

# Collective bargaining: building solidarity through the fight against inequalities and discrimination

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## ABSTRACT

Equality bargaining in essence is turning the resource of collective bargaining to the objectives of equality and diversity in work and employment. This article traces the progress of equality bargaining, with a focus on the UK. It explores the decline of the coverage and scope of collective bargaining and increase in pay gaps on the vertical plane alongside extant social divisions and inequalities. It looks at legal solutions including statutory mechanisms to achieve collective bargaining and a National Minimum Wage. It notes that in the UK women are more likely to be covered by collective bargaining and despite a hostile economic climate, characterised by the fragmentation of bargaining through privatisation, that a union pay premium has survived and is larger for women. It discusses the limitations of both a National Minimum Wage and *voluntary* Living Wage for equality and concludes by supporting calls for the rebuilding of sectoral collective bargaining, but emphasises that this needs to be inclusive and expansive.

**Keywords:** Collective bargaining, equality, national minimum wage, statutory recognition, Living Wage

## Negociación colectiva: construyendo la solidaridad mediante la lucha contra las desigualdades y la discriminación

## RESUMEN

Negociación en igualdad implica esencialmente dirigir el recurso de la negociación colectiva a los objetivos de igualdad y diversidad en el trabajo y en el empleo. Este artículo explora el progreso de negociación en igualdad, con un particular énfasis en el Reino Unido. Analiza el declive de la naturaleza y alcance de la negociación colectiva y el incremento de las diferencias salariales en un plano vertical, al mismo tiempo que se extienden divisiones sociales y desigualdades. Estudia las soluciones legales, incluyendo los mecanismos reglamentarios para la negociación colectiva y el Salario Mínimo Interprofesional. Señala que las mujeres británicas tienen mayor probabilidad de estar protegidas por la negociación colectiva, ya que ha mantenido una prima sindical que es mayor para mujeres, a pesar del clima económico hostil caracterizado por la fragmentación de la negociación colectiva como resultado de la privatización. El artículo discute los límites tanto del Salario Mínimo Interprofesional como del *voluntario* salario digno para la igualdad y concluye

apoyando las demandas de reconstrucción de la negociación colectiva sectorial, pero insistiendo en que necesita ser inclusiva y expansiva.

**Palabras clave:** Negociación colectiva, igualdad, salario mínimo interprofesional, reconocimiento jurídico, salario digno.

#### REFERENCIA NORMALIZADA

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### Introduction

Historically collective bargaining was characterised by its sectional and exclusive basis. Labour market and divisions based on gender and race were often reinforced (Virdee, 2000). There were important and key battles by workers over equal pay and representation<sup>1</sup>, however, and at the end of the twentieth century wider social relationships became legitimate issues for inclusion in collective agreements (Danieli, 2006). Influences included the feminisation of the labour market and reform of the internal structures of unions, including the formal self-organisation of black, women, disabled and gay and lesbian workers. At the same time the retreat from the Fordist model involved the corrosion of national, sectoral and enterprise bargaining. While this has been a long and complex process, uneven between and within countries, the scope and coverage of collective bargaining has contracted substantially in liberal market economies over three decades and in a number of EU countries in the past ten years. The onslaught of neo-liberal capitalism has opened up yawning wealth and income gaps on the vertical plane alongside extant social divisions and inequalities. Privatisation, a key feature of neo-liberalism, has marked a new phase of organisational restructuring and the fragmentation of work, representation and bargaining, to enshrine racial, ethnic and gender divisions of labour. The financial crash expressed the dynamics of capitalism unchallenged (Ewing and Hendy, 2013) and the suppression of living standards has prolonged 'resolution' of the crisis. Across Europe the state is retrenching public sector employment and cutting or freezing pay in ways that

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<sup>1</sup> In the UK, the Ford Dagenham women sewing machinists' strike in 1968 was the catalyst for the 1970 Equal Pay Act, although the terms of the return to work brokered by the government failed to meet the women's demand for the same grading and pay as their male colleagues.

challenge the (hitherto relatively resilient) infrastructure of public sector collective bargaining (Glassner, 2010). Yet in the UK at least, women are more likely to be covered by collective bargaining (Emery, 2012) – they predominate in health and education public services - and benefit more than men from the squeezed, but persistent, union pay premium (Bryson and Forth, 2010; BIS 2014).

This article traces the emergence and progress of equality bargaining over this period, with a focus on the UK. Conceptually it is informed by two theoretical models of equality, the liberal and the radical. The former is based upon sameness or equal treatment and the latter upon the recognition of difference and is characterised, politically, by self-organisation. More recently, and associated with theories of intersectionality, there has been a move to embrace multiple discrimination. This more integrative model of equality, reflecting the European legal context (Squires, 2009), is distinct from the more politicised model of self-organisation that emerged in the 1980s to mobilise conscious and specific social identities. Contextually, the article identifies the tension between voluntary and legal responses to discrimination as ‘vehicles for equality’ (Briskin, 2006:12) and the move away from voluntary solutions in a changed environment for unions. In the UK it considers the introduction by the Labour Government of a statutory trade union recognition procedure and a National Minimum Wage. The focus was individual as opposed to collective employment rights, arguably personified by the introduction of two new workplace union representatives, the Equality Representative and Union Learning Representative. The article considers how far the limited impact of these legislative settlements with the unions has provoked campaigns beyond the workplace to introduce a voluntary living wage and also demands to restore and rebuild collective bargaining.

## **1. Concepts and Context**

The potential for harnessing (Dickens 2000) or bending (Heery 2006) collective bargaining to the promotion of equality at work and in employment has attracted research interest in a number of OECD countries in the past fifteen years. The development reflects frustration with the progress attained through reliance on equalities and human rights legislation, in particular individualised complaint-based discrimination legislation. It also shows confidence in the potential of collective bargaining. With attention to gender equality, Dickens (2000:196-7) identifies five respects in which collective bargaining can be advantageous for the ‘social partners’ in comparison with legal regulation: flexibility, acceptability, legitimacy, enforcement and voice. Initiatives can be targeted and tailored to suit local circumstances, which may mean they are more acceptable and workable. The co-determination of equality measures may lessen resistance to them. Existing mechanisms of collective bargaining provide ready-made policing and enforcement mechanisms. In contrast to top-down legislative intervention (‘men’s rules for women’s rights’) collective bargaining, resting on representative structures,

provides a way of giving women a voice, ‘an ability to define their own needs and concerns and to set their own priorities for action’. Moreover, collective bargaining has a track record. Throughout Europe, women in unionised employment generally have had better terms and conditions than those who are not (Ibid.: 194).

Obviously collective bargaining mechanisms and systems are not equality neutral. The reasons are discussed by Blackett and Sheppard (2002, 2033) in their analysis for the International Labour Organisation. Access to collective bargaining was unequal in OECD countries in the twentieth century, when rates of collective bargaining coverage were otherwise high. Labour law could omit from the right to bargain collectively workers whose work (or workplace) deviated from the ‘industrial model’; Fordism’s ‘fictions’ (the male breadwinner, society is homogeneous) could result in *de facto* exclusions; and some industry sectors militated against the capacity to sustain effective collective bargaining (at least without additional union resourcing). Disproportionately represented among the excluded were historically disadvantaged societal groups, discriminated against in the labour market on the basis of gender, race, ethnicity, country of origin, ability, age and/or religion. Subsequently they have been joined by numbers of ‘mainstream’ workers, since in the New International Division of Labour (or age of global neo-liberal capitalism) ‘atypical forms of employment and the informal sector are no longer residual categories but integral to the overall development dynamics’ (429).

Collective bargaining can hamper rather than enhance equality. Its scope can be narrow and omit issues central to equality and non-discrimination (recruitment, training, promotion). A larger problem is the interaction between collective bargaining constructed as a ‘majoritarian mechanism for workplace governance’ and the ‘structurally ‘minority’ position of equality seeking groups in many workforces’ (Blackett and Sheppard 2003: 421). Simms and Charlwood (2010:127) summarise that:

‘Because unions are democratic organizations, with objectives decided by members who participate in decisions, they have tended to prioritize the interests of full-time male employees, because they traditionally made up the majority of members’.

In the effort to build solidarity around a ‘common cause’ union leaders may select issues which seem to them likely to appeal to the largest number of their members (dominant workers), thereby neglecting social division and the particular needs of minority groups for positive action to even-up their opportunity. They may frame issues (Briskin 2014) as sectional concerns (for example, as ‘women’s issues’). Presumptions about ‘generic worker’ interests can be extended to workplaces where, due to segregation, the majority are part of an historically disadvantaged group. Collective agreements in content can conflict with equality principles.

Weighing these issues, Blackett and Sheppard nonetheless conclude that collective bargaining – ‘whose rationale is deeply rooted in notions of social justice,

egalitarianism, democratic participation and freedom’ – has great potential to promote equality (2003: 421). In order for that potential to be realised, however, the ‘social partners’ (or some among them) have to make demonstrable commitment to promote equality and embrace ‘a robust, transformative and substantive vision’ of what it means (2002: 19). Blackett and Sheppard (Ibid. 24) elaborate that ‘formal conceptions of equality focus on equal treatment of all individuals’. Substantive equality ‘recognizes that sometimes equality requires that individual and group differences be accommodated to secure equality of outcomes’. They write that:

To assume that the workplace is composed of undifferentiated individuals risks reinforcing the legitimacy of rules and standards that have been shaped to meet the demands and capacities of the dominant worker. An inclusive workplace must be responsive to the diverse needs and approaches of historically excluded and underrepresented social groups.

Briskin (2006: 12-13), who uses the term equity on the principle that equality can be imbued with the liberal conceptualisation of equal treatment, distinguishes between ‘equity bargaining’ and ‘bargaining equity’. The former ‘refers to the process of bargaining, bargaining strategy and includes issues such as the gender of negotiators’. Bargaining equity refers to ‘the issues on an equity agenda’. Similarly, Dickens (2000: 205-6) argues in respect to gender equality that it is insufficient to add on women to existing bargaining agendas or as members of unions that remain unchanged. Rather, ‘harnessing collective bargaining as a mechanism for the promotion of gender equality implies radical change in the traditional platforms and approaches of much collective bargaining and poses challenges to the existing nature of many trade unions’

Studies of union efforts to reform their internal governance, whether in response to internal challenge, in recognition that social justice principles necessitate inclusivity, or because of an organisational need to intensify recruitment among a more diversified workforce (Kirton and Greene, 2002), celebrate achievements and highlight the tortuous pace of progress (Kirton and Healy 2013; Milner and Gregory 2014; Williamson and Baird 2014). Pressure for internal gender equality in UK unions began to build from the mid-1970s. Women’s share of a (then rising) aggregate union membership was growing. Equality legislation obliged unions to at least review their bargaining structures and their rule books (the catalyst for the 1970 Equal Pay Act was the Ford women sewing-machinists’ strike). A pivotal role was played by feminist women trade union activists, agitating for *positive action*. Their demands gained some traction with the publication in 1979 of the TUC’s Charter for Equality for Women within Trade Unions, which encouraged unions to establish separate women’s committees and ensure women’s representation in decision making bodies (additional seats or co-option): measures which ‘do not necessarily transform male culture but do give women agency’ (Kirton and Greene 2002; Kirton 2014). The TUC adopted a Black Workers Charter in 1981 and in 1984 recognised black workers’ self-organisation rights although for some time

actual initiatives were largely confined to the public sector union Unison. The UK TUC which has a 150 year history elected its first woman General Secretary, Frances O'Grady, in 2012.

Much of the research literature on equality bargaining has focused on gender. Indeed, the concept is sometimes defined to mean bargaining for gender equality (Williamson and Baird, 2014). Blackett and Sheppard's definition is broader and Briskin (2006:12) has urged that:

For the equity project to move forward, understandings of the resonance in the workplace of race, ethnicity, citizenship, sexuality, age, and ability will need to be greatly enhanced, and in particular the experience of intersectional discrimination'.

There are studies attentive to racial divisions in the labour market and their reinforcement, rather than removal, due to the sectional nature of collective bargaining and its historical association with exclusionary practices (e.g. Virdee 2000). And across Europe there is an emerging literature on the experiences of migrant workers, an increasing ethnic division of labour and the need for unions to address ethnicity (e.g. Wills et al., 2010). In the UK the TUC completed a rule change in 2003 that committed affiliated unions to promote equality in all aspects of their work, and instituted biennial TUC Equality Audits. Three of these (2005, 2009, 2012) have specifically addressed equality bargaining. A feature of the recent agreements recorded in the last audit is the integration of gender equality into a broader equality agenda; for example, negotiated policies against discrimination on grounds of age, sexual orientation, trans-sexuality, ability, and religion or belief. An important influence is EU equalities and human rights legislation. Briskin (2014: 123-4) cautions, however, that an intersectional approach has as yet to be incorporated into the equality bargaining paradigm and we pursue the point and its significance later in this paper. From her analysis of Southern and Eastern Region TUC (SERTUC) surveys (1987-2012), Kirton (2014) discerns a trend towards generic equalities officers gaining ground by 2008: the majority of unions reported having an officer covering women's equality as well as other equality strands. She situates the trend in the context of constrained union resources alongside increased socio-political attention to different marginalised groups.

Trade union membership has steadily feminised in a number of OECD countries (Briskin 2012). In the UK women are currently 55% of aggregate union membership (BIS 2014), although the total has halved since the end of the 1970s. Black British workers are more likely to be union members than 'all employees' (29% compared to 26% in 2013) and this is particularly true for black women. Union leaderships at different levels have recognised a need to promote the activism of black, female and migrant workers, albeit with some ambiguity in respect to the means and this is true elsewhere in Europe. For example, Beccalli and Meardi (2002) identified the reasons for the decline in women's separate activism in Italy to include the difficulty of incorporating anti-hierarchical models into union structures, differing political orientations which undermined women's unitary self-

organisation and an inability to resolve the ambiguity between gender and general representation.

Trade unions have engaged in reforms of their internal governance structures but the transformation is a work in progress and unions need to 'link the struggles around diversity, equity and representation inside unions to the collective bargaining process and agenda' (Briskin 2006:52). The paradox observed by Colling and Dickens (2001:14) at the turn of the millennium remains: unions 'discovered' the need to act effectively on behalf of women (and other social groups they had under-represented) when 'their ability to do so was particularly constrained'. Indeed there has been concern since 2008 that state and employer austerity measures will translate into union internal austerity policies that 'crowd out' equality bargaining (Briskin 2014; Milner and Gregory 2014). The TUC's Equality Audit 2012 Report refers to the 'unprecedented challenges' of the three years covered (2009-12) and to unions on the defensive, 'trying to protect earlier achievements' although also to the measures to advance equality in unionised workplaces as still being underway, despite hard times.

### **1.1. The decline of collective bargaining coverage**

Collective bargaining affected the pay of 71% per cent of the workforce in Britain in the late 1970s. Wages Councils – statutory quasi collective bargaining bodies - set minimum pay rates and regulated working hours for a further 11% of the workforce in industries in which labour organisation was insufficient to support 'voluntary' collective bargaining (principally private service industries employing predominantly women). They were weakened in 1986 and abolished in 1993 as part of the effort of New Right Conservative governments to undermine the institutions and legislation that had provided organised labour support. New laws restricted industrial action. Government economic policies in the recession of the early 1980s accelerated 'deindustrialisation'; capacity contracted sharply in manufacturing which had been a site of relatively well paid, unionised, manual employment for men. Employment growth was concentrated in private service industries, with the privatisation of public services contributing.

Collective bargaining in private sector manufacturing was relatively decentralised by the 1970s. The structure is supportive of 'grassroots participation' but favours strong workplace trade union organisation and is associated with a widening pay gap (Curtin 1999). That said, Milner and Gregory's (2014) analysis for France in the decade to 2010 emphasises that centralised bargaining and supportive legislation can yield 'empty shell' company equality policies when there is inadequate coordination between levels of negotiation and inadequate union 'revitalisation' effort. In the UK in the 1980s and 1990s multi-employer bargaining virtually disappeared in the private sector, as large employers withdrew from long-standing agreements, causing their collapse. For the economy as a whole collective bargaining became increasingly exclusive, covering just 40% of the workforce by 1998 (Ewing and Hendy 2013). In the private sector (now employing 80% of the UK workforce) it became increasingly confined to large workplaces: the most

recent Workplace Employment Relations Survey found the employee coverage was 16% in 2011 (van Wanrooy et al. 2013).

Earnings inequality on the vertical plane widened persistently and markedly in the UK over the 1980s and 1990s. The highest earners moved away from middle earners and those in the middle moved away from the bottom. As a result the proportion of workers falling below the low pay threshold (two thirds of gross hourly median pay among all employees) rose from a low of 15% in 1975 to a peak of 23% in 1996. The proportion changed little in the 2000s (Whittaker and Hurrell 2013:1). Such trends were not unique to the UK and across OECD countries and into the first decades of the new millennium the wages share of GDP fell, (Stockhammer 2012). Through the ‘long boom’ to 2007/8, however, the UK stood out as having one of the highest incidences of low paid work in the OECD (Grimshaw and Rubery 2010). Women were and remain the majority of low paid workers but the incidence of low pay among men edged up, to 16% currently. New Labour governments from 1997 enacted new individual employment rights (many EU derived) but afforded little support for collectivism.

## **2. Responses to decline: the role of the law**

### **2.1. The National Minimum Wage**

In response to union campaigns and growing pay dispersion a National Minimum Wage (NMW) was enacted by the Labour Government in 1997 through the establishment of the Low Pay Commission— a form of social partnership with three employer representatives, three employee representatives and three independent members (Metcalf, 1999, 2008). The Commission recommends to the Government an hourly minimum rate (and age-related rates) on a yearly basis. The introduction of the NMW from 1999 was for the explicit purpose of improving pay at the bottom of the wage structure (Grimshaw and Rubery 2010: 354) and by that measure it has had impact. Around a third of low paid employees were on extreme low pay in 1997 (hourly wages below one third of gross median hourly pay for all employees) and the proportion was 2% in 2012 (Whittaker and Hurrell 2013). However, the ‘ripple effect’ of the NMW has been smaller than was anticipated in 1999. Grimshaw et al. (2014) record examples of bottom-weighted pay settlements, as part of union pay equity campaigns to raise the base rate premium over the minimum (in the period of minimum wage activism from 2003, when the LPC sought to raise the level of the NMW relative to the average wage, and which was drawn to a halt from 2006 by Confederation of British Industry lobbying for realignment with average earnings growth and thereafter economic crisis). It would seem, however, that in the absence of unions and collective bargaining the NMW in many instances has been used as ‘the going rate’. A growing spike at the wage floor has replaced the long tail of extreme low pay and the share of low wage employment has remained high (Grimshaw et al. 2014; Whittaker and Hurrell 2013).



The Low Pay Commission Report for 2013 showed the median gender pay gap had declined over the previous year from 9.6% to 8.6% stating ‘this continues a trend that began at the same time as the introduction of the minimum wage’. It reports that the gender pay gap has nearly halved over this period from 15.9% in 1998 to 8.6 per cent in 2012. Yet the gender pay gap has persisted. This is particularly in terms of gross weekly earnings: 17.8% for gross weekly earnings excluding overtime, (ASHE, 2012), which is above the EU average. The difference between the median hourly earnings of men who work full-time and women who work part-time has narrowed very little since 1997 and in 2012 was 38.8%. Whittaker and Hurrell (2013) note that median pay stagnated from 2003, which suggests a levelling down of pay gaps (see also Briskin 2014). The Low Pay Commission Report for 2012 indicates high proportions of NMW workers amongst women, young workers, older workers, disabled people, ethnic minorities, migrant workers and those with no qualifications.

## **2.2. Statutory union recognition and the scope of collective bargaining**

The decline of collective bargaining and union membership led UK unions to press for legal intervention. In response, in 2000, the Labour Government introduced a new statutory trade union recognition procedure. The Government did not intend that the law should promote collective bargaining. Rather the procedure was to be a last resort in circumstances where employers and unions could not come to a voluntary agreement over recognition, despite support for it in the workplace. It enables unions that can demonstrate majority support within a specified bargaining unit to be recognised for collective bargaining in the workplace. Following an award of statutory recognition, however, the employer is only obliged to bargain on pay, hours and holidays. In introducing the Act the Labour Government stated that training and equality were important aspects of the employment relationship. Yet it did not add them to the core bargaining issues contained in the statutory model of bargaining that may be imposed if the parties are unable to come to their own agreement following the recognition award (DTI, 2003). A study of statutory recognition agreements emerging from the procedure found that over three quarters were confined to negotiating over pay, hours and holidays (McKay et. al, 2005).

On the basis of research conducted prior to the statutory recognition procedure, Oxenbridge et al. (2003: 327) suggested that ‘a fundamental change has occurred in the character of collective bargaining’ and that where organisations still recognised trade unions ‘union recognition has become a diffuse and often shallow status’. Following the introduction of the statutory procedure Moore et al. (2004) found that the limitations of the statutory model of collective bargaining had begun to extend to voluntary collective agreements concluded in its shadow. An analysis of a sample of voluntary recognition agreements found that one in five (22%) limited the scope of bargaining to a combination of pay, hours and holidays, whilst in over half (56%) bargaining coverage was defined in broad terms as over ‘pay and conditions’ or ‘terms and conditions’.

In the sample of voluntary agreements, equal opportunities were specified as a subject of bargaining in less than one in ten (8%) and specifically excluded in one third (31%). A number did provide for consultation or representation over equality and others contained commitments to equal opportunities or to develop equality policies. Case studies conducted as part of this research suggested that employer representatives were open to discussions with unions on equal opportunities. Such discussions tended to be employer-led, however, with unions at the workplace not having a clear-cut bargaining agenda on equality. Fewer than one in ten (7%) agreements provided for collective bargaining on family-friendly policies (maternity or paternity leave or maternity support leave or pay, parental leave, adoption leave, compassionate or bereavement leave and time-off for domestic emergencies). In terms of the content of recognition agreements equal opportunities appeared to be a procedural issue, although family friendly policies offered the opportunity for more substantive gains in terms and conditions.

The scope of recognition within the statutory procedure is already limited and employers have attempted to redefine it in even narrower terms. In response to union applications for statutory recognition, some employers have claimed they have an existing collective bargaining agreement with a union or non-independent employee body (in order to block an application from an independent or another union). This is even though the existing agreement is confined to recognition for representation rights in disciplinary and grievance matters, or facilities relating to shop stewards, or the machinery for negotiation or consultation about these matters. It is a very real limitation on the scope and content of collective agreements and has been challenged in the case of the Pharmacists Defence Association Union (PDAU) and Boots Management Services (TUR1/823/2012). John Hendy QC argued that a pre-existing agreement with what the employer argued was a trade union, the Boots Pharmacists Association (BPA), did not constitute an agreement for collective bargaining in the terms of Article 11 of the European Convention of Human Rights since it expressly excluded bargaining on hours, pay and holidays. However, Boots Management Services sought judicial review of this decision and the review stated that the phrase collective bargaining in Para (134) 1 (a) means negotiations over pay, hours and holidays. However it concluded that it could not make a final order on the claim as it was for the PDAU to apply for a "declaration of incompatibility" and give notice to the Crown. In response the PDAU filed a request in February 2014 with the High Court to declare that UK trade union law is incompatible with the European Convention on Human Rights. This follows the 2009 European Court of Human Rights' judgement in the case of *Demir and Baykara and Turkey*, which made it clear that workers must have and states must protect the right to collective bargaining (Ewing and Hendy, 2010).

### **2.3. The Europeanisation of anti-discrimination law – an integrated approach to equality?**

Theories of intersectionality developed from the work of Black feminist thinkers, particularly Kimberlé Crenshaw (1989). She used the term to highlight the

‘multidimensionality’ of the experience of marginalised subjects (Durbin and Conley, 2010). Squires has described Article 13 EC, which requires action to combat discrimination on six strands – sex, racial and ethnic origin, disability, age, religion and sexual orientation - as to some degree part of ‘the Europeanisation of anti-discrimination law’(2009:497). Squires asks how far there has been a move towards the institutionalisation of intersectionality throughout Europe through the unification of previously separate anti-discrimination legislation and policies directed at specific groups, and through the establishment of single equality bodies to monitor discrimination: a more integrated approach to equality. Kantola and Nousiainen (2009:460), on the other hand, distinguish between multiple discrimination and intersectionality. In the former, discrimination on one ground adds to discrimination on another (additive). In the latter, discrimination on different grounds interact simultaneously and are inseparable. They argue that political and legal constructions of intersectionality as multiple discrimination in Europe ‘privilege anti-discrimination over wider measures to further equality thus ‘narrowing down the debate’ rather than supporting positive proactive policies. Intersectionality is informed by ‘the conjuncture of social structures’ – the dynamic interaction of individual and institutional factors - and not the categories of identity which underpin ‘human rights discourse’ and anti-discrimination law and equality policies (2009: 462).

In the UK multiple discrimination was included in the 2010 Equality Act, but the secondary legislation was not enacted by the incoming Conservative-Liberal Democratic Coalition. A similar fate met the proposed public sector equality duties; a duty on public authorities to promote equality and address discrimination in the exercise of public functions with the potential to move beyond anti-discrimination. For Squires (2009:\*\*\*) the language of the Equality Bill ‘echoes popular perceptions of equality, which focus on the idea of equal opportunities, or protection from discrimination’, ‘a fairness approach to equality...structurally antithetical to developing a nuanced recognition of intersectionality’. Moore et al. (2010) identified the difficulties of proving multiple discrimination. They are in particular, finding comparators in discrimination claims where discrimination on more than one ground is claimed, compounded by the individualistic approach of the remedies available under anti-discrimination law which do not address collective workplace issues. Whilst two major tenets of the Equality Bill did not materialise, it did provide the context for the introduction of workplace trade union Equality Reps.

#### **2.4. The integration of equality - Equality Representatives**

Union aspirations for training and equality to be included as subjects of collective bargaining under the statutory recognition procedure were not realised. However, the Labour Government did support the emergence of two new types of trade union representative: the Union Learning Rep (ULR) and the Equality Rep (ER). The Union Learning Representative (ULR) role was first introduced in 2000 to engage and support workers – often ‘non-traditional learners’ – in learning at the

workplace. Under the Employment Act 2003 ULRs were granted statutory rights to time-off in workplaces with union recognition to enable them to carry out their duties. The TUC (unionlearn 2010) reported that in the ten year period since their introduction it had trained 23,000 ULRs funded by Government through the Union Learning Fund (ULF). In the case of ERs the Labour government rejected the TUC's argument for statutory rights to paid time off, facilities and training. However, it did provide £1.5 million through the Union Modernisation Fund (UMF) for pilot projects 'to help develop a union infrastructure to support the workplace activities of equality representatives – for example through training and development' (Government Equalities Office, 2009). For the TUC, ERs are uniquely placed to promote fairness in the workplace. This is first, by raising the equality agenda among fellow workers and in their own unions; second, by encouraging employers to make equality and diversity part of mainstream collective bargaining; and third by working with 'vulnerable workers' and trying to ensure that every worker receives fair treatment irrespective of gender, race, disability, religion, age, gender reassignment or sexuality (TUC, 2009). The 2012 TUC Equality Audit found that over a quarter (28%) of unions had provision in their rulebook or practice for the nomination or appointment of ERs in the workplace.

Squires characterised the Equality Bill as consistent with the liberal model of equality. In their study of ERs in two public sector unions (Public and Commercial Services union, the PCS, and UNISON) Moore and Wright (2010) found a reluctance of many ERs to positively identify in terms of race, gender, class, sexuality, disability or age. This may imply a more inclusive approach to equality - reflecting the prevailing legislative and policy trends - than the single-strand focus of self-organisation. There is a tension then between the equal treatment or sameness conceptions driving the ER role and the radical or difference perspective underpinning self-organisation. Yet the evaluations of the UNISON and PCS ER projects (Moore and Watson, 2009; Moore and Wright, 2010) suggested that rather than conflict with self-organisation, there is complementarity and the potential for a close relationship between ERs and the self-organised networks and the possibility for ERs to reinvigorate self-organisation. The ER role may also be consistent with a transformative approach that seeks to change both union and workplace cultures through mainstreaming equality concerns. Booth and Bennett's (2002) call this approach the 'gender perspective (as distinct from the 'difference approach') in that it focusses upon gender (rather than the underrepresented group, 'women') acknowledging the relevance of men's experience to the equality debate and to achieving change. The PCS ER project had, according to one of its project officers, been effective in mainstreaming equality concerns across the union and this was helping to overcome a previous separation between industrial and equality issues.

On the other hand both the ER and the ULR roles have been seen as confirming the move away from collective bargaining and towards individual representation, with unions seduced by the Labour Government's provision of public funding to support both roles. For Daniels and McIlroy, 'the restricted nature of the roles they offer cannot be minimised or downplayed' (2009: 140) because the functions of

ERs and ULRs do not involve collective bargaining and joint regulation. Ewing (2005) argues that ULRs/union learning have moved unions towards a 'public administration function' (facilitating funding for learning) and away from their role in regulating employment relations through collective bargaining. And the emergence of ERs may reflect a model of equality based upon the individualised rather than collective assertion of rights. Moore and Wright found some evidence that the ER role is providing new routes to activism for both PCS and UNISON members. Yet UNISON ERs saw themselves as identifying and promoting awareness of equality issues which could be taken up by their branches and informing and 'empowering' members to raise issues. They described their role as the 'eyes and ears' of the union in the workplace, 'the people on the ground floor, the people that are actually in contact with the grass roots and our members'. In a UNISON survey of activists only a very small number reported involvement in negotiations, although there was a broad understanding of the need to negotiate on equality issues, including equality impact assessments, equal pay and more generally over 'equality and diversity'.

### **3. The fragmentation of bargaining**

Legal responses appear limited in the extent to which they promote or support collective solutions and this is particularly the case in the context of organisational fragmentation in the economy and its impact on representation and joint regulation. Bach and Kessler (2012) have documented New Labour's commitment to consumer choice and the diversity of providers in the public sector. The current Conservative-Liberal Democrat Coalition government's determination to reduce the size of the state has intensified the role of the private sector in public service delivery (Tailby, 2012). Colling (2010; see also Pownall 2013) has outlined the implications of 'transformational governance' in the public sector for bargaining and representation. Fragmentation of workforces potentially weakens collective bargaining coverage, existing representation structures and union density. Exposure to competitive pressures potentially erodes terms and conditions. Colling highlights concurrent developments; the emergence of multi-agency governance, for example shared services; direct payments and individual budgets in social care; and devolved governance in education (for example Academy Schools).

The predominance of female and black workers in the public sector (Runnymede, 2013) means privatisation and outsourcing raise important equality issues. The concentration of women, black and migrant workers in privatised services in some geographical areas (Wills et al., 2010) suggests strengthened divisions of labour on the basis of race, gender and ethnicity. Research undertaken as part of UNISON's migrant participation project (delivery of privatised services is increasingly concentrated in the hands of a small group of multi-national companies, workers Moore & Watson, 2009) found that although they are employed on a multiplicity of small contracts characterised by divergent working conditions and fragmented

representation and bargaining. This has had a direct impact on migrant worker representation and organisation since they are disproportionately employed in privatised services and because UNISON lacks organisational strength in these areas. Privatisation removes workers from direct employment in local government, health or higher education, where union branches traditionally were organised on the basis of one employer. It removes them from the union's immediate influence, with directly employed branch officers denied facility time to represent or organise workers employed by contractors or to negotiate over their employment. A survey of UNISON branches revealed that overall just over a third (36 per cent) of branch secretaries reported that their branch did not recruit amongst private contractors (Ibid).

Moore, McKay and Veale (2012) show how privatisation and outsourcing processes have become manifested in the statutory recognition procedure, resulting in contract-based bargaining units covering very small numbers of workers. Their analysis of cases submitted to the Central Arbitration Committee (CAC) – the body that administers the UK statutory recognition procedure - confirms the fragmentation of employment relations and explores resultant employer and union strategies and the tensions between organisational and representative imperatives. The privatisation of public services has meant that the early sectoral concentration of applications has shifted. The CAC's 2011/12 Annual Report commented on the 10% decline in the proportion of applications from manufacturing, transport and communication over the previous year, with public service unions moving gradually into the arena of statutory recognition. These unions of necessity have been resorting to the CAC to safeguard representation for members removed from direct employment in the public sector and from the protection of national collective bargaining agreements<sup>2</sup>. Increasingly statutory recognition claims are based upon small bargaining units covering workers on contracts outsourced to private sector organisations. The continual cycle of commissioning means these bargaining units have a potentially transitory existence, so that the Transfer of Undertakings Regulations (TUPE) plays an increasing role in statutory recognition and its scope of application to outsourced services has recently been 'clarified' (see Pownall, 2013).

One area where public sector restructuring is reflected in CAC statistics is social care, where local authorities have transferred directly employed, largely female, staff to private care homes. In 2001, where the CAC had made a decision on admissibility, only two applications (3%) represented bargaining units based on a contracted service and none were in social care. By 2011 nearly half the applications represented a contracted service and just over one in ten concerned a private care home. By definition these are small bargaining units typically based on one care home. For example, the union Community won recognition at Four

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<sup>2</sup> Taken to include Pay Review Bodies, described by White (2000:71) as institutions 'halfway between fully-fledged collective bargaining and unilateral imposition by government'

Seasons Healthcare for around 70 care staff employed at one residential home. The employer reported it employed a total of 20,000 staff in over 400 locations in Britain, Jersey and the Isle of Man (TUR1/487/2006). The difficulties for unions in gaining recognition at national level in larger national care providers is exemplified by the GMB's 19 separate applications for staff below management level in Bondcare care homes (TUR1/793/2012 to TUR1/811/2012). This was following the transfer of staff as a result of the closure of Southern Cross care homes with whom the union stated that it had a national single union agreement. TUPE in its intent preserves existing representational channels. Yet the operation of the statutory union procedure has in practice served to disrupt them and CAC cases suggest an increasing tension.

In another privatised sector, rail, national collective bargaining was initially replaced by company level bargaining in the privatised rail companies, but such agreements are increasingly undermined by outsourcing. As a consequence of privatisation the RMT rail union had to apply for recognition in a number of private service businesses that had secured contracts with rail companies, including for cleaning, likely to disproportionately cover female, black and migrant workers. For example, in 2010 the RMT gained recognition for 59 cleaners on the Network Rail CTRL contract based at St Pancras International and Ebbsfleet International stations. The employer, Initial Facilities Services, stated it employed 2,000 people altogether (TUR1/736/2010). In these cases and in the context of the requirements for coherent bargaining units with majority union support set out in the statutory procedure, unions are pushed to argue in favour of bargaining units defined by privatisation. The process undermines not only unions' historic national collective bargaining agreements but also their own organisational coherence. In arguing for contract-based recognition, unions are reinforcing the dissolution of collective bargaining and collective organisation that privatisation and outsourcing are designed to facilitate at a national and organisational level. While union and employer tactics in the statutory procedure aim to define bargaining units in their own immediate interests and their logic may be inconsistent across statutory cases, the trend is towards fragmentation.

#### **4. The return to voluntarism? The Living Wage**

Moore et al. (2013) confirm the minimal impact of the statutory recognition procedure in extending union recognition for collective bargaining and argue that the law has encouraged a limited form of joint regulation. The wider evidence is the continued contraction of collective bargaining coverage. The latest Workplace Employment Relations Survey conducted in 2011, ten years after the introduction of the procedure, shows bargaining on pay for just 25% of the workforce, the proportion falling to 16% in the private sector. Large firms and large workplaces are more likely to have joint regulation, but in manufacturing, for example, work can be outsourced to a myriad small workplaces (Froud et al. 2011).

Collective bargaining decline has been accompanied by pay inequality. The growth in executive pay in the UK has meant that whilst in 1979 the top 10% took home 28.4 per cent of the national income, by 2007 this had grown to 40% (High Pay Commission, 2012). Despite the introduction of a NMW low pay has persisted. This has led to community based campaigns for a living wage often for workers on the type of privatised service contracts described earlier. Stewart et al. (2009) imply that interest in community unionism reflects the fragmentation of work resulting from the decline in manufacturing and increase in service sectors characterised by low-wage and unregulated employment and the decline of national collective bargaining, particularly in the UK and US. The challenges that these developments pose for unionisation have led to mobilisations beyond the workplace in order to engage with so-called 'hard to organise' workers, including migrants. The Living Wage campaign calculates an hourly rate, which ensures a minimum acceptable standard of living and which is above the NMW. Yet Pennycock calculated that only 10,000 workers had won a Living Wage between 2005 and 2011 (2012). An estimated 5.24 million people in the UK were earning below the Living Wage in 2013: 21% of all employees (ONS ASHE). The proportion of jobs paying below living wage increased because of the rise in living costs (KPMG, 2013). The proportion of women earning below the Living Wage was 27% compared to 17% for men, largely because part-time jobs are far more likely to pay below the Living Wage than full-time.

The NMW and the Living Wage may lift hourly rates at the bottom. There is increasing evidence, however, that employers can accommodate the rates through the reconfiguration of hours, so that workers may not achieve any increase in weekly earnings. Bessa et al. (2013) explored low pay in the home care sector and found that between 2008 and 2012 median hourly rates were 15 per cent above the NMW. However, unpaid labour time due to the non-payment of travel time between home visits meant that staff were in reality not receiving a NMW and the widespread practice of employing workers on zero-hours contracts meant workers were not guaranteed work and an adequate weekly wage. Elsewhere in the service sector the introduction of a NMW or living wage has been accompanied by the removal of weekend and evening premia, or by cuts in weekly or annual hours (Lopes and Hall, 2014). Campaigns focused on lifting hourly wage rates may cut across and even supersede wider existing collective bargaining agreements and as such they can reinforce the attack on collective bargaining structures. Employer strategies accommodating statutory and voluntary minima add fuel to demands for a return to collective bargaining. Ewing and Hendy (2013:56) argue that a requirement for employers to pay a Living Wage, as in the case of the NMW, would reduce the capacity of workers to be represented at work over pay, and would have 'no impact on the multitude of other issues that arise at work, including other terms and conditions'. This must include equality. They advocate the reinstatement of sector level collective bargaining in the interests of social justice and sustainable economic growth.



## 5. Conclusions

Collective bargaining decline is associated with increased earnings inequality. The evidence presented in this article suggests that legal measures introduced by the Labour Government and European-derived law have not been able to adequately address this. The introduction of a National Minimum Wage has had some impact upon the gender pay gap, although in a context of stagnating median pay: there may have been some levelling down (Briskin, 2014). The ability of employers to accommodate the NMW and even a Living Wage by cutting and reconfiguring working hours limits its capacity to deliver an adequate weekly wage. The statutory recognition procedure has served to narrow the scope of bargaining and hence its capacity to address equality. Moreover privatisation in removing very many workers from collective bargaining has had a real impact on the terms and conditions of those now employed on private service contracts and they are often migrant workers, black workers and women. Privatisation has intensified in the context of financial crisis and cuts in local government budgets. Briskin (2014: 116 and 2006: 34) argues in respect to Canada that although women are almost half of trade union members, their interests are side-lined during economic restructuring and concession bargaining and equality bargaining marginalised. Similarly Hunt (2002) suggests that union progress on equality for sexual orientation has diminished in the face of a harsh economic crisis and restructuring. Moore and Wright (2010) found that the potential for ERs to mainstream and integrate equality into workplace activity was being severely tested by the public sector environment of large-scale job losses. This suggests 'the limitations of a liberal model confined to promoting equality in organisational structures when the public sector is subject to wider market forces' (Moore and Wright, 2010). Union initiatives to make their decision making structures at all levels in their organisation inclusive, to support self-organising and to build an expansive solidarity around equalities and against discrimination could not be more important.

Briskin (2006) concurs with Dickens' evaluation that a multi-pronged strategy, harnessing all levers to promote equality, legal regulation and collective bargaining, affords the greatest potential. However, she contrasts the virtuous combination of centralised bargaining and strong (positive action) equity legislation in Scandinavian EU member states with the weak legislation and declining government commitment to equality measures in Canada which, like Britain, has gravitated to be more fully a liberal market economy in the Hall and Soskice (2001) *Varieties of Capitalism* framework. Briskin records that the direction of state policy together with the changes wrought by restructuring and globalisation have convinced the Canadian Labour Congress that collective bargaining is the much more effective mechanism for ensuring that equality rights exist. In a more recent article (2014:126) she proposes 'gendered social unionism', which 'situates unions, and collective bargaining in particular, as policy and political vehicles in relation to the workplace-household-community nexus' as an alternative progressive and expanded frame for equality bargaining in a period of austerity.

Collective bargaining in the UK now has the lowest level of coverage in Europe (with the exception of Lithuania) according to Ewing and Hendy (2013). Nonetheless there remains evidence of its importance for equality. Bryson and Forth (2010) found that the union pay premium fell from 12 to five per cent between 1999 and 2009, after controlling for a range of characteristics. However, it has not disappeared; in fact the premium increased from 2009 reaching ten per cent in 2010 before starting to dip again. Bryson and Forth suggest that unions may be able to resist downwards pressures on wages during recession. Further, women union members receive a consistently higher wage premium than men and in 2010 this was 9% compared to 3% for men. Bryson and Forth also find that unions continue to constrain wage inequality by raising the wages of those at the bottom. The dispersion was 16% larger among non-members than among union members in 2009 and contracted in 2010 before widening again when in this case the gap was wider for men than women (19% compared to 12%). This lends support for Ewing and Hendy's campaign for the restoration of sectoral collective bargaining. The challenge is for a renewed system that is expansive and inclusive.

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