

EQUAL PAY: LESSONS FROM THE UK?

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The 29th December 2005 will mark the 30th anniversary of the implementation both of Britain's Equal Pay Act 1970 and of the Sex Discrimination Act 1975. In the intervening time full-time women workers have seen their hourly rates of pay, relative to those of full-time men, increase from 63% in 1975 to 81.8% in 2003. But the almost 50% of women in Britain who work part-time continue to earn less than 60% of the average hourly rate for full-time men (a figure barely changed since the implementation of the SDA and EqPA. Part-time workers are also disproportionately excluded from 'fringe' benefits such as pensions, sick-pay, company cars, transport subsidies, discounted goods, finance and/or loans, life assurance, private health care, childcare and recreation facilities, meal subsidies, accommodation and paid time off for domestic reasons. The TUC estimated in 1998 that fringe benefits were worth, on average, 86 pence per hour to full-time workers, but only 40 pence per hour to part-timers.¹

Cabinet Office figures released in 2000 indicated that, over a lifetime, highly skilled women lost £143 000 simply by virtue of being women, middle skilled women £241 000 and low skilled women £197 000. The cost of childbearing – £19 000, £140 000 and £285 000 respectively for high, medium and low skilled women – was in addition to the sex penalty.² In all, typical high skilled mothers earned 88% of the lifetime earnings of comparable men, typical medium skilled mothers 57% and typical low skilled mothers 34%.

The gender-pay gap persists within as well as between occupations. In 2001, for example, the gap between male and female managers in the United Kingdom stood at 24%. Within managerial subgroups, however, it ranged from 39% in distribution, storage and retail and around 30% in financial institutions and offices and other service industries through around 20% in hospitality and leisure, functional managers and health and social services to a low of 6% in production.

Research recently carried out by Sylvia Walby and Wendy Olsen for the Government's Women's and Equality Unit suggested that almost a third (29%) of the gender-pay gap is attributable to women being paid less simply because they are women, more than 50% of the remainder (26%; 15% and 12% respectively) resulting from differences in the length of women's full-time work experience, the more interrupted nature of women's working lives and women's greater tendency to work part time. Only a relatively small proportion of the gap (13%) was attributed to occupational segregation and a minimal 6% to differences in educational attainment.

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¹ Evidence to the Employment Sub-committee of the Education and Employment Select Committee of the House of Commons, March 1998, reported at p.109 of the Sub-committee's Second Report 1998-1999, *Part-time Working*, Volume II HC 346-II

² Briefing on women's incomes over the lifetime, Cabinet Office

Why is there such a disparity between the earnings of women and men despite almost three decades of legislative intervention? The first point to make relates to the complexities involved: in addition to the EqPA, any survey of the law relating to equal pay must also take into account EC provisions - in particular, Article 141 TEC and Council Directive 75/117 (the Equal Pay Directive). To the extent that UK law is compatible with the EC provisions, the former should be relied upon. But in those cases where UK legislation is inadequate (where, for example, the 'pay' whose inequality is challenged takes the form of unfair dismissal compensation which is covered neither by the EqPA nor by SDA), EC law can be relied upon either for the purposes of interpreting the UK legislation consistently with it or, where this is not possible, directly. In this latter respect the position regarding pay is unusual in employment law terms: whereas most EC employment provisions take the form of directives which can be relied upon by the individual, if at all, only against the state (whether as employer or otherwise³), Article 141 (and, to the extent that it serves only to apply Article 141, the Equal Pay Directive) can be relied upon as against private sector employers too.

As if all this were not sufficiently complex, some equal pay cases should be taken under the SDA, rather than the EqPA. The latter Act regulates only inequality in contractual terms: where the payment whose inequality is challenged is gratuitous (as in *Garland v British Rail Engineering*,⁴ in which the disputed 'pay' consisted of gratuitous travel concessions), the SDA should be relied upon. The SDA may also be used in respect of contractual benefits of a non-monetary form, so long as no claim is possible under the EqPA (i.e., where no comparator is available for the purposes of an EqPA claim).

British legislation imposes an individual model of 'equal pay'. The legal challenge to existing pay structures comes only from those employees directly affected by them, and then only if they can tailor their challenge within the narrow legal framework of the equal pay claim. There is no obligation upon employers to review pay structures for evidence of discrimination and, while some trade unions have been in the forefront of the struggle to improve women's pay, no recognised legal role for them.⁵

In order to challenge her rate of pay an individual woman (or man) must select a comparator of the opposite sex who is paid more than she (or he) is but whose work is equivalent in one of three ways: i.e., is either 'like' (broadly similar) work to that done by the claimant, or has been 'rated as equivalent' to hers by a job evaluation scheme carried out (or agreed) by her employer, or is of equal or less value than the work done by her.

Not only is the equal pay claimant obliged to put forward a comparator who fits one of these three sets of criteria but the comparator must, in addition, be employed by the same or an associated employer⁶ as the equal pay claimant and at the same establishment in Great Britain or one 'at which common terms and conditions are observed either generally or for employees of the relevant classes'.⁷

³ *Frankovich & Bonifaci v Italy*, Cases 6, 9/90 [1992] IRLR 84.

⁴ [1982] IRLR 111.

⁵ The EOC's powers to issue Non Discrimination Notices extend to 'discriminatory practices' (indirectly discriminatory practices even in the absence of a specific victim) but (see chapter 5), this provision has shown itself to be something of a dead letter.

⁶ The very narrow definition adopted by the EqPA. has been held by EAT, in *Scullard v Knowles and Southern Regional Council for Education and Training* [1996] IRLR 344, to be inconsistent with the broader approach taken by the ECJ in relation to Article 141's employment 'in the same establishment or service' with the effect that wider claims can be taken under Article 141 (which does not restrict 'associated employers' to companies as is the case under the EqPA).

⁷ EqPA, s.1(6). Northern Ireland is covered by almost identical provisions.

In *Leverton v. Clwyd County Council* the House of Lords interpreted this to permit a claim in respect of a comparator whose contract of employment was governed by the same collective agreement (this situation was, in fact, described by Lord Bridge as the 'paradigm, though not necessarily the only example, of . . . common terms and conditions'⁸).

A woman may choose more than one comparator for an equal pay claim, and might be well advised to do so in order to multiply her chances of success.⁹ But this tactic is not without its pitfalls: in *Leverton v Clwyd* the House of Lords, *per* Lord Bridge, counselled industrial tribunals to:

be alert to prevent abuse of the equal value claims procedure by applicants who cast their net too wide over a spread of comparators. To take an extreme case, an applicant who claimed equality with A who earns £X and also with B who earns £2X could hardly complain if an Industrial Tribunal concluded that her claim of equality with A itself demonstrated that there were no reasonable grounds for her claim of equality with B.¹⁰

The reluctance of their Lordships to permit multiple-comparator claims is perhaps understandable given the delays and expense associated with the investigation of equal pay claims, in particular where the claim is one of equal value (which, until recently, required an independent expert's report if it was to succeed). But there are real difficulties in choosing an appropriate comparator, particularly in an equal value claim, when information on pay and job requirements is hard to come by outside heavily unionised workplaces. In addition, even independent experts rarely share similar approaches to the evaluation of jobs.

The three possible types of claim consist, as was mentioned above, of 'like work', 'work rated as equivalent' and 'work of equal value'. 'Like' work is defined by s.1(4) of the EqPA as work which 'is of the same or a broadly similar nature . . . the differences (if any) between [the jobs] . . . not [being] of practical importance in relation to terms and conditions of employment; and accordingly in comparing [the jobs] regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences'. In introducing the EqPA, the Secretary of State Barbara Castle was keen to stress that 'like work' went well beyond the 'same job', a definition which she claimed was 'so restrictive that it would merely impinge on those women, very much in the minority, who work side by side with men on identical work'.¹¹ Hence, she claimed, differences between jobs had to be 'of practical importance' in order to preclude a 'like work' finding. The approach of the tribunals has not always been as Mrs Castle envisaged it.

⁸ [1989] IRLR 28, p.31.

⁹ This is true particularly in equal value cases and where a material factor defence might cover one, but not another, comparator.

¹⁰ In December 1994 the Green Paper *Resolving Employment Rights Disputes: Options for Reform* (London: HMSO, 1994) Cm. 2707 suggested that equal value applicants be limited to a single comparator. The suggestion has not been acted upon, perhaps in part as a result of EOC opposition.

¹¹ 795 HC Debs 915 (9 February 1970).

Work will be regarded as having been 'rated as equivalent', according to s.1(5), if the jobs of the applicant and her comparator(s) have been given equal value in a job evaluation scheme which has considered the demands made upon all or any employees in an undertaking or group of undertakings under headings such as skill, effort and decision-making, and which has been agreed by the parties thereto.¹² 'Equal value' does not mean *exactly* equal value - EAT accepted in *Springboard v Robson* that, if the scheme assigned value within bands (100 - 120 points, for example, or 410 - 449 as in *Springboard*), then the placing of two jobs within a single band (in *Springboard*, at 410 and 428) was sufficient to render them 'equivalent' for the purposes of s.1(2)(b).¹³ Jobs will also be taken to have been rated as equivalent if it would have been given the same value under the scheme but for the fact that different values were assigned, according to sex, to the same levels of effort, skill and decision-making, etc. In order that an employee is entitled to claim under s.1(5), the job evaluation scheme in question must have been *analytical* in form (that is, it must have considered jobs under various sub-headings, such as skill, effort and decision-making, rather than comparing them in the round¹⁴). An applicant can only rely on a *discriminatory* job evaluation scheme to claim equal pay if she claims that the scheme directly and obviously discriminated by assigning different values to the same levels of skill, effort, decision-making etc according to whether the job-holder was male or female.

In order to succeed in a claim based on a (non-discriminatory and analytical) job evaluation scheme, the scheme must have been accepted by both sides (employer and employees or representative trade union) but need not actually have been applied to the pre-existing pay structures. So, for example, in *O'Brien v Sim-Chem Ltd*, the House of Lords found in favour of the applicant women whose jobs had been rated as equivalent to those of their male comparators, but whose employers had failed to implement the new structure because of the Government's income policy.¹⁵ Overturning the decision of the Court of Appeal, their Lordships ruled that the right to equal pay vested at the moment when the conclusion of equal value was reached. Whether or not the scheme was ever applied was an irrelevance. And in *Arnold v Beecham Group Ltd*, the applicant's claim was accepted by EAT despite the fact that the job evaluation scheme which had rated her job as being of equivalent value to that done by her comparator had proven too controversial to provide the foundation for a new pay structure, and so had been left aside by employer and trade union. Although an 'equivalent value' equal pay claim required a completed job evaluation study and although this, in turn, required that the parties involved in it had accepted it as valid, it did not require that they subsequently agreed to use it as the basis for pay negotiations.¹⁶

A successful claim for equal pay for work of equal value required, until 1996, the report of an 'independent expert'. The EqPA provided that a tribunal could not find in favour of an EqPA claimant unless it had received the report of an independent expert on the issue of the relative value of the jobs of the claimant and her comparator(s).¹⁷ Since 1996 tribunals may determine the question of value, whether in favour of or against the interests of the applicant, without the report of an independent expert.¹⁸

¹² *Arnold v Beecham Group Ltd* [1982] IRLR 307.

¹³ [1992] IRLR 261.

¹⁴ *Bromley v Quick* [1988] ICR 623.

¹⁵ [1980] IRLR 373. The Court of Appeal's decision is at [1980] IRLR 151 and it in turn overturned EAT's decision (at [1978] IRLR 398) allowing the appeal against the decision of the industrial tribunal.

¹⁶ [1982] IRLR 307.

¹⁷ EqPA, s.2A (1).

¹⁸ SI 1996 No. 438, reg. 3. The tribunal must also dismiss where there are no reasonable grounds for a finding of equal value.

The problems which may arise under this approach were highlighted, prior to the passage of the amending legislation, by the decision of an industrial tribunal decision in *Cato v West Midlands Regional Health Authority*.¹⁹ In that case the independent expert felt unable to reach a conclusion on the relative value of the jobs done by an administration officer and her comparator technical officer. Rather than appoint another expert the industrial tribunal took the view that, under the Equal Pay Directive, it was entitled to decide an equal value claim absent the report of an expert. The tribunal devised a job evaluation procedure using paired comparison under six factor headings (basic educational requirements; necessary training and experience; technical knowledge and organisational skills; degree of personal autonomy, responsibility, initiation, etc., required; physical and mental demands including time constraints and coordination requirements; and number of reportees and grade of person to whom job holder reported), took evidence from the applicant and her comparator over a period of one-and-a-half days, and decided that the comparator's job was more valuable than that of the applicant. The tribunal may have come to the same conclusion as an independent expert would have. But without the opportunity to observe the applicant and her comparator at work and without training on the techniques of job-evaluation (much less, gender-neutral job evaluation), it is hard to view the tribunal's determination of relative value as anything other than a shot in the dark. Such untrained and uninformed decision-making is much more likely to rely upon stereotypical assumptions about the relative value of male and female jobs than is a more rigorous approach. EqPA cases are not heard by specialist tribunals and such is the relative rarity of equal value cases that employment tribunals hearing such claims will rarely have any experience of the EqPA, much less of the finer points of job evaluation.

Assuming that an independent expert is appointed in an equal value claim, the tribunal may not determine the question of value until it has received the expert's report. It may reject the report if, either on the application of one or other party or of its own accord, it decides that the report is unsatisfactory or its conclusion 'one which . . . could not reasonably have been reached',²⁰ in which case it should commission another. Such a course of action is rare indeed, however, leading as it would to yet further delays.²¹ In any event, the tribunal is not bound by the report and may decide to accept or reject the expert's conclusions regarding value, taking into account if it will any evidence put forward by experts commissioned by the parties themselves.²² Once the tribunal has received the report and decided on the issue of value it will either determine the case or, if the employer puts forward a 'material factor' defence under s.1(3), consider it at this stage. It is to the employer's material factor defence that we now turn.

The employer confronted with a tribunal finding that the equal pay claimant's work is 'like', 'rated as equivalent' or of equal value to that done by her comparator(s) (or with the prospect of an equal value finding), may claim, under s.1(3) of the E EqPA, that 'the variation [in pay] is genuinely due to a material factor which is not the difference of sex'.

¹⁹ Case No.18283/88, see *Equal Opportunities Review* 58, p.11, 'Equal Value Update', pp.28-29.

²⁰ Industrial Tribunal (Constitution and Rules of Procedure) Regulations 1993, 8A (13). See generally regs. 8A and 9.

²¹ 'Equal Value Update', *op. cit.*, p.29 reports that, between 1984 and 1994, only 4 expert's reports were rejected.

²² Reg 9 of the Industrial Tribunal (Constitution and Rules of Procedure) Regulations 1993 allows the parties to call evidence from one expert each.

This appears relatively straightforward but the EqPA pre-dated the SDA's interpretation of discrimination in terms of the *indirect* (disparate impact) as well as the *direct* (disparate treatment) models. While early decisions often rejected the possibility of reading a prohibition on indirect discrimination into the EqPA, EAT. ruled, in *Jenkins v Kingsgate*, that differently impacting practices were subject to the same tests of justification under the EqPA as applied under the SDA.²³

Difficulties in interpretation (see, in particular, the decisions of EAT in *Reed v Boozer*, *BCC v. Smith* and *Enderby v Frenchay Health Authority* and of both EAT and the Court of Appeal in *Ratcliffe v Yorkshire CC*) led to the House of Lords' decision in *Ratcliffe* in which their Lordships ruled that s.1(3) EqPA 'must be interpreted . . . without bringing in the distinction between so-called "direct" and "indirect" discrimination' made by s.1 SDA.²⁴ Their Lordships appeared to be attempting to avoid the situation in which a woman, having established that she was paid less than a suitable comparator, was then put to proof that the pay differential was the result of discrimination. The burden of proof is on the employer to show that the factor relied upon to explain the difference in pay '*is not the difference of sex*'. Given this burden of proof, the better view is that it is for the employer to prove that the factor relied upon is not the difference of sex in the sense *both* that it does not discriminate *directly* as between men and women (as would a pay difference which depended upon the status of fatherhood, or membership of the Freemasons) *and* that:

(i) it does not have any disparate impact as between the sexes (as, for example, would the reward of full-time work or, in most cases, seniority or continuity of employment) or, if it does,

(ii) reliance upon it is nevertheless justifiable in line with the tests laid down by the ECJ in *Bilka-Kaufhaus*, *Rinner-Kuhn*, *Danfoss* and *Nimz*.²⁵ These cases are discussed in chapter 6 but briefly they require, in order that a disparately-impacting pay practice be justified, that it can be shown to: 'correspond to a real need on the part of the undertaking, [is] appropriate with a view to achieving the objectives pursued and [is] necessary to that end'.²⁶ Where the reward of particular factors can be shown to impact disparately by sex, reliance upon them will not be regarded as objectively justified unless the factors rewarded were important to the particular workers' ability to perform their jobs effectively.²⁷

It is evident from this brief discussion that the current law on equal pay is quite rigorous. It has become ever more difficult for employers to justify disparately impacting pay practices as the influence of EC law has made itself increasingly felt. Not only has the employer's defence become narrower over time, but the definition of 'pay' in respect of which equality must be enjoyed by men and women has spread itself ever wider with the effect that part-time employees have been granted access to many statutory employment rights on the same basis as full-time workers and pension provision is en route to equality.

²³ [1981] IRLR 388.

²⁴ [1995] IRLR 439 per Lord Slynn, p.442.

²⁵ *Bilka-Kaufhaus GmbH. v Weber von Hartz* [1987] ICR 110, *Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH* [1989] IRLR 493, *Handels-og Kontorfunktionaerernes Forbund I Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)* [1989] IRLR 532, and *Nimz v Freie und Hanse-Stadt Hamburg* [1991] IRLR 447.

²⁶ *Bilka-Kaufhaus*, *op. cit.*, pp.125-6.

²⁷ *Danfoss and Nimz*, *op. cit.*

The latter is, of course, a mixed blessing for women just as the equalisation of retirement ages has been, but the legal strides towards equality have, for the most part, been to women's benefit.²⁸

That is, at least, the theory. But in practice the picture is rather less bright. Massive inequality remains, and while it may be increasingly difficult for employers to justify disparately impacting pay practices, the intra-employer comparator model adopted by the EqPA has the effect that the very significant proportion of the pay gap which is associated with workplace segregation is incapable of challenge. This has proven particularly problematic with the inexorable growth in contracting-out within the public sector, a development which has resulted in significant deteriorations in the relative position of women within the broader public sector.²⁹ The Transfer of Undertakings (Protection of Employment) Regulations, which were supposed to safeguard the pay and conditions of contracted-out workers, were not regarded until 1994 as applying in the context of contracting-out. By this time the predominantly female contracted-out workforce had already suffered significant disadvantage. These were not put right by the subsequent application of the TUPE Regs whose protection did not, in any event, apply to pensions or to staff recruited by the private sector contractor rather than transferred from the public sector employer. There were hopes that Article 141 would permit contracted-out women to compare themselves with in-house male staff but the decision of the ECJ in *Lawrence v Regent Office Care*³⁰ was to the effect that such a comparison was possible only where the pay of the woman and her comparator could be attributed to a single source. This has not to date been the case in the contracting-out scenario, though it is possible that the single tier workforce agreement reached between the TUC and the government at national level may result in the attribution of control to the public authority in such cases. It is too early, as yet, to tell if the courts will accept this argument, and contracting-out has already served to drive down women's pay in the wider public sector to a significant degree.

The major weakness of the EqPA is that it reacts to a systemic problem in an individual way. Even as an individualistic, complaints-driven model it is flawed for reasons set out above. But its even more significant flaw is that it imposes an individual, legally highly complex solution on a problem of systemic pay discrimination. Comparisons can be made only within, rather than between, workplaces, and no proactive approach is required of employers. This explains in part the particularly bad position of part-time women workers.

The poor rates of pay enjoyed by part-time women workers, and the stasis in their relative pay over time, was mentioned above. The part-time female: full-time male worker differential explains a significant part of the lifetime earnings gap between women and men which was mentioned above. The figures illustrate that mothers lose out on lifetime earnings to a significantly greater extent (at least in the case of medium and low skilled women) than do women without children. This happens in part because women (other than those in the very highest paid occupations) often resume work after childbirth on reduced hours. In many cases this is associated with a drop in wages much greater than that which is attributable simply to the shortfall in hours – part-time women workers earn, on average, only in the region of 60% of male full-time workers' hourly wage as against full-time women's 80%.

²⁸ *Marshall v. Southampton and South West Area Health Authority* [1986] IRLR 170.

²⁹ See the report of the Local Government Pay Commission at <http://www.lgpai.org.uk/>.

³⁰ Case 320/00 [2002] ECR I-07325.

Women who switch to part-time working are disadvantaged partly because many are not permitted to return to full-time jobs on a part-time basis without loss of status and prospects. This results in a herding of women into less desirable (and in many cases, less skilled) work in workplaces where poor pay is standard. One study reported that stereotypically “women’s work” was frequently offered as part-time by employers who could not attract full-timers at the rates they were prepared to pay.³¹ The gender-segregated nature of the workplaces within which many part-time women workers are concentrated robs them of comparators for the purposes of the EqPA, while their weakness in the bargaining arena helps to hold down their pay and that of those full-time workers who occupy similar positions.

The pressure to work part-time is increased by the long hours culture which attaches to full-time work. Workers in the United Kingdom have the longest working hours in Europe. Full time workers (male and women) worked an average 43.5 hour week in the United Kingdom. The closest other country was Greece with an average 41.1 hour week while the average working week across the European Union was just under 40 hours.³² British fathers work even longer hours than the average - no less than 47 hours a week in 1998. A quarter work more than 50 hours and one in eleven in excess of 60 hours per week.

The increasingly long hours demanded of full-time workers not only serve to exclude men from family life and involvement with their children, they render it virtually impossible for most mothers of dependent children to work other than part-time. The cost of this in terms of life time earnings was mentioned above.

Equal Pay legislation cannot alone eliminate the gender-pay gap. It must be accompanied by strong provisions to combat sex discrimination in access to jobs. It must also be coupled with provisions to ensure that women – and men – can balance their work and family lives. The restriction – in theory or in practice – of “flexible working” to women will result in further labour market segregation and worse lifetime pay for women as they are increasingly expected to undertake the dual burden of paid work and disproportionate responsibility for children and home. But serious measures to reduce the working hours of all, so that men as well as women can achieve a more satisfactory work-life balance, could have a very significant effect. This, together with changes to equal pay legislation to remove the very strict “comparator” approach and, more importantly, to impose on employers an obligation to take proactive steps to eliminate pay inequalities, could go a long way towards eradicating the gender-pay gaps between full-time and part-time women workers and male full-time workers. The eradication of that gap will probably require the abandonment of the enterprise-level model of pay determination.

³¹ Hunter and McInnes, *Employers’ Labour Use Strategies*, London: HMSO, 1991.

³² EIRO, *Working time developments*, 2002.