



## OpenAIR@RGU

### The Open Access Institutional Repository at Robert Gordon University

<http://openair.rgu.ac.uk>

This is an author produced version of a paper published in

International Journal of Discrimination and the Law (ISSN 1358-2291,  
eISSN 2047-9468)

This version may not include final proof corrections and does not include  
published layout or pagination.

#### Citation Details

##### Citation for the version of the work held in 'OpenAIR@RGU':

GOW, L. and MIDDLEMISS, S., 2011. Equal pay legislation and its  
impact on the gender pay gap. Available from *OpenAIR@RGU*.  
[online]. Available from: <http://openair.rgu.ac.uk>

##### Citation for the publisher's version:

GOW, L. and MIDDLEMISS, S., 2011. Equal pay legislation and its  
impact on the gender pay gap. *International Journal of  
Discrimination and the Law*, 11 (4), pp. 164-186.

#### Copyright

Items in 'OpenAIR@RGU', Robert Gordon University Open Access Institutional Repository,  
are protected by copyright and intellectual property law. If you believe that any material  
held in 'OpenAIR@RGU' infringes copyright, please contact [openair-help@rgu.ac.uk](mailto:openair-help@rgu.ac.uk) with  
details. The item will be removed from the repository while the claim is investigated.

## **Equal Pay Legislation and its Impact on the Gender Pay Gap**

### **Abstract**

*Equal pay legislation has been in existence for over forty years in the UK and the legal rules dealing with equal pay have been consolidated and amended recently with the implementation of the Equality Act 2010. However, despite this problems can still be identified with equal pay in the UK most notably the continued existence of a sizeable gender pay gap. This article will outline the current legal rules on equal pay and analyse their effectiveness in addressing the issue of the gender pay gap. It is clear that a problem such as the gender pay gap is often caused in society by deeply held stereotypical, discriminatory views and in employment by employers (and some employees) with institutionalised discriminatory attitudes and behaviour. These causes of the gender pay gap militate against it being tackled solely by the law (specifically equality legislation). In this article we will undertake a comprehensive analysis of the topic and establish to what extent the current law can facilitate the necessary changes to eradicate this gap. In areas where it is not sufficiently robust to do this we will analyse what further changes are required through adjustments in the legal rules in the UK. Clearly much is to be gained from eradicating the gender pay gap however, as will be seen there are a number of obstacles to achieving this.*

\*Ms Laura Gow, Graduate Student, Dr Sam Middlemiss, Reader in Law, Robert Gordon University

## **Introduction**

Progress toward removal of the gender pay gap since the introduction of equal pay legislation in the form of the Equal Pay Act 1970<sup>i</sup> has been reasonably slow and this lack of progress has been widely reported in the media with recent headlines noting that efforts to remove the gender pay gap are ‘grinding to a halt’<sup>ii</sup> and that ‘equal pay for women is not likely until 2067.’<sup>iii</sup>

The Equality Act 2010 was enacted last year with its main aim being to simplify and harmonise the existing equality legislation. It was seen by the promoters of the legislation, the previous Government, as an opportunity to bring in new provisions to help tackle inequality of pay and narrow the gender pay gap.<sup>iv</sup> The broad objective of the Act in respect of equal pay is that: “The Act’s provisions on equal pay and sex discrimination are intended to ensure that pay and other employment terms are determined without sex discrimination or bias.”<sup>v</sup>

However, there has already been criticism of the Act specifically relating to the limited changes that it brought to the previous law and the various measures that were introduced in the Act to deal with the gender pay gap that have been removed or had their operation suspended.<sup>vi</sup>

The following quote identifies other areas where the Equality Act 2010 is lacking. “The JCHR<sup>vii</sup> was critical of the failure of the Government to make significant changes to the existing provisions on equal pay, pointing out ...that the Bill does not establish new procedures for providing arbitration in equal pay disputes nor does it impose positive duties on employers to take steps to monitor and respond to patterns of pay inequality”<sup>viii</sup> The shortcomings of the legislation will be analysed later in the

article however, what follows is an analysis of the reasons for the gender pay gap and the statistical evidence of its nature and impact.

### **Analysing the Reasons for the Gender Pay Gap**

A common explanation for inequalities between men and women in the workplace is the sexual division of labour. This can be seen operating in society when traditionally men were considered to have the right to be in employment while women were expected to refrain from working and remain in the home.<sup>ix</sup> It became a common perception that the most practical thing for a woman to do was not go to work and stay at home and look after her children.<sup>x</sup> Another traditional view was that certain jobs were for men or women solely and that women should not do a 'man's job' and vice versa. This is known as occupational segregation.<sup>xi</sup> These ideas are firmly rooted in tradition and could easily be seen as outdated and irrelevant in modern working life. However, they are still having an impact upon equality and more specifically equal pay and the gender pay gap.<sup>xii</sup>

Clearly the sexual division of labour is less relevant today and the position of women in employment has improved judging by the current figures for female employment in the UK.<sup>xiii</sup> These figures show that there are currently a record number of women employed in the UK and the rate has steadily risen over the years. In 2008 there were approximately 13.6 million jobs filled by women in the UK and a similar number of men were in employment. This can be compared with the position in 1985 when men filled 2 million more jobs than women.<sup>xiv</sup> Therefore, there are more women now working in the UK than ever before. However, men still have a higher employment rate than women with 79% of men being employed (employed?) compared to 70% of women. Male employment rates have steadily risen since 1971 but have levelled off

in recent years. However, female employment rates have increased continuously across the same period but, almost half of women in work are employed in part-time positions compared to just 1 in every 6 men.<sup>xv</sup> This statistic starkly illustrates that different employment patterns still exist between the sexes and occupational segregation in terms of the availability of full time work is still a valid issue.

With respect to the impact of occupational segregation in Scotland this is illustrated by the following quote: “The continuance of occupational segregation has important economic and social implications, not only in relation to pay inequality and the potential cost to the Scottish economy of women not realising their full potential, but also in terms of the differential status attached to specific jobs.”<sup>xvi</sup>

One of the most important features of the sexual division of labour in modern times (that contributes to the gender pay gap) is the disproportionately high number of women in part time employment compared with men.

### **Part time employment and equal pay**

The fact that half of the jobs held by women are part-time can be linked to the traditional view (held by both men and women) that women should place family commitments before occupational opportunities and where women undertake part time work it complies with that notion. However, it could be argued that working part-time is a personal choice for women. The statistics point to the fact that working part-time can often be linked to an individual woman being responsible for looking after a dependent member of her family. The figures taken from a report prepared for the European Commission showed a 62.4% employment rate for women with dependent children in Europe compared to an employment rate of 91.4% for men.<sup>xvii</sup> This starkly illustrates that women are more likely than men to give up work (albeit temporarily) when they have family commitments. This not only links back to the

traditional idea that a woman should stay at home and look after her family but also the outdated concept that when in work (and often working part time) a woman play a less valuable role than a man within employment. Although these stereotypical attitudes are targeted by the equality legislation and are less in evidence nowadays they still exist in some quarters and can be extremely harmful. One commentator stated that: ‘the social construction of part-time work as secondary, less committed or inferior to full-time work is thus inextricably linked with the undervaluing of women in society.’<sup>xviii</sup> She reached this conclusion through analysing how organisations commonly operate when there is a culture of long working hours. Employers will often value long hours spent at a desk by their employees as a sign of commitment and productivity.<sup>xix</sup> This commentator found that although a part-time worker may be as committed and productive as a full-time colleague an employer will often value a full-time employee more because of his perceived commitment to the organisation and this will often be reflected in him receiving a higher level of remuneration. As women are more likely to be employed on a part-time basis than men they may find they are being paid less than them for this reason. In fact, the GEO statistics (considered in detail below) calculate that the gender pay gap between full-time men and part-time women is 31%. Comparison between women working part time and full time found that women working part-time in the UK had average hourly earnings that were 25% less than women who worked full-time, with this gap widening continuously over the past 30 years.<sup>xx</sup>

Another problem often arises when a woman wants to move from full-time to part-time work but, find that she cannot remain in the same job to do this. The strongest influence on women to downgrade their jobs was found to be the lack of part-time positions available within a current occupation. (the following should be one sentence

with the previous one) whereas a woman's personal characteristics, experience in the labour market, level of education and the number of her children had a relatively small impact. Therefore she has to accept a different job which requires a lower level of experience or qualification than she has already attained and is consequently paid less.<sup>xxi</sup>

The availability and quality of part-time work for women is an issue that can affect the gender pay gap. Although part-time work is often seen as a positive way for those with children to return to work, the gender pay gap will persist where women have to move into lower-skilled occupations to be able to secure such flexible work. If an individual has to work part-time at a level lower than they could have worked full-time, it is said to be "underutilisation of their actual and potential human capital."<sup>xxii</sup>

Women having to downgrade their jobs to secure flexible or part-time work undermines and conflicts with strategies to improve education and workplace skills.

<sup>xxiii</sup> Although education is no longer held to be such an important cause of the gender pay gap, the fact that women are more educated and the increased requirement on their part for part-time work means that women are often overqualified which is estimated to be responsible for them receiving around 11% lower wages than men.

<sup>xxivxxv</sup> Often an issue for a female part time worker is that although she may be allowed to work flexibly and reduce her hours she may find that in turn she has to intensify her pace of work so that she can accomplish what she would have done if she had remained full-time. (Lewis, Taylor, 1996)<sup>xxvi</sup> This is unfair as it could mean that a part-time worker in this position is paid less for completing the same amount of work as persons working full-time.<sup>xxvii</sup>

The reality is that changing the traditional views and attitudes of employers and others in society can be difficult and women will continue to be more likely than men to be

responsible for looking after children. As a result a woman may find herself; with less work experience than her male colleagues, having to work part-time and needing to take a career break or abandon her career. All of this is likely to create a severe wage penalty for her.<sup>xxviii</sup> This links with the statistical findings below that show the pay gap over a woman's lifetime becomes most apparent and common at the age of 27 and peaks at 45 (around 28%) because it is during these years that childbearing is most common that the pay gap becomes more significant. As part-time work has been shown to be detrimental to a woman's employment and earning level it will also have a negative impact on the gender pay gap. What follows is an explanation of how statistically the gender pay gap is determined.

### **Calculating the Gender Pay Gap**

The gender pay gap is a statistical measure of the difference between the earnings of men and women and is determined by calculating women's' average pay as a percentage of men's.' So the pay gap is the difference between whatever the women's' figure is and 100 per cent of the men's' figure.<sup>xxix</sup> In 2008 the gender pay gap in the United Kingdom was 21.4% which was one of the highest figures in Europe.<sup>xxx</sup> However, the statistical exercise of calculating the gender pay gap can be complicated and the results can vary depending on the method used, the variables examined (i.e. only full-time included or including part-time) and the type of pay looked at. To illustrate the diversity of approaches used in arriving at this figure the Government Equality Office (GEO) uses median hourly earnings, the Equality and Human Rights Commission (EHRC) uses the mean average and the Office of National Statistics (ONS) reports on the Annual Survey of Hours and Earnings (ASHE) which includes both the mean and median measurements.<sup>xxxi</sup> Due to this variation in the methods



used the reported figures produced by these organisations can vary significantly although as will be seen certain methods are regarded as more reliable than others for measuring the gender pay gap.<sup>xxxii</sup> With respect to the approach of the GEO the measurement of the median gender pay gap finds the midpoint in hourly rates of pay but it excludes the lowest and highest rates to ensure that the figures are not distorted by any unusually high or low rates of pay. However for calculating the gender pay gap use of the median has been criticised precisely because it excludes figures for those paid particularly high salaries (normally men) and those paid particularly low salaries (normally women).<sup>xxxiii</sup> One researcher<sup>xxxiv</sup> used statistics derived from the Annual Survey of Hours and Earnings (ASHE), the Labour Force Survey (LFS) and the New Earnings Survey (NES) panel data set (a single longitudinal data set dating back to 1975) to analyse the gender pay gap.<sup>xxxv</sup> She identified that various methods that can be used with her preferred method being hourly earnings of men and women (excluding overtime and part-time employees). Her reasoning was that overtime and part-time work should be excluded because more men do overtime and more women work part-time and their inclusion could skew the results.<sup>xxxvi</sup> Her research conclusions were that the gender pay gap in relation to women working-full time compared with men working on the same basis had lessened. However, she found there were variations in the gender pay gap which were determined by an individual's circumstances. Factors such as the type of occupation and the number of dependent children that a woman has have a bearing on the size of the gap but as was seen earlier not such an impact on the availability on part time work. Another important finding was that in 1975 the gender pay gap between women and men was noticeable from the age of 18. However, in 2006 the gap in pay between genders was not evident until the age of 34.<sup>xxxvii</sup> This does highlight a positive change in the gender pay gap

with the problem not now being evident for women until a later age. The gender pay gap might be expected to increase with age as a result of career breaks taken by women during their working life. In 2006 this trend was identified as applying across Europe when statistics showed a clear increase of the GPG corresponding with an increase of the age of women across all of the member states of the EU. This was illustrated by an average figure of 3.1% of a pay gap for female employees younger than 30 years which increased to 17.5% for those 30-39 and to 23.8% for those 40-49 years old. It decreased slightly, however, for those 50 years and older (21.8%).<sup>xxxviii</sup>

The Government Equality Office (GEO) also published research findings<sup>xxxix</sup> examining the gender pay gap in the UK between 1995-1997 and 2004-2007 to determine whether any changes had occurred. The researchers used the British Household Panel Survey (BHPS) utilising panel regression techniques. They used a wage model for each time period, controlled for all variables that could be associated with pay disparity (education, unemployment, tenure). They also used a sex segregation scale (measuring the male dominance in each occupational group) and also controlled firm size, industrial sector, region, trade union membership and gender. By simulating bringing women's experience up to the level of men's, the researchers were also able to use the effect on the pay gap to calculate the main direct drivers of the pay gap.<sup>xl</sup> The GEO report noted that the overall gender pay gap had fallen between the two periods of 1995-1997 and 2004-2007 from 24% to 19%. When comparing full-time men and full-time women in 2004-2007 the gap was 15% and comparing full-time men and part-time women the gap was 31%. It was also identified that the pay gap was insignificant at school leaving age, becoming an issue (see earlier) at the age of 27 and then rising to a peak by the age of 45.<sup>xli</sup> By the use of simulation to assess which variables impact the gender pay gap, the researchers

established that: 10% of the overall pay gap could be attached to occupational sex segregation with a 10 percent more men in an occupation being equated with a 2% higher average hourly wages. The type of industries in which men and women worked accounted for 12% of the gap and 21% of the GPG was due to differences in the number of years of experience of full-time work. The negative effect on wages of having worked part-time before or having taken time off to look after family accounted for 16% of the pay gap. They also found that 36% of the pay gap a sizable amount could not be explained by any of the characteristics that were accounted for in this particular study. This meant that even when a woman had the same work history and education and was working in the same type of organisation and occupation as the average man she would still most likely be paid significantly less.<sup>xlii</sup> This unexplained difference is often known as the 'pure gender effect.'<sup>xliii</sup> The researchers also examined the factors which had a positive impact on women's pay. There were more women than men working in the public sector over the period examined. This was beneficial to women in particular and being a trade union member was beneficial to both sexes in terms of its impact on pay (around 11% better off ). So where both factors applied to women this could lead to a significant reduction in the size of the pay gap for them.

### **Occupational segregation**

Occupational segregation is another area that needs further examination as it is a major contributor to the gender pay gap and is an issue that is difficult and slow to resolve because men and women tend to follow different career paths. Statistics show that men are ten times more likely than women to be employed in skilled trades and men are more likely to be employed as managers and senior officials.<sup>xliv</sup> Women on the other hand are more likely to be employed in traditionally lower paid jobs such as

administrative or secretarial work with 20% of women in employment being employed in this area compared to 4% of men.<sup>xlv</sup> Women are also more likely to be employed in the personal services, sales and customer service sectors.<sup>xlvi</sup> So there is a clear correlation between lower paid industries and a predominance of women workers. However there are some exceptions for example in secretarial and related occupations, full-time women earn more than full-time men (-5.8% pay gap) and female part-time workers in the health and social welfare associated professions also earn more than part-time men (-22.5% pay gap).<sup>xlvii</sup> In these sectors, employees are predominantly female but it is interesting that the gender pay gap can also discriminate against men rather than women. A secretarial job is one that would be traditionally associated with women rather than men, so if women tend to earn more money in this type of job than men it may make them more inclined to work in this area. When looking at figures relating to occupational segregation the data is shaped by various factors such as the size of an organisation, its location and also the over representation of females in lower level jobs.<sup>xlviii</sup> Occupational segregation is also impacted upon by the public and private sector divide with figures from the Office of National Statistics noting that 65% of public sector workers are female whereas 60% of workers in the private sector are male. This divergence could have an impact on the gender pay gap and equal pay. Another factor that might explain a woman receiving a lower wage than a man is the element of personal choice. This would apply for example when a woman may be more willing than a man to work in a more worthwhile job (involving no remuneration or low pay) in the voluntary or public service sector.<sup>xlix</sup> Women will be more inclined to take these jobs because the public and voluntary sectors are perceived to offer a better work-life balance<sup>1</sup> than the private sector (important to women who bear childcare responsibilities). As well as

causing major differences in pay levels between the sexes occupational segregation can also have an impact on the process of equal pay claims. This is because female claimants often find it difficult to identify relevant male comparators, particularly if they are working in a predominantly female sector. Also occupational segregation not only impacts on the gender pay gap but it also affects the economy. It has been estimated that if the Government could successfully remove the barriers to women working in traditionally male-dominated occupations and increase their overall labour market participation that it could be worth between £15- £23 billion to the UK economy.<sup>li</sup> “ Outdated gender norms and stereotypes around men and women’s value in the workplace still exist, which leads to women and men doing different types of work. In addition, men’s work is generally given a higher value both socially and economically. Jobs traditionally done by women, such as cleaning, catering and caring, are undervalued and paid less than jobs traditionally done by men, such as construction, transportation and skilled trades. “<sup>lii</sup>

It is important at this stage to consider the legislative provisions dealing with equal pay and their impact of the gender pay gap.

### **Equal pay legislation in the UK**

The Equality Act was passed in 2010 and this repealed most of the existing law on sex discrimination.<sup>liii</sup> Although the new legislation contained simplified provisions regarding equal pay the changes to the law have been minimal. To understand these changes, the provisions regarding equal pay under the Equality Act 2010 will be examined and compared with the previous law under the Equal Pay Act.

#### *Equal Pay Act 1970*

Although the UK was not a member of the European Union when the Equal Pay Act was enacted, it has long been recognised that the Act after numerous revisions is the means by which the UK gave effect to the Treaty.<sup>liv</sup> Under the previous and current law a female employee can raise an action for equal pay if she could establish that she and a male comparator<sup>lv</sup> are ‘in the same employment.’ A person can be a comparator if they are employed by the same employer or by an associated employer and they both work at the same establishment<sup>lvi</sup> or they do not work at the same establishment but common terms apply to them.<sup>lvii</sup> This latter point is illustrated by the case of *Leverton v Clywd County Council*<sup>lviii</sup> where nursery teachers were held to work in common and in the same employment with clerical workers for the purposes of the Equal Pay Act 1970 solely because they were governed by the same collective agreement. This was despite the fact that male and female employees being considered were working different hours, had different holiday entitlement and different pay scales. A more striking example of this was in *South Ayrshire Council v Morton*,<sup>lix</sup> where a female primary school head teacher sought to use a male secondary school head teacher as a comparator in an equal pay claim on the basis that salaries for primary school head teachers (where 75% were female) were lower than that of secondary school head teachers (where 75% were male).<sup>lx</sup> Ms Morton the claimant was employed by South Ayrshire Council and her comparator a male secondary school head teacher was employed by Highland Council. However both of their rates of pay were fixed by a statutory scheme determined under a national collective agreement. Therefore, it was held that Morton’s comparator could be used because, although the employers were separate education authorities, they were subject to a national collective agreement which they both had to give effect to. This case applied the principle established by the European Court of Justice (ECJ) in

*Defrenne v SA Belge de Navigation Aerienn*<sup>lxi</sup> that direct discrimination can have its origin in legislative provisions or collective labour agreements and also where ‘men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.’<sup>lxii</sup> As a consequence equal pay could be regarded as discriminatory on the grounds of sex although the obvious way to enforce such inequality of pay was through the Equal Pay Act rather than the Sex Discrimination Act 1975. However, the *Morton* decision can be contrasted with the decision in the case of *Armstrong v Newcastle Upon Tyne NHS Trust*<sup>lxiii</sup> where the Court of Appeal held that as the claimants and the comparators were employed by two separate NHS trusts and because different bodies determined their pay, there was no ‘single source of employment’ and therefore unless the employer set the employment terms of both claimant and comparator they could not be held to have the same employer for the purposes of the Act.<sup>lxiv</sup>

#### *Methods of comparison*

At this stage it is worth briefly pointing out that the comparison underpinning an action will be on one of three grounds. It can be ‘like work,’ ‘work rated as equivalent’ or ‘work of equal value.’<sup>lxv</sup> It will be held to be ‘like work’ if the woman’s work compared with that of a man in the same employment is the same or broadly similar and any differences are not of practical importance in relation to the terms of their work.<sup>lxvi</sup> In *Capper Pass Ltd v Lawton*<sup>lxvii</sup> the Employment Appeals Tribunal (EAT) upheld a decision that a woman working as a cook in a company directors’ dining room providing meals for 10-20 people was entitled to equal pay with two male assistant chefs who worked in the factory canteen and prepared 350 meals a day. This was despite differences such as the woman working less hours (40

hours per week unsupervised compared with the male chefs who worked 45 hours per week under the supervision of the head chef). It did not matter that the work was not exactly the same. Work is 'rated as equivalent' if a job evaluation study gives equal value to both workers jobs in terms of the demands made on the worker, or would have done if the evaluation was not made under a sex-specific system (where it sets different values for men than it does for women).<sup>lxviii</sup> Finally, work is of 'equal value' if it is not work rated as equivalent but, if the jobs being compared are equal in terms of their value to the organisation and the demands made on men and women by the job (with such factors as physical and mental effort, skill and decision-making being taken into account).<sup>lxix</sup> The legislation ensures equal pay between men and women but, what is pay? It has been defined by the European Court of Justice as: '...the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.'<sup>lxx</sup>

Prior to the 2010 Act, the Equal Pay Act 1970 only allowed for an actual comparator to be used meaning that a claimant could only use a real person and not a hypothetical comparator in comparing his position with her. In the past a comparator did not have to be an existing worker as on some occasions a predecessor<sup>lxxi</sup> or successor would suffice. However this changed in the case of *Walton Centre for Neurology and Neuro Surgery NHS Trust v Bewley* the EAT held that the previous authority for using a successor as a comparator in a claim for equal pay had been wrongly decided. It held that a successor could not be used as a comparator in a claim for equal pay and it also noted that where a claimant relies on a predecessor as a comparator, the comparison is limited to the terms enjoyed by the comparator at the termination of



their employment. So, the requirement for an actual comparator meant the Equal Pay Act 1970 was much less effective than it could have been.<sup>lxxiv</sup> “This requires not simply that they do the same type of work, but that they be employed by the same employer (or associated employers), either at the same establishment or at different establishments belonging to that employer (or those associated employers) where common terms and conditions of employment are laid down for the two establishments ... The restrictive nature of this test has prompted many claimants to try their luck under directly effective European Community law.”<sup>lxxv</sup>

The main problem was that in industries or workplaces where there was occupational segregation and the workforce were predominantly female, finding a comparator of the opposite sex was often not possible. In *Meeks v National Union of Agricultural and Allied Workers*<sup>lxxvi</sup> a part-time secretary was paid less per hour than those employed full-time, as only those working 35 hours per week qualified for the higher hourly rate. Although the Employment Tribunal said this requirement was indirectly discriminatory, neither the Sex Discrimination Act 1975 nor the Equal Pay Act 1970 could be successfully used by her because the 1975 Act did not cover the payment of money and there was no male comparator to satisfy the comparator requirement in the 1970 Act as all the secretaries were female.<sup>lxxvii</sup> This case emphasises the problems in relation to the requirement for actual comparators. This is exemplified when it is noted that there is a close correlation between low pay and the proportion of female employees in a company and in many of the lowest paying companies there is a 100% female workforce.<sup>lxxviii</sup>

*The Equality Act 2010*

The Equality Act 2010 provides that the provisions apply to terms of a person's employment which are 'in the person's contract of employment, contract of apprenticeship or contract to do work personally.'<sup>lxxix</sup> Therefore, workers and employees are included whether they work full-time or part-time. Self employed persons can also be included under the provisions as in *Quinnen v Howells*<sup>lxxx</sup> where a self-employed man could be included because he was being paid less than two fellow self-employed female workers who were doing similar work at a department store.

### *Comparators*

The Equality Act 2010 provisions apply when a person is being employed to do work that is equal to work being done by a comparator of the opposite sex. Although the Equality Act 2010 still normally requires an actual comparator a hypothetical comparator can now be used in certain limited situations. The benefit of using a hypothetical comparator may be lost if an employee cannot prove their case to a high enough level. The provisions are also limited to cases of direct sex discrimination and therefore equal pay cases involving indirect sex discrimination would still require an actual comparator.

Interestingly section 71 of the Equality Act 2010 allows for a claim of sex discrimination in relation to contractual pay on the ground of sex. Such a claim would not have been possible under the Sex Discrimination Act 1975 because contractual pay was outside its scope. Therefore this provision would allow an employee to raise an action where there was no comparator available, but where there was evidence of direct discrimination on grounds of sex allowing for a claim under section 13 of the Act. Therefore, although there have been changes to the law on comparators the effect

that the new provisions will have on equal pay and the gender pay gap is likely to be restricted.

There is also provision for a 'sex equality clause.'<sup>lxxxii</sup> The sex equality clause is treated as being included in the terms of a workers employment and means that where a contract term is less favourable than that of a comparator, it will be modified to make it not less favourable.<sup>lxxxiii</sup> Similarly, if a comparator has a benefit in their terms of employment that the other worker does not, the sex equality clause will operate to include such a term.<sup>lxxxiii</sup> However, this useful provision also requires an actual comparator, so if a workplace had no male comparator doing equal work the equality clause could not operate.

### **Material factor defence**

A further equal pay provision that needs to be examined is the material factor defence. Under the previous legislation the defence had been available when the employer could prove that the variation between a man and woman's pay was genuinely due to a material factor.<sup>lxxxiv</sup> A genuine material factor was one that justified the reasoning behind what would otherwise have been indirectly discriminatory levels of pay given to a woman.<sup>lxxxv</sup> A notable change brought in by the Equality Act in relation to this defence is that the word genuine no longer appears and it is now simply known as a material factor defence. The Government omitted this word on the basis that it did not consider that the term genuine added anything to its meaning.<sup>lxxxvi</sup> Although the sex equality clause implies into all employment contracts it will not have any impact if the employer can show that the difference in pay is due to a material factor, reliance on which: (a) does not involve treating the employee less favourably because of their sex than they treat the comparator and ( b) it is a proportionate means of achieving a legitimate aim.<sup>lxxxvii</sup> Therefore, if an employer can show that the difference is because

of a material factor which is not related to the claimant's sex, this would provide them with a defence and the sex equality rule would have no effect.<sup>lxxxviii</sup> There is no justification needed if the reason for the pay inequality is not gender related.<sup>lxxxix</sup> This was confirmed by the Court of Appeal in *Glasgow City Council v Marshall*<sup>xc</sup> and *Redcar & Cleveland BC v Bainbridge & ors; Surtees & ors v Middlesbrough Council CA*.<sup>xc</sup> However, when the pay disparity is sex related it is necessary to show that it was justified. The case law from the ECJ<sup>xcii</sup> has highlighted that employers may need to show an objective justification for a difference in pay between workers of different sexes doing work of equal value. This can apply even where there is no evidence that the employer has intentionally discriminated against women in terms of pay and there are no apparent barriers to equal pay.<sup>xciii</sup> In *Enderby v Frenchay Health Authority and Secretary of State for Health*<sup>xciv</sup> a female speech therapist claimed equal pay on the basis that it was an overwhelmingly female profession and that in other comparable NHS professions which were predominantly male, such as pharmacists the pay was higher. The ECJ stated that where there was a significant difference in pay between jobs of equal value and where one job was predominantly female and the other predominantly male, that a prima facie case of discrimination would be made out.<sup>xcv</sup> In *Sharp v Caledonia Group Services Ltd*<sup>xcvi</sup> the EAT held that employers must always objectively justify their use of the defence. The need to justify pay differences was affirmed in *Gibson and others v Sheffield City Council*<sup>xcvii</sup> when the Court of Appeal held that an employment tribunal was wrong to find that a pay differential between male street cleaners and gardeners and female carers was not discriminatory on the ground of sex because it had been caused by a productivity bonus given to the cleaners and gardeners but not the carers as it was inappropriate due to the nature of the womens' work. As a result of the impact of

these decisions the test for the material factor defence where the difference in pay is sex related has become stricter for employers. This is because an employer is required to show that the difference in pay is necessary and sensible rather than just genuine and this development is significant because it means that employers will not be in a position to establish a defence as easily. The Equality Act 2010 has clarified the law in this area and the changes it brought in are considered below.

Although, recent changes to the equal pay provisions have been reasonably limited, the availability of hypothetical comparators in certain situations (see below) and the development of a stricter test for employers relying on the material factor defence will be of some assistance in the fight for equality of pay.

### **Equality Act 2010 and the Gender Pay Gap**

Although the Equality Act 2010 made changes to the existing equal pay provisions as highlighted it has also introduced some new provisions that deal with the gender pay gap more directly. These provisions revolve around transparency which is clearly an important element in tackling the gender pay gap as otherwise the true extent of the problem may not be realised. Transparency in this context refers to clarity in the method of calculating pay and in the underlying reasons for employees being allocated a position on a pay scale.

#### *Limited use of hypothetical comparators*

Comparators have already been considered but need further analysis to assess what impact their availability or non availability can have. It has been argued that not being able to use hypothetical comparators under the previous legislation restricted the law's ability to reduce the gender pay gap.<sup>xcviii</sup> Under section 71 of the Equality

Act 2010 it allows employees to bring sex discrimination claims, relying on hypothetical comparators, in circumstances in which it is impossible to identify actual comparators for the purpose of equal pay claims. This will make it easier for the claimants to establish a claim particularly where there are no male comparators around because of occupational segregation. This ability to pursue a claim on this basis should serve to reduce the gender pay gap over time. The law is very recent so it is difficult to know how the courts and employment tribunals will deal with cases brought under s71 of the Act. However, there is no six-year back pay limitation period for compensation specified for s71 claims (as there is in other equal pay claims) and compensation could also arguably be widened to include injury to feelings. In the meantime, the important message is that a lack of a comparator may no longer be a bar to bringing a claim concerning inequality of pay or conditions.

#### *Material Factor Defence*

Another significant change brought in by the Equality Act 2010 was clarification of the application of the material factor defence. As already seen the case law on the application of the material factor defence lacked clarity at times and left the parties somewhat confused about when it applied. If the reason for the inequality of treatment in terms of pay was the claimant's sex then the employer had to objectively justify any differences in pay between men and women by showing a material factor accounted for the difference. The law has now been clarified and an employer can only justify a pay difference with a "material factor" if the material factor itself does not directly or indirectly discriminate against women. For example if a particular pay practice does on the face of it indirectly discriminate against women, then the employer will need to justify the difference on the basis that it is a proportionate means of achieving a legitimate aim. The Equality Act 2010 also provides that when

there is inequality in pay but the employer's long-term objective is to reduce inequality between men and women in their terms and conditions (e.g. pension entitlement) this will always be regarded as a legitimate aim although an employer would still have to show that a particular practice was a proportionate means of achieving that aim.

In this context the importance of transparency and monitoring pay systems can be seen in *Hastings v Davisons Solicitors*<sup>xcix</sup> where a female paralegal claimed equal pay with a male paralegal at the same firm who had been taken on a year after her on a salary of around £3000 more, with the pay gap being maintained when both their salaries increased. The employer tried to use the genuine material factor defence based mainly on differences in the comparator's (a male paralegal) role to the role of the claimant, his more substantial prior experience than the claimant and his better fee performance than her.<sup>c</sup> However, the tribunal rejected the defence noting that the claimant was as able as the comparator to do the work and that in practice she was given fewer cases and more cases that did not reach completion. "We conclude that if the explanation for the disparity in pay is a sham, it matters not whether the true reason is tainted by sex...The sham or non genuine explanation which is a false one does not have to be deliberate. It can be unconscious, and this is a matter of fact for the tribunal to determine."<sup>ci</sup> The tribunal stated that the problem of unequal pay had arisen because the company did not have a transparent pay system.<sup>cii</sup> This case exemplifies the importance for companies of monitoring and organising their pay systems so that they are transparent and fair if they want to avoid equal pay claims.

### *Secrecy Clauses*

Under section 77 of the Equality Act 2010 it provided that a term which prevents or restricts an employee from disclosing or seeking to disclose information about the terms of his work is unenforceable.<sup>ciii</sup> Secrecy or ‘gagging’ clauses have become popular amongst employers with the Equal Opportunities Commission <sup>civ</sup> finding that nearly a quarter of employers included such a clause in their employment contracts.<sup>cv</sup> This provision is therefore important as it allows employees more of a chance to collect important pay-related information to assist them in raising an equal pay claim.<sup>cvi</sup> Otherwise an employee may not be aware of the variations in pay in relation to gender or she may fear disciplinary action for having breached a secrecy clause. However, the right only applies to a ‘relevant pay disclosure’ which is defined as one where the purpose of an employee disclosing or receiving the information is to ascertain whether or to what extent there is a connection between pay and gender.<sup>cvii</sup> This particular aspect of the provision has been criticised because it may be hard to distinguish whether an employee is actually seeking information in relation to perceived discrimination against them or not.<sup>cviii</sup> An employer may not be certain as to the employee’s intentions if they do not expressly state them. Therefore this could cause confusion for an employer who may be uncertain as to whether or not the employee is protected by section 77. This negative aspect was most likely not intended by Parliament. However, it highlights another issue with the legislation that will need clarification by the employment tribunals and courts.

#### *Gender pay gap reporting*

The Equality Act 2010 had contained a provision under section 78 which had required employers with over 250 employees to publish information relating to the pay of their employees to determine if there are any differences between the pay for men and women. However, the Government announced in December 2010 that it would not



implement the gender pay reporting measures while it is working with business to encourage the publication of equality workforce data on a voluntary basis. Organisations are being encouraged to voluntarily report on the pay gap between the level of pay between male and female employees. The Government does not intend to review this voluntary arrangement until 2013 at the earliest. They will then decide whether publication by employers of gender pay gap information will become mandatory.<sup>cxix</sup> It is clear that the provision will only be brought back in if voluntary disclosure proves to be unsuccessful.<sup>cx</sup> The Coalition Government are not taking a strong stance with regard to tackling the gender pay gap through encouraging transparency. This is perhaps not surprising given the Conservative party's pro business stance and cost-cutting agenda. The Equality and Human Rights Commission (EHRC) has noted that to tackle the gender pay gap it needs to be identified and measured at an organisational level.<sup>cxii</sup> However, they believe that businesses can voluntarily change and embrace greater transparency on pay without the need for section 78 being brought back into force.<sup>cxiii</sup> The Discrimination Law Review (DLR) is a governmental body that was set up to provide the framework for reforming equality laws in the UK. They were also against mandatory equal pay reviews on the basis that they tackle only one cause of the gender pay gap, this being gender pay discrimination. They recommended instead the spread of good practice, although there was some criticism of their view given that they had in reaching it ignored clear evidence of the ineffectiveness of voluntary measures.<sup>cxiv</sup> It is clear that because of the current views of the Government and independent statutory bodies, such as the EHRC, gender pay reporting will remain voluntary for the foreseeable future and there is some indication that some companies have already decided to carry out voluntary reporting. Employers are now more appreciative of the need to tackle

equal pay because shareholders, consumers and employees are increasingly more selective when choosing companies to contract or deal with<sup>cxv</sup> and some of the more progressive companies in the UK are already carrying out pay audits and adopting the Equal Opportunities Commission's model.<sup>cxvi</sup> HBOS is an interesting example as they are part of the finance sector which is the employment sector that has the largest gender pay gap in the UK. However, HBOS have been carrying out equal pay reviews since 2003. These audits had shown that although they had no pay bias against women they did find that they employed fewer women than men in higher-paid specialist or senior roles. HBOS took the findings from their audit and formulated a plan to tackle equal pay. It demonstrates that a large company can commit to tackling the gender pay gap and companies may find HBOS's actions a helpful model. Particularly, if they are keen to pre-empt the Government making this review process a legal requirement.<sup>cxix</sup> However, it is clear only a minority of companies are reporting voluntarily and the EHRC gathered evidence showing that 'few private sector companies are taking action to close the gender pay gap.'<sup>cxx</sup> Even if section 78 of the Act was enforced, the Fawcett Society have identified that of the 4.7 million businesses in the UK only around 6000 have more than 250 employees. Thus, around 59% of employees would be unaffected by the provisions if reintroduced in their current form.<sup>cxxi</sup> It is important that in the unlikely event that this provision is brought into force it should be amended to include businesses with fewer than 250 employees. A suitable example can be found in Sweden where businesses with 25 or more employees have to carry out an equality action plan every three years. This has proved to be successful with a gender pay gap of only 3% in Sweden for women working in male dominated professions.

## **The general equality duty in the public sector**

The gender pay gap varies between the public and private sectors and one notable difference between them is that the gender equality duty that was introduced for public sector organisations in 2007. However before that the disability equality duty came into force under the Equality Act 2006 and the racial equality duty even earlier in 2001. <sup>cxxiii</sup> These duties were introduced in a bid to tackle discrimination in public sector organisations and it required them to promote equality and not just avoid discrimination. It also shifted the burden of taking action against discrimination from individuals to organisations. <sup>cxxiv</sup> This has now been replaced by a new more general duty under the Equality Act 2010 which extends to all grounds of discrimination and provides that a public authority must have due regard to: ...eliminate discrimination... advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and foster good relations between persons who share a relevant protected characteristic and persons who do not share it. <sup>cxxv</sup> This duty came into force under the Equality Act 2010 on 5 April 2011. <sup>cxxvi</sup> The Act also allows for the creation of what are known as "specific duties" to be placed on public authorities under sections 153-155 of the 2010 Act. These duties help those bodies to fulfil their responsibilities under the general duty. Equality Duty means public authorities need to be proactive. Although the public sector now has more of a specific duty in relation to equality than the private sector, criticism has been raised in the past over the wording of the public sector duties. The duty uses the phrase to have 'due regard' which suggests that an authority is only required to consider the need to eliminate pay discrimination rather than actually taking action to eliminate it. <sup>cxxvii</sup> However, specific duties were introduced in the UK which required all listed public bodies to produce a gender equality scheme that informs how they will fulfil both the

general duty and the specific duties.<sup>cxxviii</sup> All public authorities in Scotland are subject to the general duty, but only some public authorities (for example, the Scottish Government, Local Authorities, Health Boards etc) are subject to the specific duties. However, the Scottish Government have decided to postpone its operation until later in 2011.<sup>cxxix</sup> The Scottish specific duties will include a requirement for listed public bodies with 150 or more employees to publish an equal pay policy statement and report on it every three years.<sup>cxxx</sup> The specific duties<sup>cxxxi</sup> do appear clear in their aim to tackle the gender pay gap by requiring public authorities to report on it and provide statistics to back it up.<sup>cxxxii</sup> However, the impact of this requirement is unlikely to be significant unless the type of data to be reported is more clearly specified and the duty to provide it can be enforced. The exclusion of public bodies with less than 150 employees from undertaking the specific duties should be overturned as an organisation should not be permitted to be less equality minded just because it is smaller.<sup>cxxxiii</sup>

### **Representative Actions**

A criticism of the current legislation is that requires an individual person to bring a claim under the Act rather than a group of claimants who are all affected in the same or similar way by unequal pay. This has led to calls for the Government to introduce representative actions. Representative (the term used in the UK) or class actions (used in the US) are essentially the same and can be taken where a group of people with the same common legal interest collectively bring a claim to a tribunal or court. The Equality Act 2010 made no provision for representative actions despite the fact that they would assist in equal pay claims by reducing the number of cases brought and therefore reduce the burden on employment tribunals, employers and

claimants.<sup>cxxxiv</sup> Representative actions are not common in the UK and particularly not in employment law as they are still thought of as a feature of the American legal system. Their implementation in Europe has been frustrated by traditional legal systems in member states that are based on individual rights.<sup>cxxxv</sup> There seems to be a consensus that representative actions should be introduced but, it has been regarded as “one of the least controversial areas for potential reform.”<sup>cxxxvi</sup> Why has it not been done then if it is not controversial? The strongest argument for their introduction into UK equal pay law relates to the recent mass of claims arising from changes to payment systems in the health and local government sectors. It seems incredible that where thousands of employees are employed by the same organisation and are affected in the same way in terms of inequality of pay any claim must still be brought on an individual basis. There are examples of large group actions in the public sector where employees have had to ‘opt in’ to be included as a claimant. However, this can be a lengthy process with claimants having to wait on the outcome of test cases.<sup>cxxxvii</sup> It has been suggested that representative actions should be introduced on an opt-out basis whereby every woman would be included as a claimant unless she specifically opted out.<sup>cxxxviii</sup> Despite clear support for the introduction of representative actions, there has been no indication that the Government intends to introduce them in the near future. One commentator raised the question of who would bring a representative action. Would it be bodies such as the EHRC, trade unions or other interested organisations? If it was a trade union would it be required to bring a representative action on behalf of all the employees affected by inequality of pay and not just on behalf of those employees who are members of the union?<sup>cxxxix</sup> There is nothing to stop a lawyer bringing a representative claim and where this happened only those persons who signed up with him and agreed to pay his costs would be represented. It

has been argued that despite the obvious benefits of class or representative actions they may be difficult to implement. This is particularly true when an employer brings forward a material factor defence as this involves consideration of the ‘personal equation’ between a claimant and her comparator. Differences in the length of service or the quality of work undertaken by male and female comparators may not be able to be accounted for if a case was not heard on an individual basis.<sup>cx1</sup>

## **Conclusion**

The objectives of the equal pay provisions of the Equality Act 2010 were identified in the EHRC code of practice as addressing the following points: “ **the full-time gender pay gap has narrowed since 1975 when equal pay legislation first came into force but there remains a gap of over 16 per cent between women’s and men’s pay.**” Historically, women have often been paid less than men for doing the same or equivalent work and this inequality has persisted in some areas. The Act’s provisions on equal pay and sex discrimination are intended to ensure that pay and other employment terms are determined without sex discrimination or bias. “ (see note 5)

The Act introduced some new provisions that were intended to be more suitable than previous legislative measures for reducing the gender pay gap. The introduction of the hypothetical comparator will get over some of the evidential hurdles faced by some claimant in these cases most notably those that are subject to occupational segregation. The changes to the material factor defence, while narrowing the circumstances it can be used by employers, should make it more equitable in terms of proving an equal pay claim. It is too early to know the impact of removal of the secrecy clauses from employment situations but, it can only increase transparency in

terms of pay systems and allow people to discuss issues concerning pay more freely. The downside might be more equal pay claims where employers are unwilling to address inequalities in pay.

However, many ideas and recommendations for improving equal pay legislation that have been suggested in the past were not introduced. For example the continued operation of the individualistic nature of the employment law claims in this context (and refusal to allow representative actions) is likely to limit the impact that the legislation will have on efforts to close the gender pay gap. However the European Commission recently invited comments on their proposal to introduce legislation which will provide a European approach to collective action.<sup>cxli</sup> If this receives a favourable response from member states it could lead to changes in the law in the UK. The Coalition Government has backtracked somewhat on the commitments in the Equality Act to deal with the pay gap. Most notably the removal of the legal requirement for employers to undertake equality audits.

To underline the importance of the issue of the Gender Pay Gap a recent reported statistic highlighted that women are severely disadvantaged due to it. An average woman working full-time from the age of 18-59 is estimated to lose out on £361,000 over the course of her working life compared to an equivalent male.<sup>cxlii</sup> This is clearly a significant difference in pay and it can be seen that the UK still has a long way to go to address the issue of equal pay for men and women.

The new general equality duty in the public sector will be of assistance in removing inequality in pay. However, there is a large pay gap in the private sector which will not be addressed by this. Accordingly the Government should look at extending such a duty to the private sector. One commentator noted that: ‘...there is a strong argument for extending the proactive equal pay duty to the private sector.’<sup>cxliii</sup> She

concluded that the existence of a ‘two tier system’ with different rights for public and private sector employees was irrational with those in the private sector not having their rights to equal pay fulfilled unless they could afford to raise an expensive and unpredictable equal pay claim.<sup>cxliv</sup>

The following quote highlights the present position and the challenges ahead: “even though legislation on implementing equal pay has been in place for 40 years, the gender pay gap in Britain remains among the highest in the European Union. We still have a shocking gender pay gap of 15.5% that hurts women, society and the economy. Removing barriers to women working in occupations traditionally done by men and increasing women's participation in the labour market could be worth between £15 and £23 Billion or 1.3 to 2% of GDP.”<sup>cxlv</sup> Interestingly, the position in the United States is considerably worse. In 1996 women in the US only earned an average of 59% of the wages that men earned. However, by 2008 (although the position had improved) women still only earned an average of 77% of men's wages.

<sup>cxlvi</sup>

A Consultation on Modern Workplaces was published on May 16, 2011 <sup>cxlvii</sup> which made clear that legislation was the route by which a number of coalition agreement commitments will be implemented. This covers further steps to tackle the gender pay gap. The equal pay proposals are designed to ensure employers who have breached the law take appropriate action to rectify the problem. This would be achieved by requiring Employment Tribunals that have decided an employer has discriminated in contractual or non-contractual pay matters relating to his employees to order them to conduct a pay audit, unless the tribunal is satisfied it would not be productive to do so.<sup>cxlviii</sup> If this change is implemented it will improve things but the gender pay gap cannot and will not be closed until more is done to deal with the underlying issues.



---

<sup>i</sup> Now Equality Act 2010

<sup>ii</sup> BBC News. Gender pay gap progress 'grinding to a halt' 11 Oct 2010  
<http://www.bbc.co.uk/news/uk-11511714>

<sup>iii</sup> Allan K 'Equal pay not likely for women till 2067, says research' *The Guardian* (19 Aug 2010)  
<http://www.guardian.co.uk/uk/2010/aug/19/equal-pay-women-2057?INTCMP=SRCH>

<sup>iv</sup> <http://www.equalityhumanrights.com/legal-and-policy/equality-act/>

<sup>v</sup> Equality and Human Rights Commission, Equality Act 2010 Code of Practice on Equal pay  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

<sup>vi</sup> Fawcett Society (2010) Coalition plans around Equality Act 'Endorse Pay Gap'  
[www.fawcettsociety.org.uk](http://www.fawcettsociety.org.uk)

<sup>vii</sup> Joint Committee on Human Rights of the Institute of Employment Rights

<sup>viii</sup> Aileen McColgan, Institute of Employment Rights, 8 December 2010 paragraphs 24 – 30 at para. 24

<sup>ix</sup> Bradley, *A Men's Work, Women's Work: A Sociological History of the Sexual Division of Labour in Employment* (Feminist Perspectives) (1989) Polity Press

<sup>x</sup> M Connolly, *Townshend-Smith on Discrimination Law: Text, Cases and Materials* 2<sup>nd</sup> edition, (2004) Cavendish Publishing, London, p. 42

<sup>xi</sup> Hakim, C Occupational segregation: a comparative study of Britain, the United States and other countries. (1979) Research paper, No.9 Department of Employment should there be a reference to a website? Couldn't find one

<sup>xii</sup> Macpherson S Tackling Occupational Segregation in Scotland (2008) Employment Equality Unit  
[www.scotland.gov.uk](http://www.scotland.gov.uk)

<sup>xiii</sup> However, it is still relevant when examining the division between men and women having part time and full time jobs in the UK and at the level of senior management

<sup>xiv</sup> Office for National Statistics (ONS) Focus on gender – working lives 26 Sep 2008  
<http://www.statistics.gov.uk/cci/nugget.asp?id=1654>

<sup>xv</sup> Ibid.

<sup>xvi</sup> Ibid paragraph 1.1.5

<sup>xvii</sup> European Commission. Gender pay gap: What are the causes?

<http://ec.europa.eu/social/main.jsp?catId=682&langId=en>  
<http://ec.europa.eu/social/main.jsp?catId=682&langId=en>

<sup>xviii</sup> S Lewis. 'Restructuring workplace cultures: the ultimate work-family challenge' *Women in Management Review* (2001) Vol. 16 (1) 24

<sup>xix</sup> Ibid p. 24

---

<sup>xx</sup> Manning, A Petrongolo, B ‘The part-time pay penalty for women in Britain’ *The Economic Journal* (2008) Vol. 118 Issue 526 pp 28-51 at p 28

<sup>xxi</sup> *Ibid* p 47

<sup>xxii</sup> S Connolly, M Gregory. ‘Moving down: women’s part-time work and occupational change in Britain 1991-2001’ *The Economic Journal* (2008) Vol. 118 Issue 526 pp 52-76 at p 52

<sup>xxiii</sup> *Ibid* p. 52

<sup>xxiv</sup> Olsen, W et al, ‘The Gender Pay Gap in the UK 1995-2007: Part 2 – Policy-related factors offsetting women’s low pay in the UK 2004-07’ (2010) GEO pp 4 and 8 [www.equalities.gov.uk](http://www.equalities.gov.uk)

<sup>xxv</sup> *Supra* 19 p 52

<sup>xxvi</sup> Lewis, S. and Taylor, K. (1996) *Evaluating the impact of family-friendly employer policies: a case study in Lewis, S and Lewis, J. eds. Family Challenge: Rethinking Employment* Sage Publications, London p 26

<sup>xxvii</sup> *Ibid* p. 27

<sup>xxviii</sup> S Fredman. ‘Reforming equal pay laws’ *Industrial Law Journal* (2008) Vol. 37 Part 3 pp 193-218 at p 193

<sup>xxix</sup> D Leaker. ‘The Gender Pay Gap in the UK’ *Economic & Labour Market Review* (2008) Vol. 2 No. 4, pp 19-24 at p 19 see also Proposals for measuring and publishing information on the gender pay gap, Equality and Human Rights Commission (2010) [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

<sup>xxx</sup> [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Gender\\_pay\\_gap\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Gender_pay_gap_statistics) Eurostat 2008 the EU average was estimated at 17.5%

<sup>xxxi</sup> ‘Statistics’ Close The Gap, Working Paper 4 (2010) Close the Gap is an impartial body that provides advice about equal pay to employers and trade unions [http://www.closesthegap.org.uk/component/option.com\\_docman/Itemid,64/gid,22/task.cat\\_view/](http://www.closesthegap.org.uk/component/option.com_docman/Itemid,64/gid,22/task.cat_view/)

<sup>xxxii</sup> *Supra* 26 D Leaker p 19

<sup>xxxiii</sup> *Supra* 26 D Leaker

<sup>xxxiv</sup> *Supra* 26 D Leaker

<sup>xxxv</sup> *Supra* 26 D Leaker p. 19

<sup>xxxvi</sup> *Supra* 26 D Leaker p 20

<sup>xxxvii</sup> *Supra* 26 D Leaker p. 24

<sup>xxxviii</sup> [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Gender\\_pay\\_gap\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Gender_pay_gap_statistics)

<sup>xxxix</sup> GEO (2008) Olsen, W Gash, V Grimshaw, D and Vandecasteele L The gender pay gap in the UK: 1995 to 2007

<sup>xl</sup> *Ibid.* p. 4

<sup>xli</sup> *Ibid.* p. 1

<sup>xlii</sup> *Ibid.* p 1

<sup>xliii</sup> K Mumford, P Smith The Gender Earnings Gap in Britain, *The Manchester School* (2007) Vol. 75 (6) pp 653-672

<sup>xliv</sup> Office of National Statistics Focus on gender – working lives 26 Sep 2008 <http://www.statistics.gov.uk/cci/nugget.asp?id=1654>

<sup>xlv</sup> *Ibid.*

<sup>xlvi</sup> *Ibid.*

<sup>xlvii</sup> *Supra* 26 p 22

<sup>xlviii</sup> C Cotton, D Worman. *The effect of occupational segregation on the gender pay gap* (2005) CIPD [http://www.cipd.co.uk/about/\\_effect\\_occ\\_seg\\_pay.htm](http://www.cipd.co.uk/about/_effect_occ_seg_pay.htm)

<sup>xlix</sup> *Ibid*

<sup>l</sup> *Ibid*

<sup>li</sup> Fawcett Society. ‘Equal Pay: Where Next?’ (2010) [www.fawcettsociety.org.uk](http://www.fawcettsociety.org.uk) p.9

<sup>lii</sup> Fawcett Society. Equal Pay – The Facts [www.fawcettsociety.org.uk](http://www.fawcettsociety.org.uk)

<sup>liii</sup> Equal Pay Act 1970, Sex Discrimination Act 1975, Sex Discrimination Act 1986, Employment Act 1989 (ss. 1-7, 9), Equality Act 2006 (ss. 25, 25, 33, 43, Part 2, 81, Part 4 and part of Schedule 3)

<sup>liv</sup> Steele, I Sex Discrimination and the material factor defence under the Equal Pay Act 1970 and the Equality Act 2010 (2010) *Industrial Law Journal* Vol. 39 (3) pp 264-274

- 
- lv Or a hypothetical comparator in limited circumstances under the Equality Act 2010 (considered below)
- lvi Equality Act 2010 s. 79 (3)
- lvii Equality Act 2010 s. 79 (4)
- lviii (1989) IRLR\_28
- lix (2002) ICR 956
- lx Ibid. p. 956
- lxi (1976) ICR 547
- lxii Ibid p 566 paragraphs 21 and 22
- lxiii (2005) EWCA Civ. 1608
- lxiv Ibid.
- lxv Equality Act 2010 s.65
- lxvi Equality Act 2010 s 65 (2)
- lxvii (1977) QB 852
- lxviii Equality Act 2010 s. 65 (4), (5)
- lxix Equality Act 2010 s. 65 (6)
- lxx *Barber v Guardian Royal Exchange Assurance Group (1991) 1 QB 344*
- lxxi *Macarthys Ltd v Smith (1980) IRLR 210*
- lxxii *Diocese of Hallam Trustee v Connaughton (1996) ICR 860*
- lxxiii (2008) IRLR 588
- lxxiv Heavily criticised by the Fawcett Society and UNISON
- lxxv Steel, I Tracing the Single Source: Choice of Comparators in Equal Pay Claims (2005) *Industrial Law Journal* Vol. 34, Issue 4 pp 338 – 344 at p 338
- lxxvi (1976) IRLR 198
- lxxvii Morris A, Nott S *Working Women and the Law – Equality and Discrimination in Theory and Practice*, (1991) Routledge, London p. 70
- lxxviii Supra 7 p 386
- lxxix Equality Act 2010 s. 80
- lxxx *Quinnen v Howells (1984) I.C.R. 525*
- lxxxi Previously the equality clause see *Glasgow City Council v Marshall (2000) ICR 196* and *Redcar & Cleveland BC v Bainbridge & ors; Surtees & ors v Middlesbrough Council CA (2008) EWCA Civ. 885, CA.*
- lxxxii Equality Act 2010s. 66 (2) (a)
- lxxxiii Equality Act 2010s 66 (2) (b)
- lxxxiv Equal Pay Act 1970 s.1(3)
- lxxxv Supra 7 p 409
- lxxxvi Keen, S Pre-employment health questions & equal pay’ News Section, *New Law Journal*, October 2010 pp 1327-1333 at p 1332 look at explanatory notes as well?
- lxxxvii Equality Act 2010 s 69 (1)
- lxxxviii Equality Act 2010 s 69 (4)
- lxxxix *Strathclyde Regional Council v Wallace (1998) 2 WLR 259*
- xc (2000) ICR 196
- xc1 (2008) EWCA Civ. 885, CA see also *Armstrong v Newcastle upon Tyne NHS Hospital Trust (2006) IRLR 124,*
- xcii *Enderby v Frenchay Health Authority and Secretary of State for Health (1993) IRLR 591*
- xciii B Perrins et al, *Harvey on Industrial Relations and Employment Law* (2010) Issue 211, LexisNexis, at K-19 para 8
- xciv (1993) IRLR 591
- xcv Supra 88
- xcvi (2006) ICR 218
- xcvii (2010) IRLR 277
- xcviii M Connolly. ‘The gender pay gap, hypothetical comparators and the Equality Act 2010’ *Employment Law Bulletin* (2011) Issue 101 p 6
- xcix 22 September 2009, Case nos. 1305947/08 and 1309616/08 M commented on in ‘Genuine material factor defence fails’ *Equal Opportunities Review* (2010) Vol. 198, p 32

- 
- <sup>c</sup> *Ibid Case nos. 1305947/08 and 1309616/08* Paragraph 3
- <sup>ci</sup> *Ibid Case nos. 1305947/08 and 1309616/08* Paragraph 46
- <sup>cii</sup> *Ibid Case nos. 1305947/08 and 1309616/08* Paragraph 51
- <sup>ciii</sup> Equality Act 2010 s. 77 (1)
- <sup>civ</sup> Predecessor to the Equality and Human Rights Commission
- <sup>cv</sup> ‘Equality Act 2010’ *Health & Safety at Work* (2010) 16 (9) p 8
- <sup>cvi</sup> ‘Will the Equality Act bring equal pay closer?’ *IDS Pay Report* (2010) Issue 1059 p12
- <sup>cvi</sup> Equality Act 2010 s. 77 (3)
- <sup>cvi</sup> Thomas, D ‘Closing the gap’ *Employers’ Law* (2010) 7 July p 14
- <sup>cix</sup> ‘EHRC proposals for gender pay reporting’ *Equal Opportunities Review* (2010) Issue 198, p 16
- <sup>cx</sup> R McDonald, S Buckley. ‘Equal pay’ *Employment Law Bulletin* (2010) Issue 96 (Apr), 8
- <sup>cx</sup> EHRC. ‘Proposals for promoting greater transparency in the public sector: a consultation on improving gender equality in the workplace’ EHRC (2009) p. 9  
[http://www.equalityhumanrights.com/uploaded\\_files/consultations/gender\\_pay\\_consultation.pdf](http://www.equalityhumanrights.com/uploaded_files/consultations/gender_pay_consultation.pdf)
- <sup>cxii</sup> *Ibid* p. 9
- <sup>cxiii</sup> *Supra* 25 p. 215
- <sup>cxiv</sup> *Supra* 25 p. 215
- <sup>cxv</sup> It has been identified that what is needed is as a move away from a remedial model to one of positive obligations imposed on organisations.
- <sup>cxvi</sup> R Lewis, S Smee. ‘Closing the gap: Does transparency hold the key to unlocking pay equality?’ (2009) Fawcett Society p. 9 <http://www.fawcettsociety.org.uk/?PageID=1022>
- <sup>cxvii</sup> K Godwin. ‘Equal pay reviews in action’ *Equal Opportunities Review* (2008) 174, 8
- <sup>cxviii</sup> *Ibid*. p. 10
- <sup>cxix</sup> The costs of gender pay reporting and equal pay audits are one of the main arguments against implementing section 78 – Minster for Equalities, Lynne Featherstone, stated that it may place a ‘burden on business.’ *Will the Equality Act bring equal pay closer?’ IDS Pay Report* (2010) 1059, 12
- <sup>cxix</sup> *Supra* 106 p 16
- <sup>cxix</sup> *Supra* 113 p. 9
- <sup>cxix</sup> *Supra* 114 p. 10
- <sup>cxix</sup> By amendment to the Race Relations Act 1976
- <sup>cxix</sup> EHRC. (2010) Background to the public sector duties  
<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/background-to-the-public-sector-duties>
- <sup>cxix</sup> Equality Act 2010 s. 149
- <sup>cxix</sup> EHRC. (2010) The new Public Sector Equality Duty <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duty>
- <sup>cxix</sup> *Supra* 25 p 213
- <sup>cxix</sup> EHRC. (2010) Gender equality duty <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/what-are-the-public-sector-duties/gender-equality-duty/>
- <sup>cxix</sup> EHRC (2010) Interim advice on the Equality Act Scottish Specific Duties  
<http://www.equalityhumanrights.com/scotland/scottish-news/interim-advice-on-the-equality-act-scottish-specific-duties/>
- <sup>cxix</sup> *Ibid*
- <sup>cxix</sup> The Equality Act 2010 (Specific Duties) Regulations 2011
- <sup>cxix</sup> At organisational level, relevant information would include sex-specific information on for example: numbers of employees, categories of employment, duration of employment contracts, proportions of part-time workers, wage levels, types of jobs, proportions in management positions, take-up of family leave policies, access to training. This information can be collected analysed by the company management.
- <sup>cxix</sup> *Ibid*.
- <sup>cxix</sup> ‘Will the Equality Act bring equal pay closer?’ *IDS Pay Report* (2010) 1059, 13
- <sup>cxix</sup> Hodges, C. ‘From class actions to collective redress: a revolution in approach to compensation’ (2009) *Civil Justice Quarterly* Volume 28 , issue 1 , pp. 41-66
- <sup>cxix</sup> *Supra* 130
- <sup>cxix</sup> M Rubenstein. ‘Representative actions and equal pay’ (2008) *EOR* Issue 174 p 31
- <sup>cxix</sup> *Ibid*. p. 31
- <sup>cxix</sup> *Ibid* p. 31
- <sup>cxix</sup> *Ibid* p. 31

---

<sup>cxli</sup> Towards a Coherent European Approach to Collective Redress, European Commission SEC (2011) 173 (Final)

<sup>cxlii</sup> Fawcett Society. 'Equal Pay: Where Next?' (2010) p. 9 [www.fawcettsociety.org.uk](http://www.fawcettsociety.org.uk)

<sup>cxliii</sup> *Supra* 25 p 218

<sup>cxliv</sup> *Supra* 25 p 218

<sup>cxlv</sup> Fawcett Society (2011) Equal Pay – The Facts [www.fawcettsociety.org.uk](http://www.fawcettsociety.org.uk)

<sup>cxlvi</sup> The Wage Gap: A History of Pay Inequity and the Equal Pay Act (2008) [Infoplease.com](http://www.infoplease.com) <http://www.infoplease.com/spot/equalspayact1.html#ixzz1RVL3y7Xo>. President Obama has vowed to reduce the wage gap between the genders in the United States.

<sup>cxlvii</sup> <http://discuss.bis.gov.uk/modernworkplaces/>

<sup>cxlviii</sup> The consultation closed on August 8, 2011