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, disclosure, 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
- 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
- Ineffectiveness, in practice, of shareholder monitoring, despite official encouragement (Kingsmill Review, 2001)

Rise of mass claims: the legal context

- Civil procedure rules on 'no win, no fee' litigation loosened in the early 2000s
- New business model for law firms: targeting union members dissatisfied with collective bargaining outcomes
- Innovative legal claims: litigation against unions (*Allen* v. *GMB*, 2008); challenges to employer's use of material factor defence to justify historical pay differences (*Redcar BC* v. *Bainbridge*, *Surtees* v. *Middlesborough BC* (2008); challenging 'scope of employment' defence (*City of Edinburgh Council* v. *Wilkinson*, 2012); routing claims through the regular courts to avoid time limits (*Abdulla* v. *Birmingham City Council*, 2012); 'piggyback' claims (*Hartlepool BC* v. *Llewellyn*, 2009)

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
Wilson v. *North Cumbria NHS Trust* (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
Allen v. *GMB* (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
Redcar and Cleveland BC v. *Bainbridge*, *Middlesborough BC* v. *Surtees* (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
Slack v. *Cumbria CC* (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
Hartley v. *Northumbria NHS Trust* (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
Nicholls v. *Coventry CC* (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
Bridges v. *Bury MBC* (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
Barker v. *Birmingham CC* (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 estimated £200-£600 million; employer appealing
South Lanarkshire Council v. *Russell* (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
Brennan v. *Sunderland CC* (2012)	Unclear number of claims, Stefan Cross Solicitors	Bonuses, JES, union role in negotiation collective agreement	Bonuses not clearly enough linked to productivity	Liabilities to be determined

The move to single status (SSA) in the public sector

- 1997 Single Status Agreement (SSA)
  - 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
- Key issue was male bonus (30%), response to public sector pay freezes of the 1970s
  - 1987 job evaluation exercise had ignored bonuses
- Catalyst was Cleveland dinner ladies, 1996
  - Awarded £4m equal pay, £1m for sex discrimination
  - Union lawyer was Stefan Cross

Inertia and delay

- SSA 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
- 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 for ‘losers’
  - Employers wanted ‘nil cost’ settlements; waiting to see what other LAs were doing

Entry of Stefan Cross

- Acted as a fillip
  - Directly: representing individual claimants
  - Indirectly: pushing the unions towards back pay settlements and forcing them to litigate
- Unions claim they were already seeking back pay and taking legal action (limited evidence)
- Interviews with employer reps and local union officials suggests :
  - Focus of early negotiation on rectifying existing inequalities and pay protection issues
  - Early back pay settlements: ‘a compensatory sum for giving up right to make a claim’ pre *Allen* v. *GMB*

Controversy of no-win, no-fee lawyers

- 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’.

Controversy of no-win, no-fee lawyers

- “What he did initially I think he should be praised for because he made everybody take action... it enabled me to go to our cabinet and say look folks we can do things two ways, you can either keep your head buried in the sand and wait for him to take us to tribunal and he will get a lot of money. Because we had some really awful old bonus schemes around.

- BUT: “What he has done since I think is a different kettle of fish, I think he is now into a bit of the money and the mischief and getting his name in the law books, because he wants to be remembered in prosperity”.

  - HR Manager

No-win, no-fee lawyers response

- 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'.
- Unions are 'sexist' – first priority is protecting male 'losers': pay protection, job enrichment, re-jigging the scores...
  - Colluded with employers to deny low-paid women
- Unions only act when lawyers intervene, e.g.:
  - 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.'

Allen v. *GMB*

- Middlesbrough Metropolitan Borough Council
- ET rejected a claim of direct discrimination agreeing that the union motivation had not been gender, but to 'produce the least protest from the membership as a whole'
- Ruled that the way in which the GMB had attempted to balance a range of conflicting interests constituted indirect sex discrimination
  - Gave undue weight to 'losers'
  - Did not inform the women of the sacrifice they were being asked to make in accepting only 25% of what they might be entitled to
  - Sought to 'persuade or frighten' the women into accepting the deal
- Critical of the union for failing to protect the interests of the claimants by not issuing legal proceedings early.

Impact on collective bargaining

- Unions became more cautious in negotiating settlements
  - Significantly slowed the process down
  - Union official: “crossing every T and dotting every I”
  - LA HR Manager: Its “difficult to get the unions to agree to anything now because they feel they are potentially going to be litigated against... Although they are quite prepared to talk to us and give us their views on various issues, at the end of the day ... they are not going to agree anything... [Allen has] slowed things down quite significantly”.

- Unions have become far more proactive in litigating
  - Unison ~ 40,000 + GMB ~ 25,000 +
- Fractured working relationships in some instances:
  - Union official about a LA CEA:
  - “He just leaned across the table and said why are you doing this to us? You are not doing this to councils in the south east of England or London where 15 years ago they privatised all their support services. But we did everything you wanted, we didn’t privatise the services and now you are doing this to us”.

- Seen 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)

Long term impact of Allen decision not as great as feared

- Didn't bankrupt the unions:
  - A union official on Middlesbrough: "there's no question in my mind that the local people had been sloppy".
- *Hartley V Northumbria NHS Trust:* Collective settlement is "a sensible and enlightened decision in the best interests of their members as a whole"
- HR Manager: unions are now forcing local authorities to take equality impact assessment seriously

Cost of back pay major issues

- Many employers using legal processes as a way of delaying resolution, despite a clear picture having emerged about the scope of the material factor defence

- “We had a case [recently] which we will lose and it’s just a case of how much we lose by... we are just waiting for the decision. The reason we fought it was that we wanted to try and minimise the amount we had to pay”.

- “They [the unions] wanted people to get a whole heap of money and going back six years; the council doesn’t have that kind of money.... [and if it] decides to agree to the demands we will have to cut a significant number of jobs, it’s that simple”.

‘This is yet a further skirmish in the on-going litigation brought by Mrs Brennan and others against the City of Sunderland and two trade unions…. From time to time the parties surface from the Employment Tribunal in Newcastle to obtain a ruling on some disputed matter from the EAT, and scuttle back to continue the battle below. This is the third appeal relating to this particular litigation that I have heard in the course of last year.’

– Elias J., 2008, in EAT ruling on *Brennan* v. *Sunderland City Council, GMB and Unison* (case still ongoing)

Conclusions

- Entry of no-win, no-fee firms seems to have triggered more union-led litigation
- But, problems for collective bargaining include litigation risk leading to uncertainty and further delays to implementation of single status agreement
- Different conceptions of fairness in equal pay?
- Limits to the law as a means of implementing equal pay: is a ‘hard law’ strategy centred on legal claims inimical to, or complementary to, regulatory strategies based on collective bargaining and disclosure?