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Focus on the Gender Pay Gap

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Caroline Underhill explains what the gender pay gap is and why we still have it, despite 40 years of equal pay legislation

Mind the gap

THE GENDER pay gap is the measurement of the difference in pay between men and women, expressed as a proportion of men's pay. It can be measured in different ways, such as: hourly rates, weekly pay including allowances and overtime, or annual pay.

Alternatively, the mean (average) or the median (the middle point in pay with equal numbers of people above and below it) can be used.

Structural factors are the key cause of the gender pay gap.

These include: occupational segregation; the part-time pay penalty; women's disproportionate responsibility for unpaid caring; and women's concentration in low paid highly feminised sectors

The Office for National Statistics (ONS) reported in December 2016 that the median gender pay gap for all employees, based on hourly pay excluding overtime, was 18 per cent. This is obviously better than the situation 16 years ago when the median gender pay gap was nearly 27 per cent; and even better than where we were 40 years ago when it was common to find jobs paid at a man's (higher) rate or a woman's (lower) rate. The difference of 18 per cent is still unacceptable, however.

The Equal Pay Act 1970

The Equal Pay Act 1970, which came into force in 1975, stated that every contract of employment had an implied term whereby women and men doing similar work, or work rated equal under a job evaluation scheme, should be on the same terms of employment, including terms as to pay.

There were some hard-fought battles to make sure that the right to be paid the same for work rated as equal meant what it

said. Nevertheless, there were still substantial differences between men and women doing different jobs where there was no job evaluation scheme.

It was not until 1986 that the Equal Pay Act was amended to include the right to equal pay for different work that was of equal value. Because there was (and is) no general agreement about which jobs are equal in value however, the law was (and is) difficult to understand and therefore difficult (and expensive) to enforce.

For instance, it takes a long time for claimants to make their way through the tribunal process and requires either substantial resources, the expectation of a very high award, the backing of a trade union or combining with large numbers of other women in the same situation.

Persistence of the gender pay gap

The question, of course, is why do we still have a gender pay gap, despite over 40 years of equal pay legislation? The answer is far from straightforward but at least part of it is caused by structural reasons which cannot be remedied by individual legal action under the Equality Act 2010 (or the Equal Pay Act 1970).

According to a 2016 report by the Women and Equalities Committee (a select committee in the House of Commons): "The causes of the gender pay gap are complex and varied. Direct discrimination plays a part in women's lower wages, particularly for older women who entered the labour market on less equal terms to men and who may face dual discrimination on the grounds of age and gender.



Encouraging more women into STEM jobs could reduce the gender pay gap

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Occupational segregation and low pay

One difficulty is that a national gender pay gap figure measures all jobs and so may be measuring inequality generally rather than differences between jobs that should be paid the same. We know that jobs such as cleaning and clerical work tend to be lower paid. A cleaner is not paid as much as a manager, for instance. So part of the gender pay gap is explained by the fact that a lot more women than men work in lower value occupations.

The equal pay legislation never set out to remedy that inequality, as the right to equal pay is only between jobs that are equal in terms of demands on them. This can be measured by jobs being broadly the same, where a job evaluation scheme analyses the jobs as in the same grade or score, or

where an exercise similar to job evaluation is done and the jobs measure up as equal.

There are social policy measures and other steps that could be taken to reduce the size of the gender pay gap, however. These include improving equal opportunities both at work and in education, in recruitment, training and promotion such as taking steps to encourage women into STEM jobs (science, technology, engineering and mathematics) and steps to encourage women into management.

Part-time penalty and caring responsibilities

Another contributory factor is that childcare and care for the elderly or those with disabilities tends to be mainly done by women. This is often unpaid work within the family. Women therefore tend to work shorter hours in paid work than men.

This impacts on their pay because part-time work tends to be limited to certain types of job that are generally poorly paid; because women take time out of the

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Barbara Castle was responsible for the 1970 Equal Pay Act as Secretary of State for Employment in Harold Wilson's government

↪ labour market for periods at a time and then return part time and also because of assumptions that women will take time out to care for children.

The effect of childcare can be seen in the analysis of the pay gap by the Resolution Foundation think tank.

It recently reported, using ONS figures, that the gender pay gap for women and men aged between 20 and 22 was just under seven per cent, while for women and men aged 30 to 39 it was just under 12 per cent, half what it was in 2000.

For women and men aged over 40, however, it remains at about 25 per cent, a gap that has not changed much over the years.

It can be seen from these statistics that the law has, to some extent, reduced the element of pay gap due to caring responsibilities but has not been able to tackle differences in pay due to women falling behind in experience and skills after being out of the workplace or returning part time.

Social policy measures could help, such as employers offering to re-train returners to work; the government encouraging equal sharing of care within the home; and the provision of support outside the home so

that working and caring are more practicable for those on median or lower incomes.

Market forces

In addition to the structural factors, the impact of the law is limited by the role that market forces are permitted to play in wage rates. In effect, past discriminatory pay differentials continue to adversely affect current pay decisions.

The Equality Act 2010 cannot correct the discrimination in the market because it can only deal with claims of inequality between different employers in very exceptional circumstances.

Indeed, the need to pay more to recruit people with particular skills or experience has been accepted by courts and employment tribunals as justifying discriminatory gender pay gaps between men and women doing equal jobs.

There is very little objective, analytical evidence that market pay makes a difference in recruitment or subsequent performance but is generally accepted in individual cases.

Conclusion

In effect, neither statistics nor research tell us which jobs are equal, nor do they tell us about pay practices, which tend to be shrouded in mystery. Market forces are similarly foggy.

Add to that the punitive regime of fees for employment tribunals and the impossibly lengthy, time consuming and difficult procedures for bringing a claim and it is easy to see why the pay gap persists.

On the other hand, those who work in sectors where there is union membership and collective bargaining generally are paid more on average and the gender pay gap is, on average, lower.

The need to pay more to recruit people with particular skills or experience has been accepted by courts and employment tribunals as justifying discriminatory gender pay gaps between men and women doing equal jobs

Kate Lea explains what the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 say and how employers should put them into operation

Calculating the gender pay gap

THE GENDER pay gap regulations, which come into force on 6 April 2017, set out how employers with more than 250 employees should calculate and report on the gender pay gap.

In addition, draft regulations have been published for public sector employers with 250 or more employees. The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 comes into force on 31 March 2017 and largely mirrors the private sector regulations, except that they form part of the existing public sector equality duty.

It is important to note that the gender pay gap is not the same as equal pay, as Caroline Underhill explains on pages 2-4.

Duty to publish annual information relating to pay (regulation 2)

Every year, starting in 2017, private sector employers with 250 or more employees must publish the following information:

- The difference between the mean hourly rate of pay of male and female employees
- The difference between the median hourly rate of pay of male and female employees
- The difference between the mean bonus pay paid to male employees and that paid to female employees
- The difference between the median bonus pay paid to male employees and that paid to female employees
- The proportions of male and female

Main points

- The regulations apply only to private sector employers with 250 or more employees, including any self-employed workers engaged directly by the employer, as well as consultants and independent contractors
- Employers must publish the mean and median hourly pay gap between men and women on a defined date, referred to as the "snapshot" date
- Employers have to publish information on the gender bonus gap; the proportion of men and women who were paid a bonus; and the proportion of men and women in different pay bands
- Employers have to publish the figures on their website as well as a government website.

- employees who were paid bonus pay
- The proportions of male and female full-pay employees in the lower, lower middle, upper middle and upper quartile pay bands.

This information must be published within 12 months beginning with a defined pay date of 5 April (31 March for public sector employers), referred to as the "snapshot" date.

When compiling this information, employers do not have to include data relating to an employee who is personally employed under a contract to do work, if they do not have, and it is not reasonably practicable for them to obtain, that data.

In addition, only employees on full pay are included in order to avoid any ↪

- skewing of data that might arise from those on temporarily lower rates of pay, for example, by reason of maternity and family friendly or sickness absence.

Meaning of ordinary pay (regulation 3)

Ordinary pay includes: basic pay, allowances, pay for piecework, pay for leave and shift premium pay.

It excludes overtime pay, redundancy pay or any payment relating to termination of employment, pay in lieu of leave or any non-monetary remuneration.

Meaning of bonus pay (regulation 4)

Bonus pay means any remuneration:

- in the form of money, vouchers, securities, securities options, or interests in securities
- which relates to profit sharing, productivity, performance, incentive or commission.

It excludes ordinary pay, overtime pay or payment relating to redundancy or termination of employment.

Employee's weekly working hours (regulation 7)

Generally, the number of working hours are those stipulated in the employee's contract of employment that are in force on the "snapshot" date. If the employee does not have the same working hours every week, they should be calculated over a 12-week period.

If they have not been working that long, then the number should "fairly represent" the number of hours they work every week.

If the employee is paid on the basis of piecework, then the number of working hours is the number of hours of output work for that employee in the week when the snapshot date falls.

Working hours include hours when the employee is available, and required to be available, at or near a place of work for the

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purposes of working unless they are at home. They exclude any hours for which the employee is entitled to overtime pay.

Information to be accompanied by signed statement (regulation 14)

The information published under regulation 2 must be accompanied by a written statement which:

- confirms that the information is accurate; and
- is signed either by a director, a partner



or the most senior employee in the organisation.

Form and manner of publication (regulation 15)

The information relating to pay and the written statement must be published on the employer's website:

- in a manner that is accessible to all its employees and to the public; and
- for a period of at least three years beginning with the date of publication.

The employer also has to publish on a website "designated for that purpose by the Secretary of State":

- the information required by regulation 2, and
- the name and job title of the person who signed the statement required by regulation 14.

As the first calculation date is 5 April 2017, the information therefore has to be published on the employer's website by ➤

➔ April 2018 and remain there for three years. It is not clear whether this information will be used in due course to create league tables for certain industries.

Shortcomings

While the aims of the regulations are admirable they are highly prescriptive and contain a number of shortcomings.

The “snapshot date” for workers paid weekly or fortnightly, as opposed to monthly, will be skewed in the event of bonuses being paid at the start of the month as it will not include the entire month. The definition of pay includes bonuses only if paid in April, so if it is paid in another

month it drops out of the calculation altogether. It is also worth noting that the bonus gap calculations use an annualised sum.

There is no requirement to include data for employees who are personally contracted to do work, if the employer does not have their pay data and it is not “reasonably practicable” to obtain it. Employers may seek to take advantage of this provision to exclude pay data for male dominated, higher paid contractors.

The calculation of average hourly rates of pay provides that, where an employee does not have normal working hours, the employer should use a number which fairly represents the number of working hours in a week having regard to “the average hours worked”. Unscrupulous employers may seek to use this to their advantage.

Partners, including members of limited liability partnerships, are excluded from the remit of the regulations.

The requirement to only include “full pay” employees when calculating pay has not been extended to the calculation of bonus payments and pay quartiles.

The regulations include premiums paid to night shift workers in the definition of pay. As they are predominantly men, there is still scope for perceived inequality without there actually being any, thereby artificially skewing the results.

Pay does not include remuneration provided, otherwise than in money, and so does not address benefits provided in the forms of goods and services. For example, a car allowance will count but the provision of a company car will not.

More importantly, there is no means of checking the data and no legal sanction for getting it wrong.

Pay discrimination

Even if an employee can show the existence of a pay or bonus gap, this will not help them in proving unlawful pay discrimination. For a claim to succeed, a successful claimant still has to show equality of terms of like work, work rated as equivalent or work of equal value.

Once proven, it is then open to the employer to defend the claim on the basis that the reason for any pay disparity was genuine, “material” and unrelated to the gender of the workers.

Equally, however, the published data will prove a useful resource and hopefully such transparency may serve to deter future pay discrepancies.



Jo Seery outlines some of the steps that companies and unions can take in order to tackle the gender pay gap

What can companies and unions do?

ACCORDING TO government research carried out in 2014, removing the gender pay gap was a high priority for almost two thirds of medium-sized employers (those with fewer than 250 employees) as well as large employers (those with 250 or more employees).

However, only a small proportion had a planned approach for reducing any potential pay gap and two thirds had no plan at all.

Despite these findings, the 2017 pay gap regulations (see the article by Kate Lea on pages 5-8 for details) only apply to employers with 250 or more employees. As most workers (60 per cent) are employed by small to medium-sized employers, it would greatly increase the number of workers covered if they were extended.

There is a cost to the economy if employers do not take action. The government stated in the consultation on the regulations that removing the gender pay gap would help increase women’s participation in the labour market, worth between £15 and £23 billion or 1.3 to 2 per cent of gross domestic product each year. Employers can therefore ill afford to ignore the gender pay gap.

Achieving transparency in pay

By introducing a statutory requirement to publish gender pay information, the 2017 regulations provide a step in the right direction towards achieving transparency in pay.

However, because they only require employers to publish a single overall gender pay gap figure for full time employees, pay transparency is limited, making it harder to identify where the real pay gaps lie and what the causes are.

Steps employers could take

Employers who are genuinely committed to addressing the gender pay gap could:

- Ensure transparency in pay
- Analyse where the pay gaps are
- Consult with workers and their trade unions
- Introduce an agreed action plan for addressing the gender pay gap
- Publish their gender pay reports
- Review at regular intervals in consultation with workers and their trade unions.

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To properly identify the gaps, employers should have to publish a much wider range of information than the regulations require. This should include:

- The gender pay gap within grades or job roles, as this would help to identify gaps between women and men doing the same work and reduce the risk of employers having to defend equal pay claims
- Part time workers' earnings. The charity, Business in the Community,

The charity, Business in the Community, recommends that employers provide the gender pay gap between part-time workers' hourly earnings as compared with men's full-time earnings. More women generally work part time and part-time work is more likely to be lower paid work. Therefore, a comparison between part-time women's and full-time men's earnings is necessary to understand what other factors are causing the gender pay gap.

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- Include overtime pay to get a fairer representation of the pay gap between women and men. Excluding overtime, which is generally earned by more men than women, distorts the true pay gap when considering the pay within grades.
- Bonus pay should include the value of salary sacrifice schemes. A failure to take into account elements of pay that more men earn enables biased reporting to creep in, and a failure to include salary sacrifice schemes allows employers to portray a smaller pay gap than in reality.

To achieve transparency and instil trust among workers and their representatives actual pay data should be disclosed.

Analysing the pay gaps

Having gathered the information, employers should be required to explain the data including who has been included, what has been included, how it has been collated and over what period. There should be a clear narrative explaining how the gender pay gaps have been calculated.

Consulting with workers and their trade unions

Employers should disclose the information to workers and their trade union representatives, as they do in France, in advance of publication. Both parties can then work to identify the gender pay gaps and agree an action plan for addressing them.

This may or may not impact on pay negotiations so the correct forum for discussing the gender pay gap should be agreed at the outset. Regular review meetings to assess progress on the action plan should be arranged and agreed in advance.

Developing an action plan

Employers should set out what action they propose to take to address the gender pay gap. We know from the Office for National Statistics survey that some of the causes of the single gender pay gap include job segregation, the fact that women tend to work in lower paid part-time jobs and suffer a mother's penalty for time taken out of employment to look after children. In light of that, employers' action plans could include:

- Better paid part-time work
- Better paid shared parental leave so that fathers and partners can actually afford to take time off to look after children and dependents
- Improved training and promotion practices.

Publish gender pay reports

Gender pay gap reports should be published separately and not buried in the company's annual report. It should be in clear language, should not contain jargon and any data should be presented with an explanation that makes it easy for everyone, managers and workers alike, to understand, both in terms of what the data means and what measures need to be introduced. They should be regarded as working documents to assist both workers and employers in reaching a common goal of eliminating the gender pay gap.

Sanctions

There should be sanctions for employers who fail to provide gender pay gap information. Government research found that employers were more likely to provide information if there was a legal obligation with which they had to comply. However, a legal obligation with no sanction is unlikely to have the same effect, since there is no incentive to do anything at all.

What can unions do?

In the absence of sanctions, the question as to what can be done to make sure employers comply with their legal obligations falls to the unions, not least because the requirement to publish gender pay gap information presents them with an opportunity to include it in their collective bargaining negotiations.

In the absence of any enforcement provisions, trade unions can use the disclosure provisions under section 181 of the Trade Union and Labour Relations (Consolidation) Act 1992 which states that: "an employer who recognises an independent trade union shall for the purposes of all stages of collective bargaining ... disclose to representatives of the union on request information ... without which the trade union representatives would be to a material extent impeded in carrying on collective bargaining ... and which it would be, in accordance with good industrial relations practice that [they] should disclose..."

The union can use these provisions to request gender pay gap information from the employer, including how they have calculated it, on the basis that without this information their ability to negotiate on pay (which is a collective bargaining matter) is materially impeded. For example, where the union includes, as part of its pay claim, a specific provision to address the gender pay gap.

The ACAS Code of Practice on disclosure of information to trade unions for collective bargaining purposes states that collective bargaining can range from negotiations on specific matters arising daily



Protestors in 1956 arguing for equal pay

in the workplace to extensive negotiations on terms and conditions. Where a union is recognised, they will usually have annual pay negotiations. As part of those negotiations, the ACAS Code states that relevant information for the purposes of collective bargaining includes pay analysed by sex, as well as information on how basic pay has been calculated.

Applying for disclosure

Where employers fail to provide the information required under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, unions can seek disclosure under the provisions of section 181 by arguing that their ability to represent their members in collective bargaining and address their obligations to secure fair pay is materially impeded and undermines good industrial relations.

Given that there is a statutory obligation on employers to provide gender pay gap information, they are unlikely to succeed in arguing that they do not have the information in their possession. Nor are they likely to succeed in arguing that the information does not materially impede the union's ability to collectively bargain to ensure fair pay.

Where the employer does not provide this information, the unions could apply to the Central Arbitration Committee for disclosure.

Despite this government's best intentions, it is a collective response to equal pay that will ultimately call employers to account.

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