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# The Gender Wage Gap in Norway and the Principle of Equal Pay for Work of Equal Value

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# Summary

In Norway, a gender wage gap persists despite its reputation for being one of the most gender equal countries in the world. Over the last 20 years women's education levels have been on the rise and today the majority of students in Norwegian institutions of higher education are women. Yet, the gender wage gap has not significantly shrunk in this period. Still today working women are paid 14% less than working men. Unequal pay between women and men remains a persistent challenge for Norway if it is to fulfil its optimistic reputation. Achieving equal pay between women and men and eradicating pay discrimination is inextricably linked with the pursuit of gender equality in society at large.

The principle of equal pay for work of equal value demands that men and women receive equal pay for the same work or for work of equal value. This principle was first laid out by the International Labour Organisation in its Equal Remuneration Convention, No. 100 of 1951. The principle of equal pay for work of equal value is concerned with the eradication of pay discrimination based on sex.

This thesis explores what the principle for equal pay for work of equal value requires and how it addresses the gender wage gap in Norway. It further examines the implementation of the principle of equal pay for work of equal value through two key national mechanisms; The Gender Equality Act's complaints mechanism and the system of collective bargaining. Based on this a recommendation is presented aimed at increasing cooperation between these two mechanisms in the effort to strengthen the implementation of the principle of equal pay for work of equal value, in the system of collective bargaining. Overall, the aim of this thesis is to add to existing knowledge and recommendations on how to further narrow the gender wage gap in Norway.

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# 1 INTRODUCTION

## 1.1. Background and context

*"I do not demand equal pay for any women save those who do equal work in value. Scorn to be coddled by your employers; make them understand that you are in their service as workers, not as women." (Susan B. Anthony)<sup>1</sup>*

When men and women perform work that is the same or of equal value they have a right to receive equal pay. Equal pay for work of equal value is a recognized human right to which all men and women are entitled.

The fight for equality and non-discrimination forms one of the major struggles of human rights law and international labour law. Equality is considered a necessary component of social justice.<sup>2</sup> Equality and non-discrimination constitutes the main subject of widely ratified human rights treaties such as the Convention on the Elimination of all forms of Discrimination against Women<sup>3</sup> and forms an inseparable component of most human rights treaties as well as national constitutions.<sup>4</sup> The elimination of discrimination in respect of employment and occupation forms part of the fundamental principles and rights at work.<sup>5</sup>

The right to equal pay for work of equal value, also referred to as the equal pay principle, is a concept that has been acknowledged by the International Labour Organisation (ILO) since its conception in 1919. The principle is set out in the opening lines of the ILO Constitution, which recognises the principle of equal pay for work of equal value as a fundamental element of social justice.<sup>6</sup> The International Labour Organisation's Equal Remuneration Convention, 1951 (No.100)<sup>7</sup> was the first international instrument promoting the principle of equal pay for work of equal value. This Convention and its corresponding

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<sup>1</sup> Susan B Anthony lived from 1820-1906, she was an American publisher, civil rights activist, editor, women's rights activist and journalist. Quote and information taken from *The Biography.com website*: <<http://www.biography.com/people/susan-b-anthony-194905>> accessed 18 May 2015

<sup>2</sup> Ilmar Tammelo, *Justice and Doubt: An Essay on the Fundamentals of Justice* (Springer-Verlag Wien GmbH 1959) p. 333.

<sup>3</sup> Convention on the Elimination of All forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 December 1981) 1249 UNTS 13

<sup>4</sup> See, for example, art 3 of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

<sup>5</sup> ILO, *Declaration on fundamental principles and rights at work*, 18 June 1998

<sup>6</sup> *Constitution of the International Labour Organisation*, 1 April 1919

<sup>7</sup> ILO, *Equal Remuneration Convention (C100)* 29 June 1951

Recommendation, 1951 (No 90)<sup>8</sup> has provided a basis from which the principle of equal pay in international, regional and domestic law has developed. The principle is also reflected in Norway's Gender Equality Act first adopted in 1978, which applies to all areas of social activities.

The principle of equal pay for work of equal value is concerned with the elimination of pay discrimination. This principle needs to be implemented if equality is to be promoted and pay discrimination is to be addressed effectively.<sup>9</sup> This is a premise on which this thesis is based.

Despite advancements made towards gender equality and equal opportunities for all, especially in the last century, unequal pay between men and women and gender discrimination is a persistent problem in all countries. When women first entered the labour market, paying women lower wages than men was, in many countries, a systematic and intentional policy. This reflected the perception that men were the primary "breadwinners" while women were only "secondary earners", as their role was primarily within the home. Even though this intentionally discriminatory policy is almost completely eradicated today it has left traces on the labour market perpetuating a chronic unequal pay disease. Many jobs are still dominated by women and considered of "female character". The socialisation process leads many women and men to make stereotypical choices about their education, careers and family life. Due to historical and stereotypical attitudes towards the role of women, there is a downward pressure on wages in female dominated professions. As a result, women's average pay continues to be lower than men's in all countries and for all levels of education, age groups and occupations.<sup>10</sup>

In this way the gender wage gap touches on two main problems that call for action. The first is the difference in pay between men and women that is related to the way the labour market is structured. The second is the difference in pay between men and women that is contrary to the principle of equal pay for work of equal value, i.e. pay discrimination. As we shall see, these two problems are very interrelated. Gender pay differences that pertain to certain structures in the labour market can also be considered discriminatory and contrary to the principle of equal pay for work of equal value. An example is pay structures that systematically undermine female dominated work.

Nonetheless, there is a distinction to be made between these two problems and what should be understood is that the fight for equal pay requires two main sets of action. Firstly, action that addresses pay discrimination, i.e. correcting wage differences that are contrary to the principle of equal pay. Secondly, actions

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<sup>8</sup> ILO, *Equal Remuneration Recommendation (C90)* 29 June 1951

<sup>9</sup> Martin Oelz, Shauna Olney, Manuela Tomei, *Equal Pay: An introductory guide* (ILO 2013)

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<sup>10</sup> *ibid.* p.3

directed at structural and sociological change, such as changing stereotypical attitudes towards gender roles, realising equal opportunities for men and women in education and at work and also achieving gender balance in relation to family responsibilities.<sup>11</sup> Even though these two aspects are closely linked and interrelate, it is the first problem this thesis primarily seeks to address in the context of Norway's gender wage gap. i.e. pay discrimination contrary to the principle of equal pay for work of equal value.

Even in Norway, a country considered to be one of the most gender equal in the world, unequal pay remains a persistent problem. Although, the gender wage gap is considerably lower in Norway than in many European countries, women still earn about 14% less than men per hour. This is a significant gap considering women have made great leaps in educational investment. For the last quarter of a century women have made up the majority of students at colleges and universities. The gender wage gap in Norway is structural, in that it follows gender segregation in the labour market but as we shall see some wage differences between men and women can be considered discriminatory and contrary to the principle of equal pay for work of equal value.

Despite the principle of equal pay for work of equal value being incorporated into national legislation a gender wage gap persists and pay discrimination has not been eradicated. Examining the implementation of the principle of equal pay for work of equal value in the Norwegian context can therefore lead to useful knowledge on how to better apply the principle and ultimately narrow the gender wage gap.

An Equal Pay Commission, appointed by the Norwegian cabinet in 2006, published a comprehensive study on the equal pay problem in Norway. The study was published in 2008 with the title *Gender and Pay: Facts, analyses and measures to promote equal pay*.<sup>12</sup> It provides a very holistic overview of the equal pay problem in Norway and also recommends some measures to reduce pay differences. It is hoped that this thesis amounts to an additional contribution to and an expansion of the research undertaken by the Equal Pay Commission.

## 1.2. Purpose of thesis

The purpose of this thesis is to explore what the principle for equal pay for work of equal value requires and how it addresses the gender wage gap in

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<sup>11</sup> Stortingsmelding nr 6 (2010-2011) *Likestilling for Likelønn*. Oslo: Barne- og Likestillings- og Inkluderingsdepartementet

<sup>12</sup> Likelønnskommisjonen, NOU 2008:6 *Kjønn og Lønn* (referred to in this thesis as the *Gender and Pay* report)



Norway. It further purports to examine the implementation of the principle of equal pay for work of equal value through two key national mechanisms; The Gender Equality Act's complaints mechanism and the system of collective bargaining.

Based on this research a recommendation is presented, which is aimed at increasing cooperation between these two mechanisms in the effort to strengthen the implementation of the equal pay principle in the collective bargaining system.

Overall, the aim of the thesis is to add to existing knowledge and recommendations on how to further narrow the gender wage gap in Norway.

### **1.3. Research questions**

To this end, the thesis seeks to answer the following key research questions: What does the principle of equal pay for work of equal value require and how does it address the gender wage gap in Norway? How well is the principle of equal pay for work of equal value implemented by the complaints mechanism and within the system of collective bargaining? How can implementation of the principle of equal pay for work of equal value in Norway be improved?

### **1.4. Delimitations**

As stated above, pay differences between women and men can be seen as both a structural problem and a pay discrimination problem. Addressing these differences thus calls for a multifaceted approach. This thesis is primarily concerned with addressing pay differences between men and women that can be explained by pay discrimination contrary to the principle of equal pay for work of equal value, rather than changing the structures of the labour market as such. With this said, these are very interrelated problems. Therefore, the discussion at times touches on this relationship and thereby acknowledges that the fight for equal pay also requires efforts that go beyond the implementation of the principle of equal pay for work of equal value.

The thesis further delimits what aspects of the gender wage gap it seeks to address. Some pay differences fall outside the scope of pay discrimination and can be described more firmly as structural problems. For example, more men than women are found in management positions and women are concentrated lower down in the employment hierarchy. This aspect of the gender wage gap is more concerned with social attitudes, the choices of men and women as well as

opportunity equality rather than pay discrimination as such. This issue therefore falls outside the focus of this thesis. The thesis identifies the concentration of women in low paid professions as a focus point and how the principle of equal pay for work of equal value relates to this problem. As the focus is on pay discrimination contrary to the principle of equal pay for work of equal value, the thesis does not delve into any in-depth discussion of why women are concentrated in low paid professions and more generally why the labour market in Norway is gender segregated. It may briefly touch upon such questions but it accepts the current situation of the labour market as a point of departure and the focus is on what can be done with the current wage differences in light of the principle of equal pay for work of equal value.

The thesis does not deal with every institutional mechanism that has a bearing on the implementation of the principle of equal pay for work of equal value in Norway. This thesis focuses primarily on the implementation of the equal pay principle by two key mechanisms, namely the Gender Equality Act's complaints mechanism and the system of collective bargaining. The complaints mechanism, made up by the Equality and anti-discrimination Ombud and the Equality and anti-discrimination Tribunal, handles individual equal pay complaints at the national level and is the central mechanism in developing legal practice in relation to equal pay at the national level. In Norway wages are determined primarily through collective bargaining agreements between workers and employers. The focus will be on these two mechanisms because they are of great significance to the practical implementation of equal pay for work of equal value in Norway. With this said, other relevant mechanisms, especially certain government initiatives, are discussed when related to the activities of these two key mechanisms.

## **1.5. Method and Structure**

As already stated this thesis is premised on the idea that the principle of equal pay for work of equal value needs to be implemented if equality is to be promoted and pay discrimination is to be addressed effectively. The principle of equal pay for work of equal value thus forms a norm from which my argumentation follows. The thesis is primarily concerned with what the current state of the law is, as well as how it is implemented, and uses mainly legal sources to this end. This thesis therefore largely employs a legal dogmatic method, although elements of sociological as well as political perspectives also feature in the discussion.

Chapter One provides an account of the gender wage gap in Norway, which is primarily based on statistical evidence. It provides an explanation for why there is a gender wage gap in Norway and discusses the causes.

Chapter Two gives an overview of the legal requirement of the equal pay principle as enshrined in International Labour Law and European Union Law. For International Labour Law the relevant convention, recommendation and statements by the ILO's Committee of Experts on the Application of Conventions and Recommendations are examined. The ILO Equal Pay Guide has also been consulted. For European Union Law the relevant Directive as well as case law from the European Court of Justice are the main materials utilised. How the principle of equal pay for work of equal value is reflected in Norwegian domestic law is explained along the way with reference to the relevant national legislation and their preparatory works. This chapter also serves to highlight how the principle of equal pay for work of equal value addresses the gender wage gap in Norway.

Chapter Three evaluates the implementation of the equal pay principle by the Gender Equality Act's complaints mechanism. To this end the case law of the Equality and anti-discrimination Ombud and the Equality and anti-discrimination Tribunal are examined.

Chapter Four discusses the implementation of the equal pay principle within the process of collective bargaining. A combination of different materials is used in this section. Main sources used are government reports, which are relevant to the work of the social partners in wage determination and equality issues. Supplementary sources include collective bargaining agreements and a statistical study on the social partner's influence on the gender wage gap.

Finally, Chapter Five draws out some central conclusions and a recommendation is discussed on how to strengthen the implementation of equal pay principle in the system of collective bargaining.

## 2 The Gender Wage Gap in Norway

### 2.1. Introductory remarks

The gender wage gap is well documented in Norway and the Equal Pay Commission undertook a particularly comprehensive study on the explanations for the gender wage gap using statistics from the national statistics agency in their *Gender and Pay* report. The explanations for the gender wage gap are multifaceted and rooted in a complex set of sociological and historical causes. The purpose of this chapter is not to discuss all the various explanations and their causes in depth, but rather to provide a general overview of what the gender wage gap is and why there is a gender wage gap in Norway. In Norway it is not commonly the case that men and women with the same job and who work for the same employer receive unequal pay. Rather, the gender wage gap is structural and follows gender segregation in the labour market. As we shall see women and men are concentrated in very different parts of the labour market with consequences for the gender wage gap. Women are concentrated in relatively low paid professions, industries and sectors.

### 2.2. Male and female participation in the labour market

In Norway female labour market participation (women in paid employment) is high compared to other countries. Female labour market participation has been increasing since the 1970s when only about 45% of women were employed compared to 78% of men.<sup>13</sup> In 2014 the difference was significantly smaller, 66% of women were employed in comparison to 70% of men.<sup>14</sup> The increase in female labour market participation has occurred in the context of the increase in women pursuing higher education as well as political developments, giving more opportunities to women with family responsibilities.<sup>15</sup> However, a gap still persists meaning that more men are in paid employment than women.

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<sup>13</sup> NOU 2008:6 *Kjønn og Lønn*, p.39

<sup>14</sup> Statistisk Sentralbyrå (2015) *Arbeidskraftundersøkelsen, 4. kvartal 2014*. Taken from <<http://ssb.no/arbeid-og-lonn/statistikker/aku>> accessed 8 April 2015

<sup>15</sup> Erling Barth and Harald Dale-Olsen, "Lønnsforskjellene mellom kvinner og menn i et 30 års perspektiv" in publication: *Søkelys på Arbeidsmarkedet* (Institutt for Samfunnsforskning 2004) p.71

Furthermore, women in Norway to a much larger extent than men, work part-time instead of full hours. In 2014, 38% of employed women were part-time workers, while only 14% of employed men.<sup>16</sup> This must be seen in the context of traditional expectations of women in relation to family responsibilities. While extensive part-time employment can be a big contributor to high female labour market participation, the fact that there are such a disproportionate number of women in part-time employment suggests that there is still a social expectation that the woman is the primary care person in the family while the man is the main provider.<sup>17</sup>

The Norwegian labour market is also very gender segregated. According to the OECD the Norwegian labour market is one of the most gender segregated in the world.<sup>18</sup> Segregation occurs along both vertical and horizontal axes. By vertical segregation it is meant that women and men are placed in different positions in the employment hierarchy. Far more men than women are found in management positions. By horizontal segregation it is meant that women and men are concentrated in different professions, industries and sectors. One main separation is that far more women work in the public sector, while men dominate in the private sector.<sup>19</sup>

The difference between men and women in the degree and areas of labour market participation is the result of a mixture of personal preferences, gender role expectations, the organisation of the labour market and economic needs. These are structures with historical causes that have, to a certain extent, managed to persevere despite huge advancements in gender equality more generally. The wage gap between men and women in Norway can be explained by some of these structures.

## **2.3. The gender wage gap**

### **2.3.1. The gross gender wage gap**

The term “gender wage gap” used throughout this thesis, means the difference between men and women’s wages adjusted for working time. It is the hourly wage of women and men that is compared and not the overall wage income of men and women. It is this gender wage gap that is of interest in this paper. When we compare the wages adjusted for working time of *all* employed men

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<sup>16</sup> *ibid.*

<sup>17</sup> NOU 2008:6 *Kjønn og Lønn* p.47

<sup>18</sup> *ibid.* p.140

<sup>19</sup> *ibid.* p.141-142

and women, women in Norway earn about 86% of men's wages. Women thus earn 14% less than men on an hourly basis.<sup>20</sup> This number constitutes the gross gender wage gap.

Between the early 1970s until the 1980s the gender wage gap was significantly reduced. This must be seen in the context of an increase in the level of education for women and an expansion of the public sector creating many new jobs for women. After the mid 1980s the gender wage gap has stood more or less still fluctuating at around 15%,<sup>21</sup> even though female education levels have increased in this period.<sup>22</sup> How can this persistent gap be explained?

In a country known for its advancement in the field of gender equality, it might easily be assumed that this gender wage gap of 14% is either statistically insignificant or explainable through completely objective factors that ought to be left alone. On a closer look, however, a more ominous picture emerges, which from the perspective of pay equality is problematic.

### 2.3.2. Level of education

From the 80s female education levels have increased without this having had any significant effect on the gender wage gap. Indeed, in Norway today more women than men have education of more than four years beyond high school,<sup>23</sup> yet women earn 14% less than men. When comparing only women and men with the same level of education a gender wage gap still persists. The gender gap is actually the widest among the most highly educated men and women. Statistics from 2005 showed that in groups with up to 4 years higher education the gender wage gap was about 20%, while in groups with more than 4 years higher education it was about 18%.<sup>24</sup> Therefore, we cannot explain the gender wage gap through a difference between men and women in education levels. Women are receiving less remuneration in return for investment in personal resources.

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<sup>20</sup> Statistisk Sentralbyrå (2015) *Lønn, alle ansatte, 2014*. Taken from <<http://ssb.no/arbeid-og-lonn/statistikker/lonnansatt>> accessed 8 April 2015

<sup>21</sup> see NOU 2008:6 *Kjønn og Lønn*, p.52, table 4.2

<sup>22</sup> Erling Barth and Harald Dale-Olsen, "Lønnsforskjellene mellom kvinner og menn i et 30 års perspektiv", in publication: *Søkelys på Arbeidsmarkedet* (Institutt for Samfunnsforskning 2004) p.71

<sup>23</sup> NOU 2008:6 *Kjønn og Lønn* p.58 table 4.7

<sup>24</sup> *ibid.*

### **2.3.3. Generational perspective**

Women entered the labour market later than men and it was only about 20 years ago that they started participating, on par with men, in higher education. As such, women and men in the labour force today represent two different generations. It is therefore not surprising that the gender wage gap is wider between men and women of older age. For male and female workers below 29 years old the gender wage gap is 6% compared to 18% for workers between 55 and 60 years old.<sup>25</sup>

If the generational perspective accounts for this difference it is positive from an equal pay perspective because it suggests that young men and women workers in a more gender equal society are phasing out inequalities in pay with time. However, it is doubtful whether the generational perspective provides a full explanation. The Equal Pay Commission suggests in its *Gender and Pay* report, using a statistical study on the wage development for women and men,<sup>26</sup> that the main reason for the difference is not that the labour force is made up of two different generations, rather it is the case that salaries increase at a higher rate for men than for women throughout their lifecycle regardless of any generational effect. This suggests that women have a weaker career development than men. It is not clear from this what the reasons for this are, suffice to say that the generational perspective does not provide a satisfactory explanation for why there is a gender wage gap in Norway.

### **2.3.4. The gender wage gap and gender segregation in the labour market**

The gender wage gap cannot be explained by women and men having different levels of education, nor does the generational perspective offer a satisfactory explanation. In Norway the gender wage gap follows gender segregation in the labour market. That the Norwegian labour market is gender segregated means that women and men work in different positions, professions, industries and sectors. While women mostly dominate in the public sector and in care professions, men dominate in the private sector and in technical professions. Gender segregation in the labour market has significant consequences for the wage spread between women and men and it is the main explanation for the gender wage gap today.

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<sup>25</sup> NOU 2008:6 *Kjønn og Lønn*, p.61

<sup>26</sup> Erling Barth and Pål Schøne, "Undersøkelser av lønnsforskjeller mellom kvinner og menn" (Institutt for Samfunnsforskning 2006)

### *Vertical segregation*

By vertical segregation it is meant that women and men in Norway are placed differently in the employment hierarchy. More men than women are found higher up in the employment hierarchy, in leadership or management positions. This has obvious consequences for the gender wage gap. Although women make up almost half of the work force, only one out of three leaders are women. In the private sector 74% of those in managerial positions are men.<sup>27</sup> An in-depth discussion on the causes of this unequal distribution goes beyond the purpose of this paper, suffice to say that personal preference, the socialisation process and expectations relating to family responsibilities are likely to be significant contributing causes.<sup>28</sup>

### *Horizontal segregation*

By horizontal segregation is meant that women and men in Norway work in different professions, industries and sectors. Women make up around 70% of employees in the public sector while men, about 68%, dominate in the private sector. Local government<sup>29</sup> forms part of the public sector and has a particularly heavy concentration of women, about 78%.<sup>30</sup> In local government we find heavily female dominated professions, especially the care professions.

Average wage in the private sector is higher than in the public sector and with a wider wage structure. Thus highly educated workers in the private sector receive more in remuneration for their education than in the public sector where the wage structure is more compressed. This helps to explain why the gender wage gap is especially wide among women and men with higher education; most of the highly educated women work in the public sector.

Still, even within each sector, a gender wage gap persists. The gap was at about 16% in the private sector and about 12% in the public sector in 2006.<sup>31</sup> Thus the public-private divide cannot explain the whole gender wage gap. Even within the sectors, men and women are found in different positions and are concentrated in different industries and professions.

Women are concentrated in industries such as health care, social work and teaching, traditionally lower down on the pay scale, while men dominate in construction, oil, agriculture and metals, traditionally higher up on the pay scale. The most female dominated industry is the health authorities with 72%

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<sup>27</sup> NOU 2008:6 *Kjønn og Lønn*, p.71

<sup>28</sup> *ibid.* p.143-145

<sup>29</sup> When reference is made to local government in Norway's context what is being referred to are the municipalities

<sup>30</sup> NOU 2008:6 *Kjønn og Lønn*, p.41

<sup>31</sup> *ibid.* p.71, table. 4.16



women and the most male dominated industry is construction with 95% men.<sup>32</sup> Professions follow the same pattern. For example, among those with higher education women dominate among nurses, primary and preschool teachers while men dominate among engineers. Overall industries and professions in which there is a high concentration of women are remunerated less than industries and professions in which there is a high concentration of men. A study published by the Institute for Social Research in Norway found that there is a negative correlation between the concentration of women in a profession and the wage level of that profession.<sup>33</sup> The study concerned women and men with the same level of education and potential work experience and showed that a profession with 10% more women than another profession has 1,7% lower wage.<sup>34</sup> On the whole, female dominated work is remunerated lower. It is this aspect of the gender wage gap that will be in focus in this paper.

## 2.4. Concluding remarks

In Norway it is not normally the case that men and women with the same job and working for the same employer receive unequal pay. Yet, working women earn 14% less than working men. This wage difference cannot be explained by differences in levels of education between men and women and the generational perspective does not offer a satisfactory explanation either. The gender wage gap in Norway largely follows gender segregation in the labour market, both vertical and horizontal. Women and men in what has been proclaimed to be the most gender equal country in the world are still to a very large extent making traditional choices about their education and careers.

Of course the equal pay challenge involves working with changing these attitudes and structures so that the labour market can eventually become less gender segregated, however that is not the focus of this thesis. Rather the author has chosen to focus on the other major equal pay challenge; namely correcting existing gender wage differences that are unacceptable in light of the principle of equal pay for work of equal value. In other words, the focus is on wage discrimination, especially in the context of horizontal gender segregation in the labour market. The fact that women are concentrated in low paid professions, industries and sectors can, as we shall see, constitute wage discrimination contrary to the principle of equal pay for work of equal value. In order to understand the relevance of the principle of equal pay for work of equal value to horizontal gender segregation in the labour market, it is necessary to

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<sup>32</sup> *ibid.* p.41

<sup>33</sup> Erling Barth and Ragnhild Steen Jensen, "Arbeidsvurdering for likelønn: Er det noen sammenheng?" In publication: *Søkelys på arbeidsmarkedet* (Institutt for Samfunnsforskning 2005) p.141

<sup>34</sup> *ibid.*

understand what this principle requires. The following chapter provides an overview of the principle of equal pay for work of equal value.

# 3 The Principle of Equal Pay for work of equal value in International, Regional and Domestic Law

## 3.1. Introductory remarks

The principle of equal pay for men and women for work of equal value was set out in the Equal Remuneration Convention (No. 100),<sup>35</sup> adopted by the ILO in 1951. This convention as well as its corresponding Recommendation, 1951 (No. 90)<sup>36</sup> has provided a basis from which equal pay in international, regional and domestic law has developed.

The principle of equal pay for men and women for work of equal value can be found in other important international and regional conventions. It appears in article 11(1)(d) of the Convention on the Elimination of All Forms of Discrimination against Women (1981)<sup>37</sup> and article 7(a) of the International Covenant on Economic, Social and Cultural Rights (1966).<sup>38</sup> The principle of equality and the principle of equal pay are fundamental to the European Union. The principle of equal pay for work of equal value is enshrined in article 157(3) of the Lisbon Treaty<sup>39</sup> and clarified in equal treatment directive 2006/54/EC.<sup>40</sup>

Norway is bound by all the abovementioned instruments but for the purpose of this chapter, it is the principle of equal pay for work of equal value as enshrined in International Labour Law and EU Law, which will be elaborated on. How Norwegian domestic law corresponds to these obligations will be presented along the way. The purpose of this chapter is to give an overview of what the principle of equal pay for work of equal value requires. It should also become clearer in what way this principle is relevant to addressing the gender wage gap in Norway, which follows horizontal gender segregation in the labour market. The picture that emerges is that persisting wage differences in Norway that pertain to the concentration of women in low paid professions, industries and sectors can in some circumstances be contrary to the principle of equal pay.

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<sup>35</sup> ILO, *Equal Remuneration Convention (C100)* 29 June 1951

<sup>36</sup> ILO, *Equal Remuneration Recommendation (C90)* 29 June 1951

<sup>37</sup> CEDAW art 11(1)(d)

<sup>38</sup> *International Covenant on Economic, Social and Cultural Rights*, art 7(a)

<sup>39</sup> *Consolidated version of the Treaty on the Functioning of the European Union* (2012) OJ C326, art 157(3) (ex art 141 EC)

<sup>40</sup> *Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*, OJ L204/23 (Directive 2006/54/EC)

## 3.2. General obligations

### 3.2.1. International Labour Law and EU Law

Norway ratified ILO's Convention 100 in 1959<sup>41</sup> and is thereby bound by its equal pay standards. Norway is bound by the EU standards on equal pay as a member of the European Economic Area (EEA). What obligations this generates for Norway will be mapped out below with reference to the ILO Convention and Recommendation on equal remuneration as well as EU's Equal Treatment Directive.

Both legal texts promote the principle of equal pay for work of equal value and defines this as remuneration without discrimination based on sex. Convention No. 100 requires member states to "promote" and "ensure" the application "to all workers of the principle of equal remuneration for men and women workers for work of equal value".<sup>42</sup> It allows for flexibility in the manner of promoting and ensuring application<sup>43</sup> and, as stated in Recommendation 90, the principle of equal pay for work of equal value is to be "promoted or ensured by means appropriate to the methods in operation for determining rates of remuneration."<sup>44</sup>

Recommendation 90 elaborates on when member states are obligated to "ensure" the application of the principle. The duty to "ensure" the application of the Convention's principles applies vis-à-vis workers in occupations in which wage determination is in direct control by the government or where it is subject to statutory regulation or public control.<sup>45</sup> The Convention also calls for provision to be made by legal enactment for the general application of the principle of equal pay for work of equal value. The Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) have stated that where national legislation provides for this, the state is in a legal position to enforce the principle and thus responsible for *ensuring* its application to *all* workers under article 2(1) of the convention.<sup>46</sup>

It is important to stress that equal pay for work of equal value is not a gender equality goal that exists in isolation. Wage disparities between women and men

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<sup>41</sup> NORMLEX, Ratifications for Norway, accessed 11 March 2015

<sup>42</sup> C100 art 1

<sup>43</sup> C100 art 2

<sup>44</sup> Recommendation 90 Preamble

<sup>45</sup> Recommendation 90 art 1, 2

<sup>46</sup> Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the Reports on the Equal Remuneration Convention (No.100) and Recommendation (No.90)*, 1951, International Labour Conference, 72<sup>nd</sup> Session, 1986, para. 28 (emphasis added)

exist in the wider context of historical and structural discrimination of women in the labour market and in society more generally. As such, Recommendation 90 places the principle of equal pay for work of equal value within this wider context. It calls for action to be taken to raise the productive efficiency of women workers through equal treatment and opportunities at work more generally. This includes equality in vocational training opportunities and access to employment as well as the provision of welfare and social services that meet the needs of women workers.<sup>47</sup>

Directive 2006/54/EC also deals with the equal treatment and opportunities of men and women in matters of employment and occupation more generally. It contains provisions not just on equal pay, but on “Equal treatment in occupational social security schemes”<sup>48</sup> as well as “Equal treatment as regards access to employment, vocational training and promotion and working conditions.”<sup>49</sup> Other complimentary directives on the topic of gender equality include Directive 92/85<sup>50</sup> regarding pregnant workers and workers who have recently given birth or are breastfeeding as well as Directive 2010/18<sup>51</sup> on parental leave, which lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents.

Although this paper focuses on the principle of equal pay for work of equal value, i.e. on eliminating pay discrimination, in order to address the gender wage gap, efforts must also be made to tackle discrimination of women in the labour market more generally. Eliminating existing pay discrimination is one element of the fight for pay equality.

### **3.2.2. Domestic law**

In Norway provision for the general application of the equal pay principle is made through the Gender Equality Act, which first entered into force in 1979.<sup>52</sup> It applies to all areas of social activity. The state is, as such, responsible for

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<sup>47</sup> *Convention No. 111 concerning Discrimination in Respect of Employment and Occupation* was adopted by the ILO on 25 June 1958 and entered into force 15 June 1960. It is one of ILO’s fundamental Conventions and promotes equal opportunity and treatment in respect of employment and occupation more generally. It prohibits discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin. It thereby addresses wider aspects of discrimination and must be seen in complement to Convention No. 100 on equal pay.

<sup>48</sup> Directive 2006/54/EC Chapter 2

<sup>49</sup> Directive 2006/54/EC Chapter 3

<sup>50</sup> Directive 92/85/EEC

<sup>51</sup> Directive 2010/18/EU

<sup>52</sup> *Likestillingsloven 2013*, note: the act has, since first coming into force in 1979, been amended on several occasions. Reference to the act in this paper is the act in its latest form from 2013, which includes all amendments that have been made in the past.

ensuring the application of the equal pay principle to *all* workers. The purpose of the Gender Equality Act is to promote gender equality and non-discrimination, with particular emphasis on bettering the position of women in society.<sup>53</sup> It contains a special provision on the right to equal pay for work of equal value.<sup>54</sup>

The Gender Equality Act also promotes equal treatment of men and women in the context of employment and occupation more generally. In addition to §21 on equal pay, the act contains provisions on equal treatment in relation to access to employment, vocational training and promotion<sup>55</sup> and gives special protections to worker's that take parental leave.<sup>56</sup>

Public authorities, workers and employers organisations as well as all employers are obligated to actively, targeted and systematically work towards promoting the principles of the act in their respective activities.<sup>57</sup> Thus, all institutions, which are of significance for the determination of wages in Norway, are bound by the equal pay obligations arising from the Gender Equality Act. They are not only under a negative obligation not to discriminate, but also under a positive obligation to actively implement measures in promotion of the principles of the act.

The enforcement of this act is provided for by the The Equality and Anti-discrimination Ombud and The Equality and Anti-discrimination Tribunal. I return to their role and practice in a later chapter.

### **3.3. The principle of equal pay for work of equal value**

#### **3.3.1. International Labour Law and EU Law**

What equal pay for work of equal value actually means is not specified in the wording of either Convention 100 or directive 2006/54/EC. The wording of the legal texts in combination with statements by ILO's Committee of Experts as well as jurisprudence from the European Court of Justice has been reviewed in this section in order to provide a general interpretation of the principle of equal pay for work of equal value.

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<sup>53</sup> *Ibid.* §1

<sup>54</sup> *ibid.* §21

<sup>55</sup> *ibid.* §17

<sup>56</sup> *ibid.* §18

<sup>57</sup> *ibid.* §12 and §14

The term remuneration is clearly defined and is of broad scope and covers, in both Convention 100 and Directive 2006/54/EC, “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.”<sup>58</sup>

Equal pay for work of equal value means rates of remuneration established without discrimination based on sex.<sup>59</sup> Thus a wage difference is contrary to the principle of equal pay for work of equal value if the wage is set in such a way that it is discriminatory on grounds of sex. This implies of course, that where there are objective reasons for a relative wage difference that is not discriminatory, this is not contrary to the principle of equal pay for work of equal value.

### **3.3.2. Domestic law**

The starting point for the principle of equal pay for work of equal value is the same in Norwegian domestic law. §21(1) of the Gender Equality Act states that “women and men shall have equal pay for the same work or for work of equal value and that this means remuneration is to be established in the same way for men and women, without regard to sex.”(Author’s translation).<sup>60</sup>

Remuneration is defined as “all ordinary remuneration for work plus any additional payments or advantages or other emoluments granted by the employer”(Author’s translation).<sup>61</sup>

## **3.4. Work of equal value and objective job evaluation**

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<sup>58</sup> C100 art 1(a)

<sup>59</sup> C100 art 1(b) and directive 2006/54/EC art 4

<sup>60</sup> Likestillingsloven 2013, §21(1): “Kvinner og menn i samme virksomhet skal ha lik lønn for samme arbeid eller arbeid av like Verdi. Lønnen skal fastsettes på samme måte for kvinner og men uten hensyn til kjønn.” (original text from legislation)

<sup>61</sup> Likestillingsloven 2013, §21(4): “Med lønn menes det alminnelige arbeidsvederlag samt alle andre tillegg eller fordeler eller andre goder som ytes av arbeidsgiveren.” (original text from legislation)

### 3.4.1. International Labour Law and EU Law

The objective evaluation of jobs forms a component of the evaluation of equal pay for work of equal value. The purpose of this exercise is to objectively determine the relative value of different jobs using a method that is free from gender bias. It is meant to give an indication of how different jobs should be remunerated.

What does objective evaluation of jobs mean? As a point of departure, some jobs that are completely different in content cannot be considered to be of equal value and are thus not required to receive equal pay. A doctor will be paid more than a hospital cleaning staff. Without making any judgment about the societal usefulness of these two jobs, their content contains some obvious differences such as, educational requirements, level of responsibility and working conditions, which warrants different pay.

However, some jobs are considered either to be the same or to be of equal value. When this is the case the equal pay principle is engaged. Where two jobs are the same, i.e. when the job description is identical, it is obvious that, as a point of departure, they are to be paid equally. However, where job content is very different this may not be as obvious. Yet the jobs may still be considered of equal value and thus might be entitled to receive equal pay.<sup>62</sup>

Both Convention 100 and Directive 2006/54/EC call for a form of objective job evaluation for the purpose of determining wages free from discrimination based on sex. It is stated in Convention 100 that, “measures shall be taken to promote the objective appraisal of jobs on the basis of the work to be performed.”<sup>63</sup> This implies that it is the content of the job itself that is to be evaluated.<sup>64</sup> The Committee of Experts has emphasised that, in the interest of objectivity, it is the job that is evaluated and not the person performing the job. Hence the characteristics of those performing the job, are not relevant in the evaluation. Factors that may enter into the evaluation may be skills, training and responsibilities required for the job, as well as the nature of the work and working conditions.<sup>65</sup> The choice of factors and the comparison itself must be

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<sup>62</sup> Martin Oelz, Shauna Olney, Manuela Tomei, *Equal Pay: An introductory guide* (ILO 2013) p.31

<sup>63</sup> C100 art 3(1)

<sup>64</sup> Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the Reports on the Equal Remuneration Convention (No.100) and Recommendation (No.90)*, 1951, International Labour Conference, 72<sup>nd</sup> Session, 1986, paras. 20, 21

<sup>65</sup> Committee of Experts on the Application of Conventions and Recommendations, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, International Labour Conference, 101<sup>th</sup> Session, 2012, para. 695



free from any gender bias.<sup>66</sup> It is thus, for example, important that certain factors are not presumed to be of lower value because they pertain to traditionally female work, for example skills required for providing care for people. If the objective job evaluation exercise is undertaken rigorously and objectively it means that work that is completely different can still be considered to be of equal value.

Objective job evaluation is thus very important in addressing the aspect of the gender wage gap attributed to the concentration of women in low-paid professions, as the wages in these professions can often be associated with the requirement of traditionally female skills. Historical attitudes towards work that was traditionally performed by women, although less blatant in today's society, are still detectable and to some extent reflected in wages. It is important to have a mechanism, which challenges historical perceptions of the value of traditionally female work.

As a starting point, all jobs can be objectively evaluated on the basis of their content and jobs that are not considered of equal value are not required to receive equal pay. However not all jobs that are the same or of equal value are required to receive the same pay either, i.e. the objective evaluation of the content of jobs is not the only factor to be considered in determining equal pay for work of equal value. If this were the case it would require evening out wage differences across the whole labour market without consideration of other factors. This is not the intention of the equal pay principle. Rates of remuneration will only be contrary to the principle of equal pay when it is discriminatory on the basis of sex. We must therefore look more closely at how discrimination is established in the context of the principle of equal pay for work of equal value. Factors such as the reach of comparison between jobs, how direct and indirect discrimination are established and the use of objective justifications must feature in the evaluation. The following sections explore each of these factors in turn.

### **3.4.2. Domestic law**

Domestic law follows the same logic on evaluating the objective value of jobs. The wording of §21(3) of the Gender Equality Act indicates that an objective evaluation of the content of jobs must be undertaken in order to determine their relative value. It states:

Whether the work is of equal value is decided after an overall assessment where emphasis is placed on expertise required to perform the work and

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<sup>66</sup> Directive 2006/54/EC art 4

other relevant factors, such as for example effort, responsibility and working conditions.<sup>67</sup>(Author's translation)

Thus it is the job content itself that is to be evaluated and if there are objective differences on this basis a corresponding wage difference will not be contrary to the principle of equal pay. The idea is that an objective evaluation of job content shall produce a determination of relative value free from gender bias.

Norway has not developed any consistent national strategy or method on the implementation of objective job evaluation. There have been pilot projects in various sectors of the labour market, where jobs were categorised in a pay scale according to their objective value. One such project was the objective job evaluation tool FAKIS. This project did not lead to actual wage changes. A main criticism was that objective job evaluation alone did not take into account objective reasons for different pay such as market value or work performance. Thus whether wage differences actually amounted to pay discrimination was not considered. When the content of jobs were found to be of equal value, without consideration of whether there might be other objective factors justifying unequal pay, the method called for equalization of pay. In the Norwegian wage determination context, where great importance is attached to free negotiation between the social partners, it was simply too radical.<sup>68</sup>

The Equality and Anti-discrimination Ombud as well as the Equality and Anti-discrimination Tribunal have developed a legal practice on objective job evaluation in their capacity as a complaints mechanism for the Gender Equality Act. Contrary to the approach taken in the pilot projects, in their view the undertaking of objective job evaluation forms an element of a wider evaluation of discrimination. As established above, objective job evaluation in itself is not enough to determine whether the principle of equal pay for work of equal value has been breached. Just because jobs are of equal value based on their content, does not mean that a wage difference is necessarily contrary to the principle of equal pay. Since rates of remuneration will only be contrary to the principle of equal pay when it causes discrimination on the basis of sex, one must look further at how discrimination is established in the context of equal pay. This is exactly what the Ombud and Tribunal do and, as we shall see, this approach is more nuanced and allows room for consideration of other interests as well, also those that the employer may deem especially important.

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<sup>67</sup> Likestillingsloven 2013, §21(3): "Om arbeidene er av lik Verdi, avgjøres etter en helhetsvurdering der det legges vekt på den kompetanse som er nødvendig for å utføre arbeidet og andre relevante faktorer, som for eksempel anstrengelse, ansvar og arbeidsforhold." (original text)

<sup>68</sup> NOU 2008:6 *Kjønn og Lønn*, p. 206

## 3.5. Reach of Comparison

### 3.5.1. International labour law and EU law

Who can compare their wages to who is key to the effectiveness of the application of the equal pay principle and both Convention 100 and directive 2006/54/EC promotes a wide reach of comparison.

The principle of equal pay for work of equal value requires comparison with an individual or group of the opposite sex. The equal pay principle promotes equal pay as between women and men workers and not any other groups, for example between migrant and native workers. There must be a gender element.

Men and women are spread across the labour market but as we have seen, they are concentrated in different professions, industries and sectors. A reach of comparison, which takes this into account, is thus necessary for the principle to be effective to address the gender wage gap in the Norwegian labour market. According to the Committee of Experts, the reach of comparison between jobs should be as wide as allowed by the national wage fixing system.<sup>69</sup> Comparison must be able to take place between jobs that are completely different. This includes jobs that belong to different professions and jobs that cut across occupational borders.<sup>70</sup> Because women and men are concentrated in different jobs, their wages are often also regulated by different collective bargaining agreements. According to the European Court of Justice, comparison can take place also between jobs governed by different collective bargaining agreements.<sup>71</sup>

But what about comparison between jobs in different enterprises, i.e. when jobs have different employers? Women and men are concentrated in different professions, industries and sectors. Consequently, they are also concentrated in different enterprises with different employers. The Preamble of Directive 2006/54/EC states that according to the European Court of Justice “the principle of equal pay is *not* limited to situations in which men and women work for the same employer.”<sup>72</sup> The ILO does not either restrict the principle of equal pay for work of equal value to work performed for the same employer. The Committee of Experts have stated:

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<sup>69</sup> General Survey on Equal Remuneration (1986) para 22

<sup>70</sup> Committee of Experts on the Application of Conventions and Recommendations, general observation on Convention No. 100, 2001

<sup>71</sup> Case C-127/92 *Enderby* (1993)

<sup>72</sup> Directive 2006/54/EC, preamble (emphasis added)

Application of the Convention's principle is not limited to comparisons between men and women in the same establishment or enterprise. It allows for a much broader comparison to be made between jobs performed by men and women in different places or enterprises, or between different employers.<sup>73</sup>

This stance is also detectable from the Committee of Experts' observations to Norway on Convention 100. The body has repeatedly stressed this point in relation to the "same enterprise" limitation in the Norwegian legislation.

However, the European Court of Justice has developed a legal rule to the effect that, the wages being compared need not necessarily concern workers for the same employer but the wages must nonetheless be attributable to a single source. This was established in the *Lawrence* case. The point made in *Lawrence* was that it must be possible to point to a single entity, which is responsible for the pay disparity in order for the equal pay principle to be enforceable. This might be the case for example where multiple enterprises are closely connected. Where this principle creates the most obvious barrier for comparison is between jobs in the public and purely private sector.

### 3.5.2. Domestic law

When it comes to the reach of comparison, the Norwegian legislation presents a notable limitation, which not only calls into question the law's compatibility with international labour standards, but also its suitability to address pay disparities in the Norwegian gender segregated labour market where women dominate in low-paid professions, industries and sectors. §21 of Norway's Gender Equality Act specifies that the right to equal pay for the same work or for work of equal value applies to women and men "in the same enterprise"(Author's translation)<sup>74</sup>. According to the Act's preparatory works, this is to be understood as men and women that work for the same employer.<sup>75</sup>

This can be very problematic when seeking to address the gender wage gap in Norway as women and men are often concentrated in different enterprises. However, it is perhaps not as limiting as the wording first implies. A broad understanding of the word enterprise has been intended: the state is one

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<sup>73</sup> Committee of Experts on the Application of Conventions and Recommendations, *General Survey on the fundamental conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, International Labour Conference, 101th Session, 2012, para. 697

<sup>74</sup> Likestillingsloven 2013, §21(1): "Kvinner og menn i samme virksomhet skal ha lik lønn for samme arbeid eller arbeid av lik verdi."(original text from legislation)(emphasis added)

<sup>75</sup> Ot.prp.nr.77 (2000-2001) p.53

employer as is each individual municipality.<sup>76</sup> As entities they are responsible for the employment of a wide range of trades and occupations. Similarly private companies will still be regarded as one enterprise even though they are divided into various departments.<sup>77</sup>

The legislation is obviously limiting in that it cannot be used to address wage differences across the public and private sector and the law does not catch pay differences between different enterprises in the private sector. This is of course unfortunate in light of the fact that women dominate to a large extent in the public sector while men dominate in the private sector. However, and as was observed in Chapter Two, the public private divide does not account for the whole gender wage gap. A gap still persists within each sector, thus part of the gender wage gap is still within the reach of the law.

Despite the limitation to same employer it is explicitly stated in §21(2) of the Gender Equality Act that comparison is not limited to the same profession or collective bargaining agreement. Thus within the same enterprise, wage differences between men and women who belong to different professions and have their wage determined by different collective bargaining agreements fall under the scrutiny of the equal pay principle. The state is a large employer, which includes not only those that work directly for the government, but also state agencies<sup>78</sup>, of which even universities are considered an example. A wide range of jobs will fall under equal pay scrutiny.<sup>79</sup> Municipalities are also responsible for the employment of a wide range of different jobs and professions with contrasting gender profiles, the employment of nurses and engineers is a good example.

A broad scope of different jobs will therefore fall under the definition “same enterprise” hence, there is within reach of the current legislation, potential to address a significant portion of the gender wage gap.

## **3.6. Burden of proof**

### **3.6.1. EU law**

According to article 19 of directive 2006/54/EC it is for the respondent (employer) to prove that the equal pay principle has not been breached where facts, from which it may be presumed that there has been direct or indirect discrimination, have been established. The burden of proof thus shifts to the

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<sup>76</sup> NOU 2008:6 *Kjønn og Lønn*, p.28

<sup>77</sup> *ibid.* p.105

<sup>78</sup> In Norway referred to as *forvaltningsorganer*

<sup>79</sup> NOU 2008:6 *Kjønn og Lønn*, p.105

employer in pay discrimination cases so as to not make it too difficult for a victim of discrimination to make a case. The view has emerged from the European Court of Justice that if the normal division of proof were applied in cases where the employer does not have an easily accessible and understandable pay system, it would be excessively difficult or impossible to prove that pay discrimination has taken place.<sup>80</sup>

### 3.6.2. Domestic law

In correspondence to these obligations The Gender Equality Act establishes that if circumstances give rise to the belief that discrimination has taken place, it is for the employer to substantiate that discrimination has not taken place.<sup>81</sup>

## 3.7. Direct and Indirect discrimination

### 3.7.1. International labour law and EU law

Discrimination based on sex must be established for the principle of equal pay for work of equal value to be breached. The principle of equal pay for work of equal value prohibits both direct and indirect discrimination according to both international labour standards and EU law. The pay practice does not need to be *intentionally* discriminatory, i.e. that the wage difference is attributed to sex, in order to be contrary to the principle of equal pay for work of equal value. If the wage difference has a discriminatory *effect*, i.e. is in fact discriminatory, it can be considered indirectly discriminatory and contrary to the principle of equal pay for work of equal value.<sup>82</sup> Art 2(1)(b) of directive 2006/54/EC defines indirect discrimination as:

*“where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a*

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<sup>80</sup> Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases and Materials* (3rd edn, OUP 2011) p.851

<sup>81</sup> Likestillingsloven 2013, §27: ”Det skal legges til grunn at diskriminering har funnet sted hvis: a) det foreligger omstendigheter som gir grunn til å tro at det har skjedd diskriminering og b) den ansvarlige ikke sannsynliggjør at diskriminering likevel ikke har funnet sted” (original text from legislation)

<sup>82</sup> Directive 2006/54/EC art 2(1)

legitimate aim, and the means of achieving that aim are appropriate and necessary.”<sup>83</sup> (emphasis added)

The question of indirect discrimination arose under EU law in the case of *Bilka*,<sup>84</sup> where a department store company excluded part-time workers from its occupational pension scheme. The exclusion was gender-neutral in that it applied to both male and female part-timers. However, among the employees of the company 75% of the women were part-timers, but only 10% of the men. There was no intention to discriminate; yet the effect of the measure was in fact discriminatory and would be contrary to the principle of equal pay unless objective justification could be provided.

The situation could be the same if a female cleaner performing work of equal value to a male janitor, received less pay. There might be no intention to discriminate and both female and male cleaners and female and male janitors receive the set wages. However, the pay can still be considered indirectly discriminatory if the cleaners employed are predominantly women and the janitors employed are predominantly men.

Scrutinizing the wage difference between a female dominated profession and a male dominated profession can unveil pay discrimination that is indirect. This is an element of the law on equal pay for work of equal value, which is essential for addressing the gender wage gap in a horizontally gender segregated labour market.

### **3.7.2. Domestic law**

Both direct and indirect discrimination are contrary to the principle of equal pay under the Gender Equality Act. This is rooted in the Act’s general discrimination clause,<sup>85</sup> which prohibits both direct and indirect discrimination and provides a definition of those concepts congruent with article 2(1) of directive 2006/54/EC.

§5(1) frames unequal treatment based on pregnancy and childbirth as *directly* discriminatory. This places emphasis on the importance of eradicating this form of discrimination, which is so inextricably linked to gender.

In Norway, detecting and correcting indirect discrimination is essential to addressing the gender wage gap. This is because discriminatory pay practices, which follow a gender segregated labour market will not be direct and openly

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<sup>83</sup> Directive 2006/54/EC 2(1)(b)(emphasis added)

<sup>84</sup> Case C-170/84 *Bilka* (1986)

<sup>85</sup> Likestillingsloven 2013, §5(1)

attributed to sex, rather they will be based on reasons which are apparently gender neutral but which in fact put women in a disadvantaged position. This type of discrimination can be harder to detect and correct. For example when entire professions are paid relatively low wages, both men and women in that profession are affected. You cannot point to one woman being treated less favourably than a man. One must look at the gender composition of that profession and the status of that profession within the labour market in order to be able to detect indirect discrimination embedded in the structure of the labour market.

## **3.8. Objective justifications for different pay**

### **3.8.1. International labour law and EU law**

The final factor in the evaluation of pay discrimination is objective justifications. The right to equal pay is not absolute. There can be certain objective reasons, which justify a wage difference despite the fact that it has a discriminatory effect on women. Using the *Bilka* case mentioned above as an example; even though women were disproportionately negatively affected by the measure that excluded part-timers from benefits, it would still not be considered discriminatory and contrary to the principle of equal pay if the employer had an objective reason, which justified the difference in treatment between part-time workers and full-time workers. EU law provides guidance on the use of objective justifications for different pay.

Although the European Court of Justice has accepted such objective justifications, it is less clear where international labour standards stand on this issue. The Committee of Experts, although clearly conceding that there may be objective differences in the value of jobs based purely on their content, they have stated that “ “Value” in the context of the convention indicates that something other than market forces should be used to ensure the application of the principle, as market forces may be inherently gender-biased.”<sup>86</sup> For example, external factors that arguably justify unequal pay can have the effect of systematically rewarding male professions, while disadvantaging female professions. This statement calls into question whether reasons for different pay, which do not relate to the objective content of the job, but rather external factors, are legitimate in light of international labour standards. The overall

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<sup>86</sup> Committee of Experts on the Application of Conventions and Recommendations, *General Survey on the fundamental conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, International Labour Conference, 101th Session, 2012, para. 674



purpose of equal pay seems not to permit this as gender equality risks being systematically undermined.

As art 2(1)(b) of directive 2006/54/EC states, an indirectly discriminatory measure can be objectively justified if it pursues a legitimate aim, and providing the measure is appropriate and necessary for achieving that aim, i.e. the test of proportionality. An example of a legitimate aim may be needs caused by the state of the labour market, such as a shortage of candidates for a job. The following introduces the use of objective justifications under EU law using guidance from the European Court of Justice.

The case of *Bilka* provides a starting point for the use of objective justifications. The European Court of Justice makes a general statement to the effect that, the difference in wage must correspond to a “real need on the part of the undertaking”, it must be “appropriate with a view to achieving the objectives pursued” and it must be “necessary to that end.” Examples of what criteria can justify higher relative pay include, a worker’s length of service, flexibility or adaptability to hours and places of work and the state of the employment market.<sup>87</sup>

Note here that personal characteristics become relevant in the consideration of objective justifications. In the objective job evaluation stage only the job content can be considered, personal characteristics are kept out of the process. As we shall see, objective justifications can be inherently discriminatory. From an equal pay perspective their application warrants caution.

### *Length of Service*

The length of time someone has been active in their profession can constitute an objective reason which justifies higher relative pay. Women have, in connection with family responsibilities, more interruptions to their employment. In this context, the length of service justification has the potential of systematically disadvantaging women.

In the case of *Cadman*<sup>88</sup> length of service was accepted as an objective justification because of the link between the length of an employee’s service and the employee’s ability to perform his or her duties better to the advantage of the undertaking. When it comes to this criterion, the employer is not required to account for this link in detail. It is presumed that the longer an employee has been in service the better equipped they are to perform their duties.

This shows that a “real need” does not require that the undertaking be in a situation of desperation or absolute necessity, a legitimate aim can simply be

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<sup>87</sup> Case C-127/92 *Enderby* (1993) paras. 25-26

<sup>88</sup> Case C-17/05 *Cadman* (2006)

that it is in the economic interest of the company, providing of course that the relative higher wage is proportional in pursuit of that interest.

*Personal characteristics tied with the performance of work*

Personal characteristics, which are tied to the performance of work, can justify higher relative pay. This is because the performance by an employee of their work is necessarily tied to the needs and interests of the undertaking he or she works for. As we recall, personal characteristics cannot feature in the objective evaluation of jobs. Gender stereotyping can express itself under the guise of seemingly neutral rewarding of certain personal characteristics. Yet, it is possible for the employer to objectively justify the rewarding of higher wages to an employee based on their personal characteristics. This therefore seems somewhat contradictory to the principle of equal pay but it is important to note that there are restrictions to the use of this justification.

Unlike with length of service, the link between a personal characteristic and the performance of the work, is not simply presumed. The employer will be required to account for this. As follows from the case of *Danfoss*<sup>89</sup> the personal characteristic rewarded with pay supplements must be connected to the performance of the specific tasks entrusted to the employee in question. The case concerned pay supplements in reward of mobility (the same applies to pay supplements in reward of training). The Court held that:

“the employer may justify recourse to the criterion of mobility if it is understood as referring to adaptability to variable hours and varying places of work, by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee.”<sup>90</sup>

For example, if a civil servant has undergone extra financial training this can only be rewarded with a pay supplement if the civil servant in question is entrusted with tasks relevant to that training, e.g. responsibility for budget.<sup>91</sup>

In the case of *Brunnhofen*<sup>92</sup> it was held that the productivity of an employee can justify pay supplements. The European Court of Justice stated that it was essential for the employer to be able to take employee's productivity into account and therefore their individual work capacity when rewarding pay.<sup>93</sup> This must however, be based on the actual output of the employee once having already taken up employment. A pay supplement cannot be given on the

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<sup>89</sup> Case C-109/88 *Danfoss* (1989)

<sup>90</sup> *ibid.* para 25(i)

<sup>91</sup> Lina Berg Valnes, *Retten til lik lønn for arbeid av lik verdi- målsetninger og resultater* (LLM thesis, University of Tromsø 2009) p.34

<sup>92</sup> Case C-381/99 *Brunnhofen* (2001)

<sup>93</sup> *Ibid.* para 72

expectation that said person will be more productive. Otherwise, gender-bias could very easily enter into the process.

*Market value:*

The *Enderby* case held that the state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, can constitute an objectively justifiable ground for unequal pay.<sup>94</sup>

This justification is of particular relevance to the concentration of women in low-paid professions and will form the subject of further study in the next chapter. An example where the market value justification can work to the particular disadvantage of women is a monopsony in relation to a female dominated profession. An illustrative example is the demand for both primary school teachers and engineers in Norway's public sector. Engineers, a male dominated profession, are more exposed to competition from various employers in both public and private sector and are thus able to use the market to drive up wages. Primary school teachers, a female dominated profession, are employed almost exclusively by local government in a primarily public education system and cannot threaten to seek employment elsewhere. They can therefore not use the market to drive their wages up.

The *Enderby* case concerned a speech therapist (a female dominated profession) that received considerably lower pay than pharmacists (a male dominated profession). The employer was the National Health Service, which justified the wage difference based on market value.

The European Court of Justice started out by stating that the way in which the market value justification is to be applied in the circumstances of each case will depend on the individual facts.<sup>95</sup> The Court suggested that if the employer is able to show "precisely what proportion of the increase in pay is attributable to market forces"<sup>96</sup> it must be accepted that the measure is objectively justified to the extent of that proportion. The Court goes on to state that if this is not shown, it is for the national court to assess whether the role of market forces in determining the rate of pay was sufficiently significant to provide objective justification for part or all of the difference.<sup>97</sup>

It appears that quite a high threshold for accepting market value is intended here. The actual situation of the labour market must be accounted for and provide the basis for the difference in market value. The employer must thus

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<sup>94</sup> Case C-127/92 *Enderby* (1993)

<sup>95</sup> *ibid.* para 25

<sup>96</sup> *ibid.* para 27

<sup>97</sup> *ibid.* para 28

show that the situation of the labour market makes it necessary to increase the pay of one group to the extent in question in order to attract job candidates.

### **3.8.2. Domestic law**

Norwegian domestic law also allows for limited exceptions to the general prohibition on discrimination. As in European law, there will not be discrimination where there are objective justifications for differential treatment. According to article 6 of the gender equality act, a measure will not be considered discriminatory when:

- a) it has an objective purpose,
- b) when it is necessary to achieve that purpose and
- c) when there is a relationship of proportionality between what is sought to be achieved and how intrusive the measure is for the person or persons negatively affected by it. (own translation)

In the Gender Equality Act's preparatory works length of service, performance of work and market value were advanced as possible justifications for unequal pay.<sup>98</sup> Objective justifications under Norwegian domestic law will be further explored in the next chapter, which assesses the case law of the complaint's mechanism of the Gender Equality Act. In particular, we take a closer look at the market value justification.

## **3.9. Concluding remarks**

The principle of equal pay for work of equal value is not only about establishing the objective value of jobs and evening out the differences in pay accordingly, i.e. Objective job evaluation is not the only requirement of the principle of equal pay for work of equal value. The principle of equal pay for work of equal value is about eliminating pay practices, which are discriminatory on the basis of sex. A difference in pay will thus be contrary to the principle of equal pay when the pay difference concerns jobs that are the same or of equal value based on objective job evaluation *and* discrimination on grounds of sex can be established. In establishing this, steps that must be taken include the objective evaluation of jobs, consideration of whether the jobs fall within the reach of comparison of the equal pay principle, the evaluation of

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<sup>98</sup> Ot. Prp. Nr.33(1974-1975) pkt. 4, p.58

direct and indirect discrimination and assessing the validity of objective justification for unequal pay.

The ambition of the equal pay principle goes beyond addressing discrimination that is blatant, e.g. a woman being paid less than a man when they have the same job in the same company. The reach of comparison includes jobs that are completely different in content and reaches across professions and occupational borders, even between different collective bargaining agreements. The principle prohibits not only direct discrimination but also indirect discrimination. The principle of equal pay for work of equal value requires states to question and take action against wage differences that result from structures, traditions and attitudes that are inherently discriminatory and embedded in the labour market. This requires broad consideration of a country's institutional structures and at times it will require radical changes directed at these structures. As shown throughout this chapter, these are essential characteristics of the law on equal pay for work of equal value in relation to addressing the gender wage gap in Norway, which follows horizontal gender segregation in the labour market. In certain circumstances the concentration of women in low paid professions and industries will be contrary to these legal rules. The principle of equal pay for work of equal value is as such highly relevant to the gender wage gap in Norway.<sup>99</sup>

With this said the principle of equal pay for work of equal value is not unlimited and objective justifications can at times justify unequal pay even when women are more negatively affected. This is not intended to be a free pass, but rather to be interpreted narrowly. If its use is not contained it risks seriously undermining the equal pay principle and justifying a large portion of wage differences between women and men in Norway, as objective justifications can be inherently discriminatory.

In the following chapter we take a closer look at how the domestic law on equal pay has been interpreted and applied with particular focus on market value justifications. The Equality and anti-discrimination Tribunal have been the central actors in developing legal practice in relation to equal pay at the national level.

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<sup>99</sup> It must, however, be acknowledged that there is a notable limitation to comparisons between jobs within the same enterprise in the domestic legislation.

# 4 The Equality and anti-discrimination Ombud and the Equality and anti-discrimination Tribunal

## 4.1. Introductory remarks

The norm for the equal pay for work of equal value principle derived from international labour standards and EU law was laid out in the previous chapter. Despite some limitations that were discussed, notably the “same enterprise” restriction, domestic legislation is largely congruent with this norm. However, the law is a living thing. It comes to life through the meaning given to it through application and interpretation. The Equality and Anti-discrimination Ombud and the Equality and anti-discrimination Tribunal, make up the complaints mechanism for the Gender Equality Act. Their case law makes up the central legal practice on the right to equal pay in Norway. The purpose of this chapter is to provide an overview of the role of these two bodies and to evaluate the implementation of the principle of equal pay for work of equal value in their practice. Special attention is paid to the evaluation of market value justifications.

## 4.2. An overview of the equality and anti-discrimination Ombud and Tribunal

The Gender Equality Act is enforced by the Equality and anti-discrimination Ombud and the Equality and anti-discrimination Tribunal<sup>100</sup> (from now on “the Ombud” and “the Tribunal”).<sup>101</sup> The mandate of the Ombud and Tribunal is given through a statute, *Diskrimineringsombudsloven*.<sup>102</sup> In short, the Ombud and Tribunal both enforce the law in their capacity as a complaints mechanism. The Ombud has additional advocacy

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<sup>100</sup> Likestillingsloven 2013, §26

<sup>101</sup> In Norway these bodies are referred to as *Likestillingsombudet* and *Likestillingsnemnda* respectively

<sup>102</sup> Diskrimineringsombudsloven 2006

responsibilities, mainly in the form of providing guidance and information on the subject of equality and non-discrimination.<sup>103</sup>

The Ombud and Tribunal are two separate bodies. The Ombud interprets and applies the law in relation to specific actions and makes statements about the legality of said actions. Anyone can, without cost, bring a case to the Ombud or the Ombud can take up a case on its own initiative. The Ombud then makes a non-legally binding statement as to whether the action in question is in breach of the law. The intention is for the parties to the inquiry to voluntarily resolve their dispute in line with the statement and guidance provided by the Ombud.<sup>104</sup> It is as such the first instance complaints body.

If this does not happen or there is disagreement regarding the Ombud's statement, the case can be brought to the Tribunal for a legally binding decision.<sup>105</sup> The Tribunal then acts as an appeals body. The Tribunal is technically a state agency, but it is independent with its authority stipulated in formal legislation. Its role is to apply the law and develop legal practice.<sup>106</sup> Furthermore, the Tribunal can order rectification, termination or other measures to secure discontinuation of the discrimination.<sup>107</sup> It can further order fines to be issued in order to enforce compliance.<sup>108</sup> Although the regular courts have jurisdiction to try the Tribunal's decisions, decisions by the Tribunal are very rarely appealed to the courts. Their decisions therefore usually stand as an indication of current legal practice.<sup>109</sup>

The decisions of the Ombud and Tribunal only have a direct effect on the individuals who are parties to the case at hand. When the Tribunal makes a binding decision, this will only be applicable to the employer and worker(s) who are parties to the case at hand and does not have the power to render a whole collective agreement null and void. Only the Labour Court has authority to try the provisions of a collective bargaining agreement for compliance with the law<sup>110</sup> and only the parties to a collective agreement can bring a case before the Labour Court.<sup>111</sup> The Labour Court has not been actively used to resolve pay equality disputes in relation to collective bargaining agreements. It has not heard a case on this question since the "bioengineers case" of 1990.<sup>112</sup> There is thus little guidance to be derived from that source on the law on equal pay. However, the Equality and anti-discrimination Tribunal has been granted the power to give reasoned statements regarding the legality of a collective bargaining agreement in relation to the gender equality act when an individual case gives rise to this issue.<sup>113</sup> Such statements can in theory be taken up as arguments by parties in negotiations between workers and employers. Notably, according to the Equal Pay

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<sup>103</sup> *ibid.* §3

<sup>104</sup> *ibid.*

<sup>105</sup> Diskrimineringsombudsloven 2006, §4 and §6

<sup>106</sup> Ot.Prp.nr.33(1974-1975) p.48

<sup>107</sup> Diskrimineringsombudsloven 2006, §7

<sup>108</sup> *ibid.* §8

<sup>109</sup> Lina Berg Valnes, "Retten til lik lønn for arbeid av lik verdi- målsetningen og resultater" (LLM thesis, University of Tromsø 2009) p.10

<sup>110</sup> Diskrimineringsombudsloven 2006, §10

<sup>111</sup> Arbeidstvistloven 2012 (Norwegian Labour Disputes Act), §35

<sup>112</sup> NOU 2008:6 *Kjønn og Lønn*, p.198

<sup>113</sup> Diskrimineringsombudsloven §10

Commission's *Gender and Pay* report, the Tribunal has not made use of this power since it was granted in 2002.<sup>114</sup>

In general we must thus rely on the statements and decisions the Ombud and Tribunal have made in regard to the individual circumstances of each case for guidance on the interpretation and application of the principle of equal pay for work of equal value. This can of course provide guidance on questions of whether a collective bargaining agreement as a whole is in compliance with the principle.

## **4.3. An evaluation of the practice of the Ombud and Tribunal**

### **4.3.1. Case sample and overview**

In the following, equal pay cases handled by the Ombud and Tribunal have been examined. The sample of cases that has been considered is equal pay cases handled by the Ombud and Tribunal between 2006 until present. The last time significant changes were made to the Gender Equality Act, all of which have been taken into account in Chapter Three, was in 2002. Since then the understanding of the equal pay principle has been in development and the case sample selected is considered sufficient to illustrate the current state of the law. A review of all the 47 cases of my sample (13 of which were appealed to the Tribunal) has been undertaken and a few, particularly illustrative examples have been selected for closer examination.

This section is split into two parts. The first part comprises an assessment of the way in which the Ombud and Tribunal use objective job evaluation to evaluate whether different work is of equal value. The second part focuses on how the Ombud and Tribunal have treated objective justifications of unequal pay, specifically justifications based on market value. There is a reason why market value has been chosen as a focus point in this section. In Norway market value is the most frequently invoked justification for unequal pay between men and women who are performing work of equal value, by employers.<sup>115</sup> At the same time the market value factor is a very significant contributor in perpetuating the current differences between female and male dominated jobs. The market value of a job usually applies not just to an individual but to entire professions. It is often the case that female dominated professions have a lower market value compared with male dominated professions. Market value, if allowed to dominate, risks systematically undermining many female dominated professions.

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<sup>114</sup> NOU 2008:6 *Kjønn og Lønn*, p.198

<sup>115</sup> Lina Berg Valnes, "Retten til lik lønn for arbeid av lik verdi- målsetningen og resultater" (LLM thesis, University of Tromsø 2009) p.36



The practice of the Ombud and Tribunal are commented on collectively despite the fact that they are separate bodies with separate functions. This is because their practice is congruent in many respects and similar language and opinions appear in both the Ombud and Tribunal's statements. Where their practice diverges, this is made clear in the text.

### **4.3.2. Work of equal value and objective job evaluation**

Both the Ombud and Tribunal perform the exercise of objective job evaluation to determine whether the work they are comparing is of equal value. It is used as a point of departure in the evaluation of whether the right to equal pay for work of equal value has been breached. If the jobs are not objectively considered to be of equal value, the equal pay principle is not engaged and unequal pay is permitted. If the work is considered to be of equal value they go on to consider whether the unequal pay is directly or indirectly discriminatory and further if unequal pay can still be objectively justified, i.e. whether the equal pay principle has been violated.

As we recall from the domestic legislation, the Ombud and Tribunal are restricted to comparing jobs within the same enterprise, but not necessarily within the same trade or collective bargaining agreement. There is a broad understanding of what constitutes "the same enterprise". The state is considered one employer, as is each individual municipality (local government) in the public sector. In the private sector it is more restrictive, as there are many employers that are considered completely separate. However, especially in the public sector, this broad understanding of "the same enterprise" has allowed the Ombud and Tribunal to evaluate the relative value of widely different jobs.

As we recall from the legislation, it is the job content, which is evaluated at this stage and not the personal characteristics of the employee. The equal pay provision of the Gender Equality Act lays out a non-exhaustive list of criteria to be considered in the evaluation; "expertise necessary for the performance of the work, effort, responsibility and working conditions."(Author's translation)<sup>116</sup> In their evaluation the Ombud and Tribunal go through each criteria separately using information provided by the employer, the employees, job descriptions and job advertisements to make their evaluation. Using this criteria both bodies have applied a liberal understanding of what constitutes work of equal value in the sense that even work, which is very different in character has been considered to be of equal value. A clear effort to eliminate gender-bias in the process of objective job evaluation is evident.

In the *Aftenposten* case,<sup>117</sup> a female consultant working for a newspaper was paid less than a male typographer working for the same newspaper. At first glance these two jobs appear very different. The jobs required completely different type of expertise; the formal requirement for typographers was vocational training or certificate in graphics and for the consultant it was, in more general terms, relevant education, preferably

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<sup>116</sup> Likestillingsloven 2013, §21(3), "...den kompetanse som er nødvendig for å utføre arbeidet og andre relevante faktorer, som for eksempel anstrengelse, ansvar og arbeidsforhold." (original text from legislation)

<sup>117</sup> case LDO 06/15 *Aftenposten* (Ombud) and case LDN 17/2006 (Tribunal)

within sales and marketing. Yet both the Ombud and Tribunal arrived at the conclusion that the expertise required was of equivalent *level* and thus of equal value.

In comparing the effort, responsibility and working conditions required, the Tribunal stressed that comparison can, according to the law, take place between completely different trades and professions. The employees do not need to be performing the same tasks; the question is whether they are performing work, which is of equal value. Even though the work tasks in this case were very different, the Tribunal pointed out that both the typographer and consultant job related to the production of advertisements. The consultants' focus was on the sale of advertisements and the typographers' focus was on their technical production. The Tribunal made an interesting comparison between the jobs in relation to effort and working conditions. It pulls out the jobs' relationship with deadlines as a point of commonality. Although the typographer's deadlines were more absolute in that an advertisement could not be printed in time if it was not completed, the sales consultants were under general time pressure to secure sufficient numbers of adds by the printing date. The Ombud and Tribunal examine jobs at a detailed level and are creative in their evaluative technique.

In the *Harstad* case<sup>118</sup> both the Ombud and Tribunal demonstrated their willingness to challenge traditional conceptions on the value of typically female jobs. In this case two female nurses were considered to be performing work of equal value compared to four engineers employed by Harstad municipality. The Ombud made a statement to the effect that:

Although comparison between jobs that are of very different character raises challenges, it would be contrary to the purpose of the principle of equal pay if such differences prevented the evaluation of whether two people, or two professions, are performing work of equal value. (Authors translation).<sup>119</sup>

The Ombud captured the intention of objective job evaluation, which is not just to compare jobs that are the same or similar, but to undertake comparison between jobs that are widely different. It is meant to go beyond and challenge preconceived attitudes about the relative value of different work.

In coming to the conclusion that the nurses and engineers were performing work of equal value, both the Ombud and the Tribunal, as in the *Aftenposten* case, went through each objective criteria separately. They considered the actual tasks the employees were entrusted to perform on a day-to-day basis and made an evaluation accordingly. An important point was made by both bodies in regard to the responsibility of the nurses and engineers. Mistakes made by the engineers could have economic consequences for and cause technical problems in the municipality, while the nurses' actions have consequences for the life and health of the inhabitants of the

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<sup>118</sup> case LDO 06/1834 *Harstad* (Ombud) and case LDN 23/2008 (Tribunal)

<sup>119</sup> case LDO 06/1834 *Harstad* (Ombud): "Ombudet ser at sammenlinkningen mellom arbeidet som sykepleierne utfører, og arbeidet som ingeniørene utfører, byr på utfordringer. Ombudet vil allikevel bemerke at karakteren av forskjellige typer arbeid ikke skal være et hinder for å vurdere om to personer, eller to yrkeskategorier, utfører arbeid av like verdi. Dersom en slik synsvinkel skulle være lagt til grunn, ville mye av formålet med forbudet mot ulik lønn for arbeid av like verdi falle bort." (original text from case)

municipality. It was emphasised that responsibility for humans carries the same weight as responsibility for material value.<sup>120</sup>

The Ombud and Tribunal have stressed this point on several occasions. In the SFO-case,<sup>121</sup> responsibility for students was considered to be of equal value as responsibility for the coordination of technical operations. In another case three female managers in the care sector were considered to be performing work of equal value to a male manager of industries. In finding that responsibility for people was of equal value to responsibility for material value, the Ombud and Tribunal emphasised one of the main purposes of objective job evaluation, which is to challenge our perception of the value of traditionally female work.<sup>122</sup>

Based on these examples, both the Ombud and Tribunal demonstrate that they are capable of evaluating the content of jobs in an objective and rigorous manner. Thinking outside the box of what can be included in the criteria expertise, effort, responsibility and working conditions, allows work to be considered comparable even when the employees are performing very different tasks. Interestingly, the Ombud and Tribunal, with reference to the overall purpose of the equal pay principle, places emphasis on challenging attitudes and conceptions about the value of traditionally female work. This is very much in keeping with the purpose of objective job evaluation, the essence of which is to eliminate gender bias in the process of according value to different jobs. This is fundamental to addressing the gender wage gap in a horizontally gender segregated labour market because it opens up the possibility of comparing the wages of typical female work and typical male work which is often very different in character and challenge any presumption that less value should be accorded to typically female work. This is a starting point in addressing the portion of the gender wage gap attributed to the concentration of women in professions and industries lower down on the pay scale.

### **4.3.3. Market value – the Tribunal’s Achilles heel?**

When work is found to be of equal value based on objective job evaluation, it does not necessarily mean that the employer has violated the principle of equal pay by awarding the work different wages. It does, however, create a presumption that the jobs should be awarded equal wages. In other words the burden of proof shifts to the employer to show that discrimination has still not taken place, despite the jobs being of equal value.<sup>123</sup>

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<sup>120</sup> case LDN 23/2008 *Harstad* (Tribunal): ”Effektivitetshensyn tilsier derfor at ansvar for mennesker tillegges samme vekt som ansvar for materielle verdier.”

<sup>121</sup> case LDO 07/406 *SFO* (Ombud) and LDN 42/2009 *SFO* (Tribunal)

<sup>122</sup> case LDO 07/406 *SFO* (Ombud): ”Ett av formålene med likelønnsbestemmelsen er å oppjustere typiske kvinneyrker. Effektivitetshensyn tilsier derfor at ansvar for mennesker tillegges samme vekt som ansvar for materielle verdier.” (original text from case)

<sup>123</sup> see case LDO 07/1652

The Ombud and Tribunal's liberal assessment of the comparative value of different jobs is somewhat contrasted by their more conservative approach in determining whether discrimination has taken place. The Ombud and Tribunal diverge more here in their practice compared to their more homogenous approach to objective job evaluation. In particular, it is the Tribunal's rather generous acceptance of employers' objective justifications for unequal pay that causes concern from the perspective of pay equality.

The influence of market value on wage has its basis in the logic that wage is determined by different influences in the supply and demand of labour. Wages usually rise when there is a shortage of labour and sinks in industries that are saturated. The way in which this can work to the disadvantage of women is when there is a lower demand for female dominated trade compared to male dominated trade even though the work in question is of equal value.

In my sample of cases I have identified 8 in which the employer's reliance on the market value justification is in focus. In two of these cases the Ombud and Tribunal were in agreement that the market value argument could not justify unequal pay. In the remaining 4 cases, while the Ombud rejected the market value argument, the Tribunal reversed the decision, accepting market value as an objective justification for unequal pay. A closer look at the two following cases provides an illustration of how the Ombud and Tribunal have handled the invocation of the market value justification.

#### *The Harstad Case*

The *Harstad* case concerned whether the wage difference between female nurses and male engineers employed by Harstad municipality violated the equal pay principle. As mentioned in the previous section, both the Ombud and Tribunal agreed that the nurses and engineers were performing work, which was of equal value. However, the Ombud reached the conclusion that the wage difference was discriminatory and in breach of the equal pay principle while the Tribunal found the wage difference to be objectively justified.

Harstad municipality argued that because they struggle to retain employed engineers, wage is used as a tool to keep the required labour. In this sense the wage difference between the nurses and engineers was not gender based but had its basis in the engineers' labour market position. Both the Ombud and Tribunal conclude on this basis that no *direct* discrimination has taken place.

It was then considered whether the wage difference was *indirectly* discriminatory. In evaluating whether the measure was indirectly discriminatory, it was observed that nurses are a female dominated group while engineers are a male dominated group and if the effect of the measure is such that women are in fact more negatively affected than men, it must be considered indirectly discriminatory. The Ombud stated that the rewarding of higher wages to engineers based on their stronger labour market position systematically puts women in a disadvantaged position. It emphasised here that the market value justification was integrated into the pay policy of the municipality without further consideration of its consequences for equal pay. The Ombud warned that if such differences were acceptable this would mean that when women and men

perform work of equal value, the market will still automatically dictate what wage they receive. This would seriously undermine the principle of equal pay for work of equal value.<sup>124</sup> The Ombud and Tribunal thereby agreed that the wage difference was indirectly discriminatory.

Where the Ombud and Tribunal's opinions diverged, however was in consideration of whether, despite the wage difference being indirectly discriminatory it could be permitted with reference to objective justifications. As mentioned in Chapter Two, according to §6 of the Gender Equality Act, differential treatment will not be considered discriminatory when it has an objective purpose, is necessary to achieve that purpose and there is a relationship of proportionality between the purpose to be achieved and the intrusiveness of the measure for the person or persons negatively affected by it. The Ombud emphasised that according to the preparatory works of the Gender Equality Act this exception is to be interpreted narrowly i.e. there is a high threshold for fulfilling these requirements.<sup>125</sup>

Neither the Ombud nor the Tribunal contested that the pay practice pursued an objective purpose. The Tribunal stated that in order for this requirement to be fulfilled, the pay practice must be based on a real need of the undertaking.<sup>126</sup> This criteria was satisfied in this case, as the fulfilment of certain duties of the municipality was dependent on the expertise of engineers. The Ombud and Tribunal also agreed that giving the engineers higher wages was both a suitable and necessary measure to retain needed labour. The Ombud stressed in reference to the necessity requirement that the engineers' labour market position is very different from that of nurses, as engineers can often apply for jobs in private companies if the municipality does not offer competitive wages. Nurses do not have the same opportunity, as there are fewer jobs for them within the private sector.

However, the Ombud was not satisfied that there was a relationship of proportionality between the purpose to be achieved and the intrusiveness of the measure for the persons negatively affected by it. Here, the interest of the municipality must be balanced with the consequences for the nurses. The Ombud stated that in this exercise consideration for the relevant equality principle is to carry a lot of weight.<sup>127</sup> The

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<sup>124</sup> case LDO 06/1834 *Harstad* (Ombud): "Etter ombudets oppfatning må det legges til grunn at dette vilkåret er oppfylt hvis lønnspolitikken eller lønssystemet i en virksomhet systematisk fører til at kvinner og menn som utfører arbeid av lik verdi, lønnes ulikt. Så langt ombudet kan se er dette tilfellet i Harstad kommune, ettersom kommunen uten videre legger en markedstekning til grunn for lønnsfastsettelsen, uten noen nærmere vurdering av hvilke følger dette får i forhold til likelønn, eller om slike konsekvenser er akseptable." (original text from case)

<sup>125</sup> case LDO 06/1834 *Harstad* (Ombud): "det fremgår av ordlyden ("særlige tilfeller") og er også forutsatt i forarbeidene at unntaksbestemmelsen skal tolkes strengt" (original text from case)

<sup>126</sup> case LDN 23/2008 *Harstad* (Tribunal): "Kravet om *saklighet* betyr først og fremst at arbeidsgivers begrunnelse for lønnsforskjellene skal bygge på reelle behov." (original tekst from case)

<sup>127</sup> case LDO 06/1834 *Harstad* (Ombud): "I forholdsmessighetsvurderingen må de hensyn som begrunner kommunens handlemåte, vurderes i forhold til hvor inngripende konsekvenser denne har for kvinnene som rammes. I denne vurderingen må man legge stor vekt på de likestillingshensyn som gjør seg gjeldende." (original tekst from case)

Ombud referred to the equal pay provision of the Gender Equality Act, which states that, “the right to equal pay for work of equal value applies regardless of whether the jobs belong to different trades and if the wage is determined by different collective bargaining agreements.”(Author’s translation).<sup>128</sup> The Ombud observed that if one is to accept all wage differences with a basis in market value, this provision of the law would lose its meaning.

Indeed, in Norway’s gender segregated labour market women and men are often concentrated in different trades and they are subject to different collective bargaining agreements. Due to gender segregation and historical socio-economic reasons it is often the case that female dominated professions have a weaker labour market position than male dominated professions. The *Harstad* case’s nurse and engineers comparison is a classic example of this.

The Ombud referred to the preparatory works of the Gender Equality Act and emphasised that the purpose of the Gender Equality Act is to change “tradition, structures and practice” (Author’s translation)<sup>129</sup> that are discriminatory. The situation between nurses and engineers is an example of exactly this type of discrimination. The Ombud explained that nursing has always been a female dominated profession with relatively low pay due to among other things that the public sector has largely had a monopoly on the use of their labour. Engineers, on the other hand, have always been a male dominated profession with relatively high pay due to, among other things, the existence of a competitive market outside the public sector. In order for the purpose of the equal pay provision to be kept alive, this form of structural discrimination cannot be tolerated. The Ombud thereby concluded that the proportionality requirement was not fulfilled and the equal pay provision of the Gender Equality Act had been breached by the municipality.

The Tribunal’s majority was of the opinion that it would be unreasonable to deny the municipality the ability to use wages as a means of retaining the needed labour. It considered the size of the wage difference between the nurses and engineers to be proportional to this end. It stated that it was not the intention of the Gender Equality Act to be used for the general increase in wages for entire trade groups. It referred to the Equal Pay Commissions *Gender and Pay* report and remarked that the question of how to deal with the undervaluation of female dominated professions was under political consideration. It thereby concluded that the wage difference was objectively justified and that there had been no violation of the principle of equal pay for work of equal value.

This final remark by the Tribunal causes concern, as it appears to write off its responsibility as interpreter and enforcer of the Gender Equality Act in the face of market value considerations. One interpretation could be that the Tribunal is reluctant to make decisive statements, which compromises the freedom of the employer when market forces have an influence on wages. It leaves the question for political

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<sup>128</sup> Likestillingsloven 2013, §21(2): ”Retten til like lønn for samme arbeid eller arbeid av like verdi, gjelder uavhengig av om arbeidene tilhører ulike fag eller om lønnen reguleres i ulike tariffavtaler.”

<sup>129</sup> Ot. Prp. Nr 77 (2000-2001) p.61, ”Departementet viser til at det er et formål med likestillingsloven å endre tradisjon, strukturer og praksis som innebærer forskjellsbehandling.”

consideration instead of seizing the opportunity to make an important point on structural discrimination embedded in the Norwegian labour market. Such a statement would indeed have been of important normative value and of great relevance for addressing the gender wage differences, which follow horizontal gender segregation.

With this said, the Tribunal, by referring the question for political consideration, does not ignore that market value can have a discriminatory effect on women in the Norwegian labour market. It does not, however, want to address the issue in this case. Of course, the Tribunal does not have the mandate to require the wages to be raised for entire professions. It did however, have the opportunity to require the wages to be raised for the two individuals to this case and thereby make an important statement regarding the undervaluation of female dominated groups in general. It did not seize this opportunity.

On the other hand, the Ombud does seize the opportunity. It even admits that the statement it is making is a radical one as it calls into question the legality of wage differences, which exist between many professions in the Norwegian labour market. What the Ombud has essentially said is that when the market suppresses women from receiving equal pay when they are performing work of equal value to men, the principle of equal pay for work of equal value and gender equality more generally is undermined.

The Ombud's approach appears to go even further than the requirements under EU law in relation to the market value justification. The Ombud is pursuing an ambitious path in relation to equal pay. In this case the municipality was able to show that the labour market situation made it necessary to increase wages to retain needed labour, yet the Ombud was not prepared to accept the labour market justification. Rather, it chose to make a point about the overall purpose of the equal pay principle, which stands contrary to allowing the market value justification to override pay equality.

If the logic of the Ombud's statement was to be followed, this would in some cases mean lifting the wages of entire professions or trade groups. This is undoubtedly radical, not just in a normative sense but the task would be, from a logistic and economic perspective, a huge one.

### *The SFO Case*

The *SFO* case<sup>130</sup> also concerned the question of the legality of the wage difference between a female dominated profession and a male dominated profession. However, both the Ombud and Tribunal were in agreement in this case that the wage difference was discriminatory and contrary to the principle of equal pay.

The case concerned the wage difference between a female after-school activities manager (SFO-manager)<sup>131</sup> and five male supervisors at the technical department of Fredrikstad municipality. As mentioned in the previous section, the work of the SFO-

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<sup>130</sup> case LDO 07/406 *SFO* (Ombud) and LDN 42/2009 *SFO* (Tribunal)

<sup>131</sup> SFO is an organised after-school programme, which invites youth to participate outside the ordinary school day. It is very common in Norway and most schools offer this service.

manager was considered to be of equal value to that of the male supervisors based on objective job evaluation.

Fredrikstad municipality argued that the reason for the wage difference was the labour market situation, which was such that it was difficult to get a hold of the required labour. The wage difference was thus not attributed to sex but rather to external factors. Both the Ombud and Tribunal agreed that women were disproportionately negatively affected by the measure due to the gender composition of the two professions being compared. The case thus raised the question of indirect, not direct discrimination.

The question then fell to whether market value could be used as an objective justification for unequal pay. Neither the Ombud nor the Tribunal accepted the market value justification in this case. As mentioned above the basic criteria for objective justification is that the measure must have an objective purpose, be necessary to achieve that purpose and there must be a relationship of proportionality between the purpose to be achieved and the intrusiveness of the measure for the person or persons affected by it. The Ombud referred to a statement made about market value in the preparatory works of the Gender Equality Act:

Market value can be a reason to pay workers differently. The decisive factor must be to what degree there is a lack of applications (for a job), and if it is necessary to use wage as a tool. This means that the market value argument must be evaluated in light of the concrete circumstances of the labour market, and if it is necessary to recruit labour in this way, or if the need could be met using different means. (Author's translation)<sup>132</sup>

This is largely reflective of EU law guidance on market value justifications. The Ombud and Tribunal agreed that the municipality had only put forward an assertion that it was difficult to get a hold of the needed labour. No documentation was provided in support of this. Therefore the criteria for objective justifications had not been fulfilled.

At first glance, this appears to be a victory for the equal pay principle as the market value justification was not accepted. However, on a closer look there appears to be less cause for enthusiasm. Both the Ombud and Tribunal chose here to focus on the fact that there was no documentation to support the market value justification. Neither body chose to make any wider statement regarding the relationship between the forces of the labour market and gender equality. The systematic discrimination of a female dominated profession as a result of the market value justification was not discussed.

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<sup>132</sup> Ot. Prp. Nr.77 (2000-2001) p.61, "Markedsverdi kan [...] være en grunn til å lønne arbeidstakere forskjellig. Det avgjørende må være i hvilket omfang det er mangel på søkere, og om det er nødvendig å bruke lønn som virkemiddel. Dette må bety at begrunnelsen skal vurderes i lys av de konkrete forhold på arbeidsmarkedet, og om det er nødvendig å etterspørre arbeidskraft på denne måten, eller om behovet kunne vært dekket på andre måter." (original text)



The case suggests that had the municipality been able to document the difficulty of recruiting the needed labour, the market value argument would have been accepted without any further discussion of the consequences this would have for gender equality. Especially for the Ombud who ventured such a liberal application of the equal pay principle in the *Harstad* case, this judgment appears slightly meek and conservative in comparison.

As the Ombud and Tribunal focus on very different arguments in the *Harstad* case and the *SFO* case, one cannot really say that one overrules the other. Perhaps, the Ombud chose not to delve into another normative discussion in the *SFO* case because the lack of documentation was enough to show that the proportionality requirement was not fulfilled, thus such a discussion was not necessary to reach the desired outcome. In light of this the Ombud's normative statements in the *Harstad* case can still be considered a representation of the Ombud's stance on pay equality and market value. The Tribunal on the other hand, has not demonstrated any willingness to adopt a position on the consequences on pay equality when forces of the labour market dictate wage. This leaves the state of the law on this issue somewhat ambiguous.

## 4.4. Concluding remarks

The Ombud and Tribunal have developed an impressively detailed and rigorous method of objective job evaluation, which allows comparison between jobs that are widely different in character. Many jobs that are different are thus still found to be of equal value. The purpose of objective job evaluation, which is to determine the relative value of jobs based on objective criteria free from gender bias, is upheld by the Ombud and Tribunal. This is of fundamental importance when it comes to wage differences, which follow a horizontally gender-segregated labour market, as women and men work in professions that are completely different.

However, the way in which the market value justification has been handled presents a more inconclusive picture. Neither the practice of the Ombud or the Tribunal causes any concrete or direct conflict with the equal pay principle, however the overall purpose of the equal pay principle gets lost in the practice of the Tribunal. EU law permits objective justifications for unequal pay based on market value, but objective justifications are intended to be of exceptional use, not systematically justify indirectly discriminatory wage differences, and allowed to persist because they are embedded in the structure of the labour market. As we recall, the purpose of the equal pay principle goes beyond addressing discrimination that is blatant. It is asking states to question and take action against structures, tradition and attitudes that are inherently discriminatory and embedded in the labour market. This requires broad consideration of a country's institutional structures and at times it will require radical changes directed at these structures. Indeed, addressing the gender wage gap, which follows horizontal gender segregation in the labour market is dependent on such an understanding of the equal pay principle. The Ombud, in the *Harstad* case, demonstrated that it is willing to do just this. However, the inconsistency between the practice of the Ombud and Tribunal shows that there is a lack of unity in the implementation of the equal pay principle between these bodies leaving the state of the law somewhat uncertain in this area.



# 5 Collective Bargaining and Wage Determination

## 5.1. Introductory remarks

Employer organisations and trade unions exercise the most influence on the determination of wages through collective negotiations and collective agreements. Although the freedom of workers and employers to negotiate their own collective bargaining agreements is a central principle in Norwegian labour law, the social partners are bound by the Gender Equality Act, hence by the principle of equal pay for work of equal value. It is therefore interesting to examine the role of the social partners in an equal pay perspective. This chapter outlines the Norwegian collective bargaining model and discusses the role of the social partners in an equal pay perspective. It especially explores how equal pay objectives are incorporated into the activities of the social partners.

## 5.2. An overview of collective bargaining and wage determination in Norway

### 5.2.1. Organisation in the Labour market

Within the labour market the influence and power of workers and employers is exercised through trade unions and employer organisations and expresses itself in the system of collective bargaining. The participation of workers and employers in this organisational structure is therefore crucial for its proper functioning. In comparison to other western countries the level of organisation in the labour market is relatively high in Norway. In 2013, 55% of all wage earners in Norway were members of a trade union. In comparison the organisation level was below 20% in the U.S.<sup>133</sup> Women make up about half of all trade unionists in Norway. This has been the result of an increase in female trade union organisation over the past 30 years.<sup>134</sup>

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<sup>133</sup> Statistisk Sentralbyrå (2014) *Regulering av Arbeidsmarkedet – ubetinget positivt?*  
<<https://www.ssb.no/nasjonalregnskap-og-konjunkturer/artikler-og-publikasjoner/reguleringer-av-arbeidsmarkedet-ubetinget-positivt>> accessed 15 April 2015

<sup>134</sup> NOU 2008:6 *Kjønn og Lønn* p.79

Workers are organised into various trade unions with a particular industry or trade membership profile, for example NITO, which organises over 70 000 engineers and technologists and Norsk Sykepleierforbund, which organises over 100 000 nurses midwives and nursing students. These are in turn affiliated to one of the four central trade unions: Landsorganisasjonen (LO), Unio, Akademikerne and Yrkesorganisasjonens Sentralforbund (YS). The membership profile of the central trade unions are roughly reflective of industry affiliation, level of education and hence to a certain extent also sex. For example, LO, the largest trade union organises the majority of workers without higher education with a spread across the public and private sector. Unio organises workers with college or university education, primarily within the public sector. About 76% of the members are women. Not surprising, considering that most highly educated women are concentrated in the public sector.<sup>135</sup>

These central trade unions have a collective bargaining relationship with five central employer organisations of which companies, enterprises, local government and central government are members: Næringslivets Hovedorganisasjon (NHO), Spekter, Handels- Og servicenæringens hovedorganisasjon (HSH), Kommunesektorens interesse- og arbeidsgiverorganisasjon (KS) and the Ministry of Government Administration, Reform and Church Affairs. The largest is NHO and its membership base is primarily private businesses. In the public sector KS represents the interests of local government (the municipalities) while the Ministry of Government Administration, Reform and Church Affairs represents the interests of the central government.<sup>136</sup>

The main role of these central trade unions and employer organisations is to negotiate the basic collective agreements within their respective areas and participate in tripartite collaboration with the government.

### **5.2.2. Collective agreements**

Most workers in Norway are covered by a collective agreement. Not only unionised workers are covered. Employers who are bound by collective agreements are obligated to apply the terms of the agreement to unionised as well as non-unionised employees. The total collective agreement coverage is 67%. The public sector is exhaustively covered, while the private sector is about 50% covered.<sup>137</sup>

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<sup>135</sup> NOU 2013:13 *Lønnsdannelsen og utfordringer for norsk økonomi* p.29-30

<sup>136</sup> *ibid.* p.32

<sup>137</sup> *ibid.* p.34

Collective agreements regulate social rights, pension and conditions of employment but their most central content is wage settlement. Collective agreements are negotiated every two years and wage negotiations take place every year. Wages are thus frequently subject to regulation. Apart from the principle of equal pay in the Gender Equality Act, there is no legislation on wage determination. Collective agreements are the principal source in the determination of wages. Hence, the social partners wield the main responsibility in the wage determination process. Wage negotiation is a highly complex process and collective agreements are concluded at different levels of organisation and in the various sectors of the labour market; between different central trade unions and employer organisations, between different trade unions and employer organisations at industry level or between trade unions and employers at company level.<sup>138</sup>

There are three main types of wage determination in collective agreements. The main distinction is between centralised and localised regulation. *Normal wage agreements* are a centralised form of wage determination. Wages and wage increases<sup>139</sup> are exhaustively determined at the central level and no money is allocated for additional wage increases to be determined at the local level. The state determines wage through normal wage agreements. *Minimum wage agreements* determine the minimum wage of different categories of workers and in addition, local negotiations at company level take place regarding any wage increases beyond this. This is the most common form of wage agreement in the private sector as well as in local government. *Agreements without central regulation* is when wage determination takes place exclusively at the local level. This is a common form of wage determination for certain groups of white-collar workers in the private sector.<sup>140</sup>

There are notable differences in the degree of centralisation between different collective agreement areas. The obvious difference is between the private sector where there is deference to local agreements (minimum wage agreements and agreements without central regulation) and the public sector, which is characterised by centralisation. Even though minimum wage agreements are common in the local government sector the framework for the local wage increases are still negotiated at the central level. In the private sector the local wage increases are usually not regulated centrally, it is up to the individual company to determine.<sup>141</sup>

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<sup>138</sup> *ibid.* p.33-34

<sup>139</sup> by "wage increases" the author is referring to any increase in wage for a group of workers negotiated and agreed upon by the social partners.

<sup>140</sup> NOU 2013:13 *Lønnsdannelsen og utfordringer for norsk økonomi*, p.33-34

<sup>141</sup> *ibid.*

According to the Technical Committee for Wage Determination (we return to this body later) some general features of wage agreements are of particular significance to the way in which the gender wage gap develops. Firstly, the way in which central wage increases are distributed can have the effect of evening out wage differences between men and women. It might be given as a percentage increase of current wage, or as an equal sum for all workers. Special wage increases for low-wage workers or for particular professional groups can be given. Percentage increases have a neutralizing effect on wage differences, while equal sum increases can benefit women, as they are more concentrated in low-wage jobs. Special wage increases for professional groups can benefit women and contribute to narrowing the gender wage gap if female dominated professions are prioritised, as can the distribution of local wage increases if certain proportions of the money gets reserved for women. Thirdly, if the relative increases are higher in typical female sectors and industries compared to male dominated sectors and industries it could contribute to narrowing the gender wage gap.<sup>142</sup>

### **5.2.3. Coordination and wage determination: *frontfagsmodellen***

Although, as we have seen, the social partners exercise huge influence over the wage settlements, as there are few formal regulations on wage, the Norwegian wage determination model is characterised by a high degree of tripartite coordination. This means, in effect, that there is a framework based on certain solidarity principles that must be adhered to. The social partners and the government work closely together. The government participates through its role as legislator, but in the area of wage determination it exerts influence mainly through cooperative forums, institutions and mechanisms.

Experience from Norway and other countries show that high nominal wage growth that is not consistent with relative productivity growth will over time lead to higher inflation and unemployment. A high degree of coordination in the Norwegian wage determination system has the intention of preserving a balance between market interests and workers' interests. The model ensures moderate wage growth, high employment rates and small wage differences overall.<sup>143</sup>

*Frontfagsmodellen* (the “frontfag” model), the logic on which the Norwegian system of wage determination is based, is built on the idea that wage development should be adapted to what the sector exposed to competition on the international market can handle. In this sector, if wage grows in

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<sup>142</sup> NOU 2008:6 *Kjønn og Lønn*, box 11.2

<sup>143</sup> NOU 2013:13 *Lønnsdannelsen og utfordringer for norsk økonomi*, p.39-40

disproportion to what productivity permits, investment will drop and employment and productivity will be reduced, as it is not possible for these companies to increase the price of their product in response to an increase in expenses, as this would compromise their competitive position in the international market. What the frontfag model means in practice is that the social partners with a high composition of internationally competitive enterprises negotiate and form agreements first and these agreements form a norm for wage determination in other collective negotiations. Wage growth can therefore not go beyond what this sector can handle and a sufficiently large internationally competitive sector can thus be sustained.<sup>144</sup>

### **5.3. Equal pay and collective bargaining**

As we have seen, the social partners play a decisive role in the income settlements. They are, however, bound by the Gender Equality Act's equal pay principle. It is therefore interesting to explore how equal pay has been implemented in collective bargaining. The Norwegian collective bargaining system is highly complex with negotiations taking place and agreements being formed at different organisational levels and in different sectors of the labour market. Comprehensively considering all the intricacies of this system goes beyond the scope of this paper. The aim in this section is rather to make some general observations about the system of collective bargaining from an equal pay perspective and how equal pay is incorporated into the activities of the social partners.

#### **5.3.1. The social partners and the gender wage gap**

In consideration of how much power the social partners wield over wage determination a natural starting point is to explore if and how they are influencing the gender wage gap. Are they making any contributions to the widening or narrowing of the gender wage gap?

The various trade unions and employer organisations represent workers and employers in different sectors of the labour market. In order to gain some understanding of how the social partners are influencing the gender wage gap it is necessary to separate these different collective bargaining areas in order to examine them in relation to one another and individually. A study entitled, *The*

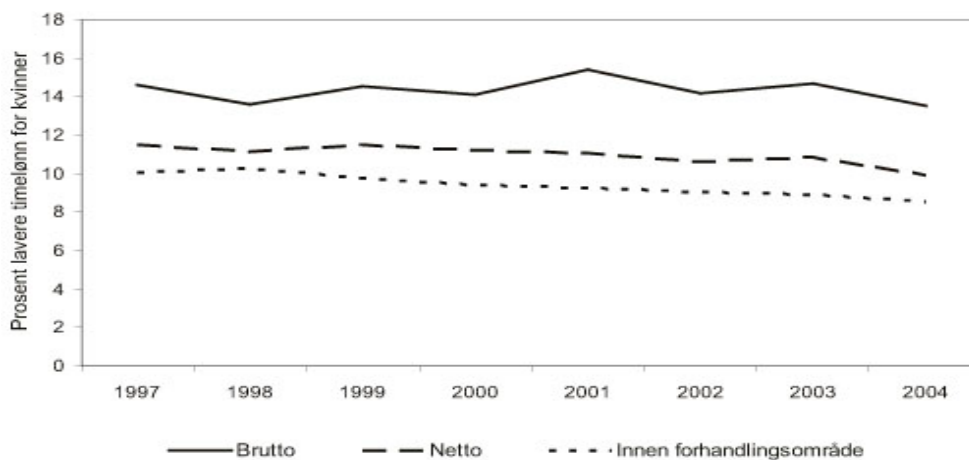
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<sup>144</sup> *ibid.*

*Norwegian collective bargaining model in an equal pay perspective*,<sup>145</sup> published by the Institute for Social Research does exactly this. The results of the study gives reason to suggest that the social partners have not made any great leaps in narrowing the gender wage gap. The findings of the study will be briefly analysed in this section.

### *The gender wage gap and differences between collective bargaining areas*

As we know, the Norwegian labour market is gender segregated, as a consequence men and women are also concentrated in different collective bargaining areas. As the gender wage gap follows gender segregation in the labour market it would be reasonable to suspect that the fact that men and women are concentrated in different collective bargaining areas can explain a lot of the gender wage gap. However, this appears not to be the case. Nilsen and Schøne delimit six main collective bargaining areas in their study; central government, local governments, finance and insurance services, retail, industry officials and industry workers. In the graph below they look at how much the difference between these collective bargaining areas impact the gender wage gap.



Nilsen and Schøne, diagram 5.1. p 34

The upper curve represents the development of the gross gender wage gap, meaning the average gender wage gap between all men and women over time. As we see it has fluctuated between 14-15% between 1997 and 2004. The middle curve represents the net gender wage gap, meaning the wage gap between women and men with the same length of education and potential work experience. The fact that the net gender wage gap is smaller than the gross gender wage gap confirms that a part of the gender wage gap can be explained by differences between men and women in objective traits. It is the bottom

<sup>145</sup> Kjersti Misje Nilsen and Pål Schøne, "Den norske forhandlingsmodellen i et likelønnspektiv" (Institutt for Samfunnsforskning 2007)



curve that is of particular interest in this section. It shows the net gender wage gap also controlled for collective bargaining area. This curve lies slightly below the net gender wage gap throughout the time period and this means that a part of the gender wage gap can be explained by the fact that men and women are concentrated in different collective bargaining areas. But only very little, in 2004 the net gender wage gap was 9,9% and when controlled for collective bargaining area this was only reduced to 8,5%. This means that also within the collective bargaining areas a relatively large gender wage gap persists.<sup>146</sup>

### *The gender wage gap within collective bargaining areas*

Hence a gap remains within each collective bargaining area. Arguably, this means that there is a portion of the gender wage gap that falls under the direct responsibility of the social partners within each collective bargaining area. Indeed, it is within their respective collective bargaining areas that the social partners exercise their influence over wage determination.

The development of the gender wage gap between 1998 and 2006 *within* the six major collective bargaining areas identified by Nilsen and Schøne,<sup>147</sup> shows that overall the social partners have been achieving very small reductions to the gender wage gap over time. However, a significant gap still persists in all areas leading to the conclusion that despite some slow progress, the social partners are essentially reproducing old wage differences imbedded in the labour market. This is an indication that there is potential to address the gender wage gap within the collective bargaining process, yet changes are not being made to a sufficiently large extent. Looking into ways to better address equal pay through collective bargaining is thus a worthwhile endeavour.

It is acknowledged that the study undertaken by Nilsen and Schøne dates quite a few years back, yet there is reason to deduce that it is still indicative of the current situation. Firstly, the period studied shows a rather stable trend of near stagnation of the gender wage gap within collective bargaining areas. Secondly, in the following we look more closely at how equal pay is incorporated into the activities of the social partners and this information also supports the persuasion that major leaps have not been made by the social partners in more recent years to further narrow the gender wage gap.

## **5.3.2. The social partners and equal pay**

Under the Gender Equality Act trade unions and employer organisations are under an obligation to actively, targeted and systematically work towards

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<sup>146</sup> *ibid.* p.34-35

<sup>147</sup> *ibid.* diagram 5.2. p.36

gender equality and equal pay. Equal pay forms a formal part of collective bargaining agendas today, but how is equal pay actually incorporated into their activities?

The fight for equal pay has been, to varying degrees, on the agenda of the social partners throughout the 20<sup>th</sup> century. The equal pay fight has evolved dramatically throughout history, in pace with social change and the various trade unions and employer organisations have developed different ideas on how to address the gender wage gap. The equal pay challenges the social partners faced in the mid 20<sup>th</sup> century, such as separate wage agreements for women and men were easier for the social partners to address in a unified way as these practices were contrary to even the core principles of equal pay enshrined in Convention 100.<sup>148</sup> Since then the more indirect and structural forms of wage discrimination have come into focus and dissent has characterised the social partners policy and action in relation to equal pay. This section explores how equal pay is incorporated into the activities of the social partners today.

#### *Gender equality work by the social partners*

There is evidence that gender equality is an important part of the social partners' policy agenda. Several of the organisations have incorporated framework agreements on gender equality within their basic collective agreements. For example the basic collective agreement between national employer organisation NHO and the national trade union LO, contains a supplementary agreement containing provisions on equality between men and women in employment.<sup>149</sup> Trade union YS and employer organisation Virke have the same provisions incorporated into their basic collective agreement.<sup>150</sup> This supplementary framework agreement on gender equality promotes equal opportunities and equality between men and women in regard to employment, wages, vocational training and career advancement. It acknowledges that all social partners at all levels; trade unions and employer organisations as well as individual companies or employers have a responsibility in this pursuit. These are very general obligations and the agreement does not give any more specific guidance on how to achieve gender equality in employment. Concerning equal pay, the agreement recommends that NHO and LO should develop strategies and mechanisms to tackle gender based wage differences. No further guidance is provided on what constitutes gender based wage differences or where the social partners are to derive guidance from on this subject. Notably the principle of equal pay for work of equal value is not even mentioned.

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<sup>148</sup> NOU 2008:6 *Kjønn og Lønn*, p.155

<sup>149</sup> Hovedavtalen LO-NHO (2014-2017) Tilleggsavtale II: Rammeavtale om likestilling mellom kvinner og men I arbeidslivet, p.94

<sup>150</sup> Hovedavtalen YS-Virke (2014-2017) Tilleggsavtale V: Rammeavtale om likestilling mellom kvinner og men I arbeidslivet, p.44

In the basic collective agreement of employer organisation for local government, KS,<sup>151</sup> only two brief references to equal pay are made. The agreement states that wage policy should promote and sustain equality between the sexes and it should be practiced in such a way that women and men are treated equally in the consideration of wage and advancement.<sup>152</sup> The agreement also requires employers to annually produce gender-disaggregated statistics showing wage level and development in different jobs as a basis for discussions on pay equality.<sup>153</sup> Again, there is no further elaboration on what it means that women and men are treated equally in the consideration of wage. There is no mention of where guidance on this question is to be derived from, nor is the principle of equal pay work of equal value stipulated.

Employer organisations and trade unions have also undertaken gender equality initiatives on a more ad hoc basis. For example employer organisation, KS, has undertaken a project named “Gjennomslag” (Breakthrough) with the aim of increasing the proportion of women in municipal leadership positions. Employer organisation Virke, in cooperation with LO and industry level trade union HK, have undertaken activities looking into improving the working environment for pregnant employees in retail.<sup>154</sup>

Trade unions have, to a greater extent than employer organisations, integrated gender equality as a formal part of their agenda and have institutional mechanisms dedicated to this. For example LO has a special gender equality committee that meets six times a year. Equivalent Committees are also found at the regional and local levels of organisation. YS have their own gender equality council headed by a gender equality councillor. Unio has gender equality and equal pay as one of its main policy areas and has developed its own political platform for equality. The subject of equal pay forms a central part of the content. A part of this equality work is also performed by the various industry level trade unions affiliated to Unio.<sup>155</sup>

There is thus evidence of political will and a degree of formal integration of gender equality and equal pay goals among the social partners. The problem of equal pay, as we know, is not an isolated issue but associated with gender inequality more widely. In that sense it is positive that the social partners appear to take a holistic approach to gender equality and equal pay, acknowledging the need for social and structural changes. However, what must be noted is that no comprehensive or coordinated picture emerges on how the social partners define their gender and pay equality goals or how they work

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<sup>151</sup> KS's main agreement is between KS and the relevant sections of multiple trade unions.

<sup>152</sup> KS Hovedtariffavtalen (2014-2016) p.39

<sup>153</sup> *ibid.* p.40

<sup>154</sup> Likestillingsutvalget (2011) *Struktur for Likestilling*. Oslo: Ministry of Children, Equality and Social Inclusion.

<sup>155</sup> *ibid.* p.120-121

towards them. Furthermore, the legal principle of equal pay for work of equal value does not appear to have a strong presence in their activities.

There is, however, one unifying element worth mentioning. *Arbeidslivs og Pensjonspolitisk Råd* (The Labour and Pension Policy Council) maintains regular dialogue between the Labour Minister and the organisational leaders of the national employer organisations and trade unions regarding challenges in the field of labour and pension policy. When biannually discussing gender equality issues, the minister of children, equality and social inclusion is also present.<sup>156</sup> The Council cooperated on developing objectives and measures for the government's *Action plan for the promotion of equality and the prevention of ethnic discrimination*.<sup>157</sup> Although this document does not have a specific focus on equal pay it represents an endeavour to develop some common objectives and measures for the promotion of equality.

Within the system of wage determination there are unifying elements that are of more direct relevance to equal pay.

#### *Equal pay and cooperation in the system of wage determination*

As discussed earlier tripartite cooperation and coordination in the Norwegian model of wage determination is of great importance to the maintenance of *frontfagsmodellen* (the “frontfag model), which ensures moderate wage growth, small wage differences and a high level of employment. But tripartite cooperation is also of importance to the consideration of equal pay in collective negotiations. Tripartite cooperation allows all the national employer organisations and trade unions to be represented in a common forum and allows the government perspective to enter into the process. There are two main institutional mechanisms that facilitate cooperation in the wage determination system. The Government Liaison Committee for Wage Determination (Author's translation)<sup>158</sup> and the Technical Calculations Committee for Wage Determination (Author's translation).<sup>159</sup> The work of these forums contains elements that are of particular importance to the consideration of equal pay in wage negotiations.

The Liaison Committee is an income policy organ founded in 1962. It is headed by the Prime Minister and all the national employer organisations and trade unions are represented. Furthermore, the relevant government ministries are participants depending on the subject of the meetings. The committee meets twice a year, once in the autumn to discuss the national budget and once in the

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<sup>156</sup> *Struktur for Likestilling* (2011) p.119

<sup>157</sup> Barne-, Likestillings- og Inkluderingsdepartementet, *Handlingsplan for å fremme likestilling og hindre etnisk diskriminering* (2009-2012)

<sup>158</sup> Regjeringens Kontaktutvalg for Lønnsoppgjøret (original title)

<sup>159</sup> Det Tekniske Beregningsutvalget for inntektsoppgjørene (original title)

spring, in the lead-up to when the social partners will negotiate the annual wage settlements. Although gender equality is not formally a part of the meeting agenda, if equality issues are relevant to wage settlements, for example equal pay, it can be brought up during discussions.<sup>160</sup>

The Technical Calculation Committee for Wage Determination, founded in 1967, has representatives from national employer organisations and trade unions. Additionally, the Ministry of Labour, the Ministry of Finance, The Ministry of Government Administration, Reform and Church Affairs as well as the national statistics agency are represented. Its mandate is to present the best possible numerical data for use in wage negotiations. The purpose is that disagreement regarding economic circumstances to the best possible extent can be avoided. It usually produces two reports a year. One before the wage settlement takes place containing an overview of wage and income development, price trends and the development of market competitions. It also produces statistics and facts on equal pay and the gender wage gap. The second report is produced after the wage settlements have taken place and are a summary of the wage settlements.<sup>161</sup>

These forums are thus a platform from which the social partners have the opportunity to develop some common understanding of the causes of the gender wage gap and what action should be taken to close it. But it is important to note that the central content of the discussions that take place within these forums is not equal pay but rather income policy more generally, thus their role in the equal pay fight in collective bargaining must not be overstated.

#### *Equal pay and dissent between the social partners*

In the Equal Pay Commission's *Gender and Pay* report, consultation with various employer organisations and trade unions on the equal pay problem was undertaken and their statements presented in an attachment. In studying their understanding of the equal pay problem and their views on how to address it, it seems that no unified picture emerges. The social partners have nuanced differences and at times completely divergent views on how they explain the gender wage gap and what steps should be prioritised in the fight for pay equality. Some of these differences will be explored with references to the employer organisations and trade unions discussed below.

LO, the largest national trade union has developed a low-wage approach to equal pay. This means that it views the gender wage gap as primarily a problem concerning low-wage jobs, in turn measures should be directed at increasing the wage of those that are placed lowest down on the wage ladder. In support of this approach it argues that the gender wage gap is also present among those

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<sup>160</sup> *Struktur for Likestilling* (2011) p.118

<sup>161</sup> *ibid.* p.118-119

with shorter education and it draws attention to the fact that female dominated low-wage jobs make up a large proportion of the gender wage gap. It also states that there are forces pressing wages down in the service industry that need attention. A low-wage approach would benefit women who work in female-dominated jobs that have lower educational requirements.

LO emphasises that a collective and coordinated wage determination system is essential and it states that the degree of pay equality is largest where the trade union has the strongest influence over the wage settlement. It therefore advocates a high degree of centralisation, where this is appropriate, rather than a decentralised local wage negotiation structure, in the interest of equal pay. It is a supporter of the idea that more than a proportionate share of the local wage increases should be allotted to women, and they propose that a framework for the allocation of these funds should be negotiated at a central level. It does, however, emphasise that any measure should not compromise the freedom of the social partners to collective bargaining. Thus, no government overhaul in the interest of equal pay is recommended. LO would like to see equal pay measures integrated into the current system of wage determination, which is characterised by tripartite cooperation but also a high degree of freedom for the social partners to negotiate their own terms.<sup>162</sup>

The focus on low-wage is perhaps not surprising considering LO's membership profile, which to a larger extent than other trade unions is lower and middle income workers. In contrast a low-wage approach would not make sense to Unio.

Unio, which represents mainly college and university educated workers in the public sector, has adopted an equal pay approach, which focuses on the undervaluation of female jobs. What they mean by this is when women do not get the same monetary reward for their level of education compared with men. A focus on low-wage workers would not make sense for Unio because their members are not found at the bottom of the wage ladder. The main equal pay problem from Unio's perspective is that highly educated women in female dominated professions are paid less than male counterparts in male dominated professions.<sup>163</sup>

Unio acknowledges that the fact that the labour market is gender segregated is itself a problem from an equal pay perspective. Work must be done to even out the spread of men and women across the labour market. But although Unio advocates measures that encourage men and women to make less gender stereotypical choices about their education and career, it sees the undervaluation of female work as an element inextricably linked with gender segregation in the labour market. In other words the undervaluation of female

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<sup>162</sup> NOU 2008:6 *Kjønn og Lønn*, vedlegg 1: Innspill fra Referansegruppen, p.266-267

<sup>163</sup> *Unios likestillingspolitiske plattform- veien mot et likestilt arbeidsliv* (Oslo, 2014) p.7

work is in itself contributing to the gender wage gap and in addition to this it is contributing to maintaining gender segregation in the labour market. In order to encourage men and women to make less gender stereotypical choices it is crucial that wages reflect the value of the profession. It will be exceedingly difficult to recruit more men into the nursing profession, for example, if something is not done about the wage levels.<sup>164</sup>

Unio emphasises the fact that highly educated workers in the public sector earn considerably less than equivalently educated workers in the private sector. It singles out female dominated work in the public sector as a particularly undervalued group and argues that it is a problem with consequences for pay equality that education, competence and responsibility is valued at a higher rate in the private sector than in the public sector.<sup>165</sup> It thus seems to advocate that wage differences that cut across the public-private sector divide should be addressed. As we recall, the legislation on equal pay does not require such a comparison.

Unio sees the equal pay responsibility as lying with the social partners and the government to increase wages for female dominated profession in the public sector. It is of the opinion that the fight for equal pay must be conducted through collective bargaining but also through government action. It advocates an ambitious plan to lift the wages of female dominated professions in the public sector so that wages reflect their education and expertise, although it does not venture to specify exactly which professional groups they are referring to.<sup>166</sup> This plan would require a much larger role for the government in wage determination system and as such it would require more compromise by the social partners on their freedom to negotiate. Unio even goes as far as stating that the government should take responsibility to ensure that educated female groups in the public sector receive equal pay to male dominated professions in the private sector with the same level of education.<sup>167</sup> As expected the employer organisations are more conservative in their approach to equal pay than their trade union counterparts. This goes for the private sector employer organisation NHO as well as the public sector KS.

NHO is the largest employer organisation with a membership profile primarily within industry. It views the gender wage gap as mainly a problem of gender segregation between the public and the private sector. However, in difference to Unio it does not consider that it is within its role to even out differences across sectors. It sees its role as primarily being to address equal pay within the NHO-area thus within the private sector. At the same time it does not consider that it is within anyone's role to interfere in the recruitment process of private

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<sup>164</sup> NOU 2008:6 *Kjønn og Lønn*, vedlegg 1: Innspill fra Referansegruppen, p.276-277

<sup>165</sup> *ibid.* p. 277

<sup>166</sup> *Unios likestillingspolitiske platform- veien mot et likestilt arbeidsliv* (Oslo, 2014) p.8

<sup>167</sup> NOU 2008:6 *Kjønn og Lønn*, vedlegg 1: Innspill fra Referansegruppen, p.278

businesses. This means that it neither considers the problem of the undervaluation of female dominated work across the public-private sector divide nor the lack of women in management positions within the private sector its concern. Furthermore, it does not consider that the undervaluation of female dominated work occurs within the NHO area. An example of female dominated work, which is low paid in the NHO area is the hotel and restaurant industry. NHO argues that rather than undervaluation, the wages are a reflection of the lack of educational requirements, the low average wage and the high turnover characterising the industry. It simply does not seem to find that there are equal pay problems that are within its responsibility to address.<sup>168</sup>

KS is the employer organisation for local government, i.e. the municipalities. As we recall it is in this sector that there is a particularly heavy concentration of educated women in low paid jobs, such as nurses and primary school teachers. KS emphasises that the gender wage gap is considerably lower in the municipal sector than the other sectors. The average gender wage gap is, as we recall, at about 14% while, according to their own sources, the gender wage gap in the municipal sector is at about 6%. It thereby attributes most of the gender wage gap to the public-private divide.<sup>169</sup>

Within the municipal sector it explains the 6% gender wage gap with reference to firstly, that fewer women than men are found in management positions and secondly, that women and men are concentrated in different types of work that is remunerated differently. Referring to this it is of the opinion that the focus should be less on the wage difference between male and female work, and more on the question of why men and women make such different choices. Measures should be directed at evening out the distribution of men and women in positions, professions and industries in the labour market. As such it does not consider whether something ought to be done about wages in low-paid female dominated professions in the municipal sector.<sup>170</sup>

As we know from some of the case law discussed in Chapter Four some female professions that require the same level of education and are of equal value based objectively on job content are not paid equal wages in the municipal sector. An example of this is nurses and engineers. The statement made by KS does not discuss whether or not something ought to be done with the persistence of this wage difference.

What it does emphasise, however, is the importance of preserving the social partners' right to free negotiations in the wage determination process and stresses that the municipalities must be free to take into consideration certain

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<sup>168</sup> *ibid.* p.268-270

<sup>169</sup> KS høringsuttalelse vedrørende NOU 2008:6 Kjønn og lønn – Fakta, analyser og virkemidler for likelønn (2008) Ref. 08/00820-5 520, p.1

<sup>170</sup> NOU 2008:6 *Kjønn og Lønn*, vedlegg 1: Innspill fra Referansegruppen, p.264



market interests where this is necessary, for example to compete for needed labour.<sup>171</sup> This suggests that they find that current wage differences between different professions in the municipal sector satisfactorily justified. In an official response to the recommendations proposed by the Equal Pay Commissions in its *Gender and Pay* report, KS states that the municipal sector is characterised by gender segregation but that women and men are either concentrated in different jobs that are not of the same value, or they are concentrated in different jobs that are of the same value yet are remunerated differently based on legitimate reasons.<sup>172</sup>

## 5.4. Concluding remarks

Although there is a portion of the gender wage gap that can be explained by the fact that men and women are concentrated in different collective bargaining areas, we have seen that even within collective bargaining areas, a portion of the gender wage gap persists. The social partners thus wield great responsibility over the future of equal pay, yet they have been making only slow progress towards narrowing the gender wage gap within their respective areas.

Gender equality and equal pay issues are incorporated into the activities of the social partners in different ways and the approach varies from one organisation to the other. They have separate gender equality agendas with varying degrees of commitment and the principle of equal pay for work of equal value does not appear to be formally incorporated into these agendas. Despite there being elements of cooperation between employer organisations, trade unions and the government on gender equality issues, when it comes to equal pay cohesion seems to be lacking. There is no tripartite forum dedicated to equal pay, rather equal pay forms a component of the agenda when social partners meet to primarily discuss other things. It seems no common understanding of the equal pay problem or what is required to address it emerges. The principle of equal pay for work of equal value does not appear to feature strongly anywhere in their activities even though it is the only legal authority on what the obligation to work towards equal pay actually requires.

The social partners' divergent approaches to equal pay, also reflects the conclusion that there is a lack of guidance and common understanding of the equal pay problem and what is required to address it. Of course, some of these differences must be considered in light of the fact that different trade unions and worker organisations represent workers and employers in different sectors

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<sup>171</sup> KS høringsuttalelse vedrørende NOU 2008:6 Kjønn og lønn – Fakta, analyser og virkemidler for likelønn (2008) Ref. 08/00820-5 520, para. 2.2.

<sup>172</sup> *ibid.*

of the labour market and accordingly have different equal pay priorities. However, there seems to be differences between the social partners also in the fundamental understanding of what the principle of equal pay actually requires. This can be considered a significant obstruction to eliminating pay discrimination contrary to the principle of equal pay. For example, Unio considers that the concentration of women in low-paid jobs in the municipal sector constitutes undervaluation of female dominated work and must be addressed by lifting the wages of these professions. Their most important collective bargaining partner KS directs the “blame” on the fact that men and women make traditional choices about their education and career and thus end up in different jobs with different pay. It does not consider whether something ought to be done with the current wage differences between female and male-dominated professions in this sector. If anything it considers that these differences are objective and legitimate based on a combination of the different value of the jobs or other factors such as market value. It would therefore be exceedingly challenging for them to come to an agreement on an equal pay approach and implement it in their wage settlements.

As is evident from the previous chapters of this paper, there is guidance to be derived from the principle of equal pay for work of equal value on these questions. The principle of equal pay for work of equal value can help to provide clarity on some of these conflicting opinions, which in turn can help the social partners make progress towards narrowing the gender wage gap in their respective areas. This brings us to the final chapter of the thesis in which I present some general conclusions and discuss one main recommendation based on the findings of this research.

# 6 Conclusions and Recommendation

## 6.1. Introducing the recommendation

In Norway provision is made by legal enactment for the general application of the equal pay principle in the Gender Equality Act. Public authorities and all social partners are under a negative obligation not to discriminate but also under the positive obligation to promote equal pay within their respective areas of activity. The Gender Equality Act lays down the principle of equal pay for work of equal value, with its origins in Convention 100 in international labour law. Equal pay for work of equal value calls for remuneration free from discrimination based on sex. As we have seen there are legal rules for evaluating what does and does not constitute pay discrimination contrary to the principle of equal pay; an objective evaluation of jobs free from gender bias is a starting point for determining whether jobs are of equal value. Further, in evaluating whether pay discrimination has taken place, there are legal rules for the reach of comparison between jobs, the way in which direct and indirect discrimination are evaluated and when an employer can nonetheless justify unequal pay with objective reasons.

The Gender Equality Act's complaints mechanism, embodied by the Equality and anti-discrimination Ombud and the Equality and anti-discrimination Tribunal, has been responsible for developing legal practice in this area. In the Norwegian context it is primarily to this authority we must look in order to understand what the principle of equal pay for work of equal value actually requires.

It was concluded in the previous chapter that the social partners are not lacking a willingness to address gender equality and equal pay issues, but rather that there is a lack of cohesion in these efforts and more specifically that the principle of equal pay for work of equal value does not have a strong presence in the collective bargaining process. Arguably, this is contributing to the level of divide and confusion between the social partners concerning what action is actually required in order to move forward in the equal pay fight. The recommendation proposed in this chapter is based on the argument that instilling a better understanding of the principle of equal pay for work of equal value among the social partners could engender a more unified approach to in the equal pay fight, which in turn would contribute to making advancements towards closing the gender wage gap.

The Equal Pay Commission's *Gender and Pay* report is a comprehensive study on the equal pay problem in Norway. The report also considered some

measures to reduce pay differences. This thesis has intended to be an expansion of the information provided in the report and as such the recommendation presented in this section purports to be an addition to those already forwarded by the Equal Pay Commission or other bodies. The recommendation must therefore be placed in the context of existing recommendations to narrow the gender wage gap in Norway.

This thesis recommends an advisory role for the Equality and anti-discrimination Ombud on the principle of equal pay, to provide expert advice that could be used by the social partners within the system of collective bargaining.

As we have seen there exist cooperative forums in which the social partners, the government and other bodies meet in order to discuss various issues of common interest. The topic of gender equality and equal pay, features in some of these discussions. Yet there is no single forum that comprehensively takes on the issue of equal pay. This section forwards the recommendation that the Equality and anti-discrimination Ombud should take an active role as an advisor on the legal requirements of the principle of equal pay, to be used by the social partners within the collective bargaining system. This would take the form of an equal pay forum, in which primarily the Ombud and the social partners participate. The aim of the forum would be to clarify, from a legal perspective, what the principle of equal pay for work of equal value requires in the context of the activities of the social partners. This could ultimately have a positive impact on how pay equality is reflected in wage settlements. The following sections elaborate on and account for the principle features of this recommendation.

## **6.2. Why the principle of equal pay for work of equal value?**

In short, this recommendation proposes advising the social partners on the legal requirements of the equal pay principle. As such, it is the equal pay principle itself that forms the basic tool in this recommendation. An effort has been made throughout this paper to illustrate that the principle of equal pay is of relevance to addressing the gender wage gap in Norway, where women are concentrated in jobs that are paid less relative to male dominated jobs. Therefore only the most relevant points will be restated here. As we have seen in Chapter Three and Four, the wage difference between female and male dominated work can in certain circumstances be considered discriminatory and contrary to the principle of equal pay. This is why the equal pay principle can be a useful tool in addressing the gender wage gap in Norway.

Objective job evaluation is a method, which forms a component of the principle of equal pay for work of equal value and is intended to establish the relative value of jobs without gender bias. This exercise forms an important starting point in addressing gender wage differences that follow gender segregation in the labour market as it opens up the possibility of comparing the wages of typical female work and typical male work, which is often very different in character, and challenge any presumptions that less value should be accorded to typically female work. The skills required for a job cannot be attributed less value based on the assumption that they form an inevitable part of a woman's nature. The provision of care for humans, for example, in professions such as teaching or nursing, must be evaluated in an objective way and this exercise must be rigorous enough to challenge historical perceptions of the value of traditionally female work. As we have seen from the case law of the Ombud and Tribunal, a nurse can be considered to be performing work of equal value to an engineer when the content of those jobs are evaluated objectively and without gender bias.

The reach of comparison of the equal pay principle is broad and allows comparison to take place between completely different jobs, across occupational borders and collective bargaining agreements. Its scope is therefore broad enough to address wage differences in a very gender segregated labour market.

One main reason why many female dominated jobs remain relatively less paid is their market value. Employers contend that they, in certain circumstances, have legitimate reasons for rewarding unequal pay even though women are disproportionately negatively affected. According to the principle of equal pay for work of equal value there can be objective reasons that justify unequal pay, market value being one of them. Employer organisation KS has expressed that wage differences between female and male dominated jobs in the municipal sector concern jobs that are either not of the same value or jobs that are of the same value but that the difference in pay is in these cases justified by objective reasons. However, the principle of equal pay does not seem to support this. There are limitations to the use of objective reasons to justify unequal pay. As we recall, in the *Harstad* case the Ombud was not prepared to accept the municipality's market value argument for paying higher wages to engineers than to nurses. It reasons that in light of the overall purpose of the equal pay principle, market value cannot systematically suppress women from receiving equal pay to men when they are performing work that is of equal value. The principle of equal pay for work of equal value establishes some limitations for when wage differences based on market value justifications can be deemed acceptable.

The point to be made is that the principle of equal pay for work of equal value provides guidance as to which current wage differences in the Norwegian labour market are deemed unacceptable from a legal perspective. Trade union

Unio, speaks of valuation discrimination as an equal pay problem. In general terms they state that this is when certain professions and sectors reward higher wages than others for equally qualified workers. However, it is not specified which professions this applies to. The principle of equal pay for work of equal value can be seen as a tool to evaluate which wage differences are not acceptable from the perspective of the principle of equal pay for work of equal value. The principle of equal pay for work of equal value is a legal concept and, as such, it has a certain accuracy, which the social partners can benefit from. Establishing that a wage difference is contrary to the principle of equal pay for work of equal value provides more foundation for arguments in wage negotiations that something ought to be done with certain persisting gender wage differences between female and male dominated professions and provide a more accurate picture of which professions this applies to. This could have a positive effect on the outcome of wage settlements from an equal pay perspective.

### **6.3. Why collective bargaining?**

As shown in Chapter Five the gender wage gap persists within collective bargaining areas. There is thus a portion of the gender wage gap, which arguably falls under the responsibility of the social partners, yet only very slow progress has been made on the gender wage gap within collective bargaining areas. Looking into ways to better address equal pay through collective bargaining is thus a worthwhile endeavour.

The freedom of workers and employers to negotiate their own collective bargaining agreements is a central principle in Norwegian labour law. Wage determination forms part of the central content of collective agreements. It is thus these bodies that wield the most influence over the determination of wages through the negotiation of collective agreements. Yet, the social partners are bound by the Gender Equality Act and hence by the principle of equal pay for work of equal value. The social partners are thereby the bodies with the most important responsibility for the determination of wages and they are also bound to apply the principle of equal pay for work of equal value.

Furthermore, most workers in Norway have their wage determined by collective agreements. Not only unionised workers are covered. Employers who are bound by collective agreements are obligated to apply the terms of the agreement to unionised as well as non-unionised employees. Collective agreements thus cover almost the entire working population. A recommendation directed at the collective bargaining process, thus has the potential to have a significant impact on the gender wage gap.

## **6.4. The complicated web of social partners**

The Norwegian collective bargaining system and the model for wage determination is complex and involves negotiations between many different social partners and at different levels of the organisational structure. Agreements can be concluded between different central trade unions and employer organisations, between different trade unions and employer organisations at industry level or between trade unions and employers at company level. Wage can be determined conclusively at the central level or conclusively at the company level, or a combination of both. For example, in the case of minimum wage agreements, a minimum wage is set at the central level and local negotiations take place regarding any additional wage increases. There are thus many actors, at different levels in the wage determination system that exert influence on wage settlements. These are often linked and have consequences for each other. A basic collective agreement between the central actors may set the framework for negotiations at a more local level.

Therefore, in order for the recommendation to be effective, the Ombud should conduct discussion forums not only with the central trade unions and employer organisations but also with social partners at different levels of the organisational structure. This would include individual employers and workers at company level, especially in cases where wage is determined almost exclusively at the local level. This would be no small undertaking and it would require a sophisticated organisational effort. Not least, it would be dependent on the allocation of a substantial amount of additional resources to the Equality and anti-discrimination Ombud.

## **6.5. Why the Equality and anti-discrimination Ombud?**

It is through their role as a complaints mechanism that the Ombud and the Tribunal have developed the current legal practice on the right to equal pay. Their decisions, however, are only directly applicable vis-à-vis the parties to the case at hand. It is only the National Labour Court that has the authority to invalidate provisions of a collective bargaining agreement as a whole. But the National Labour Court, having heard only one case concerning pay equality, is no authority on this subject. We must therefore still look to the Ombud and Tribunal as authorities on this principle.

It must be noted that the Norwegian government has paid attention to how the relationship between the Labour Court and the Equality and anti-discrimination Tribunal is problematic from an equal pay perspective. In the event of the 2002 reform of the Gender Equality Act, the government explored ways in which to strengthen the role of both the Ombud and Tribunal in relation to the validity of collective bargaining agreements. One of the suggestions made was that the Ombud be granted the power to demand that a case is brought before the Labour Court, something only the parties to a collective agreement can do. The Ombud would then also have a role in the case proceedings.<sup>173</sup> The outcome of the discussions, however, fell short of this and the reform landed on was granting power to the Tribunal to give reasoned statements regarding the legality of a collective bargaining agreement in relation to the Gender Equality Act when an individual case gives rise to this issue.

The statements and decisions of the Ombud and Tribunal thus still only have direct consequences for the individuals to the case at hand. However, what is important to note is that the Ombud and Tribunal, in their capacity as a complaints mechanism, develop legal practice and set precedence on the principle of equal pay for work of equal value. This can be of use also outside their role as a complaints mechanism. The complaints mechanism is primarily in place to provide recourse when discrimination has already taken place. However, the process in which wages are determined in the first place, i.e. collective bargaining, can benefit from the legal guidance provided by these bodies on the principle of equal pay for work of equal value.

As we recall, the mandate of the Ombud goes beyond the role of a complaints body and includes advocacy responsibilities, mainly in the form of providing guidance and information on the subject of equality and non-discrimination. On the official website of the Ombud a list of responsibilities within their mandate as an advocate for equality can be found. Two responsibilities are listed that are of particular relevance to this recommendation. Firstly, the Ombud is to provide information, support and guidance in the work to promote equality and fight discrimination. Secondly, it is to be a forum and information centre that facilitates cooperation between different actors in their work to promote equality.<sup>174</sup>

The recommendation proposed, for the Ombud to take an active advisory role on the principle of equal pay for work of equal value in a forum between itself and the social partners is thus within the Ombud's mandate.

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<sup>173</sup> NOU 2008:6 *Kjønn og Lønn*, p.197

<sup>174</sup> Likestillings- og diskrimineringsombudet, *Arbeidet vårt*, taken from <<http://www.ldo.no/nyheiter-og-fag/om-ombudet/arbeidet-vart1/>> accessed 20 May 2015



## 6.6. Ambiguities in the case law

It must be acknowledged that there are some inconsistencies in the case-law on equal pay between the Ombud and the Tribunal that raise some questions for the role of the Ombud as a legal advisor on the equal pay principle. One concern is whether inconsistencies in the legal practice of the complaints mechanism undermine the Ombud's authority on certain legal questions.

This does not seem to be a problem in regard to objective job evaluation. The Ombud and Tribunal have developed a detailed, rigorous and consistent method of objective job evaluation. This puts the Ombud in a strong position to provide legal guidance on the question of the objective value of different jobs and it can use its own as well as the Tribunal's case law in discussions with the social partners. Legal certainty in this area would make it more likely that the social partners make use of the Ombud's advice.

However, and what formed the central analysis in Chapter Four, there is less clarity in the case law regarding market value justifications. The Ombud takes a strong stance against market value justifications that compromise the purpose of the equal pay principle, yet the Tribunal shows unwillingness to challenge market value justifications, taking a more conservative approach to interference with the freedom of the employer. This leaves the state of the law somewhat uncertain in this area and a consequence could be that the Ombud is not able to adopt a clear stance on the use of market value justifications or that the stance it does adopt will carry less weight in discussions with social partners. For the purpose of this recommendation it would be beneficial if the Ombud and the Tribunal clarify their legal position on the use of market value justifications.

## 6.7. Why an “advisory role” approach?

The freedom of workers and employers to negotiate their own collective bargaining agreements is a central principle in Norwegian labour law. Although the social partners are legally bound by the provisions of the Gender Equality Act, an overwhelming compromise of this freedom would, from the perspective of the social partners be problematic. This is why an *advisory* role for the Ombud is suggested in this paper, as this does not put any legal restrictions on the social partners right to negotiate their own collective bargaining agreements.

A discussion forum on the principle of equal pay for work of equal value, in which the Ombud has an advisory role, would allow room for the social

partners and the Ombud to debate and negotiate the points of law that are more ambiguous. An example would be that employer representatives contend that the market value principle justifies unequal pay, while worker representatives argue that equal pay interests take precedence over market interests. The Ombud could provide examples of cases, balancing the interests of the two opposing groups and base its positions on an interpretation of the law. The social partners would still have final say on the matter in collective bargaining; however, clarification of the law during the discussions could be influential and carry a lot of weight in final wage negotiations.

This stands in contrast to the objective job evaluation tool FAKIS, mentioned in Chapter Two, in which employers would have been obliged to carry out wage adjustments following the categorisation of different jobs using an objective job evaluation method. This only took into account the objective job evaluation stage without consideration of the other elements that factor into the evaluation of pay discrimination, for example objective justifications. This uncompromising approach led to no wage adjustments at all. The discussion forum would not just consider whether two jobs are of equal value based on objective job evaluation but examine whether wage differences actually amount to pay discrimination contrary to the principle of equal pay, rigorously considering all factors that enter into this legal exercise. This would allow room for employers to forward arguments based on market value interests or other objective reasons they may have for rewarding unequal pay, and these would be evaluated based on the legal requirements of the principle of equal pay for work of equal value. This more discursive, persuasive form of promoting the principle of equal pay for work of equal value could ultimately be received more favourably by the social partners, especially those forces more sceptical to major equal pay changes.

The recommendation proposed in this section can also be distinguished from related recommendations forward by the Equal Pay Commission in their *Gender and Pay* report. One of their major recommendations was that the public authorities along with the social partners conduct a general wage raise for female dominated professions in the public sector. The Commission proposed that it would be up to the social partners to decide which trade groups would be granted these raises.<sup>175</sup> The recommendation proposed in this paper is not opposed or irreconcilable with measures aimed at raising the wages in female dominated professions. Indeed, the ultimate purpose of an equal pay discussion forum is for wages to be raised in low-wage female dominated professions when the principle of equal pay demands this. However, the focus of my proposal is on providing more clarity on where and when the law demands such raises so that the social partners could be more guided in their equal pay efforts and conclude wage agreements that are reflective of what the principle of equal pay for work of equal value requires.

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<sup>175</sup> NOU 2008:6 *Kjønn og Lønn*, p.223-224

Undeniably, such changes would have significant economic consequences. A question that most certainly will have to be grappled with is where economic resources to conduct these resulting wage raises are to come from. Is it the government or the employer that is to take primary responsibility? Although addressing these issues fall beyond the scope of this paper, they are essential technicalities that must be dealt with if progress is to be made on the gender wage gap in Norway.

The Equal Pay Commission's proposal mentioned above would be aimed at raising the wages of female-dominated professions in the public sector relative to the private sector. As such it would be addressing wage differences between the public and private sector. As we know, this is something that the domestic law on equal pay does not require. The right to equal pay for work of equal value is restricted to the same enterprise. Thus the principle of equal pay carries a significant limitation. However, the discussion forum proposed, in which the Ombud acts as an expert advisor, could be flexible enough to explore and challenge this limitation in the law. As we have seen in Chapter Five, trade union Unio advocates that wage differences that cut across the public-private sector divide should be addressed. The discussion forum could be a setting in which social partners can share their views on these questions. Although the domestic law is rather clear in its limitation, as we know, it is incompatible with international labour standards, which envisages comparison to be able to take place also between different enterprises and as such between private and public employment. The Ombud could contribute guidance not just on the domestic law, but also on what international labour law, European Unions Law or other sources of law demand in relation to equal pay. This could have the potential of being the starting point in encouraging reform of this limitation in the domestic law or indeed developing the legal principle of equal pay for work of equal value in domestic law, more generally.

Key arguments in support of an advisory role for the Equality and anti-discrimination Ombud on the principle of equal pay for work of equal value, to provide expert advise that can be used by the social partners within the system of collective bargaining, have been forwarded in this chapter. The author thereby hopes to have communicated that, although this recommendation would require a sophisticated organisational effort and undoubtedly place a significant demand on financial resources, it would be a worthwhile undertaking with the potential of having a substantial impact on the gender wage gap in Norway.

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