The colour purple

***Alexandra Carn** discusses employment rights, looking at equal pay issues and the different types of discrimination claims a company might face*

From the Golden Globes to the BBC – the sound of the furore on equal pay is deafening. With the deadline for publication of gender pay gap details for companies with more than 250 employees set for 4 April this year, the drums were already beating – and that was before Tesco was presented with a reported £4bn demand for back pay.

The financial services sector has one of the biggest gender pay gaps in the UK. According to a report released by Staffmetrix, a workforce analytics consultancy, in October 2017, the median pay gap between men and women in financial services is 31 per cent. Although women make up 50 per cent of the workforce in the sector, they hold only 25.5 per cent of senior positions. But statistics should always be taken with a pinch of salt. In February 2018, the Fawcett Society, a charity for women's rights dating from 1866, called for a clampdown on "fake" gender pay gap reporting, following several companies reporting a 0 per cent gender pay gap and others reporting absolute equality, with women accounting for precisely 50 per cent of lower, middle, upper and higher wage earners.

> *Women make up 50% of staff in financial services but hold only 25% of senior positions*

Some companies openly admitted to publishing incorrect figures, including one employment agency, which made the refreshingly honest comment: "I don't think we've filled this out right." Nonetheless, circumspection about statistics aside, the male/female pay divide remains real.

Equal pay legislation in the UK dates back to the days of the Dagenham sewing machinists' strike in 1968 and was originally enshrined in the Equal Pay Act 1970. But the arguments go back further. The National Federation of Women Workers, for example, struck for, and gained, a minimum wage for "small chain makers" in 1910, the first guaranteed minimum wage in the UK.

The Equal Pay Act was absorbed into the Equality Act 2010 and the legislation remains a complicated beast. The principle that men and women doing like work should be paid the same amount should be simple. But, to misquote Oscar Wilde, the law is rarely pure and never simple. Equal pay also enshrines the concept of "work of equal value", which is a far more subjective matter and one usually determined by an "expert". This in turn raises the question of how many experts there are for different types of work or, cynically, how many experts does one really need. As an equal pay claim is a claim of discrimination, a woman making it must compare her pay to that of a man. It also means that to pay two women doing the same job differently would not infringe any laws.

Once a claims starts, however, it can have knock-on-effects that employers rarely welcome. Consider, for example, a desk that employs four men and one woman, doing different but similar jobs. Everyone is paid the same, save for one man who is paid more. The lower-paid men cannot claim for equal pay as they are paid the same as the woman. But the woman claims discrimination, naming the highest paid man as her comparator. She wins the claim and is now paid the same as the highest-paid man. Now, though, the lower-paid men can claim discrimination, using the woman as their comparator. A male employee on a different female-dominated desk then hears about the claims and brings a claim on the basis of equal value and so on, ad infinitum.

The above example relates to "pay" only. Discretionary pay (ie a bonus) is not "pay" in this legal context as it is not a guaranteed contractual entitlement. Despite the cap on bonuses in some parts of the financial services (see *FW*, August/September 2016), bonuses remain a substantial element of remuneration in that sector. The Staffmetrix report found that financial services had the second-biggest median bonus gender pay gap of 36 per cent, trumped only by the arts and entertainments sectors at 49 per cent.

Paying one gender a lesser bonus is unlawful if the reason for the lesser pay is their sex (direct discrimination). It is also unlawful if the provisions for getting a bonus put one gender at an unjustifiable disadvantage (indirect discrimination). Indirect discrimination claims have historically centred on provisions regarding requirements to work certain hours,

something women, who as a group have more childcare responsibilities, find harder to comply with. But as society continues to evolve with greater shared responsibilities between the sexes, the assumption of disadvantage to women is becoming increasingly open to challenge.

Sex discrimination is not just about pay. Complaints include marginalisation, inappropriate behaviour, retaliation following family leave or the making of complaints and – perhaps the hardest of all for any organisation to address – unconscious bias. The reported shenanigans of the Presidents Club dinner in January this year do not reflect well on the intelligence of the male glitterati, not least if the most "amusing" slogan they could come up with was "Spice up your Wife!", but generally such overt discriminatory conduct is rare.

Moreover, where discrimination is overt, most cases are settled. This can be either to avoid difficult publicity for the employer or because it is not cost-effective to defend the claims – sex discrimination cases have to be brought in an Employment Tribunal and legal costs are rarely awarded.

Cases that are fought can go either way. Schroders Securities lost a £1.4m case in February this year. In 2010, in contrast, none of the sex discrimination claims totalling £4m that were brought by the senior marketing executive Jordan Wimmer against Nomos Capital, a hedge fund, was upheld.

Discrimination claims are comparatively prolific in high-earnings workplaces. This is in part because, if an employee is dismissed in the ordinary course, the maximum compensation that can be awarded is approximately £80,000 for unfair dismissal. But in claims for discrimination, compensation is potentially unlimited. A banker earning £500,000 a year who loses his or her job and is out of work for a year will find £80,000 scarcely touches the sides

> *Compensation for injury to feelings has recently been increased to £42,000*

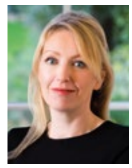
of his or her loss of earnings. But if the dismissal had a discriminatory element, whether on the grounds of sex or other protected characteristics (mostly commonly age, race or disability), then a successful claim may award compensation against future loss in six figure amounts.

Discrimination claims also allow compensation for injury to feelings and for personal injury – neither of which is available in vanilla unfair dismissal claims. Compensation for injury to feelings has recently been increased to £42,000 and personal injury claims are not subject to any cap on compensation.

No article on employment rights would be complete without a mention of Brexit. Although it has been stated that the European Union (Withdrawal) Bill will transpose existing employment rights into the post-Brexit UK statute books, the current wording of the bill allows for significant changes. That means the EU "backstop" on non-discrimination rights could be removed.

The Fawcett Society is calling for existing rights to be cemented against future erosion, but also for increased rights and remedies, such as civil penalties for non-compliance with pay reporting, enhanced maternity and family-friendly rights, and extension of legal aid to employment claims.

In the context of a male/female divide, perhaps what is called for is a "purple" Brexit – a mix of the stereotypical pink and blue that embraces the rights of men and women across the board. True diversity is not just about recognising that individuals look different but also acknowledging the fundamental right of individuals to think differently. ■



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Agony Uncle

Weighing anchors

Dear Nadim,

I work as a senior financial adviser for a large independent financial advisory partnership, based in Norwich. I love my job, I am good at what I do and have some fantastic clients. Eighteen months ago, I was promoted and given responsibility for training new paraplanners and junior financial advisers. My boss told me that, by taking the lead for training, I would be adding more value to the business. I saw this as a great opportunity to develop my skills and boost my profile. But this has not turned out to be the case.

The past 18 months have been the least enjoyable period I have ever known at work. I am spending much more time managing other people than I expected. This also means I have to deal with many issues that take me away from covering my own workload. To make up the time, I am working late nights and at weekends.

To cap it all, the new job has changed the way I work. In the past, I worked mainly alone and had a lot of autonomy when it came to managing my clients. Now that I have full responsibility for the new trainees I feel I am in a bit of a straitjacket. I seem to have lost the joy that I once took in my role.

The bottom line is: how can I tell my boss that I do not want any more management responsibility without damaging my prospects and hurting my relationship with him? If nothing else, I do not want him to think I am ungrateful for the chance he gave me, particularly as there are others in my company who would have been delighted to be offered this role. Would it be a bad career move to find something else that did not have the added weight of managing others?

I know I am an excellent adviser and can make my company a lot of money, but I am not a natural manager. It just does not appeal to me. All in all, I find myself in a bit of a pickle. What is the best way to broach this conversation with my boss?

Thanks,

James, 38, Norwich

Nadim says:

Dear James,
You might be surprised to hear that your case is not unusual. This is a classic example of believing that "managing others" is the only way to progress in an organisation or in developing your career.

First, it sounds to me like you are a technical expert in your field. Most people in financial services can be grouped as technical/functional experts or general managers – these are the two key competencies that highlight one's career values or career anchors. Edgar Schein, a leading organisational psychologist, came up with eight key career anchors that people naturally identify with. You can find out which best reflects your style by taking the career anchors test, which is a 40-item questionnaire.* You will probably find it helpful to ask yourself which fits you best.