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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

28 May 2018

Case Document No. 5

University Women of Europe (UWE) v. Sweden
Complaint No. 138/2016

**OBSERVATIONS BY EQUINET, EUROPEAN NETWORK OF
EQUALITY BODIES**

Registered at the Secretariat on 30 March 2018

Equinet
Rue Royale/Kooningsstraat 138
1000 Brussels
Belgium

University Women of Europe (UWE) v. Sweden Complaint No. 138/2016 before the European Committee of Social Rights

Observations by the Swedish Equality Ombudsman

Having regard to the complaints submitted by University Women of Europe against fifteen European countries (including Sweden), and in response to the request issued by the European Committee of Social Rights for the relevant members of Equinet to submit information *”on the situation in law and in practice as regards equal pay in each of the countries concerned, focusing on the implementation on measures aimed at reducing and closing the gender pay gap, through the work of equality bodies or otherwise”*, please find below the observations of the Swedish Equality Ombudsman.

The existence of a gender pay gap remains a reality in Sweden. As set out in greater detail the Government’s submissions on the merits¹ the available statistics show that the so-called unweighted wage difference between men and women in 2016 stood at 12.0 percent. This is a decrease by 0.5 percentage points from the preceding year and by 4.3 percentage points when compared to 2005.

By the use of standard weighting it is possible to take into account factors such as differences inter alia in professions, sectors, education and age. Even when this is done, however, there remains an unexplained difference in pay between women and men of 4.5 percent. It should be noted, however, that the fact that this pay differential is unexplained in a statistical sense does not exclude that it is the result of factors other than discrimination on the grounds of sex. Thus, the available data does not permit any firm conclusions to be drawn concerning the extent to which the existing Swedish gender pay gap is caused by pay discrimination in a legal sense.

A comprehensive description of the Swedish legal framework on the prohibition of discrimination in this field has been provided by the Government in its observations on the merits. It is important to note, however, that in

¹ Complaint No. 138/2016, Submissions by the Government on the merits, paras. 36-38

addition to the prohibition of discrimination on the grounds of sex in working life (covering, inter alia, discriminatory pay differentials between women and men) the Discrimination Act provides for an obligation for employers to undertake prevention and promotion measures aimed at preventing discrimination and serving in other ways to promote equal rights and opportunities regardless of all the seven grounds of discrimination, including sex. In the terminology of the Act this is referred to as an obligation to undertake “active measures”. This obligation includes, as set out in greater detail in the Government’s observations, the duty for employers to carry out annual pay surveys and, significantly, in this connection to assess whether existing pay differences are directly or indirectly associated with sex. Where such pay differences are found to exist, the employer is under an obligation to take the measures that are necessary to rectify the situation.

The Equality Ombudsman, as part of its mandate, is tasked with monitoring compliance with the Discrimination Act. This includes both the Act’s provisions on the prohibition of discrimination and its provisions imposing an obligation on employers to take active measures. In the latter area the Ombudsman may, if it considers that an employer has failed to meet its obligations, apply to the Board against Discrimination for an order for fulfilment to be directed to the employer. Such an order by the Board shall be combined with a conditional financial penalty. With respect to violations of the prohibition of discrimination the Ombudsman may bring a court action on behalf of a victim of discrimination for financial compensation to be paid to the individual concerned. No other sanctions are available to the Ombudsman in situations where discrimination has occurred.

As part of its activities in this area the Equality Ombudsman has during the last five years carried out several larger-scale coordinated efforts aimed at monitoring compliance with relevant aspects of employers’ duty to take active measures.

Thus, in 2015 the Ombudsman examined the so-called “equality plans” from approximately 100 medium sized companies. According to the legislation in force at this time, the equality plans were to contain information relation to the companies’ action plans for equal pay. In 2016 the activities were expanded to include some 200 public authorities and their work on gender equality. This included the examination of the authorities’ equality plans.

The Equality Ombudsman has further conducted two larger supervisory schemes with a specific focus on pay surveys.

As a follow-up to an earlier large-scale examination carried out by the previously existing Gender Equality Ombudsman, the Equality Ombudsman in 2013 – 2014 examined whether the work on pay surveys among the relevant employers had continued. In total this action involved some 470 large employers with a workforce of approximately 550 000 – 600 000 employees.

Furthermore, in 2014 – 2015 the work of approximately 150 employers, both in the private and public sector, were monitored. The examination was aimed at sectors with significant differences in pay between women and men and focused on the employers' work on pay surveys.

The Ombudsman further maintains more routine monitoring activities in this field. This includes the examination of an individual employers' fulfilment of the duty to take active measures, including the obligation to carry out pay surveys, conducted as a result of information received e.g. through individual communications or media reports.

In addition to its supervisory function, the Equality Ombudsman also acts in a promotional capacity. As an example of its activities in this role specifically aimed at counteracting gender based pay discrimination, the Ombudsman in 2015 developed a step-by-step e-learning training tool to support employers in their work of conducting pay surveys. The Ombudsman has further repeatedly engaged inter alia with labour unions and employers' organisations to provide information and support related to the new provisions on active measures in the Discrimination Act that entered into force on 1 January 2017, with a particular focus on equal pay and pay surveys. In 2016 the Ombudsman published a report² focusing on employers' work on pay surveys, based on a qualitative analysis of documentation provided by some 100 employers on their activities to live up to their legal obligations in this area. The report has been widely disseminated and presented by the Ombudsman in different fora.

As is seen from the above, the Ombudsman over the past five-year period has devoted a not insignificant part of its resources on measures aimed at preventing and counteracting discriminatory pay differences between women and men. These efforts have, to the largest part, been related to the Discrimination Act's provision on active measures.

It should in this connection be observed that in the Ombudsman's experience the litigation of individual cases of gender based pay discrimination offers only limited possibilities to address the problems that exist in this area. Even disregarding the fact that individuals may often be unaware that they are subjected to this type of discrimination, there are many reasons for the difficulties encountered in bringing such cases to a successful conclusion. These include, but are far from limited to, the problem of identifying the appropriate comparator in sectors where wages are individually set. In more general terms, the existence of unwarranted pay differentials between women and men in a workplace *at the structural level* does not necessarily translate to a successful legal course of action for gender based pay discrimination *in an individual case*.

² Sakligt motiverad eller koppling till kön? En analys av arbetsgivares arbete med att motverka osakliga löneskillnader mellan kvinnor och män, 2016.

The Equality Ombudsman further has expressed its view that the existing sanctions regime for violations of the prohibition of discrimination is insufficiently effective. For a sanction to be imposed upon an employer which maintains discriminatory wage differences between women and men it is necessary to identify an individual employee which is not only aware of having been discriminated against but also prepared to engage in legal proceedings against the employer – a choice many persons may not feel comfortable to make. Unless such an individual can be identified an employer may thus, in principle, engage in systematic gender based wage discrimination without any sanction being imposed. The situation is compounded by the fact that even if an individual claimant were to be identified and a legal action successfully brought, the amount of compensation awarded may be expected to be too low to have the requisite deterrent effect.

Based on these and additional related considerations, the Ombudsman has proposed that the possibility of introducing a different, more effective and truly dissuasive sanctions regime, better suited to addressing issues at a structural level should be considered. In this connection the Ombudsman has suggested that the existing legal framework in areas such as competition law and data protection law could serve as inspiration for such an inquiry. While the Ombudsman's comments have been directed at the Swedish context, it is understood that similar considerations may apply in many other European countries. Thus, it may be noted that the European Commission in its recent action plan for tackling the gender pay gap³ has stated its commitment to taking action to improve sanctions in this field.

³ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, EU Action Plan 2017-2019, Tackling the gender pay gap, COM (2017)678 final.