DISCRIMINATION (III) EQUAL PAY

Preparation

This seminar covers the principle of equal pay for equal work for men and women. In order to prepare for this seminar you should read from one or two of the textbooks from the general reading listed below. You should then look at and prepare answers to the seven questions which will be discussed in class. You should read any specific material cited and undertake any specific tasks set.

General Reading:
Selwyn chapter 5*
Deakin and Morris pp. 605 – 637*¹
Honeyball & Bowers chapter 4*
Painter and Holmes chapter 4*
Pitt, pp. 207-236*
Smith & Wood pp.324-343*

Journal Reading:
Iain Steele, “Tracing the Single Source: Choice of Comparators in Equal Pay Claims” (2005) 34 ILJ 338*
Gavin Barrett, “Shall I Compare Thee To…?: On Article 141 EC and Lawrence” (2006) 35 ILJ 93*
Iain Steele, “Beyond Equal Pay” (2008) 37 ILJ 119
Sandra Freedman, “Reforming Equal Pay Laws” [2008] ILJ 193*

Advanced Reading:

Snoxell v Vauxhall [1977] IRLR 123*
Rainey v Greater Glasgow Health Board [1987] IRLR 26*
Hayward v Cammell Laird Shipbuilders Ltd. [1988] IRLR 257*
Enderby v Frenchay Health Authority [1993] IRLR 591*
Coloroll Pension Trustees Ltd v Russell [1997] ICR 179
Strathclyde Regional Council v Wallace [1998] IRLR 146
Glasgow City Council v Marshall [2000] IRLR 272*

¹ PLEASE TREAT THIS WITH CAUTION AS IT DOES NOT COVER THE EQUALITY ACT 2010 AND INSTEAD IS A TREATMENT OF THE PRE-EQUALITY ACT LAW!
Question 1:

What is the purpose of sections 64-80 of, and Schedule 7 to, the Equality Act 2010? Is there any difference between ‘fair’ pay and equal pay?

Question 2:

What is covered by the word ‘term’ in ss. 64-66 and 80(2) of the Equality Act 2010? Is there a difference between the meaning of the word ‘term’ in the Equality Act 2010 and the meaning of the word ‘pay’ in Article 157 of the Treaty on the Functioning of the European Union (“TFEU”)?

Question 3:

In what circumstances are women entitled to equality of terms under the Equality Act 2010?

Question 4:
What constitutes "like work", "work rated as equivalent", and "work of equal value"? Illustrate with cases. What is a 'piggyback' equal pay claim? Is such a claim lawful under the Equality Act 2010?

**Specific Task:**

Ensure that you can cite at least 4 cases (with a concise explanation of the facts and the *ratio decidendi*) in total which illustrate issues concerning 'like work', 'work rated as equivalent' and 'work of equal value'.

**Question 5:**

Do the female and male comparators require to work for the same employer? Is there a difference in the law for the purposes of s. 79 of the Equality Act 2010 and Article 157 of the TFEU in relation to this issue?

**Question 6:**

Explain the differences between Article 157 of the TFEU and sections 64-80 of, and Schedule 7 to, the Equality Act 2010. How do these equal pay regimes differ?

**Question 7:**

2 strands
Occupational segregation
Top jobs go to men
Glass ceiling.
Law firms,
Majority of people are women.
Top people are men.

Equal Contractual Terms
Benefits of peoples' jobs.

*Snoxell v Vauxhall [1977] IRLR 123*
“Held: The mere attaching of a label of ‘red circling’ will not, by itself, constitute a material factor,
particularly if past discrimination has contributed to the unequal pay.” (Selwyn, 5.51)

*Rainey v Greater Glasgow Health Board [1987] IRLR 26*
Rebuttable presumption that market forces are ‘GMFs’
“The need to attract qualified staff of either sex may amount to a material factor.” (Selwyn, 5.45)

*Hayward v Cammell Laird Shipbuilders Ltd. [1988] IRLR 257*
Term-by-term
Limited to cherry picking.

“The claimant, a canteen worker, was paid at a lower rate than certain skilled workers, but she enjoyed superior sickness benefits, paid meal breaks and extra holidays. An independent expert concluded that her work was of equal value to the male comparators, but

Held (ET): DISMISSED her claim.
Holding that the terms and conditions as a whole must not be less favourable. Thus, although her cash pay was less than the comparators, her others terms and conditions, which were more favourable, had to be taken into consideration.

Held (HoL): UPHELD her claim.
Holding that the ET should have considered each individual term which was not less favourable, and did not require a holding that terms as a whole should not be less favourable” (Selwyn, 5.40)

*Enderby v Frenchay Health Authority [1993] IRLR 591*
Where collective agreement results in pay disparities, this is unlikely to be ‘GMF’

“Once there is a suspicion of discrimination in pay scales, the burden of proof shifts to the
employER to justify pay differentials.” (Selwyn, 5.4)
“The claimant worked for a health authority for six years.
She successfully made an equal value claim, using her comparator a man who had only been employed for one year.
She argued that she was entitled to the pay her comparator would have received had he been employed as long as she, i.e. to include the potential increments he would have had.
Held (CoA): SUCCESSFUL
That she was entitled to receive the same pay as her comparator was currently receiving.” (Selwyn, 5.62)

Coloroll Pension Trustees Ltd v Russell [1997] ICR 179
Strathclyde Regional Council v Wallace [1998] IRLR 146

Glasgow City Council v Marshall [2000] IRLR 272*
If the female employEE can provide evidence that the material factor is NOT gender neutral but that it in fact functions in a way which is discriminatory or exhibits a direct or indirect discriminatory impact, then the onus reverts to the employER to objectively justify the difference in terms of the female and of the male employEES.

Jorgensen v Foreningen [2000] IRLR 726*
Budgetary constraints CANNOT be a ‘GMF’
“The package approach, where more favourable terms can be set off against less favourable terms, is wrong.” (Selwyn, 5.16)

Brunnhofer v Bank der Ostereichischen Postsparkasse AG [2001] IRLR 571*

Lawrence v Regent Office Care Ltd. [2002] IRLR 822*
Held (ECJ): That where differences in pay or conditions cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Therefore, such a situation does not come in the compass of Article 141 (Article 175).
“Having a common employER is not the same thing as being ‘in the same employment’, or having pay and conditions attributed to a ‘single source’…” (Selwyn, 5.7)

Allonby v Accrington and Rossendale College [2004] IRLR 224*
...“because there must be a single source responsible for the pay” (Selwyn, 5.7)

“A was employed by ARC as a part-time hourly paid lecturer in office from 1990 to 1996 on a
succession of one-year contracts.
In 1996, in order to reduce the financial impact of new rights for part-time workers, the college decided to terminate or no renew the contracts of employment of part-time lecturers and instead retain their services as subcontractors. This was done through and arrangement with Employment Lecturing Services (ELS), the second respondents, who are an agency holding a database of available college lecturers.
A's employment was terminated with effect from 29 August 1996 and, like other lecturers, she was told that if she wanted to continue work, she had to register with ELS and thereby become self-employed.
The pay of part-time lecturers in A's position became a proportion of the fee agreed between ELS and the college.
Their income fell and they lost a series of benefits, ranging from sick pay to career structure, which went with employment. ELS did not contribute to the Teachers' Superannuation Scheme (TSS). It is a condition of the TSS that the member be an employEE and no lecturer engaged by ELS is an employEE.
A brought test-case proceedings against the college for indirect sex-discrimination by reason of dismissal.
She also brought a claim against the college on the grounds that it was discriminating against her as a contract workers contrary to s.9 of the Sex Discrimination Act, an equal pay claim against ELS contending that it was obliged to pay her pro rata with a male full-time lecturer (a Mr R. Johnson) at the college, and a claim against the Department for Education contending that it was unlawful to deny, as a self-employed worker, to the TSS.

Held (ECJ):
A woman whose contract of employment has not been renewed and who is immediately made available to her previous employER through another undertaking to provide the same services is not entitled to rely on the principle of equal pay in Art. 141 of the EC Treaty (Art. 157 TFEU) in a claim against the new employER, using as a basis for comparison the remuneration received for equal work of the same value by a man employed by the woman's previous employERs. Although Art.141 (Art. 157) is not limited to situations in which men and women work for the same employER and may be invoked in cases of discrimination arising directly from legislative provisions or collective agreements, as well as in cases in which work is carried out in the same establishment or service, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is nobody
responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Art.141 (Art.157)."

(Cases & Materials, p228)

Schonheit v Stadt Frankfurt Am Main [2004] IRLR 983

**Robertson v DEFRA [2005] IRLR 363**
The 'single-source' test was applied to deny female Civil Servants in one government department from comparing themselves with male Civil Servants in another government department – even though they had the same employer i.e. the Crown. "Male Civil Servants sought equal pay with senior secretaries in a different government department. The claim failed. Although they were in common employment, responsibilities for terms and conditions of employment had been transferred to the individual government departments, and thus there was no single source of the pay structure." (Selwyn, 5.7)

Degnan v Redcar and Cleveland BC [2005] IRLR 615*
Similar key terms are grouped together. "The ‘term by term’ approach, if taken literally, may well result in an equal pay claim to become unequal pay, with all sorts of leap-frogging claims." (Selwyn, 5.16)

**Held (CoA):** That the ‘term’ in question must be the same subject-matter. Thus, basic rates, bonuses and attendance allowance were all part of one ‘term’ on remuneration, thus preventing a female claimant from cherry-picking the most advantageous part of a remuneration package of a number of male employees". (Selwyn, 5.41)

Sharp v Caledonia Group Services Ltd. [2006] IRLR 4*

**Villalba v Merrill Lynch [2006] IRLR 437**
If the female employee can provide evidence that the material factor is NOT gender neutral but that it in fact functions in a way which is discriminatory or exhibits a direct or indirect discriminatory impact, then the onus reverts to the employer to objectively justify the difference in terms of the female and of the male employees.