

EXTENSION OF EQUAL PAY ACT (EPA) TO OFFICE HOLDERS

The Law

The Employment Equality (Sex Discrimination) Regulations 2005 (the Regulations) have been made to implement the Equal Treatment Amendment Directive (ETAD). The Regulations amend the Sex Discrimination Act 1975 and the Equal Pay Act 1970 (EPA) so that they extend to office holders. In that regard the sex discrimination strand has been made consistent with the other discrimination strands – race, disability, religion or belief and sexual orientation. The prohibition against age discrimination will also apply to office holders. Office holder includes, amongst others, public appointees and judicial office holders.

The Regulations come into force on 1 October.

For the purposes of the Regulations office holders are those appointments made by a Minister of the Crown/government department or those remunerated appointments where the person was appointed to discharge functions personally under the direction of another person.

“Under the direction of another” is likely to have a broad interpretation such that most office holders would be caught. This also should not impact on the independence of the role. It is possible for an individual to carry out independent decision-making, but still be under the governance of another in terms of when and where they carry out that role.

Any fundamental change in current position?

It ought to be borne in mind that some (but not all) office holders hold dual status.

For example, rent officers are both office holders and employees¹. Where this is the case the status of office holder may be of little consequence.

Also of note is the fact that Article 141 (which requires Member States to ensure that the principle of equal pay for equal work is applied)² was relied upon directly in *Perceval-Price*³ to limit the operation of section 1(8)(a) EPA, which excluded statutory office holders from the remit of the Act.

¹ See *Johnson v Ryan* [2000] ICR 236

² Note that Article 141 cannot be relied upon alone – it must form part of a claim brought under domestic law.

³ *Perceval-Price v Department of Economic Development* [2000] IRLR 380 NICA – Three full-time chairmen of tribunals in Northern Ireland brought claims for equal pay, arguing that they had been treated less favourably than men in relation to pension rights. Although the case involved Northern Ireland legislation, this was to all intents and purposes similar to that in the rest of the UK₁



The extension of the EPA to office holders will include pension arrangements. HM Treasury issue guidance in relation to offering equivalent opportunities to the PCSPS to board members which appointing bodies may wish to bear in mind. The guidance can be found under 'Related Links' at the web address below.

www.hm-treasury.gov.uk/documents/taxation_work_and_welfare/public_service_pensions/tax_pensions_guidance.cfm

Given the broad range of work that office holders undertake, it is not easy to identify appropriate comparators who may be doing like work or work of equal value, other than members of the same board as the office holder. However, even if it can be established that an individual is a comparator, it may be possible to justify differences in pay, and justification arguments can take many different forms, including such issues as:

- a. the statutory background relating to how the posts were created;
- b. the number of people subject to the decisions of the boards/posts;
- c. the budget of the bodies;
- d. the individual responsibilities of those office holders or other comparators;
- e. the number of hours per week worked, including the number of calls on time both actual and potential;
- f. difficulties in recruitment to the posts;
- g. market forces, for example there are some bodies where the skills required are so specific that there are only a handful of people in the country able to take up that post.

Future Action

Given that domestic law will now provide a direct route for office holders/public appointees to bring a claim for equal pay, departments may wish to consider their own processes for assessing remuneration levels when appointing office holders and to bear in mind the following:

- a detailed audit trail identifying the functions of each appointment
- the background of the post
- the reasons for the remuneration provided for that post, and a process (however simple) of considering changes in remuneration (including pension entitlement)
- if available, details of remuneration levels on similar bodies sponsored by the department
- advice from the department's Equal Pay Unit on departmental policy

Departments will also wish to bear the above in mind when making re-appointments or conducting reviews of existing remuneration levels

