



**Coimisiún na hÉireann  
um Chearta an Duine  
agus Comhionannas**  
Irish Human Rights and  
Equality Commission

## YOUR RIGHTS INFORMATION NOTE

### EQUAL PAY

#### ABOUT “YOUR RIGHTS”

“*Your Rights*” is a service operated by the Irish Human Rights and Equality Commission (“**IHREC**”) to provide individuals with information in respect of their rights and remedies that may be available should they believe they have suffered a breach of equality and/or human rights law in Ireland. IHREC can only provide information through this service and cannot provide advice or comment on individual cases. This is not a legal document, and it is not a substitute for legal advice.

#### DISCLAIMER

The contents of this document are provided for information purposes only and do not constitute a legal analysis of any individual’s particular situation. While we seek to ensure that the information provided is accurate and up to date, it is not a legal interpretation of the law and should not be relied on as such. For any professional or legal advice, all individuals should consult a suitably qualified person.

## RELEVANT LEGISLATION

### EMPLOYMENT EQUALITY ACTS 1998-2015 (“EEA”)

The obligation to remunerate people equally when they are engaged in “like work” is provided for in the [Employment Equality Acts 1998-2015](#) (“EEA”).

### IHREC’S CODE OF PRACTICE ON EQUAL PAY

IHREC prepared a code of practice, which has been approved by the Minister for Children, Equality, Disability, Integration and Youth. [The Code of Practice](#) does not place additional legal obligations on employers, but rather seeks to provide a guide as to how the obligation to remunerate people equally for like work should work in practice. Its aim is to give practical guidance on:

- how to identify pay inequality and to eliminate it, including on how to conduct a pay review;
- the benefits of providing equal pay for employers, which include the avoidance of legal actions and costs, staff wishing to remain working for a certain employer, and increasing morale and productivity;
- how an individual or individuals who feel they are not being paid equal pay for like work, can raise this internally and/or then institute a complaint.

The Code of Practice is not itself a final interpretation of the law, this falls to the Workplace Relations Commission, the Labour Court, and the courts. However, it can be used at the hearing of a complaint to make an argument as to how the law should be interpreted and/or to guide the WRC adjudicator on how the law should be interpreted.

## COMMON TERMINOLOGY

### WHAT IS A “COMPLAINANT”?

In the context of equal pay disputes under the EEA, a complainant is a person who entered into a contract of employment and who claims they are or have been paid an unequal amount for like work, on the basis that they are a member of a protected group (for more information on “protected grounds”, please see the section below entitled “*What are the Nine Grounds of Discrimination?*”, and who has therefore proceeded to take a claim against the person or organisation they claim is responsible for this.

A complainant may be full-time, part-time, permanent or temporary employee. They may also be an agency worker or a person who provides personal services within another person’s home, such as a childminder or carer (although, different rules apply in respect of part-time and agency workers as compared to other categories of employees, as set out below).

### WHAT IS A “RESPONDENT?”

In the context of equal pay disputes under the EEA, the respondent will be an employer – a person or organisation with whom an employee has entered into a contract of employment.

### WHAT IS A “COMPARATOR”?

In order for a complainant to successfully demonstrate they have not been treated equally in terms of the amount they are paid, they must make a comparison between their circumstances and that of another employee who is performing “like work”, but who is not in

the same protected group (for more information on “protected groups”, please see the section below entitled *“What are the Nine Grounds of Discrimination?”*).

Paying two workers unequal amounts will only be unlawful where it occurs because one of the employees is a member of a group that fits within the nine protected grounds, while the other is not, and this must be shown by the complainant.

For example, a woman who claims she has been paid a lesser amount on the basis of her sex will need to identify a male comparator (a colleague) who is being paid more than she is even though both are doing like work. A person who claims they are being paid an unequal amount on the basis of their age will need to identify a person of a different age who is being paid more than they are for like work.

It must be shown that the comparator is paid more than the complainant.

The comparator must be employed by the same employer as the complainant or by an associated employer. An employer will be defined as “associate” where a company (known as a parent company) controls another. For example, X company may be the main company which also controls Y company - the complainant may be employed by one of these companies, either company X or company Y, while the comparator is employed by the other (see: sections 19(1), 19(3), and sections 29(1) and 29(3) of the EEA). If a comparator works for an associated company, they must have the same or reasonably comparable terms and conditions in their contract of employment.

The comparator should have been employed by the same employer or an associate employer and have been engaged in like work within a period of three years of the complainant having been so employed and engaged in like work.

It is not sufficient for a complainant to refer to a hypothetical comparator or colleague, they must name an actual person for the purpose of their equal pay claim.

It is not necessary to identify a comparator if a person claims they have been the subject of pay discrimination on the basis of their pregnancy and/or maternity leave (as opposed to any other category of discrimination on the basis of gender).

In a case involving indirect discrimination, it is necessary for a complainant to identify a group of comparators as opposed to just one individual, and that group should be made up of persons who predominantly differ from the group the complainant is a part of with regard to a protected characteristic (for more information, please see the section entitled “*Discrimination*” below).

## WHAT IS “EVIDENCE”?

Evidence may be introduced by a complainant or respondent at the hearing of a dispute at the WRC. In the confines of an equal pay dispute, evidence may include, documentary evidence such as correspondence between the complainant and their employer or internal correspondence from the employer, payslips, job descriptions, timesheets, job evaluations (for more information, see below), or it may be provided in oral testimony, by a person who witnessed events or who is aware of the types of work tasks undertaken by different categories of people, commonly referred to as a “witness”.

## WHAT IS THE BURDEN OF PROOF?

The onus is on the complainant to prove the basic facts to establish that they are being paid an unequal amount on the basis of a prohibited grounds. In order to do so, they will need to:

- identify a comparator or a group of comparators if they are claiming to have been the subject of indirect discrimination as opposed to direct discrimination (for more information, please see the section entitled “*What is a comparator?*” below);

- demonstrate that they are performing like work (for more information, please see the section entitled “*What is like work?*” below);
- present evidence to ground they claim they are being paid a lesser amount than their comparator; and
- show that they are a member of a protected group, and their comparator is not a member of the same group (thus demonstrating that they are being discriminated against on the basis of one of the protected grounds).

Once a complainant has shown the above criteria are satisfied, and therefore that the discrimination is likely to have occurred, they are said to have shown a *prima facie* (“at first sight”) case of discrimination, and the complainant is said to have discharged the burden of proof.

The burden of proof now shifts to the other side – in other words, the employer answering the complainant must now show that they either did not discriminate against the complainant, or that they have a good defence to the allegation (for more information, please see the section entitled “*Defences*” below). Once a complainant has shown or established that discrimination is likely to have occurred, then a respondent must demonstrate that discrimination did not occur or that there was a good reason permitted by law for the discrimination, known as an objective justification (for more information, please see the section entitled “*Defences*” below).

Under the EEA, an example of how this works might involve a female factory operative demonstrating that she is paid a lesser amount than a male colleague who is also a factory operative and who is carrying out like work. It is likely that this would be a *prima facie* example of discrimination on the basis of sex, and the burden of proof would then shift on to the respondent, in this case an employer, to demonstrate that there is an objective reason for this. Examples might include where one of the employees is tasked with working the night

shift, while the other works during the day, or where one employee has carried out special training and the other has not.

## WHAT IS AN “ADJUDICATION OFFICER”?

An Adjudication Officer is a person appointed by the WRC to investigate disputes and decide on claims that individuals make under the EEA. They chair the hearing of disputes, investigate the dispute and then come to a decision in relation to whether a complainant’s case has a basis or not.

An Adjudication Officer carries out a similar role to a judge in a normal court case, but they are likely to act in a less formal manner, and they should be addressed as “Chair” or “Adjudication Officer”.

## WHAT IS “LIKE WORK”?

Like work is defined by [section 7\(1\) of the EEA](#). The term “like work” can be summarised as meaning work that is the same, similar or of equal value to that of another person – the “comparator”.

A person will be engaged in “like work” when they are compared to a fellow employee and when it can be said that:

- both perform the same work under the same or similar conditions, or each is interchangeable with the other insofar as their work is concerned;
- the work performed by both employees is of a similar nature to that performed by the other and any differences either in the type of tasks undertaken or the conditions (such as the environment or the equipment used) are of small importance in relation

to the work when it is viewed as a whole, or they occur so infrequently as to have any significance; or

- the work performed by one is equal in value to the work performed by the other (as set out below, factors that may be relevant in determining this question include, the skills involved and needed to carry out the work; the physical or mental requirements involved in the work; the responsibilities of each; and the working conditions including the environment in which both people work and the equipment they use to do their work).

It is not necessary for a person to demonstrate that all of the three criteria apply in order to claim they are being paid an unequal amount for “like work”.

It is important to emphasise that there can be variations in two persons’ work practices and they can still constitute “like work” (see, for example, the section entitled “***What is Discrimination?***” below).

## WHAT IS WORK OF “EQUAL VALUE”?

Even if the work carried out by a complainant and their comparator is not the same or similar in nature, it may be unlawful to pay a person a different amount as compared to their comparator where the work that both people are carrying out is of “equal value”. This is set out in [section 7\(1\)\(c\) of the EEA](#).

In order to determine whether work is of equal value, the WRC Adjudicator may take account of the following factors:

- the type and level of skills need to fulfil the tasks;
- the physical and mental requirements needed to carry out the work;



- the level of responsibility involved in the work; and/or
- the working conditions, for example, where a person is required to work in more dangerous or unpleasant conditions, this may mean that their work is of greater value as opposed to being of equal value.

This is not an exhaustive list of factors that may be taken into account in carrying out this assessment, the Adjudicator at the Workplace Relations Commission may take other things into account in deciding whether work is of equal value.

## THE FORUMS FOR COMPLAINTS

### EEA

#### WHERE CAN A COMPLAINT FOR PAY DISCRIMINATION UNDER THE EEA BE INSTITUTED?

[The Workplace Relations Commission](#) (“WRC”) was established by legislation, [the Workplace Relations Act 2015](#) (for more information, please see IHREC’s standalone guide entitled “*The Process for Instituting a Case at the Workplace Relations Commission Under the Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2018*”) [How you bring a case to the Workplace Relations Commission under the Employment Equality Acts and the Equal Status Acts.](#)

All claims under the EEA, including claims for pay discrimination, may be instituted at the WRC. It is also possible to bring a case to the Circuit Court instead of the WRC, where the pay discrimination occurs as a result of a person’s gender (for more information, please see IHREC’s Guide entitled, *The Process for Instituting a Case at the Workplace Relations*

*Commission under the Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2018.* [How you bring a case to the Workplace Relations Commission under the Employment Equality Acts and the Equal Status Acts.](#) There are no other circumstances where a case can start in the Circuit Court when it relates to conduct prohibited by the EEA.

Hearings at the WRC usually take place at Lansdowne House, Lansdowne Road, Dublin 4, but they can also take place at various locations across the country to facilitate participants who live outside or far from Dublin.

When a complaint is made and a hearing date is provided, the WRC will take into account the location of the Parties, for example, if a person's claim relates to their employer in Kilkenny, there is a possibility the case may be heard in Kilkenny or the South East.

The WRC procedure is designed to be as informal as possible. Parties do not necessarily need to engage legal representation, although many choose to do so.

Hearings and mediations at the WRC take place in boardrooms, with parties and adjudicators/mediators seated around conference tables. Unlike a courtroom, it is usual for those involved in these hearings and mediations to remain seated. Special arrangements can be made for persons with disabilities.

For more information in relation to the procedures associated with instituting a complaint at the WRC, please see IHREC's standalone guide entitled "*The Process for Instituting a Case at the Workplace Relations Commission Under the Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2018*") [How you bring a case to the Workplace Relations Commission under the Employment Equality Acts and the Equal Status Acts.](#)

## DISCRIMINATION

## WHAT IS DISCRIMINATION?

Discrimination means less favourable treatment on one of nine protected grounds under the EEA.

For the purpose of the EEA, discrimination occurs where a person is treated less favourably than another is, has been, or would be treated in a comparable situation on one of the specified grounds.

**Direct** discrimination involves a person being treated less favourably as compared to another person on the basis of a different personal characteristic or circumstance. Direct discrimination is much less likely to arise in the context of equal pay. Unequal pay arises as a result of indirect discrimination on a much more frequent basis. An **example** of where direct discrimination may arise might be where a group of male and female employees in a role or in roles with a different title but which involves the same tasks are paid on different pay scales.

There is a clear intention on the part of the employer characterises the example above, but it is not necessary for there to be a negative intention to discriminate in order for pay practices to constitute unlawful discrimination.

Direct discrimination can never be legally justifiable, whereas, if a respondent is able to show there is an objective or reasonable justification for indirect discrimination in pay, this may be lawful (for more information, see below).

**Indirect discrimination** in respect of pay occurs where the application of a rule, criterion or practice is more difficult for a worker to fulfil or comply with because of the presence of a protected ground. This rule, criterion or practice appear to be neutral but it will disadvantage individuals as a result of their personal characteristic or circumstance.

### Case Study 1 (Indirect discrimination):

The complainant was a medical doctor, and not a citizen of Ireland or of any member state of the European Union. The complainant obtained his degree in medicine from an Irish university and, before being able to qualify as a medical practitioner, he was required to obtain a certificate from a teaching hospital which demonstrated that he had experience in a hospital approved by the (Irish) Medical Council.

77 paid intern (pre-qualification) posts were allocated between two hospitals for medical graduates of the particular university that the complainant had graduated from. When he received his examination results, the complainant had been ranked 81<sup>st</sup> and he was therefore not allocated any of the funded places in the two hospitals.

Those who were Irish or citizens of the European Economic Area (which is made up of members states of the European Union and additional countries) were given priority over those who were not citizens of Ireland or the EEA. Therefore, despite the fact that they were ranked 82<sup>nd</sup> in their examination results, an Irish citizen was given one of the paid internship positions that were available.

When candidates failed to secure one of the 77 funded places, posts that were described as “supernumerary posts” were created. The complainant was appointed to one of those posts. The complainant did not receive pay (except for overtime and when he was on call). In contrast, those who were in one of the 77 posts were paid a monthly wage and an additional payment (known as a “living out allowance”). The complainant brought a claim for equal pay, and used two doctors appointed to the paid intern posts as comparators. He claimed that he had been discriminated against in relation to his pay on the basis of race (“the race ground”), because many of those who were appointed to supernumerary posts were non-nationals and therefore not in receipt of pay. The Equality Tribunal (the predecessor of the Workplace Relations Commission) decided that he had been discriminated against in relation to his pay on the basis of race.

The respondent hospital was asked how many non-EEA nationals filled the funded internship posts and vice versa in the five years up to the case having been instituted. When this

information was provided, it became clear that all paid/funded internship posts were filled by citizens of Ireland and other EEA countries, while all of the supernumerary posts were filled by individuals from countries outside the EEA in that five-year period.

The hospital argued that it may not have been possible to obtain a work permit for the complainant had these conditions in respect of pay not been applied. It was also argued that the provision of supernumerary posts was to assist those who had not obtained a funded internship post, and therefore, this also served as an objective justification for the difference in pay between those in funded internship posts and those who in supernumerary posts.

The Labour Court (where decisions of the Equality Tribunal and now the Workplace Relations Commissions are appealed to) decided that:

- the complainants and the comparators were engaged in like work;
- the complainant was on a different and lesser rate of pay as compared to the comparators;
- the criterion used by the hospital in determining if certain elements of remuneration (i.e. the regular monthly wage) should be paid to intern doctors is whether the post is a funded post (of which there were 77) or a supernumerary post, a person's race or nationality was not an explicit factor and therefore, and it was therefore not direct discrimination;
- a disproportionate number of employees who were paid a monthly wage (because they were in funded posts) were Irish or EEA citizens and those who were not in receipt of the monthly payment were disproportionately non-Irish and non-EEA citizens (in fact, the statistics demonstrated that the former group was made up solely of Irish and EEA citizens and vice versa);

- The criterion applied in respect of pay disproportionately impacted non-Irish and non-EEA nationals and could not be reasonably justified, and this constituted indirect discrimination on the basis of race.

The Labour Court therefore said the decision of the Equality Tribunal should still apply and that the complainant was entitled to have been paid an equal amount to those in funded posts.

## Case Study 2 (Indirect discrimination):

Two women had been employed on a job-share arrangement working for the Revenue Commissioners. Job-share arrangements allowed two civil servants to share one full-time job equally.

Civil servants' salaries increase on an incremental or periodic basis based on their years of service within the civil service. The Irish Government introduced a rule whereby those employees in job-share arrangements had their service increments (i.e. their increases in salary) calculated on the basis of the hours they worked, rather than their years of service. This meant that those in job-share arrangements were treated differently as compared to those in full-time employment, whose service increments were calculated on the basis of the years they had worked in the civil service.

The European Court of Justice observed that although it was possible for men to be in job-share arrangements (and there were some examples of that), 98% of all civil servants employed in job-share arrangements were women, and 99.2% of clerical assistants in job-share arrangements (the category of civil servants that the complainants in that case fell into) were women.

The European Court of Justice ruled that this amounted to pay discrimination on the basis of gender, because of the disproportionate impact this differentiation in relation to payment benefits had on women.

### Case Study 3 (Indirect discrimination):

186 women employed as cleaners instituted a complaint at the Equality Tribunal against their employer, a university. They claimed they had been the subject of pay discrimination on the basis that a group of male colleagues received higher pay.

The job titles held by all of the female employees was “cleaners”. The roles of “maintenance general operatives” and “ground staff general operatives” were all held by males - the individuals in these roles were paid at a higher hourly rate. When the roles were advertised, it was not stipulated that cleaners could only be female and/or that maintenance general operatives and ground staff general operatives could only be males, this was also not stated in their job descriptions.

There were also some differentiations in their work practices – the female employees worked exclusively inside, while males worked both inside and outside. The females were responsible for cleaning duties inside the building, while males might carry out activities as diverse as planting and maintaining flower beds, Hoovering, or unloading trucks full of rubble using a shovel.

Despite these differences, the Equality Tribunal (the predecessor to the Workplace Relations Commission) concluded that both were engaged in “like work” and that the female employees had been the subject of indirect discrimination on the basis of gender, and were therefore entitled to the same rate of pay as their male counterparts.

Discrimination by **imputation** occurs where the worker is discriminated against because they are imputed (incorrectly assumed) to be a member of one of the protected grounds under the EEA. Discrimination **by association** occurs where a person is treated less favourably because of their connection, relationship or association with another person who falls within the protected grounds. These categories of discrimination are much less likely to arise in the context of pay disputes.

## WHY IS DISCRIMINATION RELEVANT IN RESPECT OF EQUAL PAY?

In order for a difference in pay/remuneration to be unlawful, it must be demonstrated that it arises from discrimination on the basis of one of the protected grounds outlined in the EEA and not for some other reason.

If this is not the case, then the difference in pay will not be deemed to be unlawful under this legal framework.

Historically, differences in pay arising from discrimination were on the basis of gender, and in a large number of cases this remains the case. However, there will also be numerous instances of pay discrimination on the basis of other protected grounds.

## WHAT ARE THE NINE GROUNDS OF DISCRIMINATION?

In order for a person to prove they have been subject to pay discrimination, they must show the difference in pay is related to one of the grounds of discrimination under the EEA. The nine grounds of discrimination are:

### Gender (male, female, transgender, pregnancy, or maternity leave)

Where a complainant is one gender (male or female) and another person is another gender (male or female). Discrimination because of pregnancy or maternity leave is also defined as gender discrimination (please see the section below in respect of particular legal rules and principles which relate to discrimination on the basis of pregnancy or maternity leave). Under EU law, a transgender person who experiences discrimination is also protected under the gender ground.



## Civil status (single, married, separated, divorced, widowed or in a civil partnership)

Where a complainant has a different civil status to another person, for example, where a person is divorced while another person is married.

## Family status (a pregnant person, parent or acting parent of a child, a parent or a carer of a person with a disability who requires continued care)

Where a complainant has a different family status as compared to another person, for example, where one is pregnant and someone else is not.

## Sexual orientation (heterosexual, homosexual or bisexual orientation)

Where a person is treated less favourably because they have a different sexual orientation to another person, for example where a complainant is gay while the other person is heterosexual.

## Age (only applies to those who are aged eighteen years and over)

Where a complainant is a particular age and another person is older or younger than they are.

## Religious belief (including religious background and those who have no belief)

Where a person is one religion, for example, Jewish, while the other is a different religion, such as being a Roman Catholic or has no religious belief.

## Membership of the Traveller community

Where a person is a member of the Traveller community and another person is not.

## Race (colour, nationality, ethnic or national origin)

Where a person is a particular colour, nationality, ethnicity or nationality compared to another person who is a different colour, nationality, ethnicity or nationality.

## Disability (intellectual, mental and/or physical disability)

Where a person has a disability and another person does not. 'Disability' is defined broadly as, for example, the total or partial absence of a person's bodily or mental functions, the presence of organisms that cause or are likely to cause chronic disease, or a condition or illness which affects a person's thought processes, perceptions of reality or emotions. The definition includes a disability that exists, that previously existed, that may exist in the future or that is imputed to a person.

## WHEN CAN PAY DISCRIMINATION ARISE?

### Where a ground exists at the time of making the complaint

Where a person is being subjected to pay discrimination, and the ground upon which they are being subjected to that discrimination exists at the time of the making of the complaint.

### Where a ground used to exist but no longer exists

Pay discrimination can arise on the basis of a ground that used to exist but no longer exists, for example, where a person has returned from maternity leave and they are paid a lesser amount as a result of that, or where a person has experienced a period of illness but is no longer ill.

### Where a ground may exist in the future

Pay discrimination can also occur where a person is discriminated against on the basis of a ground that may exist in the future, for example, where a person is paid a lesser amount because they may or it is anticipated they may become pregnant or where their spouse is suffering from a terminal illness and it is anticipated they may become widowed.

### Where a ground is assumed to exist by the employer but actually does not exist

Even if an employer wrongly believes that a person falls within a group linked to one of the protected grounds and pays them a lesser amount on that mistaken belief, this may still constitute unlawful pay discrimination. An example may be where a person is assumed to be Muslim but where they are in fact not, or where they are assumed to be gay but is in fact not.

## ARE THERE ANY PARTICULAR RULES OR PRINCIPLES THAT APPLY TO THOSE WHO ARE PREGNANT AND/OR ON MATERNITY LEAVE IN TERMS OF EQUAL PAY?

As set out above, discrimination because of maternity leave or pregnancy is defined as gender discrimination. This means that a person can institute a claim in the Circuit Court directly, as opposed to having to bring it to the Workplace Relations Commission (for more information, please see IHREC's standalone guide entitled *"The Process for Instituting a Case at the*

*Workplace Relations Commission Under the Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2018).*

A woman's entitlement to normal contractual remuneration/payment ceases during maternity leave. A contract of employment may provide for maternity-related pay but that may not necessarily be the case.

A woman that has been on maternity leave is entitled to any increase in payment applied to employees while they have been on leave, when she returns to work, and she is also entitled to be assessed, while on maternity leave, for any performance-related pay increase.

## ARE THERE ANY PARTICULAR RULES OR PRINCIPLES THAT APPLY TO PERSONS WITH DISABILITIES IN TERMS OF EQUAL PAY?

[Section 35 of the EEA](#) sets out "special provisions" relating to persons with disabilities. The section sets out that an employer is legally permitted, as opposed to being obliged, to provide an enhanced payment to an employee with a disability where, as a result of their disability, the amount of work they carry out in a particular period is less than the amount of similar work done, by an employee without a disability.

This section of the Act also allows an employer to provide special facilities to an employee who is disabled, that they may not and do not have to provide to other employees, in order to facilitate that disabled person engaging in work or training.

These rule does not entitle persons without disabilities to the same rate of pay or facilities that may be provided by an employer

## ARE THERE ANY PARTICULAR RULES OR PRINCIPLES THAT APPLY TO AGE?

The EEA specifically states that different rates of remuneration based on seniority or length of service will not be deemed age discrimination (see: section 34(7), EEA). However, relying on seniority or length of service to justify a difference in remuneration must be reasonably justified.

## DOES A COMPLAINANT HAVE TO SHOW THAT THEY HAVE BEEN TREATED DIFFERENTLY IN COMPARISON TO A “COMPARATOR”?

Yes, it is necessary for a complainant to demonstrate that they have been paid a lesser amount as compared to another person employed by their employer or an associated employer based on a protected ground. They must therefore show that the person they are comparing their situation to is not a member of the same group linked to that protected ground (for more details in relation to what characteristics a comparator should have and/or what an employer or associated employer is, please see the section entitled “**Common Terminology**” above; and for more general information in relation to “comparators”, please see IHREC’s standalone guide entitled *“The Process for Instituting a Case at the Workplace Relations Commission Under the Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2018*).

It can be very difficult to identify a comparator in the context of equal pay disputes but it is still a legal requirement. The situation becomes all the more difficult in the context of indirect discrimination. In such cases, it is necessary for a complainant to identify a group of comparators as opposed to just one individual, and that group should be made up of persons who predominantly differ from the group the complainant is a part of with regard to a protected characteristic (for more information, please see the section entitled “*Discrimination*” above).

The High Court has set out a number of principles to guide the task of identifying a group of comparators in equal pay disputes:

- claims relating to equal pay disputes will only be determined on the basis of identified comparators, who must be real people as opposed to hypothetical individuals;
- in the context of indirect discrimination claims, the group of comparators must be large enough to cover enough individuals and demonstrate a comparison that is not by chance or short term and that is significant;
- the comparators in question must be paid at a higher rate than the complainant(s);
- comparators must be in an equivalent situation as compared to the complainant(s);
- it is not acceptable to be selective in selecting comparators from a group without acknowledging that there are individuals within the same group of employees where the comparison with the complainants is not so stark or is non-existent.

## EQUAL PAY EXPLAINED

### WHAT TYPE OR CATEGORIES OF PAYMENT ARE COVERED BY THE EEA?

The term “equal pay” is generally used, and it should therefore be clear, that the rules provided in the EEA apply to wages and salaries paid to employees. However, the legal term used in the EEA is actually “remuneration” as opposed to equal pay. The term remuneration covers many more aspects of payments made and benefits given to employees than wages and salaries.

In addition to wages and salaries, the rules provided for in the EEA cover any other benefits whether they are provided in monetary terms or through some other mechanism (such as bonuses, share allocations, performance related payments, and non-cash benefits such as company cars or mobile phones).

Pensions are not included in this definition, in fact, they are explicitly excluded from the remit of the EEA. The Equality Tribunal (the predecessor to the Workplace Relations Commission) has also decided that rules in relation to equal pay cover travel and subsistence expenses, as they do not constitute a benefit for the employee.

Equality in relation to pension entitlements is dealt with in separate legislation – [the Pensions Act 1990](#).

## WHAT IS A CONTRACT OF EMPLOYMENT?

One of the first steps a complainant needs to take in demonstrating they have been subjected to pay discrimination is to show that they are or were working under a contract of employment with the employer they have instituted the claim against.

A contract of employment is a formal legal relationship between two persons or a person and an entity (such as an organisation or a company). It involves an employer (which can be a person, a company, or another category of organisation) remunerating a person where they agree to personally carry out work on behalf of the employer (for more information on what constitutes an employee, for the purpose of instituting a complaint under the EEA, please see the section *“Common Terminology”* above).

A contract of employment can be and often is set out in writing, but it does not necessarily have to be. It can also be expressed, in that the employer and the employee have expressly stated either verbally or in writing that they are entering into a contract whereby the employer remunerates the employee for work done, or it can be implied. This means that while the employer and employee may not have explicitly said they are entering into a contract of employment, the fact that a person is carrying out work under the direction of a particular person or organisation and/or is being remunerated for work, demonstrates that there is a contract of employment in being.

Every contract of employment contains an implied term (a term that does not explicitly need to be said or written down) that requires equal pay on the gender ground – this is explicitly set out in section 20 of the EEA. A similar term is implied in relation to equal pay on all other grounds.

## WHAT CATEGORIES OF EMPLOYEES ARE COVERED BY THE RULES IN RELATION TO EQUAL PAY SET OUT IN THE EEA?

### Full-time employees

A person who is engaged as a full-time employee of an employer is covered by the equal pay protections provided for in the EEA.

### Part-time employees

Part-time employees are also covered by the EEA and in fact, less favourable treatment of part-time workers can constitute indirect discrimination, often on the gender ground, where the majority of part-time workers are female (for an example, please see the section entitled “*Discrimination*” above).

### Agency workers

Agency workers are covered by the protections afforded by the EEA, but in bringing a claim, they must use another agency worker engaged by the same employer or an associated employer as a comparator. They cannot use a colleague who is directly employed by the employer, usually the owner of a business or other organisation, as a comparator.

## IS IT POSSIBLE TO PROVIDE A STEP-BY-STEP GUIDE FOR INSTITUTING AN EQUAL PAY CLAIM?



Each pay discrimination case will be different, but there are a number of criteria that a complainant must satisfy in order to advance a complaint in relation to unequal pay, in summary they are as follows:

- a complainant must first show they are in or were in a contract of employment with the respondent (for more information, please see the section entitled “*What is a contract of employment?*” above);
- a complainant must then identify a comparator or a group of comparators in the case of indirect discrimination (for more information, please see the sections entitled, “*What is a comparator?*” and “*Discrimination*” above, where case studies are provided);
- a complainant must show they are paid a lesser amount than their comparators;
- a complainant must then seek to demonstrate they are engaged in “like work” (either the same or similar work) as compared to their comparator(s) (for information, please see sections entitled, “*What is like work?*” and “*Discrimination*” above, where case studies are provided);
- a complainant should seek to show that the work they are engaged in is of equal value to that being carried out by their comparator(s) (for more information, please see the section entitled, “*What is work of equal value?*” above);
- a complainant should seek to show that the difference in pay is motivated by factors linked to one of the protected grounds (for more information, please see the section entitled “*Discrimination*” above).

## DEFENCES

As set out above, where a complainant is able to demonstrate a *prima facie* case of discrimination in relation to pay, it then falls to the respondent employer to set out an objective justification (sometimes referred to as a reasonable justification) to provide a basis for the discrimination and to defeat the complainant's complaint.

## WHAT ARE THE GROUNDS UPON WHICH A RESPONDENT EMPLOYER COULD RELY IN ORDER TO DEFEAT A COMPLAINANT'S COMPLAINT IN WHICH THEY CLAIM TO HAVE BEEN THE SUBJECT OF PAY DISCRIMINATION?

### A reason not linked to a protected ground

Where an employer is able to demonstrate that the difference in pay is because of a reason other than a reason connected to a protected ground, then it may not constitute unlawful pay discrimination. This may be, for example, because an employee has been 'red-circled' (for more information, see below) or because the employees are not engaged in like work.

### Case Study 1

While a university lecturer recently demonstrated that she was employed in "like work" with her comparator, the Workplace Relations Commission deemed her as having not made out a *prima facie* case of discrimination. This was because the university justified the differentiation in pay on the ground that the comparator had more years of service working at the university than the complainant.

### Case Study 2

A number of female aviation officers claimed they were discriminated against on the grounds of gender as they were paid less than their comparators (who held a variety of roles, including air traffic control officers and radio officers). The complainants' work was entirely administrative in nature. While their comparators did carry work of a similar nature, they also carried out very technical tasks which the complainants did not, and which required specific technical qualifications and skills.

## Red-circling

Red-circling is a term used where an employee who holds a role is unable to perform some of the tasks associated with that role because of ill-health. Alternatively they may be assigned to other tasks because of ill-health. Where either of the developments occur and that employee retains the pay they were previously in receipt of despite not being able to carry out all of the tasks associated with the role and/or which are being carried out by their colleagues in the same or similar roles, this is known as "red-circling". This may act as a legal justification for differences in remuneration provided to different categories of employee.

## Market forces

An employer may seek to rely upon factors relating to market forces to justify a differentiation in remuneration. However, in order to do so, very clear and concrete evidence would need to be presented and it would still need to be a proportionate difference in pay (in other words, not an unfair or too significant a difference on balance and taking all circumstances into account).

One recent case demonstrates how such a defence can apply – the complainant (a GP) had complained that two younger female colleagues, who were also GPs, were being paid more than her. The employer put forward a number of purported justifications for this difference in pay, however, the Labour Court focused on the part of the employer's defence that focused on market forces.

The respondent presented evidence that in the year the comparators had been recruited, there was a significant shortage of GPs available, and the employer had therefore been required to pay the higher rate in order to attract them to work for them. This was accepted by the Labour Court as serving as an objective and reasonable justification for the differences in pay.

In addition, the Labour Court decided that the difference in pay was proportionate, when the complainant's whole remuneration package was examined (including the considerable periods of free time she had outside her contracted hours).

## Collective bargaining

The fact that a pay level has been arrived at following a collective bargaining process is highly unlikely to serve as a standalone justification for a difference in remuneration connected to any of the protected grounds. However, the Courts have said that ensuring good industrial relations (the relations between employers and employees), that are brought about by collective bargaining are protected, may be a factor taken into account when deciding whether a differentiation should be deemed unlawful or not.

Collective bargaining is a term which refers to negotiations between one or more employers and one or more workers' representative organisations (such as trade unions) for the purpose of determining working conditions and terms of employment, including issues relating to pay and working time.

Another important factor may be where minimum rates of pay are set out in law. In many sectors, for example, cleaning or hairdressing, the Government has set out in legal documents called statutory instruments or regulations what the minimum rate of pay is to be for people working in those industries. These rates of pay are arrived at following recommendations being made by industry experts appointed by the Labour Court under a process set out in [the Industrial Relations Act 1946](#).

## OBTAINING INFORMATION TO ADVANCE A COMPLAINT OR CLAIM

Having access to information is crucially important to any complainant who wishes to advance a complaint in relation to pay discrimination. It is necessary for a complainant to be able to demonstrate that they are being paid a lesser amount than their comparators. It is difficult to do this without documentary evidence or an admission on the part of an employer.

There are various ways that a complainant can seek information in respect of possible pay discrimination, some of the options are set out below.

### The Freedom of Information Act 2014

A request for information under the [Freedom of Information Act 2014](#) can be made at any time, either before or after submitting a complaint under the EEA (for more information in respect of the type of information that can be sought under the 2014 Act and/or the types of bodies that are the subject of the Act, please see IHREC's standalone guide entitled "*The Process for Instituting a Case at the Workplace Relations Commission Under the Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2018*") [How you bring a case to the Workplace Relations Commission under the Employment Equality Acts and the Equal Status Acts.](#)

If the employer/possible respondent is a body that falls within the scope of the Freedom of Information Act 2014, it would be open to a complainant to seek information in relation to the remuneration of groups or categories of employees.

### The Data Protection Act 2018

[The Data Protection Act 2018](#) provides all persons with the legal right to access data (in other words, information) held about them by a “data controller”. It is possible that a respondent will be a data controller, for example, an employer may hold an employee’s file which holds personal information that is relevant about them (for more information, please see IHREC’s standalone guide entitled “*The Process for Instituting a Case at the Workplace Relations Commission Under the Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2018*”) [How you bring a case to the Workplace Relations Commission under the Employment Equality Acts and the Equal Status Acts.](#)

A request pursuant to the Data Protection Act 2018 could be submitted before or after a complaint has been instituted.

It is unlikely that a complainant would be able to obtain personal information in relation to a comparator or potential comparator using this method.

## Section 76 of the EEA

[Section 76 of the EEA](#) provides a potential complainant with the right to seek ‘material information’ from an employer, for example, in relation to the remuneration of fellow employees, in order to decide whether or not to pursue a complaint.

This information can be very useful to a complainant, it may show differences in pay or, for example, by asking a certain type of question, the answer may demonstrate that one category of workers is exclusively female while a comparable group that is paid more is exclusively male.

An employer is not obliged to respond to the request for information, but if they fail to do so or they respond in a dishonest way, the Adjudication Officer (or the Circuit Court) may draw an inference from this. In other words, they may view it in a negative light and/or view it as adding support to a complainant’s case.

Certain categories of information cannot be sought using this method, these include “confidential information” about other persons (for example, other employees). In order for information to be confidential, it must relate to a specific individual rather than a group of individuals. For example, it would not be permissible to ask whether person X has a disability or is gay, but it would be permissible to ask what pay the group of employees they are a part of (such as cleaners or factory operatives) are in receipt of.

Potential complainants are also not permitted to seek information about the scale or financial resources of the employer’s business, using this method.

The questionnaire that must be used to seek information from an employer can be found on the [Workplace Relations Commission website](#).

## Gender Pay Gap Information Act 2021

[The Gender Pay Gap Information Act 2021](#) became law in Ireland in May 2022. The 2021 Act amends the EEA, by inserting a new section 20A. Shortly after the 2021 Act became law, the Minister for Children, Equality, Disability, Integration and Youth introduced the [Gender Pay Gap Information Regulations 2022](#) in June 2022 which, for the time being, provide guidance in respect of the operation and implementation of the 2021 Act.

At the moment the 2021 Act and the 2022 Regulations require employers with 250 or more employees (and all public sector bodies and all bodies wholly or partly resourced by public funds, whether they have 250 employees or not) are included.

Those employers must publish the following information:

- the mean and median gap in hourly pay between men and women;
- the mean and median gap in bonus pay between men and women;

- the mean and median gap in hourly pay of part-time male and female employees;
- the percentage of men and of women who received bonus pay;
- the percentage of men and of women who received benefits in kind.

These requirements will also apply to employers with less than 250 employees but more than 150 employees from the second anniversary of the 2022 regulations, and employers with less than 150 employees will be obliged to publish this information from the third anniversary of the regulations.

This public information may be of assistance to complainants in specific equal pay claims.

Where an employer fails to fulfil their obligations under the 2021 Act and/or the 2022 Regulations, it is now possible for an employee or the Irish Human Rights and Equality Commission to apply to the Circuit Court or the High Court to seek an order directing the employer to publish the information required by section 20A of the EEA. It is not possible for the Courts to grant compensation to an employee for an employer's failure to publish this information.

## Request for a job evaluation

Before instituting a complaint under the EEA or instead of doing so, an employee may wish to ask their employer for what is commonly referred to as a job evaluation. A job evaluation will involve an employer examining the profile of, and tasks carried out by, certain categories of workers, and an analysis of pay practices in respect of those groups. It may lead to changes in pay practices, but information gleaned from this process may also be useful in any complaint which an employee may wish to advance.

Guidance in relation to job evaluations can be found in IHREC's [Code of Practice](#).



## TIME LIMITS

### HOW LONG DOES A COMPLAINANT HAVE IN ORDER TO INSTITUTE A COMPLAINT IN RELATION TO PAY DISCRIMINATION?

Section 77(5)(c) of the EEA explicitly states that the normal time limits in respect of other discrimination and/or victimisation cases under the EEA do not apply to equal pay disputes. All other discrimination and/or victimisation claims must be instituted within six months of the date of occurrence or most recent occurrence of discrimination or victimisation.

However, when it comes to equal pay, the time limit that applies to claims for breach of contract claims, as set out in the [Statute of Limitations Act 1957](#), is the applicable period. The applicable period is six years from the breach of contract, in other words the alleged pay discrimination, occurring.

### CONTACT DETAILS FOR THE IHREC “YOUR RIGHTS” SERVICE

- Call us on 018583000
- Email us on [YourRights@ihrec.ie](mailto:YourRights@ihrec.ie)

You can also write to us at: Your Rights, Irish Human Rights and Equality Commission, 16-22 Green Street, Dublin 7.