision that he did and that there was no interference with the right to respect for private life (under Article 8, European Convention of Human Rights) as the requester would not have been able to discover the identity of the data subjects (employees) concerned.

The Supreme Court judgment indicates that, in principle, union representatives and others who advise potential claimants in the public sector on equal pay issues can have a legitimate and enforceable right to seek statistical data of the kind that would be needed to pursue an equal pay claim involving indirect discrimination. This information is likely to be essential to assessing the strength of a potential claim, and at this stage, it would not be recoverable under the employment tribunal rules. If a claim is made, success at the tribunal could depend on the claimant being able to adduce (i.e. cite) cogent statistical evidence in support of the allegation of indirect discrimination in relation to the pay structure.

The judgment may also be useful to union representatives in persuading recalcitrant employers to cooperate in conducting equality impact assessments, equal pay audits and local grading and pay reviews on a joint basis, and/or in sharing pay modelling data and pay/grading outcomes (or EPA and EIA outcomes) with union negotiators.

The Huntingdonshire case

In Huntingdonshire District Council v the Information Commissioner (EA/2015/0092), the First-Tier Tribunal (General Regulatory Chamber) decided that the Council had not been justified in refusing to disclose certain information on the basis that it was exempt under the FOIA section 43(2) i.e. if disclosure would or would be likely to prejudice the commercial interests of any person.

The Council used the Inbucon JE System for its single status grading and pay review. At the end of the process, the Council published a list of all posts ranked by score (but not including the scores) and the factor plan (which had also been available to employees early on in the exercise). Using the FOIA, a person requested information including the JE score for each job, a list of the factors and the scores on a factor by factor basis for each job. The requester indicated that the information was being sought so that employees could prepare appeals and be reassured that the Council’s new structure met equal pay requirements, was fair and transparent, and accorded with NJC and EOC/EHRC guidance.

The Council put forward a number of arguments in support of the fairness and robustness of the JE and grading review process (some of which the Information Commissioner commented on unfavourably) but the nub of its appeal against the Commissioner’s decision to agree to the FOI request was its argument that it was exempt from disclosure as harm would be done to Inbucon and the Council (if Inbucon took legal action against it.) Apparently Inbucon considers that the law on the right to confidentiality entitles it to protection from disclosing the ‘descriptors’ (weightings) which its JE scheme uses and also the range of scores attributable to each of the scheme’s six factors. (As it happens, the FOI request did not ask for disclosure of the descriptors.)

On appeal, the Tribunal agreed that ‘commercial disadvantage’ engaged the section 43(2) exemption. It then undertook a balancing exercise setting the public interest in employees having the information against the public interest in preserving this element of Inbucon’s competitive edge and in removing the risk of a legal action (on the part of Inbucon) against the Council.
In brief, the Tribunal considered that while the JE process and grading review might be fair and balanced in some respects, if the effect of withholding the information was to engender mistrust in the evaluation and appeals process, as well as the pay review results emanating from it, ‘the resulting scheme may still be regarded as flawed’ (paragraph 25). The question to be determined was whether the withheld information was ‘sufficiently important and central to the process to have that effect’ – the Tribunal decided it was, ‘because, without seeing the range of scores attributed to job factors across the full range of jobs, an employee will not know the relative contribution any one factor is capable of making to the total score to be applied to any particular job in question. That... reduces the information which an employee and/or his representative should have, at the stage of submitting a completed JEQ [Job Evaluation Questionnaire] and before launching an appeal, in order to fully understand the Inbucon scheme’ (paragraph 26).

The Tribunal considered that the legal risk to the Council was ‘sufficient to engage the exemption’ but it was ‘overstated’ and even when aggregated with the possible commercial harm to Inbucon, it did not give rise to a public interest factor to outweigh the public interest in disclosure.

The observations of the Tribunal on the factors a court would consider should Inbucon have taken a legal claim against the Council are interesting (paragraphs 27-28), including the foreseeable vulnerability of being exposed to FOI requests when operating in the public sector; and ‘the extend of Inbucon’s rights in light of other information already in the public domain (including information that could be obtained without restriction from one or more of Inbucon’s competitors)’. When Inbucon marketed its JE System to the public sector, the risk of commercial harm must have been anticipated. The Tribunal decision indicates that commercial confidentiality requirements may not always pose an insurmountable barrier to accessing information about JE outcomes arising from the use of a proprietary JE scheme which has elements of secrecy as to its workings.

Although they were not central to the judgment, other noteworthy features of this case included the Information Commissioner’s adoption of UNISON’s criticism that the Council could have used another more transparent JE scheme; and the Commissioner’s rejection of the Council’s argument that its processes were to be trusted because the Inbucon System had been tested through EIAs at various stages of the pay review and the pay of various posts had been benchmarked against that of a range of other public sector employers. The Commissioner had not been convinced that disclosure was unnecessary where it was possible to derive, from information given, an approximate JE score and a salary range emanating from it. The Council had also argued against disclosure partly on the grounds that without the weightings, data on past salaries for individual employees, and training in JE, it was questionable whether an employee (or member of the public) would achieve a better understanding of the system.

This case highlights the importance of pay transparency – that the pay system should be understandable to employees. The steps taken by the employer to involve staff in the process and quality assure the outcomes did not undermine the argument that it would be in the public interest to disclose the requested information to employees. Another learning point is that when a FOI request is successful, the usefulness of the information disclosed will depend on the precise wording of the data request (so attention to drafting this is important).

The Public Sector Equality Duty – specific duties
The section supplements the section on the Public Sector Equality Duty in Part 2.

**Specific duties: England**

Listed authorities are required to prepare and publish one or more equality objectives. This could include addressing pay inequality. A public commitment is helpful to the unions in holding the employer to account.

The other specific duty is to publish information to demonstrate the listed authority’s compliance with the general duty.

The EHRC technical guidance on the PSED gives examples of the types of employee information which ‘listed authorities’ with 150 or more employees might publish, including ‘the profile of staff at different grades, levels and rates of pay, including any patterns of occupational segregation and part-time work’ (Para 6.13). Where relevant, this requirement could be helpful in getting recalcitrant employers to cooperate with an EIA or EPA.

For more information, see the *EHRC Technical Guidance on the PSED: England* (2014)

**Specific duties: Scotland**

The specific duties are to:

- report progress on mainstreaming the general equality duty
- publish equality outcomes and report progress
- assess new or revised policies and practices
- review existing policies and practices
- gather, use and publish employee information
- publish gender pay gap information
- publish an equal pay statement
- consider award criteria and contract conditions in relation to public procurement.

A further duty is imposed on Scottish Ministers to publish proposals for activity to enable listed authorities to better perform the general equality duty.

For more information, see the *EHRC Technical Guidance on the PSED: Scotland* (2014)

**Specific duties: Wales**

The specific duties which apply in Wales are the most extensive in Great Britain. They include:

- Equality objectives
- Engagement with appropriate persons
- Relevant information
- Assessing and monitoring the impact of policies and practices
- Collecting employment information and addressing the cause of pay differences
- Training
- Pay differences and action plans
- Strategic Equality Plans
- Annual reports
- Procurement
- Disclosure of information

For more information, see the *EHRC Technical Guidance on the PSED: Wales* (2014)
Northern Ireland: Equality schemes

The Northern Ireland Act 1998 (NIA) requires public authorities to produce equality schemes showing how they will implement their s.75 duty in respect of their ‘relevant functions’. Equality schemes must set out arrangements for (for example) impact assessment and monitoring adverse impact of policies on the promotion of equality of opportunity, publishing the results of assessments and for training staff.

Northern Ireland employers and union representatives should read the Green Book Part 4.11 guidance on equality impact assessment in the context of the statutory responsibilities laid down by the NIA.

Northern Ireland has two statutory equality bodies - the Equality Commission for Northern Ireland (ECNI) and the Northern Ireland Human Rights Commission (NIHRC). The ECNI is the commission responsible for addressing all forms of discrimination and fair employment.
LIST OF ABBREVIATIONS (legal terms in brown font)

AC – Law Reports, Appeal Cases
ACAS – Advisory, Conciliation & Arbitration Service
AfC – Agenda for Change
ALEO – arms-length external organisation
ALMO – arms-length management organisation
APT&C – Administrative, Professional, Technical & Clerical Services
BAME – Black and Minority Ethnic
Brexit – UK exit from the European Union
CA – Court of Appeal
CAC – Central Arbitration Committee
CIC – Community Interest Company
Civ – Civil Division (of the Court of Appeal)
CJEU – Court of Justice of the European Union
COT3 – name of the form used by ACAS to formerly settle claims to the employment tribunal
CRP – competence-related pay
CS – Court of Session (Inner House)
Ct Session – Court of Session
DEFRA – former Department for Environment, Food & Rural Affairs
DPA – Data Protection Act 1998
EAT – Employment Appeal Tribunal
EC – ACAS Early Conciliation
ECA 1972 – European Communities Act 1972
ECJ – European Court of Justice
ECNI – Equality Commission for Northern Ireland
ECR – European Case Reports
EFLG – Employment Framework for Local Government
EHRC – Equality & Human Rights Commission
EIA – Equality impact assessment
EPA – Equal pay audit
EqA – Equality Act 2010
EqLR – Equality Law Reports
ET – employment tribunal
ETO – economic, technical or organisational (reason) – in respect of TUPE (see below)
EU – European Union
EWCA – Court of Appeal unreported case number
FOI – Freedom of Information
FTE – Full-time equivalent
FTE Regs – Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002
GED – General Equality Duty
GLPC – Greater London Provincial Council
HL – House of Lords
HR – Human Resources
HRM – Human Resource Management
ICR – Industrial Cases Reports
IDS – Income Data Services
IRLR – Industrial Relations Law Reports

IT – information technology

JE – job evaluation

JES – Job Evaluation Scheme

JETWG – Job Evaluation Technical Working Group (of the NJC)

JNC – Joint National Council for Chief Officers of Local Authorities

L&D – learning and development

LGA – Local Government Association

LLP – Limited liability partnership

LMS – labour market supplement

LOS – length of service

NIA – Northern Ireland Act 1998

NICA – Northern Ireland Court of Appeal

NIHRC – Northern Ireland Human Rights Commission

NJC – National Joint Council

NJC JES – National Joint Council Job Evaluation Scheme

NLW – National Living Wage

ONS – Office of National Statistics

PAYE – Pay as you earn (tax)

PCP – provision, criterion, practice (under the Equality Act 2010)

PO – Principal Officer

PRP – performance-related pay

PSED – Public Sector Equality Duty

PTW Regs – Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

Reg or Regs – Regulation or Regulations

RRA – Race Relations Act 1976
s. – section (of an Act of Parliament)

SC – Supreme Court of the United Kingdom

SDA – Sex Discrimination Act 1975

SJC – Scottish Joint Council

ss. – sections (of an Act of Parliament)

TBP – team-based pay

TFEU – Treaty on the Functioning of the European Union

TU – trade union

TULR(C)A – Trade Union and Labour Relations (Consolidation) Act 1992

TUPE – Transfer of Undertakings Protection of Employment

TUPE Regs - Transfer of Undertakings (Protection of Employment) Regulations 2006

TWA – temporary work agency

WPBR – Workforce Pay and Benefits Review

WRAE – work rated as equivalent (using a job evaluation scheme)

ZHC – zero hours contract