

EQUAL PAY QUESTIONNAIRE

RESPONSE OF THOMPSONS SOLICITORS



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Thompsons is the UK's largest trade union, employment rights and personal injury law firm. It has a network of 18 offices across the UK, including the separate legal jurisdictions of Scotland and Northern Ireland. Thompsons' specialist Employment Rights Unit (ERU) acts only for trade unions, employees and workers and the ERU has acted in many of the leading employment rights cases, advising extensively on UK and European law developments.

Thompsons has been an active participant in government consultation on proposed legislation.

Thompsons has extensive experience of employment tribunal litigation across the UK. We deal with thousands of tribunal cases every year, ranging from individual claims for unlawful deductions or unfair dismissal, through multi-day cases concerning discrimination, to significant major multi-applicant litigation on issues such as equal pay and TUPE; as well as cases in the Employment Appeal Tribunal, Court of Appeal, House of Lords, European Court of Justice and European Court of Human Rights.

While Thompsons generally represent applicants, we also represent unions and other labour movement organisations defending claims brought by employees or members.

Thompsons is also a significant employer. We employ 700 staff at 18 offices. We recognise an independent trade union for collective bargaining for all employees and regularly negotiate and consult with the union.



1. We consider that the introduction of a Questionnaire for claims under the Equal Pay Act (EPA) will facilitate the early resolution of complaints and the management of Tribunal cases, and we therefore welcome the Government's proposals. Equal pay cases tend to become unwieldy and complex, and any proposals that encourage negotiation and focus at an early stage will benefit both parties to a claim.

2. The draft Questionnaire is usefully designed not just for complainants represented by trade unions and lawyers, but also for people who are unrepresented. In that respect we note that the Introduction section and Guidance Notes assist unrepresented complainants by summarising the EPA. That summary is helpful, though in a few respects we suggest that the summary is not entirely accurate:
 - (i) It is not correct that the EPA only applies between men and women in the same employment. The EPA must be interpreted in the light of European law, in particular Article 141 of the Treaty of Rome. Under Article 141 claims can be brought between a complainant and a comparator with different employers. The Article 141 test is "same establishment or service" and we refer in this connection to *Scullard v Knowles* 1996 IRLR 344, *South Ayrshire Council v Morton* 2001 IRLR 28 and others, all equal pay cases where cross-employer comparisons were successful. We suggest that the wording in the first line of the Introduction be changed to "in the same employment, establishment or service". The same point applies to the first sentence of the section in the Guidance Notes dealing with the scope of the EPA, and the third section dealing with the identity of the comparator.

 - (ii) The draft Questionnaire refers throughout to "employees". This is misleading, and to accord with the law we suggest that the word "worker" be used instead.

 - (iii) It would be more accurate to use the words "in jobs" as opposed to "in a job" in paragraph 1 of the Guidance Notes dealing with the scope of the EPA.

- (iv) The section in the Guidance Notes dealing with what is covered under the category equal pay suggests that the EPA is restricted to pay and contractual terms and conditions. This is correct in terms of the EPA, but Article 141 goes beyond contractual terms to include payments such as discretionary payments (for example *Lewen v Denda* 2000 IRLR 67), and compensation related to employment such as redundancy payments and unfair dismissal compensation. We suggest that it would be more accurate to add the words “and other related benefits” or words to that effect at the end of the first sentence of that paragraph.
- (v) The obligation to objectively justify arises not just where the material factor affects a greater proportion of one sex than the other. In paragraph 4 headed “The employer’s defence” it is suggested that the employer must objectively justify only in these circumstances. In fact, the obligation of objective justification applies whenever the pay differential is connected with sex discrimination, whether that discrimination arises through disproportionate impact or otherwise. Therefore if a woman is paid less than a man due to market forces which made stereotypical assumptions about the nature of her work, then even though the market forces might not affect more women than men the employer will have to be able to objectively justify the pay difference (*Ratcliffe v North Yorkshire County Council* 1995 IRLR 439). We refer to the formulation by Lord Nicholls in the House of Lords in *Glasgow City Council v Marshall* 2000 IRLR 271 : “if there is any evidence of sex discrimination, whether direct or indirect, such as evidence that the differential in pay has a disproportionate adverse impact on women, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justified.” We therefore suggest that the wording in paragraph 4 be changed so that in place of “in fact affects a greater proportion of one sex than another” to “in fact is directly or indirectly discriminatory such as where it affects a greater proportion....”
3. It would be useful if the Questionnaire contained a clear statement of the law in relation to time limits for lodging Tribunal claims for equal pay. We appreciate that the matter is currently under consultation. Nonetheless once the law is clarified, we consider that the Questionnaire would benefit from a clear statement of the position.

4. Paragraph 5 of the Guidance Notes allows an employer not to provide pay details where it considers that the information is confidential. Whilst we recognise that the Questionnaire should not be a means for a complainant to obtain any information about anyone's pay package, we do not agree with this proposed broad formulation which would effectively leave it at the employer's discretion whether to reveal the information or not:
- (i) Although the procedure will allow for the Tribunal being able to draw inferences from a failure to answer a question, this factor is not in itself in our view an effective sanction (subject to our comments below). The need to obtain information through the Questionnaire procedure arises at an early stage when a decision is being made whether to seek to negotiate for or pursue a Tribunal claim for equal pay. In effect, as a result of the way in which the Guidance is drafted, the issue of whether or not the employer has a "reasonable excuse" for not providing the pay information will be addressed at an interlocutory tribunal hearing once the equal pay claim is up and running. This does not therefore take matters much further than the current position. Although the Guidance Notes state that employers are likely to be able to disclose information about general pay scales and that this would not be regarded as confidential, we suggest that this is exactly the sort of information that is likely to be accessible to the complainant and in the public domain anyway.
 - (ii) In any event, the test that the Tribunal will adopt in deciding whether or not to require pay data to be disclosed is not confidentiality, but relevance (*Nasse v Science Research Council* 1979 IRLR 465). The terms of the Questionnaire should reflect the law.
 - (iii) The issue of transparency in pay systems is central to issues of equal pay. Increasingly we find that pay systems lack transparency and clarity (for example in the increasing use of performance related pay and bonuses which encourage pay by discretion so increasing the opportunity for discriminatory elements). In *Danfoss* (1989 IRLR 532) the European Court of Justice emphasised that where pay systems lacked transparency, the burden of proof lay on the employer to show that the pay system does not discriminate. The more the pay system lacks transparency, the higher the burden on the employer. Again, so that the Questionnaire is in line with the law, we suggest that the emphasis should be on transparency, not secrecy.

- (iv) As the draft Questionnaire is currently drafted, it almost invites the employer to refuse to provide these details. Although we appreciate that additional questions can be asked and indeed the Questionnaire form itself need not be used, the format of the Questionnaire is important in setting the agenda. Question 4, the only one dealing with pay, simply asks whether the complainant has received less pay than his or her comparator. This does not put any onus on the employer to consider the details of the comparator's pay. It is inviting a general response ("No") and a generalised explanation. The question does not fit with the more sophisticated situation in relation to pay as set out in section 2 of the Guidance Notes ("What is covered under equal pay?").
- (v) Against this background, we suggest that although the duty to disclose pay details should not be absolute, there should be more emphasis in the Questionnaire on the primary obligation on the employer to disclose the pay details of comparators. We suggest that the question to be put by the complainant should be reformulated to allow space for the complainant to ask what each of the different elements of the comparator's pay are. The Reply should have a space for replying in relation to each element. To accommodate the issue of confidentiality, we propose a side note explaining that an employer may consider that some aspects of the comparator's pay package may be confidential. The note should however go on to make it clear that the legal test that the Tribunal will ultimately follow is not confidentiality but relevance. The note should also make the point that an unreasonable withholding of pay information by an employer may lead to a Tribunal making an order for costs in favour of a complainant who subsequently has to apply to the Tribunal for an order to extract the necessary information from the employer. It should further make the important legal point that secrecy in a pay system may lead a Tribunal to conclude that the system lacks transparency so increasing the burden on the employer to justify the pay difference between the complainant and the comparator. We suggest that this approach is consistent with the law, puts the employer on notice of the risks attached to inappropriately withholding pay data, yet allows for the protection of genuinely confidential information.

5. We suggest that the Questionnaire should specifically ask whether the employer has complied with an equal pay review (in line with the recommendations of the Equal Opportunities Commission in their Equal Pay Code of Practice). The apparent reluctance on the part of employers to carry out voluntary pay reviews (see for example the recent survey by Amicus-msf showing only 50 out of 6000 firms being willing to carry out equal pay audits) might be evidence that a Tribunal would wish to take into account in drawing inferences of pay discrimination.

6. At paragraphs 10 to 12 of the Guidance Note, reference is made to complainants obtaining further advice from the Employment Tribunal Service, ACAS or the EOC. We find it extraordinary that no reference is made to trade unions or the TUC in this context. Trade unions have been at the forefront of pursuing equal pay claims over the years and would be the obvious first point of contact if an individual was considering negotiating for equal pay or pursuing an equal pay claim. We suggest that the Questionnaire recommend that complainants seeking advice contact their trade union or the TUC, and that details of the TUC be provided for this purpose.

