

Speaking out for change



Winning equal pay for NHS speech and language therapists



a TUC oral history project on equal pay,
in association with the Wainwright Trust

RECORDING WOMEN'S VOICES

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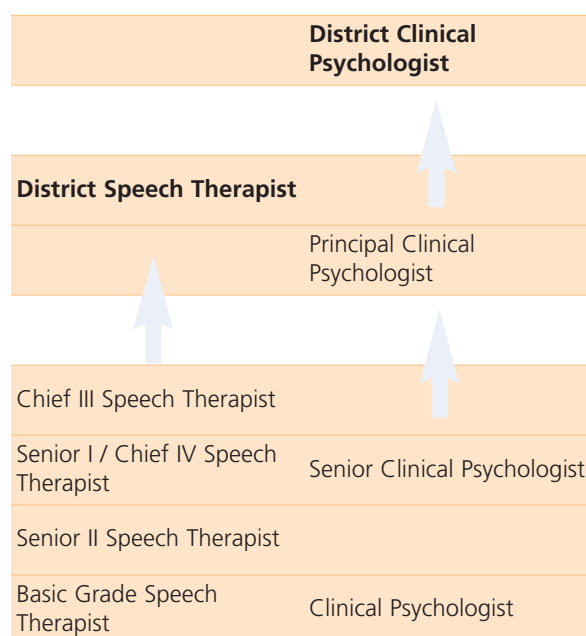
The claims of the speech and language therapists took almost 15 years to resolve...

However, during that period a number of important legal decisions were made in their cases, with significant implications not only for their own claims, but also for those of other equal pay claimants. The claims were financially and practically supported by the speech therapists' union MSF (now Amicus) and the Equal Opportunities Commission – without their support it would have been impossible to sustain the long drawn-out legal proceedings which eventually established new case law.

The first of what eventually became around 1200 claims from speech and language therapists (almost all of those working in the health service at the time) were submitted in 1985, but most were dated 1987 after a campaign initiated by their union MSF (now Amicus) national committee and MSF national officer, Donna Haber. The applications cited as comparators clinical psychologists and/or hospital pharmacists employed by the same health authorities as the claimants. The comparator groups were also organised by MSF, but the pay of each of the three groups was negotiated by a separate committee within the Health Service Whitley Council system.

Like many predominantly female groups in both public and private sectors, the speech and language therapists had a very compressed pay structure with considerable pay overlaps between grades and small pay increases on promotion: indeed, two grades, called Senior I and Chief IV, had exactly the same pay scale, even though the Chief IV grade was viewed as a promotion step. In contrast, the comparator groups had pay structures with less overlap and bigger promotion pay increases. So, although all three groups had similar starting salaries for newly qualified practitioners, the pay gaps

between grades increased, until the top point of the highest grade in each of the comparator grades was some thousands of pounds higher than the top point of the highest speech therapist grade (that of District Speech Therapist):



THE CLAIMS WERE DELAYED BY A SERIES OF LEGAL ISSUES raised by the Health Service employers. The first defence was that the employers did not control the pay levels of the speech and language therapists, because they were bound by the terms of statutory instruments (Parliamentary Orders) regulating their pay (and indeed that of the clinical psychologists and hospital pharmacists also). However, the Divisional Court held that this was not a material factor defence to an equal pay claim and that the real issue was why the particular rates were decided on and whether there are material factors in this regard. This decision meant that other groups in the public sector whose pay was promulgated by

statutory instrument could pursue equal pay claims.

The next argument raised on behalf of the employers was that, because the pay of the three groups was determined under separate collective bargaining arrangements (separate Whitley Council sub-committees), this provided a genuine material factor defence to the equal pay claims. At the first hearing on this issue, 10 days were spent by the respondents taking the tribunal through the minutes of negotiating meetings to demonstrate that there was no discrimination in the way the pay rates had been determined.

THE TRIBUNAL WAS PERSUADED BY THIS APPROACH, but it was eventually turned down by the European Court of Justice (ECJ), although not until 1993. The ECJ held that the fact that the rates of pay for two jobs, assumed for the purpose of the hearing to be of equal value - one carried out exclusively by women and the other predominantly by men - had been arrived at by collective bargaining processes that had been conducted separately without any discriminatory effect within each group is not sufficient to provide objective justification under European legislation.

The ECJ pointed out that if an employer could rely on the absence of discrimination within separate collective bargaining processes, the principle of equal pay could easily be circumvented by using separate processes. The ECJ did not point out, but might have done, that separate collective bargaining arrangements for male- and female-dominated occupational groups have been a cause of unequal pay historically in the UK.

As separate collective bargaining arrangements were being relied on as a defence to equal pay claims by other large employers, especially in the public sector, the dismissal of this line of defence opened the way for a much wider range of equal pay claims in both the private and public sectors and reinforced the trend towards bringing together previously disparate groups into single harmonised grading and pay structures. This led ultimately to the introduction of the Agenda for Change structure in the health service and single bargaining table

arrangements for most employees in a number of other parts of the public sector, for example, higher education, further education, and the probation service.

The same decision in 1993 of the European Court of Justice in *Enderby v Frenchay Health Authority* also clarified the position in relation to market forces as a material factor defence. The ECJ said "the state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground for (all or part of) a difference in pay."

In the case of the speech and language therapists, it had been agreed between the parties at an early stage that 10 per cent of the difference in pay between the claimants and the hospital pharmacist comparators was attributable to market factors. This had to be taken into account during the settlement negotiations.



Lisa Thompson, speech therapist, at Rachel McMillan nursery

THE QUESTION OF 'EQUAL VALUE' WAS NOT CONSIDERED BY ANY INDUSTRIAL (NOW EMPLOYMENT) TRIBUNAL UNTIL 1995, when 20 'lead cases' were referred to a team of independent experts. Three of the 20, including those of lead claimant, Pam Enderby, and of Lesley Forsdike, were settled when the respondents' experts (Hay Management Consultants), as well as the applicants' expert and the independent expert in each case found the claimant job to be of equal value to that of the relevant comparators.

The first report to be considered by the tribunal was in the case of *Evesham v North West Hertfordshire Health Authority*. The applicant, Margaret Evesham, was in 1987

District Speech Therapist, responsible for the speech therapy services for the District HA and with additional responsibilities for coordination of para-medical services, including clinical psychology. Her higher paid comparator was the then recently appointed District Clinical Psychologist, responsible for the clinical psychology services for the District HA and with additional specialist responsibilities for personally providing psycho-therapy services. Like most tribunals in a similar situation, the IT followed the independent expert's report and found the applicant's work to be of equal value to that of her comparator.

More radically, in two further speech therapist claims, the industrial tribunal went against the conclusions of the relevant independent experts, for different reasons, and found the jobs to be of equal value. In one of these claims, the tribunal considered the question, previously avoided by most tribunals of 'what is equal value' and effectively found that 'almost equal value' is 'equal value'. The tribunal concluded:

"The Tribunal..... finds that there is no.... measurable and significant difference in the demands made upon Mrs. Worsfold as compared to her comparator. It is supported by this in the evidence of Mr. Colville [Independent Expert] to the Tribunal that if he as a manager were grading the job for job evaluation purposes the difference would not lead to a difference in grading in the real world. The Tribunal therefore concludes that the Applicant was engaged on work of equal value with that of her comparator.' [para. 31]

These two decisions were appealed by the respondents, but the findings were confirmed by the Employment Appeal Tribunal (EAT), which endorsed the tribunal's approach.

In the three initial speech and language therapist cases, the tribunal found equal value in relation to specialist and professional management posts in a typically female caring occupation, which had traditionally been paid substantially less than the male-dominated medical and related health service professions. Further cases were in preparation for tribunal hearings.

HOWEVER, IN THE MEANTIME, THERE HAD BEEN A CHANGE OF GOVERNMENT and a recognition by the Department of Health that most of the 'test cases' were likely to be found in favour of the claimants. Settlement negotiations were commenced, but were protracted because the Department of Health team insisted on comparing each claim individually with the outcomes of the cases determined by the tribunal. There was also extensive negotiation over the amounts to be paid to the various categories of claimants, depending on their 1987 gradings.

The individual case settlements dealt with the past, but not the future. As part of the overall settlement, a new pay structure for speech and language therapists was agreed, based on that for clinical psychologists. However, it was clear at the time that this could not provide a long term solution, as there were other female dominated groups in the health service, for example, physiotherapists, occupational therapists and radiographers, who might also pursue equal value claims. The eventual resolution was through a new grading and pay structure, called the Agenda for Change system, after the government consultation paper that proposed it.

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Filmed interviews on the speech therapists case are available from TUC publications on 020 7467 1294. Further information on the TUC oral history project on equal pay is available from September 2007 at www.unionhistory.info



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