

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the draft Equal Pay (Amendment) Regulations. They have been prepared by the Department of Trade and Industry in order to assist the reader in understanding the Regulations. They do not form part of the regulations and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the regulations and are not meant to be a comprehensive description of the regulations. So where a regulation or part of a regulation does not seem to require any explanation or comment, none is given.
3. As with the Equal Pay Act, these notes are drafted in terms of a woman claiming pay equal to that of a man doing equal work. However, the Act also applies where a man claims pay equal to that of a woman doing equal work. The notes should be read as applying equally to claims brought by men.
4. These regulations are published in draft, and the detailed drafting may be subject to alteration.

BACKGROUND

5. These regulations amend two parts of the Equal Pay Act:
 - the time limits contained in section 2(4) and 2(5), which affect the time within which a claim must be brought to an employment tribunal, and the period of time in respect of which arrears may be awarded if unequal pay is found. These time limits were considered by the European Court of Justice in the cases of *Levez* and *Preston*, and were found to be contrary to EC law in certain respects;
 - the rules in section 2A of the Act concerning procedure in claims for equal pay for work of equal value. These regulations remove the 'no reasonable grounds' procedure. The regulations also make a minor change to the role of the independent expert.
6. The Government published outline proposals on changes to the time limit in section 2(5) Equal Pay Act and the 'no reasonable grounds' defence in the consultation document *Towards Equal Pay for Women* in December 2000. That consultation document also said that proposals concerning the six month time limit in section 2(4) would be put forward at a later date once the outcome of the *Preston* case was known. Those proposals are

set out in full in these regulations and the consultation document *Equality and Diversity: The Way Ahead*.

7. The regulations are made under section 2(2) of the European Communities Act 1972, as they implement Community obligations and matters arising out of or related to those obligations. The Secretary of State is designated under the European Communities (Designation) (No. 3) Order 2002 for the purposes of s.2(2) in matters relating to discrimination.
8. A consolidated version of sections 2 to 2A Equal Pay Act is set out at the end of these notes. This sets out the sections as they would be after the amendments in these regulations were brought into force.

REGULATIONS

Regulation 1: Citation, commencement, application and interpretation

9. Paragraphs (4) and (6) deal with the application of the regulations. All of the amendments, except those to the six month rule in section 2(4) of the Equal Pay Act, are intended to apply to proceedings which have been instituted with an employment tribunal but not yet determined at the date that the regulations come into force.
10. The amendments to the six month rule in section 2(4) of the Equal Pay Act (i.e. regulations 2(2) and 3) are intended to apply to those proceedings which had not already been instituted at the date that the regulations come into force, but would not have been time-barred under the previous rules on that date. For example, if a woman's employment ceased on 15 January 2003, and the regulations came into force on 1 July 2003, her claim would not necessarily become time-barred on 15 July 2003 if the rules on disability or concealment were applicable to her situation.
11. In addition, the new rules will apply to all proceedings commenced after the regulations come into force.

Regulations 2 - 5: Amendment to the time limits in the Act

12. Following the decisions in *Levez* and *Preston*, the Government proposes to amend the rules currently contained in section 2(4) and 2(5) of the Equal Pay Act so that they are no less favourable than those which apply to claims for breach of contract. The rules which apply to claims for breach of contract in England and Wales are slightly different from those which apply in Scotland. Accordingly, these regulations contain different rules for the two jurisdictions.

Section 2(4): six month time limit for proceedings to be heard by the employment tribunal

13. The current rule in section 2(4) is that an employment tribunal can only hear complaints if they are made during the woman's employment, or within six months after the end of the employment. These regulations do not change that general principle, but allow the six month period to be extended in certain circumstances. They also introduce a new rule to make clear that a woman who has been employed under a stable employment relationship consisting of two or more contracts can bring a claim within six months of the end of that relationship. The detailed provisions are moved to a separate section (new section 2AA) for clarity.
14. Under new section 2AA, the general rule is that proceedings have to be brought either during the employment contract or stable employment relationship, or within six months after its end. However, there are two exceptions. The first applies where the employer deliberately concealed any fact relevant to the claim from the woman, and the woman did not discover the fact (or could not reasonably have discovered it) during the employment. In such a case, the six month period does not start to run until the woman has either discovered the fact, or could with reasonable diligence have discovered it.
15. The second exception applies if the woman was under a disability at any time during the six months which follows the end of the employment. In such a case, the six month period does not start to run until the woman has ceased to be under a disability. Subsections (11) and (12) of new section 2AA set out the meaning of 'disability' for these purposes, which is consistent with the meaning that the word has in relation to claims for breach of contract. There are slightly different definitions for Scotland and England and Wales. In England and Wales, a woman is under a disability if she is a minor (under 18) or of unsound mind. In Scotland, a woman is under a disability if she is under 16 or incapable within the meaning of the *Adults with Incapacity (Scotland) Act 2000*.

Section 2(5): award of arrears or damages

16. The current rule in section 2(5) is that arrears or damages in respect of unequal pay can only be awarded in respect of the period of two years before the proceedings were instituted. These regulations amend that rule, and would mean that arrears or damages for unequal pay could be awarded in respect of the time that it would be possible to make a claim for breach of contract. This is governed by the *Limitation Act 1980* in England and Wales, and by the *Prescription and Limitation (Scotland) Act 1973* in Scotland. In principle, this is up to six years in England and Wales and up to five years in Scotland. However, the limit may be longer in certain circumstances. For the purposes of clarity, the detailed rules are moved from section 2(5) to a new section 2AB (for England and Wales) and a new section 2AC (for Scotland).
17. Under Section 2AB, the general rule in England and Wales is that arrears or damages in respect of unequal pay can be awarded for up to six years before the date that the proceedings were instituted. However, the period

is longer if the employer deliberately concealed facts relevant to the claim from the woman. In that case, provided that she brings her proceedings within six years of the date when she discovered the concealed fact (or could with reasonable diligence have discovered it), arrears can be awarded in relation to the entire period for which the concealed fact was relevant and for which there was unequal pay. There may be situations where the concealed fact is discovered during the employment itself (as in *Levez*). The requirement under section 2(4) to bring a claim within six months only applies once the employment has ceased, so in such circumstances it is possible that a woman would bring a claim up to six years after she discovered the concealed fact, but within the time period required by section 2(4). This provision is based on the rule in *section 32(1)(b) Limitation Act 1980*, which applies to claims for breach of contract where any fact relevant to the claimant's right of action is deliberately concealed by the defendant.

18. The period for arrears is also longer if the woman was under a disability at the time when she was first paid unequally. (The meaning of the word 'disability' in this context is explained at paragraph 15 of these notes.) In such a case, provided that she brings her proceedings within six years of the date when she ceased to be under a disability, arrears can be awarded in relation to the entire period of unequal pay. This provision is based on the rule in *section 28 Limitation Act 1980*, which extends the limitation period in claims for breach of contract where the claimant is under a disability.
19. Under section 2AC, the general rule in Scotland is that arrears or damages for unequal pay can be awarded in respect of the period of up to five years before the date that the proceedings were instituted. This follows the short negative prescriptive period for claims for breach of contract, as set out in *section 6 Prescription and Limitation (Scotland) Act 1973*. However, when calculating the period of five years, certain periods of time are not included. These are any period where the woman was induced to refrain from commencing proceedings because of fraud by the employer or error induced by the employer, and any period where the woman was under a disability. In accordance with the long prescriptive period contained in *section 7 Prescription and Limitation (Scotland) Act 1973*, the total time period in respect of which arrears may be awarded can never be more than 20 years.
20. These regulations do not currently contain any specific provision dealing with complaints by members of the armed forces under section 7A Equal Pay Act, but this will be changed before the final regulations are made. The Government intends that the new rules should apply to such claims, with appropriate adjustments to take into account the service redress procedure referred to in section 7A.

Regulation 6: amendments to the procedure before the employment tribunal in equal value cases

21. Regulation 6 amends the rules in section 2A Equal Pay Act which deal specifically with claims of equal pay for work of equal value. At present, section 2A allows an employment tribunal to strike out a complaint where the tribunal is satisfied that there are 'no reasonable grounds' to determine that the work of the woman and that of the man are of equal value. Regulation 6 removes this rule. This would mean that in all cases the parties are able to put evidence before the tribunal as to whether the jobs are of equal value.
22. There is a different rule which applies where there has already been a job evaluation scheme which covers the jobs of both the woman and her chosen comparator, and which gives different values to the two jobs. Under new section 2A(2) and 2A(2A), the tribunal shall conclude that the work is not of equal value, unless it suspects that the job evaluation scheme itself is not suitable to be relied upon. This might be, for example, because the tribunal suspects that the job evaluation scheme was made on a system which discriminates on the grounds of sex.
23. Regulation 6 also expands the role of the independent expert slightly. Under the current section 2A, the tribunal may only ask the independent expert to prepare a report on the question of whether the work of the woman and that of her chosen comparator are of equal value. Under the amendment made by regulation 6(2), the independent expert could also be asked to prepare evidence on whether a job evaluation scheme was made on a system which discriminates on the grounds of sex or is otherwise unsuitable to be relied upon.

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