

GOVERNMENT AND PAY AND EMPLOYMENT EQUITY: THE ROLE OF THE STATE IN ACHIEVING EQUITY IN THE WORKPLACE

Paper for the Pay and Employment Equity for Women Conference
Wellington, New Zealand 28 June 2004

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There are a variety of tools by which the state can intervene in the workplace to promote equality both in terms of pay and more generally. The most obvious of these consists of direct legislative intervention in the form of a prohibition on discrimination and/or – in more advanced equality regimes – the imposition of positive obligations on employers to promote or achieve equality. So, for example, the UK's Sex Discrimination Act and Race Relations Act prohibit employers, whether in the public or private sector, from discriminating on grounds of sex or race respectively while the Equal Pay Act (broadly) prohibits sex discrimination in pay. This type of legislative intervention is particularly weak given its individual approach and enforcement mechanisms, together with the unavailability in the UK of class actions. Ontario's Pay Equity Act goes considerably further in imposing positive obligations on employers to "do" pay equity – that is, to undertake processes of pay review and adjustment in a positive attempt to eliminate sex discrimination in pay. A more modest example of proactive legislation can be found in Northern Ireland's Fair Employment and Treatment Order which imposes upon employers obligations to monitor and report on the religious composition of their staff.

The full proactive model is perhaps the most radical approach to employment equity – whether in the area of pay or, more broadly, of employment access and conditions. Many governments are reluctant to intervene so dramatically in the private sector in what is traditionally seen as an area for management prerogative. Notable exceptions include the UK government in relation to Northern Ireland, FETO forming part of the response to a perceived crisis of legitimacy in Northern Ireland because of the weight of discrimination suffered by members of the Catholic/ Nationalist minority. Ontario's Pay Equity Act was the result of a deal struck by the left-of-centre New Democrats as a condition of their support for the minority Liberal Government. But while the Pay Equity Act survived, albeit in a weakened state, subsequent political developments, Ontario's Employment Equity Act (which would have imposed monitoring and reporting obligations on employers in respect of women, Aboriginal, disabled and visible minority staff) did not.

Governments are traditionally less reluctant to undertake equity-related obligations themselves and, on occasion, to impose these obligations on local government and the broader public sector (education, for example, and health). Thus, for example, a number of Canadian provinces have adopted pay equity legislation binding only on public sector employers. Even in the UK, obligations have been imposed on central government departments to conduct pay reviews. The Race Relations (Amendment) Act 2000 further imposed obligations on public authorities, broadly defined, to "have due regard to the need – (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups".

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Regulations passed under the Act require public authorities to monitor and publish details of the ethnic composition of their staff, and it is likely that similar obligations will be imposed in the near future with respect to disability.

Somewhere in the spectrum of intervention between bare prohibitions on discrimination and full-blown proactive legislation lies contract compliance which builds on government's greater willingness to regulate the public sector and extends additional obligations into those parts of the private sector with which government contracts. This mechanism is of increasing importance as the private sector infiltrates deeper and further into the broader public sector, robbing many of the workers therein of the protections traditionally associated with public sector employment.

Contract compliance is not the only mechanism by which the state may become involved in imposing or giving effect to equity obligations in the private sector. Where public functions have been contracted out, the state may well have itself to supply funding for the increase in wages associated with "doing" pay equity. This was the case in Ontario itself, for example, where the Liberal government (opposed to the Pay Equity Act) frustrated its operation in the broader public sector simply by withholding the necessary funding. But contract compliance is a very significant mechanism by which the state can encourage the private sector to take steps to reduce pay discrimination and other forms of discrimination in the workplace. The rationale is straightforward: public money should not be spent paying employers who flout the letter (or spirit) of equality laws.

Contract compliance is one of the main mechanisms by which anti-discrimination legislation and guidelines are enforced in the United State. There, for example, an Executive Order was issued by President Roosevelt in 1914 to prohibit discrimination by defence contractors. The US federal government has used contract compliance since 1968 in order to require government contractors, more generally, to adopt "affirmative action" (first race-based, then also sex-based) in an attempt to assimilate the racial and sexual balance of workforces to those of locally available workforces. Executive Order 11246 binds federal contractors and subcontractors whose US-based government contracts are worth in excess of \$10,000. Such contractors are required to monitor and report on the racial and sexual composition of their workforces. Those whose federal contracts are worth in excess of \$50,000 and who employ at least 50 staff must, in addition, produce written affirmative action plans. It is estimated that the contract compliance programme covers over 20 per cent of the civilian workforce.

In Canada, federally regulated employers and contractors bidding for goods and services contracts with the federal government are required to provide "employment equity", defined as "an action-oriented approach that identifies under-representation or concentration of, and employment barriers to, certain groups of people, and provides a number of practical and creative remedies. The Employment Equity Act 1995 and accompanying regulations require employers, in consultation with their workforces to:

- conduct a workforce survey to ascertain the proportion and position of women, aboriginal, disabled and "visible minority" workers
- undertake a "workforce analysis" to determine the degree of under-representation, if any, of the groups within the workforce

- undertake an “employment systems review” to determine what, if any, barriers “prohibit the full participation of designated group members within the employer’s workforce”
- develop and implement an “employment equity plan” which “must include:
 - positive policies and practices to accelerate the integration of designated group members in employers’ workforces
 - elimination of employment barriers pinpointed during the employment systems review
 - a timetable for implementation
 - short term numerical goals
 - and longer term goals”
- monitor the implementation of the plan, reviewing and revising it as necessary.

The Canadian rules apply to contractors with at least 100 employees wishing to bid for contracts worth at least \$200 000. Failure to comply with the rules can result in ineligibility to bid for further contracts. And in the UK itself, contract compliance in the form of the Fair Wages Resolutions was practised between 1891 and 1983. These Resolutions, passed by the House of Commons, aimed to ensure that government contractors provided their employees with terms and conditions that were no less favourable than those generally established by collective bargaining in the trade (many local authorities also imposed fair wages clauses on private sector companies with which they contracted).¹

A Select Committee reporting in 1890 expressed concern about wages “barely sufficient to sustain existence . . . hours of labour . . . such as to make the lives of the worker periods of almost ceaseless toil. . . . sanitary conditions . . . injurious to the health of the persons employed and . . . dangerous to the public”.² Concern over what was known as ‘sweated labour’ increased over the final years of the nineteenth century, particularly after the report of that Committee which resulted in the Fair Wages Resolution 1891. This Resolution was very general and unspecific³ and was succeeded in turn by the 1909⁴ and 1946 Resolutions, both of which were considerably more detailed. The 1946 Resolution also required government contractors to permit workers the freedom to join trade unions and was, in addition to being administered by the executive in the allocation and content of government contracts, incorporated into a number of statutes. It required contractors:

- 1 to pay rates of wages and observe hours and conditions of labour no less favourable than those established for the trade or industry in the district where the work is carried out by machinery of negotiation or arbitration to which the parties are organisations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in the trade or industry in the district.

- 2 In the absence of any rates of wages, hours or conditions of labour so established . . . [to] pay rates of wages and observe hours and conditions of labour which are no less favourable than the general level of wages, hours and conditions observed by other employers whose general circumstances in the trade or industry in which the contractor is engaged are similar.⁵

Contractors were, in addition, responsible for ensuring compliance by any sub-contractors. The Fair Wages Resolution gave no individual rights of enforcement to workers but operated so as to make compliance with its terms a condition of the contract between government department and employer. Alleged infringements were referred through the government department concerned to the Ministry of Labour which could attempt conciliation before referring the matter for arbitration first to the Industrial Court, from 1971 to the Industrial Arbitration Board and subsequently, after February 1976, by the Central Arbitration Committee. A decision by either body that the Resolution had been infringed did not itself give rise to any rights but permitted the contracting department to take the appropriate contractual measures. The 1946 Resolution remained in place until 1983 when the Conservative administration repealed it.⁶

The information is not available with which to determine with any degree of precision the impact of the Fair Wages Resolutions upon women's wages. Certainly the earliest version of the Resolution could be expected to have had little positive effect, in light of the generally held views that "the Fair Wages Resolution says nothing as to the standard rate of wages for women", that "we do not think that it was the intention of the resolution to enforce the payment to women of the rate 'current' for men employed on the same class of work".⁷ Not only this, but until 1970 the provisions of the Resolutions were applicable only to those workers actually employed on governmental contracts, in early years they applied only during those hours in which workers were so employed,⁸ and there was a great deal of government departmental resistance to the first resolutions. According to Brian Bercusson the Treasury: "had not in fact bothered to communicate the [1891] Resolution to the other departments - an administrative action normally undertaken in the event of new policies being introduced" (emphasis omitted) and government departments frequently failed to include the terms of the resolution within their contracts and required complaints from workers before making any attempts to enforce the Resolution. Such complaints were generally unforthcoming as a result of worker ignorance of the terms of the Resolution and lack of organisation.⁹ Further, many departments undermined the entire purpose of the Resolution by taking the view that: "If the Government is to have its work executed at the ordinary market price it cannot require the contractor to pay more than the market rate of wages".¹⁰ This intransigence persisted during the operation of the 1909 Fair Wages Resolution whose impact was, as a result, very limited.¹¹

The 1946 Resolution provided for determination by an independent tribunal, rather than by the government department concerned, because the administration of the previous Resolutions had been far from satisfactory, with a fairly widespread lack of concern on the part of these departments for the implementation of those resolutions.¹² It was hoped that the provision of a complaints system external to the government departments concerned would "dispel some of th[e] suspicion [that] the contracting departments were [not] applying the fair wage standard correctly".¹³ But history records very little use of the Resolution despite the improved enforcement procedure.

And of the 58 claims made, there only 11 findings of breaches of the Fair Wages Resolution in cases of genuine dispute in the first thirty years of its existence.

In 1964 the TUC condemned the Resolution as “absolutely inadequate” because of its “weak wording” and “flimsy text”.¹⁴ Among the problematic issues encountered by complainants were the precise scope of the “industry” against whose nationally agreed or generally observed terms the employer’s should be compared (this was of particular concern in those contracting-out cases where contractor’s terms were compared with those of other contractors in the field, rather than those observed in the public sector); the definition of the “district” within which clause 1(a) comparisons should be made; and the extent to which terms other than those in dispute could be set-off against the disputed term in determining whether the employer’s terms were “less favourable” than those nationally agreed or generally observed. In addition, where claims under clause 1(b) (the “general level”) were concerned, enormous difficulties arose as a result of the IAB’s failure to specify how this level was to be calculated.¹⁵

The result of these short-comings was that the Fair Wages Resolution 1946 had relatively limited impact on the wages even of those employees engaged on government contracts. Where the Resolution might have proven most useful - in cases where the government contracted-out work to the private sector (as occurred in the early 1970’s with cleaning work) - its impact was severely undermined by the IAB’s decision that the appropriate comparators for workers in the private sector firms were not firms within the office and factory cleaning industry, much less those government employees whose jobs had been contracted out but, rather, the contract cleaning industry.¹⁶

If complaints alone are considered the Fair Wages Resolutions would appear to have affected the pay and conditions of a very small number of workers. But their impact is likely to have been considerably wider than this. To the extent that the Resolutions regulated the terms of conditions of workers in firms which entered into contracts with government departments women, who were likely to enjoy less favourable terms than those of their male colleagues, would have gained some benefit. Equally, where a trade or industry was generally mixed or male-dominated but the workplace in respect of which a particular government contract was awarded was female-dominated, women should have benefited from the application of nationally agreed terms or, failing this, the “general level” of terms observed by employers in the relevant trade or industry (assuming in the first case that the national agreement was observed in the district in which the workplace was situated and, in the second, that the female-dominated workplace would be regarded as sharing the same “general circumstances” as those in which men predominated¹⁷). But where entire trades or industries were female-dominated, the Resolution would have done little to advantage women as (a) national bargaining (or, indeed, bargaining at any level) was less likely to be in place¹⁸ and (b) the level of terms generally observed within the relevant trade or industry was likely to be lower than those prevailing in male-dominated industries or trades.

It would appear that the bulk of questions raised under the Resolution concerned male workers. If a random sample is taken from the CAC’s 1977 decisions, for example, ten of the 15 questions raised¹⁹ concerned workers who were identifiably either exclusively or mainly employed in predominantly male jobs (heavy engineering manual workers, for example; senior foremen engaged in the manufacture of mining equipment; draughtsmen working in the shipbuilding industry; maintenance workers; engineers and technical staff²⁰).

Of the other five questions raised, three included a substantial or unspecified number of clerical and administrative staff²¹ and two were made in respect of workers who may well have included a significant number of women.²²

The fair wages clauses adopted in the UK were far too narrow to impact significantly on economy-wide levels of wage dispersion and gender-pay gap. They never regulated the wages of more than a very small minority of workers and the impact of the Fair Wages Resolutions, together with contract compliance measures imposed by various local authorities, is impossible to determine given the lack of monitoring of compliance with such clauses. Given the comments made above, however, it is unlikely that they had any significant effect on low-paid workers in general, or on the wages of women in particular. Fair Wages Resolutions only ever applied in practice, whatever the theory, to a handful of workers; benefited men for the most part and, to a significant extent, assisted already relatively well-paid workers in their attempts to circumvent incomes policies rather than providing protection for the poorest. They were dependent upon individual complaint or action taken by a small number of eligible trade unions or employer's organisations. To the extent that they were used, their benefit appears to have been enjoyed primarily by men. Even if the detail of the Resolutions and other provisions had been more satisfactory, there was no centralised mechanism by which the minimum standards set by collective bargaining could be generally enforced. This had the effect that those employees most in need of the protection afforded by the fair wages clauses were least likely to be in a position to benefit from it.

Notwithstanding these criticisms, the operation of Fair Wages clauses in the UK is of interest for a couple of reasons. In the first place, they draw attention to the significance of the correct enforcement mechanisms being applied to contract compliance if it is to be of value to workers. Where, as in the early years, the public sector employers covered were not enthusiastic about the Resolutions, the controls tended not to be applied. It is important in such cases to allow individual complaints, though the individual mechanism is far less satisfactory than enforcement by an enthusiastic public sector. Secondly, the Resolutions draw attention to the possibility of applying equity standards derived other than from within the firm concerned. Much of the pay gap in the UK results from the clustering of women – especially those who work part-time – into predominantly female, low-paying workplaces. To require pay equity within these organisations will do little to improve women's wages within them. Contract compliance could, however, be used as a mechanism by which wages in these organisations could be pinned to those elsewhere.

Fair Wages Resolutions were not the only contract compliance mechanisms adopted in the UK. Throughout the twentieth century many local authorities adopted contract compliance policies, using their financial muscle to pursue social ends. Local authorities' powers were always subject to public law duties to act reasonably, within the powers granted them by statute, and in compliance with fiduciary duties to ratepayers. S.71 RRA imposed duties on councils to work towards the elimination of race discrimination and to promote equality of opportunity between people of different races. And during the 1970s and 1980s many local authorities used contract compliance to promote sex as well as race equality.²³ The conservative government, however, acceded to lobbying from employer interests and passed s.17 of the Local Government Act 1988, which prohibited local and other public authorities from taking into account, in their contracting functions: "non-commercial matters". Such matters were defined to include "the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded

to, their workforces". The only exception to this prohibition was provided by s.18, which permitted only that local authorities:

- "ask . . . approved questions seeking information or undertakings relating to workforce matters and consider . . . the responses to them" and/or "include[e] in a draft contract or draft tender for a contract terms or provisions relating to workforce matters and consider . . . the responses to them . . . if, as the case may be, consideration of the information, the giving of the undertaking or the inclusion of the term is reasonably necessary to secure compliance with [RRA s 71]".

S.71 RRA imposed upon local authorities an obligation to "to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need:

- to eliminate unlawful racial discrimination; and
- to promote equality of opportunity and good relations, between persons of different racial groups."

That provision, which has been amended more recently, did permit a degree of control on the part of public authorities. The six "approved questions" which local authorities were permitted under the LGA 1988 to ask of prospective contractors concerned, *inter alia*, their arrangements for complying with the RRA and the existence of any findings of unlawful race discrimination against them in the previous three years. Local authorities were not, however, permitted to practice any other form of contract compliance. And according to the CRE's second (1992) report on the RRA:

. . . we were disappointed by Government action in relation to the local government legislation of 1988. If it had not been for the existence of Section 71 of the Race Relations Act 1976, the probability is that Government would have banned local authorities altogether from considering equal opportunities in their contracting processes. . . . The Sex Discrimination Act contains no similar provision and Government did ban local authorities from considering equal opportunities between men and women in their contracting processes.

Because of Section 71 the Government felt it had to permit some local government action in the area of race, but restricted it. By use of the Approved Questions under the legislation, Government has stopped local authorities obtaining ethnic monitoring data from those they might wish to contract for the supply of goods and services. Yet, in *West Midlands Passenger Transport Executive v Singh* (CA) [1988] IRLR 186 and in the Commission's *Code of Practice in Employment*, the value of that data in determining whether equal opportunities is being provided is recognised.

The prohibition on contract compliance was particularly problematic given the widespread contracting-out of services previously provided by the public sector. The Local Government Act 1988 removed local authorities' powers to use their commercial weight to seek to eradicate discrimination in the organisations with which they contracted, or to require any commitment to equality on the part of those organisations. Central government in the period from 1979 to 1997 was positively hostile to labour-market intervention designed to eradicate discrimination or foster equality, and virtually

all legislative developments in the equality arena in this period were the result of EC requirements.

Not only were local authorities prevented from using their commercial power to impose employment-related conditions on their contractors, but the Conservative period of government oversaw a massive privatisation of the public sector. This entailed not only the selling-off of formerly publicly owned manufacturing and utilities, but also the introduction of compulsory competitive tendering whereby large numbers of workers formerly employed in the public sector found their jobs contracted-out into the private sector. Coupled as this was with deliberately inadequate protection over affected workers' pay and conditions, and the obligation on authorities, by and large, to accept the lowest offer in the CCT process, this had a devastating impact on the terms and conditions of those workers the large proportion of whom were women. These mainly part-time workers, who had previously been sheltered by their position in strongly unionised parts of the public sector in which national bargaining was the predominant model, found themselves cast adrift in low-wage, non-union private sector companies. The contracting-out imposed on local authorities by the CCT regime was echoed across the public sector as cleaning, catering and other predominantly-female services were transferred into the private sector.

Compulsory competitive tendering had a devastating on the terms and conditions of former public sector jobs. According to Linda Dickens:²⁴

There has been a disproportionate adverse effect on women and ethnic minorities (in particular black women) who tend to be over-represented in those sectors and jobs which have been effected. Some predominantly male areas, such as refuse collection have been affected, although the stronger union and bargaining position of male workers helped reduce some of the adverse consequences of CCT for them. The major impact has been on women who have lost jobs, had hours reduced and work intensified, experienced pay reductions and loss of benefits . . . The government policy shift in the public sector towards sub-contracting could have been harnessed for equality through a strategy of contract compliance . . . [which] had been used to some effect by local authorities in the past. Instead a contrary path was taken with contract compliance being curtailed by [the LGA 1988] . . . Nor was there any equality-proofing of the CCT process. Rather than disseminating good practice out from the public sector (which traditionally provides the model of a "good employer"), increased commercialism within a deregulated framework has weakened the good practice itself.

Dickens states that "some protection of existing terms and conditions was provided by the need for the UK to conform to European requirements relating to transfers of undertakings". The Acquired Rights Directive requires that incoming contractors take on the existing staff on their existing terms and conditions. But, as Dickens points out, this protection was "belated", the Transfer of Undertakings Regulations 1981 only being amended in 1993 clearly to apply to public sector contracting-out (and even now their application in relation to re-tendering is unclear). In any event, their imperfect protection applies only to existing workers, rather than to jobs, so they have little long-term impact on terms and conditions in contracted-out sectors. 1995 research by Escott and Whitfield for the EOC further demonstrated that women in particular had suffered as a result of CCT.²⁵ And recent research by UNISON found that, as recently as 2002 "pay levels for new employees were worse than those for transferred staff; that most

companies offered inferior occupational sick pay, maternity leave, special leave and holiday entitlements to new staff; that one in five organisations specified a longer working week for new staff; that there was not a single example of a defined benefit pension scheme being open to new employees; and that generally there were more than two sets of terms and conditions in existence. . .”²⁶

The CCT regime has been replaced, as from April 2000, by “best value” which requires public bodies to engage in a rolling programme of review to ensure the achievement of “best value”, whether in-house or contracted-out, in all their services. But legislative amendments have provided that “the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces” and the conduct of contractors or workers in industrial disputes shall cease to be non-commercial matters for the purposes of section 17 of the 1988 Act—

- a to the extent that a best value authority considers it necessary or expedient, in order to permit or facilitate compliance with the requirements of Part I of the 1999 Act (Best Value), to exercise the functions regulated by that section in relation to its public supply or works contracts with reference to those matters
- b for the purposes of any functions regulated by that section in relation to a public supply or works contract which involves a transfer of staff to which the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 1981 may apply.

UNISON’s Guide to the Code of Practice on Workforce Matters in Local Authority Service Contracts in England suggests that councils may “consider a range of issues when selecting and awarding contracts including the contractor’s policy and practice for its own workforce on: basic pay, unsocial hours payments, pay related benefits, bonus schemes, equal pay, pensions, working patterns, health & safety, training, trade union recognition, part-time workers rights, race equality, gender equality, lesbian and gay equality, disability equality, family friendly policies and job security.”

“Best value”, coupled with the amendments made to the LGA 1988, provide a climate less hostile to contract compliance than did CCT. But it is not at all clear that this will result in enhanced equal opportunities outcomes. As P. Higgins and I Roper point out, the regime encourages greater rather than reduced private sector involvement in the public sector: whereas CCT applied only to particular aspects of local government services (cleaning, catering, waste collection in particular), “best value” imposes obligations on local authorities to subject *all* their services to fundamental review over five years and to consider not only how these services ought best to be provided but also “whether certain activities ought to be provided by the council and ultimately the taxpayer at all”.²⁷ According to Higgins and Roper:

. . . the introduction of a BV system has increased the number of avenues in which the private sector can be involved in the delivery of public services and has provided a foundation from which a more entrenched process by which to transfer staff from the public to the private sector can ensue. In this way BV poses a greater threat to workers and unions who wish to remain council employees than was the case under CCT. While CCT created a process that was explicitly geared towards transferring work to the private sector, it was at least, a transparent process. Councils could attempt to – and succeed in – keeping a service in-house. In contrast, the provisions for BV are far more wide-ranging and ambiguous. In particular, the notion of retaining services in-house is less clear cut under BV and its provisions extend far beyond a one-off tendering exercise. Thus even if, as part of the BV review process, local authorities decide to restructure services in-house, post inspection findings could signal failure and enact one of a number of the laid down remedial options. . .

Currently, BV does not, unlike CCT, directly incentivise the cutting of the wage bill and the undermining of collective bargaining in order to compete on the lowest price. BV, in contrast, requires the demonstration that in-house provision will be ‘better’ than externalisation. Conducting a BV review and not recommending private sector involvement is not viewed favourably. CCT, though crude, did at least provide a process that enabled a local authority to compete for a service with the legitimate intention to retain direct in-house provision.

As for the consequences for workers, the transfer of staff into external organisations does not seem to be backed-up with long terms guarantees – either current or future. Others outside the UK would be wise to monitor the outcome of BV. It is quite possible that this model will be recommended, as a ‘third way’ alternative to privatisation of public services, elsewhere.

On 13th March 2003 the Government published a statutory Code of Practice on Workforce Matters in Local Authority Service Contracts. The Code, product of prolonged negotiations between government and the public sector unions, is intended to extend the benefits of TUPE to new staff employed by private sector firms which contract with local authorities. TUPE provides that staff transferred into the private sector in the process of contracting-out ought to have their terms and conditions of employment (though not their pensions) preserved. The application of these provisions was very slow in the public sector, which in part explains the devastating effect of contracting-out on staff terms and conditions. It has been established for a number of years now that TUPE does apply to transferring staff, but concern has grown as to the creation of a “two-tier” workforce with new staff being employed by private contractors on inferior terms in an effort to cut costs. The Code must be incorporated in all local authority contracts advertised after 13th March 2003. It states that:

Service providers who intend to cut costs by driving down the terms and conditions for staff, whether for transferees or for new joiners taken on to work beside them, will not provide best value and will not be selected to provide services for the council. However, nothing in this Code should discourage local authorities or service providers from addressing productivity issues by working with their workforces in a positive manner to achieve continuous improvement in the services they deliver . . .

Where the service provider recruits new staff to work on a local authority contract alongside staff transferred from the local authority, it will offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees. The service provider will also offer reasonable pension arrangements . . .

The principle underpinning the provisions of paragraph 7 is to consider employees' terms and conditions (other than pensions arrangements . . .) in the round - as a "package". This Code does not prevent service providers from offering new recruits a package of non-pension terms and conditions which differs from that of transferred staff, so long as the overall impact of the changes to this package [makes it no less favourable]. . . The aim is to provide a flexible framework under which the provider can design a package best suited to the delivery of the service, but which will exclude changes which would undermine the integrated nature of the team or the quality of the workforce.

The service provider will consult representatives of a trade union where one is recognised, or other elected representatives of the employees where there is no recognised trade union, on the terms and conditions to be offered to such new recruits. [References to 'trade unions' throughout this code should be read to refer to other elected representatives of the employees where there is no recognised trade union.] The arrangements for consultation will involve a genuine dialogue. The precise nature of the arrangements for consultation is for agreement between the service provider and the recognised trade unions. The intention is that contractors and recognised trade unions should be able to agree on a particular package of terms and conditions, in keeping with the terms of this Code, to be offered to new joiners. . .

Throughout the length of the contract, the service provider will provide the local authority with information as requested which is necessary to allow the local authority to monitor compliance with the conditions set out in this Code. This information will include the terms and conditions for transferred staff and the terms and conditions for employees recruited to work on the contract after the transfer.

Such requests for information will be restricted to that required for the purpose of monitoring compliance, will be designed to place the minimum burden on the service provider commensurate with this, and will respect commercial confidentiality. The service provider and the local authority will also support a central Government sponsored review and monitoring programme on the impact of the Code, drawn up in consultation with representatives of local government, contractors, trade unions and the Audit Commission and will provide information as requested for this purpose. Such requests will follow the same principles of proportionality and confidentiality.

The local authority will enforce the obligations on the service provider created under this Code. Employees and recognised trade unions should, in the first instance, seek to resolve any complaints they have about how the obligations under this Code are being met, directly with the service provider. Where it appears to the local authority that the service provider is not meeting its obligations, or where an employee of the service provider or a recognised trade union writes to the authority to say that it has been unable to resolve a complaint directly with the service provider, the local authority will first seek an explanation from the service provider. If the service

provider's response satisfies the local authority that the Code is being followed, the local authority will inform any complainant of this. If the response does not satisfy the local authority, it will ask the service provider to take immediate action to remedy this. If, following such a request, the service provider still appears to the local authority not to be complying with the Code, the local authority will seek to enforce the terms of the contract, which will incorporate this Code. In addition, where a service provider has not complied with this Code, the local authority will not be bound to consider that provider for future work.

Local authorities will be required to certify in their Performance Plans that individual contracts comply with best value requirements, including workforce requirements in this Code and the accompanying statutory guidance. The Audit Commission's appointed auditor will through the audit of the Performance Plan:

- provide assurance that local authorities are meeting their statutory duty of certifying their compliance with the Code and that they have put in place adequate arrangements to ensure compliance;
- receive information from third parties about any concerns with the authority's compliance;
- consider the information received and decide how to deal with those concerns;
- where the subject of any concern is of material significance (e.g. large contracts or where a major breach of this Code is alleged) the auditor will decide on a proportionate response to investigate the concerns.

If, as a result of investigations, the auditor has concerns about an authority's compliance with this Code, they may exercise their appropriate statutory powers, which include:

- requiring the authority to respond publicly to a written recommendation;
- recommending that the Secretary of State should give a direction under Section 15 of the Local Government Act 1999.

The amendment of the Race Relations Act by the Race Relations (Amendment) Act 2000 has resulted in the imposition on public authorities of wide-ranging duties to promote race equality. Similar duties are planned by the Disability Discrimination Bill currently under consultation. And Northern Ireland's Fair Employment and Treatment Order, which regulates discrimination on grounds of religion and political opinion, embraces a form, albeit an extremely limited form, of contract compliance. But though these mechanisms have some potential for use in relation to private sector contracting, the government has thus far shown no signs of implementing its commitment to take similar steps in relation to sex equality. It has imposed pay audit practices internally on government departments, but remains firmly unwilling to impose similar obligations on the private sector (or, indeed, the public sector other than central government).

In general terms the UK Government remains very culturally hostile to the use of contract compliance measures to promote equality at work. *Partnership for Equality*, the White Paper which preceded the FETO, made clear the government's general disapproval of the CC mechanism:

[C]ontract compliance . . . runs counter to the spirit of market liberalisation in public procurement which has been promoted by the European Union and the UK Government. The Government's policy has been that value for money is central to public sector procurement policy . . . The [fair employment legislation] includes a form of contract compliance [which] . . . stand[s] as a significant modification of general government policy on contract compliance and an acknowledgement that the particular circumstances of fair employment in Northern Ireland might warrant sanctions of a different magnitude from those applying to other types of discrimination . . . the Government does not propose to extend contract compliance to achieve fair employment objectives.

The public procurement directives (council directives 93/37, 93/36, 92/50 and 93/38) guarantee equal treatment on grounds of nationality in the contracting process in relation, respectively, to works, supplies, services and utilities. They apply to contracts which exceed specified financial thresholds and require that the tendering process be transparent and that the selection of candidates in the award of tenders be based on objective criteria.

The directives permit the tendering authorities to advise prospective contractors as to the national employment regulations and in the view of Northern Ireland's then Fair Equality Commission appear to permit authorities "to request tenderers to provide a guarantee that their future compliance with national anti-discrimination requirements had been included in their tender price . . . The fundamental principle applied is that the method adopted by the contracting authorities in satisfying themselves of future conformity must not directly or indirectly discriminate against contractors from other member states ."

In *Gebroeders Beentjes BV v State (Netherlands)* Case C-31/87 [1990] 1 CMLR 287, the ECJ distinguished between contractual conditions imposed on contractors, on the one hand, and selection criteria for contractors on the other. As far as the latter were concerned, the public procurement directives would be breached if they had a discriminatory impact on grounds of nationality. It had already been established, in *Commission v Italy* Case C-360/89 [1992] ECR 3401, that the only criteria upon which tendering authorities could assess the suitability of prospective contractors were those set out in the directives themselves. The suitability criteria imposed by the public procurement directives provide little scope for enforcing anti-discrimination provisions, the only potentially relevant criteria included in the works directive, for example, being a legal finding of professional misconduct or a finding of "grave professional misconduct proved by any means which the contracting authority can justify". *Commission v Italy* dealt with the suitability, rather than the award criteria. As far as the latter were concerned, the directives require that the contract be awarded to the lowest-priced or economically most advantageous tender. The *Beentjes* case concerned a contract awarded to a bidder who was able to employ long-term unemployed, the authority regarding this as one of the selection criteria. The ECJ took the view that, the public procurement directives not being intended exhaustively to regulate procurement, such factors could be taken into account as long as they did not operate in a discriminatory manner.

The EC position on contract compliance was summarised by the FEC in the following terms.²⁸

3.72 It is clear therefore that there are circumstances in which equality criteria and conditions may be incorporated into the contracting process both at the suitability and the award stages:

- 1 Requiring the contractor to agree that he/she will comply with national requirements concerning non-discrimination.
- 2 Enabling the authority to satisfying him/herself that the contractor has not been convicted of a breach of anti-discrimination laws.
- 3 In some limited circumstances, in the context of the award criteria.

3.73 It is under this third heading that contracting authorities may be required to undertake more far reaching positive action measures to promote the participation and interests of minority groups in the work place. In order to be acceptable such contract conditions must not be discriminatory between contractors in different member states. For example if the positive action condition were such that a contractor was required to carry out affirmative action in his undertaking the key question is whether that affirmative action is of a type which is lawful in one member state but unlawful in another. The tenderer in the country where it is lawful would have a clear advantage in being able to satisfy the positive action criteria As there is no common policy across the Member States with regard to positive action this would prove difficult. Thus requiring affirmative action without first carefully considering whether contractors in all Member States are legally able to engage in it runs the risk of breaching the Procurement Directives. For example the question arises as to whether it is lawful in other member states to adopt affirmative action measures in a redundancy situation such as those protected by the FETO. One suggested way to resolve this might be to exclude non-national contractors from having to satisfy any affirmative action requirement or at least those which are unlawful in their member state. (Executive Order 11246 in the United States provides that contracts and sub-contractors are exempt from the requirement of an equal opportunity clause with regard to works performed outside the United States by employees who are not recruited within the United States). However there are strong arguments that this would amount to reverse discrimination against the domestic contractor.

The UK government – as has been mentioned above – has imposed proactive pay review structures upon central government departments. And it has imposed some proactive obligations upon public authorities in relation to race equality. It has, however, displayed great reluctance to accompany the payment of public money to private sector companies with any obligations to take pro-active steps to foster equality (by, for example, conducting pay reviews or monitoring staff by race, sex, etc.). But for all the hostility on the part of the present UK government to contract compliance, the practice has a long history in the UK as a response to the evils of sweated labour and, later, non-union workforces. Some of the shortcomings of the previous regimes have been highlighted in this paper. Valuable lessons can be learned from these. But it is hard to dispute the contention that those companies which are in receipt of public funds ought at least to be obliged, as a condition of such funds, to comply with the law.

And there is no quantum leap from this position to one which is that, if government recognises (as it does in the UK) the benefits of pro-active action on pay equality, it should not deny the benefits of this to workers whose jobs are removed from the public into the private sector (or, as for example in the elderly-care sector, whose jobs are predominantly funded by public money). That government take such action is ever-more important as the private sector extends its reach ever deeper into the public purse.

¹ See generally Bercusson, *op.cit.*

² Select Committee on the Sweating System, 5th Report (1890), p. xvii. For further discussion of the events leading up to the introduction of the Trade Boards see Morris J., *Women Workers and the Sweated Trades* (Aldershot: Gower Publishers, 1986).

³ 'That in the opinion of this House, it is the duty of the Government in all Government contracts to make provision against the evils recently disclosed before the Sweating Committee, to insert such conditions as may prevent the abuses arising from sub-letting, and to make every effort to secure the payment of such wages as are generally accepted as current in each trade for competent workmen'. According to Bercusson, *ibid.*, p. 46, the resolution was: 'so vague and so general that . . . the problem was not one of interpreting the Resolution in those situations in which it applied, but of finding situations where it could be said to apply at all'. In addition, very low levels of trade union membership (p.48) and poor administration by government departments rendered the first resolution little more than useless.

⁴ 'The contractor shall, under a penalty of a fine or otherwise, pay rates of wages and observe hours of labour not less favourable than those currently recognised by employers and trade societies (or in the absence of such recognised wages and hours, those which in practice prevail amongst good employers) in the trade in the district where the work is carried out. Where there are no such wages and hours recognised or prevailing in the district, those recognised or prevailing in the nearest district in which the general industrial circumstances are similar shall be adopted. Further, the conditions of employment generally accepted in the district in the trade concerned shall be taken into account in considering how far the terms of the Fair Wages Clauses are being observed. The contractor shall be prohibited from transferring or assigning, directly or indirectly, to any person or persons whatever any portions of his contract without the written permission of the department. Sub-letting other than that which may be customary in the trade concerned shall be prohibited. The contractor shall be responsible for the observance of the Fair Wages Clause by the sub-contractor'.

⁵ The Resolution also imposed an obligation to permit trade union membership and to display the Resolution in the workplace.

⁶ Repeal took place on 21 September 1983 following a Commons vote to rescind on 16 December 1982.

⁷ Bercusson B., *Fair Wages Resolutions* (London: Mansell, 1978), pp.36-7.

⁸ Bercusson, *ibid.*, p.145 ff.

⁹ Bercusson, *ibid.*, pp. 56 & 62 ff. Inclusion was particularly patchy in goods supply contracts.

¹⁰ Report of the Fair Wages Committee 1908, Cmnd 4422, para. 22 cited by Bercusson, *ibid.*, p.31.

¹¹ Bercusson, *ibid.*, pp.133 ff.

¹² See generally Bercusson, *ibid.*

¹³ Bercusson, *op. cit.* (1976), p.135.

¹⁴ 1964 *Annual Report* cited by Beaumont, *op. cit.* (1977), p.38.

¹⁵ Bercusson, *ibid.*, pp.144-5.

¹⁶ See Beaumont, *op. cit.* (1977), pp.39-40. Despite this, the I.A.B. found against the employers in five of the nine contract cleaning cases.

¹⁷ See for example the decision of the C.A.C. regarding contract cleaning - if the situation then was similar to that prevailing today, contract cleaning was probably more predominantly female, as well as lower paid, than cleaning in general (see chapter 2).

¹⁸ This would equally apply when the trade or industry in a particular district was female dominated, in which case the district would be less likely to have engaged in the bargaining from which any national agreement was produced and such nationally agreed terms would be unlikely to be established within that district.

¹⁹ Award Nos. 84, 115, 137, 155, 168, 218, 167, 292, 313, 326, 331, 334, 348, 359 & 370. The sample was selected by taking every eighth award, arranged in alphabetical order, as listed in the C.A.C.'s *Annual Report* 1977. Award No. 334 was selected in the same manner for the sample of Schedule 11 complaints (see below) but was added to the Fair Wages Resolution sample because it had been incorrectly categorised in the C.A.C. report.

²⁰ Awards No. 326; 292; 331; 370; 115, 137 & 168.

²¹ Awards No. 84, 267 & 348

²² Award No. 359: design development, inspection, sales and accounting staff engaged in the production of sound recording equipment and Award No. 326: camera equipment production workers and administrative and clerical staff.

²³ See C. McCrudden, "Codes in a Cold Climate" (1988) 51 *Modern Law Review* 409, 429.

²⁴ L. Dickens, "Gender, race and employment equality in Britain: inadequate strategies and the role of industrial relations actors" (1997) 28 *Industrial Relations Journal* 282.

²⁵ *The impact of CCT in Local Government* (Manchester: EOC, 1995).

²⁶ Does Best Value Offer a Better Deal for Local Government Workers than Compulsory Competitive Tendering? (Middlesex University Business School, Human Resource Management Discussion Paper (references omitted)

²⁷ Does Best Value Offer a Better Deal for Local Government Workers than Compulsory Competitive Tendering? (Middlesex University Business School, Human Resource Management Discussion Paper (references omitted).

²⁸ *Review of the Fair Employment Act* (1997).