GENDER INEQUALITY AND REFLEXIVE LAW: THE POTENTIAL OF DIFFERENT REGULATORY MECHANISMS FOR MAKING EMPLOYMENT RIGHTS EFFECTIVE

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Abstract: We review the different regulatory mechanisms which have been used in the UK context to promote gender equality in employment over the past decade, including legal enforcement based on claimant-led litigation, collective bargaining, pay audits, and shareholder pressure. Evidence is drawn from case studies examining the effects of these different mechanisms on organisations in the public and private sectors, and from econometric analysis of the impact of stock market pressures on firms' human resource practices. We argue that there is scope for reflexive solutions to improve the effectiveness in practice of UK equality law, by inducing efficient disclosure by employers, setting default rules, and encouraging bargaining in the shadow of the law.

Key Words: equal pay, gender equality, reflexive law

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1. Introduction

In this paper we look at some of the ‘reflexive’ legal mechanisms used to encourage employers to address the gender pay gap and gender inequalities more generally in the UK during the 2000s. The Kingsmill review of 2001 argued that improved diversity management would benefit employers by reducing the risks associated with equal pay and sex discrimination litigation, and the costs of staff turnover. Kingsmill implied that a combination of disclosure, reputational effects and shareholder activism would help to drive improved diversity management without the need for new legislative initiatives. The Equality Act 2010, the result of a long process of review of discrimination law which began in the mid-2000s, moved away from a purely voluntarist approach in setting out a number of legislative reforms aimed at increasing the effectiveness of equality law in practice. However, one of the key parts of the Act, its provisions for mandatory disclosure of gender pay inequalities, was put on hold by the Coalition government after it entered office in 2010. This poses the question of how likely it is that progress on narrowing the pay gap can be made in the absence of greater legal compulsion.

We have a means of assessing the prospects for making equality law more effective from the ‘natural experiment’ on equal pay audits which has in effect been going on since the early 2000s. Pay audits have been in effect obligatory during this period for public sector employers, while remaining voluntary for the private sector ones. The public sector has also been subject to one of the most far-reaching developments in the operation of UK employment law for several decades, namely the huge increase in equal pay litigation which has been triggered by the entry into this field of no-win, no-fee law firms. The greater susceptibility of public sector employers to equal pay claims is, paradoxically, the result of the continuing role played by collective bargaining in that sector and by the requirements of transparency in the reporting of pay structures to which the public sector is subject. These features of the public sector context greatly increase the scope for legal challenges. The private sector, although largely insulated from these pressures, is nevertheless subject to distinctive ones of its own, in the form of shareholder and customer influence based on the logic of the ‘business case’ for more effective diversity management.

Our analysis is presented as follows. Section 2 below sets out the principal legal initiatives in this area since 2000. Section 3 then outlines theoretical considerations on the meaning of reflexive law in the context of equal pay and anti-discrimination legislation. Section 4 reports on the contrasting experience of pay audits in private sector and public sector firms, section 5 looks at the impact of litigation in the public sector, and section 6 considers the experience of shareholder and customer pressure in the private sector. Section 7 concludes.

2. Legal and Policy Initiatives Addressing the Gender Pay Gap in the 2000s

Thirty-five years after the Equal Pay Act came into effect in the UK, there remains a significant gender pay gap. The difference between the median hourly pay of full-time males and females was 10.2 per cent in 2010, while the gap for all employees was 19.8 per cent. In the private sector there is an even wider gap at 19.8 per cent and 27.5 percent respectively (ONS 2010).

While the pay gap can be partially explained by wider social structures, including occupational segregation, the undervaluation of women's work and the unequal division of family responsibilities, it is generally accepted in policy circles that discriminatory practices by employers also contribute to the ongoing inequality in pay. The assumption is that while some pay discrimination may be deliberate, it is more likely in practice to be systemic, and as such only identifiable through systematic evaluation of payment systems by employers. Following the approach first adopted in Ontario under its 1987 Pay Equity Act (McColgan, 1997), the argument for mandatory equal pay audits has been increasingly made in the UK over the last decade. The Equal Pay Taskforce (2001) concluded that as most employers did not consider their pay systems to be discriminatory, they would only conduct an equal pay audit if it were made compulsory.

Compulsion, however, was rejected by the government at this time, and instead Denise Kingsmill was commissioned to examine *non-legislative* proposals for addressing the pay gap and other issues of women's employment (Kingsmill, 2001). Given Kingsmill's terms of reference, it was not surprising that her report recommended that firms should be encouraged, rather than required, to undertake equal pay audits. She based her argument for voluntarism on the business case for gender equity. She suggested that the persistent pay gap reflected human capital mismanagement by UK firms. By conducting a pay audit, organisations would not only uncover systemic discrimination if it existed, but would also uncover the causes of the clustering of women in lower levels in the organisational hierarchy and the resulting under utilisation of women's abilities and experience. Thus, pay audits should lead firms to analyse the barriers to women's advancement, such as promotional structures that favoured long working hours or disadvantaged those with caring responsibilities or who took career breaks. They would also reduce the risks and costs associated with equal pay and sex discrimination litigation, and the costs of recruitment and retention. Finally, they would help to bring about a better balanced composition to the workforce, one that would better reflect the companies' consumer bases.

Kingsmill pointed to the increased interest of institutional and individual investors in how effective companies were at managing their non-financial resources, implying that ‘reputational effects’ and shareholder activism would help drive human capital management reform, which would incorporate better practices around gender equality, including conducting a pay audit. Kingsmill did accept, however, that if it became clear within a few years that the majority of firms were not voluntarily conducting a pay audit then it should be made mandatory.

The issue of compulsory pay audits was also examined by the Women in Work Commission (2006) and the Discrimination Law Review (2007). The former set out the case for and against compulsion, but was unable to reach a consensus on the issue. The latter rejected mandatory pay audits suggesting that the potential costs would outweigh any benefits, and as such would ‘contravene better regulation principles’ (DCLG, 2007: 54).

In order to support the chosen strategy of encouraging employers to voluntarily undertake equal pay audits and tackle gender inequality more broadly, a range of public policy supports were implemented throughout the 2000s. For example, various toolkits and codes of practice on conducting equal pay audits were published by the former Equal Opportunities Commission (EOC), award schemes introduced to reward exemplar employers, and the business case for equality and conducting pay audits were widely promoted through employer networks such as Opportunity Now.

During the same period, pay audits became *de facto* mandatory in the public sector through the local authorities National Joint Council pay agreement, the Agenda for Change programme in the NHS and the Civil Service Reward Principles. Additionally, the public sector Gender Equality Duty, which came into force in April 2007, required public bodies to address the causes of the gender pay gap as part of a wider legal obligation to eliminate unlawful sex discrimination and promote gender equality. Part of the logic of compulsion in the public sector was for the public sector to set a ‘best practice’ standard for private sector employers to emulate. Meanwhile, there was a significant rise in equal pay litigation involving local authorities and a number of cases received widespread media coverage, which highlighted the penalties for employers found to be in breach of the equal pay legislation.

Between the various public policy supports to encourage employers to voluntarily undertake a pay audit and the various governance changes in the public sector, the profile of equal pay audits had significantly increased by the mid-2000s (Neathey et al., 2005). And yet, despite this profile, the empirical evidence suggests that it only had a limited impact in influencing private sector organisations to conduct equal pay audits. An EOC commissioned survey conducted in 2005 found that eighty-two percent of organisations had not conducted an equal pay audit, did not have one in progress, and did not intend to conduct one (Adams et al., 2006). A more recent EHRC survey, limited to large organisations (250+), found that only 43 percent were conducting any gender pay review activity. Of those reporting no pay review activity, the explanation provided by 85 percent was that there was no need to carry out a pay audit because there was no inequality within their payment systems (Adams et al., 2010). These findings confirmed the view of the Equal Pay Task Force in 2001, that without compulsion, the majority of employers would not voluntarily undertake a pay audit, as they did not think they had any pay equity issues to resolve.

As a result, opinion shifted in favour of regulation, with the Equality Act 2010 containing a mandatory reporting requirement . Initially, this legal reporting measure, which would require organisations with more than 250 employees to report on their gender pay gap, was due to come into effect in 2013 (GEO, 2010). However, the new coalition government announced in late 2010 that it would not be bringing this section into force, although implementation in the future remains possible as repeal of this section was not proposed .

3. Reflexive Regulation as a Response to Gender Inequality

If the 1980s and early 1990s were periods of deregulation in employment law, the period since the mid-1990s has been characterised by greater innovation and experimentation in regulatory policy, a trend which has influenced legal responses to gender inequality. Regulatory techniques which have been variously referred to as 'responsive' (Ayres and Braithwaite, 1992) and 'reflexive' (Teubner, 1993) are those which attempt to tailor regulatory mechanisms to particular contexts, in particular by seeking to integrate formal legal devices with self-regulation on the part of societal actors. A possible role for reflexive regulation in the context of discrimination law was identified by the Nuffield Foundation-sponsored review of the enforcement of UK anti-discrimination laws in 2000. This work pointed to the limitations of a hard-law approach, which included low success rates for applicants in employment discrimination tribunal hearings and to significant delays in the resolution of litigation (Hepple, Coussey and Chowdhury, 2000).

Reflexive regulation offers a critique of voluntarist approaches on the one hand and 'command and control' forms of law on the other. Voluntarist approaches which assume that the interests of business will automatically align themselves with the wider public good are seen as ignoring a range of barriers to this occurring, including externalities and related forms of market failure. The 'command and control' approach, in contrast, is criticised as involving excessive reliance on prescriptive controls. The ineffectiveness of command and control is derived in large part from limits on the capacity of law-makers to predict the consequences of regulatory interventions in the multiples contexts in which they operate. Regulation should aim instead to be reflexive in the sense of both responding, in its form and content, to social contexts, and in triggering a range of responses from social actors which can form the basis for effective self-regulation.

Autopoietic social systems theory provides the foundation for the view that the capacity of the legal system to influence social behaviour is conditioned by its need for internal consistency (Luhmann, 1995, 2004; Teubner, 1993). The legal system is seen as having its own unique linguistic forms and institutional processes, which these translate only partially into the economic and organisational spheres. The more prescriptive a legal rule is in formal terms, the less effective it may be in practice in bringing about the desired outcome. Overly prescriptive law which results in 'juridification' or growing levels of detail and complexity has been recognised to be a particular problem in the employment law field (Simitis, 1987).

Experimentation in the form of social legislation has emerged as a response to these dilemmas. A prominent example is the use of so-called 'bargained statutory adjustments' in employment law (Davies and Kilpatrick 2004). Here, legislation sets a default rule on a matter such as working time controls, which social actors can modify through self-regulation, such as collective bargaining between employers and trade unions, if the agreement they make satisfies certain criteria. These criteria could be substantive in nature (for example, setting an absolute upper limit to working hours) or procedural (for example, requiring the trade union to be broadly representative of the relevant workforce). This approach implies that a range of distributive outcomes is possible, and that standards set by law can, within limits, be traded off against other considerations. The result should be to promote diversity of practice, and, on this basis, to stimulate a learning process. Deliberation both within and between organisations is a critical part of the reflexive approach. This can be aided by benchmarking procedures and other 'best practice' dissemination mechanisms, as well as by rules mandating disclosure of current practices by the actors concerned.

Thus the reflexive approach does not at all imply the absence of law. The law has a number of roles to play: setting default conditions which apply in the absence of agreement between social actors; limiting the scope for departure from the default rule through such self-regulation; legitimating the collective actors concerned, by prescribing the conditions under which they are regarded as having the relevant representative capacity; and mandating disclosure of the information needed for meaningful negotiation. Reflexive law is therefore a form of regulation by design, not one based on the notion of law as spontaneous order: the 'frame', or 'the conditions under which a deliberative process may succeed [need to] be identified, and once identified, must be affirmatively created, rather than taken for granted' (De Schutter and Deakin 2005:3).

A well designed reflexive law is, nevertheless, insufficient on its own to achieve the aims of regulation. For reflexive regulation to be effective in practice, 'bridging institutions' between the legal sub-system and economic and organisational fields must be in place. This means that institutions or mechanisms must be present beyond the legal system in which effective deliberation and participatory decision-making can occur. In the employment relations context these should include, at a minimum, collective bargaining or other employee-based representative mechanisms. Thus reflexive law is by no means individualist in orientation. Where the relevant collective mechanisms do not exist, the law has a capacity-building role to play in enabling them to develop.

Potential limits to the reflexive approach are nevertheless evident in the phenomenon of the 'managerialisation' of law identified by Edelman's studies of the operation of US anti-discrimination legislation (Edelman et al., 1999, 2001). These studies highlight the role of HRM professionals in assisting the translation of legal norms into organisational practice. In the US context, human resource managers were able to use the threat of litigation, with the potential for substantial liabilities and wider reputational losses, to persuade employers to adopt a diversity management agenda. They were able to present compliance with the law as part of a wider business case for workplace equality. In this way, 'legal rules [were] filtered through a set of managerial lenses chiefly designed to encourage smooth employment relations and high productivity' (Edelman et al., 2001: 1599). As this happening at a time in the 1980s and 1990s when, in the legal and policy arena, the civil rights agenda which had been initiated in the 1960s was coming under pressure, the advent of diversity management helped confer a new legitimacy on the goals of the legislation.

At the same time, the metamorphosis of the legally-orientated, civil rights agenda into the practice of diversity management brought with it new dilemmas. The embedding of the diversity agenda in managerial practices had the potential to dilute the social concerns which provided the motivation for the legislation in the first place. The de-radicalisation of the law was also the precondition to its successful institutionalisation at the level of the firm: 'as legal rules are recast in managerial terms, they may be weakened but they are nonetheless more easily incorporated into organizational routines' (Edelman et al., 2001: 1633).

Similar tensions are evident in Kirton and Greene's studies of diversity management in the UK. They have looked at the effects of the displacement of equality officers by diversity management specialists with a generalist HRM background during the 2000s. The greater legitimacy enjoyed by diversity managers meant that senior managers were more ready to give them public backing than they had been with equality officers, and that line managers were more prepared to take equality issues seriously. On the other hand, there was a 'considerable risk that if diversity practitioners over-identify with management and management interests, the changes they drive are more likely to serve organisational objectives than improve working lives' (Kirton and Greene, 2009: 173; see also Barmes and Ashtiany, 2003).

In the process of iteration between the legal system and the organisational field of the workplace, the growing acceptance of a diversity agenda within managerial practice has also potentially negative implications for the way in which the law is designed, interpreted and enforced. Once the aim of the law is seen to be the promotion of organisational efficiency as opposed to the assertion of individual rights, it is in danger of being depoliticised. This issue was raised during the process of deliberation around the Discrimination Law Review of 2007. In part because of concerns over the reflexive turn taken by that review (McCrudden, 2007), the Equality Act 2010 emerged as a stronger and more far-reaching measure than had at one stage seemed possible: in addition to the introduction of mandatory reporting on pay inequalities, the Act also widened the scope for positive action in favour of historically disadvantaged groups, and introduced changes to tribunal procedure aimed at enhancing the effectiveness of legal sanctions for discriminatory acts (see GEO, 2009). However, as we have seen, the Coalition government which took office in 2010 deferred, possibly indefinitely, the bringing into force of the Act's provisions on pay disclosure. The long gestation and incomplete implementation of the 2010 Act highlights the difficulties inherent in applying reflexive methods in the discrimination law field, a context in which conflicting economic interests are clearly visible, and where distributive and deliberative approaches to bargaining often operate in tension with each other. With these issues in mind, we now turn to our empirical evidence.

4. Pay Audits in Practice: Comparing the Public and Private Sectors

Our analysis here is based on 40 interviews conducted between late 2007 and early 2010. Our research examined a range of pressures on organisations to address equal pay and gender equalities including corporate governance, the business case, law, unions, employees, and procurement. Here we limit our discussion mainly to the issue of pay audits though we examined other issues of gender inequality as well. At the organisational level, we carried out interviews with eight public sector organisations (six local authorities and two civil service departments), eight private-sector organisations (five listed companies and three professional partnerships), two universities, and two not-for-profit organisation (a housing association and a charity). Here our interviewees were with a mix of HR managers and diversity champions, most of whom occupied senior positions in the relevant organisations. Our sample consisted mostly of organisations which had made a public commitment to greater gender equality, as it proved difficult to get other organisations to participate in the research. As Kirton and Greene (2010) have also found, access to private sector organisations on gender equality issues is problematic because of fears of equal pay litigation and concerns that public statements of commitment to gender equality might be seen to amount to window dressing. We also interviewed five investment/equity funds, a range of union officials at local, regional and national level, one no-win no-fee lawyer involved in equal pay and other national-level stakeholders.

While all of the private sector firms in our study had conducted some form of equal pay analysis, only two had disseminated the results to employees or their representatives, and only one of these was also reporting its pay gap externally. In one case, the relevant union had asked to see the results of an audit but their request had been refused. Grosser and Moon (2008) similarly report that even among the best performing gender diversity companies in their research, the majority do not report information on equal pay audits, and the recent EHRC survey on equal pay activity among large organisations (250+) also found that while 43 percent reported carrying out equal pay activity, of these only 16 percent reported the results internally and 6 percent externally (Adams et al., 2010).

A comparison of one private sector and public sector organisation that were part of our research illustrates the importance of transparency. The private sector firm told us that it had conducted a pay audit in secrecy, and claimed that it had shown there to be no gender discrimination within the firm's payment systems. However, later in the same interview the respondent commented that that men engaged in 'harder bargaining' during the interview process than women, to such an extent that a male employee might end up with a starting salary of up to £10,000 more than a woman with similar experience and qualifications.

In contrast, one of the public sector organisations interviewed, which had carried out open and transparent equal pay audits on an annual basis for some years, showed greater awareness of the role played by the hiring process in building in discriminatory pay structures. This organisation cited a case in which a man and a woman with similar experience had been appointed within the same department at the same time. They had both been offered a starting salary on the same scale point, but the male bargained for a higher starting point, claiming he would not take the job otherwise. Six months later, when it became clear that the female employee's performance was superior, the department came back to the organisation's HR division, looking to raise her salary. The HR division of this organisation was able to use this example, in tandem with the transparent and detailed pay audit, to educate departmental managers about potential gender bias in the appointments process, and its impact on the gender pay gap.

In the first case, the pay audit was conducted in secrecy by management, and as a result was narrow in scope and failed to highlight some potential issues in the appointments process. The outcomes of the appointment process were not perceived to be inequitable, but rather the inevitable outcome of individual bargaining. Additionally, despite the potential litigation risk, it was felt that the organisation could find some way to justify the differences retrospectively if it was ever challenged. The HR manager in this example seemed committed to addressing diversity issues, but her analysis of the equal pay gap and its causes was narrow. In contrast, the pay audit in the public sector organisation was part of a transparent deliberative process, that stimulated learning within the organisation around some of the underlying causes of pay inequality. While it was driven by a particularly effective HR department, the inherent transparency of the union negotiated pay-scales made their job easier.

Voluntary pay audits therefore appear to be less effective when there was a lack of transparency. In contrast, those conducted in an open and deliberative way led to a deeper analysis of the causes of the pay gap and related gender issues. Without transparency, the results cannot be assessed or challenged. Where this is the case, there is no deliberation among stakeholders and the end result is likely to be only a partial evaluation of potential discrimination within a company's pay systems, with the analysis conducted from a narrow 'business case' perspective.

Deliberation around the results of a pay audit also has the potential to go beyond simply highlighting discrimination within the pay system. As Kingsmill (2001) noted, highlighting a gender pay gap within an organisation should lead to an exploration of why that gap exists, and thus to an examination of other HR systems, such as promotional structures. Some of the causes of the pay gaps will relate to outside factors, but organisations can take action to mitigate the influence of these factors. One University we interviewed had altered its promotion criteria for academics as a result of the pay audit. In this case the initial audit had found a pay gap between male and female academics, but only across the entire scales and not within different categories. At this point they could have concluded that their pay systems were not discriminatory, in that the causes of the pay gap lay elsewhere. However, they saw the pay audit as a tool for deeper analysis, and by analysing the gender gap by part-time and full-time status, it became clear that working part-time was the major promotion obstacle for female academics and thus a significant contributor to the pay gap. This led the organisation to conduct some qualitative research among part-time staff, which revealed the various pressures around teaching while still needing to achieve the same publication outputs as full-time academics in order to earn promotion. As a result of this process, the University changed its promotion criteria so that academic outputs were weighted on a pro-rata basis. It was hoped that over time this may have some impact on the promotion of female academics, and thus on the gender pay gap within the University.

These cases illustrate some clear benefits for conducting transparent pay audits and allowing meaningful deliberation within an organisation about ways to close any gender pay gap. The diversity manager at a large listed company that did not disclose its pay gap noted, in response to a question about the then expected impact of the Equality Act provisions on disclosure: ‘publicly I don’t like the transparency, privately I think it can only help’. A key obstacle to public disclosure is, paradoxically, reputational risk. Several respondents noted that there might be legitimate explanations for pay gaps in particular cases, but if only the headline figure were reported, the public would draw negative but arguably unfair conclusions about the organisations concerned. One NGO we interviewed reported that they had an overall pay gap of 35 per cent between male and female employees, but that the pay gap within each of their two business units was minimal. The NGO felt the overall pay gap could be easily explained. In one of its business units, there were many highly skilled employees, and the gender balance of the staff was roughly equal. In the other business unit, the work was less skilled, the pay lower, and the workforce predominantly female. The NGO was concerned that the headline pay gap figure would be reported in the press without adequate explanation and the conclusion the public might reach would significantly affect the donations it received, which was the primary source of its funding.

A second concern was the potential legal liabilities arising from publishing pay gap data. Several respondents pointed towards the high level of litigation in the public sector as evidence of what organisations could be opening themselves up to. This was also the explanation one respondent gave for having only conducted a pay audit at a high level of generality and not in more detail: ‘we haven’t done it to that level of detail [and] I don’t think we want to… because [of] what you might find and therefore what it would cost to correct’. Several of our interviewees noted the perverse incentive operating, in that firms that took positive steps to examine their pay systems might then be liable for six years back pay, whereas taking no action reduced the risk of liability. It was noted, on the other hand, that this was also an argument for mandatory disclosure, as it would open up all firms equally to litigation, and provide an incentive for them to ensure their pay systems were not discriminatory.

Only one of the eight private sector organisations argued for mandatory pay audits. As this respondent noted, conducting a regular pay audit ‘gives you comfort that… you are treating people fairly’. This company published the results of its annual pay audit both internally and externally, and had the process externally audited every three years. However, the overall picture emerging from our interviews with private sector firms is that those companies which were not already disclosing their pay structures, either internally or externally, were not going to do so voluntarily. As one HR manager told us, referring to disclosure, ‘we would only do it voluntarily if it would show us in a good light... Without the law we would never do it’.

5. Equal Pay Litigation and Collective Bargaining in the Public Sector

The issue of equal pay among UK local authorities reached crisis proportions in the second half of the 2000s. Some estimates put the liability for back pay in local government at almost £3 billion, and it was thought that an increase of 5 per cent in the pay bill going forward would be required to ensure compliance with equal pay law (LGE 2006). It was claimed that local authorities would have to cut services and sell off assets in order to meet their equal pay obligations. The employment tribunal system was described by Lord Justice Mummery as ‘bursting at the seams’ with the sheer volume of cases. The background to the litigation involving local authorities was the 1997 national collective agreement, referred to as the ‘single status agreement’ (‘SSA’), which was negotiated between the public sector unions and the local authority employers to address historical gender inequalities within the local authority pay systems. The agreement brought together the employment terms and conditions of various groups of workers – what was known as the ‘white book’ for manual workers and the ‘purple book’ of the administrative, professional, technical and clerical workers (APT&C) – to form the ‘green book’, or single spine of terms and conditions. While the SSA was a national agreement with a national pay structure, actual spinal points for different jobs were to be worked out locally through a detailed job evaluation exercise. The most significant inequalities related to the ‘white book’ or manual workers. A limited job evaluation for the ‘white book’ had taken place in 1987 but it had ignored the bonus system through which workers in mostly male dominated grades had been receiving historical bonuses of up to 30 per cent that in effect were now part of their basic pay. Hence, there were some clear historical inequalities, as well as potential hidden inequalities that local job evaluation processes was intended to unveil and eradicate. The original pay structures were to apply until after the job evaluation process had been completed, at which point workers would move across to their new scale point in the ‘green book’.

Despite the SSA being a significant achievement for the unions which negotiated it, very few agreements were struck at local level over the implementation of single status. No date was set in the 1997 agreement for implementation of single status and there were no penalties for failing to implement the SSA at the local level. The 2004 NJC Pay Implementation Agreement set a deadline of April 2006 for job evaluations to be completed, with the new single status pay structures to be implemented by March 2007.

Again, however there were no penalties on the parties for failing to reach agreement by these dates. A small number of local authorities completed the job evaluation process quickly and, as a result, seem to have avoided the back pay issues which developed at other authorities. Most local authorities took a long time to get the process under way. By the 2007 deadline, estimates reported in the media were that only around half of the almost 400 local authorities within England and Wales had implemented a new single status pay structure, and by the middle of 2009 this figure had still only increased to around two-thirds of local authorities (LGE, 2009).

Of the six local authorities we interviewed between late 2008 and early 2010, one had completed the process by 2003, two had adopted a two-phase process and implemented phase one (the lower half of the new single spinal column) and were still working on phase two (although they still had some outstanding legal cases in relation to the implementation of phase one), two authorities were still conducting job evaluations and had yet to implement a new pay structure for any of their green book staff, and one authority had been unable to reach agreement with their unions and had unilaterally imposed a new single status pay structure. Interviews with Councils were conducted with senior HR representatives (for example, HR Managers and Pay and Reward Managers). We also interviewed five union officials from local, regional and national level, and a law firm involved in equal pay litigation.

A significant problem in the implementation of the SSA was that employers and unions could not reach agreement about what to do with the results of the pilot studies. Inertia turned to resistance as it became evident that implementation of the JES would result in some workers facing potential pay cuts (on average, around 20 percent of council workers are what have been referred to as ‘losers’), while other workers would gain from the process (around 40 per cent). Councils could see that one possible impact was a significant increase in the overall wage bill, and many initially tried negotiating on the basis of an overall ‘nil cost’ settlement, where the additional costs of winners would be offset by reductions for losers. On the union side, it had been assumed that achieving equal pay would be achieved through pay rises for those who were being underpaid, while pay cuts were not something that had been anticipated and nor were they something the unions could sell to their members, particularly as it was not the basis on which they sold ‘single status’ to them back in 1997. Thus, employers wanted a settlement that would not increase wage costs while unions wanted lifetime pay protection for any workers who would suffer cuts in income as a result of the job evaluation scheme. Negotiations over the JES became fractious and stalled in many local authorities.

The involvement from early 2003 'no-win, no-fee' law firms was a turning point in this process. Around the same time the period of entitlement for back pay in equal pay cases was increased from two to six years as a result of a series of European law judgments. Prior to the emergence of no-win, no-fee litigation, while there had been some litigation by unions and use of the equal pay questionnaire to get management to the table to negotiate over single status, the issue of back-pay does not appear to have been on the agenda. A local authority we interviewed, which had otherwise fully implemented the JES by 2004, had made no back-pay settlement at all. Another local authority we interviewed had agreed the first phase of the JES with the unions to start in February 2004, and this agreement also contained no back-pay settlement. As the HR manager of this council noted, 'it is hard to believe now but back in 2004 we were in very different territory'. The focus of the negotiation between management and unions up to this point had been about rectifying existing inequalities in the pay structures and dealing with potential 'losers'.

Negotiations between unions and employers over back pay were initially for significantly less than full potential entitlements. As one HR Manager described it, 'it was simply a... compensatory sum that they would accept in return for giving up their right to make a claim'. Unions argued that in negotiating a deal with management, they had to balance a range of interests. Unions not only wanted back pay compensation but they also wanted pay protection for losers going forward for a period of time. Some of the early agreements involving the councils we interviewed included pay protection of up to six years. Employers claimed they did not have access to unlimited funds and were threatening to outsource services and cut jobs. As one union official put it, 'there is no point us getting our women members X thousand £s in the pocket if they get... three months notice and they've got no job to go to'. As back pay had not been an anticipated part of the SSA, no councils had budgeted for it. Initial amounts of back pay cited to us in the interviews in agreements reached between 2003 and 2005 were capped at around £10,000 per person, with the amount actually paid out based on some form of locally agreed matrix which took account of length of service and hours per week worked. In 2011, settlements were being reached at over three times this amount.

The entry of the no-win, no-fee solicitors had a major impact in large part because of their willingness to support litigation against unions which had negotiated agreements implementing the SSA. In the *Allen* v. *GMB* litigation, an employment tribunal ruled that the way in which the union arrived at a negotiated collective settlement with the Middlesbrough Metropolitan Borough Council, which had attempted to balance a range of conflicting interests (back pay, pay cuts, and potential job losses through service cuts and outsourcing), constituted indirect sex discrimination against their female members. In balancing the various interests, the tribunal found that the GMB had given undue weight to pay protection for the 'losers'. It recognised that the union had adopted a strategy that would provide 'the least protest from the membership as a whole'. However, the agreed back pay settlement constituted only 25% of a potential claim by the White Book claimants. Moreover, the claimants had not been made aware of this. The tribunal ruling focused on the union's failure to give the women involved adequate advice or to inform them of the extent losses they were being asked to bear. The tribunal's finding of indirect sex discrimination was reversed by the EAT but restored by the Court of Appeal. Several thousand further claims were then issued against both the GMB and UNISON, although these were later withdrawn.

There are conflicting views on how far the *Allen* ruling altered the strategy of the unions in dealing with equal pay. The GMB officials involved in the case had, according to a union officer we interviewed, been 'absolutely vilified' in the ruling, and yet had acted in good faith. The *Allen* ruling came as a shock to the unions, but in the local authority sector they responded positively: as a result of the ruling, union systems had been 'enhanced and [made] more robust'. The unions became more cautious in their approach to negotiating settlements, but also more proactive in taking cases of their own against employers. UNISON, for example, had taken more than 40,000 claims to the Employment Tribunal by early 2008 (Jaffe et al., 2008). A contrasting view was expressed by a member of the law firm we interviewed: 'unless the unions have an on the road to Damascus moment, they see this as a problem which they have to get round. They don't see it as an issue which they need to pursue on behalf of their female members'.

The increased role for litigation, although defended by the no-win, no-fee law firms on the basis of its potential for vindicating the rights of disadvantaged female workers and union members, was seen by unions and employers as having the potential to undermine the effectiveness of the collective bargaining process. As one official put it:

> Everything at the end of the day is a shabby compromise…. but it's done on the basis of this is the best we can negotiate; it's not some of you can take it and some of you can't. Once we take a vote on it, it's implemented collectively, that's the whole basis. Why would they bother negotiating with us otherwise?

From the employers' perspective, the prospect of liability for up to six years' back pay was a factor in chilling negotiations. This was seen as contradicting the aim of a more open examination and discussion of pay systems. As we have seen, the high profile of equal pay litigation in the public sector was a reason given by a number of the private sector employers we interviewed for avoiding too close an examination of their own pay systems. Their fears may be justified: according the member of the law firm we spoke to, ‘if there was an actual obligation to publish information, and a right to receive information, in relation to these matters, we would make huge progress’ in the private sector.

There is also some evidence that, in the public sector, the cost of back pay settlements had also slowed down the process of implementing single status. Councils we spoke with talked about the difficulties of meeting the costs within existing budgets and many had held back from reaching agreements hoping that central government might have assisted with funding, particularly given this was an historical issue. In 2007 the government announced that it would not provide additional funding to cover the increased costs associated with equal pay, but it would allow councils to capitalise expenditure (CIPFA, 2007).

Finally, there is some evidence that the litigation around the implementation of the SSA had had made it more difficult to reach settlements. Although the scope of the law had become clearer over time, employers continued to fight cases on costs-related grounds, and were using the legal process to delay the resolution of claims. One union official noted:

> everyone is now getting a much clearer picture about what’s the scope of the GMF defence, how is it going to work, where is it not going to work, what kind of evidence will stand up to scrutiny in a tribunal, what won’t.... there is still a huge grey area, but there are a certain number of cases where you think yes that’s clearly a case that looks like it’s going to succeed. But there isn’t always a correlation between the strength of the case and the ferocity with which the employer fights it.

6. CSR and Shareholder Pressure in the Private Sector

Reflexive mechanisms have been adopted in the area of corporate governance as a way of bringing about change in firm behaviour. As part of the wider CSR agenda, pension funds and other institutional owners have been encouraged to adopt an ‘enlightened shareholder value’ position by taking a long-term view of their investments and engaging more actively with the social, ethical and environmental (SEE) practices of their investee companies (Myners 2002). To aid this process, pension funds are required to disclose their statement of investment principles (as set out in the 2000 disclosure regulations and the 2002 Myners Principles, now incorporated into the Financial Reporting Council’s Stewardship Code). The Companies Act 2006 requires boards of large companies to take account of a range of stakeholders, including employees, when managing a firm’s financial performance. Thus, firms can legally take a long-term view in adopting human resource management strategies that take account of employee rights and interests, such as gender equalities (Company Law Review, 2001; Armour et al, 2003).

It was this 'enlightened shareholder value' perspective that influenced Kingsmill's (2001) argument that a combination of shareholder activism and reputational effects would help drive human capital management reform in the area of gender equality, and would thus put pressure on firms to conduct equal pay audits. However, as the research cited earlier showed, the proportion of firms conducting pay audits voluntarily remains small. Additionally, of the private sector firms we interviewed, only one interviewee was aware of any questions being raised by shareholders in relation to gender equality issues. While this resulted in a head office decree for subsidiary organisations to produce a gender diversity policy, this was seen by the subsidiaries as a public relations response to the shareholder concern, with no follow up or monitoring of the policy. This section explores the relationship between shareholder pressure and firm behaviour in this area drawing on our interviews with SRI funds and union officials as well as an analysis of WERS data. We will see that the influence of shareholders is quite minimal in improving gender-related employment rights and other pressures are more significant. For reflexive mechanisms such as shareholder activism to work effectively, more effective disclosure-based regulation is needed.

Evidence of the impact of SRI on employer practice is available from WERS 2004. WERS is a nationally-representative sample of workplaces in manufacturing and services with 5 or more employees in Great Britain. It covers both the public and private sectors. The 2004 survey made it possible for the first time to study the impact on corporate governance on employment relations by identifying the ownership form and corporate governance structure of the employing organization. Among other things, WERS 2004 distinguishes between private-sector employers with a stock exchange listing and those without. In relation to equality, WERS enables us to see whether an employer has a gender equality *policy*; whether it *monitors* gender equality in relation to recruitment, promotion and pay; and whether it implements family-friendly *practices* above the level mandated by law. By combining the corporate governance and gender equality data from WERS, we can get a measure of how far listed firms are more likely than others to prioritise gender equality issues in the way that reflexive theory suggest they might. We can also test for other possible influences on gender equality policy and practices: whether a firm has government contracts, and thereby comes under pressure to comply with best practice on gender equality issues (among others); whether it deals directly with the public as consumers (a 'B2C' firm), a possible indicator of its greater sensitivity to reputational issues; whether it subscribes to or otherwise complies with voluntary standards stressing good HR practice on matters including equality, such as Investor in People guidelines; what its ownership structure is (whether it is family-owned and/or foreign owned); whether it has an employee share- or profit-sharing scheme, a possible indicator of employee empowerment; whether it employs a significant number of female managers; and whether it has a strong union presence. Unfortunately, there is no information in WERS on whether firms have conducted a pay audit, hence the discussion here is on gender equality more generally.

A full analysis of the WERS data is available elsewhere (Deakin, Chai and McLaughlin, 2011) and here we briefly summarise our key findings. Around 15% of private-sector workplaces sampled by WERS 2004 belonged to employers with a stock market listing; 26% had government contracts; and 40% dealt directly with members of the public as customers. Around half of all private-sector workplaces had a gender equality policy. However, only 12.5% monitored their recruitment practices from a gender-equality point of view, 6% monitored promotion, and 4% monitored pay. When we conducted a bivariate analysis, we found that listed firms were significantly more likely than non-listed ones to have a gender policy and to engage in monitoring of recruitment, promotion and pay. However, some of these differences disappear once we control for other potential influences. We compared the effects of a stock market listing with other external pressures (government contracts, B2C, voluntary standards) while controlling for firm characteristics and the extent of workplace diversity. What we found was that having a stock market listing matters for whether a firm has a gender policy, but that it makes no difference to gender monitoring, and has little impact on family-friendly practices (reduced working for parents, maternity leave and paternity leave are significantly correlated with listing). Of the other external pressures, government contracts do not appear to be significant drivers of equality, but being a B2C firm is significant for both gender policies and monitoring (although less so for family-friendly practices). Firm size (as might be expected) is strongly correlated with the incidence of policy, monitoring and practices. Firms employing a high proportion of female managers are more likely to have a gender policy and to monitor recruitment and promotion, but not pay. In addition, union presence is strongly linked to having a gender policy and to the monitoring of gender equality in recruitment.

In short, the WERS evidence appears to point to some positive effects of a stock market listing in terms of the approach of private sector companies to gender equality. However, these effects are largely confined to gender policies rather than to the monitoring of gender equality outcomes or to the substance of family-friendly practices. One interpretation of this is that a gender equality policy is window dressing for the annual report aimed at (among others) SRI funds. Firms do not need to translate the policy into practice because the level of interest of institutional investors in the area of gender equality is superficial and the presence of a policy ticks the necessary boxes. This interpretation is supported by our interviews with the investment funds, which found that gender equality was not high up the list of social issues that investors raised with them. Among employee issues, child labour, supply chain employment conditions, and health and safety carry the biggest reputational risk. And when gender is raised by investors, it is generally in relation to equal opportunities policy or the proportion of women on the board, but rarely in relation to equal pay. Despite the publicity in the UK during the 2000s around pay audits, the only question relating to pay audits put to the investment funds we interviewed had come from a trade union official. Most of the investment funds noted that there is a fine line between engaging with companies over important issues and moving into micro-management. As one interviewee noted in response to a question on equal pay audits:

> We have a dividing line or a tenet if you like, thou shalt not micro manage, [and] that is just too far down. There are limits to what we think we can achieve as corporate owners and although we have here the biggest resource of any fund management company, this is still a finite resource and there are a lot of companies [we invest in]... So it is our job then to call to account the Directors of companies..., but if we were then to try to get involved in this type of management decision, which is setting pay for employees generally, or quotas for types of employees, it is beyond what I think we should be doing and what I would suspect our clients would want us to do.

Our interview data also suggest that the reputational risk for shareholders that might arise from equal pay litigation may not be significant enough to concern institutional investors, at least not from a purely financial perspective. One union official with responsibility for pensions had raised the question of equal pay audits with six SRI firms in relation to a large public sector contractor. The union official claimed that the contractor had inherited discriminatory pay systems from the public sector and felt there was an equal pay litigation risk in the region of £70 million. The response of one fund manager to this financial risk was that it was too small and ‘would have no material impact on the share price; no one would be interested’. Only one of the fund managers took his questions to the company concerned but the union official reported receiving no response.

While gender did not feature significantly as an issue among SRI funds, the picture more broadly is of a limited impact of SRI on the treatment of social, ethical and environmental issues at company level. All our interviewees noted the growth of SRI over the last decade and could point to examples of where they had filed or supported a shareholder resolution or engaged with firms over specific issues and changed behaviour. Some of these examples related to employment rights. Several of the interviewees cited their involvement in supporting the same resolutions in the US relating to Walmart and to the First Group. This is interesting in that it highlights the challenge of bringing about change in very large MNCs. Given the number of institutional investment funds investing, SRI funds need to coordinate to have any impact when voting against large mainstream funds which may be less interested in social and ethical issues. One widely reported example of this coordination was when four investment firms from the US and UK – New York City Pension Funds, Illinois State Board of Investment, F&C Asset Management and the UK University Superannuation scheme – wrote a joint open letter to the chairman of Walmart's audit committee stating it needed to improve its employment practices as they were damaging the share price. This followed a number of embarrassing stories in the media relating to illegal immigrant workers, a class action sex discrimination suit, and cuts to employee healthcare benefits (http://news.bbc.co.uk/2/hi/business/4605733.stm).

However, these appear to be isolated cases; it is clear that the extent of shareholder activism more generally is very limited. SRI remains a niche part of the overall investment market. As one SRI fund told us, 'on the whole people are investing as they have always done. They are not raising issues at company meetings with CEOs, they have issues that affect the share price to discuss – that's the bottom line'. The overall picture that emerged was that many fund managers were not being challenged in relation to social or ethical issues by individual or institutional investors.

The SRI investment firms we interviewed were disappointed about the apparent lack of interest by pension funds and other institutional investors, particularly in the light of developments in disclosure regulation. In the UK, it was anticipated that the pension disclosure regulation would raise awareness of SRI issues for pension fund trustees and lead to greater engagement over social, ethical and environmental investment. The regulations require pension funds to report their investment principles and how they are achieving them on an annual basis. However, our interviewees suggested that pension fund trustees are largely conservative, even when they might be overseeing pension funds of NGOs actively engaged in such issues. Additionally, as one interviewee noted, where trustees do have an interest they are not aware of how to use the fund:

> 'the level of ignorance around how the capital markets and how fund managers, how finance actually works, people might be

> interested in ethics and being responsible but how you actually progress that through to understand it, it is just too much'.

The interviewees were unanimous that one of the biggest barriers to greater levels of social investment and engagement by pension funds and other institutional investors over SEE issues was a lack of transparency and quantitative information that third parties can use to make meaningful investment decisions While pension disclosure rules have led to a significant increase in the number of pension funds drawing up statements about investment principles, the consensus was that the actual impact on practice was questionable; 'a one-off policy statement sits in the drawer or in an investment management agreement signed by two people that probably left the company a couple of years ago'. Without meaningful reporting about how the policy is actually being implemented and what has been achieved, the perception is that most are meaningless statements of intent. However, for pension funds to engage effectively on CSR issues with the companies they invest in, they will also require a commensurate level of transparent, quantitative and regular information to be reported by these companies. As one interviewee put it:

> transparency is a fundamental tenet of responsibility; without transparency you can't have accountability [and] third parties have no way of judging what you have been doing.... In the absence of either civil society institutions or professional bodies that are ranking that transparency, it won't move companies forward, it will become an anodyne boiler plate, the same old 'this is what we said last year it is the same thing this year' type reporting. So you need that evaluation, the analysis of the approach, of the transparency, for it to actually get companies on a conveyor belt to being, if you like, the most responsible.

These findings support the research by Grosser and Moon (2008) into corporate reporting on gender equality. While they found that many 'best practice' companies were reporting on a range of gender indicators, reporting was mostly limited to policy and practices. Only in a small number of cases was there reporting on progress against targets. Moreover, because firms choose what they report on, comparing firm performance on gender performance was not possible. Thus, as a number of our interviewees noted, for disclosure rules to be effective, there needs to by key performance indicators developed with an independent verification system so that progress can be monitored and compared across a range of companies. Hence, most of the investor firms we spoke with were not opposed to greater levels of regulation. As one interviewee noted, 'companies operate within a society which itself has laws and rules… and to suppose that the control of companies can be left entirely to the shareholders as owner seems to me wrong and rather dangerous'. Thus they saw regulation as potentially important, both in assisting institutional activism, and in helping firms understand society's expectations of their behaviour.

7. Conclusions

In this paper we have reviewed evidence on the operation of a range of mechanisms used for making equal pay law in the UK more effective. In the past decade, these have included pay audits and collective bargaining at national and local level in the public sector, and shareholder pressure, based on the logic of the business case for diversity, in the private sector. There has also been a huge increase in litigation against both unions and employers, almost entirely affecting the public sector. This is therefore a rich field in which to compare the modes of working of different regulatory techniques.

We see evidence, firstly, of both the costs and benefits of 'hard law' strategies. The large-scale litigation initiated by no-win, no-fee law firms was defended by them on the basis of the substantive gains it achieved for a group of disadvantaged workers. For unions and employers in the public sector, on the other hand, the litigation process was seen as undermining the effectiveness of collective bargaining as a means of realigning pay structures with the goals of equal pay legislation. In those parts of the public sector most exposed to these legal claims, mandatory pay audits and the resulting public disclosure of pay inequalities had failed to avoid a situation in which the costs of implementing equal pay had increased exponentially, and may have contributed to this situation.

The situation in the private sector is on the face of it very different, but outcomes equally problematic. Here, collective bargaining has weakened as an influence over pay structures. Pay audits are voluntary and, when they are carried out, are rarely made public. There is comparatively little litigation, in part because of the relative weakness of unions as collective actors in the private sector, and a lack of transparency over pay structures. However, alternative mechanisms for implementing equality law, including shareholder pressure based on the 'business case' for diversity, appears to be failing to have a significant impact on firm behaviour. A growing awareness of the reputational dimension of diversity management has so far been reflected in a greater willingness of private sector firms to agree and disseminate equal opportunities policies, but not to put them into practice.

An emerging conclusion is that there is scope for reflexive solutions of the kind which have not yet been systematically attempted. A reflexive approach does not imply the absence of 'hard law'. Rather, the legal framework has a number of roles to play: inducing efficient disclosure, setting default rules and encouraging bargaining in the shadow of the law. The current structure of UK equality law arguably fails to provide the kind of structure that is needed. In the absence of a general requirement for mandatory pay audits, disclosure in the private sector is limited and information flows restricted. In the public sector, by contrast, individual litigation has been pursued at the cost of the effective working of the system of collective self-regulation. Victories gained in some high-profile cases have had mixed effects in the wider system. These issues need to be addressed by steps to restore the primacy of collectively-negotiated solutions while enhancing public disclosure of the extent of pay inequalities. This is an approach which, unfortunately, is missing from the Equality Act 2010, at least in the form in which it is being brought into force by the Coalition government.

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