

The Agenda podcast by Lewis Silkin: Pay Attention

Pay Attention Episode 3: workers' representatives and the Pay Transparency Directive

Tom Heys

Hello and welcome to another episode of Pay Attention, a regular podcast coming to you from Lewis Silkin offices in London and in Belfast. I'm Tom Heys [and I'm David Lorimer] [and I'm David Hopper] and once again we have gathered round the table to talk about the Pay Transparency Directive. Today we will be talking about the role with employee representatives. Now before we get into the nitty gritty of this topic, lets look at the role that Worker Representatives play in equal pay disputes across Europe. In the 60's and 70's, female workers who were backed by their representatives carried out a series of equal pay strikes and campaigns. In Belgium, textiles industry women orchestrated the strikes that paved the way for the Belgian equal pay act of 1972. In the UK, the iconic 1968 strike by female machinists at the Ford factory in Dagenham shook the nation demanding fair pay for equal work and eventually leading the way for the UK's equal pay act in 1970. Not to be outdone in Spain in 1971, the famous Seat strikes fought for bigger salaries and better working conditions and shone a glaring spotlight on equal pay problems. And lets not forget our Scandinavian friends up North. In Iceland woman workers staged massive strikes in 1975 backed by their unions and their representatives, similarly resulting in equal pay litigation in 1976 and in the 1980s in Sweden, trade union and representatives took centre stage in implementing equal pay measures and job evaluation systems shaping the landscape for fair wages. Today, trade union and representatives continue to campaign and litigate equal pay issues and with the new rights created by the pay transparency directive, and the beefed up role of employee representatives, this trend is only going to intensify. So now that I have set the scene – David Lorimer – could you tell us about the role that the pay transparency directive envisages for worker representatives?

David Lorimer

Yes absolutely, I think its fair to say that it gives them a real platform to drive even more progress on this front. It envisages a super prominent role for worker reps and they are given significant powers under the pay transparency directive to hold employers to account in relation to their pay practices and to get really into the detail on that. So lets just trot through them at a high level. First worker reps have got the right to request and receive information on workers pay and average pay levels broken down by sex for others in the same category – that is those performing like work or work of an equal value. That sounds complicated but in essence it is the power for worker reps to exercise the right of pay equity access on behalf of individual employees. In response to that they will receive some statistics, which may show some evidence to an actionable breach of the equal pay principle and lead to equal pay claims. Worker reps can also request further clarifications and details, and that likely means they will have access to clients methodologies when they construct categories of workers and when they carry out pay analysis. I think that could be a really powerful weapon, especially in organisations where the headcount threshold for other types of reporting pay differences isn't reached and it is important just to pull that out. So this right of access to pay levels broken down by sex within category, that applies regardless of whether the headcount threshold for more general reporting is reached. Moving on then worker reps also have a very prominent role when it comes to the reporting of gender pay statistics under the directive. Management are required to consult with representatives before confirming the accuracy of what they publish. Again that envisages that worker reps will have access to significant and probably highly confidential pay data to effectively carry out their role of marking employers homework. As with the right to access pay equity data, reps are going to have opportunities to ask for further clarification and details about the statistics, and the underlying methodologies used. Thirdly we have spoken about joint pay assessments on a previous podcast and will continue to as it is one of those big hallmarks of the PTD but as a very brief reminder, where an employer has a pay gap of 5% or more, within a category of workers (that is a set of workers carrying out like work or work of an equal

value), then they may have to carry out a joint pay assessment, which is a form of equal pay audit which is across the entire organisation. Now what do worker reps have to do with this, well they have some really big roles to play in this area. First the directive envisages that worker reps will work in part as a kind of gatekeeper, as to whether or not a joint pay assessment is triggered and that's because those gaps of 5% or more which I have spoken about, well they can be justified by gender neutral criteria and where there are, there wouldn't be a need to have a joint pay assessment. But crucially, that sort of justification needs to be approved by worker reps. In extreme situations that may be mean that worker reps might have to essentially veto any justification but at the very least it means employers have to engage meaningfully on the factors that form the pay gaps along with their workers reps. Secondly, they have a consultative role to play in a joint pay assessment itself as you would expect. Finally, worker reps will have a role on consulting on pay structures that have to be adopted by employers and which must enable the assessment of which workers may carry work of an equal value. In other words, workers reps will need to be given access to pay settings and progression policies, and methods for categorising workers to be meaningfully consulted on all of that and ideally to agree with the employers approach – back to the marking of homework analogy. So its worth pausing there and taking a step back to think about what all this means. Clearly worker reps are going to play a vital role in terms of compliance for the PTD, and it follows that it's in the interest of everyone to make sure they are going to have a good understanding of those often complex principles. We'll come back to what that means for training and education in a moment, but first, Tom, perhaps lets talk about how those reps are going to be selected, appointed, and anointed.

Tom Heys

Yeah so who are going to be the worker representatives. So to try and figure that out lets look at what the PTD says. Article 1M describes workers representatives as the worker representatives in accordance with national law and/ or practice. So this brief definition is very little help to try and understand how to identify worker representatives however the PTD also says at recital 24 – in order to protect workers and to address their fear of victimisation in the application of the principle of equal pay, they should be able to be represented by a representative; this could be trade unions, or other worker representatives and if there are no other worker representatives, workers should be able to be represented by a representative of their choice. Member states should have a possibility to take into account national circumstances and different roles concerning worker representation. While the recitals are not binding and not a formal part of the PTD they provide some assistance in how employers should identify the representatives. So can existing worker representatives be used? In short, yes, we think it's clear from the text of the directive the context of the existing worker representatives' councils are responsible to assume responsibilities for the worker representatives although member states could depart from that under implementing law. Does there have to be an election for worker representatives – no at least not in countries where this is the national relevant law, for examples it might be possible for a local works council to appoint a number of it's members to act as the workers representatives however where there are no such structures, we believe that an election or appointment process will need to be followed. Can there be different worker representatives for different aspects of the PTD? As we've discussed the workers representatives must be involved in a variety of areas however in practise we think it's probably going to be unlikely that different representatives would be involved in different aspects. How many workers representatives should there be? Well there is no maximum or minimum number of representatives. Employers are likely to want to keep the number of representatives down so there's not too many people involved in the process and those who are involved are well versed in complex principles of the pay transparency directive.

So to try and help you understand how to prepare for the pay transparency directive and understand the role of workers representatives that's why we have collective expert David Hopper here.

David Hopper

Thanks very much Tom. so as we've been hearing from both Tom and from David Iorimer so far, workers representatives are going to play a really important role under the pay transparency directive. Now the directive itself is clear that employee representatives must receive training but frankly this is also in the interest of businesses. The reason I say that is if you as a business are going to have to engage with your representatives, it is in your interest for them to be well skilled, and able to perform the role that is required of them under the directive. Now as I see it that broadly breaks down into two categories. The first is going to be training on the remit of their particular role - so this is a new legal framework and people are going to have to get familiar with what is the particular role that they have to play; and critically as well what is the role they do not play under the legislation. So making sure that wraps are clear on the parameters of their role it can be vital for ensuring they can focus their attention and their efforts where they are able to add value and not get distracted by things which are outside of the scope and which the business will not be expecting to be dealing with them on. I would anticipate some form of legal training will be important just to set those parameters of what is their role.

As importantly though is going to be the actual substance of what they're doing in this particular role, so an employee representative might normally be focused on essentially representing the interests of employees so that would be a case of getting feedback from employees, putting those views to management and then engaging in a dialogue as part of consultation with management on proposals for example things like collective redundancies or TUPE transfers that many people will be very familiar with. But under the pay transparency directive the substantive role being played by the rep is going to be slightly different; so for example, the representative might normally be able to speak to their colleagues, take the mood of the workforce and then engage in a dialogue to represent the views of employees - under the pay transparency directive they maybe need to do for examples statistical analysis. So making sure that the reps are actually skilled in for example statistics, making sure they understand things such as the difference between the mean and the medium, is going to be really important to make sure they can actually play that role an add value as part of this process. Because ultimately the reason for including workers representatives as part of this framework is that they can add value and they can add that voice of the employees and make sure they're actually equipped to do that is not only in their interest as the employee representatives but actually also in the businesses interest.

I think we could probably also anticipate going alongside this is going to be protections for employee representatives. So for example I'd be surprised if we don't see an entitlement to, for example paid time off, so that when they are receiving that training the individuals shouldn't be losing out financially as a result of taking on this important role in the business and I think that same principle would apply beyond that as well so time off that is needed for them to statistical analysis as part of performing their role, I'd expect to be seeing as paid. Many businesses will be very familiar with having to deal with those kind of issues where people have time off, for example European works council duties or national works council duties or trade union duties; but the same principles are likely to be applying across the board here. Tying in with that again is then going to be a case of ensuring that people don't feel victimised. We already heard earlier on the podcast about this phrase about making sure that people don't feel victimised as part of performing this important role so I'd expect to see similar provisions in national law for protection from dismissal, protection from detriment because people are performing these important roles.

Now quite where that that that protection will go, I think it's going to be something we're going to see on a case by case basis between different countries, but for example, some countries might say that you can't be treated worse because you have been performing these duties, it's possible that in other European countries but we will see is effectively direct protection not just in the context of what you were doing as a rep but also more general protection for example against redundancy, so that's one of the tricky things that that many businesses going to have to look out for and see how expensive are the protections for employee reps in each particular country because what we can see from other European legislation is there is often no one-

size-fits-all framework for employee protections. Instead we go back to this phrase of national law and/or practice and that does vary quite distinctly across European countries.

David Lorimer

That's really interesting David. Would you expect the kind of variants to reflect what we've already got in terms of collective type protections across Europe? Would you expect the protections in each country to reflect the levels of protections already in place or do you think there's scope for divergence even within countries?

David Hopper

So I think it's starting point is we're going to see a very similar framework what will already be in place for other employee representatives so take a European works council member for example, the protections they enjoy vary quite distinctly between different countries. But there is also scope for what we often call gold plating where countries go above and beyond. Now given the importance of the pay transparency directive and the public policy rationale behind this legislation coming in, and the very significant role that the wraps are actually going to be playing as part of the process engaging with business on this data throughout the 5% threshold and the implications of what happens if the reps comes with a particular view on those - I think that it's possible that we will see some additional gold plating across member states so I think it's going really case of looking out for the detailed country by country without there being one size fits all and unfortunately that does then add to complexity of having to do with different protections in different countries. That said I think we can give businesses some reassurance here of assuming that businesses are not going to be wanting to discriminate there not wanting to be wanted to treat people worse because they are performing these duties. It's something that people need to be aware of but it shouldn't really cause day-to-day issues as long as businesses aren't actually trying to act in a retaliatory way against their reps.

David Lorimer

Great that's really interesting David. Just turning back to the kind of training and resources you mentioned that reps will need to be well trained in statistics including mean and median and we think that's going to have to be actually quite complex and layered training to cover things like regression and model selection just because employees will inevitably have to get into that when they want to justify or explain their gaps which is a key bit of the directive and a key bit that they need to consult on, so clearly that's going to be quite in depth training and an really important as you say. I suppose a very pragmatic question is, is the selection of training provider and the way it's couched going to be a controversial thing the employer should already be thinking about?

David Hopper

Unfortunately yes it can be quite a controversial topic. So we see this in other areas of employee representative training, for example on the European Works Council front where the choice of training provider is something that either varies on a country by country basis and even within countries can become quite contentious topic. So for example in some countries management essentially gets to choose who the training provider will be. Now I think that's always something that is going to be caveated by a need to pass in a reasonableness test so ultimately because this is a legal entitlement if employee representatives say that training they have received is not appropriate, and hasn't been sufficient, then ultimately that's something that a Labour Court or equivalent will be able to scrutinise. And in that kind of situation I would expect the Court to be looking at the syllabus of what was covered, they'll be looking at how was that structure to make sure that the employees needs under the directive are actually being met so that they can actually perform the role that's given to them. So I think the idea that management could simply pick organisations that won't properly equip the representatives because they don't want them to be well armed when they go into those that process of engagement with management. I don't think we're likely to see that. That said what we do see elsewhere, is for example union side consultancy's which set up and may well see

this is a good opportunity to develop what could be quite lucrative financial revenue streams for them, so there may well be pressure on businesses to allow their reps go to particularly chosen consultancy's or union affiliated organisations, and in that situation there may well then be essentially a conflict between the reps on the one hand saying we want to go to a particular organisation, and management for example thinking that actually it's found a better financial deal with a different training provider where the training would be equally as adequate but it may just be cheaper for example. So I can see some tensions arising there, but as I say we're used to seeing that in different areas, and ultimately whilst there may well be a few difficulties at the very start of this kind of process, I would expect that within a few years there will be a new normal of established where essentially both sides understand the rules of the game and so ultimately I wouldn't see training as being a long term issue on the pay transparency directive, it will but more be a teething problem as the system gets set up in the first few years.

Tom Heys

Thanks David. So in the UK going back 10/15 years we saw lots of equal pay litigation against local authorities with workers representatives and trade unions really being the driving force behind that and earlier on at the start of the podcast I talked about how, across Europe workers representatives have been the driving force towards lots of the equal pay legislation, so I was wondering what your view was on the degree to which we might see much more equal pay litigation across Europe and the extent to which that would be driven by workers representatives?

David Hopper

You're right Tom. So the union movement has played a really significant role here and you know recording this in London, Dagenham is only a few miles away across London from sitting at the moment and so the importance of what the unions have done over the last 50 years or so has been seismic in this area, and we only have to look at current examples, for example in the UK with Birmingham City Council having effectively gone into a bankruptcy state over having had historic equal pay issues within how it was paying its staff, to see the ongoing significance of these issues. Do I see that diminishing over the next few years? No I don't think that will go away come-what-may. I think the society we're now living it, people are increasingly aware and trying to do things about things such as equal pay issues and so in that sense I would see the pay transparency directive is only exacerbating that that trend. I think we can see it increasing because there's going to be more data out there and more information becomes available to employee representatives and ultimately I don't see them giving up this fight. I think the pay transparency directive is simply going to give them additional ways to take that case and take that cause further over the next 5-10 years or so. Might that be something that we see continuing to increase beyond that? I think that's slightly more questionable, you know there is there is a possibility that we will see possibly an influx of things happening over the next few years as the data starts to be published, and then once that has happened then there may even be and you and you levelling off situation but I still anticipate that the that the levelling off will be at a higher level than we're currently seeing.

David Lorimer

Great, well that has been a really useful insight into how this might work practically drawing on historical experience and navigating the landscape on involving worker reps in our PTD compliance. Thanks very much joining us for that chat David and Tom, and thanks to those who are listening for joining in. Do keep your eyes peeled for upcoming future podcasts and other materials that we're constantly refining and publishing on the pay transparency directive and do get in touch with your usual LS contact if you want to discuss any further thanks again for joining.