

Equal Pay Act 1970: the questionnaire Confidentiality and data protection issues concerning comparators

Introduction

Individual employees have become able to use the new Equal Pay Questionnaire from 6 April 2003 to find out how their colleagues' pay is set. The main issue to arise from this development of the Equal Pay legislation, and the procedure by which issues over Equal Pay are dealt with, concerns the confidentiality of which may be regarded as private information which colleagues and many employers prefer to keep confidential.

The Enquiry – Questionnaire

The standard format of questionnaire invites the individual serving the questionnaire to "give the names or, if not known, the job title(s) of the person or persons with whom equal pay is being claimed. These are referred to as your "comparators". These standard questions require the employer to "agree or disagree" with the statement that the individual is receiving or has received less pay than these comparators, and to explain their response.

The individual serving the questionnaire is also encouraged to add "any other relevant questions" which they think may be important. For example, they may want to know:

- Details of how pay is determined for them and their comparator within the organisation, e.g. details of pay schemes, job grading systems or how skills and experience are reflected in the pay system;
- Information relating to the pay and benefits package of the individual and his or her comparator(s), e.g. basic pay, benefits such as company car, private

health insurance and occupational pensions;

- Whether the individual's employer thinks that there are significant differences between their duties and those of the comparator(s);
- Details of the duties (e.g. job description and person specification), the individual post(s) of the comparator(s).

Through these additional questions, employers will be asked to provide information that has hitherto been kept confidential between the employer and the comparators. This could include details of personal performance and appraisals which they may regard as personal data within the meaning of the Data Protection Act 1998.

Not Compulsory, but Adverse Inference

Whilst the questionnaire procedure encourages employers to disclose relevant information about salary details and comparators in order to answer the questionnaire as fully as possible, there is nothing in the rules relating to questionnaires that mandates an employer to answer such questions. Rather, the position is that if the employer deliberately, and without reasonable excuse, does not reply within eight weeks, or replies in an evasive or ambiguous way, the Tribunal may take this into account and the employer's position may be adversely affected should the complainant bring proceedings.

Conflicting Obligations?

It is recognised that the employer may have pre-existing obligations to the comparator employees, which may be inconsistent with a full, candid and non evasive response to

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any questions asked. The guidance notes that accompany the questionnaire address this. Section 5 of these notes asks, "What if the employer is asked to identify confidential information?". The guidance notes acknowledge that a problem exists when employers are asked to provide information that is confidential to another person if that colleague does not want it disclosed. In fact, the questionnaire states that "certain information about individuals is protected by the common law of confidence and the Data Protection Act 1998". The guidance notes go on to say "Where information is confidential, an employer would only be able to disclose the information if he had the consent of the individual in question, where he had a legal obligation to do so, or where there was a strong public interest requirement". This sums up in one sentence the legal position.

"Confidential" is not a term used by the Data Protection Act, which only recognises distinctions between 'personal data' and 'sensitive personal data'. The latter relates to information concerning racial or ethnic origin, political opinions, religious or other similar beliefs, trade union membership, physical or mental health or condition, sexual life or criminal offences. People may be 'sensitive' about their pay package or appraisal contents, but this information gets no special protection under the Act, as 'sensitive personal data'. It is, however, 'personal data' and can be processed lawfully under the DPA without consent, provided the processing meets at least one of the conditions set out in Schedule 2 to the Act. There are three possible categories that might apply:

- Processing is necessary for compliance with the legal obligation that the employer is subject to. It is difficult to see how this would apply before any

Equal Pay Act Tribunal proceedings are instituted, because there is no compulsion to respond to the questionnaire; only an adverse inference can be drawn if an evasive or no response is given.

- Disclosure is needed for the administration of justice. Again, this would only apply where Tribunal proceedings had been instituted and does not cater for service of an Equal Pay Questionnaire where there are no Tribunal proceedings contemplated.
- Disclosure is necessary for the purposes of legitimate interests pursued by the data controller or by the third party to whom the data are disclosed, except where the processing is unwarranted by reason of prejudice to the rights, freedoms or interests of the data subject.

It is the third of these categories that is most likely to allow disclosure in these circumstances. The nature of this third category is that it requires some degree of balancing between the legitimate interests being pursued: - the answering of the questionnaire to avoid any adverse inference being drawn; or the pursuit of the Equal Pay claim by the third party employee; and the rights, freedoms and interests of the data subject (the comparator). This would tend to suggest that it may be more difficult to disclose detailed information about salaries than a simple answer to the question proposed in the questionnaire, namely "Does the comparator earn more than me?". This yes/no answer is clearly less detrimental to a potential comparator than stating their previously unknown salary details.

The Employment Practices Data Protection Code, 'Employment Records: An Employer's Guide' sets out benchmarks in

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connection with disclosure requests. Benchmark 3 states that “Unless you are under a legal obligation to do so, only disclose information about a worker where you conclude that in all the circumstances it is fair to do so. Bear in mind that the duty of fairness is owed primarily to the worker. Where possible, take account of the worker’s views. Only disclose confidential information if the worker has clearly agreed”. It is this benchmark which recognises the inherent problem over the common law duty of confidentiality. This duty of confidentiality may make the disclosure “unwarranted by reason of prejudice to the rights, freedoms or interests of the data subject”.

Is it safe to respond?

If the information requested is confidential, e.g. sickness or earnings, only disclose if you have obtained the worker’s consent. If that consent is not given, you may not be penalised by the drawing of adverse inferences if you respond to a request for information about a particular comparator by stating simply that the comparator has refused to consent to the giving of information. Section 6 of the guidance notes to the Equal Pay questionnaire states that “The reason for any refusal should be clearly outlined in the questionnaire. It is important that the explanation for any refusal is both genuine and clear”. This encourages the Tribunals to question such a refusal where they will need to be convinced that an employer has not manufactured the comparator’s refusal.

Thinking out of the Box?

There are other ways to provide sufficient information to persuade the individual serving the questionnaire that sex has not played a part in any relevant pay decisions.

The guidance notes to the questionnaire suggest that “In many cases, employers will be able to answer detailed questions in general terms whilst still preserving the anonymity and confidence of the worker”. The notes give examples of “describing groupings on a pay scale” or confirmation “that a comparator’s pay is above a certain rate”. It also suggests that “Where more than one comparator is named, information could be provided in an anonymised way. If only one comparator is named, employers could provide some of the information being sought in a generalised fashion, e.g. by explaining more fully how the pay system operates. Much of the information requested will not be confidential. It could include details of pay schemes, job grading systems and job descriptions or how skills and experience are reflected in the employer’s pay system.” Such responses will assist the employer in appearing “non evasive” and also avoid any data protection or confidence problems because this is data which neither identifies individuals, nor breaches individual confidences.

This information sheet has been prepared to highlight some key issues relating to The Equal Pay Act 1970. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at July 2003 and may be affected by subsequent changes in the law. Should you require any specific legal advice on the issues covered, please contact Nick Hobden by email at nick.hobden@ts-p.co.uk or call on 01892 701326.