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Conley, H. (2014) Trade unions, equal pay and the law in the UK. *Economic and Industrial Democracy*, 35 (2). pp. 309-323. ISSN 0143-831X Available from: <http://eprints.uwe.ac.uk/25950>

We recommend you cite the published version.

The publisher's URL is:

<http://dx.doi.org/10.1177/0143831X13480410>

Refereed: Yes

(no note)

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Trade unions, equal pay and the law in the UK

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Abstract

Trade unions in the UK have traditionally followed a voluntarist strategy that has preferred collective bargaining and avoided the use of the law wherever possible. The exception to this has been in relation to the pursuit of equal pay between women and men. The paper examines this apparent contradiction by examining the ways in which British trade unions have used the equality legislation in the past to secure equal pay through the courts. The paper further considers recent legislative changes that, by adopting a reflexive approach, appeared to open up ways for equality bargaining to take place. Unfortunately the conclusion is not a positive one as political conservatism in relation to equality and judicial animosity towards trade unions has secured the status quo, ironically forcing trade unions to continue to use adversarial legal methods to pursue equal pay.

Keywords

Trade unions, equal pay, legislation, voluntarism

Introduction

It is not controversial to argue that trade unions in the UK have a chequered history in relation to equality. It is equally uncontroversial to point out the uncomfortable relationship that they have with the law. However, quite interestingly, when these two problematic issues for trade unions are brought together, the picture seems more positive. Some of the most important victories for equality in the UK have come about in relation to the trade unions' influence on, and use of, the law. Most of these victories have been in relation to the battle for equal pay for women. Whilst pay is clearly a central issue for most trade union collective bargaining agendas, it does beg the question of why in the UK equal pay for women is often sought through legislative means. It is also important to point out that recent events have served as a reminder that even equal pay legislation can have a powerful sting in the tail for trade unions.

The aim of this paper is to explore these issues in greater detail. It does so by firstly considering the impact that voluntarism may have made on the development of an equality agenda within UK trade unions and by assessing the arguments that they have thrown off their traditional mantle of voluntarism to embrace the law. As part of this assessment the paper examines how UK trade unions have influenced and used equal

pay legislation to good effect in the past, but also considers where case law has remained 'trade union unfriendly' and unhelpful in relation to collective bargaining on pay equality. In doing so the analysis highlights the tension between the collective bargaining function of trade unions and the pursuit of equal pay for their women members. Part of the problem lies in the individualistic nature of equal pay legislation and the paper considers recent developments in UK law that might help to collectivise equal pay issues, at least within the public sector.

Voluntarism and equality – avoiding the law?

Trade unions in the UK have historically had a problematic relationship with the law leading to Lord Wedderburn's famous opening statement: 'Most workers want nothing from the law than that it should leave them alone' (1986: 1). How far this statement did in fact reflect the views of most workers rather than the trade union movement is open to debate. However it is widely considered that the historical mistrust of a class biased statute and judiciary led to the traditional stance of voluntarism within British trade unions (Griffith, 1981; McIlroy, 1995).

In addition to their problematic relationship with the law, British trade unions have had an uneasy relationship with the concept of equality. Historically they have protected

differentials for their established white, male membership and have been slow to adopt the interests of workers who fell outside this description (e.g. Cockburn, 1983). Whilst both voluntarism and the problematic nature of equality within trade unions are widely accepted, the two have rarely, if ever, been considered in conjunction. Interestingly, a link has been drawn by historians between a voluntarist approach by US trade unions and their failure for many years to engage with civil rights issues (Rogin, 1962; Greene, 1998; Robertson, 1999). Robertson (1999) argues that the political stance taken by the American Federation of Labour (AFL) at the turn of the 20th century was one of ‘radical voluntarism’ which sought to concentrate trade union effort only on activities that would lead directly to increases in pay. Robertson argues that this strategy inevitably led to a severe narrowing of the bargaining agenda of the AFL. At its height, radical voluntarism also entailed the AFL opposing the development of welfare policies such as state provided pensions and unemployment benefit in the belief that these provisions would weaken the ability of trade unions to increase wages by collective bargaining. Robertson argues that this strategy impacted most on the poorest and already marginalised workers in the US. Citing Greene (1998), Robertson (1999:149) argues: “[AFL] leadership ensured a conservative labor strategy geared to white, male-dominated craft unions... [which] steered the AFL down a path that benefited its members at the expense of women, blacks, new immigrants, socialists and industrial workers.”. Robertson further argues that this strategy set the seeds of alienation from

the trade union movement for the majority of American workers that is readily apparent today in the very low percentage of union membership despite the largest wealth gap in the world.

Whilst British trade unions did not adopt the radical voluntarism described by the US labour historians, it is commonly held that voluntarism has dominated British trade union strategy and activity. In his historical assessment of unions' attitude to the law McIlroy (1995:234) states: 'Reliance on the law could sap independence and pave the way for restrictive legislation. If the state played too great a role in providing rights, workers may question the rationale for union membership'. These arguments have some resonance with the arguments of the US historians in relation to voluntarism and the AFL. Although the link has never been directly made in the UK case between voluntarism and a reduced input by trade unions to a wider civil rights movement, there is clear evidence that narrow bargaining agendas have impeded equality outcomes at the level of the workplace (e.g. Colling and Dickens, 1998; McBride 2001).

Trade union politics clearly plays a role in decisions about if or how gender pay equality will be pursued, but there are other influences. The decentralised structure of collective bargaining in the UK has meant that, compared to most other European countries, collective agreements on pay have not extended beyond workplaces where union

organisation is established (Whitehouse et al. 2001). This structural element has a particular impact on women workers who often work in un-unionised workplaces (Whitehouse, 1992; Howell, 1996; Rubery *et al*, 2005). Howell (1996) argues that the limited impact of collective bargaining on pay equality in the UK increased the importance of the law, and particularly European equality law, for trade union activity on gender equality marking of the end of voluntarism.

Whilst the effect of structural determinants in pay setting structure on equal pay in Europe have been widely studied (e.g. Whitehouse, 1992; Rubery and Fagan, 1994; Whitehouse et al. 2001; Blau and Kahn, 2003), differences in how trade unions and other groups might use the equality law have been explored by a limited number of comparative researchers (e.g. Harlow and Rawlings, 1992; Blom et al. 1995 cited in Alter and Vargas, 2000; Alter and Vargas, 2000). Whilst it is beyond the scope of this paper to examine their findings in depth it is worth noting that the British example of pressure groups, including trade unions, using litigation to secure equal pay appears to be distinctive (Alter and Vargas, 2000). National structures remain a key issue and it is argued that the more embedded collective bargaining is within national pay setting frameworks, the less likely trade unions are to use equal pay litigation and might actively oppose legal intervention from other sources for fear that this strategy would undermine collectively negotiated agreements (Harlow and Rawlings, 1992; Blom et al.

1995 cited in Alter and Vargas, 2000)¹. This clearly has some resonance with arguments in favour of voluntarism.

Internal trade union structures are also considered to be important. Perhaps unsurprisingly, it is argued that trade unions with high female membership numbers are more likely to use the law to gain equal pay. Trade union democracy and self-organisation is also raised as an issue. The all female Danish Women Workers Union (KAD) is cited as an example where a litigation strategy has been particularly successful (Fitzpatrick et al. 1993 cited in Alter and Vargas, 2000:473). However it would be difficult to separate these factors from issues of size and influence that might improve the chances of affecting change through collective bargaining rather than resorting to the law.

In the UK writers have identified an easier relationship with the law, suggesting that trade unions have moved into a post-voluntarist phase (e.g. Clough, 2007; Heery *et al.* 2004; Howell, 2005). This seems to have been particularly true in relation to the fight for equality but it could be argued that the traditional voluntarist stance taken by trade unions in relation to labour law did not apply in relation to equality legislation. McIlroy notes that voluntarism in the UK was always partial and contingent:

By its emphasis on the procedures of collective bargaining and the value of legal abstention, voluntarism obscures questions of power and substance. The kind of law that is available is a key issue. The absence of one kind of law may help trade unions. The absence of another may handicap them. (1995:236)

Examples of this ambivalence are clear in trade union histories in relation to equality. Howell (1996) highlights that, because of the limited impact of collective bargaining on pay equality in the UK, the equal pay legislation became an important tool for trade unions in the period between 1979 and 1989, although ironically, the reduction in trade union power during this period and the consequent demise of collective bargaining coverage since then stemmed from restrictive legislative reform of industrial relations. Martinez-Lucio and Perrett (2009) make the same point in relation to race discrimination noting that equality legislation continued to develop as collective bargaining has declined since the 1980s. Similarly Howell (2005) describes the 1960s and 70s as the heyday of voluntarism in the British trade union movement, but it was just at this time that the women trade unionists at Ford were fighting for and winning equal pay legislation (Friedman and Meredeen, 1980).

It seems that, in relation to equality, some of the reasons for the traditional mistrust of the law are less evident. One reason for this might be pointed to by Howell (2005) who

suggests firstly that the trade unions have always been willing to engage with protective employment legislation (as opposed to restrictive labour law) and secondly that the British state has played a far more active role in the shaping of industrial relations than the tradition of abstentionism suggests. It could be argued that this is most clearly evident in relation to equality where the legislature has been the weapon of choice for both the state and the unions in the battle against discrimination. However the direction of causation is not clear. Does the state enact legislation to prevent discrimination at work because trade unions have failed to tackle it through collective bargaining or have trade unions used the law because the state has favoured a regulatory approach? The following section considers some of the important milestones in trade union backed equality and equal pay cases² to develop the analysis.

Trade unions and equality - using the law

The events surrounding the Ford sewing machinists' strike in 1968 were a defining moment for women in British industrial relations and for the development of equal pay legislation. The dispute is documented in most detail in Friedman and Meredeem's (1980) book and more latterly in the TUC's "Winning Equal Pay" film documentaries.

Interestingly, Friedman and Meredeen's account indicates that the dispute started as a pay and grading issue between two groups of *women* sewing machinists at Ford's Dagenham plant following job evaluation. However, as the dispute progressed, it became clear that there were wider issues of comparison between men and women workers at the plant. According to Friedman and Meredeen, the trade unions involved ambivalently decided to pursue the dispute as an equal pay issue, particularly when the new³ Secretary for Employment and Productivity, Barbara Castle, took a personal interest in settling the dispute.

Friedman and Meredeen's account stresses how, at that time, internal trade union politics on a number of levels meant it was extremely sensitive to label the strike as an equal pay dispute rather than one of re-grading. The women on strike at Dagenham were unequivocal that the dispute was about equal pay and they persuaded their male trade union convenor of this. The national officials of some of the unions involved were more resistant to pursuing the dispute as an equal pay issue, as were union branches at the sister plant in Halewood. Despite this ambivalence the strike was called off only after Castle brokered a settlement and agreed to table legislation on equal pay. These events suggest that the state stepped in because collective bargaining failed. Interestingly, the trade unions' confidence in Castle was soured within 18 months when plans for another piece of legislation, contained in the controversial White Paper 'In

Place of Strife', an early attempt to control trade unions, were unveiled, further demonstrating the volatile relationship between trade unions, the State and the law.

During this turbulent industrial relations period and amidst Parliamentary and some trade union opposition, the first Equal Pay Act was passed in 1970, although such was the extent of pay inequality, the legislation would not come into force until 1975. What should be noted from this decisive period in equal pay and trade union history is that the Act, as it was passed, did not help the Ford women to achieve equal pay. Theirs was essentially an equal value claim that could not be addressed by the 1970 Act. In failing to address issues of gendered job segregation the law, as a solution, still lagged seriously behind the actuality of the problem. Following the dispute and the legislation the Ford women machinists were still only paid 92% of the equivalent male rate. It took sixteen years, another piece of legislation - the Equal Pay (Amendment) Regulations, *and* another strike in 1984 before the Ford women were re-graded to match the pay of semi-skilled male co-workers.

McCrudden (1983) notes that pressure for the equal value legislation came from the trade unions, this time via the TUC. Citing the TUC Annual Report of 1976, McCrudden states:

The TUC General Council during the consultation on the drafting of the Regulations pressed for a definition of equal value which would involve “the elimination of all discrimination from all aspects and conditions of employment which related either directly or indirectly to the sex of the worker concerned” (1983:209).

McCrudden additionally notes that both the TUC and the EOC pressed for the Regulations to include the notion of a hypothetical comparator, something that has not been achieved and continued to be pressed for in the consultation on the Single Equality Bill in 2007⁴ discussed below. However, as if to illustrate the tensions that exist between the lobbying role and the collective bargaining role of the unions, McCrudden specifically notes the potential for differences in collective bargaining machinery to be used as a ‘material factor defence’.

It was not long before these tensions were tested in the courts. In a crucial early equal value case, *Enderby v Frenchay Health Authority*⁵, the employers did indeed use the different Whitley structures responsible for determining pay in the Health Service as a material defence for their lower pay to female dominated speech therapists’ roles compared to male dominated pharmacists’ and clinical psychologists’ roles. Rather ironically, whilst the employers were relying on discriminatory collective bargaining

outcomes as a defence, the legal and financial support for Pamela Enderby's ground breaking case came from the trade union movement.

Fredman (1994) highlights how the British judiciary's reluctance to interfere with collectively bargained pay rates thwarted Enderby's case in the domestic courts. By taking a very narrow definition of what constituted discrimination in relation to wage setting that failed to recognise institutional discrimination embedded in pay structures, the Employment Appeals Tribunal (EAT) accepted the employer's material factor defence. In contrast, Fredman (ibid: 39) argues that "The ECJ [European Court of Justice] was far less concerned with the autonomy of wage setting and was therefore able to rely on a more incisive notion of discrimination" based on outcomes rather than process, meaning that separate collective bargaining structures as a material defence for pay inequality was ultimately rejected.

The Enderby case is one example of a number of trade union backed cases that sought to make use of the equal pay legislation. However there is much less evidence of trade union backed cases using either the Sex Discrimination Act or the Race Relations Act. It could be argued that using the law to directly improve pay is less removed from the ideals of voluntarism and therefore a more natural solution for trade unions. One notable exception is *Preston v Wolverhampton Healthcare Trust* in which the Sex

Discrimination Act, as well as the Equal Pay Act, was relied upon to challenge the exclusion of part-time workers, overwhelmingly women, from pension schemes. But even here the approach - a number of unions combining to take 60,000 simultaneous cases to improve the pensions of their members has a clear resonance with at least the desired outcomes of voluntarism – collective strength to force employers to improve the terms and conditions of workers. The difference here is that industrial action is replaced by the less predictable and cumbersome law as the lever to exert pressure on employers.

Most of the problems for trade unions occur when they attempt to navigate the adversarial process of legislation that requires remedies to be taken via the courts rather than on their ‘home ground’ of the bargaining arena. Rights-based law can be used in collective bargaining (Howell, 1996), but only as a threat that individual cases would be identified and employment tribunal cases taken if the employer does not remedy the situation via negotiation. However, as with all threats, action is eventually required if they are not to lose their potency. When this course of action has proved necessary identifying and taking cases is time consuming, difficult, expensive and unpredictable in terms of outcome for trade unions. Some of the leading cases such as *Enderby* took over ten years to settle. Even where negotiated settlements are achieved at the level of the workplace, the recent cases taken *against* trade unions (*Allen and others v GMB*) were made possible by the rights-based system, highlighting the unpredictability of legal

outcomes for trade unions. These cases have brought into question the role of trade unions in equality bargaining and are discussed further in the final section.

It could be argued that both the law and the way in which trade unions are prepared to use it have become stuck in a particular mindset which, in part, attempts to recreate the traditions and values of voluntarism. This mindset entails a narrow conception of equality and how it can be achieved underpinned by individualised, right-based legislation that has historically encouraged a cautious, reactive and essentially adversarial approach. The following section examines arguments which have called for changes to the conceptualisation of equality law and the role of trade unions within it.

Rethinking equality legislation and representation

Calls for a review of the anti-discrimination legislation began to gain momentum in the UK following the change of government in 1997. Some of the first press releases by the head of the newly formed EHRC, Trevor Philips, argued that the existing equality legislation, particularly the Equal Pay Act has 'reached its sell-by-date'. In addition, legal and industrial relations scholars (e.g. Hepple *et al*, 2000; Dickens 1997, 2007) have lobbied for radical change to the equality legislation.

In an insightful paper Dickens (1997:285) argued:

The current legislative approach in Britain centres on a predominantly private, individualised model of sex and race discriminations law concerned with formal equality (equality of treatment rather than outcomes). The main requirement is to desist from doing negative things, there is no legal requirement to *do* anything to promote equality...” (emphasis as in original).

Dickens goes on to argue for an articulated approach in which collective bargaining complements rather than contradicts equality legislation and where ‘unions can act as positive mediators of legislative equality frameworks and could be ‘written-in’ to more proactive legal measures...’ (ibid: 288).

Hepple *et al.* (2000) call for a review of the equality legislation and provide 53 detailed recommendations on how change could be achieved. Their leading claim is that “the present framework places too much emphasis on state regulation and too little on the responsibility of organisations and individuals to generate change” (2000: xiii). The recommendations for change included the public sector taking a lead via the

introduction of positive duties to promote equality and for a process of negotiated change within organisations.

The impetus to put some of these recommendations in to practice followed the Stephen Lawrence⁶ inquiry, which uncovered serious institutionalised race discrimination in the Metropolitan Police Force. Three new legal duties were placed on public authorities to address institutional discrimination. Reflecting the seriousness of the Stephen Lawrence Inquiry, the first of these duties, the Race Equality Duty, was introduced in 2001 under the Race Relations (amendment) Act 2000. The second duty to be introduced was the Disability Equality Duty in December 2006 as part of the Disability Discrimination Act 2005 and the final duty, the Gender Equality Duty came into force in April 2007 as part of the Equality Act 2006. These separate equality duties were combined with five other equality strands to form a single Public Sector Equality Duty in the Equality Act 2010.

The most important point to note about the Public Sector Equality Duties is that they were unlike any previous equality legislation in that they did not provide additional rights for individuals but rather placed responsibilities on public authorities. In this respect they were considered to be a positive, proactive approach to equality which did not depend on discrimination having already taken place. They did not replace the

existing equality legislation, which still provides legal remedies for individuals who have suffered discrimination. Rather they sought to pre-empt legal cases by requiring public sector employers to anticipate and address potential sources of discrimination before cases emerged. McCrudden (2007) refers to this change in approach as one of 'reflexive regulation' where '[T]he trick... is for the legal system to construct a set of procedural stimuli that lead to the targeted subsystem adapting itself' (p.259).

To this end, the duties required authorities to have 'due regard' in all of their public functions to eliminate unlawful discrimination and harassment and to promote equality of opportunity. In practice this approach was designed to ensure the mainstreaming of equality issues and to counter the past criticisms that equal opportunities were confined to specialist management functions and were not 'owned' by operational areas of public authorities (e.g. Jewson and Mason, 1986; Rees, 2005). Another distinguishing factor was that the duties covered public authorities both as employers and as service providers.

All of the duties adopted a similar format with a set of substantive 'general duties' placed on public authorities to eliminate unlawful discrimination and harassment and to promote equality of opportunity. Each equality duty also contained a set of more 'specific duties' which were procedural requirements in relation to the disadvantaged

groups covered in each of the pieces of legislation. One of the requirements was that members of the disadvantaged groups should be consulted in various ways as 'stakeholders'. It is important to note at this point that the focus on participation increased with each successive equality duty. In the Race Equality Duty the specific duties included an 'expectation' that groups affected by their policies and their provisions to meet the duty will be consulted. There is a strong emphasis in the Disability Equality Duty on involvement of people with disabilities and there is an express requirement to do so in the specific duties. However the focus is on direct participation rather than collective representation. In the Gender Equality Duty the specific duties required that public authorities consult stakeholders, including trade unions, and to take into account their views in formulating gender equality objectives. These conceptual differences in the equality law provided an important opportunity for trade unions to strengthen the links between collective bargaining and equality that are considered in more detail in the following section.

Using positive duties for equality bargaining

The Public Sector Equality Duties offered an opportunity for trade unions to pre-empt the turbulent cycle of winning and losing inherent in a rights-based, adversarial regulation. The specific duties within Gender Equality Duty directly required that trade

unions should be consulted. Having provided a formalised route into the process of implementation, the different conceptualisation and format of the equality duties, particularly the Gender Equality Duty, offered the trade unions an opportunity to collectivise equality representation within and beyond collective bargaining without recourse to tribunal proceedings. The divergence from an individualistic rights-based conceptualisation framed the process of collectivisation. The duties, in essence, were about improving the situation for disadvantaged groups rather than individuals. In addition the Gender Duty Code of Practice describes the Gender Equality Duty as a ‘form of legally enforceable gender mainstreaming’ (p.7). The mainstreaming approach coupled with an emphasis on participation, specific to trade unions in Gender Equality Duty, codified trade union input and involvement in all areas of equality policy and planning. The duties were retrospective in that they covered past policies that may have embedded discrimination and required public authorities to consider how this may be redressed. The equality duties therefore also offered the opportunity for trade unions to revisit policy areas where they previously have not been consulted on equality issues or simply may have ‘missed the boat’.

The equality duties also covered, although in a more limited form, those public functions that had been contracted out to private or voluntary sector organizations. This feature of the equality duties was particularly important to the public sector trade unions

who found it increasingly difficult to represent their members working in contracted out services (Foster, 1993; Colling, 1995), many of whom are low paid women (Escott and Whitfield, 1995). The specific duty to consult with trade unions in the Gender Equality Duty therefore made union exclusion more difficult to achieve.

The Gender Equality Duty importantly offered another route by which the trade unions might have worked to close the gender pay gap in the public sector. It required public authorities to have due regard to the Equal Pay Act and to demonstrate how they had or intended to eliminate unlawful pay discrimination. The Gender Equality Code of Practice (s3.41) states:

These requirements, taken together with the specific duty to collect and make use of information on gender equality in the workforce and the duty to assess the impact of policies and practices, mean that listed public authorities have to undertake a process of determining whether their policies and practices are contributing to the causes of the gender pay gap. This should be done in consultation with employees and others, including trade unions.

The Code of Practice went on to provide detailed information and examples of the sort of actions that public authorities would need to undertake to comply with the duty and

in doing so offered trade union activists some useful points of reference when seeking to negotiate on pay equality.

Paradise Lost?

The Public Sector Equality Duties were undoubtedly a break-through in the reconceptualisation of equality law in the UK but they did not address the limitations discussed above in relation to the equal pay legislation or the wider sex and race discrimination legislation flagged up by critics such as Dickens and Hepple. The move to formalise more significant changes to the equality legislation appeared on the last page of the 2005 Labour Party Manifesto which included a pledge to introduce a Single Equality Act. Following their re-election to government the Discrimination Law Review was established in 2005 to work towards this goal. In addition, the Equalities Review was commissioned by the government to provide an independent assessment. The remit of the Equalities Review was far broader than the legal focus of the Discrimination Law Review. The stated aims of the review were to:

- Provide an understanding of the long term and underlying causes of disadvantage that need to be addressed by public policy

- Make practical recommendations on key policy priorities for: the Government and public sector; employers and trade unions; civic society and the voluntary sector
- Inform both the modernisation of equality legislation, towards a Single Equality Act; and the development of the new Commission for Equality and Human Rights (Equalities Review 2007:13).

The final report of the Equalities Review was published in February 2007. In line with its remit the report was broad ranging recommending more integrated implementation strategies across equalities areas including the adoption of a single public sector equality duty. It was therefore disappointing that the Discrimination Law Review consultation paper putting forward proposals for a Single Equality Act, released in June 2007 (DLR, 2007), took an unambitious approach that sought to maintain the *status quo* in relation to older discrimination legislation.

The Green Paper was silent in relation to some important principles established in the existing Public Sector Equality Duties such as involvement of stakeholders, the requirement to set equality objectives; the requirement for impact assessments and the duty to consult with trade unions significantly reducing the effectiveness of the new single public sector equality duty and the ability for trade unions to use them in a

collective way. In his analysis of the Green Paper consultation McCrudden (2007:258) notes '[t]here is little, if any, discussion of the role of collective bargaining (the term, for example is never mentioned), trade unions are seldom mentioned, and recent proposals to protect the results achieved as a result of such bargaining in the equal pay context is rejected...'

Criticism of the Green Paper obviously elicited some concern on behalf of the Government. The Single Equality Act was due to be announced in the Queen's speech in November 2007 but was withdrawn until 2008. The White Paper, The Equality Bill – Government Response to the Consultation was published on 21st July 2008. Despite the disappointment of Green paper the White paper contained some innovations to the equality legislation that would benefit trade union equality bargaining and representation. Firstly, there was support for the continued development of dedicated equality representatives whom are noted as having a crucial role in the enforcement of the Single Equality Bill. The White Paper states 'We will work with the trade unions to strengthen the excellent pioneering work of trade union equality representatives in the workplace' (pg. 11). However the White Paper stopped short of providing the same statutory footing for equality representatives as provided to health and safety and learning representatives. In addition there were provisions for a public sector socio-economic duty which required public authorities '...to consider how their decisions

might help to reduce the inequalities associated with socio-economic disadvantage⁷. Other innovations included an extension to permitted positive action in the recruitment and selection of employees, allowing employers for the first time to make voluntary recruitment decisions based on protected characteristics where this would improve the representation of disadvantaged groups in the workplace. The Act also contains provisions that would allow discrimination claims which combine two protected characteristics rather than making separate claims. In relation to equal pay the Equality Act contains provisions for mandatory equal pay audits in workplaces with 250 or more employees. The data collected for equal pay audits would clearly be of significant use to trade unions in pursuing equality bargaining or equal pay claims through the courts and could provide an important bridge between collective and legal responses as envisaged by Dickens (1997).

The passage of the Bill through parliament and the House of Lords was heavily contested by the Conservative Party, then in opposition. For a while it was feared that it would not be passed before the 2010 general election and was at risk of being abandoned completely if the Conservatives won the general election. The Equality Act finally made it on to the Statute books on the 8th April 2010 – a month before the general election that did result in the current Conservative-Liberal coalition government. It soon became clear that the passage of the Act was not completely held

up by the Conservatives because much of its contents, certainly on any of the innovative aspects, are subject to secondary legislation. Shortly after taking office the Coalition government announced that it would not introduce the secondary legislation required to take forward the provisions for a socio-economic duty, a combined discrimination provision or for mandatory equal pay audits meaning that much of the innovation contained in the Equality Act has been shelved. In addition the specific duties for the public sector equality duty in England⁸ are more limited than those for its predecessor duties, having no direct provisions for equal pay or requirements to consult trade unions. The government is currently reviewing the future of the public sector equality duty, with the threat that it too may be repealed⁹.

The Equality Act 2010 is something of a disappointment for those eager to see reform of equality legislation (see Hepple, 2011) and undoubtedly reduces the ability for trade unions to consult on equality issues, but perhaps the most worrying legal outcome for trade unions in relation to equality representation is the Court of Appeal ruling in *Allen and others v GMB*¹⁰. The case highlights quite dramatically the historical tension between the collective bargaining role of the trade unions and their relationship with equality law that is identified in earlier sections of this paper. The case stems from a collective agreement in local government – the Single Status Agreement - which requires local authorities to harmonise the terms and conditions of their workforces. In

most authorities this has entailed job evaluation exercises that have uncovered historical equal pay discrepancies, which would require not only increases in future pay for large numbers of women but also substantial compensation for past discrimination. In Middlesbrough Borough Council, where Mrs. Allen worked, the local collective agreement traded some of the back pay entitlements for pay protection for other (male) groups of workers. Mrs Allen and other affected women claimed the union had acted in a way that had discriminated against them. The Employment Tribunal rejected a claim of direct discrimination but upheld a claim of indirect discrimination and victimisation. This judgement was overturned at the Employment Appeals Tribunal but reinstated by the Court of Appeal, which also refused the right of appeal to the House of Lords.

Notwithstanding all of the very complicated legal issues that have been thrown up by this case, the outcome is that the trade union was left having to compensate women for the back pay that has accumulated as a result of the historical discriminatory pay practices of their employers. The situation occurred precisely because the government had refused to fund the equal pay outcomes of the Single Status Agreement in local government, forcing trade unions and local government employers to negotiate settlements. In short, one arm of the State (the judiciary) has forced the trade union to pay for the discriminatory behaviour of another arm of the State (local authorities),

whilst the central executive of the State (the government) abdicated from any financial responsibility.

The financial implications of this case could be as serious to trade union activity as the Taff Vale case that consolidated early union mistrust of the judiciary and the retreat into voluntarism in the UK. Some newspaper reports put a figure of £100m on the liability of outstanding cases (Wintour, 2008), which could severely impact on trade union funds. The timing of the final ruling on the Allen case, within a few days of the release of the Equality Bill White Paper, was also portentous. The Allen case threw into disarray the ability for UK trade unions to collectively bargain on equal pay issues, whilst the White Paper stressed their importance for the enforcement of equality in the workplace.

The ruling in the Allen case has implications for the concept of equality bargaining (Colling and Dickens, 1989, 1998; Heery, 2006) as it reinforced the legal position that gender pay equality, once uncovered, is non-negotiable. In doing so the ruling made bargained outcomes on equal pay risky for UK trade unions, perhaps forcing them down a legal route. Whilst it is clear that statutory rights to equal pay cannot be traded during collective bargaining, there is still an important role for trade unions to ensure that pay inequality is uncovered and acted upon using collective machinery where possible and

the law where necessary. Unison, one of the largest public sector trade unions, seems to have recovered some momentum in this direction after recently winning equal pay cases for almost 1000 women in a single local authority where collective bargaining had failed. However, in a period of intense financial austerity in the UK public sector the cost of securing equal pay is likely to mean even tougher negotiations in relation to protecting jobs and public services, whilst the Allen case is a reminder to trade union of the limitations of collective bargaining.

Conclusion

This paper has sought to explore the relationship between trade unions and equality legislation in the UK. Historically, the trade unions have had a problematic relationship with the law leading to what is commonly held to be a tradition of voluntarism. Whilst their engagement with equality legislation has been more positive, there are historic and contemporary tensions between the collective bargaining functions of trade unions and their engagement with individualistic, rights based equality legislation. Voluntarism may have underpinned the narrowing of bargaining agendas to the detriment of equality priorities, particularly those unrelated to pay and benefits. At the same time a changing membership and activist demographic has required engagement with the rights based

legislation (Howell, 1996) with some successes but the drains on union resources have been high. Moves to modernise equality legislation, substantively with the development of reflexive regulation in the form of Public Sector Equality Duties, appeared to alleviate some of these tensions and provide a more central and collective role for UK trade unions that need not depend on large-scale, adversarial legal intervention. However, as if to strike this initiative down before it had taken root, hopes for the development of progressive equality legislation have been halted by political conservatism and a disappointing suspension of some of the innovative provisions within the Equality Act 2010. At the same time the historic animosity between the judiciary and the trade unions has surfaced within what appeared to be the safer waters of the equality legislation, ironically forcing UK trade unions to continue to pursue equal pay through the courts when collective bargaining fails.

Notes

¹ For example Harlow and Rawlings (1992) note that the leading European equal pay case, *Defrenne v Sabena* 1976, was vigorously opposed by the Belgian trade unions.

² E.g. *Hayward v Cammell Laird Shipbuilders Ltd.* [1988] QB12 (CA)
Enderby v Frenchay Health Authority [1993] ECR1-5535 (ECJ)
Preston v Wolverhampton Healthcare Trust [2000] ECR1-320 (ECJ)

³ Castle was appointed to the post in April 1968. The strike took place in June of the same year.

⁴ Now the Equality Act 2010

⁵ The TUC “The Equal Pay Story: Scenes from a Turbulent History” provides a useful documentary of Pamela Enderby’s account of the case.

⁶ Stephen Lawrence was murdered following a racially motivated attack in 1993. His murderers were sentenced 19 years later in January 2012.

⁷ Equality Act 2010 Part 1 clause 1

⁸ The specific duties are subject to regional variation. The Welsh Duties are much more detailed than those for England and include equal pay provisions. At the time of writing the Scottish parliament had not agreed specific duties.

⁹ See: <http://www.redtapechallenge.cabinetoffice.gov.uk/in-the-public-sector/> [accessed 20th December 2012]

¹⁰ Allen and Others v GMB (2008) EWCA Civ 810

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