

Equal pay, litigation strategies and the limits of the law

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Equal pay, litigation and the law

- Background: evolution of equal pay law in Britain and the European Union
- Alternative mechanisms for making equal pay law effective: collective bargaining, pay audits, shareholder activism, litigation
- The rise of mass claims: the legal context
- Public sector collective bargaining: the move to single status
- Litigation tactics and outcomes
- Research: 40 interviews, 20 organisations (6 LAs), local, regional and national-level union officials and stakeholders

Equal pay law in Britain and Europe

- Sources of law: Equal Pay Act 1970; Treaty of Rome, Art. 119 (now Art. 157 TFEU); Equal Pay Directive 1975 (now Directive 2006/54/EC); Equal Pay (Amendment) Regulations 1984 (introduced 'equal value'); Equality Act 2010
- EU law as underpinning UK equality law
- ECJ rulings on the justification (or material factor) defence (*Enderby*, 1993) and on arrears and time limits (*Magorrian*, 1998, *Preston*, 1998) paved the way for 'historical' claims
- UK Supreme Court ruling in *Abdulla* (2012) further loosens the rules on time limits

Alternative regulatory mechanisms

- Collective bargaining: EqPA 1970, s.1(3) arbitration mechanism diminished by *Hy-Mac* case (1979) and not subsequently restored despite an ECJ ruling (Sex Discrimination Act 1986)
- Pay audits became de facto compulsory in the public sector during the 2000s but were not widely adopted in the private sector
- Disclosure rules in EqA 2010 limited to protecting relevant disclosures by *workers* (s. 77); s. 78 (disclosure of gender pay gap information by larger employers, >250 workers) not brought into force, but a new provision introduced by Enterprise and Regulatory Reform Act 2013 will introduce requirement for audits in cases where employers found liable for breach of equal pay legislation
- Shareholder monitoring and activism ineffective in practice, despite official encouragement from the Kingsmill Review (2001)
- Litigation: mass claims on the rise (37,400 equal pay claims accepted by tribunals in 2009-10, 34,600 in 2010-11, 28,800 in 2011-12)

The move to single status collective bargaining in the public sector

- 1997 Single Status agreement
 - Brought together the ‘white book’ (manual workers) and the ‘purple book’ (APT&C) to form the ‘green book’
 - A national single spine with all jobs to be evaluated locally
- Catalyst was the Cleveland dinner ladies’ case, 1996
 - Awarded £4m equal pay, £1m for sex discrimination
 - Union lawyer was Stefan Cross
- Key issue was male bonus (30%), response to public sector pay freezes of the 1970s
 - 1987 job evaluation exercise had ignored bonuses

Inertia and delay

- Single status contained no implementation deadline
- 2004 NJC Pay Implementation Agreement set a deadline of March 2007, but no penalties
 - Only half achieved this deadline
 - 2012: two-thirds completed, 80% well on the way
- Inertia:
 - agreeing terms of JES, pilot studies, process of JES
- Delay as implications became clear:
 - Pay cuts and budget expenditure increases
 - Unions wanted lifetime protection
 - Employers wanted 'nil cost' settlements; waiting to see what other LAs were doing

Entry of Stefan Cross

- Impact on claims
 - Directly: representing individual claimants
 - Indirectly: pushing the unions towards back pay settlements and forcing them to litigate
- Unions argue they were already seeking back pay and taking legal action
- Interviews with employer reps and local union officials suggest :
 - Focus of negotiation on rectifying existing inequalities and addressing ‘losers’ (about 20% of LA workers)
 - Early back pay settlements: ‘a compensatory sum for giving up right to make a claim’ pre *Allen v. GMB*

Legal issues in mass litigation

- Back pay (remedying past inequalities, bonus schemes)
- Pay protection (challenging schemes which carry forward historical differentials, if only temporarily)
- Challenges to job evaluation schemes as bases for new agreements (Agenda for Change in NHS, Green Book (England and Wales) and Red Book (Scotland) in local government)
- Challenges to job enrichment schemes (introduced once pay protection schemes ruled discriminatory)

Case	Claimants/ Reps	Issue	Result	Liabilities/ Costs
<i>Wilson v. North Cumbria NHS Trust</i> (2005)	1,600 claimants/ UNISON, GMB	Scope of comparison	Judgment for claimants on scope of comparison issue	£300 million in back pay, some claims worth £200,000
<i>Allen v. GMB</i> (2008)	5 named claimants, others added later/ Stefan Cross Solicitors	Union liable for negotiating discriminatory collective agreement	Union found to have concealed information from members and pressurised them to settle claims	Press reports compensation of £100 million, figures disputed by unions
<i>Redcar and Cleveland BC v. Bainbridge, Middlesbrough BC v. Surtees</i> (2008)	Small number of test cases, >2,000 affected workers/ Stefan Cross Solicitors	Pay protection	No automatic justification for pay protection; employer must consider historical context	Not known
<i>Slack v. Cumbria CC</i> (2009)	3,000 claims/Stefan Cross representing 70%	Time limits	Court gives broad reading to 'stable employment' test	Council offer to settle for £40 million, £21 million in claims settled by 2009
<i>Hartley v. Northumbria NHS Trust</i> (2009)	10,500 claimants/ Stefan Cross Solicitors	JES under Agenda for Change; pay protection	ET upholds JES and union negotiation strategy	NHS Trust reported to have spent £3.3 million on litigation
<i>Nicholls v. Coventry CC</i> (2009)	643 claims/500 represented by UNISON	Material factor defence	EAT rejected union liability, stressed pay a matter for the employer	Council liabilities to be determined

Case	Claimants/ Reps	Issue	Result	Liabilities /Costs
<i>Bridges v. Bury MBC</i> (2010)	1,200 claimants	Bonus scheme; pay protection	Bonus scheme failed, pay protection upheld	Council criticised for spending £600,000 on legal fees, threatens job cuts
<i>Barker v. Birmingham CC</i> (2010)	4,000 claimants/ Stefan Cross Solicitors Thompsons solicitors	Bonus scheme; material factor defence	Bonus scheme failed due to lack of transparency, material factor defence failed	Liabilities reported in the range £200-£600 million; employer appealing
<i>South Lanarkshire Council v. Russell</i> (2012)	2,400 claimants/ Fox Cross Solicitors, Action 4 Equality Scotland	Red Book, Council opting out of national JES	Council failed to show justification for route involving opting out of national scheme	Liabilities to be determined
<i>Brennan v. Sunderland CC</i> (2012)	Around 1,200 claimants / Stefan Cross Solicitors	Bonuses, JES, union role in negotiation collective agreement	Bonuses not clearly enough linked to productivity	Liabilities to be determined

Case study (1): Birmingham CC

- Single status introduced in 2008, with retrospective effect to 1.4.2007
- 6 comparator (male dominated) groups: main focus on Fleet, and Waste and Highways
- March-April 2009: litigation on procedural points (time limits, exhaustion of remedies, duplicate claims rules)
- November 2009-March 2010: litigation over material factor defence: EAT judgment in favour of claimants, employer appealing
- Challenge to time limits: successful in *Abdulla* case in Supreme Court, 2012

Birmingham CC (cont.)

- Employer responded by changing terms and conditions of whole workforce through 'dismissal and re-engagement': further litigation, employer successful before EAT in 2011
- December 2010-January 2011: industrial action by Fleet and Waste teams, reportedly over loss of bonuses following tribunal rulings, but also over cost-cutting by employer
- Council's accounts from 2006-7 to 2011-12 reflect combined and potential equal pay claims totalling £757 million

Case study (2): Sunderland CC

- First claims lodged 2004 but generic claim form not settled until 2007 and substantive hearings began in 2008; after 30 days of evidence, tribunal rejected employer's material factor defence
- Further, largely procedural hearings during 2008
- Court of Appeal ruled in favour of claimants on material factor defence in 2012
- Further litigation at tribunal level over the JES between 2009 and 2012, culminating in tribunal judgment in claimants' favour in February 2012

Sunderland CC (cont.)

- In the JES hearings, over 30,000 pages of documents disclosed by the Council, 125 days of litigation
- All claims brought by those instructing Stefan Cross were settled by 2012
- 6 EAT hearings, one CA hearing

Critical views on no-win, no-fee law firms

- Unions accuse them of 'parasitic' behaviour:
 - 'No-win no-fee lawyers were waiting for the unions to do the hard work of negotiating... To get the ground work done for work related as equivalent claims and then moved in after the unions to mop up the back pay'
- Equal pay can only be achieved through a negotiated settlement, back pay only one part of equation
- Forced unions to take litigation in the middle of job evaluations and meaningful negotiations with employers to see off threat from Stefan Cross.
- Fear of bankrupting councils: 'There's no point in us getting our women members x thousand pounds in their pocket if they get a P45 the day after'.

In defence of no-win, no-fee litigation

- No-win, no-fee lawyers argue:

Equal pay litigation is a catalyst for collective bargaining....
'you put in the claims and suddenly the employers start acting a hell of a lot faster'.

Claims unions are 'sexist' – first priority is protecting male 'losers': pay protection, job enrichment, re-jigging the scores...

E.g. [local authority JES] was 'implemented in 2003-2004 but women got not a single penny in back pay as a result.... the men got 5 years 100% pay protection.... We don't come onto the scene until late 2007, within 3 months of us coming on the scene they're paying out £15 million in back pay to the women.... And the unions say "well we've been negotiating"'.

'We're talking about people who are working full-time... for £12,000 a year.... This is virtually poverty wages.'

Impact on collective bargaining

- Unions became more cautious in their approach to negotiating settlements
- But also became more proactive in litigating
- Union officials saw this shift as potentially undermining the effectiveness of collective bargaining:
 - ‘Everything at the end of the day is a shabby compromise.... but it’s done on the basis of this is the best we can negotiate; it’s not some of you can take it and some of you can’t. Once we take a vote on it, it’s implemented collectively, that’s the whole basis. Why would they bother negotiating with us otherwise?’ (Union official)
- The cost of meeting back pay claims has led many employers to use legal processes as a way of delaying resolution despite a clear picture having emerged about the scope of the material factor defence

Limits of the law

- ‘The long-term goal of the equal pay legislation, which has been in force since 1975, is not, of course, interminable litigation between waged workers and their employers about their rights. They all have other things to do and to spend their money on. The aim is the elimination of sex discrimination against women and against men in matters of pay. Putting that uncontroversial aim into practice is taking a very long time indeed, which is not surprising as the whole set up involves, indeed requires, the clashing of rights not just between employer and employee, but also as between groups of employees. The fact that the rights are qualified, not absolute, has not deterred trips to the tribunals and confrontation in the courts, which have demonstrated that they are not necessarily the best places in which to put an end to the injustices of discrimination in the workplace’ (Lord Justice Mummery in *Haq v. Audit Commission*, 2012)

Issues of regulatory design

- Equal pay laws do not operate as ‘default rules’ in the manner of ‘statutory bargained adjustments’ over working time and collective redundancies, so collective agreements can always be challenged on their grounds of incompatibility with the legislation, but is this appropriate given the fundamental nature of the right to equality?
- Is the public sector a ‘soft target’ thanks to greater transparency on pay, presence of collective bargaining, limited scope for employer avoidance?
- Is the ‘disruptive’ effect of litigation beneficial in terms of challenging stereotypical views on pay?

Conclusions

- Litigation and collective bargaining are potential complements in addressing equal pay, but defective regulatory design could lead to them operating as substitutes
- No clear view yet on net effects of mass litigation in addressing inequality
- Focus on symptoms as opposed to underlying causes of discrimination in the workplace?