

EQUALITY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Work

Chapter 3: Equality of terms

Section 69: Defence of material factor

Effect

236. As a general rule, if the work of a worker and a comparator of the opposite sex is equal but their terms are not, the sex equality clause takes effect. Section 69 provides that neither a sex equality clause nor a sex equality rule will apply if the employer can show that the difference in terms is due to a material factor which is relevant and significant and does not directly or indirectly discriminate against the worker because of her sex.
237. If there is evidence that the factor which explains the difference in terms is not directly discriminatory but would have an adverse impact on people of her sex (that is, without more, it would be indirectly discriminatory), the employer must show that it is a proportionate means of meeting a legitimate aim or the sex equality clause will apply. For these purposes, the long-term objective of reducing pay inequality will always count as a legitimate aim.
238. Subsection (4) deals with the application of the material factor defence to occupational pension schemes.

Background

239. The Equal Pay Act 1970 and Pensions Act 1995 made similar provision permitting employers and trustees to objectively justify differences to which an equality clause or rule would otherwise apply. This section draws those separate provisions into one section and clarifies the way in which they are to be applied. The reference in the previous legislation to a difference being “genuinely” due to a material factor has not been repeated in this section since the adverb added nothing to the meaning of the requirement, which is that the employer’s obligation is to show that the reason for the difference is genuine and not a sham. The section incorporates the effect of EU law in respect of objective justification of indirectly discriminatory factors.
240. The reference to an employer’s long-term objective of reducing pay inequality between men and women always being considered a legitimate aim is new.

Examples

- An employer introduces a bonus payment to encourage staff doing the same work to work a new night shift to maximise production. Only a small number of female staff can work at night and the bonus payments go almost entirely to male employees. Despite the disparate effect on the female employees, the employer’s aim is legitimate and the payment of a bonus to night workers is a proportionate way of achieving it.

*These notes refer to the Equality Act 2010 (c.15)
which received Royal Assent on 8 April 2010*

- A firm of accountants structures employees' pay on the basis of success in building relationships with clients (including at after-hours client functions). Because of domestic responsibilities, fewer women than men can maintain regular client contact and women's pay is much lower. The employer is unable to show the way it rewards client relationship building is proportionate, taking into account the disadvantage to women employees.
- In imposing a new pay structure which seeks to remove pay inequalities between men and women employees, and to accommodate the interests of all the various groups, an employer includes measures which seek to protect the pay of the higher paid group for a short period of time. The intention to remove pay inequalities is a legitimate aim, and the question will be whether the imposition of the particular temporary pay protection arrangements is a proportionate means of achieving it.