

## Merit based schemes – a panacea for women?



Echoing accountancy and other professional services sectors, many firms no longer believe that lockstep is the right pay model for associates. “...from a common sense perspective, it’s ludicrous paying associates more because they are a year older...” (Charlie Keeling, HR Director, Field Fisher Waterhouse). In their place, merit or competency-based systems coupled with transparent career structures are increasingly popular. In this article, having interviewed a number of HR and other directors involved in introducing new schemes<sup>1</sup>, we explore some of the issues firms face in seeking to ensure fairness to women lawyers in pay and career progression.

Theoretically, lockstep schemes guarantee equal pay regardless of gender (or ethnicity) because of their time-served nature. However, David Jabbari CEO of Barlow Lyde Gilbert believes very few firms embrace the “purest form of lockstep, allowing some subjectivity in either a degree of salary-band flexibility or bonus payments that reward individual performance”. Researching the impact of these traditional models on women’s pay is fraught with

<sup>1</sup> We are very grateful to Charlie Keeling Field Fisher Waterhouse; Lisa Nwachukwu, Gates and Partners; David Jabbari, Barlow Lyde Gilbert; Jeff Marlow, Stephenson Harwood; Shasha Hardman, Allen & Overy, however, the views expressed here are our own unless otherwise stated.

difficulty but, in 2008, The Law Society<sup>2</sup> found multiple gender pay gaps of varying size which became wider the more experienced and senior solicitors became. In the largest firms, the mean pay gap (at 45%), indicated wide variation between men and women in the highest earning brackets. This research suggests an existing degree of unfairness to women lawyers both in terms of their pay and in their position on the lockstep. In introducing change, firms have a real opportunity to create schemes which ensure equal treatment between male and female lawyers although redressing this existing apparent imbalance is rarely mentioned as a reason for making change. Lisa Nwachukwu, Practice Manager of Aviation specialists Gates and Partners, is one of the few who was driven in part by equal treatment when considering the move to the more transparent merit based scheme they now operate.

Whilst the new schemes could really have a positive impact on women lawyers, many have expressed the concern, well described by Charlie Keeling; that “merit based pay could result in greater exposure to gender bias since, by their very nature, these schemes aim to treat associates differently depending on acquired core competence...arguably when women are on maternity leave they aren’t building this”. Ensuring then that schemes avoid gender bias will be the key challenge, and whatever that difficulty, as Jeff Marlow (HR Director Stephenson Harwood) suggests, “the change will benefit women because partners will become better at accurately assessing performance”. Unsurprisingly, a reported two thirds of partner respondents<sup>3</sup> believed law firms would need to acquire new skills to meet the greater demands of managing assistants’ careers through merit-driven pay. Firms clearly recognise the need for developing new skills as all the firms interviewed made significant upfront investment in scheme design and in training partners on evaluating performance accurately and briefing and training

<sup>2</sup> Salary survey - gender and earnings in private practice 2008. Research Unit. The Law Society. 2009

<sup>3</sup> The Legal Week Big Question 4 August 2010

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associates on how to use the scheme. Despite this intense initial effort, we believe it is important to ensure that schemes are gender-neutral, for example, auditing pay/bonuses and collecting other statistical data, such as speed of movement through the career structure, to show up any disproportionate impact on women lawyers. In our discussions with practices, only a minority including Gates and Partners reported having conducted a base line audit and few reported an intention to conduct pay audits in the future, most instead planning to rely on reviewing and, where necessary, moderating individual results to achieve fairness in operation.

Why do we think that firms need to assess the operation of their schemes so carefully? Evidence of what can go wrong, can be seen in the numerous claims of discrimination both in pay and bonus mounted by women working in financial services. Given that these organisations generally have highly sophisticated competency schemes often coupled with 360 degree feedback, fair pay, bonus and promotion for women should result. However, as Louise Roth<sup>4</sup> reveals the problem is “the subtle structural discrimination that occurs when the unconscious biases of managers, co-workers, and clients influence performance evaluations, work distribution, and pay” and Deborah May<sup>5</sup> quotes Wall Street workers as describing how “factors such as the preference to associate with those of the same gender contribute to systematic inequality”. Because most of these cases are settled under strict confidentiality undertakings, specific lessons for the legal sector are hard to find. Nevertheless, this experience suggests that law firms need to look particularly carefully at how unconscious bias can creep into schemes which at their inception appear entirely gender neutral.

### Gender neutrality in competency frameworks

The starting point in rewarding and recognising people on merit means:

1. defining precisely what associates are required to be able to do (competencies); and
2. being sure that associates are in fact evaluated against those competencies and nothing else.

On the face of it, identifying and describing competencies is relatively straightforward. Each firm interviewed conducted detailed research with partners, (many) using reward experts to do this, set up partner working groups (including women partners) to vet and approve the scheme, tested the schemes through associate forums and, in the case of Allen & Overy and Field Fisher Waterhouse, gave the system a year to bed in before applying it to rewards. However, we question whether even this degree of care is enough, without more, to ensure that the competencies chosen and the way they are expressed avoid importing potential bias.

The whole idea underpinning the use of competencies is that they enable individuals to be judged objectively based on their actual performance and observed behaviour and not subjectively on their traits or personality. Some firms also set targets for associates to meet, for example, on chargeable hours, work for core clients, high profile work, business development and because these are measurable they are thought to provide completely objective data on which to evaluate performance. Even so, bias can creep in as some targets may be harder for women lawyers to meet, importing unfairness and stunted career progression into schemes. For example, the difficulty in attracting and retaining women in the more transactional areas which generally carry the high hours, the extent to which work generally, or work for the most important clients is distributed as between male and female lawyers, the extent to which opportunities to participate in business development activities is shared between male and female lawyers, etc.. The Lawyer<sup>6</sup> highlights one of these concerns: “Who’s more likely to be paid more under this new scheme? The young, single bachelor working all the hours G-d sends or the

<sup>4</sup> Selling Women Short

<sup>5</sup> Women Legal May 2010 — In their own words

<sup>6</sup> Corinne McPartland - Is merit putting paid to lockstep? 10 December 2009

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young woman who's working just as hard but has a child to get home to after work? Firms will have to be careful not to resign women to a lifetime of much lower pay.”.

Risk can also arise when firms use different competencies for each practice area. These need to make equal demands on associates. Often the non-transactional areas attract more women (“gender-ghettos”) and so unintended bias can occur if the competencies used in these areas make heavier demands with the result that women do not achieve the highest pay or bonus and suffer in career progression.

### Competencies that value diversity

Men and women are known to approach aspects of performance such as business development, ambition, leadership and people management differently and so schemes need to reflect and recognise these differences not as better or worse or right or wrong – just different and collectively valuable. For example, research shows <sup>7</sup> that males tend to be monochronous (functioning best when performing tasks one at a time in a linear sequence) whereas, women tend to be polychronous (functioning best when doing several things at once -which explains why women score higher on traits such as collaboration). As Professor Veronica Hope-Hailey notes<sup>8</sup>, since “diverse teams outperform homogenous teams both approaches are valuable to business”. However, she notes, there is a risk of “unconscious bias arising if competencies reflect only the dominant style which because of the dearth of women in business (and in law firms) is likely to be male”. Similar research exists showing that men and women exhibit different leadership attributes and that female attributes are key to business success<sup>9</sup>.

<sup>7</sup> David Sims Professor of Organisation Behaviour, Cass Business School in Diversity Problem? What Diversity Problem? By Alison Maitland 2009

<sup>8</sup> Cass Business School, in Diversity Problem? What Diversity Problem? By Alison Maitland 2009

<sup>9</sup> Women Matter – Female leadership a competitive edge for the future – Mckinsey

### Career progression

Most schemes also incorporate a career structure with progress through the structure depending on merit alone. Merit-based promotion, if it works fairly, will give important signals to women lawyers that they are on track and ultimately can make partner helping firms promote more women. Again there are a number of issues which can arise and undermine good intentions. Schemes need to be flexible enough to allow for maternity leaves and flexible working. They also need to recognise non-fee earning roles perhaps in know-how and secondments as these help to develop valuable skills. Maternity coaching is of critical importance here as is appropriate advice about the best time to have a family. Many businesses identify their star performers early and train them specifically for their role as future leaders; but this has been rare in law firms; introducing career structure could lead firms to provide specific support to those identified as potential future leaders/partners. How might this impact women lawyers? Arguments about whether leadership training should be separate for men and women. At Allen & Overy, women associates do not want to be trained away from their male counterparts whereas at Norton Rose a new leadership programme for women associates has recently been deployed. Firms need to measure the impact of these new structures and any training provided on their women lawyers to see whether the senior roles are fairly divided and, given the current economic situation where fewer partnerships are on offer, whether women get their fair share of partnerships.

### Holding partners to account

Effect evaluation of performance is critical to ensuring that schemes work fairly. All of the firms in our sample have trained partners carefully in how to conduct appraisals effectively and some have explicitly included in that training overcoming unconscious bias, for example, in holding women to higher account for performance than men. Whilst training is very important, in law firms “what gets rewarded gets done!” so we would go further. To

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eliminate gender bias, making partners (men and women) accountable could be achieved by assessing them on their demonstrated commitment to the progression of women. A number of possible key performance indicators (KPI) often collected at firm level could relatively easily be brought down to individual level, for example, data about women lawyers working with a partner on: attrition rates; high profile and high value work allocated; high profile client work allocation; participation in business opportunities such as beauty parades; promotion rates; promotion sponsorship; progression to leadership role; mentorship; and appraisal assessments.

### A visible reputation

Associates also have a part to play in ensuring their merit is recognised. They need to be able to highlight their achievements and successes. Apart from resulting in fair pay and career progress this also leads to a better and more balanced conversation about performance. However, research shows that women are less likely than their male colleagues to be comfortable about building a visible reputation. A visible reputation is made up of three components: actual performance (10%); image (30%); and exposure (60%) (PIE), and women too often expect their performance to speak for itself doing little to increase their image and exposure. Interestingly, Allen & Overy have trained their associates on how to prepare an effective self-review and intend that this will help to ensure that successes are fairly taken into account. Also, unconscious bias can mean that it may be thought unseemly for women to “brag” about their successes.

### Avoiding bias

We have highlighted a number of areas where potential and unconscious bias may creep in despite best intentions. Binna Kandola<sup>10</sup>, writes that “the glass ceiling is still denying women advancement despite research showing that women are as competent as men and have beneficial

effects on organisational performance and profitability.” There is he says also a “persistent stereotype which associates management (partnership in this context) with maleness. The belief that bosses are men is deeply ingrained (and held equally by men and women). Even enlightened people are likely to hold this belief – unarticulated and unexamined but nevertheless present. Implicit beliefs short-circuit our ability to make rational judgements but have the appearance of judicious decisions. In this case we may perceive a basic incompatibility between what it means to be female - for example, nurturing, helpful, gentle and what it means to be a leader – for example assertive, forceful and ambitious.” The statistics show<sup>11</sup> how right this analysis remains for law firms.

Our research shows that firms have sought to overcome this in a number of ways, some believing that by involving women partners in working groups issues will be identified and avoided. Interestingly, as Binna Kandola<sup>12</sup> points out, women are just as likely to make stereotypical assumptions about women as men do and so their involvement of itself may not be enough to guarantee fairness. Having real understanding of unconscious bias and spotting the issues and dealing with them is key and, we believe, a skilled job. Most firms have training on recognising and avoiding bias but as Sasha Hardman, Associate Director at Allen & Overy reports intercalating training on recognising and dealing with unconscious bias in context is more successful as it ensures that partners are taught about these risks in the context in which they will meet them.

Our research found that firms use moderation in order to identify results that are out of line and then correct them. We would question whether this is enough to avoid the underlying issue which will

<sup>11</sup> Women make up less than 20 per cent of the total of partners in Britain's 30 biggest law firms, the study, by *Legal Week*, shows. Among the magic circle firms — Allen & Overy, Clifford Chance, Freshfields Bruckhaus Deringer, Linklaters and Slaughter and May — the average is only 15 per cent. February 2010

<sup>12</sup> The Value of Difference - Eliminating Bias in Organisations

<sup>10</sup> The Value of Difference - Eliminating Bias in Organisations

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ultimately need to be addressed which is to ensure that the best women do as well as the best men in pay, bonus payments and career progression – statistics can only give a broad idea that there may or may not be a problem!

### Conclusions and recommendations

All the firms we have spoken to believe that merit based schemes will address the gender issue of few women staying the course to partnership. Undoubtedly, there is compatibility between merit-based systems and managing diversity but great care needs to be taken in setting up schemes and monitoring how they operate in reality – we believe the following 10 steps will ensure that schemes operate fairly across genders.

- Review competencies to ensure there is no bias unconscious or otherwise and that they reflect both male and female working preferences.
- Where different competencies are used for different practice areas / countries these should be reviewed to ensure fairness and equal impact.
- If targets are set these should be assessed for bias for example, chargeable hour targets could be replaced with targets that support efficient working and any targets should focus on output rather than input.
- Evaluations should focus on behavior and actual performance -- what the employee does and enable associates to highlight their successes – which means ensuring that men and women both have the skills to build a visible reputation and are valued equally for doing so.
- Conduct regular pay audits to ensure that pay differentials are truly based on performance.
- Audit to make sure there is fairness in promotion and career progression and in opportunities to build a visible reputation such as, whether there is: equal access to work/clients that enables associates to show themselves in the best light; equality in charge out rates (headline billing rates and negotiated) between male and female lawyers especially given the current pressure on rates; more time written-off women's work; equality in realisation rates between men and women, all these give an indication of bias which may impact assessment of performance and therefore pay and career progression.
- Conduct practice area audits to understand more about male / female preference and find ways to increase the number of women choosing or being chosen for transactional areas.
- Review how schemes deal with women on maternity leave, flexible working or taking time out from directly fee-earning.
- Train everyone on how to eliminate bias from the merit process by intercalating that training into training on the merit scheme – ensure that this is an on-going process.
- Set tailored KPI's through practical tangible objectives on erasing unconscious bias to address partner performance issues around achieving gender fairness. Make full use of statistics to reinforce the importance of committing to fairness and equality and to help individuals shift their personal mindset.

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