



PROFESSIONAL PRACTICES ALLIANCE REPORT

FEMALE PARTNER PAY IN PROFESSIONAL SERVICES FIRMS

Samantha Mangwana, Partner, CM Murray LLP, Discrimination and Equal Pay specialist
(Chair)

Paul Epstein QC, Cloisters Chambers, Discrimination and Equal Pay specialist

Sarah Chilton, Partner, CM Murray LLP, Partnership and Employment Law specialist

Kate Mueting, Partner, Sanford Heisler Sharp LLP, US Discrimination & Equal Pay Class Action specialist

Dr. Zara Nanu, co-founder and CEO of Gapsquare, a company that brings together technology and diversity and inclusion expertise to close the gender pay gap

The top 3 points that came out of the discussion:

- The panellists each provided thoughts on the root causes of unequal pay, which included lack of transparency on decision making, old fashioned assumptions on motherhood and childcare, job segregation, discrimination, and the impact of maternity leave on a woman's career.
- Women over the age of 50 are particularly disadvantaged in relation to unequal pay and this is the case across all job sectors.
- The panellists also each provided suggestions on proactive steps to address gender pay gap issues, which included firms being clear and transparent about pay criteria and putting in place policies for women returning from maternity leave and dealing with childcare.

Samantha Mangwana, whom CM Murray LLP recently welcomed as a partner, asked the panel to consider whether professional services firms have a problem with pay disparity between male and female partners.

The discussion was broadly broken down into three sections:

- i. the root causes of unequal partner pay in professional services firms;
- ii. the US and UK approach to collective action by female partners; and
- iii. what proactive steps can be taken by firms.

Samantha noted at the outset that gender pay reporting and equal pay are two very important, but distinct, issues in that equal pay is the unlawful differences in pay between men and women who do the same or similar jobs, or who do work of equal value, and the gender pay gap is the overall average difference in male and female pay within an organisation. “A big gender pay gap doesn’t necessarily mean unlawful pay practices.” The example she gave of this distinction was a helpful one: male and female pilots at the same airline might receive equal pay, however the airline may still have a big gender pay gap. This might be because, across the airline, women traditionally hold positions such as members of cabin crew, where they will be paid less than if in positions that have been traditionally occupied by men – such as pilots. As a result, there will be a gender pay gap at the airline, but it is not to say that the airline has unlawful pay practices. Samantha highlighted that whilst gender pay reporting may not currently be required for LLP members, “it looks like that might soon be on the horizon.”

The root causes of unequal partner pay

Sarah Chilton identified the key problem areas in unequal partner pay with reference to CM Murray LLP conducting a survey into female partner pay inequality. The results revealed that over a quarter of female partners were paid less than male partners, performing a similar role in their department. One fifth did not know if they were paid less so, as Sarah noted, “there is a transparency issue.” Sarah went on to refer to the lack of transparency as being a “black box issue” which was not so much a cause of inequality, but a factor, which allows the situation to continue, unchallenged.

There are two main things in practice as to why partner inequality may exist. Sarah identified these as being firstly, old fashioned assumptions of motherhood and maternity leave. Female partners often have to pass clients over to other partners when they go on maternity leave, and they will not necessarily get those clients back. However, as Sarah noted, from a business's perspective it is a tricky issue, because it has to protect itself and maintain client relationships, and so might be unwilling to pass back clients to the partner who returns from maternity leave. This can have devastating effects on the female partner's career. A female partner may spend their career building up a client base, and then lose it. As to how this affects the pay of female partners, Sarah's explanation was clear, "if your remuneration structure looks at billings, then losing clients will impact on this."

There are other, more nuanced, effects of motherhood and flexible working that indirectly result in unequal pay. For example, Sarah suggested that business development opportunities, such as a round of golf with a client, may not be offered to a woman, "because there is a perception that childcare may prevent her from being able to attend such an event – as such the opportunity is never offered."

Paul Epstein QC agreed that fees coming into a business was clearly very important, and it was no doubt an explanation for the inequality of pay between partners depending on new fee generation and origination. He provided a further explanation by identifying segregation in the workplace: "women tend to be in areas of work such as administrative roles whereas men often do company and corporate type work."

In Kate Mueting's experience, the bulk of the discrimination claims she saw were based on a gender bias. Decisions on remuneration are often made – as Sarah said – in a black box, and traditionally by men. "There's no transparency", Kate commented. "We see a bias on how credits are assigned. The other issue is that institutional clients are often handed down from one male partner to the next, and we do see a 'boys' club' culture." In her view, women with children experience a "motherhood penalty" in that they might be seen to be less invested in their jobs when they have a child, whereas the opposite applies to the man with a family who is seen to be more invested in their job.

Dr Zara Nanu said that the data Gapsquare had compiled from across 120 clients backed up what had been said by the panel. Zara agreed with Paul Epstein QC's point that women seem

to be more likely to be in jobs that pay less and noted, “what was particularly surprising is how disadvantaged women over 50 are – there is clearly a generational issue, and this is the case across all job sectors.” A further point Zara raised was that women make partner later in their careers. This may be the case because of the issues surrounding motherhood that Sarah had raised.

UK and US approach to collective action by female partners

Paul Epstein QC began by explaining the key elements of equal pay claims in the UK. “There must be a female who is doing equal work to a male but is paid less and for no good reason”. The three elements to this were as follows:

1. Comparability – can a woman compare themselves to a man?
2. Equal work – she must be doing work that is equal to that of the man (this could be broken down into i) the claimant and the male comparator doing similar jobs or ii) there is in place a Job Evaluation System (JES) which rates the jobs done in a business and show a claimant and a man doing “like” work.
3. Equal value – where the work is not alike, the demand on a female’s role and a male’s role must be equally great. Paul gave the example of *Hayward v Cammell Laird Shipbuilders* which determined that canteen workers did equal work to that of shipbuilders.

He went on to explain that there is often a burden on the employer to show there has been no direct discrimination. If they are unable to do that, a claimant will likely succeed in a claim for discrimination. Indirect discrimination is slightly different and requires justification. Indirect discrimination might occur where there is i) a provision criterion or practice (PCP) which both the woman and the male comparator are subjected to; ii) lack of transparency; and iii) job segregation (where men may be predominantly grouped in one role and women grouped in another). A material factor defence was identified by Paul, that “it can be that the difference in pay is excused, for example, where the same job is done at different times of the day, as nightwork can usually justify higher pay. Market forces are also very relevant, which can operate to depress female pay. For example, where a man is hired from another firm and negotiates a higher salary than those at the hiring firm.” This differed from the US, where

Kate Muetting noted that some states have laws which say firms cannot use market forces as a defence. “The causative potency of market forces”, Paul speculated in relation to the UK position, “must end at some point.”

Kate compared the UK position to that in the US. “We bring claims under two federal laws: i) for general anti-discrimination laws, the Civil Rights Act of 1964 or ii) for pay claims, the Equal Pay Act of 1963, which can provide for double damages in backpay. There can be advantages in bringing claims together under both laws. Those bringing claims must be ‘employees’, although courts have found that law firm ‘partners’ are ‘employees’ within the meaning of these laws because they lack a level of control over the law firm.” In Kate’s experience, a significant issue is that decisions tend to be made by a small number of partners, who are not required to justify their decisions. Paul added that in the UK, claims can be brought under domestic legislation or European legislation although he noted that there was, as yet, no definitive authority as to whether a partner or LLP member could bring a claim as a ‘worker’ under European equal pay legislation.

Kate went on to set out the requirements for bringing a class action in the US, an area where she is very experienced. “We filed a very early class action on behalf of female partners in the US in 2011, and it is a relatively new method for partners bringing such claims.” She explained that claims are governed by the Federal Rule of Civil Procedure 23. Rule 23 imposes several prerequisites, including that the potential class members are sufficiently numerous – usually more than 40 people – and that their claims are sufficiently common to one another. In the US, they then often bring in experts, including labour economists and human resources experts to analyse the statistical evidence and firm policies. Kate went on to say that “employers are taking class actions and the threats of class actions very seriously”.

The position was not the same for UK claims, as Paul explained. He noted that there has been an explosion of equal pay claims in the private sector, typically where there are very large workforces, and there have been some notable examples in recent years of store workers bringing claims – for example against Asda, Tesco, Morrisons, and Next. “My analysis of the increase suggests that it came about because of i) the financial incentive to lawyers in bringing such claims under no win no fee arrangements and damage-based agreements; ii) greater pay transparency; and iii) a greater willingness in numbers.” However, Paul’s view was that we would see more class actions brought by partners in law and accountancy firms

and that there will be more claims brought by firms operating under damage-based agreements on behalf of partners at law and accountancy firms.

Samantha Mangwana's view was that part of the problem in relation to UK claims is that in the financial and professional services sectors, women will typically only know of a pay disparity when other claims are brought. The problems are clearly significant, she continued, "a report by the Equality and Human Rights Commission in 2010 found a disparity in bonus pay between male and female workers of between 50-60%. Historically, without transparency, women have not known this. But the tide is turning, with high profile cases like at the BBC and now in the retail and private sectors." Samantha went on to explain that the other barrier used to be organising group action: "it is obviously more comfortable to take on your firm as part of a group rather than individually, but women in the City would not realistically attend a public meeting to find out about this. That is not necessary now. The issues are publicised and promoted directly in the traditional news media and on social media. This promotes people feeling confident and emboldened to move forward together, and there are no longer the barriers that once existed for women in the City – the landscape has changed."

Proactive steps

At the moment, the statistics do not make for pleasant reading. Sarah Chilton observed that the CM Murray LLP survey showed that 35% of respondents felt they were disadvantaged when they returned to work from maternity leave and a further 2 out of 5 respondents felt they were disadvantaged by remuneration policies.

To be proactive, firms should carry out an audit on partner pay which might highlight any problems. This would give firms the opportunity to look at why there are issues and consider procedures for addressing them. Sarah continued, "firms need to consider their structures to ensure there are processes in place to protect women returning from maternity leave. Firms should also consider their remuneration criteria – firms are aware of the challenges women face and a lot of issues appear to be subconscious which can be hard to overcome, for example, male clients often prefer to have male partners leading their matters." Sarah's view was that two of the most important steps that can be taken are i) firms being clear and transparent about their pay criteria and how remuneration works, and ii) firms should put

in place policies that better protect women returning from maternity leave and dealing with childcare.

Dr Zara Nanu explained how Gapsquare is aimed at tackling gender pay inequality. “We have developed software that supports gender pay gap reporting. Current views are that it will take 217 years for the gender pay gap to close completely, and we want to speed things up!” Zara noted that, given advances in technology, something should be done to address the gender pay gap. “What we want is for businesses to make the most of a diverse workforce, and not just be thinking about how to avoid claims. Our technology highlights the data which shows where the challenges are for businesses, and we have been working with the London Mayor’s Office and the London Met on this.” Zara pointed out that when businesses have the data, which many do not currently have, it should make addressing the issues more manageable. “Culture change is the key thing” Zara concluded, “but we are hoping this tech will help in breaking down the steps that are needed into more manageable sizes for businesses. The hope is that we can ultimately feed into government policy in the future.”

A special thank you to all the speakers for their input, in particular Kate Mueting, who had flown in from the United States to contribute. Thank you also to all the attendees, and to those who completed our survey on equal partner pay issues in the legal profession. Lastly, thank you to Maurice Turnor Gardner LLP who kindly agreed to host the event.

If you would like further information from any of the speakers, please see their contact details below:

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