I&D Series Blog Post

October 2021

UK employment: Equal pay and the return to "normality" — is now an opportunity to tackle pay inequality?

In brief

A number of reports have cited the disproportionately negative effect of the COVID-19 pandemic on the employment and earnings of women. There is a risk that the effects of the pandemic could further entrench preexisting inequalities, and that the economic impact of the pandemic on businesses could push pay equality down the agenda. Instead, we see the return to "normality" as the perfect opportunity to take stock and identify where inequality can be tackled.

In this issue

Key takeaways

This article explores the impact of the COVID-19 pandemic on women's employment and why employers should consider conducting an equal pay audit now to understand where inequalities may exist and how to address them.

Disproportionate impact of the COVID-19 pandemic

The health impacts of the COVID-19 pandemic are extensive and have rightly been the subject of significant coverage. However, measures taken to control the virus have also had significant economic impacts. It is a complicated picture, but by a number of metrics the pandemic has had a disproportionately negative impact on women in the following ways:

- According to HMRC statistics, more women than men have been furloughed across the UK in response to the pandemic.
- Before the pandemic, more women than men were employed in insecure work including zero-hours arrangements and temporary employment, which suffered from greater falls in earnings and hours during the pandemic.
- Women have continued to bear a disproportionate share of unpaid caring responsibilities; according to the Office for National Statistics (ONS), during the UK's first lockdown in March 2020 women spent 55% more time than men on unpaid childcare, which increased to 99% more time during September and October 2020. This disproportionate burden was reflected recently in the case of Dobson v. North Cumbria Integrated Care NHS Foundation Trust, in which the Employment Appeal Tribunal (EAT) ruled that tribunals must take judicial notice of the childcare disparity when considering cases of indirect discrimination.
- The Institute for Fiscal Studies estimated that women were a third more likely than men to be employed in sectors that were shut down during the lockdowns, such as travel, retail and hospitality.

This was reflected by an inquiry conducted by the House of Commons Women and Equalities Committee into the greater impact of COVID-19 on women, which concluded in its report in February 2021 that "existing gendered inequalities in the economy have been ignored and sometimes exacerbated by the pandemic policy response".

Key compliance questions

Many of the issues highlighted above reflect engrained structural issues that have long had a disproportionately negative impact on the employment and earnings of women. There is a risk that these inequalities could be further entrenched as businesses recover from the economic effects of the pandemic. This could increase exposure in two key compliance areas — addressing the gender pay gap and ensuring equal pay. Whilst conceptually different, the two are closely linked and unequal pay will certainly contribute to the gender pay gap.

The government suspended gender pay gap reporting at the outset of the pandemic. In response, the number of companies reporting dropped from nearly 11,000 in 2019 to 6,200 in 2020 (a 44% drop), with only around 2,500 reporting by April 2021, a quarter of the 10,000 companies eligible to report. However, gender pay gap reporting will soon be back on the agenda following the 5 October 2021 reporting deadline. Recent analysis conducted of gender pay gaps published in the past financial year suggest that the average pay gap is 10.4% — the same as the 2019-20 average for all firms that reported. There is likely to be a renewed interest in this issue as this year's reports continue to be analysed. Businesses will have to consider if the pandemic has contributed to a gender pay gap, whether and how to reflect that in their reports, and how to address any ongoing impact on workforce demographics.

Equal pay is an increasingly hot topic. The widely reported supermarket litigation, the #MeTooPay movement and even the US women's football team's battle for equal pay have all caused employees, employers and the press to sit up and take note now more than ever. Employers in the financial services sector will be aware that the Financial Conduct Authority wrote to firms recently urging them to review pay data across all protected characteristics and to "act swiftly to address any disparities". Where once equal pay litigation was primarily a matter that affected the public sector, the last decade has seen more and more private sector and individual equal pay claims.

An opportunity to address them?

It is easy to dwell on the negatives inflicted by the COVID-19 pandemic but perhaps harder to identify the opportunities. With the apparent easing of the "pingdemic", we see this as the perfect opportunity to take stock and identify where inequality can be tackled and changes can be made. The pandemic has led to a radical shift in working practices — a huge increase in remote working, a greater reliance on technology and more opportunities for flexibility. That, combined with the anticipated economic recovery, a buoyant job market and inflationary trends in wages in many sectors, creates conditions ripe for change.

Not only is it a matter of good compliance, but there are also business benefits, such as the following:

- It can improve employee relations leading to greater employee retention and well-being.
- It can help avoid expensive and time-consuming litigation - as the supermarket litigation has shown, equal pay claims can and do take many years to resolve.
- Failing to tackle it can lead to reputational harm.

Whilst this article focuses on equal pay between different sexes, organisations may also wish to conduct a combined audit covering ethnicity as well, particularly given the government's apparent intention to introduce ethnicity pay gap reporting at some stage. Data will be key to that, so organisations need to identify if they have the relevant data and, if not, how they can collect it that complies with data protection requirements.

How do I do it?

Diagnosis is key. To tackle a problem, you need to know what the root cause is. In our experience, the first step for any organisation is to conduct an equal pay audit. Not only does an audit identify issues contributing to equal pay, but also very often it highlights unexplained pay gaps that are contributing to an organisation's gender pay gap.

The benefits of an equal pay audit

There are many good reasons why an organisation would choose to carry out an equal pay audit, such as the following:

- A thorough audit will provide a detailed examination of how reward works at your organisation, both in theory and in practice. It will result in a deeper understanding of the discernible factors that actually drive pay, and often these are not as initially predicted.
- An examination of these factors (and the related data) will help you to understand whether your practices are adversely affecting either sex in a discriminatory manner. Specific compensation drivers can be analysed against the impact that they have had, which may bring to light some unexpected issues.
- If an equal pay risk is identified, an audit will allow you to take steps to remedy it before litigation is in prospect.
- Audits can also be used to drive cultural change within a business, by identifying where pay practices are contributing to pay disparities.
- An audit will also help an organisation to consider if its pay practices are consistent with its employer brand and values (particularly important in winning the talent war), and being seen to be open and transparent on issues of equal pay will be an attractive draw to existing employees and candidates.

How do I do one?

The specific audit methodology that best suits your organisation will depend on a number of factors. However, there are a number of key steps that should be followed in all cases, in order to ensure your audit is most effective:

- **Scoping** - The key decision is what you are going to look at: which populations and which elements of pay. Largely, this will be driven by the quality of data your organisation is able to rely upon and, in jurisdictions where equal pay laws require analysis between roles that are different but are of equal value, how easily you can identify which roles are genuinely comparable. The best audits will capture as many employees of your organisation as possible, so the broader the better in the initial stage. The scope can then be narrowed as the audit progresses.
- **Data capture and analysis** - Once you have identified your comparison pools, the next step is to analyse the data. It will not be feasible to look in detail at every role within your organisation, so at this stage you are looking for statistically significant gender pay gaps within the populations you have identified as comparable when scoping the audit. For example, you may choose to look at roles where there is a 5% pay gap or more, or at elements of pay, such as bonus, where men are earning more than comparable women.
- **A deeper dive and action planning** - Having identified your statistically significant populations, the next stage is to get into the detail and identify what is causing your pay gaps. Again, the precise scope of this phase will depend on the results of the data analysis, however, typically it involves exploring the link between identified factors (e.g., length in role) and pay by testing sample cases to establish the likely root causes of disparity and identifying potential noncompliance with equal pay legislation. These results would then inform your action plan going forward, as you will implement your report's findings across the business.
- **Managing legal privilege** - An important consideration is ensuring that the audit is carried out under legal privilege as far as possible. Without the protection of legal privilege, equal pay audits may be discloseable to would-be claimants in equal pay litigation notwithstanding their confidentiality, and it is particularly important to ensure that privilege is not inadvertently waived by, for example, the way in which the audit is carried out and how it is messaged to employees. Your privilege strategy should, therefore, be front and centre of your discussions with your lawyers when you begin to scope your audit, as a privilege strategy will need to be in place from the start.

What will change?

In most cases, disparities in pay between the sexes will not have arisen by directly discriminatory intent, but rather will be an unforeseen consequence of an otherwise legitimate pay practice. Audits can identify where this is happening, and allow an organisation to make real and lasting changes.

Remedial options are many and varied. Salary increases for specific individuals are a common step, but marked improvements can also be made without significant cost. There are a number of process improvements that allow an employer to improve its reward systems, pay governance, record-keeping and transparency. These steps help employers to easily identify why people are paid at the level they are paid, and to put in place systems and governance to ensure that pay is set appropriately.

Indeed, these latter changes are likely to be the ones that have the greatest impact, not only in improving compliance but also in mitigating against the risk of claims. A consistent issue we see with clients is an inability to prove the reason why one individual is paid more than another. Often this will be because the records do not exist — either because the information needed to defend an equal pay claim was not recorded at the time, or because no information was recorded at all.

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