

Chapter 14: Equal pay law

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1. In light of the discussion in section 14.1.1, do you agree that the UK and EU gender pay gaps are attributable to unconscious sex discrimination on the part of employers? Give reasons for your answer.

Author's answer: The existence of endemic unconscious sex bias on the part of men and wider society is one of the reasons that has been attributed to the gender pay gap. Societal attitudes are changing, but the expectation is still generally that women will act as the primary carers, rather than breadwinners. Other reasons for the gender pay gap include the depressive effect on the earnings of female workers generated by family care responsibilities, and the inadequacy of the equal pay regime in Chapter 3 of Part 5 of the Equality Act 2010. With regard to the latter in particular, the formal equality approach at the heart of the equal pay laws (which demands a real male comparator) is ineffective at tackling occupational segregation where jobs are structured along gender lines. Moreover, it renders proportionate pay challenges impermissible, since the ethos of the equal pay system is 'equal pay', rather than 'fair pay'. The lack of any legislation enjoining employers to provide employees with access to meaningful information about the pay packages of colleagues also inhibits equal pay challenges.

4. Throughout this chapter, a number of references have been made to differences which arise between the domestic equal pay regime and the EU regime under Article 157 of the TFEU. Can you identify each of these disparities?

Author's answer: First of all, the 'single source' test is applied in the case of EU Law, whereas in the domestic equal pay regime, this test is inapplicable. Instead, the approach to the application of comparators in the Equality Act 2010 enables a claimant to make a cross-establishment and cross-site comparison. Secondly, the approach to the definition of the subject-matter to be compared differs. In terms of the EU law regime, the comparison is between the 'pay' of the claimant and the comparator and the word 'pay' is given a broad meaning. Meanwhile, the domestic regime concentrates on establishing a difference in 'terms', rather than 'pay'. Thirdly, the stage at which the employer's objective justification of the material factors cited for the pay differential between the claimant and the comparator differs under EU law and the domestic framework. In the EU model, the employer must objectively justify the material factor at a much earlier stage if there is the suggestion that it may be tainted by direct or indirect discrimination. However, the domestic position is that the employee must first discharge the burden of proof that there is a real case that the employer's material factor defence is tainted by direct or indirect discrimination before the burden shifts back to the employer to objectively justify.