



Chapter 4: Equal pay and terms and conditions

This chapter covers the following topics:

- [Equal pay](#)
- [Equal treatment](#)
- [Material factor defence](#)
- [Discussions about pay](#)

The Ordinance introduces the rights of equal pay and equal treatment. The right of equal pay ensures that two people in the same employment (one with a Protected Ground and the other without the Protected Ground) performing equal work must receive equal pay, unless any difference in pay can be justified. The right of equal treatment covers any other terms and conditions of employment. The right for equal pay and the right of equal treatment, although similar, are two separate rights. Both are discussed in detail in this chapter of the guidance.

It is important to remember that the Ordinance does not currently cover the situation where the difference in pay is due to the sex of the parties concerned, as sex is not currently one of the Protected Grounds. Any claim for equal pay or equal treatment on the grounds of sex must be dealt with under the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 and is therefore not dealt with in this guidance. See [Legislation page number 5](#).

Other jurisdictions may also have legislation which addresses differences in pay or treatment due to reasons of age. Age is this is not yet a Protected Ground in the Guernsey legislation so again this is not dealt with under this guidance.

4.1 Equal pay

The right to Equal Pay requires that a person with a Protected Ground who is employed to do work which is equal to the work of someone else (who does not share the same Protected Ground) should not be paid differently, unless that difference can be justified through what is known as a material factor defence. This right is implied into everyone's contract and known as an equal pay clause.

The conditions for an equal pay clause are:

a person (A) with a particular Protected Ground is employed to do work that is equal to work that a comparator (B) who does not have the particular Protected Ground does;

- **B is employed by A's employer or by an associate of A's employer;**
- **both A and B are employed in Guernsey;**
- **B and A were employed to do the work that is equal within three years of each other; and**
- **B must be a real person.**

See section 16 of the Ordinance

At present where the difference in pay is due to sex, any claim for equal pay in relation to sex must be dealt under The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 (Sex Discrimination Ordinance).

Is work equal to that of a comparator?

Work is considered as equal to that of a comparator if both people are doing the same job. This may also be the case where they do a broadly similar job.

A's work is equal to that of B's if -

- **A's work and B's work are the same or broadly similar, and**
- **such differences as there are between their work are not of practical importance, having regard to the frequency with**

which differences between their work occur in practice and the nature and extent of the differences.

See section 16(5) of the Ordinance

Example

A Catholic employee, who works as a trust administrator for a financial services business, finds out that another employee who is Protestant and was employed at the same time as a fund administrator for a different part of the business, (but also based in Guernsey) is paid £10,000 a year more. Even though they are employed as administrators in different parts of the business, if their work is broadly similar, and the differences are not of practical importance, then their work would be considered equal.

Work of equal value

Neither the Ordinance nor the Sex Discrimination Ordinance at present extend to work of equal value (i.e. two jobs that are different but objectively are considered of equal worth), although it is intended that equal pay for work of equal value will be proposed at some point in the future in relation to any difference in pay due to the Protected Ground of sex only.

Equal pay clause

The right to equal pay covers not just the basic salary or rate of pay of an employee, but also extends to any other financial benefit relating to their employment. This could include bonuses, or rights under a pension scheme, even where previously the employee was not able to participate in the scheme.

An equal pay clause is a provision which relates to pay or any other financial benefit relating to A's employment (including, for the avoidance of doubt, membership of or rights under an occupational pension scheme) that has the following effect:

- **if a term of A's contract of employment is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;**
- **if A does not have a term in A's contract of employment which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.**

See section 16 (4) of the Ordinance

Where there is a difference in pay, unless it can be justified through a material factor defence (see below) the equal pay clause has the effect to modify the contract of employment of the individual to remove that difference. Not only does that clause give the employee the right to claim back pay for up to six years, it also amends their rate of pay going forwards. However, it should be noted that back pay cannot be awarded in respect of the period prior to 1 October 2023 i.e. the stated six years back pay can only be claimed once the Ordinance has been in force for six years. Claims cannot be made for back pay before the Ordinance came into force.

4.2 Equal treatment

The right to equal treatment requires that a person with a Protected Ground who is employed to do work that is not materially different from someone else (who does not share the same Protected Ground), should not be employed on different terms and conditions, unless that difference can be justified through what is known as a material factor defence. This right is implied into everyone's contract and known as an equal treatment clause. Pay is dealt with separately by the right to equal pay. [See Chapter 4.1.](#)

The conditions for an equal treatment clause are:

- **a person (A) with a particular Protected Ground is employed to do work that is not materially different from work that a comparator who does not have the particular Protected Ground (B) does;**

- **B is employed by A's employer or by an associate of A's employer;**
- **both A and B are employed in Guernsey;**
- **B and A were employed to do the work that is not materially different within three years of each other; and**
- **B need not be a real person.**

See section 17(1) of the Ordinance

At present where the difference in terms and conditions is due to sex, then any claim for equal treatment in relation to sex must be dealt under The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005.

Equal treatment clause

The equal treatment clause covers any terms and conditions of employment other than pay. This could include working hours, holiday entitlement and entitlement to breaks.

An equal treatment clause is a provision which relates to the terms and conditions of employment other than pay (including, for the avoidance of doubt, working hours, holiday entitlement and entitlement to breaks) that has the following effect:

- **if a term of A's contract of employment is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;**
- **if A does not have a term in A's contract of employment which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.**

Section 17(4) of the Ordinance

Where there is a difference in terms and conditions, unless it can be justified through a material factor defence (see below) the equal treatment clause has the effect to modify the contract of employment of the individual to remove that

difference. Not only does that clause give the employee the right to claim damages for any loss they might have suffered, it also amends their terms and conditions going forwards, subject to certain conditions and limitations.

Example

In addition to the usual bank holidays, an employer who has a largely Hindu workforce, gives any employees who are Hindu an extra day off each year to celebrate Diwali.

In these circumstances an equal treatment clause, would entitle an employee who was not a practising Hindu to also take the day off work.

Differences between equal pay and equal treatment

Whilst the rights of equal pay and equal treatment are similar, there are a couple of important differences between the rights:

- The right to equal pay requires people to undertake equal work, whereas for equal treatment the work must not be materially different
- The right to equal pay requires the comparator has to be a real person, whereas for equal treatment the comparator can be hypothetical

4.3 Material factor defence

Even if the conditions for an equal pay or equal treatment clause are otherwise met, an employer will be able to justify a difference in pay or treatment if that is due to a meaningful and genuine reason, which is not either directly or indirectly discriminatory. This is known as the material factor defence.

An equal pay clause or an equal treatment clause in A's employment contract has no effect if the employer shows that the difference between A's terms and B's terms is because of a material factor reliance on which:

- **does not involve treating A less favourably than B because of A's particular Protected Ground than the employer treats B; and**
- **if the factor is within the section below, is a proportionate means of achieving a legitimate aim.**

A factor is within this subsection if A shows that, as a result of the factor, A and persons with whom A shares the Protected Ground doing work equal to A's, or, as the case may be, work which is not materially different to A's, are put at a particular disadvantage when compared with persons with whom A does not share the Protected Ground and who do work equal to A's, or work which is not materially different to A's, as the case may be.

For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.

See section 18 of the Ordinance

Is there a material difference?

For a difference to be considered material, it must be a significant and relevant difference between the employee and the comparator. Whilst it is no defence to an equal pay claim for an employer to say that the difference is because an employee was willing to work for less or asked to be paid more, market forces are a potentially valid material factor defence. Ultimately, this will come down to a consideration of all of the circumstances of the case. Examples of material factors which might establish a defence depending upon the circumstances include:

- length of service;
- past performance;
- market forces; and/or
- shortage of skills and qualifications.

Is the difference “tainted” by discrimination?

Even where there is a material difference, this will only provide a defence to an employer when the reason is not either directly or indirectly discriminatory due to a Protected Ground. This is sometimes referred to as being “tainted”.

If the reason for the difference was due to a directly discriminatory reason, which cannot be justified then this cannot amount to a material factor defence.

An example might be where Portuguese workers are paid less per hour than local workers and the management cannot justify this difference, as their actions are directly discriminatory.

The question might arise as to whether or not the reason might be indirectly discriminatory, where an employee and others with the Protected Ground are put at a particular disadvantage when compared with persons who do not share the Protected Ground. If a disadvantage is identified, then the employer must objectively justify the reason for the difference, in the same way they would for an indirect discrimination claim. [See Chapter 1.2](#). Where they are unable to do so, then that reason would be considered tainted and so the employer would be unable to rely on the material factor defence.

4.4 Discussions about pay

Some contracts of employment and other agreements contain specific restrictions that are designed to prevent employees from disclosing their pay to another employee, or from asking a colleague about their pay. These terms are sometimes known as pay secrecy clauses.

Restrictions such as this make it very difficult for individuals to be able to pursue a claim for equal pay, when they can't find out what other individuals receive. The Ordinance makes such pay secrecy clauses unenforceable, where they relate to making enquiries for the purposes of enforcing a person's right to equal pay. Where pay is disclosed for the purpose of assisting a person to enforce their right to equal pay, this is known as a relevant pay disclosure.

A term of a person's contract of employment that purports to prevent or restrict the person (P) from disclosing or seeking to disclose information about the terms of P's work is unenforceable against P insofar as P makes or seeks to make a relevant pay disclosure.

A term of a person's contract of employment that purports to prevent or restrict the person (P) from seeking disclosure of information from a

colleague about the terms of the colleague's work is unenforceable against P insofar as P seeks a relevant pay disclosure from the colleague.

For these purposes the term "colleague" includes a former employee of the same employer or an associated employer in relation to the work in question.

See section 19 of the Ordinance

What is meant by a relevant pay disclosure?

The Ordinance does not outlaw confidentiality around pay completely. It is limited to what is known as a "relevant pay disclosure", which covers the situation of a person seeking to establish if they have a right to equal pay, i.e. if there is a connection between pay and having (or not having) a particular Protected Ground. So, it is not automatically unlawful to tie a payment to a confidentiality obligation, for example where someone is paid a retention bonus in order not to leave their current employer, but care should be taken in the drafting of any such clause to make it clear it does not prevent a relevant pay disclosure.

Victimisation

Regardless of whether or not there is a contractual restriction, the Ordinance then goes on to ensure that the following are protected against victimisation by their employer:

- Those who seek a relevant pay disclosure;
- Those who make a relevant pay disclosure; and
- Those who receive information disclosed in a relevant pay disclosure.

Example

An employer identifies that two employees have been discussing their bonuses, because one of them is concerned that their low bonus is linked to their sexual orientation. The employer then seeks to take disciplinary action against both employees, on the basis their bonuses are supposed to be confidential. This would amount to victimisation on the grounds that the two employees have sought or made a relevant pay disclosure.