

Appendix 16: The legal right to equal pay for equal work (See Article 11)

In recent years, the UK tribunals and courts have seen mass litigation on equal pay. Since 2005, over 200,000 equal pay claims have been lodged at the employment tribunal. Almost all these cases are multiple complaints from women seeking equal pay for work of equal value or work rated as equivalent against a small number of public sector employers. Trade unions have represented women in the majority of these cases and trade unions have also been negotiating new pay structures and seeking collectively agreed remedies for historic inequalities within many more public sector employers in recent decades.

This recent mass litigation and equal pay activity in the public sector has arisen as a result of a range of factors. The ruling by the European Court of Justice (EJC) in the Enderby vs. Frenchay Health Authority in 1993 opened the door to many more challenges. The ECJ ruled that it was sufficient to establish indirect sex discrimination for there to be a male-dominated group of employees receiving higher pay than a female-dominated group doing equal work and that an employer could not justify such a difference by saying that it was the result of separate bargaining arrangements. This increased the pressure to move to single-table bargaining and pay structures that covered the whole workforce where previously separate terms and conditions had applied to different groups in the public sector.

The UK Government's refusal to provide additional funding for new pay structures in local government led to some difficult and prolonged negotiations. It meant equal pay for women had to be delivered by cutting the pay of men to some degree rather than by simply levelling up the women's pay. The costs of providing equal pay have been very high in local government because of the large numbers of women employed in care, catering and cleaning services, comparing themselves to men in jobs such as maintenance, gardening and refuse collection, the long service of many of the women and the increase in the maximum compensation from two years to six years' back pay in 2002. The size of the compensation awards also made equal pay litigation attractive to 'no win, no fee' lawyers who have signed up many women to lodge claims.

Equal pay case law has become increasingly complex in the UK as public sector employers have sought to defend these very costly claims and have run very sophisticated legal arguments. While the number of new equal pay claims being lodged at tribunal has begun to decline since 2007/08, the existing cases will take years to reach conclusion as different points of law are heard and appealed to higher courts (there are four potential layers of appeal – Employment Appeal Tribunal, Court of Appeal, Supreme Court and potentially the Court of Justice of the European Union) before returning to the tribunal. In 2010/11, 34,600 equal pay cases were lodged at tribunal but only 280 reached a successful conclusion.

The Trades Union Congress (TUC) called for fundamental reform of equal pay law at the time the single Equality Act 2010¹ was being developed. The Equal Pay Act 1970² had a distinct approach to tackling sex discrimination in pay and contractual terms and

¹ Equality Act 2010 <http://www.legislation.gov.uk/ukpga/2010/15/contents>

² Equal Pay Act 1970 <http://www.legislation.gov.uk/ukpga/1970/41>

conditions and its interaction with the Sex Discrimination Act 1975,³ which covered all other forms of sex discrimination, is complex and has created opportunities for sophisticated legal defences. However, the distinct approach of the Equal Pay Act was retained in the Equality Act 2010. Although there were some improvements in the statutory wording to give greater clarity to how defences to equal pay claims might work, it was frustrating that these provisions still require equal pay claimants to be able to identify an actual male comparator in the same employment doing equal work, except in cases of direct sex discrimination (which are comparatively rare nowadays). Many women, particularly those concentrated in low-paid, female dominated, part-time work, which attracts low pay because of the undervaluation of women's work, (See Article 11) are unable to challenge their pay as sex discrimination because they cannot identify an actual male comparator in the same employment (this is becoming increasingly difficult where groups of women workers have been contracted out to a third party e.g. as in the Allonby and Lawrence cases which went to the ECJ).

The TUC has long campaigned for the introduction of mandatory equal pay audits into UK law. This would place the onus for regularly checking pay systems for discrimination on the employer and require them to take action to remedy any unjustified pay gaps, rather than relying upon individual women to come forward and fight lengthy legal battles which, if successful, result in compensation and a contractual variation for the women concerned but do not necessarily result in the employer remedying the pay structure or practices that gave rise to the complaint. Mandatory equal pay audits would provide a collective solution to a collective problem.

We believe mandatory equal pay audits would also result in more equal pay in the private sector. The gender pay gap in the private sector is double that in the public sector,⁴ yet there has been extensive equal pay litigation in the public sector and virtually none in the private sector. In 2008/9, only 1.3% of equal pay cases lodged at tribunal was against a private sector employer. This is partly due to a lack of transparency in the private sector and lower trade union density making it much harder for women to identify where they are receiving lower pay for equal work or even identify where equal work is being done, especially work of equal value. In the public sector, it is more likely that there is a transparent, job evaluated pay and grading structures and collectively agreed policies setting out the basis for any additional payments.

In the 7th Periodic Report⁵ the Government cites the introduction of a new provision in the Equality Act 2010, which enables individuals to share information about how much they earn with their colleagues as enabling greater transparency. This provision prevents employers from taking disciplinary action against employees where employees have given or sought information about pay from colleagues in order to find out if there has been any discrimination. A study by the Equality and Human Rights Commission (EHRC) of pay practices in large private sector employers found that 49% gave staff no information at all about pay, 18% discouraged or forbade discussions about pay and only

³ Sex Discrimination Act 1975 <http://www.legislation.gov.uk/ukpga/1975/65>

⁴ Stephenson, M. (2011) *TUC Women and the Cuts Toolkit: How to carry out a human rights and equality impact assessment of the spending cuts on women*. TUC: London <http://www.tuc.org.uk/equality/tuc-20286-f0.cfm>

⁵ Government Equalities Office (2011) *CEDAW (Convention on the Elimination of all forms of Discrimination against Women) report. United Kingdom's Seventh Periodic Report*. GEO: London <http://www.homeoffice.gov.uk/publications/equalities/international-equality/7th-cedaw-report?view=Binary>

4% formally made employees aware of how much colleagues in the same role were earning.⁶ While this new provision is welcome, it is unlikely to lead to significant culture change among private sector employers as it is reliant upon individuals actively seeking information from a range of colleagues who may not have a clear understanding of what makes up their pay and how each element contributes to the whole.⁷

The Government also refers to its voluntary *Think, Act, Report* initiative to encourage gender equality reporting by employers with more than 150 employees in the private and voluntary sectors.⁸ The framework encourages employers to choose from a variety of gender metrics, among which are: the overall gender pay gap in the organisation, the full-time gender pay gap, the differences between men's and women's starting salaries and the part-time gender pay gap (though measured by comparing the pay of part-time women with part-time men and as such not reflective of the penalty women primarily suffer by working part-time). This scheme is entirely voluntary and the Government intends to report on the uptake a year after its launch. However, it is unlikely that many large private sector organisations will use this voluntary approach to report on gender pay gaps as the baseline report prior to the launch of the initiative showed that only 3.7% reported on gender pay gaps within their organisation and just 1.3% did so externally.⁹ There are powers in the Equality Act 2010 enabling the introduction of future legislation to make gender pay gap reporting mandatory on large private sector organisations. But it is not clear whether the Government will be willing to use these powers if the voluntary approach to gender equality reporting does not succeed.

The TUC is also concerned that gender pay gap reporting, i.e. reporting on overall gender pay gaps within an organisation, does not address whether or not an organisation is fulfilling the legal requirement of providing equal pay for equal work. Only an equal pay audit can give this assurance as it involves an assessment of where equal work is being done, comparing the pay of men and women doing equal work, determining whether any of the pay gaps between those doing equal work are justified (e.g. by personal attributes such as qualifications and experience), and taking action to close any unjustified ones.

The Government has recently consulted on proposals to make equal pay audits a mandatory requirement for employers who have lost an equal pay case at tribunal.¹⁰ In this consultation it refers to equal pay audits as "*the most effective way of establishing whether an organisation is providing equal pay and rewarding employees fairly*". The introduction of mandatory equal pay audits in some circumstances would be a welcome development but it must be recognised that it will apply to only a tiny proportion of employers as very few cases against private sector employers ever get to tribunal and of the public sector employers who have recently faced litigation, the litigation has been in

⁶ EHRC (2009) *Gender pay activity in large non-public sector organisations: Baseline report*

http://www.equalityhumanrights.com/uploaded_files/research/gender_pay_baseline_report.pdf

⁷ Transparency was described by the ECJ in the Danfoss case as meaning that pay and benefits are capable of being understood by everyone and that it should be clear to individuals how each element of their pay contributes to total earnings.

⁸ Government Equalities Office (2011) *Think, Act, Report Framework*

<https://www.gov.uk/government/publications/think-act-report-framework>

⁹ Home Office (2011) *Voluntary Gender Equality Reporting: Baseline Report 2011*

<http://www.homeoffice.gov.uk/publications/equalities/womens-equality/gender-equality-reporting/baseline-report?view=Binary>

¹⁰ Home Office (2011) *Voluntary Gender Equality Reporting: Baseline Report 2011*

<http://www.homeoffice.gov.uk/publications/equalities/womens-equality/gender-equality-reporting/baseline-report?view=Binary>

relation to legacy issues and the majority have already carried out equal pay audits and have taken steps to adopt equal pay proofed structures.

In the public sector, the Gender Equality Duty that was introduced in 2007 had acted as a further impetus for public sector employers to carry out equal pay audits and ensure equal pay was being provided in practice, as well as to address other issues that influenced the wider gender pay gap. The duty required public bodies to have 'due regard' to gender equality in all their functions, including employment, and it had a further specific requirement for public bodies to consider the need to take action to address the gender pay gap. An EHRC survey of equal pay audit activity in 2008 revealed that 43% public sector employers had carried out an audit compared to 23% of private sector ones.¹¹ The Gender Equality Duty was repealed and a new Equality Duty (s.149 Equality Act 2010)¹² applying to nine different 'protected characteristics' took effect from April 2011. This new duty does not have a specific duty related to the gender pay gap, except in Scotland where there is a requirement on Scottish public bodies to publish gender pay gap information and an equal pay statement, providing information on the public body's policies in relation to equal pay and occupational segregation. (See Annex 1)

Recommendations:

- **The introduction of mandatory equal pay audits for all employers**
- **Reform of equal pay law so that discrimination in pay can be challenged in all instances where there is no actual male comparator in the same employment**
- **Measures to ensure more efficient handling of equal pay claims**
- **A specific requirement within the Public Sector Equality Duty on the gender pay gap and equal pay as applies in Scotland**
- **If tribunal fees are to be applied to multiple equal pay claims they should not be applied until conclusion of the case**

¹¹ Adams, L., Hall, P. and Schafer, S. (2008) *Equal pay reviews survey 2008*. EHRC: London
http://www.equalityhumanrights.com/uploaded_files/research/2_equal_pay_reviews_survey_2008.pdf

¹² Equality Act 2010, Section 149 <http://www.legislation.gov.uk/ukpga/2010/15/section/149>