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**The Questionable Implementation of the Human Right to Equal Pay for Equal Work**

**in the British Labour Market**

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**Summary[[1]](#footnote-1):** The Universal Declaration of Human Rights grants everyone the right to equal pay for equal work without any discrimination and also grants everyone who works the right to just and favourable remuneration ensuring for herself and her family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection.  Equal pay for women is a fundamental human right in international law, however, it is questionable whether its implementation into United Kingdom law is currently meeting international human rights obligations because enforcement of the right to equal pay is poor and the gender pay gap remains prevalent.  The Equality Act 2010 contains an equal pay regime for women which is eccentric, cumbersome and inaccessible to women workers, and which differs from the systems for claiming unequal pay because of other protected characteristics than sex.  The persistence of the gender pay gap is associated with poor social protection for women, including the absence of state-funded childcare for working parents, inadequate legislation on equal pay and payment for maternity, paternity and parental leave, and a poor quality gender pay gap reporting regime.  Further, austerity policies required court users to pay high court fees, which led to an 85% drop in equal pay claims from 2013, until the Supreme Court ruled the fees unlawful in 2017.  Cuts to the Equality and Human Rights Commission budget prevent it from supporting equal pay test cases or actively enforcing gender pay gap reporting.  In a climate of financial austerity, access to justice to enforce British women’s right to equal pay for equal work and a workplace free from unlawful sex discrimination is jeopardised.  The UK may not be meeting its obligations in international human rights law with its narrow and legally formal implementation of the right to equal pay for equal work.

**The human right to equal pay for equal work**

1. The Universal Declaration of Human Rights (“the UDHR”) grants everyone the right to equal pay for equal work without any discrimination and also grants everyone who works the right to just and favourable remuneration ensuring for herself and her family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection.
2. The International Labour Organization was established in 1919 as part of the Treaty of Versailles, which ended the First World War. It recognised in the Preamble to its Constitution the principle of equal remuneration for work of equal value[[2]](#footnote-2).
3. In the aftermath of the Second World War, in which Britain fought from 1939 to 1945, the United Kingdom (“UK”) became one of 51 founding members of the United Nations on 24 October 1945, and a permanent member of the UN Security Council. The UDHR was adopted by the United Nations General Assembly on 10 December 1948. Article 23 provides[[3]](#footnote-3):
4. **Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.**
5. **Everyone, without any discrimination, has the right to equal pay for equal work.**
6. **Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.**
7. **Everyone has the right to form and to join trade unions for the protection of his interests.**
8. It is notable that the UDHR does not treat unequal pay because of sex separately from unequal pay because of any other form of discrimination. Further, the UDHR does not separate everyone’s right to earn just and favourable remuneration from the right to receive other means of social protection which enable her to provide for herself and her family an existence worthy of human dignity.
9. Most of the international human rights norms then evolved into regional norms. The members of the Council of Europe signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the ECHR”) on 4 November 1950, and the UK was the first signatory. On 8 March 1951, the UK Parliament ratified the ECHR and it came into force on 3 September 1953.
10. Article 4 of the ECHR prohibits slavery and forced labour and Article 11 protects the right to form and join trade unions, however, the right to equal pay for equal work is not mentioned. The Human Rights Act 1998 incorporated the ECHR into domestic law from 2 October 2000. It is important to remember that the Human Rights Act 1998, like the ECHR, does not provide a right for women workers in the UK to receive equal pay for equal work to men workers.
11. The international human rights norm of equal pay for equal work, including for women, found its way into UK law not through the ECHR but through European employment law. At the time of writing, the UK is on course to leave the European Union on 31 October 2019 without a withdrawal agreement which preserves the many important rights which British women workers acquired through European employment law. Nevertheless, the out-going Prime Minister, Theresa May, had stated that workers’ existing legal rights will be guaranteed during her period in office[[4]](#footnote-4). Amongst various and conflicting proposals, the Government had also suggested at certain times that the direct effect of relevant rights under European law would persist after the UK quit the European Union and that judgments of the European Court of Justice would be given effect in domestic law at the point of exit. No promises, however, have been made, nor could any promises contained in political speeches, election manifestos, or party leadership competitions be relied on within our current doctrine of Parliamentary sovereignty.

**It is questionable whether the implementation of the human right to equal pay for equal work is currently meeting international human rights obligations**

1. Equal pay for women is a fundamental human right in international law, however, it is questionable whether its implementation into UK law is currently meeting international human rights obligations because enforcement of the right to equal pay is poor and the gender pay gap remains prevalent.
2. The right to equal pay in Great Britain is provided by the Equality Act 2010 under provisions which originated in the Equal Pay Act 1970. The unwieldy and technically-complex legal regime created by the Equal Pay Act 1970 has been a major contributor to the poor practical enforcement of women’s right to equal pay and the persistence of the gender pay gap. The Equality Act 2010 contains an equal pay regime for women which is eccentric, cumbersome and inaccessible to women workers, and which differs from the systems for claiming unequal pay because of other protected characteristics than sex.
3. The most recent Annual Survey of Hours and Earnings data, for April 2018, published on 25 October 2018[[5]](#footnote-5), shows that amongst full-time employees of all ages, the gender pay gap stands at 8.6%. For full-time employees, the gender pay gap is close to nil for workers aged 18-39, and widens after the age of 40, peaking at a gap over 25% for ages 50-59, when many skilled male workers are at the pinnacle of their careers. Over time, the gender pay gap has narrowed for all age groups since 1997, apart from those aged 60 years and over, for whom it has widened. London, the UK’s capital city, is the region with the biggest average gender pay gap between full-time workers, a gap which has barely changed over the last 20 years[[6]](#footnote-6).
4. Amongst all employees in the British labour market, both full-time and part-time, the gender pay gap is wider than when only full-time employees are compared. It currently stands at 17.9%. According to the Office for National Statistics, the higher gender pay gap amongst all employees arises from more women working in part-time jobs, which are lower-paid, with an average hourly rate of £9.36, compared to £14.31 for full-time workers.
5. Across all employees and across full-time employees, there is only one age at which there is a negative gender pay gap. At ages 16-17, there is a small gender pay gap in favour of teenage girls, of less than 3%, however, taking all teenagers of the same age group who have full-time jobs, there is a gender pay gap in favour of the teenage boys of nearly 10%.
6. Out of all female employees, 42% work part-time hours. From a peak of 93% at ages 16-17, the proportion of female employees working part-time then drops to 28% between ages 22-29. The percentage of working women who work part-time then rises throughout the age groups, until, amongst the over-60s, 64% of female employees work part-time.
7. Women dominate the part-time labour force. Across all part-time employees, there is a small negative gender pay gap of less than 5% in favour of women. In other words, women who work part-time tend to earn slightly more than men who work part-time, in terms of hourly pay excluding over-time. Similarly, between ages 30-49, when the gender pay gap for all employees is climbing to its peak of over 25% at ages 50-59, there is a small negative gender pay gap of less than 5% in favour of women who work part-time.
8. The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 required the first set of reporting data to be published by April 2018. Whilst publication of the first two rounds of data has created widespread short-term interest in the news media, the lack of effective enforcement mechanisms for employees and the absence of any financial or regulatory sanctions for non-compliance have greatly limited the potential effectiveness of gender pay gap reporting as a means for addressing unequal pay for women in Britain.
9. As part of wide-ranging and deep austerity cuts made to state services after the 2008 global financial crisis, in 2016 the budget of the Equality and Human Rights Commission was set to plummet from £62 million in 2010 to £17.4 million in 2020, which commentators predicted would leave it as a toothless watchdog[[7]](#footnote-7). For 2018-2019, the EHRC’s budget is £19.47m[[8]](#footnote-8). The EHRC operates a telephone helpline offering free information about the Equality Act 2010 and provides some information on its website about equal pay and gender pay gap reporting. It has also produced an enforcement policy for gender pay gap reporting, entered into correspondence with some employers, and published a written Report on the 2018 gender pay gap reporting cycle. The biggest reputational and commercial risk to an employer which does not comply with the gender pay gap reporting regulations is not legal enforcement action by the EHRC but the potential damage to its relationships with employees, customers or clients, suppliers and industry partners, which could arise if its non-compliance becomes a matter of public knowledge and interest.

**Austerity and cuts to legal provision**

1. Philip Alston, the United Nations Special Rapporteur on extreme poverty and human rights, published his Report[[9]](#footnote-9) on his visit to the UK to the 41st session of the Human Rights Council on 23 April 2019. He observed[[10]](#footnote-10):

**The United Kingdom, the world’s fifth-largest economy, is a leading centre of global finance, boasts a “fundamentally strong” economy and currently enjoyed record low levels of unemployment. But despite such prosperity, one fifth of its population (14 million people) live in poverty. Four million of those are more than 50 per cent below the poverty line and 1.5 million experienced destitution in 2017, unable to afford basic essentials.**

1. In the course of his Report, he also described[[11]](#footnote-11) how:

**Legal aid has been dramatically reduced in England and Wales since 2012… Consequently, the number of civil legal aid cases declined by a staggering 82 per cent between 2010-2011 and 2017-2018. As a result, many poor people are unable to effectively claim and enforce their rights, have lost access to critical support, and some have reportedly even lost access to their children. Lack of access to legal aid also exacerbates extreme poverty, since justiciable problems that could have been resolved with legal representation go unaddressed.**

1. In the climate of austerity, he noted[[12]](#footnote-12), “Women, racial and ethnic minorities, children, single parents, persons with disabilities and members of other historically marginalized groups race disproportionately higher risks of poverty.” In regard to women, he concluded[[13]](#footnote-13):

**Recent policies have too often perpetuated rather than tackled the gendered aspects of poverty. Women in the United Kingdom earn less than men, shoulder a greater amount of unpaid labour and are more likely to experience poverty… In 2018, women were paid 17.9 per cent less per hour on average than men, made up 60 per cent of the workers receiving low pay and were disproportionately engaged in part-time work with little wage progression.**

**…**

**While the Government’s gender pay gap reporting initiative is very welcome, it must look at how its own policies are affecting women. It may well appear that women, particularly poor women, have been intentionally targeted…**

1. In July 2013, the Government introduced Employment Tribunal fees of up to £1,200, triggering an immediate 85 per cent drop in equal pay claims.[[14]](#footnote-14) Over the next four years, fees depressed the number of equal pay claims to around half of previous levels. In 2015, the trade union UNISON brought proceedings for judicial review on the basis that the introduction of fees was unlawful on a number of grounds, including as a matter of access of justice, but also because it discriminated unlawfully against women and other protected groups. In July 2017, the Supreme Court held that Employment Tribunal fees were unlawful.[[15]](#footnote-15) The Government abolished fees and began trying to reimburse claimants.[[16]](#footnote-16) In 2019, two years after the abolition of Employment Tribunal fees for equal pay claims, the number of claims is still 41% below the level prior to introduction of fees.[[17]](#footnote-17)

**The persistence of the gender pay gap is associated with poor social protection for women**

1. The persistence of the gender pay gap is associated with poor social protection for women, including the absence of state-funded childcare for working parents, inadequate legislation on equal pay and payment for maternity, paternity and parental leave, and a poor quality gender pay gap reporting regime.
2. The UK has the second-most expensive childcare in the world.[[18]](#footnote-18) A British couple earning the average wage and with two young children have to devote 35.7% of their pay to childcare costs. In a labour market with a substantial gender pay gap, it is a natural consequence of the high cost of childcare that women dominate part-time work, which is lower-paid.
3. Statutory rights to maternity, paternity and parental leave and pay in the UK are complicated[[19]](#footnote-19), limited, different for mothers from fathers and, unlike parental entitlements under European Union law, UK entitlements are based on a paradigm in which childcare is first and foremost women’s work[[20]](#footnote-20). In UK law, a father’s right to care for his children is parasitic on the unavailable mother’s right, rather than a parental right of his own.

**Conclusion**

1. In a climate of financial austerity, access to justice to enforce British women’s right to equal pay for equal work and a workplace free from unlawful sex discrimination is jeopardised.  The UK may not be meeting its obligations in international human rights law with its narrow and legally formal implementation of women’s right to equal pay for equal work. Therefore, in the future, powerful arguments could be developed that the split in UK law between the lawful and unlawful causes of the differences between men’s and women’s pay - a split based on a dichotomy between formal legal equality and substantive equality of outcome - conflicts with important norms of international human rights law[[21]](#footnote-21).

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1. In this paper, which I will present to the 2019 Annual Conference in Glasgow of the International Association for Feminist Economics, I develop, combine and update themes which I have written about previously in: Harini Iyengar, “Birmingham City Council v Abdulla (2012)”, “Women’s Legal Landmarks”, Chapter 83, Hart, 2019; and Harini Iyengar, “A Practical Guide to the Law of Gender Pay Gap Reporting”, Law Brief Publishing, 2019. [↑](#footnote-ref-1)
2. International Labour Organization, “Constitution”, 1919, https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\_LIST\_ENTRIE\_ID:2453907:NO [↑](#footnote-ref-2)
3. The United Nations, “Universal Declaration of Human Rights”, 1948, http://www.un.org/en/universal-declaration-human-rights/ [↑](#footnote-ref-3)
4. https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7732 [↑](#footnote-ref-4)
5. Office for National Statistics, Roger Smith, “Gender pay gap in the UK: 2018”, 25 October 2018, https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2018 [↑](#footnote-ref-5)
6. Office for National Statistics, “London had the smallest gender pay gap 20 years ago, but now it has the largest”, 27 November 2017, https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/londonhadthesmallestgenderpaygap20yearsagobutnowithasthelargest/2017-11-27 [↑](#footnote-ref-6)
7. Jamie Doward, The Observer, “Equality watchdog’s human rights fight ‘under threat’ after cuts”, 20 November 2016, https://www.theguardian.com/society/2016/nov/20/equality-human-rights-commission-cuts-under-threat [↑](#footnote-ref-7)
8. Equality and Human Rights Commission, “Business Plan 2018/19”, March 2018, https://www.equalityhumanrights.com/sites/default/files/business-plan-2018-2019.pdf [↑](#footnote-ref-8)
9. https://undocs.org/A/HRC/41/39/Add.1 [↑](#footnote-ref-9)
10. Paragraph 3 [↑](#footnote-ref-10)
11. Paragraph 38 [↑](#footnote-ref-11)
12. Paragraph 67 [↑](#footnote-ref-12)
13. Paragraphs 69-72 [↑](#footnote-ref-13)
14. Her Majesty’s Courts and Tribunals Service: Tribunals Quarterly and Annual Reconciled Returns [↑](#footnote-ref-14)
15. R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51 [↑](#footnote-ref-15)
16. http://www.bbc.co.uk/news/uk-40727400 [↑](#footnote-ref-16)
17. Table C2, January 2013 – March 2019, Annex C Employment Tribunal Receipts Tables, Tribunal Statistics Quarterly, January 2019 – March 2019 <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2019>, [↑](#footnote-ref-17)
18. <https://www.weforum.org/agenda/2019/04/these-countries-have-the-most-expensive-childcare/> [↑](#footnote-ref-18)
19. Employment Rights Act 1996, sections 71-75; Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312); Social Security Contributions and Benefits Act 1992; Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960); Paternity and Adoption Leave Regulations 2002 (SI 2002/2788); Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 20022822); Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002 (SI 2002/2818); Children and Families Act 2014; Shared Parental Leave Regulations 2014 (SI 2014/3050); Statutory Shared Parental Pay (General) Regulations 2014 (SI 2014/3051); Maternity and Adoption Leave (Curtailment of Statutory Rights to Leave) Regulations 2014 (SI 2014/3052); Maternity Allowance (Curtailment) Regulations 2014 (SI 2014/3053); Statutory Maternity Pay and Statutory Adoption Pay (Curtailment) Regulations 2014 (SI 2014/3054); Employment Rights Act 1996 (Application of Sections 75G and 75H to Adoptions from Overseas) Regulations 2014 (SI 2014/3091); Shared Parental Leave and Paternity and Adoption Leave (Adoptions from Overseas) Regulations 2014 (SI 2014/3092); Statutory Shared Parental Pay (Adoption from Overseas) Regulations 2014 (SI 2014/3093); Statutory Shared Parental Leave and Pay (Persons Abroad and Mariners) Regulations 2014 (SI 2014/3134); Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014 (SI 2014/3096); etc. [↑](#footnote-ref-19)
20. See Harini Iyengar, “Equal rights for men: The advent of the Children and Families Act may see working fathers push for parity with mothers”, The Lawyer, 19 May 2014; Capital Customer Management Limited v Ali [2018] UKEAT 0161\_17\_1104; and Hextall v Chief Constable of Leicestershire Police [2017] UKEAT/0139/17/DA [↑](#footnote-ref-20)
21. For the view that international human rights law requires states to secure not merely formal legal equality for women but substantive gender equality, see Professor Kathleen Lahey, writing in the context of taxation: “Gender, Taxation, and Equality in Developing Countries” (UNWomen, 2018); “Feminist Judging for Substantive Gender Equality in Tax Law: Changing International and Comparative Constitutional Contexts” in “Feminist Judgments: Rewritten Tax Opinions”, ed. Brigitte J. Crawford and Anthony C. Infanti (Cambridge University Press, 2017) 222-52; “Gender Equality and Taxation in Vietnam” (UNWomen 2016, with Pham Thu Hien) [↑](#footnote-ref-21)