

Equal Pay Handbook

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Foreword

Women in Australia have been fighting for the right to equal pay since early this century. The principle of equal pay for equal work was recognised in the Universal Declaration of Human Rights in 1948. Since then, women's right to equal remuneration has gained increasing international support.

Australian women workers were granted equal pay in 1969. Nearly thirty years later it is rare, but not unheard of, for women to be paid a lower base wage than men doing the same jobs. The equal pay issues of the 1990s are far more complex than this. For example, female-dominated jobs may be paid lower over-award payments than male-dominated jobs; job evaluation processes may undervalue female-dominated occupations and therefore set lower pay rates compared with male-dominated jobs; or part-time workers may not be paid the same as full-timers doing the same jobs, on a pro-rata basis. All these factors, and others, contribute to unequal pay between men and women.

The complexity of the issue has not been well understood by employers and unions. As a result, many crucial factors which hamper the provision of pay equity have not been adequately tackled. Today, federal industrial legislation (the *Workplace Relations Act 1996*) contains strong provisions requiring that employers accord male and female employees equal remuneration for work of equal value. Claims for equal remuneration under that legislation can be made to the Australian Industrial Relations Commission (AIRC). Complaints of sex discrimination in remuneration can also continue to be made to the Human Rights and Equal Opportunity Commission under the *Sex Discrimination Act 1984*.

While the capacity to claim equal remuneration for work of equal value in the AIRC is relatively new in Australian industrial relations, Europe, Canada, the United Kingdom and the United States have all had specific equal remuneration legislation for around a decade. Because their equal remuneration case law is highly developed, case examples from these jurisdictions have been included throughout this Handbook to illustrate the principles governing equal remuneration practice in those countries. Decisions of international courts are considered to be influential, but not binding, upon Australian courts.

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Moira Scollay
Acting Sex Discrimination Commissioner

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Using this Handbook

The *Equal Pay Handbook* is designed to assist employers to meet their obligations under federal industrial and anti-discrimination legislation. It is also relevant to employees, equity practitioners and unions. It contains essential equal remuneration principles, explanatory material, case law, case studies and an equal remuneration audit methodology. The Handbook is intended to contribute to an understanding of pay equity and the implementation of equal remuneration in the workplace.

Section 1 explains the concept of equal remuneration and discusses the relevant legislation.

Section 2 examines equal remuneration in practice by looking at a number of equal remuneration problem areas: lack of transparency in pay systems, discretionary payments, allowances, performance payments, superannuation, and the impact of hours of work and market value. The section begins with a discussion of the pay-setting context and the equal pay situation in Australia. Throughout, sets of principles are included which, if adhered to, will help ensure that men and women doing work of equal value receive the same remuneration.

Section 3 discusses the objective appraisal of jobs and highlights areas of potential sex discrimination in job evaluation systems.

Section 4 is an equal remuneration audit methodology, designed to enable employers to carry out in-house assessments of their compliance with the requirements of the equal remuneration legislation.

1. Equal remuneration: definitions and legislation

1.1 Background and definitions

Equal remuneration for work of equal value means paying men and women equally for work that is of equal skill and responsibility and is performed under comparable conditions.

In Australia's federal industrial legislation, the *Workplace Relations Act 1996*, the term equal remuneration for work of equal value refers to *rates of remuneration established without discrimination based on sex*. This definition is contained in Article 1 of the International Labour Organisation's Convention No. 100 Concerning Equal Remuneration for Men and Women Workers (ILO 100). Australia ratified this convention in 1974. The equal remuneration provisions of the *Workplace Relations Act* were intended to give domestic effect to this and other international anti-discrimination conventions. As such, it is appropriate to look to the conventions for guidance on the meaning of these terms.

Remuneration is a very specific term. ILO 100 defines it as *the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment* (Article 1). In practice, this means all elements of payment to employees for their work, including superannuation payments, discretionary payments, allowances, bonuses, commissions, performance or merit payments, and non-cash benefits such as cars, loans, lap-top computers and mobile phones.

Work of equal value means work that carries the same value when measured objectively. It does not have to be the same type of work to have the same objective value. Value is determined by objectively appraising the job's content.

Equal remuneration has a broader meaning than *equal pay*. It encompasses all types of payment in cash or kind made to employees.

Sex discrimination in remuneration can occur in many ways. It is rare to find overt examples of direct sex discrimination in remuneration, such as having separate pay scales for males and females doing the same jobs. Generally discrimination is not explicit, because often men and women do not do the same type of work. Sex discrimination is more likely to be indirect - that is, hidden by rules or practices which appear to treat men and women in the same way, but which actually work to disadvantage one sex compared with the other. It is irrelevant whether or not this discrimination is intentional. If rules or practices which disadvantage women in relation to men are not reasonable, they are likely to constitute unlawful sex discrimination. Indirect sex discrimination is explained further in section 1.2.2.

1.2 Equal remuneration legislation

Federal law relating to equal remuneration is contained in the *Workplace Relations Act 1996* and the *Sex Discrimination Act 1984*. Although state industrial and anti-discrimination legislation are also applicable, this handbook deals only with responsibilities under federal legislation.

The following information about the legislation is general only. It emphasises the practical effect of the legislation rather than the letter of the law.

This information does not constitute formal legal advice, and should not be considered to be a substitute.

1.2.1 The *Workplace Relations Act 1996*

The *Workplace Relations Act 1996* provides for equal remuneration to be paid to men and women workers performing work of equal value (Part VIA, Division 2).¹ The Act also provides for equal pay for work of equal value in industrial awards, and for certified agreements and Australian Workplace Agreements (AWAs) to be free from discrimination on the ground of sex.²

Employees, unions or the Sex Discrimination Commissioner may make applications under the equal remuneration provisions of the *Workplace Relations Act 1996*. These provisions apply to all

¹ Part VIA, Division 2, provides a mechanism by which employees may seek equal remuneration orders. This Division gives effect to international conventions, including ILO 100, Article 2 of which states that Members (signatories) shall: *by means appropriate to the methods in operation for determining rates of remuneration, promote, and so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.*

² *Subsection 88B(3)*: the AIRC in the performance of its functions must have regard to the need to apply the principle of equal pay for work of equal value without discrimination based on sex (*para (d)*), and the need to prevent and eliminate sex discrimination (*para (e)*). *Subsection 88B(8)* allows inclusion of the anti-discrimination clause in awards. Section 93 requires the AIRC to take account of the principles embodied in the *Sex Discrimination Act 1984*. Section 111A requires the AIRC to convene hearings to review discriminatory awards or certified agreements referred by the Sex Discrimination Commissioner. If the AIRC finds the award or certified agreement is discriminatory, it must take action to remedy the discrimination (s.113(2A)). Section 170LU(5) states that the AIRC must refuse to certify an agreement if it thinks a provision discriminates on the ground of sex. Employers must ensure that AWAs contain anti-discrimination provisions (s.170VG(1)). Principal objects of Act (s.3 (j) and (k)) include to prevent and eliminate sex discrimination and to give effect to international obligations in relation to labour standards. Note that certified agreements and AWAs are subject to the *Sex Discrimination Act*.

employees regardless of award coverage or jurisdiction, with some exceptions. The Australian Industrial Relations Commission (AIRC) must refrain from considering the application if it is satisfied that an adequate alternative remedy is available to the applicant under a law of the Commonwealth, (including other sections of the *Workplace Relations Act*), or a law of a State or Territory which will ensure equal remuneration for the employees concerned.

Similarly, employees who have made an application in respect of alleged discrimination under any other provision in the *Workplace Relations Act*, or under any other law of the Commonwealth or a State or Territory, are excluded from consideration. Employees who make an application under the equal remuneration provisions of the *Workplace Relations Act* cannot then take proceedings in relation to this discrimination in any other jurisdiction.

The equal remuneration division of the *Workplace Relations Act* enables the AIRC to make orders requiring equal remuneration to be provided where there is not equal remuneration for work of equal value. These orders may provide for an increase in rates (including minimum rates) of remuneration (s.170BC). Where orders are made to implement equal remuneration this may occur either immediately, or the order may be implemented in stages (s.170BF). The AIRC cannot award damages.

Employers must not reduce the remuneration of any employee for the reason, or for reasons including, that an application has been made for equal remuneration (s.170BG). That is, the amount of remuneration paid to men must not be reduced as a result of an order that women performing jobs of equal value should receive equal remuneration. In other words, where women are granted equal remuneration, their pay should be increased or 'levelled up' rather than 'levelling down' the pay of the men with whom they compared themselves.

This equal remuneration division of the *Workplace Relations Act* is intended to give effect to a number of international anti-discrimination conventions ratified by Australia and to two recommendations of the General Conference of the International Labour Organisation. These are:

- International Labour Organisation (ILO) Convention No 100 Concerning Equal Remuneration for Men and Women Workers; and Equal Remuneration Recommendation No. 90;
- ILO Convention No 111 Concerning Discrimination in Respect of Employment and Occupation; and Discrimination (Employment and Occupation) Recommendation No. 111;
- United Nations Convention on the Elimination of all forms of Discrimination against Women; and
- Articles 3 and 7 of the United Nations International Covenant on Economic, Social and Cultural Rights.

1.2.2 The Sex Discrimination Act 1984

The *Sex Discrimination Act 1984* prohibits direct and indirect discrimination on the grounds of sex, marital status, pregnancy and potential pregnancy (Division 1, Part 2):

- in the terms or conditions on which employment is offered (s.14(1)(c));
- in the terms or conditions of employment afforded the employee (s.14(2)(a));
- by denying the employee access to opportunities for promotion, transfer, training or any other benefits associated with employment (s.14(2)(b));

- by subjecting the employee to any other detriment (s.14(2)(d)).

Complaints can be made to the Human Rights and Equal Opportunity Commission about such treatment. Sex discrimination need not be the “dominant or substantial” reason for the treatment complained of (s.8). In order for a complaint to be successful it is necessary only to show that sex (or pregnancy, or marital status) discrimination was a factor in the treatment giving rise to the complaint.

Terms and conditions includes all components of remuneration including superannuation, leave, bonuses, discretionary payments, allowances, performance bonuses, commissions etc.

Complaints may also be made about discriminatory acts done under awards or certified agreement provisions (s.50A). If the Sex Discrimination Commissioner considers that the provision may be discriminatory according to the *Sex Discrimination Act*, she must refer the award to the AIRC. If the AIRC finds the provision discriminatory, it must remove the discrimination (*Workplace Relations Act s.111A(2A)*).

Definition - Direct sex discrimination

Direct sex discrimination occurs where a person of one sex is treated less favourably than a person of the opposite sex in circumstances that are not materially different (*Sex Discrimination Act s.5(1)*).

Definition - Indirect sex discrimination

Indirect sex discrimination occurs where a condition, requirement or practice is imposed or proposed that has the effect of disadvantaging people of one sex in relation to the other, and this is not reasonable in the circumstances (*Sex Discrimination Act s.5(2)*).

Matters to be taken into account in determining whether a condition, requirement or practice that may be indirectly discriminatory is reasonable include:

- (a) the nature and extent of the disadvantage;
- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the imposition of the condition, requirement or practice (Subsection.7B(2), *Sex Discrimination Act 1984*).

The employment provisions of the *Sex Discrimination Act 1984*, outlined above, apply to private sector organisations within the limits of constitutional powers, including small business; Commonwealth government departments, agencies and Government business enterprises; non-government organisations; educational institutions and voluntary bodies. They do not apply to State government departments, agencies and instrumentalities.

Case study – Indirect sex discrimination in a performance appraisal scheme

A company established a performance appraisal system which was linked to pay increases. The system used a number of criteria to determine the relative performance of employees. One such criterion was *time at desk*. The guidelines to the scheme state that, under this criterion, employees could be rewarded for working longer hours than required.

When the company analysed the results of the payments made in the previous financial year, it was obvious that male employees had received higher performance payments than female employees at the same level and with the same qualifications and experience. Further analysis showed that the only criterion against which the women employees had received lower ratings than the men was the *time at desk* criterion. It transpired that all the female employees undertook family responsibilities which prevented them from working very long hours at the workplace. The women considered it unfair that they were assessed against the time spent at the office rather than against their output and the quality of their work.

The ‘time at desk’ criterion had the effect of disadvantaging women employees compared with men. This resulted in a sex-based pay differential: men received greater remuneration than women performing work of equal value.

Complaints of sex discrimination in remuneration can be made by aggrieved employees, or by unions on behalf of their members, to the Human Rights and Equal Opportunity Commission under the *Sex Discrimination Act*. The Commission attempts to conciliate complaints in the first instance. If conciliation fails, the complaint is then referred to a public hearing. This hearing is currently conducted by the Human Rights and Equal Opportunity Commission, but legislation now before Parliament intends to transfer this function to the Federal Court. The conciliation function will remain with the Commission. Under the legislation before Parliament, only an aggrieved person may commence proceedings in the Federal Court. This does not preclude further assistance by a union.

The *Sex Discrimination Act* can provide monetary damages to complainants in cases which are upheld at public hearing (s.81(1)(b)(iv)). The aim is to put the complainant in the same position he or she would have been in had the discrimination not occurred. Damages may be itemised under heads such as lost income or wages, lost opportunity costs, humiliation and injury to feelings, and interest. Punitive damages are not available.

2. Equal remuneration in practice

This section begins with a discussion of the context in which employers set pay rates and an examination of the main equal remuneration problem areas: lack of transparency; discretionary payments; allowances; performance, merit and bonus payments; superannuation; hours of work; and market rates or value. Throughout this section, sets of principles drawn from research and case law are included. Applying these principles in the workplace will help to ensure that sex discrimination does not affect decision-making about pay.

2.1 Pay-setting and equal pay: context and approaches

Women workers comprise 43 per cent of the workforce. Today, 54 per cent of Australian women work. Adult women working full-time currently earn around 79.5 per cent of men’s total ordinary time earnings. Non-managerial full-time adult women workers earn 83 per cent of men’s earnings. If all employees - full-timers, part-timers, adults and juniors - are included in the calculations, women employees earn 66 per cent of the total earnings all male employees receive. (All figures from Australian Bureau of Statistics, *Average Weekly Earnings, States and Australia*, Nov. 1996, Cat. 6302.0 and *Employee Earnings and Hours*, May 1996, Cat. 6306.0)

The causes of the pay gap between men's and women's wages are complex and include factors which cannot be controlled by individual employers. However, the evaluation of women's work and skill, and the payment of discretionary payments, are two areas in which employers can take action.

2.2.1 Evaluation of women's work and skill

Men and women largely do different jobs, often in different industries, which are valued differently. Men's jobs tend to be higher in status and rewards. Women predominate in industry sectors such as retail and personal services where the pay is generally lower than in male-dominated industries such as manufacturing or construction.

This situation has an historical basis. While some of the difference in remuneration today may reflect genuine differences in skills and knowledge, some probably reflect discriminatory assumptions made in the past about the relative value of men's and women's work. The undervaluation of women's work may account for 25 per cent of the pay gap (Smith 1996). This issue is discussed further in section 3.

By ensuring that work done by women is objectively valued and paid according to that worth, employers can eliminate pay equity problems connected with the undervaluation of women's work in their workplaces.

2.1.2 Discretionary pay

Discretionary pay is a term for any component of remuneration that is paid at the discretion of the employer. In the workplace it may be called performance-based pay, bonuses, 'market' supplements, over-award or over-agreement pay. In May 1996, women earned, on average, \$4.20 per week in over-award pay, while men earned, on average, \$7.40 (ABS Cat. 6306, May 1996). The difference between what is paid to women and men in discretionary payments may constitute six per cent of the pay gap (Smith 1996).

Seventy per cent of private sector workplaces make some type of overaward payments to employees. Therefore, by ensuring that discretionary payments are made on the same basis to male and female employees, employers can play a crucial role in eliminating this inequity in their workplace. See section 2.4 for further discussion of discretionary pay.

2.1.3 The legislative context

According to 1996 estimates, the pay and conditions of 75 per cent of the workforce were set through industrial awards (Buchanan et al, 1997). Negotiations about these issues were typically carried out at the award level by peak employer and workers' groups. Since 1993, enterprise bargaining has become more prevalent. The *Workplace Relations Act 1996* seeks to encourage workplace-level rather than award-level bargaining about pay and conditions. Awards will be simplified, but will continue to contain a safety net of minimum standards of pay and conditions which must be met overall in workplace agreements. In this context, employers are free to choose the most appropriate pay-setting method for their workplace.

There are a range of pay-setting options available. The following examples are not an exhaustive list:

- pay rates and classification structures can be adopted directly from the relevant industry award; or
- minimum award pay rates can be supplemented with additional payments negotiated in a workplace agreement; or

- internal, company-specific pay and classification structures can be devised and implemented. These need not be related to the award if they exceed the entitlements contained within it, and they could be implemented through workplace agreements; and/or
- remuneration might consist of a base rate supplemented by discretionary payments such as performance or merit-based payments. Job evaluation systems might be used to allocate jobs to places in the classification structure and to determine remuneration; or
- some workplaces have always been award-free and employees work under individual contracts. Remuneration policies and classification structures would be set internally using a variety of methods such as job evaluation, performance systems, commissions etc.

There are discrimination issues associated with each of these options for pay-setting. Sections 2.4 - 2.9 use case law and case study examples to flag the main discrimination issues which arise in making discretionary payments, paying allowances, using performance pay systems, offering superannuation benefits, managing hours of work and calculating market value. Principles for ensuring that each component of remuneration is paid in a non-discriminatory manner are also included. Section 3 examines the issue of non-discriminatory job evaluation in more detail.

2.2 Transparency

Whatever approach to pay-setting is adopted, ensuring that the system is *transparent* is a crucial step towards ensuring that it operates in a non-discriminatory manner. A transparent remuneration system is one which is based on documented principles and criteria which are explicit, visible and open to scrutiny by all.

In a transparent pay system, employees understand not only their rate of pay, but also the components of their individual pay packets, the reason they are paid each component, and how each component contributes to total earnings in any pay period. This does not mean that the actual amount paid to individuals is public information - the pay received by individuals remains confidential. However, the criteria governing who gets paid what and the method of calculating pay is public information.

This concept is drawn from European case law. The *Danfoss* case laid down the principle that where a pay system is not transparent, and the complainant proves that a pay discrepancy exists between male and female workers, the onus of proof then falls to the employer to prove that there is no sex discrimination (*Handels-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)*, [1989] IRLR 532, European Court of Justice). *Danfoss* is discussed in more detail in section 2.6.

All aspects of the pay system should be transparent. This includes criteria governing the placement of employees in classifications or grades, the payment of discretionary payments, allowances, bonuses, performance payments and non-cash benefits.

Where transparent pay-setting policies and procedures are adopted and the basis on which people get paid is clear to all, employees are more likely to have confidence in the system and are less likely to form perceptions of unfairness or discrimination.

2.3 Review mechanisms and monitoring

In addition to having a pay system which is open to scrutiny, it is useful to incorporate appeal or review mechanisms into the system. Having a procedure in place through which employees can appeal or ask for a review of decisions about their remuneration provides an additional safeguard against discriminatory practices or assumptions affecting decision-making about remuneration.

Periodic monitoring, evaluation and review of the remuneration system will allow assessment of the extent to which the system is meeting its objectives, including the aim of providing equal remuneration. Monitoring and review also may help pinpoint any discrimination or bias in the operation of the system.

2.4 Discretionary pay

Discretionary pay is a term for any component of remuneration that is paid at the discretion of the employer. This includes performance payments and bonuses (dealt with separately at section 2.6), market loadings or supplements (see section 2.9), service payments, profit-sharing payments, attendance or time-keeping payments, commissions, production or task bonuses, and productivity pay. Sometimes these payments are simply referred to as overaward or overagreement payments and no explicit reason is given for paying them.

The Human Rights and Equal Opportunity Commission's Inquiry into Overaward Payments concluded that overaward payments have been applied differently to men and women throughout Australian history and that sex discrimination could not be ruled out as an explanation for the differential between the amount of overawards paid to women and men (HREOC 1992).

Case study – Applying service payments unequally

A company employed financial officers (mainly male) and administrative officers (mainly female). The value of the work performed by both classifications was roughly equal, but the men earned more because they were paid a 'service payment' which was not paid to the women.

The company justified paying the men more on the basis that the men had longer service records than the women. The men had all worked for the company in excess of twenty years. But the women also had long service records, and some of them had worked for the company as long as some of the men who did receive the payments. This company's service payment system was not transparent and was not applied equally to all groups of workers. Sex discrimination could not be ruled out.

Case study – No criteria for overaward payments

In an automotive components factory, women were largely employed in process work and men in production, maintenance and warehousing work. The work of the women process workers was valued more highly than the work of the male general hands, and was therefore classified at a higher level in the relevant award and received a higher base rate. However, the male general hands received an overaward payment of \$30.00 per week while the women process workers received only \$4.80 per week. This meant that the lower-skilled male general hands were receiving higher remuneration than the more skilled female process workers.

The company had no clear reason or motive for paying overaward payments. For example, it was not intended to supplement an award rate considered to be too low, nor was it a reward for merit or a service payment. There were no criteria set down in the company's remuneration policy which governed the payment of overawards - the internal wage structure had evolved in an ad hoc way.

Because there was no dispute that the work of the women was more highly skilled and of greater value, and because there were no transparent or objective criteria governing the payment of overawards, it was impossible to rule out sex discrimination as a factor in the differential payment of overawards to men and women. (Frizell, 1992)

Principles – Discretionary payments

Where discretionary payments are made they should be available to men and women workers on the same basis.

- (a) Criteria for making the payments should be transparent.
- (b) Criteria used to determine the level of the payment should be objective.
- (c) The same criteria should be used for female and male-dominated occupations and for full and part-time positions.
- (d) The criteria should be applied in the same way for female and male-dominated groups (e.g. either individual or group-based assessment should be applied across the board).

2.5 Allowances

Allowances are additional payments made to employees over and above their ordinary, or base, rate. Allowances can be provided as specified in an award or agreement (*award allowances*), or as an overaward or discretionary payment, or as an additional component of remuneration paid to non-award employees such as managers.

Examples of award allowances include skill allowances for using specific skills or equipment; work disability allowances to compensate for unpleasant conditions; reimbursement allowances which compensate employees for money spent on specified purposes such as travel; and location allowances paid to compensate for working in an unpopular or isolated location.

Paying different allowances to different classifications of employees can contribute to pay equity problems, particularly where the employees who receive allowances are mainly men, and the employees who do not are mainly women.

Case study

A local council paid its outdoor (mainly male) workforce a 'plant allowance', intended to compensate workers for the maintenance of plant and vehicles. All the outdoor workers were paid this allowance in each pay, regardless of whether or not they had actually performed any plant or equipment maintenance in that pay period. This means that the plant allowance was being paid as an overaward, or discretionary, payment - it was no longer being paid simply in consideration of additional duties being carried out. The council argued that *administrative and accounting simplicity* warranted the routine payment of this allowance.

In contrast, the home care nurses employed by the council (mainly women) were entitled to a daily allowance for handling infected materials when they were required to clean contaminated premises. Despite the fact that cleaning up blood, vomit, urine and faeces was one of the nurses most regular tasks, none of the nurses were paid this allowance automatically on a weekly basis. They had to claim it specifically for each day it applied.

Because the male outdoor workers received allowances such as the plant allowance on an automatic basis whether or not they had done any maintenance work, they typically received higher remuneration than the nurses, despite the fact that the work of the nurses had been valued as more skilled. Because the council administered the payment of award allowances differently to its male and female workforces, a pay equity problem resulted. (Charlesworth, 1994)

Case law - Allowances

In a German case, women were barred from working night shift (note that barring women from night shift would be considered directly discriminatory under Australian law). Male night shift workers were paid an allowance, the purpose of which was not specified. When the women workers from other shifts also claimed the allowance, the company argued that the purpose of the allowance was to compensate the men for working night shift. The women took the case to the Labour Court.

The Court found that the allowance paid to male workers on the night shift could not be intended to compensate for the particular hardships incurred by night workers, as the company claimed, because a separate night shift allowance was already paid for that purpose. Women workers on other shifts were therefore entitled to claim the unspecified allowance.

Schickendanz Case, 5/AZR/107/80, 25 August 1982, Federal Republic of Germany, Federal Labour Court

Principles – Payment of Allowances

Where allowances are paid they should be available to men and women workers on the same basis.

- (a) Criteria for making the payments should be transparent.
- (b) Allowances for unpleasant work or conditions (*work disability allowances*) should be paid to all employees in all jobs involving unpleasant work or conditions.
- (c) Allowances for specific tasks or responsibilities should be paid to all whose tasks or responsibilities are comparably demanding, skilful, productive etc.
- (d) Location allowances should be paid to all employees working at that location.
- (e) In rectifying a pattern of allowances favouring male-dominated jobs, care needs to be taken to avoid exacerbating male/female earnings differentials. Incorporating allowances into ordinary pay for all purposes (e.g. for superannuation) is likely to have this effect.

2.6 Performance, merit and bonus payments

Payments or bonuses for *merit* or *performance* have been identified as contributing to pay inequity. Sex discrimination can be easily, and almost invisibly, built into performance pay schemes.

Definition - Inherent requirements of the job

Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination (Article 1, International Labour Organisation Convention No. 111 Concerning Discrimination (Employment and Occupation)).

In *Christie v QANTAS Airways*, Gray J discussed the meaning of the term *inherent requirements of the job* and found that this referred to ... *something that is essential to the position, rather than being imposed on it.* (No. NI2363 of 1995, [1996] 138 ALR 19, Industrial Relations Court of Australia)

Case study – Performance pay

A newspaper company introduced a performance-pay scheme which required line managers to consider the skills and personal qualities of 90 employees. The managers were required to assess each employee and award points on a scale of one to ten on 41 'work skills' and six 'aptitudes'. No guidance was given to the managers about how to award points, and no parameters were laid down for the consideration of employees' aptitudes.

The total scores awarded to each employee were recorded and averaged, and the figure was expressed as a percentage. This mark was used to allocate employees to a point in the pay structure.

Ms Latham was awarded lower pay than three male employees performing work of equal value. When she took her case to the Industrial Tribunal, the employer argued that the difference in pay was due to the outcome of Ms Latham's performance assessment, and was not related to her sex. The tribunal rejected this defence, saying that *there was confusion, double-counting and an absence of transparency in the system. The managers had no brief ... there were no parameters laid down to define the areas to be considered in the various aptitude tests. Furthermore ... it was perfectly clear that each of them took slightly different matters into account in awarding marks for the different aptitudes themselves ...* The employer failed to convince the Tribunal that the difference in pay was unrelated to the sex of the employee. ***Latham v Eastern Counties Newspapers, Case No. 32453/93, Industrial Tribunal, UK, reported in Equal Opportunities Review Discrimination Case Law Digest No 20, Summer 1994***

Case study – Performance pay

The UK merit pay study found that managers of both sexes valued different attributes in men and women. For example, intelligence, dynamism, energy and assertiveness were rated as important among male subordinates, whereas thoroughness, organisation, dependability and honesty were most highly valued for females. These differences tend to reinforce gender stereotypes, where, for example, assertiveness is viewed as appropriate behaviour for men, but 'tact' is considered more important for women.

The study found that, on the whole, the distribution of performance appraisal ratings for men and women in the same job were broadly similar in all organisations examined. Where differences occurred, the women tended to receive better ratings than the men, and the study postulates that this may be due to men with past high ratings having received promotions while women with equivalent ratings have not.

However, despite this overall similarity in performance rating, when appraisal ratings were translated into performance payments, men and women at the same job level and with the same rating received different pay rises. Women sometimes received higher rises than men, but this was confined to schemes which operated to favour individuals in lower positions on the salary scales.

In jobs dominated by men, higher than average performance pay increases were awarded, but where jobs were dominated by women, lower than average pay increases were more likely. Length of service was also found to be a factor, as some schemes aimed to reward employees for loyalty to the organisation. This advantages men, who tend to remain in one job for longer and who are less likely to interrupt their careers for purposes of child rearing or other family responsibilities. (Bevan and Thompson, 1992)

Case law – Performance pay

The *Danfoss* Case, heard by the European Court of Justice, found that the absence of transparency in the pay system, together with statistics showing that women received an average of 6.85 per cent less pay than men in the same job, added up to a prima facie case of sex discrimination.

The Court found that where a company applies a pay system characterised by a total lack of transparency, and it is established by comparison with a large number of employees that the average pay of women workers is lower than men's, then the burden of proof falls on the employer to show that the pay system is not discriminatory.

The pay discrepancy arose because the performance pay system in place allowed the company to make additional payments to individuals on the basis of their *flexibility*. Flexibility was defined in the scheme as including an assessment of the employee's capacity, quality of work, autonomy and responsibilities.

The Court held that, if the flexibility criterion is used to reward an employee's adaptability to various different work schedules and places of work, then the employer must prove that such flexibility is inherently necessary for the specific duties of individual workers. Otherwise, women might suffer discrimination, in that women are often less able than men to be flexible about working time because of their family responsibilities.

The Court said that as it had been shown that the application of the flexibility criterion had systematically disadvantaged women, then the criterion could not be justified because *it is inconceivable that the work carried out by female workers would be generally of lower quality*. ***Handels-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)*, [1989] IRLR 532, European Court of Justice.**

Performance, merit and bonus payments

Performance, merit and bonus payments should be available to all workers in all classifications on an equal basis.

- (a) Criteria for assessing performance should be transparent.
- (b) Ensure that criteria used can be validly measured. It is difficult to identify valid measures to assess qualities such as potential, enthusiasm, or commitment. Criteria should be related to critical success factors for the organisation.
- (c) Criteria should be applied fairly and uniformly.
- (d) There should be a proportional and consistent relationship between the rating awarded and the performance pay or bonus allocated.
- (e) Criteria should be based on non-discriminatory factors and be directly related to the inherent requirements of the job. Examples of factors which may be discriminatory include willingness to work long hours over and above those required or ability to travel at short notice where these are not inherent requirements of the job, and subjective application of concepts such as 'zeal' or 'enthusiasm'.
- (f) Appraisers who are formally trained in basic appraisal techniques, objective setting and sources of bias in performance evaluation, including the implications of their actions under anti-discrimination and industrial laws, are less likely to discriminate inadvertently.
- (g) Appraisers need to be familiar with the work to be assessed.
- (h) A formal appeals mechanism outside the regular grievance procedure will assist in monitoring the extent to which the process is meeting its objectives and may help pinpoint bias in the operation. In small organisations an avenue of review should be available.

2.7 Superannuation

Superannuation is an important, though sometimes hidden, element in remuneration. Since 1986, it has been incorporated into the industrial award system as a specific kind of wage payment. This

means that nearly all employees are entitled to some form of superannuation through their award. In the same way that awards can be discriminatory, so too can superannuation.

Because of this, superannuation needs to be included in any analysis of remuneration. Treating employees differently for superannuation purposes may become a pay equity issue if no compensation is made for these differences in other elements of the remuneration package. Some examples of possible discrimination are:

- providing different superannuation benefits for different groups of workers, where one group of workers is mainly male, and the other group mainly female. This may be discriminatory if the work that both groups do is essentially the same in value;
- offering lesser superannuation benefits for part-time workers where these are not compensated for in other ways (e.g. increased hourly wage rates); and
- restricting access to benefits from superannuation schemes according to employment status. For example, if (largely female) part-time workers are unable to receive some benefits (e.g. disablement or death benefits) because they do not work a specified number of hours, this may be discriminatory.

Case study - Superannuation

A woman part-time worker hurt her back while working in a shop and was permanently disabled as a result. She was covered by a compulsory superannuation scheme run by the employer and union. When she applied for her disablement insurance component from the scheme she was informed that she was not eligible as she worked fewer than 30 hours per week. She had not been aware of any restrictions on her eligibility for this benefit. She lodged a complaint of sex discrimination in superannuation against her employer, the superannuation fund and the insurance underwriters. Her complaint was conciliated and she received a settlement. (HREOC case study)

Case law - Superannuation

A United Kingdom case was lodged by Mr Barber, who was made redundant at the age of 52. He was a member of the occupational superannuation scheme. In the event of redundancy, the scheme provided immediate benefits for women aged over 50 and men aged over 55. The ages at which immediate benefits normally applied were 62 for men and 57 for women.

Because Mr Barber was 52 when he was made redundant, he had no access to immediate benefits. He complained that he had been discriminated against on the ground of sex, because he would have been granted immediate benefits if he had been a woman of that age.

The European Court of Justice held that superannuation entitlements were an element of 'remuneration' and that the application of the principle of equal pay must be ensured in respect of each element of remuneration, and not only on the basis of a comprehensive assessment of what is paid to workers. It was discriminatory that men could not gain access to immediate benefits when women of the same age could do so. ***Barber v Guardian Royal Exchange Assurance Group*, [1990] IRLR 240, European Court of Justice**

A company's policy of excluding part-time workers from the occupational superannuation scheme was found to be discriminatory because this exclusion affected more women than men. ***Bilka-Kaufhaus GmbH v Weber von Hartz*, [1986] IRLR 317, European Court of Justice**

Principles - Superannuation

Terms and conditions for superannuation contributions and benefits should not disadvantage anyone on the basis of sex.

- a. Part-time workers should receive the same entitlements as full-timers on a pro-rata basis. Requiring specified minimum hours to be worked before becoming eligible for superannuation payments can disadvantage part-timers who are likely to be women (eg by causing a break in contributions or terminating fund membership and so disadvantaging someone in terms of their final superannuation entitlements and retirement income).
- b. Eligibility periods, such as duration or continuity of service requirements, may discriminate against women. They should not be so long as to be unreasonable (eg in relation to administrative processing costs, or average duration of job tenure) and therefore beyond the reach of most part-timers and casuals.
- c. All workers taking unpaid leave should be treated in the same way by employers with regard to their superannuation payments. Women on maternity leave should not be treated less favourably than those on other forms of unpaid leave such as study leave. The provision of death and disability insurance should continue throughout maternity and family leave where this is allowed for other workers on leave without pay.
- d. Where employers wish to offer preferential treatment to women on maternity leave or career breaks while caring for children, sections 7D (special measures to promote equality) and 31 (exemption for rights and privileges relating to pregnancy and childbirth applied only to women) of the *Sex Discrimination Act* allow this.
- e. Some forms of sex discrimination in superannuation are exempt from the *Sex Discrimination Act* (eg discrimination regarding vesting, portability and actuarial data). However, where discrimination in superannuation results in work of equal value not being equally remunerated, there may still be grounds for an equal remuneration claim under the *Workplace Relations Act* where those exemptions do not apply.
- f. Where employees earning less than \$900 per month choose to 'opt out' of superannuation, they should be fully compensated in pay for the contribution the employer would have made on their behalf.

2.8 Hours of work**2.8.1 Part-time work**

Part-time employment levels are growing quickly. Nearly one quarter of the workforce now works part-time, whereas a decade ago just 18 per cent of employees worked part-time. Seventy-three per cent of part-time workers (including casuals who work less than full-time hours) are women. This represents 46 per cent of women in the workforce (ABS 6303.0, May 1996). The fact that so many women workers work part-time while the majority of male workers continue to work full-time clearly affects the size of the pay gap; however, it is essential for pay equity purposes that the difference in pay between full and part-timers reflects only a difference in working hours.

Where part-timers are performing the same range of jobs and tasks as full-timers, albeit on the basis of fewer hours per week, they should receive the same remuneration on a pro-rata basis. This includes the same hourly rate, the same access to benefits such as cheap loans and superannuation, and the same opportunity to receive yearly pay increments if these are provided for full-timers.

In many organisations and businesses, the bulk of part-time staff are women. As such, policies or procedures which result in part-timers receiving fewer or smaller benefits than full-timers may amount to indirect sex discrimination. For example, if part-timers, the majority of whom are women, are disadvantaged in comparison to full-timers, the majority of whom are men, this may be considered to be a sex-based differential.

Case law – Part-timers

A company's promotion system took into account service completed when considering applications from employees for reclassification to a higher salary grade. The rules said that only one half of the service of part-time workers could be taken into account, whereas the service of full-time workers was fully taken into account.

The Court found that this rule was discriminatory because part-time workers were disadvantaged in relation to full-timers, and the part-timers were mainly women. For there to be no discrimination, the employer would have to prove the service requirement was objectively justified by the relationship between the nature of duties performed and the experience afforded by the performance of those duties after a certain number of hours have been worked. *Nimz v Freie und Hansestadt Hamburg*, [1991] IRLR 222, European Court of Justice

A company's policy of excluding part-time workers from the occupational superannuation scheme was found to be discriminatory because this exclusion affected more women than men. *Bilka-Kaufhaus GmbH v Weber von Hartz*, [1986] IRLR 317, European Court of Justice

A provision in a collective agreement which precluded severance pay for part-timers was found to be discriminatory because a smaller percentage of men than women worked part-time. *Kowalska v Freie und Hansestadt Hamburg*, [1990] IRLR 447, European Court of Justice

Principles – Part-time work

All conditions and benefits available to full-time workers should also be available to part-time workers on a pro-rata basis. This includes:

- (a) base rate of pay;
- (b) allowances;
- (c) all discretionary payments;
- (d) service increments;
- (e) superannuation payments;
- (f) all forms of leave - sick, compassionate, family, training etc;
- (g) all other benefits, such as cheap housing loans, cars etc.

2.8.2 Overtime and shift penalties

While overtime makes up around seven per cent of men's earnings, it comprises only around two per cent of women's earnings (ABS Cat, 6306.0, May 1996). While some women are prevented from working overtime because of family responsibilities, it is important to ensure that policies, procedures, agreements and custom and practice concerning the allocation and payment of overtime do not artificially restrict women's access to it. For example, it should not be assumed that women will not want to do overtime.

Principles – Overtime and shift penalties

Access to overtime and shift penalties should be provided on the same basis to jobs and occupations which are male and female dominated.

2.9 Market rates or value

When fixing pay rates, the market value of work should be defined, assessed and applied in a non-discriminatory way. Simply establishing that women are willing to work for less than men does not justify paying women less for work of equal value.

Reproducing or continuing to use discriminatory market-based job values as a basis for remuneration is likely to breach both sex discrimination and equal remuneration legislation.

Case study – Discrimination in the interpretation of the ‘market’

Employers in Seattle, USA were having difficulty attracting nursing staff, a highly female-dominated profession. The employers compared the wage rates each offered and decided that their wage practices were correct. They explained the difficulty in attracting nurses as evidence of women’s lack of career motivation and a preference for intermittent labour market participation. Similar difficulties attracting computer programmers, a male-dominated profession, however, were attributed to an insufficient salary and high motivation on the part of the workers. The ‘market’ was interpreted and acted upon differently according to the sex of the workers. (Burton, 1987)

Case law – Market rates

A Council in the UK believed that market forces demanded a reduction in the pay of exclusively female catering workers (known as ‘dinner ladies’) to enable the council to compete for a school catering contract under the government’s policy of compulsory competitive tendering. However, the ‘dinner ladies’ jobs had previously been valued as equal to male-dominated occupations employed by the Council: road sweepers, gardeners, refuse collectors and leisure attendants. There was no proposal to reduce the men’s pay. The women claimed equal pay for work of equal value.

The women won their claim in the first instance, but this was reversed by the UK Court of Appeal which found that the ‘material factor’ which led to the lower rate of pay for the women was genuinely due to the operation of market forces and the need to compete with a rival bid. The material factor was therefore unrelated to the sex of the workers.

However, the House of Lords considered a further appeal, and disagreed with the finding of the Court of Appeal. The House of Lords found that reducing the women’s pay below that of comparable male occupations was *the very kind of discrimination in relation to pay which the (Equal Pay) Act sought to remove*. As such, this could not be justified by a market forces argument. The Council has since paid out around £4 million in back pay to 2,000 catering workers. *Ratcliffe and others v North Yorkshire County Council*, [1995] 3 All ER 597

Dr Enderby was a senior speech therapist in the UK who claimed that her work was of equal value to that done by the male-dominated classifications of pharmacist and clinical psychologist. The pay of speech therapists was generally up to 60 per cent lower than that of pharmacists. The employer denied that the work was of equal value, but contended in any event that the pay variation was due to market forces - there were shortages of pharmacists and their qualifications were much sought after in the private sector.

The case proved to be highly complex. After a number of appeals and cross-appeals, a number of questions about the case were referred to the European Court of Justice by the UK Court of Appeal. One question concerned the operation of market forces: what approach should be taken by the UK Court when part of the pay difference appeared to be due to labour shortages, but part did not? Should the Court consider the whole of the pay differential to be objectively justified in that case, even though only part of the differential had been justified in evidence?

The European Court of Justice held that unless the UK Court could determine precisely what proportion of the increase in pay was attributable to market forces, it must assess *whether the role of market forces in determining the rate of pay was sufficiently significant to provide objective justification for part or all of the difference*.

***Enderby v Frenchay Health Authority and Secretary of State for Health*, [1993] IRLR 591, European Court of Justice**

Principles – Market rates

- (a) The market within which employees' work is to be situated should be explicitly defined.
- (b) The means by which the market is to be surveyed should be accurate, unbiased and valid.
- (c) Market surveys should be fairly and directly applied if this is to be used as a rationale for pay rates.
- (d) The proportion of pay based on market value, individual performance, and other assessed job value (e.g. through skills analysis, job evaluation, grading etc.) should be specified.
- (e) If discrimination is present in market rates for particular occupations because of a history of occupational sex segregation, action should be taken to remove the discriminatory barriers and develop and implement a non-discriminatory job and work evaluation process. A history of sex segregation through discriminatory exclusion can be evidence of discrimination in current pay rates.

Summary: Equal remuneration principles for pay systems

- (a) The pay system should be transparent.
- (b) Criteria governing eligibility for different components of remuneration should be non-discriminatory.
- (c) Conditions and benefits should be available to all workers on the same basis.
- (d) Part-time workers should receive the same entitlements, conditions and benefits as full-time workers, on a pro-rata basis.
- (e) Incorporate appeal or review mechanisms.
- (f) Monitor, evaluate and review the pay system.

3. Evaluating jobs objectively**3.1 Objective appraisal**

As reflected in the ILO Recommendation quoted at left, undertaking an **objective appraisal of jobs** is a crucial step in ensuring equal remuneration. Objective appraisal assists in overcoming persistent historically-based bias and assumptions about the value of work done by women.

For example, until the late 1960s, most industrial awards contained different pay scales for men and women workers. After equal pay was granted, these separate pay scales had to be amalgamated into a scale applying to both men and women workers. But objective appraisals of the value of women's jobs were rarely carried out, and frequently the women's jobs were simply added to the lowest male pay classification available under the award.

A case study from the confectionery industry is a good example. In that industry, women were barred from anything other than work that was classed as 'unskilled' for many years. When the first federal award was made for confectionery workers in 1949, it had a separate classification for 'female workers'. When the award was varied to provide for equal pay in 1975, the female classification was merged with the lowest grade male classification. No work value inquiry comparing the work of the women and men under the award was carried out, although this was required by the industrial commission's 'equal pay for work of equal value' principle (see box on page 29) introduced in 1972 (Kelly & Forbath, 1992).

The practice described above may reflect the true value of work performed by the women, but it may also reflect discriminatory assumptions about the value of women's work. In any case, it is impossible to know which statement is true in the absence of any attempt to measure objectively the value of the work in question.

The extract from the 1972 Equal Pay Principles of the former Australian Conciliation and Arbitration Commission shown in the box below demonstrates the Commission's intention that there be comparative consideration of the value of the work performed by women and men.

Definition

*Where appropriate for the purposes of facilitating the determination of rates of remuneration in accordance with the principle of equal remuneration for men and women workers for work of equal value, each Member should ... establish or encourage the establishment of methods of **objective appraisal** of the work to be performed, whether by job analysis or by other procedures, with a view to providing a classification of jobs without regard to sex ...*

Article 5, International Labour Organisation Recommendation No. 90 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (emphasis added)

Extract from the 1972 Equal Pay for Work of Equal Value Principles of the Australian Conciliation and Arbitration Commission

- 1 The principle of equal pay for work of equal value will be applied to all awards of the Commission ...
- 2 Adoption of the new principle requires that female rates be determined by work value comparisons without regard to the sex of the employees concerned ... The gap between the level of male and female rates in awards generally is greater than the gap, if any, in the comparative value of work performed by the two sexes because rates for female classifications in the same award have generally been fixed without a comparative evaluation of the work performed by females and males.
- 3 The new principle may be applied by agreement or arbitration ...
- 4 Implementation of the new principle by arbitration will call for the exercise of broad judgement which has characterised work value inquiries ...
- 5(a) The automatic application of any formula which seeks to by-pass a consideration of the work performed is, in our view, inappropriate to the implementation of the principle ...
- 5(b) Work value comparisons should, where possible, be made between female and male classifications within the award under consideration. But where such considerations are unavailable or inconclusive, as may be the case where the work is performed exclusively by females, it may be necessary to take into account comparisons of work value between female classifications within the award and/or comparisons of work value between female classifications in different awards. In some cases comparisons with male classifications in other awards may be necessary.
- 5(c) The value of the work refers to worth in terms of award wage or salary fixation, not worth to the employer.
- 5(d) Although a similarity in name may indicate a similarity of work, it may be found on closer examination that the same name has been given to different work ... Whether in such circumstances it is appropriate to establish new classifications or categories will be a matter for the arbitrator.
- 5(e) In consonance with normal work value practice it will be for the arbitrator to determine whether differences in the work performed are sufficiently significant to warrant a differentiation in rate and if so what differentiation is appropriate ...

3.2 What if job evaluation?

Job evaluation is a process of analysing the content of jobs and ranking jobs according to their value in order to determine the appropriate wage rates. As shown above, job evaluation can expose areas of pay inequity, where, for example, female-dominated jobs are paid less than male-dominated jobs of equal value. Until the relative value of each type of job is objectively measured, it is not possible to know whether or not the pay rates reflect the true value of the job.

There are two types of approaches to job evaluation: *whole job* evaluations and *analytical*, or *points system* schemes. This handbook will concentrate on points systems, but section 3.2.1 provides an introduction to the whole job approach.

There is a considerable body of research showing that sex discrimination can enter job evaluation systems, whether they are points systems or whole job evaluations (for example, Burton, 1987 and Bennett, 1988). However, if employers are aware of potential sources of discrimination in job evaluation systems, steps can be taken to guard against discrimination affecting the operation of the system. Section 3.3 outlines areas of potential discrimination in job evaluation.

3.2.1 Whole job evaluations

Whole job evaluations are traditionally used at the level of the Australian Industrial Relations Commission to allocate occupations to positions within the classification structure of industrial awards and to make comparisons about the value of jobs and occupations across and between awards, occupations and industries. This type of evaluation compares jobs in terms of skills, effort, responsibility and working conditions. Individual employers are not usually involved in this type of evaluation – it is more likely to be conducted by peak bodies. However any increase in the award rate resulting from a case would flow-on to individual employers.

Examples of Australian cases where occupations have been compared between awards in this way can be found in the appendix. These include comparisons between therapists and scientists; counsellors and psychologists; and child care workers and metal trades workers. As these cases show, there is no single established methodology for carrying out this type of evaluation. Different approaches have been adopted in different cases.

3.2.2 ‘Points system’ job evaluation methods

Whereas whole job evaluations are used to compare occupations across and between awards, points systems are commonly used in-house by employers to establish internal rankings or hierarchies of jobs.

Points system job evaluation methods involve breaking the duties and skills of jobs down into *factors of value*. Each factor represents a different component of the value of the job. For example, factors may relate to expertise or skills; autonomy; problem-solving and responsibility. These factors may also be broken down further into sub-factors.

Once the factors have been determined, each factor is assigned a *weighting*, which indicates the value of each factor. Points are added up and used to assist translation of the job into the pay scale. However, the point score for a job does not *directly* determine the pay for a job. Organisations must formulate a policy about what relationship there will be between point scores from the job evaluation and pay points in an industrial or internal pay structure. This policy is applied to the point scores in a separate step.

3.3 Discrimination issues in job evaluation

The quotation from the *Ontario Nurses Association* case is an excellent summary of the primary discrimination problem in job evaluation schemes. Originally, these schemes were exclusively used to evaluate the worth of work performed by men, such as construction or manufacturing work. When these schemes were adapted for female-dominated industries such as the services sector, the different nature of the work was not always sufficiently compensated for or taken into account.

Commercial job evaluation systems can be bought ‘off-the-shelf’ and implemented ‘as is’ or adapted for the particular needs of the organisation. Alternatively, organisations can design their own scheme. When designing, choosing or adapting a system, it is important to be aware of how discrimination can enter job evaluation. valuation

Case law – Discrimination in job evaluation

...many compensation systems have made invisible the skills and responsibilities required in women's work.

Originally, job evaluation was designed and applied in industrial and manufacturing workplaces, and to managerial positions. When these systems were applied to workplaces in the health, service and office sectors, few changes were made to the underlying assumptions with which the value of jobs were assessed. The skills, ability and experience of women in these jobs were not recognised, leading to an inaccurate and inadequate appraisal of the value of their work, and the resultant wages paid to them. *Ontario Nurses' Association v Regional Municipality of Haldimand-Norfolk*, (No. 6) (1991) 2 PER 105, Pay Equity Hearings Tribunal, Ontario, Canada

3.3.1 Describing jobs

If one of the aims of carrying out an objective appraisal of jobs is to ensure that the full range of skills used in female-dominated jobs are recognised and remunerated appropriately, it is crucial that judgements about the worth of jobs are based on accurate descriptions of what people actually do. The more sources of information about job content, the better.

For example, relying solely on supervisors to provide information about the content of people's jobs may not provide sufficient information, because the supervisor may simply not be aware of the detail of the job. This is especially so in administrative or clerical jobs where one of the occupant's responsibilities may be specifically to take the burden of such detail away from the supervisor.

Similarly, if asked to describe their own jobs, some employees may be hampered by English language difficulties or a lack of the particular analytical skills required for the task and may not describe the job adequately.

The solution is to collect information about job content from a range of sources, including the employee and supervisor. If that information seems deficient, consider approaching employees from other workgroups and asking what services or assistance they receive from the job in question.

3.3.2 Establishing assessment criteria

The criteria used to assess the value of jobs should be equally applicable to male- and female-dominated jobs. If the criteria don't have any relevance to the sort of jobs women do, those jobs will not rate highly and will be lower paid. If there is no reasonable basis for this disparity this may constitute discrimination.

The following examples illustrate some differences to be taken into account between typical male- and female-dominated jobs.

If physical effort is recognised and rewarded (as in the male-dominated general hands' jobs), should the mental effort of (female-dominated) process workers also be recognised when this entails deep concentration for prolonged periods?

If the responsibility for budgets and resources is recognised, should responsibility for the safety and well-being of employees be recognised? Is the effort of lifting heavy people, such as in nursing or caring jobs, treated the same as the effort in lifting heavy objects?

Significant aspects of women's work have not been recognised as 'skilled' at all in the past. For example, in a 1967 case examining the value of work in the metal trades, it was found that process work (a female-dominated classification in a male-dominated industry) required a considerable

degree of manual dexterity. However, this was characterised as an innate quality possessed by women rather than as a skill (*Metal Trades Work Value Case* [1967] 121 CAR 587, p.888).

Today, communication or stress management skills used in female-dominated service jobs are sometimes attributed to ‘personal qualities’ or ‘natural attributes’ instead of being recognised as skills required to perform the job. The ability to protect confidentiality in secretarial work may not be recognised as a skill and yet it is a crucial component of the job. Similarly, the importance of writing skills in secretarial work may not be recognised, such as where executive assistants routinely re-draft and correct the correspondence of their employer.

Where the working conditions of male-dominated jobs are taken into account, consider examining the specific working conditions of female-dominated jobs. For example, working conditions such as heat, height above ground, dirt or danger are recognised in male-dominated jobs. Should the stress of multiple demands, the need to deal with distressed or angry people, the demands of repetitious work, or the particular working conditions associated with caring for people in their own homes be recognised in female-dominated jobs?

Care should be taken to ensure that criteria used to assess value relate specifically to the inherent requirements of the job. For example, only qualifications actually required to do the job should be taken into account; and an employee’s ability to work at variable times or travel frequently at short notice should not be taken into account unless this is an inherent requirement of that specific job.

3.3.3 Valuing jobs

Early in the job evaluation process, organisations should formulate a policy about how the evaluation results will relate to classification grades in its pay structure. Such decisions can either reinforce discriminatory practices or help to remedy them.

For example, if a system which awards points has been used, cut-off marks in the points scale must be selected to define the boundaries between pay grades. If the cut-offs are selected so that male- and female-dominated jobs are segregated into different pay grades even where the jobs usually performed by men have been allocated only slightly higher points scores than jobs usually performed by women, this may amount to sex discrimination.

A practical example of this would be where a male-dominated occupation attracted a point score of 250, and a female-dominated occupation attracted a point score of 245. If the boundary between pay grades was drawn at 248 points, it would have the effect of relegating the female-dominated occupations to a lower grade and pay than male-dominated occupations that received only five extra points in the job evaluation exercise. Care should be taken to ensure that cut-offs do not simply reproduce the existing classification situation where this is not reasonable. Decisions made about what is or is not reasonable in this context should be based on objective evidence.

The essential principle is that if two jobs are valued equally, both jobs should attract equal remuneration irrespective of differences in job classification, type, grade, level, enterprise, or whether or not the employee works under an award, agreement or other employment contract. Slight differences in job value do not nullify this principle.

Elements of male-dominated jobs should not be valued more highly than elements of female-dominated jobs if this does not have a reasonable basis. For example, weighting heavy or dirty work (primarily done by men) as of higher value than work requiring speed, dexterity and precision (primarily done by women) may not be reasonable.

Similarly, when the same skills are present in male and female-dominated jobs, they should be valued in the same way. 'Technical skills', for example, may be highly valued in male-dominated trade jobs, but may be overlooked or undervalued in female-dominated jobs. The technical skills of librarians such as research and database proficiency should be treated in the same way as the use of tools such as drills in male-dominated jobs.

Sometimes job evaluation shows that particular jobs are being paid at a higher rate than is warranted by the evaluation results. If the decision is made to maintain the current salary level for such jobs despite the evaluation findings, this policy should be applied consistently. Clearly, maintaining the current salary for male-dominated jobs and failing to do so for female-dominated jobs could constitute sex discrimination.

If information is gathered about market rates or comparable pay rates for positions in other organisations, this information should not be introduced into the job evaluation process itself. If this information is deemed relevant for pay-setting purposes, it should be considered only after the relative value of jobs has been established internally. This ensures that any sex discrimination in the market rate does not affect the results of the internal evaluation.

Case study – Undervaluing women's work

A manufacturing company uses a job evaluation system to place all the different types of work performed in the organisation onto the same pay scale. The system assigned points against a range of skill criteria. These criteria exhaustively described the skills involved in various production tasks. These production jobs were performed predominantly by men.

The outcome of the evaluation was that the majority of the production jobs were rated more highly than the majority of clerical and customer service jobs, and therefore they were deemed to be more valuable and worth higher remuneration.

The criteria for the clerical and customer service jobs performed predominantly by women, however, were considered by the women workers to inadequately describe the full range of their skills and duties. For example, there was no criterion for assessing their written and oral communication skills. Yet good oral communication with clients was essential for the customer service workers, and the executive assistants spent a great deal of time redrafting and correcting the written communications of their bosses. The women considered that the absence of adequate criteria in the job evaluation system for assessing their jobs had resulted in their work being undervalued compared to the men.

Case law – Non-discriminatory job evaluation

Canadian nurses claimed that a points system job evaluation scheme was not gender neutral because it did not systematically, comprehensively and accurately describe, measure and value the job content of the work they performed.

The Pay Equity Hearings Tribunal held that, for a job evaluation system to be considered ‘gender neutral’, it had to be able to analyse and rectify systemic patterns of wage discrimination. Further, in order to remedy the historical under-valuation of women’s work, the system should pay particular attention to valuing the work of female job classes. Each part of the system was required to be gender neutral.

The Tribunal held that issues to be considered in assessing whether a job evaluation system’s collection of job information was gender neutral included:

- (ii) the range of work performed in the workplace
- (iii) whether the system made the range of work done by women ‘visible’ in the workplace and therefore able to be valued;
- (iv) whether the information collected accurately captured the skill, effort and responsibility normally required in the performance of the work and the conditions under which it was normally performed for both the female dominated occupations and the comparable male occupations;
- (v) whether the job information was being collected accurately and consistently for each class to be compared.

Ontario Nurses’ Association v Regional Municipality of Haldimand-Norfolk, (No. 6) (1991)
2 P.E.R 105, Pay Equity Hearings Tribunal, Ontario, Canada

Case law – Designing a job evaluation system

The European Court of Justice ruled that if a job evaluation scheme is not to be discriminatory overall, criteria should be used which can measure particular aptitude on the part of employees of both sexes. A system is not discriminatory simply because it bases one criterion on a characteristic more often found in men than women (e.g. ability to do heavy work), but in order that the system not be discriminatory overall, it must also use criteria for which women may show particular aptitude (e.g. communication skills). ***Rummler v Dato-Druck GmbH, [1987] IRLR 32, European Court of Justice***

3.4 Implementing job evaluation

The method used to implement job evaluation will differ according to the size of the workplace. In medium to large-sized organisations, establishing a steering committee to oversee the process of job evaluation will increase the level of trust in the process from those being evaluated. Designating a senior officer within the organisation who has a good grasp of sex discrimination and pay equity issues as a contact person for questions, complaints, and advice for staff in all jobs affected by the scheme will also assist (Burton, 1987). Smaller organisations may wish to establish less formal systems but should ensure that all employees understand what those are.

It is important to avoid the assumption that staff in lower classified positions do not have anything to contribute to these processes, because, for example, they are not knowledgeable about the organisation. Many women in subordinate positions have an excellent knowledge of their organisations because of the work they do, and can be trained to be very effective evaluators.

Active measures may be needed to motivate such people to take on roles in the job evaluation process, including adequate relief arrangements for time spent on appraisal work, training about the system and about discrimination and equal pay issues, and management commitment to ensuring that there will be no victimisation of staff in subordinate positions for expressing possibly unpopular views about the relative worth of jobs in job evaluation committees. (Burton, 1987)

3.4.1 Training

Most of the personnel involved in appraising and evaluating jobs probably will not be experienced in this role. It is well worth considering providing comprehensive training, including in responsibilities under industrial and anti-discrimination law. Although this represents a cost, even small employers are encouraged to consider spending this money in order to minimise the risk of claims at a later stage.

3.4.2 Access to information

To facilitate transparency, consider providing information on how the job evaluation system operates and how job evaluation scores are translated to pay rates to all staff in clear and simple language. Information may be provided through briefings, staff newsletters, or whatever form of communication works best for staff in your organisation.

3.4.3 Appeal and review processes

The existence of independent appeal mechanisms reassures employees with concerns about the process. These may be formal processes in larger organisations, or in small businesses provision may be made for employees to request a review of the decision. In both cases, it is useful if the personnel handling the appeal or review are different from those who were involved in the evaluation process. Unnecessary appeals can be minimised by the routine provision of information to all staff on evaluation decisions regarding their jobs, and the reasons for these decisions.

Case law - Equal value

Jobs need not be absolutely equal or identical to be characterised as of equal value. It is sufficient that they be *substantially equal*. ***Schulz v Wheaton Glass Co*, 421 F.2d 259 (1970), United States Court of Appeal, Third Circuit.**

The fact that Mrs Jenkins worked part-time (while the man she compared herself to worked full-time) did not change the nature or demands of her job and did not affect the assessment of whether work was equally demanding. ***Jenkins v Kingsgate (Clothing Productions) Ltd*, [1981] IRLR 288, European Court of Justice.**

A woman could compare herself with a male predecessor who did equal work for the employer. ***Macarthy's Ltd v Smith*, (1979) 3CMLR 381; (1980) 2CMLR 217, European Court of Justice.**

Employers who undertake job evaluation studies voluntarily must remedy pay discrimination disclosed. The requirements of equal remuneration legislation are intended to 'bite' at the moment a job evaluation study shows sex discrimination. ***O'Brien and others v Sim-Chem Ltd*, [1980] IRLR 373, House of Lords.**

Employers failing to remedy pay differentials disclosed by job evaluations may face liability for intentional discrimination under Title VII of the Civil Rights Act. ***County of Washington v Gunther*, 452 US 161, 167-181 (1981), US Supreme Court**

It was no defence to argue that eliminating sex discrimination in compensation was too costly. ***City of Los Angeles v Manhart*, 435 US 702 (1978), US Supreme Court**

Case law – Equal value (continued)

The respective rates of pay of two jobs of equal value, one carried out almost exclusively by women and the other predominantly by men, were arrived at by collective bargaining. The bargaining was carried out by the same parties, but in distinct negotiations which were conducted separately for each group of workers. A higher rate of pay was negotiated for the male employees than the females. The Court held that the fact that the pay rates were set through collective bargaining was not sufficient objective justification for the difference in pay between those two jobs of equal value. ***Enderby v Frenchay Health Authority and Secretary of State for Health*, [1993] IRLR 591, European Court of Justice**

Evidence explaining the historical process by which a difference in hourly rates had been arrived at did not show any objective factor which justified the result which had been produced. ***Barber v NCR (Manufacturing) Ltd*, [1993] IRLR 95, Employment Appeals Tribunal, UK**

A United States case established a cumulative test for establishing sex discrimination in pay where the job in question was done predominantly by women and there were therefore no men doing the same job with whom the women could be compared.

The Court found that it could be established that a particular job done solely by women was of equal value to a particular job done solely by men by showing that:

- (ii) the women complainants occupied sex segregated positions; and
- (iii) the women's positions were paid less than sex segregated occupations held by men; and
- (iv) the two job classifications were similar in requirements of skill, effort, responsibility and working conditions so that it could be reasonably inferred that they were of comparable value to the employer. ***Briggs v City of Madison*, [1983] 536 F. Supp. 435 (W.D Wis. 1982)**

Principles – Non-discriminatory job evaluation

A non-discriminatory system:

- (a) uses criteria which reasonably reflect the range of skills used by your organisation's entire workforce (male and female);
- (b) makes explicit the types and levels of all skills required in the organisation, including any language, literacy, self-management and interpersonal skills;
- (c) recognises the demands of specialist technical and professional jobs whether or not they involve supervision of people or management of significant budgets or other material resources;
- (d) recognises co-ordination as well as supervision as an indicator of skill and responsibility;
- (e) recognises communicating to inform, coach or support as well as communicating to persuade or negotiate;
- (f) recognises skills gained through work and life experience as well as formal training;
- (g) avoids language which is vague, ambiguous or subjective in criteria used;
- (h) provides for objective means of determining skill (e.g. competency-based assessment) as opposed to reliance on time served in the job or reference to such subjective concepts as the incumbent's 'reputation';
- (i) accurately and completely describes jobs;
- (j) results in a coherent job hierarchy, where job classifications and levels are linked with pay and differences correspond to real and identifiable differences in skills, job requirements, responsibilities etc.;
- (k) sets a proportional and non-discriminatory relationship between job value and reward.

Principles – Non-discriminatory job evaluation

A non-discriminatory system should not:

- (a) value the skills and responsibilities more likely to be found in male-dominated jobs more highly than those found in female-dominated jobs, if this is not reasonable according to objective evidence;
- (b) be arranged in such a way that the skills and demands typical of women's jobs are absent from high-scoring criteria and clustered under low-scoring criteria;
- (c) fail to acknowledge high levels of responsibility in low-paid, typically female jobs (e.g. receptionist work in a crisis centre);
- (d) 'double-count' the same job characteristics (e.g. supervision);
- (e) measure responsibility solely in terms of the degree of supervision of the occupant's work (e.g. a job with little formal autonomy may carry heavy social responsibilities).
- (f) artificially maintain existing relativities between male- and female-dominated jobs if this is not reasonable according to objective evidence.

4. Performing an Equal Remuneration Audit in your workplace

The aim of performing an Equal Remuneration Audit is to assess whether the work performed by women is undervalued and/or underpaid in comparison with work performed by men in your workplace. The audit is performed in the context of broader award arrangements.

The audit should be performed across the whole workplace. Auditing one classification or grading or bargaining unit is not adequate, because pay discrimination may exist across these structures.

This audit has been designed to be carried out in-house, but there are a number of consultants working in the field who could assist you if desired.

Stage 1: Setting up the audit

Allocate responsibility and resources

There are two critical success factors for an effective audit:

- allocating responsibility to a senior person in the organisation for carrying out an effective audit and implementing the findings; and
- allocating sufficient financial and human resources.

Performing an audit does not have to be a very labour-intensive and costly exercise. The resources allocated to it would necessarily vary according to the size of the organisation.

Negotiate support for the audit, including a commitment from the Chief Executive and from staff and unions. Establish consultation processes.

The support of senior management and of employees and unions is crucial to the success of the audit. Remuneration is a sensitive subject for both management and workers, and the support of key people and organisations can be invaluable in allaying concerns about privacy, confidentiality and industrial issues. Circulating letters of support from key people can provide this reassurance.

Consultation is important for a number of reasons. Firstly, it is through consultation that problem areas are most likely to become apparent. Employees and line managers are most likely to know where remuneration inequities exist. Secondly, performing an equal remuneration audit is only a worthwhile process if there is a commitment from all parties to take prompt action to fix problems

which are identified. Consultation will assist people to understand the problems uncovered and foster acceptance of proposed solutions.

Establish a committee to oversee the audit. This will provide for representation of employee views, employee participation, and communication with workers about the project. The committee should be representative of the workforce composition, including gender make-up and representation of employees from all levels and classifications. Even in small workplaces, a representative group of employees is an important step.

Develop a communication strategy for the review which includes opportunities for input from staff and briefing sessions on progress.

At this stage, decisions should be made about whether to use consultants or internal resources to carry out the audit. This can affect the level of trust people have in the process. The appropriate choice will depend on the culture of the organisation. For example, in some organisations there may be a level of distrust or scepticism displayed towards outside consultants. In other organisations, internal human resources, industrial relations and EEO personnel may be viewed negatively by employees. These factors should be considered.

When a decision is made about who will carry out the audit, the auditors should be required to provide written undertakings that they will maintain the confidentiality of information about the salaries of individuals.

Stage 2: Data collection

Identify and record the sources of relevant data

Relevant information can be extracted from the human resources information systems, payroll systems, workplace policies and rules, affirmative action and equal employment opportunity reports, industrial awards, competency standards, enterprise agreements, and individual contracts.

Gather information

Collect all available data relating to:

- job descriptions
- grading, classification and evaluation systems and criteria used
- performance pay system and criteria used
- award or enterprise agreements, contracts etc.
- policies on productivity or bonus or discretionary payment schemes etc.
- pay-related policies and rules - e.g. rules about restrictions on performance pay or bonuses by level; effect of leave periods on superannuation and/or employee incentive share schemes.

Identify deficiencies in the data

Identify any deficiencies in the data available and develop strategies to obtain this information.

Construct employee profiles

Prepare a breakdown of all employees including:

- sex
- job title
- grade
- hours of work (full-time or part-time)

- base pay
- overtime pay
- discretionary or overaward pay
- allowances
- performance ratings and pay
- superannuation
- any other aspect of remuneration
- length of service
- qualifications.

Stage 3: Analysis and review of base pay rates

This step analyses base pay received by employees, that is, the base rate excluding additional payments such as discretionary pay or overawards, superannuation, allowances, commissions and performance payments.

Analyse employee profiles

Generate statistical data from an analysis of employee profiles. Determine where employees are located within the pay system according to sex, job title, grade, hours worked and base rate pay received.

- Are any indicators of sex discrimination present (see box)?

Definition - Indicators of sex discrimination in base pay rates include

- women have lower base rate earnings than men with the same job title or lower base earnings than men in the same grade
Review recruitment and selection records and criteria that determine starting pay: are women being appointed to a lower point on the pay scale than men? If so, is this reasonable, or is this a potential pay equity problem? Do particular criteria for determining starting pay appear to disadvantage women – for example, qualification requirements? Are these relevant to the demands of the actual job?
- women progress more slowly than men through incremental salary scales and/or rarely reach the highest points on incremental salary scales
What are the criteria used to determine progression through pay scales? Do these work against women more so than men? Is this reasonable?
- women in female-dominated unskilled jobs are paid less than the lowest male-dominated unskilled job
Are these jobs of equal value?
- women are paid less than men with equivalent entry qualifications and length of service
What is the basis of this difference? Is it reasonable?
- where workers are covered by different awards or agreements, those covering mainly men receive higher pay than those covering mainly women
Is this reasonable?
- the majority of men and women work under different grading and classification systems, or women are paid less than men for doing essentially the same job but with a different job title or classification.
What is the basis for this difference? Is the work essentially different? Does this result in different pay outcomes for men and women? Is this reasonable?

Definition - Indicators of sex discrimination in base pay rates include (continued)

- part-timers or temporaries have lower hourly earnings than full-timers or permanents in the same job or level.
Can this be justified? Are women disproportionately negatively affected by this situation?

Stage 4: Analysis and review of total remuneration

Using the data collected from the analysis of employee profiles, examine each element of remuneration as follows.

- Which element(s) of remuneration contribute to significant pay differences between men and women doing work of equal value?

Discretionary payments

Identify occupations which receive discretionary payments and the amounts received. Determine the gender composition of these occupations.

Identify occupations which do not receive discretionary payments and determine the gender composition.

If male-dominated occupations receive discretionary payments and female-dominated occupations do not, identify the basis on which discretionary payments are made. Apply these criteria to the female-dominated occupations.

- Is it reasonable that female-dominated occupations do not receive discretionary payments?
- If male and female-dominated occupations receive different levels of discretionary payments, determine whether this difference is reasonable.
- Is the difference in the level of discretionary payments based on a difference in the value of the work?
- Do these payments represent a significant proportion of the difference in remuneration paid to men and women doing work of equal value?

Allowances

Identify occupations which receive allowances. Determine the gender composition of these occupations and the amounts received.

Identify occupations which receive few or no allowances and determine the gender composition and the amounts received.

If male-dominated occupations receive higher payments from allowances than female-dominated occupations, identify the basis on which these allowances are paid.

- Is the allowance paid only on the basis of meeting a particular requirement or condition, or is it effectively part of the base rate because it is paid each week as a matter of course?
- If the payment is to compensate for work disabilities, are equivalent disabilities in female-dominated occupations properly compensated?

- If allowances are paid for using some skills or equipment and not others, is the allocation of allowances reasonable?

Performance pay

Determine which jobs and classifications are eligible for performance payments and determine the gender composition of those participating in the scheme.

Determine which jobs and employees are excluded from the scheme and determine the gender composition of that group.

Where the excluded employees or positions are female-dominated and the majority receiving performance payments are men, consider whether or not this is reasonable. If not, consider extending the scheme to cover all employees.

Analyse the distribution of appraisal ratings and the subsequent allocation of performance-based pay by gender, job level (particularly male and female-dominated areas), length of service etc.

- Are women workers receiving a share of payments proportional to their workforce share (or proportional to their share of the jobs in occupations eligible for payments)?
- Do the same proportion of men and women receive performance pay?
- Is the performance pay allocated proportional to the ratings received, or do women receive higher ratings and lower performance payments than men?

If women consistently receive lower performance payments than men, review the criteria to identify any direct or indirect sex discrimination.

- Is it likely that women would perform on average less well than men?
- Is performance assessment based on agreed criteria, and a performance agreement including clear goals?
- Is the system transparent and specified in guidelines, policy, and training, and is it effectively communicated and understood throughout the organisation? Is it being administered correctly by line managers?

Productivity pay

Identify which jobs receive productivity pay and determine their gender composition.

Determine which jobs and employees are not eligible for productivity pay and determine the gender composition of that group. Where the excluded employees or positions are female-dominated and the majority receiving payments are men, consider whether or not this is reasonable. If not, consider extending the scheme to cover all employees.

- Are there differences in shares of productivity pay in mainly male and mainly female jobs? Do these reflect real differences in productivity?
- Are the productivity indicators valid indicators of success (and critical success factors) for the organisation? Are less visible as well as highly visible factors and achievements included?

Superannuation

Determine how superannuation is paid and who receives it.

- Are part-timers receiving pro-rata benefits on the same basis as full-timers?
- Do eligibility requirements exist that disadvantage women? For example, is access to superannuation restricted to those working a particular number of hours per week? Is this restriction reasonable?
- Are all employees taking leave without pay treated in the same way, or are those on maternity leave treated differently?

Benefits

Identify the benefits that are available to different jobs and classifications.

- Do women and men doing jobs of equal value receive the same benefits, such as cheap loans, cars, computers, mobiles and private telephone reimbursement etc?

Hours of work

Analyse the remuneration received by part-timers in comparison to full-timers.

- Do part-timers receive all benefits and entitlements paid to full-timers on a pro-rata basis?
- Are part-timers classified differently from full-timers who do the same or similar work, merely because they work part-time?
- Are part-timers eligible for performance payments, training and development, overtime and promotion?
- Examine the distribution of overtime payments and payments of premiums for unsocial hours.
- Do women and men have equal access to work which is paid at a higher rate such as overtime or night shifts?
- Are jobs predominantly done by men receiving higher rates for weekend work or unsocial hours while jobs predominantly done by women are not?

Job evaluation

- Are jobs where women predominate valued lower than those where men form the majority? Is this reasonable? Has an objective evaluation been performed?
- Has a job evaluation process resulted in women's jobs being graded lower than men's? Is sex discrimination present in the job evaluation system? Are the full range of women's skills counted and measured by the scheme? Are only relevant criteria employed in the scheme?

Internal comparison

Identify and compare jobs which are mainly done by men and jobs which are mainly done by women.

Compare the lowest paid mainly female category with the lowest paid mainly male category.

- Do they receive comparable pay, allowances, discretionary payments, bonuses etc? There is a prima facie case of sex discrimination where valid statistics show a difference in pay between jobs of equal value done mainly by women and those done mainly by men.

Identify 'typical' male and female jobs at a number of levels: unskilled, semi-skilled, skilled and supervisory, and compare these in the same way. Pair up some male and female employees in each category who have similar service, qualifications, training etc, and compare their career paths and progression through pay scales.

- What does this reveal about the pay system?

Stage 5: Take action

Having identified equal remuneration problem areas, take action to remedy these problems

Identify possible solutions. This should include changing rules or practices which were identified as giving rise to pay discrimination.

Ensure that these solutions do not create different discrimination problems. Analyse the likely effects of proposed changes before implementing them. Rectify discrimination problems.

Consult widely with the workforce and representatives about preferred solutions. Negotiate agreement from key players for implementation of solutions. Develop a plan for implementing equal remuneration.

Ensure that the new procedures are transparent.

Establish a mechanism to monitor pay practices to ensure that the system remains non-discriminatory and is implemented by all parties in a non-discriminatory manner.

Stage 6: Comprehensive review

A comprehensive pay equity review should be undertaken every three years. This should include statistical and comparative analysis as outlined above, but should also utilise other methods such as employee attitude surveys, interviews, focus groups, union consultations etc.

Appendix: Australian Work Value Cases

This appendix outlines some of the Australian cases which have examined the value of work performed in female-dominated occupations.

Equal pay cases: 1969 and 1972, *127 CAR 1142*, 19 June, 1969; *147 CAR 172*, 15 December, 1972

In 1969 the former Conciliation and Arbitration Commission adopted an equal pay for equal work principle which provided equal pay in award rates for women who were performing work of the same or like nature as men.

The decision excluded women who worked in female-dominated occupations: they did not do work of the same or like nature as that done by men, and therefore there was no basis for awarding equal pay.

The 1972 Equal Pay Case resulted in the extension of the 1969 equal pay principle to include equal pay in award rates for work of equal value. This meant that the work of women in female-dominated industries could be compared to the work of men in male-dominated industries.

This was to be phased in through three equal instalments. Parties were to agree wherever possible, but if no agreement was reached the question would be referred to the Commission. Work value inquiries were to be conducted where no agreement was reached.

Therapists' Case, 299 CAR 533, Print G1499, December 1985

Physiotherapists, occupational therapists and speech pathologists in the Australian Public Service argued that they should be paid the same rate as male-dominated occupations classed as scientists. Scientists were covered by the *Science (Australian Government Employment) Award 1985*, and were paid considerably more than therapists, who were covered by the *Therapists, Professional Officers' Association, Australian Public Service Award 1985*.

The therapists proved that their work was of equal value to the work of the scientists: their qualifications were comparable, as was the application of scientific principles in day-to-day work and the factors of work environment, level of autonomy, responsibility, accountability and complexity of work. In the light of this, the Full Bench determined that there was no longer any justification for excluding the therapists from the Science group of employees. The reclassification of therapists to the Science Award resulted in substantial salary increases.

Nurses' Case Print G7200, 1987

Nurses employed under federal awards claimed that existing wage scales did not reflect their professional standards or provide adequate career opportunities, and that the education, training and duties of nurses warranted pay rates equivalent to other health care professionals.

The nurses claimed that their rate of pay was too low because the 1972 equal pay for work of equal value principle had not been applied to their salaries. They submitted that their rate of pay had been fixed in the knowledge that nursing was a female-dominated occupation, that sex discrimination depressed the wage level, and that this had never been corrected. In evidence the nurses compared the percentage wage increase they had received since the 1972 equal pay decision with that received by a fitter in the same period.

The Full Bench held that nurses' rates ... *were assessed in 1970 prior to the 1972 Equal Pay decision on the basis that nursing is a predominantly female occupation; that this assessment has caused the rates to be depressed, and that there has been no subsequent adjustment to fully redress the situation ... In our opinion all that has happened is that differences between male and female rates within nurses awards have been eliminated, but the original sex bias caused by assessment on the basis of a predominantly female rate remains.* The nurses received substantial pay increases.

Child Care Workers' Case, *Print J4316*, 14 September, 1990

Training requirements and levels of competency were compared for child care workers and engineering tradespeople.

Both types of workers held certificates awarded after completion of a course provided by a College of Technical and Further Education. Both were required to undertake work experience to complement their academic studies. Both learned a range of skills to be applied in circumstances calling for the exercise of responsibility.

Child care students completed approximately twice the number of hours of academic training as students in the metal and engineering industry trade certificate course, and their qualification was rated at a higher level than trade certificate courses by the Register of Australian Tertiary Education.

The Commission determined that the classification of child care worker at level 3 after one year's experience should be paid at the same rate as engineering trades level 1 in the Metal Industry Award.

Family Court Counsellors' Case, *Print K5613*, 24 November, 1992; *Print K8020*, 11 June, 1993; *Print K8931*, 24 August 1993.

On behalf of the Family Court Counsellors, the Professional Officers' Association claimed that the classification structure in use reproduced historical pay inequalities between male and female-dominated professions. In support of this contention, evidence was tabled showing that 82 per cent of the female-dominated counsellor profession was compressed into the lowest two levels of the five-level classification structure. In comparison, 44 per cent of engineers and scientists employed by the Department of Defence and 34 per cent of science professionals in the Department of Industries and Energy were located in the lowest two levels of their structures. The Association argued that this *classification compression* of female-dominated professions was discriminatory. The Association won the case, with the result that all people employed as counsellors within the Family Court were reclassified upwards.

Glossary of terms and concepts

Allowances are additional payments made to employees over and above their ordinary, or base, rate. For example, these may include:

Skill allowances - paid for using specific skills or equipment. These allowances may be paid on each occasion the skill or equipment is used or may be incorporated into someone's ordinary pay for all purposes.

Work disability allowances - paid to compensate for unpleasant conditions such as dirt, heat or wet weather. These allowances may be paid on each occasion the work disability is experienced, or may be incorporated into someone's ordinary pay for all purposes.

Reimbursement allowances - paid to compensate employees for money spent on specified purposes such as travel or use of motor vehicle.

Location allowances - paid for working in isolated or unpopular locations.

An **award** is a legally binding industrial instrument which governs the pay and conditions of workers in a industry, occupation or enterprise, and is made by a federal or state industrial tribunal. It provides legal minimum pay and conditions.

An **award employee** is an employee who works under an award.

Direct sex discrimination occurs when an employee is treated less favourably than a person of the opposite sex in circumstances that are the same, or not materially different (s.5(1) *Sex Discrimination Act 1984*).

Discretionary pay is a term for any component of remuneration that is paid at the discretion of the employer. This category includes performance payments and bonuses, market loadings or supplements, service payments, profit-sharing payments, attendance or time-keeping payments, commissions, production or task bonuses, and productivity pay. Sometimes these payments are not made for an explicit reason and may be referred to simply as overaward or over-agreement pay.

Employee is *a person working under the control and direction of another ... under a contract of employment ... in return for a wage or salary* (CCH Macquarie Dictionary of Employment and Industrial Relations).

Equal value refers to work valued as equal in terms of skill, effort, responsibility and working conditions. This includes work of different types.

Factors of value are the identified components used in assessing the objective value of a job.

Indirect sex discrimination occurs when a condition, requirement or practice is imposed or proposed that has, or is likely to have, the effect of disadvantaging people of one sex in relation to the other, and this is not reasonable in the circumstances. (Sections 5(2), 7B *Sex Discrimination Act 1984*)

Inherent requirements of the job is a term adopted from the international anti-discrimination conventions: *Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination* (Article 1, International Labour Organisation Convention No. 111 Concerning Discrimination (Employment and Occupation)). An inherent requirement of a job is *... something that is essential to the position, rather than being imposed on it* (Gray J in *Christie v QANTAS Airways*, (1996) 138 ALR 19, Industrial Relations Court of Australia).

Job evaluation is a process of systematically and objectively comparing different jobs to determine the value of each. It provides a basis for classification, grading and pay structures. There are many different methods, including 'points systems'.

Non-award employee is any employee who does not work under an industrial award, for example, managers.

Overaward payments are any payments made to a person employed under any classification in a federal or State award which is over and above the award rate of pay for that classification, and not an entitlement included in the award. Overaward payments are frequently paid to workers covered by 'minimum rates awards', (awards which set out the minimum pay and conditions to which workers covered by the award are entitled). Overawards may include profit-sharing payments, attendance or time-keeping payments, commissions, production or task bonuses, performance pay, productivity pay, market loadings etc, but often they are paid for an unnamed reason.

Pay equity means remunerating people equally for work that is valued equally through objective analysis.

Performance payments are payments made to employees to reward their performance at work. These may be known by a number of other terms, including merit or bonus pay. These are often paid to employees on an individual basis.

Productivity payments are payments made to employees to reward increased productivity. They may be paid on an individual or collective basis.

Reasonableness is a concept used in determining whether or not indirect discrimination exists. Matters to be taken into account in determining whether a condition, requirement or practice which may be indirectly discriminatory is reasonable include:

- (a) *the nature and extent of the disadvantage ...;*
- (c) *the feasibility of overcoming or mitigating the disadvantage; and*
- (a) *whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice (Subsection 7B(2), Sex Discrimination Act 1984).*

Remuneration is defined as *the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment* (Article 1, International Labour Organisation Convention No. 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value). This includes any consideration given by an employer in relation to employment and so includes paid leave, non-monetary benefits, concessions and discounts, overaward payments, allowances, superannuation etc.

Transparency refers to practices based on documented principles and criteria which are explicit, visible and open to scrutiny by all. In a transparent pay system, employees understand not only their rate of pay, but also the components of their individual pay packets, the rationale for each component and how each component contributes to total earnings in any pay period. Transparency does not mean that what individuals actually get paid is public information. While individuals' pay is confidential, the rules governing how that pay is awarded and calculated are public.

Weightings are assigned to factors of value to indicate the importance of each factor in a job.

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