Would Decentralized Comparable Worth Work?

The Case of the United Kingdom

Steven E. Rhoads

Bill Clinton may or may not be a new Democrat, but the old ones have not forgotten equal pay for comparable worth. "Pay equity," the politically palatable synonym for "comparable worth," was embraced in the 1992 Democratic platform. President Clinton's views on the subject are not known, but Karen Nussbaum, his new head of the Labor Department's Women's Bureau, is a strong advocate of the concept, as are others in the department. Moreover, in 1994 the Clinton State Department plans to push for approval of the United Nations's "Convention on the Elimination of All Forms of Discrimination against Women." That convention, if ratified, would give the United States comparable worth through the back door since it would require the United States to guarantee women equal pay for comparable work.

In the United States, mandatory comparable worth to date has been applied only to public employees and only at the state or local level. One element of the debate, as it applies to the private sector, concerns the extent to which comparable worth would require a much more centralized means of fixing wages. Proponents of comparable worth generally argue that this centralization would not be necessary. They submit that employers would be free to use any nondiscriminatory pay system, with the courts resolving the issue if complainants think they are not paid fairly because of their sex or race. Opponents, often led by economists, charge that comparable worth would have large economic costs, because a centralized wage-setting apparatus would become necessary, and it would badly damage the ability of markets to allocate labor efficiently.

For some insight into this dispute and indications of how a comparable-worth system might work in the United States, one may look to the United Kingdom, where it is a real, rather than just a paper, phenomenon. For the past decade, the United Kingdom has been operating under a decentralized comparable worth (or as they call it, "equal value") system that affects the private and public sectors alike. The European Community (EC) compelled its member states to implement equal value in the late 1970s, and

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the United Kingdom has since provided more than half of all the equal value legal cases generated in the EC. The British precedent is especially relevant to comparable worth in the United States, as the country shares with us an adversarial, common law-based legal system, and it has adopted the firm-centered approach to comparable-worth implementation most often advocated by U.S. proponents.

Major problems have arisen in implementing Britain's decentralized comparable-worth system. The United Kingdom's experience has been marked by an absence of objective or even agreed-upon criteria for job evaluation and by wrangling over the relative value of diverse jobs. The process has produced arbitrary, inconsistent, and inefficient outcomes, including a legal requirement that one business pay its employees more than competing businesses pay theirs.

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Pay Equity in the United Kingdom: How Is it Done?

The original Equal Pay Act of 1970 came into full force at the end of 1975. The act required that women (and men) receive equal pay and benefits where they did the same or "broadly similar" work or work that had been given an equal value through job evaluation. Employers were not required to conduct job evaluations if none existed. When the European Court of Justice ruled against the United Kingdom in an equal-value infringement case, new domestic legislation was required.

Under the updated law, equal value is defined as work that "is, in terms of the demands made on her (e.g., under such headings as effort, skill, and decision), of equal value to that of a man" working for the same employer. Equal value claims are heard by industrial tribunals, a system that is meant to provide for hearings that are "quick, cheap, accessible, informal, and expert." Each three-person tribunal is chaired by a lawyer. The other two members are selected by the Department of Employment, one from a list submitted by unions, the other from a list submitted by employers. Tribunal decisions on equal-pay cases may be appealed through three levels—the Employment Appeal Tribunal, the Court of Appeal, and, finally, the House of Lords.

A report by an "independent expert" helps the industrial tribunals to reach a decision. The female plaintiff chooses males in her enterprise whom she believes do work of the same or lesser value than hers, and the independent expert's report either supports or rejects the claim. The independent experts are chosen by the Advisory Conciliation and Arbitration Service from applicants with backgrounds in industrial relations. The experts have enormous discretion since the law gives no guidance as to which evaluation factors should be used. Moreover, in an effort to keep the process quick and efficient, the legislature prohibited the tribunal from hearing evidence challenging the factual basis of the independent expert's report. In practice tribunals side with the expert's view on the equal value question in the overwhelming majority of cases.

The Experts and Tribunals at Work

The reports of independent experts reveal a wide variation in the means of evaluation employed. Most experts have rated factors by a simple high, medium, or low verbal scale, but others have used elaborate quantitative rating schemes. The experts differ on the number of factors used and how they are weighted (e.g., should skill count the same or more than effort). To a remarkable degree, the extensive commentary on equal value in the United Kingdom says little about the reports themselves, seemingly taking it for granted that the experts know what they are doing. In one celebrated case, which found a female cafeteria cook of equal value to a male carpenter and several other male-dominated trades, the company's counsel criticized the independent expert's methodology on the grounds that it "was so simple as to be crude and lacking in precision." However, Robin Beddoe, in what I believe to be the only extended criticism of independent expert reports, writes that the methods used are often too com-

plex rather than too simple. Beddoe argues that the independent experts frequently try to be too quantitatively precise, and as a result, minor differences in fundamentally similar jobs are made much too important.

Beddoe focuses in particular on *Wells v. Smales*, a case in which the expert found the jobs of some of the 15 female fish packers equal in value to that of a male laborer, but others not. The *Wells* expert had originally hoped to avoid any numerical values so as to avoid giving "an impression of accuracy which is not justified by the subjective nature of the basic judgments." However, though the fish packers had the same job title, they worked in different departments doing "clearly different types of work." Thus the *Wells* expert found it necessary to give numerical values so as to keep track of the percentage of time that each of the women spent on "a range of individual or separate jobs." The result was a complicated scheme that gave the women differing total scores, such as 26.77225 and 18.268. Though Beddoe criticized the scheme for its artificial precision, he also criticized another expert for inflating male job content by failing to take account of the fact that "a number of the [job] tasks listed were not required on all occasions." Thus, one cannot be sure just what level of precision would please Beddoe, much less other equal value experts.

Beddoe also offers more general criticisms of the experts' work. In a number of cases basic job descriptions did not exist, and the expert had to provide them. Several of these descriptions were too cursory or "seriously flawed" in other ways. Moreover, many of the experts gave no "clear and comprehensive definitions of the factors" used. As a result, the applicants were deprived of the opportunity to question the experts about their factual knowledge of the jobs and about defects in the experts' evaluations of them.

In pondering why some independent experts simply offer scores or conclusions without reasons, Beddoe offers the sensible hypothesis that by doing so, "they are protecting themselves from challenges." Beddoe, however, credits one expert for providing an explanation for her report's evaluations, thus enabling others to point out the "serious defects" in them. Among them was the fact that the expert in this case had given supervisory credit to a woman applicant under the "judgment and initiative" category, whereas Beddoe and the tribunal concluded that credit for supervision should also be given under "training and experience." Beddoe thinks that by providing in the reports more definitions and more details of the reasoning process, others will be able to ascertain "the validity of the independent expert's conclusions." However, he offers no standards for validity, and none exist. And one must wonder whether an expert who would have pleased Beddoe and the tribunal by counting supervision under two categories would not have displeased other experts because of this obvious case of double counting.

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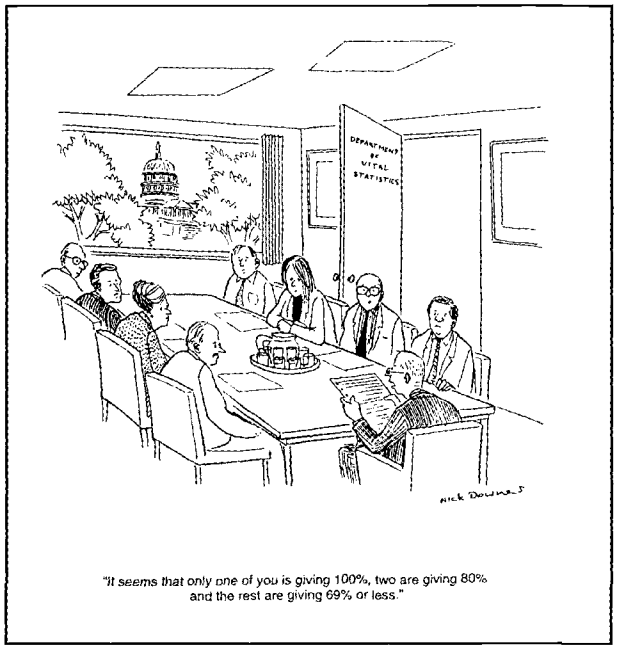
For example, when the EC's equal-pay directive mandates equal pay for work to which equal value is attributed, who is meant to be doing the attributing and by whose standards are the relative values to be assessed? There is no consensus on those questions in the United Kingdom. The Confederation of British Industry is persuaded that the law does not permit jobs to be ranked in terms of value to employers, but the Employment Appeal Tribunal describes the current process as assessing jobs in terms of "the value of the job to the employer." The U.K. Equal Opportunities Commission (EOC) also says that good job factor scores are those that reflect a job's "value to the company." One influential local-level application says that equal value is about assessing job factors on the basis of "the value people put on them."

Another source of inconsistency and contention is the question of whether "close is good enough." Suppose the applicant's job is found to be of almost equal value to that of the comparator. Should the applicant's pay be made equal to that of the comparator's in such cases? Some independent experts say yes; some, no. Some



"It seems that only one of you is giving 100%, two are giving 80% and the rest are giving 69% or less."

experts who say yes are overruled by tribunals who say no, and some experts who say no are overruled by tribunals who say yes. Two tribunals have had multiple cases and continue to decide the issue differently. One takes a "broad-brush" approach, arguing that greater "demands" on a few factors may not be materially relevant. The other is "astonished" at the broad-brush approach, noting that Parliament's statute said "equal value," not "substantially equal value."

Another problem arises when experts disagree about the relative value of the same jobs in different firms within a single industry.

In *Wells v. Smales*, the tribunal overruled its expert and said that even the female fish packer who scored only 79 percent of the male comparator's score held a job equal in value to his. One management consultant has noted that if this principle were generalized, all pay grades would collapse into one since there is rarely a 20 percent pay disparity between them. For example, the highest-ranking fish packer who scored 135 percent of the male comparator's rating could now demand to be paid with a man doing a "135" job, not the "100" job held by the original male comparator. The other 13 fish packers could then insist, citing the tribunal, that they too be paid at the rate of the fish packer scoring 135.

Another problem arises when experts disagree about the relative value of the same jobs in different firms within a single industry. One tabulation of the 64 cases that had been referred to independent experts as of mid-1989 showed that though the Smales Company fish packers ultimately were awarded pay equal to that of the male laborers, the expert in the *British Limited* case found packers unequal to laborers, and thus that company's packers got nothing. Similarly, the expert surveying Alstons furniture company found the female sewing machinists there equal to the male upholsterers, but at Frayling Furniture Ltd. and at Buoyant Upholstery the two different experts assigned the sewing machinists a lower value.

In the furniture cases, the experts used somewhat different factors and very different rating schemes. In the case of *White and Others v. Alstons,* sewing machinists were scored 16 and upholsterers 15.5; in the case of *Hall and Others v. Frayling,* sewers scored 58 and upholsterers 67; and in *Holden and Others v. Buoyant,* sewers scored 38 and upholsterers 44.

At Alstons, the sewing machinists won their case at the tribunal. In the *Holden* case, the applicants withdrew their claim after receiving the unfavorable report from the independent expert. At Frayling, despite the encouraging report of the independent expert, the company decided that it was better to try to settle. They ended up installing new, faster sewing machines while still paying their sewing machinists at the old rate per piece. Spending the money on the machines rather than in fighting the EOC-financed lawyers of their employees seemed the better course. The Frayling sewing machinists thus ended up doing better than those at Buoyant, but not as well as those at Alstons.

The experts in these cases reached different conclusions because of their very different assessments of the responsibility and physical effort demanded by the jobs. Though the Alstons expert did note that the upholsterers, at the final stage of manufacturing, had more responsibility for spotting and remedying faults from earlier

stages in the process as well as those in their own work, she nonetheless found the two occupations equal on the responsibility dimension. The other two experts both ranked the upholsterers much higher. The upholsterers must take the frames, foam padding, sewn covers, and cushions and put them together in a way that produces a product of high quality. Since the various components are not engineered to fine detail, upholsterers must work with them to produce an attractive final product. The difference in the responsibility for the overall appearance of the final product seemed significant to both the Frayling and the Buoyant experts.

For physical effort the Alstons expert did grant the upholsterers one additional point on her five-point scale. However, the two other experts granted them three added points on a ten-point scale (plus another point for "job hazards") in the Frayling case and two points on a five-point scale in the Buoyant case. The upholsterers work with frames that can weigh 50 pounds and with finished products that can weigh 100 pounds. All work is done in a standing position, leaning forward. Upholsterers must use considerable energy to manipulate the materials so as to create the correct shape and to "hump" and pull with their fingers so as to get the sewn covers on the frame. By comparison, the sewing machinists do their work sitting down, and the worst that the Alstons expert could say of the work was that it sometimes required the adoption of "awkward postures to manipulate bulky or difficult materials with pulling/pushing/reaching movements."

The Alstons expert did note that she observed two men lifting 88-pound settees by themselves, but she discounted that fact in her evaluations on physical effort and work hazards since, in her judgment, it was contrary to health and safety recommendations for such weights to be handled by one person. She assessed only what she called "normal" working. My managerial contacts at Alstons and at Frayling, however, assured me that it was quite normal for their workers to lift such weights by themselves. They wanted to make more money under the piecework rates, and despite management's advice, they did not want to slow things up by getting another person to help with the heavy pieces. Both those managers felt strongly that the upholsterers deserved more pay, in part due to their greater responsibility for the final product, but even more so because of their far greater physical effort.

One manager especially went to great pains to explain how important piecework was to his business. All U.K. furniture manufacturers who did not pay by piecework had gone out of business. His company had branches in Australia and New Zealand that built the same furniture, but did not pay on piecework. The upholsterers in Britain produced more than three times as many units as those in Australia. Their sewing machinists, spurred on by the piecework rate, also produced more than those in the Pacific, but the difference was smaller, about 50 percent more rather than over 200 percent more. The female sewing machinists could go only so fast given the capacities of their machines, whereas physical capacity and stamina set the only limit for male upholsterers.

In a well-functioning economy, Alstons furniture company will thrive if it keeps costs low and makes a good product. But in today's United Kingdom, it might not thrive even if it is efficient. Because it was unlucky and drew the wrong expert, it is now legally required to pay its sewing machinists more than its competitors are required to pay theirs.

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Criticism of the System

In the United Kingdom, complaints about the equal-value system are everywhere. Though the tribunal system was meant to provide a quick, cheap, and informal process, it has achieved none of these. The experts were meant to report in 42 days, but no expert has ever met this goal. The average report has taken 12 months to complete. The average time from appointment of an expert to tribunal decisions on the equal-value issue has been around 17 1/2 months. Legal representation and appeals are much more common than was anticipated. In my

interviews, the tribunal system was described as "remarkably time consuming," "too complicated," "legalistic," and "a mess."

The drawn-out legal process means costs to both business and complainants (or the unions which often represent them). Both sides are also adversely affected by the effects on morale of the arguments required in an adversarial system. The company's representatives try to belittle the responsibility, effort, and other characteristics of the complainant's job, while the complainant's representatives in turn run down the importance of the male comparator's job. Aside from the costs to firms and employees, there are the costs of the tribunals themselves and of the appeals to settle the numerous legal questions. The costs to all parties of cases that go all the way to the House of Lords can exceed £100,000 ($155,000).

Despite the dissatisfaction with results to date, there is no consensus about directions for reform. The most extensively discussed radical reform would do away with the role of the independent expert. This reform has been supported by Justice, an all-party legal reform group, as well as by the Confederation of British Industry and the Employment Appeal Tribunal. The Confederation of British Industry believes that doing away with a mandatory independent expert would rid the tribunals of an "unacceptable degree of arbitrariness," namely the experts' "highly personal judgment(s)" on a handful of jobs compared without reference to all others in the job hierarchy. The group Justice would give the money saved by eliminating the independent expert to the EOC to help support other applicants. As all three groups see it, the parties could still call their own experts, and the tribunals themselves would take over the role of determining if the jobs were of equal value.

Many supporters of equal value are critical of the proposed reform, however. They fear that many complainants would not be able to afford their own expert witnesses. They also wonder if, without independent expert assistance, the tribunals would know enough about what the people actually did on the job. In a revealing comment, the EOC says that without the "independent" expert to give it guidance, the tribunal "may face a difficult choice in the evidence of two experts both of whom appear to be correct."

Conclusion

The EOC sees that job evaluation is inevitably subjective, and that in the absence of the authority that comes from holding a certain office, all the experts may seem equally right. Private sector job evaluation in the United States (and in the United Kingdom before equal value) usually aims to achieve results corresponding to market wage outcomes; thus, there is a standard for a good job evaluation. Comparable-worth job evaluation has no such standard, and thus any decentralized system seems certain to produce the sort of arbitrary and inconsistent results that have occurred in the United Kingdom.

In time such results seem bound to lead to calls for more centralization, since it is neither fair nor efficient for a firm's costs and thus its success to be so dependent on whether it or its competitor happens to draw the expert who thinks some female workers must be paid much more than in the recent past. A more centralized system could clearly eliminate some of the arbitrariness in the U.K. system. It could, for example, authoritatively say whether "close is good enough," and it could standardize the job evaluation factors used and how they are weighted. But the furniture case shows that this would not be enough. All three experts evaluated the sewing and upholstery jobs according to the responsibility and physical effort job factors, but they could not agree on how the jobs should be scored. The inherent subjectivity of job evaluation means that arbitrary and inconsistent determinations are inevitable in both centralized and decentralized comparable worth systems.

Selected Readings

Steven E. Rhoads. *Incomparable Worth: Pay Equity Meets the Market*. New York: Cambridge University Press, 1993.

"Equal Value Update." *Equal Opportunities Review* (U.K.). No. 51, September/October 1993.

Victor Fuchs. *Women's Quest for Economic Equality*. Cambridge: Harvard University Press, 1988.

"The Comparable Worth Controversy." *New Perspectives*. (A publication of the U.S. Commission of Civil Rights). Vol. 17, no. 2, Spring 1985.