

# Employment Relations Matters

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## The equal pay standoff

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*Employment Relations Matters* appears every quarter and will be distributed free of charge by email. Copies can also be downloaded from [www.acas.org.uk](http://www.acas.org.uk)

*Employment Relations Matters* is intended to be as accessible as possible. Further reading will be suggested where appropriate, but there will be no notes or references.

Features will mostly be written by members of Acas' Strategy Unit or other Acas colleagues. From time to time, however, they may be especially commissioned externally.

We welcome your comments and opinions. These should be sent to the editor, Professor Keith Sisson, Head of the Acas Strategy Unit, at [strategy@acas.org.uk](mailto:strategy@acas.org.uk)

The views expressed in *Employment Relations Matters* are those of the editor and not the Acas Council.

Equal pay remains one of the most intransigent employment relations issues even after 35 years of equal pay legislation. The moral argument has been won. Yet this has not been enough. A significant gap remains that runs the risk of throwing all sides into conflict with one another.

The reasons for the equal pay gap are many, as the Women and Work Commission – recently set up by the government to address the issues – recognises. Quite rightly, the Commission is investigating the full range of causes. These range from barriers in education and careers guidance to occupational segregation, organisational practice and the lack of affordable and quality childcare.

On one level, it is astounding that legislation around for thirty five years has been unable to remedy the inequalities that exist in today's workplaces. Women cleaners can be paid £7,000 less than men cleaning cars for the same organisation and women doing detailed electrical circuit work can be paid less than men packing the appliance.

It is less astounding – though no less unjust – when the focus is on what is involved in reversing this state of affairs. Equal pay is an area that Acas has significant expertise in through its advisory work. More recently, this experience has been brought directly to bear in conciliating

in the recent spate of local government equal pay claims.

### Pay harmonisation

The harmonisation of pay scales under single status agreements in local authorities highlights important organisational barriers to equal pay, which are equally relevant to areas of the private sector. In our experience, the real problem is not that of establishing equal value between jobs but of implementing changes to address acknowledged inequality.

Take, for example, the case of male refuse collectors in one authority paid more than predominantly female street cleaners, two jobs that potentially compare as equal value. The refuse collectors are on a set rate for a given round on given days. It doesn't matter if they finish in five hours or eight, the pay is the same. Moreover, if one collector leaves, the team can choose to leave the post vacant and share out the savings between them. There is also a bonus for dirt money and lack of complaints.

The street cleaners, meanwhile, are paid an hourly rate with no bonuses. There is therefore no way of calculating an hourly rate for the men that is comparable. What does the local authority do? It cannot

realistically take the collectors' bonus away because of potential industrial action and/or breach of contract claims – many authorities are incorporating bonuses into basic pay. But if it pays a bonus to the cleaners, on what basis does it pay – the weight of litter they collect? Crucially – and this is the key question – where does it find the money to pay?

### Trade unions

The equal pay conundrum is a highly sensitive issue for unions as well, with the tension between male and female dominated unions being a barrier to progress. In one privatised industry, a number of job evaluation schemes were undertaken to harmonise the (mostly male) 'industrial' with the (mostly female) 'staff' grades. An equal pay working party was established, but the unions representing the two groups were unable to work together because of the different interests of their members. Ultimately, the lack of progress resulted in the union representing the 'staff' grades pressing ahead with a new separate pay and grading scheme and using the threat of equal pay claims to increase pay rates for its female members.

Although there are unions pushing for equal pay on a national level, representatives tend not to raise equal pay in its own right. There are difficulties in balancing everyone's interests, especially where male members fear their pay will be eroded. Another factor is the predominance of male representatives.

As a rule, employers do not look beyond the pay roll budget for funding. Consequently both employers and trade unions constantly find themselves in a position where they are

faced by opposing demands from significant sections of the workforce, and for obvious reasons do not want to raise women's pay by depressing male wages.

The question for organisations is which part of the budget does it reduce to equalise women's pay if funding is limited or not available. If they red circle men's pay, it can take years for women to catch up, particularly when inflation is low, and employers may still be vulnerable to equal pay claims. Red circling also creates potential employment relations problems because it gives out a message that men are overpaid when this is not the case. It was certainly not the aim of the equal pay legislation to reduce male wages.

### Fear factor

The fear of industrial strife is mainly a worry for larger unionised workplaces but the headache of the financial implications applies to all organisations. Consequently, the preferred option for many is to leave well alone because of the risk of opening Pandora's Box. For many smaller businesses the potential financial implications are just too great a threat. Once inequality has been identified. There is a legal responsibility to provide instant redress to all those affected. As one adviser noted, however, "half the companies we talk to don't even have enough for the annual pay rise". Other organisations will carry out an equal pay review behind closed doors without the involvement of the employee side or trade unions so that, should inequalities emerge, they can deal with problems gradually without making themselves vulnerable to tribunal claims. The failure to enforce equal pay cannot be

ignored as an influence in this decision by employers. Many see taking your chances as a better option.

Ultimately, many women remain at the bottom of the pay stack for one very simple reason. The current system supports the status quo.

### Equal pay or fair pay?

Complicating matters is a continued lack of awareness of what equal pay involves and some confusion about the nature and intent of the legislation. Calls to the Acas helpline and the experience of Acas advisers reveal not only low levels of enquiries on the issue (well below 1 per cent of calls to the national helpline concern equal pay), but also a misunderstanding of what it involves. Helpline advisers report that, of the calls they receive on the subject, many are from men seeking equal pay with male comparators. As one helpline manager noted, "calls tend to fall into two camps – those from drivers with no female comparators, and carers tending to have no male comparators." There remains a lack of understanding that equal pay must be based on sex discrimination. Helpline advisers also report unwillingness on the part of women to take unequal pay up with HR even where they may have a case.

Workplace advisers report similar misunderstandings by trade union stewards who interpret equal pay as fair pay, again often comparing pay and conditions between two people of the same gender. A proper understanding of equal pay for work of equal value is even less common.

### Pay systems

This misunderstanding between fair and equal pay throws up

another key weakness of current approaches to equal pay. This is the way in which pay systems operate.

#### *Market rates*

Employers often pay what they perceive as necessary to recruit the right person for the job. Depending on when they were recruited, employees may find themselves on very different pay rates for the same job, something that can affect both men and women. However, when asking employers about differential rates between women and men in the same job, particularly at director level, employers tell us that they cannot recruit men unless they pay market rates. Women, by contrast, are more likely to settle for less depending on their circumstances.

#### *Historical legacy*

Acas advisers also identify historical factors influencing unfair pay structures. One manufacturing company paid predominantly male weavers higher rates than other groups because it used to be the most difficult job. But since the introduction of new machines, the level of skill required had been considerably reduced.

#### *Lack of a systematic approach*

Another key problem identified by Acas advisers is the absence in many companies of a systematic approach to pay. In some companies, pay is driven almost solely by performance bonus schemes. In others, there may be no structure at all and no mechanism for setting rates for new jobs.

Pay systems frequently get out of sync because of the way individual managers exercise the discretion they may have to reward employees, whether this is to resolve a specific

staffing problem at a given point in time, or as a way of rewarding exceptional work. A manager might re-invent a job title and give a pay rise to a worker they want to retain, or fund an increase in wages through bonuses or overtime paid out of a budget not intended for wages. The long term implications for equal pay of these kinds of decisions are rarely taken into account.

#### **Looking ahead**

The challenge in addressing this issue – whether it be government, employers or unions – is how to bring into the arena those organisations that have not yet dared to dip a toe in the equal pay waters.

Evidently, there is no simple solution. But here are some suggestions that should help:

- There is a need for more emphasis on awareness raising and training, reflecting the continued ignorance about the meaning of equal pay. Events will need government funding and, ideally, should be organised in partnership with a range of organisations such as the EOC, Acas, trade unions, CBI, CIPD and SME organisations to give them their broadest possible appeal.
- There is a need for training in relation to pay systems – how to set them up and manage them – along with an emphasis on greater transparency.
- Equal pay health checks as a pre-cursor to an equal pay review might offer the least threatening form of intervention as a first step. They might look at the existence of clear pay

structures, transparency and a system for adding new jobs,

- Effective targeting is crucial. There needs to be a focus on awareness raising in start-up businesses so that they get their pay structures right from the beginning. For SMEs there needs to be information on simple things they can do to prevent the pay gap getting bigger, that might include a wider arrangement involving subscription services. Equal pay audits should be focused on areas of centrally determined pay, the public sector and local authorities.
- The nature of current legislation and its enforcement presents employers with what many see as an impossible choice that does not allow employers any space for manoeuvre in terms of introducing changes more slowly. If legislation allowed phased implementation, possibly mutually agreed, then many employers might be more willing to make changes to their pay systems.

The causes of unequal pay are multi-layered and the stalemate in Britain's workplaces is just one aspect. Yet, without some form of legislative change and a financial commitment from government, it is difficult to escape the conclusion that women will remain unable to assert their rights to equal pay. We await with great interest the final report from the Women and Work Commission later this year.

Acas' full response to the Women and Work Commission can be found at [www.acas.org.uk](http://www.acas.org.uk)

## Pregnancy at work – SME experience

Maternity rights have been climbing steadily up the public policy agenda in recent months. One catalyst was the Equal Opportunity Commission's (EOC) interim report into pregnancy discrimination. Another was the government's consultation paper on 'Flexibility and choice' with its proposals to reform current maternity legislation.

This attention appears to have stimulated considerable interest. Six months ago, maternity was the ninth most popular 'hit' on the Acas website. In April, it was the third. Similarly, calls to the Acas helpline about maternity saw a surge in response to 'Flexibility and Choice'.

Calls from employers were to the fore with the majority coming from smaller organisations, for whom the challenge of handling maternity is especially acute. As part of the EOC's ongoing investigation into maternity rights Acas carried out a series of focus groups with small employers to explore their experiences of managing pregnancy. This article explores some of the key findings.

### Negative response

Maternity is unequivocally regarded as a problem for small employers. Even the most supportive admitted somewhat guiltily and regretfully that their first response would be negative: "nightmare", "expense", "your heart sinks... it's the hassle factor. You're delighted for the individual, but it's another thing you have to worry about."

The factors contributing towards this sense of negativity largely reflect those identified in the EOC's investigation (*Tip of the Iceberg*, 2004). For the most critical, these included

a sense of hostility towards employment law generally and a belief that employers should not be responsible for bearing maternity costs; a desire to operate as free from regulation as possible; and a feeling that smaller companies bear the burden of employment law (including maternity legislation) disproportionately.

One shared perception of interviewees was that all the rights are on the side of the employee, while all the responsibilities fall to them. In fact, many employers, while being well versed in employees' maternity entitlements, were unaware of their own right to notice periods or evidence of ante-natal appointments. Those that did know, however, were often uncomfortable or hesitant in using them because of an unwillingness to damage the trust relationship between themselves and their staff or because they thought this was somehow 'not the done thing.' Ironically, we know from calls to our helpline that employees who are not contacted during their maternity leave often feel isolated, marginalised and devalued.

There was a frustration with what many felt was a failure of maternity legislation to recognise 'good' employers. Even when they went out of their way to make generous provision for their pregnant employees, they felt they were still in danger of falling foul of the law because they had overlooked a technicality.

### Employing women of childbearing age

A worrying consequence of this frustration and sense of unfairness was the view expressed by many who thought that increasingly generous

maternity provision meant that employers were becoming less likely to employ women of child-bearing age. Several employers in our sample were prepared to acknowledge that they had discriminated in this way in the past, including some who appeared to treat their pregnant employees fairly and generously.

Moreover, the definition of a woman of child bearing age was thought to be growing ever wider now that women are having children later. This is likely to increase the number of people who could potentially be subject to discrimination.

### Managing pregnancy

The overriding problem for small employers is that of handling maternity leave. The absence of an employee for up to a year, coupled with the uncertainty about whether and when she will return to work, combine to produce a raft of interlocking costs and problems, about which they found it difficult to reach agreement with employees. Chief among these are making arrangements for when maternity leave will start, when the employee will return to work and covering the employee's absence.

The main reason maternity leave caused such problems was because of the uncertainty involved in arranging cover for the employee's absence (or deciding not to do so). Very small companies would often try to cope by not recruiting to fill the role. But this either resulted in an increase to workloads of remaining employees and the potential to generate resentment, or a reduction in business, leading to the long term loss of business and key clients.

The other main option for employers was to hire a new

member of staff. But this too presented a raft of problems including recruitment costs, the dilemma of whether to employ temporary or permanent staff, the time and cost involved in training, and the problem of what to do with the permanent replacement if the original employee returned.

Managing other aspects of maternity, such as handling absences for ante-natal appointments, or agreeing flexible hours on a woman's return, were generally thought much less problematic.

Health and safety was rarely raised spontaneously as a cause for concern and yet it was clear that many employers were not fulfilling their responsibilities in this area. Most had not conducted a formal risk assessment, either because they were unaware of their duty to protect health and safety or because they thought that fulfilling this duty was largely a matter of 'common sense'.

**Information and Advice**

Employers tended to believe that their information needs had

largely been met. They also said they found it easy to access detailed information quickly. Yet there are clearly identifiable gaps and misunderstandings in their knowledge, pointing to a need for more proactive distribution and promotion of information.

Government proposals for a one stop information website on pregnancy and maternity rights and good practice are therefore to be welcomed, along with the general aim of improving communication between employers and women during maternity leave.

As part of Acas' online service we run Tiger (Tailored interactive Guidance on Employment Rights), that provides practical help to both employers and employees in planning maternity. We know that the tool is well regarded by those who use it and, with some extra publicity, it could play an important role in the government's desire to improve information available to working parents.

Above all, there is a need for automatic distribution to small employers of information about

their rights and responsibilities to pregnant women – whether through employer's organisations, Inland Revenue, chambers of commerce or via women themselves at their first ante-natal appointment, as the EOC proposes.

As well as acting as a de facto maternity policy for small organisations that do not have a written policy, it would also help to reassure employers that the legislation is not entirely biased against them, by drawing attention not only to their responsibilities but also their rights. It would help employers to feel more comfortable and confident enforcing these rights, and encourage an improvement in communication between themselves and their employees.

Please go to [www.acas.org.uk](http://www.acas.org.uk) to see the full report, *Pregnancy at work: Research to explore experiences of employers in small firms*. Acas' response to the Government consultation, *Flexibility and choice*, will also be found there.

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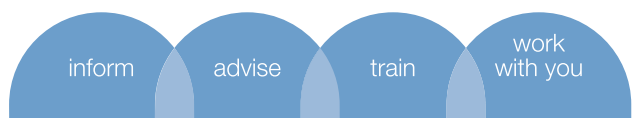
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## Managing disability

New and proposed changes in legislation require all of us working in employment relations to develop an increasingly sophisticated understanding of disability. This is true both in terms of what the legislation is saying but also, crucially, in the management of employees, both those with a disability and those without.

For small firms with under 15 employees, changes from October 2004 now bring them within the scope of the Disability Discrimination Act (DDA). This group now have to get to grips with the new concept of reasonable adjustment that does not exist in other areas of discrimination legislation, where the emphasis is on the avoidance of different treatment.

The DDA not only requires an employer to ensure that disabled employees receive equal treatment, but also to treat workers differently. This is because they are expected to take into account the impact of the workplace and working practices on the ability of any employee with a disability to carry out their job. And, it places a duty on them, where reasonable, to make changes that will facilitate this happening.

It could be argued that, as a result, employers have to become more actively involved with individual disabled employees from the outset than is the case for other employees. For the rest of the workforce, the new discipline and grievance procedures do require employers and employees to sit down and work with each other, but only once a problem has developed.

Employers previously covered by the DDA may be ahead of the game in some respects,

but evidence suggests that levels of awareness and ability to effectively manage the employment relationship with disabled staff remain in their infancy.

There are further changes on the horizon. The new Disability Discrimination Act (2005) includes an extension to cover disabled employees with asymptomatic HIV, MS and some cancers from the point of diagnosis. The Act also removes the 'clinically well recognised' requirement for mental illness. Instead the focus will be on the impact of the employee's mental illness on day to day life, as is already the case for physical disabilities. This means that many more employers will be employing people covered by the law and more will be managing staff with so called 'hidden disabilities', making the way employers deal with disclosure of disability a core issue.

### Myths and misconceptions

The Disability Rights Commission (DRC) is currently engaged in a major campaign to demystify rights and responsibilities for employers under the current Act, with a particular focus on smaller organisations for whom it realises recent changes are particularly challenging. The aim is to enable employers to understand the benefits of employing disabled workers and to feel confident about recruiting, managing and promoting them.

The statistics on work and disability are revealing. There are an estimated 6.8 million disabled people of working age in Britain, of whom a slightly larger proportion are men (52 per cent). There are

around 3.4 million disabled people in work, but a further 1.2 million would like to work but are unemployed. Since spring 1998, disabled people's overall employment rate has increased steadily from 43 per cent to 50 per cent. Despite this progress, there remain significant inequalities in the proportions of disabled and non-disabled people in work – only half of disabled people are in employment compared to four-fifths of the non-disabled population.

It is estimated that the spending power of disabled people is now around £80 billion. But although the benefits of reflecting your customer base may be a convincing argument for larger retail organisations, this is less true for smaller employers. This is particularly so where the customer base is confined to a small number of larger firms further up the

Key amendments under the DDA in force from 1/10/04 include:

- Removal of small business exemption for businesses with fewer than 15 employees.
- Change to the burden of proof whereby if an employee establishes facts from which discrimination could be inferred. It will be the employers responsibility to prove a tribunal that it did not discriminate unlawfully.
- Prohibition of harassment based on disability (which could include bullying).
- Removal of the justification defence in respect of a failure to make reasonable adjustments (at the moment the DDA allows employers to justify failures to make reasonable adjustments where they can show material and substantial reason).

supply chain. Attracting the best candidate from a diverse pool is a sound resourcing strategy that applies equally to all types of organisation, but one that will only make sense for some employers if fear of the implications of employing someone with a disability is overcome.

Misconceptions around who is disabled, and what is needed to make reasonable adjustments to accommodate this group, are still prevalent amongst all types of employer, irrespective of size or sector. Although clearly not the case for all employers, perceptions of disability often remain restricted to obvious physical and sensory impairment – someone in a wheel chair or someone who is profoundly deaf – as opposed to a spectrum of disability, which at the less severe end might include someone with diabetes, or someone with depression. The lack of awareness of what constitutes disability leads many employers to claim they have no experience of employing disabled people.

Because of this, many fear making reasonable adjustments will be a complicated and costly exercise. In fact, it often means a simple tinkering with hours, or planned time off to attend medical appointments, or being creative about how work is organised. In one organisation, for example, a woman with manic depression offered to do extra work during manic periods, allowing her to take time off during depressive periods. Many changes can therefore be cost free. Even where physical adjustments to premises are needed, these do not necessarily involve significant costs, for instance clearing walkways to provide easier access. And, where they do, employers can apply for funding from the government's Access to Work Scheme.

## Managing disability

Convincing employers of the benefits of employing disabled staff, is only half the battle, however. Training managers in effective people management skills and developing a culture of inclusion are crucial. Failure to do so can be a costly business. Cases brought under the DDA have seen payouts of up to a quarter of a million pounds. These high rates of compensation are due largely to the inclusion of 'future loss of earnings' awards where the failure to effectively manage the employment relationship with a disabled employee has led to a worsening of their condition and left them unable to continue working.

A common factor in such cases is the failure to effectively manage long term absence.

## Disability and absence

High rates of sickness absence, particularly in the public sector have significantly raised the profile of attendance management more generally, over the past five years. The CBI estimates that absence costs British industry £12.2 billion each year. Understanding where disability fits within an attendance management programme, and the ability to differentiate between absence on the grounds of disability as opposed to sickness or other reasons, is a crucial part of managing disability.

Line managers are central here. Increasingly they have delegated responsibility for handling absence and need support that will enable them to handle issues sensitively, particularly where conditions are associated with social stigma such as mental health or HIV.

The risk is that, if line managers are not properly trained, they may deal with

their colleague inappropriately or avoid talking about the issue altogether. In some cases, the skills they need are akin to a form of counselling, which may be a daunting prospect. Or they may view this new responsibility as peripheral to managing the technical aspects of the job and meeting operational targets. Such lack of confidence and understanding of disability issues risk a breakdown in the employment relationship and future problems in terms of work related stress absence.

## The new Disability Discrimination Act

The Disability Discrimination Act (2005) extends the scope of the 1995 Discrimination Act. Requirements are expected to be brought into force between December 2005 and December 2006.

- People HIV and multiple sclerosis and cancer (some cancers may be excluded) will now be covered from the point of diagnosis (December 2005).
- The clinically well recognised requirement for mental illness will no longer apply (December 2005).
- There will be a public sector duty to promote disability equality, paralleling the race equality duty, (December 2006).

For more information see the Disability Rights Commission website at [www.drc-gb.org/documents/dda2005briefing.doc](http://www.drc-gb.org/documents/dda2005briefing.doc)

The DRC advises employers to ensure that any absence management policy includes an option to record disability-related absence separately from other sickness absence. This approach helps to guard against the risk of employers unlawfully penalising disabled employees for a long period of absence if the reason is directly related to their disability.

Having such a policy also means that the employer creates a climate where disabled people who know they may need time off to have surgery or other treatments can plan appropriate leave or absence with their manager. The Crown Prosecution Service (CPS) has recently established a disability special leave scheme, making a clear differentiation between sickness absence and authorised leave.

Where employees do need to take longer periods of time off, it is essential that rehabilitation begins almost immediately. Employers should be thinking about encouraging that person back to work from the outset. Advice on managing absence generally advises employers to contact employees after a few weeks just to keep in touch. There is an emerging view, however, that unless there is contact from day one, the chances of that individual returning to work in the long term will be seriously weakened.

### Organisational culture

Understanding the importance of line managers' contribution to organisational culture and managing performance is equally important. Their position at the sharp end of attendance management requires support from HR and occupational health colleagues. Their levels of awareness and skills can also be enhanced through performance appraisal, management development programmes and, more specifically, through

training on return to work interviews. Crucially, they need to understand the underlying causes of absence – whether they are health related or a symptom of the culture and the attitudes of managers themselves.

How managers handle disclosure of disability is a priority. The perception of people who are HIV positive or suffer from mental health problems, for example, is that disclosure will have a negative effect on colleagues' attitudes. Employers need to recognise that this fear exists and acknowledge the importance of respecting people's right to confidentiality. At the same time, there is a growing acceptance that training colleagues in disability awareness where there is associated stigma is a key factor in creating an inclusive and healthy workplace culture.

For smaller organisations that are less likely to have written policies and an HR resource, access to external information and effective signposting is crucial. It is for this reason that the DRC has produced the SME toolkit. But help is also at hand from Acas, CAB, CIPD and Disability Employment Advisers at job centres, and jobcentre plus offices.

In order to encourage best practice among employees on equality issues, it makes sense to emphasise the business case based on the benefits of a diverse workforce. The threat of the deterrent power of the cost of tribunal claims can just fuel

resentment. Most importantly, it is the cost of absence that best complements the argument for managing disability. The inclusion of hidden disabilities in the new DDA will challenge previous assumptions and inaction. Employers will have little choice but to take a more proactive stance and this will benefit all those involved in the employment relationship.

### Sources of help and advice

The DRC provides information and advice on employment and disability for employers and employees at [www.drc.org](http://www.drc.org) and via its free and confidential helpline (08457 622633)

The Acas helpline (08457 47 47 47) provides information and advice on employment legislation and good practice on a confidential basis to employers, employee and their representatives. In addition, Equality Direct (08456 00 3444) is a dedicated helpline for small businesses

Acas equality and diversity advisers provide advice and support to larger organisations on policies and practices, working with employers to recommend improvements, and help put in place and provide training where needed. See the Acas website at [www.acas.org.uk](http://www.acas.org.uk)

*This feature is based on material and information supplied by Michelle Valentine of the Disability Rights Commission. We are extremely grateful for her help.*