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**Track 4 – Raising the Floor for Rights at Work in a Globalizing Economy**

*“Gender Issues in 21st century industrial relations-  
the case for pay equity and ILO Convention No. 100”*

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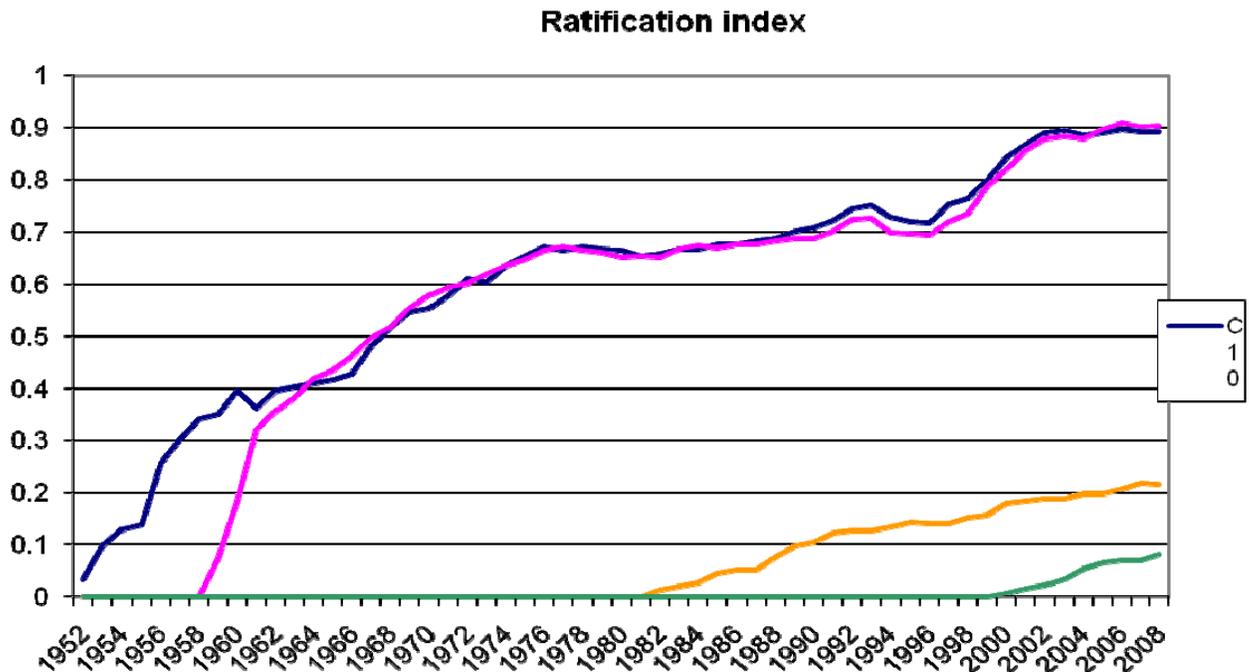
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**Director, Ms Jane Hodges**

This paper surveys most recent case law from a variety of jurisdictions (Australia, UK, USA and others) to demonstrate (i) how courts have - or have not - applied a rights-based approach in frameworks that purport to aim at equality between women and men as regards remuneration in the workplace (including class action opportunities), and (ii) courts' new approaches to handling economic efficiency principles and arguments when hearing equal pay cases. Parts I and II give an overview of the content of the relevant international labour standard, and the achievements and remaining challenges. Part III describes selected key decisions, and raises questions as to why, in this decade, few women appear to be bringing equal pay claims. The paper ends in Part IV by highlighting how the ILO can better serve Members by improving capacity and institution-building in the context of industrial relations frameworks for delivery of social justice and workplace justice for women.

**I. A Happy - and not so - Happy Birthday!**

The 60<sup>th</sup> anniversary of ILO's Equal Remuneration Convention, 1951 (No. 100) passed by in 2011 with on the one hand, reason to celebrate, and on the other hand, reason to despair. On the positive side, with 168 ratifications, it stands as one of the most highly ratified international labour standards and is still attracting fresh signatures: viz. Namibia ratified on 6 April 2010 (see the Graphic Figure below reflecting ratifications of ILO's four gender equality Conventions, Nos. 100, 111, 156 & 183, as at 2009).



Historically, the notion of equal pay for work of equal value had already been enshrined in the ILO Constitution of 1919. Three decades later, Convention No. 100 affirmed the importance of equality between men and women in respect of remuneration, which included the basic wage and any additional cash or in kind remuneration or benefit arising out of the worker's employment. A pioneering feature of this Convention was its guarantee of equal pay for “work of equal value” and not just for the same or similar kind of work. This important refinement addresses gender biases in the way labour markets are structured, because most women do different jobs from most men. This principle was subsequently adopted by the European Community Equal Pay Directive in 1975 and by the United Nations Convention on the Elimination of All Forms of Discrimination against Women in 1979.<sup>1</sup>

On the positive side, the CEACR has been pleased to note cases in which the principle of equal remuneration for men and women for work of equal value has been applied to compare the remuneration received by men and women engaged in different occupations. In its 2006 General Observation under Convention No. 100, the CEACR recognised that this had been helpful in cases such as wardens in sheltered accommodation for the elderly (predominantly women) and security guards in office premises (predominately men); or school meal supervisors (predominately women) and garden and park supervisors (predominately men). Comparing the value of the work done in such occupations, which may involve different types of qualifications, skills, responsibilities or working conditions but which is nevertheless work of equal value overall, is essential in order to eliminate pay discrimination which results from the failure to recognize the value of work performed by men and women free from gender bias.

The supervisory system of the ILO, through the Committee of Experts on the Application of Conventions and Recommendations (CEACR) has been tracking improvements in the application of Convention No. 100,<sup>2</sup> such as in 2010 for New Zealand (ratification: 1983). The CEACR noted with interest that, regarding equal pay for work of equal value in the public service the efforts made for implementation of the Five-Year Plan of Action on Pay and Employment Equity in the public service, and particularly that pay and employment equity reviews and response plans have been undertaken in the 39 departments. The findings of the reviews carried out by mid-2008 indicate a gender pay gap ranging from 3 to 25 per cent, higher starting rates and performance pay for men, an under-evaluation of women's work, an under-representation of women in management and their concentration in administrative and clerical work with limited career paths, difficult career-advancement for part-time workers, and workplace cultures that limit women's contributions. In Romania (ratification: 1957) the CEACR recalled its previous comments concerning section 6(2) of the Labour Code (a relatively recent text, Act No. 53/2003) which provided for equal pay for

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<sup>1</sup> ILO: International Labour Conference, Report I (B) *TIME FOR EQUALITY AT WORK- Global Report to the Declaration*, 91st Session Geneva, 2003.

<sup>2</sup> ILO: International Labour Conference, Report III (1A) — Report of the Committee of Experts on the Application of Conventions and Recommendations, 99th Session, Geneva, 2010.

equal work rather than for equal remuneration for work of equal value. It noted with satisfaction that Emergency Ordinance No. 55/2006 (approved by Act No. 94/2007) amended the Labour Code to provide in section 6(3) that “any discrimination based on sex shall, as regards all elements and conditions of compensation, be prohibited for equal work or work of equal value”. In Slovakia (ratification: 1993) the CEACR recalled its previous comments with respect to section 118(2) of the Labour Code of 2006, which excluded from the definition of wages certain payments provided in relation to employment. It was able to note with satisfaction that section 119(1) of the Labour Code, as amended by Act No. 348/2007, now provides that wage conditions must be agreed without any form of sex discrimination and that this applies to all remuneration for work and benefits that are paid or shall be paid in relation to employment. In Uruguay (ratification: 1989) the CEACR noted with interest that steps have been taken with regard to better implementation and that the Tripartite Commission on Equality of Opportunity and Treatment in Employment unanimously decided to include an equality clause in the wage board round. Under this clause, which is included in collective agreements, the parties agree to promote compliance with Convention No. 100 (as well as the Maternity Protection Convention (Revised), 1952 (No. 103), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Workers with Family Responsibilities Convention, 1981 (No. 156)), and the MERCOSUR Social and Labour Declaration.

Likewise, in 2011<sup>3</sup>, the CEACR noted with interest legislative developments in Australia (ratification: 1974), with the adoption of the Fair Work Act, 2009, which substantially repealed the Workplace Relations Act, 1996. It noted in particular that as a result of the adoption of the Fair Work Act, in determining “modern awards” (legal instruments setting minimum terms and conditions for national system employees in particular industries or occupations), a key objective is “the principle of equal remuneration for work of equal or comparable value”; moreover, in determining minimum wages, Fair Work Australia, which replaces the Australian Industrial Relations Commission, must take into account “the principle of equal remuneration for work of equal or comparable value”. Fair Work Australia is also empowered to make orders (called equal remuneration orders) to ensure that there will be equal remuneration for work of equal or comparable value, and the term of any modern award, enterprise agreement or Fair Work Australia order has no effect to the extent that it is less beneficial to the employee than a term of the equal remuneration order.

In Canada (ratification: 1972) the CEACR noted certain provincial legislative developments with interest: pursuant to recent amendments of the Quebec Pay Equity Act, pay equity audits must now be undertaken every five years and a joint advisory committee (with an equal

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<sup>3</sup> ILO: International Labour Conference, Report III (1A) — *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 100th Session, Geneva, 2011.

number of employers' and employees' representatives) is established to advise the Equal Pay Commission regarding making regulations, developing tools to facilitate the achievement or maintenance of pay equity, and addressing any problems in carrying out the Act. For Cyprus (ratification: 1987) the CEACR noted with interest the adoption of Act No. 38(I) of 2009 on equal remuneration between men and women for the same work and for work of equal value, amending 2002 and 2004 national statutes that had been adopted with a view to harmonizing the national legislation with the EU Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Cyprus's 2009 Act strengthens, among other matters, the definition of remuneration and inserts provisions regarding the promotion of equal remuneration through social dialogue. The Act also provides for out-of-court protection of victims of discrimination (complaints can be submitted to the Ombudsman's Office), enhances the accessibility of legal proceedings and the provision of legal aid by the Gender Equality Committee in Employment and Vocational Training, and clarifies the shifting of the burden of proof to the respondent. In Saudi Arabia (ratification: 1978) the CEACR noted with satisfaction the adoption on 18 September 2010 of Ministerial Order No. 2370/1, providing that "any discrimination in wages shall be prohibited between male and female workers for work of equal value".

The 2012 CEACR Report noted with interest, with regard to Convention No. 100, that three ratifying States had improved institutional structures for equal pay (Canada, Lithuania, Sweden) and that one other ratifying State (Viet Nam) was engaging in dedicated and intensive "training to detect unequal pay for men and women, for judges, labour inspectors and other labour officials", which has been incorporated in the general programmes of dissemination and education of the Labour Code. In Viet Nam the CEACR noted that specific training on the Convention had already provided in 2008 and 2009 for provincial labour departments and that, according to the Government "...out of the 799 enterprises inspected during 2007–10, no cases of violations of the principle of equal remuneration for work of equal value were registered.

Again, in relation to positive trends, it is clear that in order to establish whether different jobs are of equal value, there has to be an examination of the respective tasks involved. This examination must be undertaken on the basis of entirely objective and non-discriminatory criteria to avoid an assessment being tainted by gender bias. While the Convention does not prescribe any specific method for such an examination, it does presuppose the use of appropriate techniques for *objective job evaluation* (Article 3). Analytical methods of job evaluation have been found to be the most effective, because they examine and classify jobs on the basis of objective factors relating to the jobs to be compared such as skill, effort, and responsibilities or working conditions. Tools abound on how to implement gender neutral job evaluations of work, so that unequal pay based on the sex of workers can be eliminated. ILO's "*Promoting Equity, Gender-neutral job evaluation for equal pay. A step-by-step guide*" exists since 2008 and has been widely used; it was translated into Danish as recently as 26 January 2012. The aims of the "*Step-by-step guide*" are to untangle the complexities of job

evaluation methods; make such methods be understood by and accessible to a wide audience; indicate a step-by-step procedure so as to prevent difficulties of implementation; and to allow implementation of targeted technical assistance to specific cases.

It should not be forgotten that measures for the objective evaluation of jobs can be taken at the enterprise, sectoral or national level, in the context of collective bargaining, as well as through national wage-fixing mechanisms.

On the negative side, in many parts of the world Convention No. 100 is poorly understood and rarely used in national jurisdictions as a vehicle towards decent work. Its potential as a policy guide, also with strong technical advice in the industrial relations arena is largely untapped. Women's wages are on average 77.1 per cent of men's and often much less. EU 2011 data put the gender pay gap, based solely on the sex of the worker, at 17.5 per cent.<sup>4</sup> In 2010, the OECD reported a gender wage gap in the medium full-time earnings of 17.6 per cent across its members. In 2009 in the US, the women's to men's earnings ratio for 25-34 year olds was 89 per cent and for 45-54 year olds was 74 per cent. According to ILO figures in 2009, in about 80 per cent of the countries for which data are available, the pay gap has narrowed, but the change is small, and in some cases negligible.<sup>5</sup> But it must be stressed that accurate and reliable data on a *global scale* on the gender pay gap, broken down by occupation, are not readily available.

ILO has been tracking this for decades.<sup>6</sup> In relation to occupational segregation influencing wages, ILO's KILM database looked at the average pay in six occupations deemed male-dominated (labourer, welder, power distribution and transmission engineer, motor bus driver, urban motor truck driver, and refuse collection) and four female-dominated occupations (professional nurse, sewing machine operator, stenographer/typist and room attendant or chamber maid.). Based on 14 countries' data KILM found that the gender wage differential between the two categories of occupations was greater than 20 per cent in 8 of the 14 countries in the sample. The Figure below gives the ITUC data mapping as at 2006.

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<sup>4</sup> <http://ec.europa.eu/social/main.jsp?langId=en&catId=418>

<sup>5</sup> ILO: Global Wage Report 2008/09: "*Minimum wages and collective bargaining: Towards policy coherence*" (Geneva, 2008).

<sup>6</sup> See, for example, ILO: *Women in Labour Markets: Measuring progress and identifying challenges*, Geneva, March 2010, Table 4.



And yet, at the 2009 Session of the International Labour Conference, delegations from 183 members States of the ILO stated:

“International labour standards are a primary means to promote equality in the world of work for all workers. For gender equality to be anchored in a solid international framework for responses at work, the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), need to be ratified, implemented and monitored by all member States. An urgent call is launched for the universal ratification of these two fundamental Conventions... While many countries have adopted legislation against discrimination based on sex, no society has achieved gender equality. ... The involvement of the social partners in the formulation and revision of legislation ensures that legal standards accurately reflect the socio-economic realities and needs or concerns of employers and workers. There is also a need for stronger implementation and enforcement of legal frameworks concerning equality of opportunity and treatment through gender-balanced and gender-sensitive labour administrations, labour inspectorates and courts that are equipped to address gender equality. Judges, labour inspectors and government officials need to be trained so that they can better identify and redress gender inequalities.”<sup>7</sup>

<sup>7</sup> ILO: International Labour Conference, Provisional Record 13, 98th Session, Geneva, 2009, paras. 29, 32 and 56(e).

The Conference instructed the Office to support the strengthening of courts (not just labour justice institutions, but all courts, including appellate jurisdictions) so that they are able to more effectively apply the ILO gender equality Conventions - such as Convention No 100 - and deliver justice when cases of sex discrimination at work are proven.

## **II. The concept**

Convention No. 100 reads (in part):

“The ILC (...) Having decided upon the adoption of certain proposals with regard to the principle of equal remuneration for men and women workers for work of equal value, which is the seventh item on the agenda of the session, and (...)

Article 1. For the purpose of this Convention--

- (a) the term remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;
- (b) the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.”

This brief text encapsulates a fundamental women workers' right, widely acknowledged and implemented in national legal systems. It covers job comparison, namely the process of comparing the actual work undertaken should not be limited to the same jobs, enterprise and/or sector. Convention No. 100's message on pay equity includes base salary, flexible pay and cash value benefits: in sum, an extremely broad definition of remuneration that fits well with the industrial relations framework of a globalised world in the 21<sup>st</sup> Century. The application of the principle may be achieved by raising the wages of female-dominated jobs to the level of wages of male-dominated jobs of the same value, not the reverse. If the amounts to be paid out in redressing previous unequal pay are considerable, the wages can be raised gradually to achieve equity over time. This can also be done through collective bargaining.

Many researchers and policy briefs have examined why the gender pay gap exists. The above-mentioned *ILO Step-by step Guide* lists a set of reasons founded on the characteristics of individuals and of the organizations, such as:

- Educational level and field of study;
- Work experience and seniority;
- Number of working hours;
- Size of organization and sector activity.

And much has been brought to light on the direct sexist reasons (discrimination based on the sex of the worker) underlying the gap, such as:

- Stereotypes and prejudices with regard to women's work;
- Occupational segregation by gender;
- Traditional undervaluing of women's job;
- Traditional job evaluation methods designed on the basis of requirements of male-dominated jobs;
- Weaker bargaining power on the part of female workers.

The Norwegian Equal Pay Commission summarises explanations of gender differences in pay in the context of five main points: (a) differences in length of education and age do not really explain pay gap today; (b) women and men are paid approximately the same for doing the same job in the same enterprise; (c) the pay gap reflects the gender-segregated labour market; (d) the bargaining system maintains stable wage relationships, including between women and men; and (e) pay differences increase when women work and have small children.<sup>8</sup>

### **III. The cases**

The following - admittedly narrow selection - of recent equal pay decisions in English-language jurisdictions is noteworthy for the judges/commissioners' use - or not - of the Convention No. 100 principle and the new process options they uphold for women complaining of sex discrimination in remuneration. The large payouts can be compared with the trend - since diminished - of labour jurisdictions to award large payments for other types of sex discrimination, such as sexual harassment, in the late 1990s, in some parts of the world.<sup>9</sup> Such an historic perspective, based on a wider selection of decisions and desk research, poses the question of whether courts are adopting a more progressive stance in defending victims of sex discrimination and in enforcing gender equality in the workplace.

#### **Australia**

On 1 February 2012 Fair Work Australia (FWA) issued a decision with respect to low paid workers in the social and community sectors (SACS) which are characterized by predominantly female labour force participation. Several trade unions had lodged a case based on gender-based discrimination in 2011, and this national-level workplace relations tribunal found that workers in the community and disability sectors were underpaid compared

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<sup>8</sup> Summary of Official Norwegian Report 2008:6, "*Gender and Pay. Facts, analyses and measures to promote equal pay*", Oslo, 2008, submitted to the Norwegian Ministry of Children and Equality.

<sup>9</sup> "*Affirmative action in employment: Recent court approaches to a difficult concept*", I.L.R., Vol.138, 1999, No. 3, and "*Sexual harassment in employment: Recent judicial and arbitral trends*", I.L.R., Vol. 135, 1996, No. 5.

to public service workers doing jobs of equal or comparable value. It found that gender was one of the reasons for workers being undervalued. In the May 2011 decision, having indicated that it intended to make an equal remuneration order, FWA recommended that the parties enter into discussions with a view to reaching agreement on the terms of an order. In its 2012 ruling on the subsequent Joint Submission, FWA ordered that best paid employees would receive a 41 per cent, or A\$ 24,000, pay rise, bringing their annual salary to A\$83,000. Workers on the lowest award rates will receive a rise of 19 per cent, an increase of around \$6,000 a year. The effect of the decision is to provide for significant pay increases for various categories of workers to be phased in over eight years. It is reported that the changes will affect about 150,000 workers across the country.<sup>10</sup>

From a process point of view, the case is also interesting. Along with a number of employers, State and Territory Governments, and other persons and bodies which expressed support for the proposals in the Joint Submission, other interested bodies included the National Pay Equity Coalition, Women's Electoral Lobby, Council to Homeless Persons and the Australian Council of Social Service. The Australian Council of Trade Unions made oral submissions in support of the Joint Submission. In particular, it urged FWA to reject suggestions that implementing the proposals would lead to claims for flow-on increases in other industries. The Australian Human Rights Commission supported the methodologies established in the Joint Submission for evaluating the extent to which wage rates in the SACS industry were lower than they would otherwise have been because of gender considerations. It submitted that economic consequences, such as capacity to pay, funding and employment, can only be taken into account when considering the implementation arrangements. FWA's decision on the 'ability to pay' arguments noted that: "The Commonwealth has given a commitment to fund its share of the increased costs arising from the proposals. While some state governments are opposed, no government has indicated it will be unable to fund its share. On the other hand there are significant risks which need to be considered. For example, there will be an impact on employers in relation to programmes and activities which are not government funded. As a number of opponents of the proposals pointed out, any order we make has the potential to affect employment levels and service provision where costs cannot be recovered. We are also concerned about the effect on the finances of a number of the states. We have decided that in the circumstances these risks can be satisfactorily addressed by an extension to the length of the implementation period."<sup>11</sup> One Commissioner, in his dissent from the Full Bench decision, cited international labour standards: "Equal pay for men and women employees performing equal or comparable work is recognised as a fundamental right by major human rights instruments and the International Labour Organization."<sup>12</sup>

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<sup>10</sup> For the full decision see:<http://www.fwa.gov.au/sites/remuneration/decisions/2012fwafb1000.htm>

<sup>11</sup> FAIR WORK AUSTRALIA DECISION: *Equal Remuneration Case* [2012] FWAFB 1000, paragraph 65.

<sup>12</sup> *Ibid*, paragraph 89; but the Commissioner continued saying "The context of the application and the nature of wage fixing in Australia also emphasises the need for a careful and rigorous approach", at paragraph 92.

## United Kingdom

The UK Employment Appeal Tribunal has heard a number of equal remuneration cases in recent years. This is one jurisdiction that has seen a huge increase in tribunal claims in relation to equal pay, from 8,229 in 2004/05 to 44,013 in 2006/07. These cases also generate very complicated judgements, which often go to appeal: in 2006/07, 37 per cent of Employment Appeal Tribunal cases concerned public sector issues.<sup>13</sup>

Let's take *Ministry of Defence (Appellant) v. Mrs C Armstrong & Mrs K George & Others (Respondents)*.<sup>14</sup> In 2000 nine female Army Careers Officers (ACOs) brought proceedings in the UK Tribunal under the Equal Pay Act 1970 against the Appellant, claiming equal pay with male Long Service List Senior Army Recruiters (SARs) on the basis that they were engaged in like work, or alternatively work of equal value, with their named comparators. Two of them, the named Respondents in this appeal, were selected as test cases. They accepted that ACOs and SARs had always been paid according to different pay scales. However, they contended that historical factors, which caused the different pay scales to operate as they did, were tainted by sex discrimination. The women's claim denied that the difference in remuneration was genuinely due to factors of the need to attract recruits (as stated by the MOD: the difference in remuneration was justified on the basis that it was at all material times appropriate and necessary in order that they might "recruit suitable people to become soldiers in the Regular Army"), or that they were the material cause of the disparity in pay. They contended that the qualifications, skills, knowledge, experience, training, fitness requirements, liability for deployment and promotion schemes for SARs and ACOs were all the same.

Based on the evidence (including independent studies into terms and conditions of service of ACOs), the Employment Tribunal concluded, among other things, that: "...There should be no rank, grade or gender anomalies or irregularities within the employment group". It suggested options for reform which, it concluded, would satisfy the requirements by providing "equality for male and female ACOs." In its decision in favour of the women, that Tribunal stated: "The fundamental question for the Tribunal is whether there is a causative link between the Applicant's sex and the fact that she is paid less than the true value of her job as reflected in the pay of her named comparator. This link may be established in a variety of different ways, depending on the facts of the case. It may arise, for example, as a result of job segregation or from pay structures or pay practices which disadvantage women because they are likely to have shorter service or to work less hours than men, due to historical discrimination or disadvantage, or because of the traditional social role of women and their family responsibilities." In 2004, in dismissing the appeal, the EAT upheld that the reason why female ACOs were placed at a disadvantage in relation to pay was a reason linked to

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<sup>13</sup> *J.R. Shackleton: Should we mind the gap? Gender Pay Differentials and Public Policy*, The Institute of Economic Affairs, Great Britain, London, 2008.

<sup>14</sup> Appeal No. UKEAT/1239/02/SM Judgement delivered on 7 April 2004 by Justice L. Cox.

their gender, because the dependence of pay on retirement pay was linked to length of service. It stated; “In reality the reason why the service requirement for female ACOs had to be reduced to three years was because, as a result of historic discrimination and disadvantage, so few women had been able to complete 16 years service in order to qualify for appointment. This also explained why there were no or very few female SARs.”

While the decision did not rely on Convention No. 100, it made a thorough analysis of EU equal pay law, in particular the ECJ jurisprudence when hearing the arguments for justice for the women.

In 1997 1,600 women health workers lodged an equal pay case against the National Health Service (NHS) with the Employment Tribunal, in which they claimed that their jobs had been consistently undervalued compared to those of their male colleagues, for more than a decade. Based on the principle of equal pay for work of equal value, the women argued that their predominantly caring roles should be equally rewarded to those of men, which tended to be more technical. In 2005, UNISON, the national trade union representing the women, agreed with the NHS the largest ever equal pay award settlement for a total of approximately US \$480 million. The award covered compensation for lower hourly rates, lower pension contributions and the non-payment of bonuses and attendance allowances, and was backdated 14 years, all with compound interest.<sup>15</sup> The women won between \$56,000 and \$320,000 each. As part of the negotiations a new pay equity system, known as the ‘Agenda for Change’, was introduced by the NHS to put a stop to future pay discrimination.

### **United States**

In 2010 the NY Federal Court in Manhattan<sup>16</sup> ordered the drug maker Novartis’s United States division, the Novartis Pharmaceuticals Corporation, to pay US\$250 million in punitive damages for discriminating against thousands of female sales representatives over pay, promotion and pregnancy. The decision found that the company had engaged in a pattern of discrimination against women employees from 2002 through 2007. The award to the 12 women who lodged the class action opened the door for 5,588 others who could also apply for compensatory damages. Judge Colleen McMahon of United States District Court was set to determine a lump sum for back pay, lost benefits and adjusted wages that were to be distributed to plaintiffs, said lawyers who were seeking \$37 million to cover back pay alone. The lawsuit was the largest gender discrimination matter ever to go to trial in the US, according to the law firm representing the women. The suit was originally filed in 2004 and includes female sales representatives who worked for Novartis Pharmaceuticals in the US between 2002 and 2007. Following the verdict, the parties reached a court-approved settlement valued at \$175 million – including \$22.5 million for improvements to policies and

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<sup>15</sup> *Wilson and Ors v North Cumbria Acute NHS Trust*.

<sup>16</sup> *Velez and others v. Novartis Pharmaceuticals, Novartis Corporation, and Ebeling*. Case No.04-9194 (S.D.N.Y.), reported by REUTERS Published: May 19, 2010.

programmes that promote equality in the workplace. This amounted to a highly-publicised end to lengthy litigation.

In the Wal-Mart<sup>17</sup> class action, the US Supreme Court announced on 6 December 2010 that it would conduct limited review of an April 2010 ruling by the US Court of Appeals for the Ninth Circuit granting class certification of the case, which had been brought by women claiming company-wide pay (and promotion) discrimination. The class covered class of approximately 1.5 million female workers. The first instance decisions found that evidence showed that Wal-Mart lagged far behind its competitors in its promotion of women and long knew of the discrimination against its female employees but failed to act. It was the largest civil rights class action in American history, and Wal-Mart had lost the class action issue four times in lower court rulings and class action certification had been granted as early as June 2004.

The above descriptions show that class actions – when allowed to go ahead in certain jurisdictions – have been successful in enabling women to seek enjoyment of statutory protections. But why, in this decade, does it appear that few women are prepared to lodge equal pay claims, either in specialised tribunals dealing with industrial relations issues, or in the courts? Ignorance, low self esteem, illiteracy, fear of reprisals and ridicule, and cultural pressures are some factors that are well recognised and written about as representing barriers that prevent women from pursuing their labour rights.<sup>18</sup> Added to these are the complexity, duration and cost of some court processes, and uncertainty or frustration with legal remedies. As UN-Women states: “When it comes to justice, women have a range of perceptions, closely linked to the injustices they see and experience around them. Effective implementation of laws and of constitutional guarantees is a key challenge for making the rule of law a reality for women. The justice chain, the series of steps that a woman has to take to access the formal justice system, or to claim her rights, often breaks down due to lack of capacity in the justice system and discriminatory attitudes of service providers, including the police and judiciary (see Chapter 2). Services that do not take into account the barriers that women face, due to social norms, poverty or lack of awareness are a major problem in all regions.”<sup>19</sup>

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<sup>17</sup> *Dukes v. Wal-Mart Stores, Inc.*, 605 F.3d 571 (9th Cir. 2010).  
222 F.R.D. 137 (N.D. Cal. 2004).

<sup>18</sup> Un-Women: “*Progress of the world’s women 2011-2012: In pursuit of justice*”, NY, 2011; available at: <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>.

<sup>19</sup> “*Progress of the World’s Women*”, *ibid*, page 12; and, for more detail but on areas other than labour law, Chapter 2.

## Others

A recent Ontario Superior Court of Justice decision found that the Pay Equity Act did not require the closure of pay gaps caused by unequal wage grids. The union had originally complained before the Pay Equity Hearings Tribunal alleging that, under the wage grid for employees (mostly female) in a clerical/office work bargaining unit, it took 24 months of service to reach the top of the pay scale, whereas for employees (mostly male) in a service unit, progression to the top of their pay scale was possible after only nine months of service; CUPE asked for equalization of the compensation of the female job classes with their male comparators. It lost in the Tribunal and it lost on appeal. In summary<sup>20</sup>, the Court made four findings: (1) The standard of review on all issues of pay equity is “reasonableness” and it concluded that the Tribunal's interpretations on all challenged issues had been reasonable. (2) The purpose of the Pay Equity Act is to "redress" and not "eliminate" gender discrimination in compensation; the wage gap at issue here was not a gap that the Legislature had decided to remedy through the Pay Equity Act. (3) The fact that the Pay Equity Act did not redress all pay equity gaps may be the subject of a Canadian Charter challenge. (4) The Tribunal's interpretations of the Act did not violate the Human Rights Code, so that to the extent that human rights issues arise as a result of the unequal wage grids, they should be dealt with by filing a complaint under that Code.

A scan of CEACR reports for the last three years shows very little information on court cases supplied by Governments having ratified Convention No. 100. And yet the Report Forms for this Convention clearly request information of this nature of the practical application of the treaty and data on enforcement measures: “Please state whether courts of law or other tribunals have given decisions involving questions of principle relating to the application of the Convention. If so, please supply the text of these decisions.”<sup>21</sup>

## IV. Proposals on improving industrial relations frameworks for delivery of workplace justice for women

The 2009 International Labour Conference Conclusions on Gender Equality at the Heart of Decent Work<sup>22</sup> recognised the role of the ILO to “support the strengthening of labour inspection systems and courts so that they are able to monitor more effectively the application

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<sup>20</sup> CUPE Local 1999 v. Lakeridge Health Corporation (2012 ONSC 2051, dated 31 May 2012); Information supplied by Mary Cornish of Cavalluzzo Hayes Shilton McIntyre & Cornish, Barristers & Solicitors, 474 Bathurst Street, Suite 300, Toronto, Ontario, Canada CAN.M5T 2S6.

<sup>21</sup> Report forms, approved by the Governing body of the ILO, are designed to assist ratifying governments report on their implementation of a ratified text, both in law and practice. The Report Form for Convention No. 100 can be viewed on the site of the ILO Department of International Labour Standards at: <http://www.ilo.org/ilolex/english/reportforms/pdf/22e100.pdf>

<sup>22</sup> ILC: *Report of the Committee on Gender Equality*, Provisional Record 13, Geneva, ILO, 2009, at paragraph 56(e), available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_108259.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_108259.pdf)

of key equality Conventions and issues of sex discrimination at work.” The Conclusions also encouraged workers’ organisations to continue to contribute to achieving gender equality in the workplace by: “representing the workers’ point of view from a gender perspective in discussions on issues such as legislative reform, labour inspection, courts and industrial tribunals.”<sup>23</sup>

In this vein, the International Training Centre of the ILO in Turin has, for over a decade, offered training courses for enforcement authorities, especially labour inspectorates, industrial relations tribunals and labour courts, part of which aim at strengthening legal protection against sex discrimination. A number of key units of the ILO (like the International Labour Standards Department and the Social Dialogue Department, to name but a few) provide technical assistance on legal protection against sex discrimination by supporting legislative reform, offering training on drafting equality legislation, and strengthening enforcement authorities, especially labour inspectorates, alternative dispute resolution bodies and courts, not only labour courts, but also Supreme Courts and High Courts where many equal pay complaints are lodged. Outreach to specialised commissions could be stronger. As noted by the ILO, pay equity commissions or commissions with broader anti-discrimination jurisdictions can play a very helpful role in the achievement of pay equity. In Sweden, for instance, since 2001 the Equal Opportunities Ombudsman has undertaken information and education measures to assist the social partners in meeting their obligations under the Equal Opportunities Act, with special emphasis on wage mapping. Similarly, in the United Kingdom the Equal Opportunities Commission has developed a set of useful materials to promote effective equal pay practices in the workplace including in small businesses.<sup>24</sup>

National initiatives for improving the effectiveness of domestic justice systems, from the viewpoint of gender equality including equal pay, have commenced in earnest. Seminars, inter-active workshops, and other forms of professional upgrading can be effective methods of sharing not only the concept of equal pay for work of equal value, but also enlighten judges and court staff on evidence issues (viz. the role of experts and expert technical reports), judgement writing, and overall treatment of applicants and witnesses. There is ample anecdotal evidence of badgering of women on the stand, designed to weaken their presentation of technical descriptions during hearings of pay equity claims. Such methods can also assist in the area of timely delivery of decisions, which - as noted above - might dissuade the most energetic of female complainants. The results in one country where

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<sup>23</sup> *Ibid.*, para.50 (d).

<sup>24</sup> ILC: “*Equality at work: tackling the challenges*”, Global Report of the D-G under the 1998 Declaration, Report 1(B), ILO, Geneva, 2007.

activities were undertaken with ILO support demonstrated that access to justice programmes could provide tangible and lasting results without being prohibitively expensive.<sup>25</sup>

Much has been written recently on the benefits for gender pay equity through the minimum wage, especially for women in the lowest paying jobs. Raising the minimum wage is proving of particular assistance to women who form in many countries the majority of low-paid workers, especially the long-term working poor.<sup>26</sup>

Another issue that these cases bring to mind includes the role of workers' organisations in supporting their members' complaints on unequal pay based on the sex of the worker. As the above-mentioned ILC Conclusions highlighted, this kind of technical and legal assistance is much needed. The Public Services International (PSI) campaign called "Pay equity Now!" was a good start. Researchers are ratcheting up their examination of this potential, which could address many of the barriers that women, as individuals, perceive when fearing to use justice systems.<sup>27</sup>

On a final note: This paper has highlighted pay equity cases with women bringing the original claims. All said above could equally apply if men were discovering that they were victims of sex discrimination at work, by being paid lesser remuneration than their female colleagues just because of their sex.

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<sup>25</sup> R. Zibelu Banda & Ots: *"Access to Labour Justice"*, Lexis Nexis, Dayton, Ohio, 2007. See also papers presented on Malawi at this Conference.

<sup>26</sup> J. Rubbery: *"Pay equity, minimum wage and equality at work"*, Declaration Working Paper No.19/2003, ILO, Geneva. D. Grimshaw & M. Miozzo, *"Minimum wages and pay equity in Latin America"*, Declaration Working Paper No.12/2003, ILO, Geneva. M. Cornish & F. Faraday: *"A framework for action on pay equity in Ontario-Contributing to Ontario's Future"*, Equal Pay Coalition, Canada, 2008.

<sup>27</sup> L. Harré: *"Unions and pay equity in New Zealand: organisation, negotiation, legislation"*, article in Labour & Industry, Vol.18, No 2, December 2007, special issue on gender pay equity, pp 51 and following. M. Cornish, *ibid.*, page 7.