THOMPSONS SOLICITORS
THE MOST EXPERIENCED TRADE UNION FIRM IN THE UK

SPRING 2008
Issue 121

Labour & European Law Review

Pay up

Unions have been fighting for equal pay for women for more than a hundred years – and continue to do so

Going to court

An overview of the most important equal pay cases decided recently by the courts

Equal pay

An overview of the main themes to emerge from recent case law

www.thompsons.law.co.uk

Pay up

You would never know from the media coverage but unions have been fighting for equal pay for women for more than a hundred years – and continue to do so

The vast majority of tribunal cases brought by women are backed by the unions, which also continue to lead the way in negotiating equal pay for hundreds of thousands of other women, on both a collective and individual basis.

Mark Berry, Thompsons' National Coordinator for Equal Pay (Local Government), charts the history of union involvement (which started over a hundred years ago) in the fight for equal pay for women members.

Leader Annie Besant and the match girls Strike Committee

Over the years

The TUC passed its first resolution in favour of equal pay in 1888 when the idea of paying women the same as men was nothing short of revolutionary. It had to struggle against the odds for nearly a century before the tide began to turn in its favour (in the sense of government support anyway) in the form of the Equal Pay Act 1970.

The statute turned out to be anything but straightforward in its application, however, and after many years of backing thousands of cases (some of them lasting a decade), there has been a growing conviction among union reps that negotiation might be a quicker and less expensive route.

In the public sector at least, that has also proven problematic with the government refusing to provide the necessary funding to make equal pay a reality.

Although the struggle is clearly far from over, today there are millions of women who no longer have to suffer the injustice of unequal pay, thanks to the determination of their union to fight the battle for them and keep the issue in the limelight.

1880s	Sporadic industrial action at the Bryant and May match works in the east end of London culminates in the iconic and successful "match girls" strike in 1888. The TUC passes its first resolution on the issue of equal pay in 1888, but it is almost a century before the government takes any notice.
1960s	The Ford sewing machinists walk out when told they are to be graded in category B (less skilled production jobs) rather than category C (more skilled production jobs) and, to add insult to injury, are to be paid 85 per cent of the B rate. They go back to work when it has been agreed they should be paid the full rate, phased in over two years.
1970s	The labour movement celebrates the introduction of the 1970 Equal Pay Act (which came into force in 1975), for which it had fought for many years. The hourly pay gap for full time women workers in 1975 is 30 per cent.
1983	Equal Pay Act is amended to provide for "equal pay for work of equal value" with "male comparators" in the same employment.

Photo: Jess Hurd

1984	GMB union launches the first "equal pay for work of equal value" case on behalf of canteen cook Julie Hayward. She claimed her work was of equal value to that of painters, joiners and thermal insulation engineers (**Hayward -v- Cammell Laird**). The Ford sewing machinists are finally regraded to C category by a panel of inquiry.
1986	The MSF union (now part of Unite) embarks on one of the longest and most famous equal pay cases in legal history. NHS speech therapist Pam Enderby argues that her work and that of her colleagues – mostly women – is of equal value to clinical psychologists – predominantly men. Her employers said the difference in pay could be justified because the two groups bargain separately (**Enderby -v- Frenchay Health Authority**).
1988	The House of Lords finds in favour of Julie Hayward declaring that, although she received an overall package that was broadly equivalent to that of her comparators, her basic wage was the material factor that had to be considered.
1991	Unison wins £813,000 for 16 former British Gas women workers compulsorily retired in 1986 at the age of 60 (**Foster -v- British Gas**). North Yorkshire County Council cuts the wages of 1,300 school dinner ladies to keep the work in-house, but manages not to cut the wages of other employees (mainly men) working in services that are also kept in-house. Unison decides to fight the cuts (**Ratcliffe -v- North Yorkshire County Council**).
1993	The European Court of Justice rules in favour of Pam Enderby, pointing out that, if wages of different bargaining groups cannot be compared, employers can avoid equal pay claims by insisting on having separate groups.
1994	GMB, T&G and Unison sign an historic agreement paving the way for "Single Status" deal in local government.
1995	The House of Lords finds in favour of the dinner ladies protesting against pay cuts and reduced holidays as a result of compulsory competitive tendering. They win £2m in back pay (**Ratcliffe -v- North Yorkshire County Council**).
1996	Unions and management finally hammer out landmark "Single Status" deal in local government to be implemented by individual local authorities by 31 March 1997.

1997	"Green Book" national agreement signed merging white collar and blue collar pay structure. Moratorium on equal pay claims agreed by GMB, Unison and T&G for 12 months to allow time for councils to undertake job evaluations.
1998	In an out of court settlement, GMB and Unison win £1.5m in back-pay for Bedfordshire dinner ladies.
1999	After years of pressure from unions, a national minimum wage is introduced which up-rates the pay of more than 1.3 million women.
2000	Unions launch "Invest for Change" campaign lobbying the government for additional funding to implement the Single Status agreement.
2001	No win no fee (NWNF) lawyers begin to trawl for clients, charging up to 25 per cent of any compensation won.
2002	GMB and Unison submit equal pay claims on behalf of 2,960 female manual workers (**Joss and ors -v- Cumbria County Council**). Unions lobby for reform of Equal Pay Act and for ring-fenced funding for public sector equal pay initiatives.
2003	Sex Discrimination Act amended – entitlement to back pay extended to six years. NWNF lawyers submit multiple equal pay clams against Middlesbrough Council.
2004	Unison submits multiple equal pay claims against Newcastle City Council, Sunderland City Council and South Tyneside Council. Unions sign new pay system in the NHS called Agenda for Change to address pay gap, backed by £920 million of government money.
2005	GMB and Unison negotiate £300 million out of court settlement for more than 1,600 women at two Cumbria hospitals (**Wilson -v- North Cumbria NHS Trust**). The Court of Appeal says female ancillary staff working for different NHS trusts after the district health authority was broken up in 1991 did not have "common terms and conditions of employment" even though some of the trusts later amalgamated (Armstrong and ors -v- Newcastle-upon-Tyne NHS Trust).
2006	GMB and Unison win equal pay cases against Cumbria County Council on behalf of 1,700 female manual workers (**Joss and ors -v- Cumbria County Council**). Newcastle tribunal decides in favour of claimants represented by NWNF lawyers that the GMB indirectly discriminated against female employees by allegedly placing more attention on pay protection for men than on back pay for women (**Allen and ors -v- GMB**). Employment Appeal Tribunal judgement in NWNF case that women in comparable blue and white collar jobs should be paid the same as male refuse collectors who receive productivity bonuses. The decision makes previously understood law on pay protection more confused and therefore more difficult (**Bainbridge and ors -v- Redcar & Cleveland BC**).
2007	Deadline for introducing Single Status in local councils lapses with only a third of local authorities completing deals, mainly because they do not have the resources to do so. Unions announce litigation under equal pay legislation against all 22 local authorities in Wales. Court of Appeal says women employed at community schools can compare their wages with men employed in other parts of the council (**Anderson and ors -v- South Tyneside Council**). Employment Appeal Tribunal rules that GMB did not discriminate against their female members, agreeing that the function of unions is to up-rate pay, not agree wage cuts (**Allen and ors -v- GMB**). After years of pressure from unions, the government releases £500m to fund back pay at 46 local authorities. Hourly pay gap for full-time women workers stands at 17.2 per cent.

Going to court

An overview of the most important equal pay cases decided recently by the courts

The number of equal pay cases reaching the courts is now of almost epidemic proportion, making it well nigh impossible for trade unionists to keep on top of the most important decisions.

Victoria Phillips, Head of Employment Rights at Thompsons, identifies some of the key cases and extrapolates the relevant points for trade unions.

Gutridge -v- Sodexho

This case concerned a TUPE transfer in 2001. Under the Equal Pay Act, time usually starts running from the end of a particular contract. But the tribunal decided that a TUPE transfer did not trigger the time limit in claims for equal pay that were not pension claims, unless there was some other contract change. This case is now being appealed by the employers to the Employment Appeal Tribunal (EAT).

Dolphin -v- Hartlepool Borough Council

Supervisory assistants, secretaries, clerks and teaching assistants in voluntary-aided schools employed by the governing body claimed equal pay with manual staff employed by Hartlepool Borough Council. As the law does not allow equal pay claims between employees with different employers, the women in **Dolphin** argued that, in practice, the governing body followed the same terms and conditions as the local authority collective agreement.

The EAT said the collective agreement could not overcome the fact that they had separate employers from the men. Staff working in voluntary-aided, foundation, trust and academy schools cannot therefore compare themselves to those working in other parts of local authority employment.

Armstrong -v- Newcastle upon Tyne NHS Hospital Trust

The Court of Appeal decided that 124 women in one hospital trust could not compare themselves with men in another hospital trust because each trust, although part of the NHS, had separate pay and employment powers and so there was no "single source" for setting pay.

This decision allows employers to try to limit the effect of the Equal Pay Act by arguing that, even where there is the same employer, there still needs to be a "single source" of the pay inequality. This allows them to try to stop comparisons between men and women whose pay is set by different collective agreements. Given the number of reorganisations in the NHS in recent years, this decision makes it very important to have full employment histories for all claimants and comparators.

South Tyneside Metropolitan Borough Council -v- Anderson

School support assistants claimed equal pay with road sweepers on the same grade and with the same employer, but who received an additional bonus. South Tyneside argued that, as the women worked at different places to the men and were on different terms and conditions, they did not have to pay them equally.

The Court of Appeal said that, if a woman works at a different place to that of her comparator, the terms and conditions just have to be broadly similar to be able to make a comparison. They do not have to be identical and the women therefore won their claim. This decision means that women working in local authority schools can compare themselves to other local authority workers.

Bainbridge -v- Redcar & Cleveland Borough Council

Redcar and Cleveland BC replaced the White Book and Purple Book with the Green Book on 1 April 2004, which allowed for four years' pay protection. Both White and Purple Book women had started lodging equal pay claims with White Book men (who got additional allowances) in July 2003.

Pay protection: The EAT held that the council could not justify pay protection for an advantaged male group in circumstances where there had been pre-existing inequality in pay due to sex discrimination. They could, however, equalise pay downwards but must do so in full and immediately.

> This decision allows employers to try to limit the effect of the Equal Pay Act by arguing that, even where there is the same employer, there still needs to be a "single source" of the pay inequality

It also said that some of the women were entitled to the pay protection as they had established valid equal pay claims by 1 April 2004, but had just not received the money due to them. Had they done so, they would have been eligible.

This constituted direct sex discrimination. This aspect of the decision was appealed to the Court of Appeal in January 2008, along with **Surtees -v- Middlesbrough BC**.

Genuine material factor (GMF) defences: The EAT also said that women are only entitled to equal pay with a man if they can show that any differences were not justified. If there is a good reason why the man gets a particular bonus, which does not apply to the woman, she will not be entitled to equal pay. In this case, it said the productivity bonus to the men was justified. However the attendance allowance was not, even though there had been a good reason for giving it to the men originally (to improve attendance). As it was no longer achieving the aim for which it was originally given, it could not be relied on by the employers as a defence.

Comparators: The Court of Appeal said that in "work rated as equivalent" claims (where there is a valid job evaluation) and in equal value claims, a woman can compare herself with someone on a lower grade or with someone whose job has less value where that person is paid more than her.

Job evaluation: Purple Book claimants could not rely on a Green Book job evaluation scheme to claim equal pay with comparators on the same grade in the Green Book scheme before it had been implemented.

Nor could they automatically claim six years back pay. Instead, they had to show that their jobs were of equal value before 1 April 2004, the date when the job evaluation scheme was implemented.

Surtees -v- Middlesbrough BC

The claimant and comparator groups were similar to **Bainbridge**. Likewise, some claims succeeded but not until after the Green Book had been implemented. Again, as in **Bainbridge**, the council offered pay protection for the losers under the Green Book scheme.

Pay protection: The EAT held that, where there was no admitted pre-existing inequality in pay due to sex discrimination, the council could justify pay protection as a necessary component for introducing a new equalised pay system. It said that, in certain circumstances, the objective or aim can outweigh the adverse gender impact of the pay protection.

This case is being appealed, with **Bainbridge**, to the Court of Appeal. The outcome will affect all claims where a gender proofed pay system has been introduced.

Where there was no admitted pre-existing inequality in pay due to sex discrimination, the council could justify pay protection

Grundy -v- British Airways plc

Mrs Grundy had worked as a support cabin crew (SCC) member for some years when she transferred over to become a member of the cabin crew (CC). She claimed equal pay with a man who had benefited from annual pay increments as a CC member.

The Court of Appeal agreed that there was an adverse impact on women that BA could not justify as the SCC members were mainly women and the CC members almost equally divided between men and women. Provided that tribunals pick the pool for comparison that makes the most sense, the court said they cannot be challenged even if they could have chosen a different pool that would have led to a different outcome.

Chief Constable of West Midlands Police -v- Blackburn

Police officers working 24/7 shifts received an enhancement for doing nights that police on days did not receive. More women than men worked days although the difference was not great.

The EAT said that the employer was justified in making additional payments to staff who worked nights even though it had an adverse impact on women. The additional reward was a fair aim for the unsocial hours and the "social, psychological and other stresses" that night work created outweighed the discriminatory impact.

Joss -v- Cumbria County Council

The EAT made two decisions in this case in 2007 – one on GMF defences and the other on time limits.

GMF defences: The claimants were mainly carers, cleaners and catering workers. Most were on White Book terms but some were on Purple Book terms and claimed equal pay with male manual workers on White Book or Red Book terms.

The council had introduced productivity bonuses years ago for many of the comparators. Cleaners and caretakers had had bonuses until 1988 but these had been taken away to avoid job losses.

Some care assistants who transferred to another employer in 1992 then lost their enhancements (in addition to their bonuses).

The EAT agreed with the tribunal that the road workers productivity scheme was genuine but that, by the time the claims were lodged, it was no longer used to improve productivity. The bonus for the others was a sham. The council could not therefore show a GMF for the difference in pay.

The EAT also said that the tribunal was wrong to say that carers could not have equal pay with roadworkers, on the basis that their productivity could not be improved by pay incentives. Whether the carers' productivity could be measured and improved was irrelevant once the tribunal had decided that the employer could not justify the bonus.

It was also not convinced by the tribunal's rejection of the employer's argument that market forces had led them to reduce the women's pay and avoid job cuts. This was remitted to another tribunal to consider in more detail.

Time limits: The Equal Pay Act says that claims must be made within six months of the end of "the employment", meaning from the end of the contract (and not the end of continuous employment).

The EAT said that, where the paperwork shows that the employer and employee agreed to end one contract and start a new one, that is decisive irrespective of how small the changes are between the two contracts. This decision is being appealed to the Court of Appeal.

Highland Council -v- TGWU/Unison

The claimants lodged a number of equal pay grievances with their employer, and duly listed a number of job comparators in their step one letter. They then submitted their tribunal application ET1 forms, which listed those same comparators, as well as an additional number of jobs that they had not previously specified in the grievance letters.

The EAT agreed with the employer that they could not do that. It said that tribunals have to carry out a "qualitative assessment" to find out if the comparators in the ET1s were "materially different from any specified in the grievance document".

Equal pay

An overview of the main themes to emerge from recent case law

Although the Equal Pay Act 1970 has one of the shortest titles for a statute in legislative history, it has turned out to be one of the most tortuous to implement.

Caroline Underhill, Thompsons' National Co-ordinator for Equal Pay (NHS), looks at some recent cases, and identifies the issues of most relevance for trade unionists.

Different pay, same employer

The law says that women and men should be paid equally for doing the same or similar work, or work of equal value, in the following circumstances:

- if they work for the same employer
- if they have terms and conditions that are broadly similar, but work in different places
- if they work for different employers, but have a "single source" that sets their pay and conditions (not including collective agreements).

In **Armstrong -v- Newcastle upon Tyne NHS Hospital Trust**, for example, the Court of Appeal said that women in one hospital trust could not compare themselves with men in another hospital trust because each trust, although part of the NHS, had separate pay and employment powers.

The women and men worked for different employers, at different places of work. Even when their employers merged to become one, there were no common terms and conditions.

There was, therefore, no single source for both the claimants and the comparators that was both responsible for and could remedy the inequality in pay.

It is clear from the Employment Appeal Tribunal (EAT) decision in **Dolphin -v- Hartlepool Borough Council** that the same principle applies to schools and those who work in voluntary aided, foundations, trust and academy schools cannot compare themselves with other local authority employees.

Comparing jobs

The man and woman must be doing the same work, or work that is rated as equivalent under a job evaluation scheme or work that is of equal value.

Equal value claims are the most difficult cases to bring because they involve an assessment of the woman's job and the man's job

---

Once a job has been rated as equal with another one by a valid analytical job evaluation scheme, a woman cannot bring an equal value claim against her employer using men in higher grades as comparators (unless she can show the scheme is somehow invalid).

This is because the effect of the job evaluation scheme is that men's jobs have been rated as having a higher value. The case of **Bainbridge -v- Redcar & Cleveland BC** makes clear, however, that a woman can bring an equal pay claim on the basis that she is in a job that is rated the same as or higher than a man.

Job evaluations must be kept up to date to take into account changes in jobs over time that affect the value of the jobs.

Equal value claims are the most difficult cases to bring because they involve an assessment of the woman's job and the man's job to determine whether they are of equal value. This assessment is normally done by a tribunal-appointed expert who assesses the jobs on the basis of fact agreed by the parties themselves (or the tribunal, if they cannot agree).

Parties can also call their own experts to give evidence to a tribunal about whether to accept the appointed expert's view about the methodology used to assess the jobs. If they do, they can ask the tribunal to decide that the jobs were unequal because the methodology was flawed.

Sex discrimination and GMF defences

The real issue for tribunals to decide, however, is whether the pay difference between a woman and a man is due to sex discrimination – whether direct or indirect – and whether the difference in pay can be justified by a genuine material factor (GMF).

From the cases so far it seems that:

- If an employer can prove that the reason for the pay difference had nothing to do with sex discrimination then they have a valid GMF defence, and the woman's claim will fail. It does not matter whether the explanation is reasonable or fair. In the absence of some evidence of sex discrimination any explanation for the pay difference, even that it was an error or mistake, will do.
- If the employer cannot come up with a GMF defence, they have to objectively justify the difference in pay. For example, in the 2007 case of **Chief Constable of West Midlands Police -v- Blackburn**, the EAT decided that the employer was justified in making additional payments to staff who worked nights even though it had an adverse impact on women. It said that the fair aim of additional reward for the unsocial hours and the "social, psychological and other stresses" that night work creates outweighed the small, in that particular case, discriminatory impact.

The court considered how to apply principles about sex discrimination and genuine material factor defences to pay protection in new pay systems introduced to achieve equal pay

- The exact proportions of men and women affected by the differences in pay are relevant to the assessment of whether there is sex discrimination, but there is no single statistical formula that will prove sex discrimination in and of itself (**Grundy -v- British Airways plc**).
- Whether a difference in pay is justified by any particular explanation can change over time. What is justifiable at one point may not be justifiable later if the circumstances have changed.
  See, for example, the decision in **Joss -v- Cumbria County Council** in relation to the refuse workers' bonus scheme. Although it was genuine at one time it ceased to be a reasonable means of achieving a legitimate end because it was not really being used to improve productivity.

Pay protection

When an employer introduces a new pay system, they often provide short term protection for employees who will lose pay as a result. In general, pay protection is not unlawful as it may not have an adverse impact on women (or even if it does it can be justified).

In the **Bainbridge** and **Surtees** cases, heard by the Court of Appeal in January 2008, the court considered how to apply the above principles about sex discrimination and genuine material factor defences to pay protection in new pay systems introduced to achieve equal pay. Its decision is expected by May 2008.

Time limits

The Equal Pay Act says that claims must be brought within six months of the end of the woman's employment. **Joss -v- Cumbria County Council**, which is being appealed to the Court of Appeal, looks at what should happen when a woman changes her job or her terms and conditions during a period of continuous employment.

The EAT placed great emphasis on the paperwork in the particular cases it was considering. It said that agreed variations to terms do not trigger the time limit, but changes implemented by new written contracts agreed by the employee (even if they are quite small), do trigger it.

If there is no paperwork it is unlikely that changes will trigger the time limit as even quite significant changes to a contract can be implemented by an agreed variation. But it is possible that an employer can say that a substantial change in job duties and terms is so significant as to amount to the end of one contract and the start of another. So, to be on the safe side, always get claims in within six months of any change.

A TUPE transfer is not, in itself, the end of one contract and the start of another because of the effect of the Transfer of Undertakings Regulations 2006 (and its 1981 predecessor). But the regulations do not apply to pensions. So a TUPE transfer will not trigger the time limit in claims for equal pay that are not pension claims unless there is some other contract change.

This has only been decided at tribunal level so far (**Gutridge -v- Sodexho Ltd**) but this will be the subject of an appeal later this year. In pension claims, the change of employer automatically ends one contract and starts a new contract with the new employer, so a transfer will always trigger the time limit.

Comment

A number of decisions in equal pay cases in the last year have highlighted the difficulties of bringing them and the extraordinary length of time they take to resolve. The various decisions also reflect just how difficult it is to advise on all the possible different twists and turns they can take.

While the object of the legislation is to prevent discrimination between men and women, 30 years on we still have a 17 per cent gender pay gap. Little wonder that some politicians and commentators doubt the effectiveness of the legislation, and the Equality and Human Rights Commission is now pressing for a review of equal pay law.

The most effective way of delivering equal pay in workplaces is through collective bargaining. Negotiations in the public sector to implement the Single Status Agreement in local government and Agenda for Change in the NHS have made a real difference to women's pay. However, there are still huge differences in the private sector where opaque pay systems and a secretive approach to remuneration means the goal of equal pay is still some way off.

Thompsons is the largest specialised personal injury and employment rights law firm in the UK with an unrivalled network of offices and formidable resources.

HEAD OFFICE
Congress House,
Great Russell Street,
LONDON WC1B 3LW
020 7290 0000

BELFAST
028 9089 0400

BIRMINGHAM
0121 262 1200

BRISTOL
0117 304 2400

CARDIFF
029 2044 5300

CHELMSFORD
01245 228 800

EDINBURGH
0131 225 4297

GLASGOW
0141 221 8840

HARROW
020 8872 8600

LEEDS
0113 205 6300

LIVERPOOL
0151 2241 600

MANCHESTER
0161 819 3500

MIDDLESBROUGH
01642 554162

NEWCASTLE UPON TYNE
0191 269 0400

NOTTINGHAM
0115 989 7200

PLYMOUTH
01752 675810

SHEFFIELD
0114 270 3300

SOUTHAMPTON
023 8021 2040

SOUTH SHIELDS
0191 4974 440

STOKE-ON-TRENT
01782 406 200

SWANSEA
01792 484 920

Visit us at www.thompsons.law.co.uk
Email us at lelrch@thompsons.law.co.uk

LELR aims to give news and views on employment law developments as they affect trade unions and their members.

This publication is not intended as legal advice on particular cases.

Download this issue at www.thompsons.law.co.uk

To receive regular copies of LELR
email: lelrch@thompsons.law.co.uk

Contributors to this edition:
Mark Berry, Victoria Phillips, Caroline Underhill.

Editor: Alison Clarke
Design & production: www.rexclusive.co.uk
Print: www.dsigroup.com/talisman
Front cover photo: Rex Anderson

THOMPSONS
SOLICITORS

THE MOST EXPERIENCED
TRADE UNION FIRM IN THE UK