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GEO Consultation on Mandatory Gender Pay Gap Reporting – draft regulations

Response from the Employment Lawyers Association

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INTRODUCTION

The Employment Lawyers Association (ELA) is an unaffiliated and non-political group of specialists in the field of employment. Our membership includes those who represent and advise both employers and employees. It is not our role to comment on the political merits of proposed legislation, rather we make observations from a legal standpoint.

ELA's Legislative and Policy Committee is made up of both Solicitors and Barristers who meet regularly for a number of purposes; including to consider and respond to proposed new legislation.

A working group was set up by the Legislative and Policy Committee under the chairpersonship of Kiran Daurka of Slater & Gordon (UK) LLP to consider and comment on the GEO's consultation on Mandatory Gender Pay Gap Reporting – draft regulations. A full list of the members of the working group is set out at the end of this paper.

What, if any, modifications should be made to the draft regulations? To inform our consideration of any proposed modification(s), please explain your response and provide supporting evidence where appropriate.

ELA has focussed its response on key areas within the draft regulations as follows:

1. Mean and median pay - definition and calculation

2. Employee status

3. 250 employee threshold

4. Definition of bonus pay

5. Duty to publish – sanction/enforcement/remedy

6. Narrative and additional explanations

7. Final considerations

We set out our considerations below in respect of these particular issues. Some members of this ELA working group met with GEO representatives on 1 March 2016 and addressed some of the issues raised below directly. Those discussions points are repeated herein.

Average pay - definition and calculation

ELA welcomes the introduction of the obligation for employers to publish details of both mean and median pay, as this will provide a broader picture of the pay gap within any particular organisation.

As part of the previous consultation, ELA raised concerns about the approach of distilling pay to a gross hourly rate for the purposes of the pay gap calculation, noting that many employers do not record their employees' actual working hours. ELA understands that the regulations nonetheless require employers to use "weekly basic paid hours for each relevant employee" (regulation 4) as part of the calculation by reference to the standard hours of work set out in employees' contracts of employment. As before, this approach will fail to take account of the huge variances in employees' actual working hours which apply across certain sectors (professional and financial services, by way of example), and risks skewing the results. That being said, ELA recognises that this is the approach taken by the ONS when calculating the national gender pay gap and that there is merit in following this approach to allow meaningful comparisons to be made. ELA would suggest that this issue is considered as part of the review of the regulations in due course.

With respect to the definition of "pay", it is notable that maternity pay is included but not pay for other similar forms of leave such as adoption pay, paternity pay and shared parental leave pay. As a broader point, ELA considers that the inclusion of pay for family leave period risks distorting the figures: the availability of maternity pay (whether statutory or enhanced) for female employees is based on distinct policy reasons and cannot sensibly be compared to other forms of family leave pay available to male employees (it is noted that the uptake of shared parental leave to date appears to have been minimal). As such, the inclusion of maternity pay (and/or other types of family leave pay) in the definition of pay detracts from the underlying purpose for calculating the gender pay gap. Again, ELA understands that maternity pay is used in the ONS' calculation of the national gender pay gap, and that there is a desire to maintain consistency.

As a separate matter, it is understood that pay awarded in compensation for worked overtime is not to be included within the definition of pay for the purposes of the regulations. ELA understands why this may have arisen as overtime is not generally included in the definition of pay pursuant to s.234 Employment Rights Act 1996.

An important consideration is that overtime itself is a gendered issue, as women are less likely to work overtime due to the need to balance work with child care, resulting in a greater gender pay differential in favour of men. Furthermore, overtime is a key aspect of compensation in certain sectors. Therefore, ELA is of the view that the inclusion of overtime within the definition of pay is in line with the objectives underlying the regulations.

Moreover to include overtime within pay is consistent with the Equality Act 2010 (EA) (the parent legislation) and also other employment legislation, such as the Working Time Regulations 1998 (WTR). This is because (1) overtime is included within the definition of "pay" for the purposes of the equal pay aspects of the EA; and (2) some types of overtime are also included within the definition of "holiday pay" for the purposes of the WTR.

In respect of the EA, overtime pay is included in the context of equal pay due to the width of Chapter 3 of Part 5 of the EA – a claim for equal pay may be made in respect of any contractual term whether or not it relates to pay (S.66(2) EA).

In the context of the WTR, some types of overtime are included in the definition of holiday pay pursuant to Regulation 13 WTR 1998 (*Bear Scotland* v Fulton UKEAT /47/13). *Bear Scotland* referred to the case of *Tarmac v Peacock* [1973] ICR 273 in which the Court of Appeal described 3 categories of overtime (see below) and found that category 3 must be included in the definition as well as category 1:

- 1 - Guaranteed, compulsory overtime, where even if the employee is not called on to work it, the employer is liable to pay them for it. Overtime of this type is included in normal working hours.
- 2- Voluntary overtime, where an employee cannot be required to work it, and the employer does not have to provide it. This type of overtime is excluded from normal working hours.

- 3 - A "halfway house" (sometimes called "non-guaranteed" overtime), where the employee is obliged to work overtime if required, but the employer is not obliged to provide overtime or pay in lieu. This is also excluded from normal working hours.

Accordingly, in ELA's view, the inclusion of overtime within "pay" would be in line with the EA and based on recent movement towards recognising certain forms of overtime as pay.

Employee status

We agree with the Government Equality Office's confirmation that the regulations are intended to cover not only "employees" but also those under a "contract of apprenticeship [and] a contract personally to do work", which is the definition used in the parent legislation, the Equality Act 2010 (EA) (S.83).

We note that the consequence of this will be that employers will also need to report on pay to members of an LLP and partners as well as some contractors.

ELA questions the inclusion of "who ordinarily works in Great Britain" as part of the definition of "relevant employee". The EA does not utilise this test in establishing whether an individual is protected. The EA is more closely aligned with the test established in *Lawson v Serco,* more recently upheld in *Clyde & Co LLP and another v Bates van Winkelhof [2012] EWCA Civ 1207,* which states that the relevant test is a "strong connection with Great Britain". In order to ensure a consistent approach across the legislation, ELA proposes that this test ("a strong connection with Great Britain") be adopted for establishing relevant employees.

250 employee threshold

In our submission to the main consultation, ELA made the following points:

"It is the view of ELA that a lower threshold would be appropriate. However the appropriate level of such lower threshold will depend on what data the regulations require employers to publish. It is understood that this will require amendment of the primary legislation.

The Department for Business and Innovation and Skills' statistical release for the "Business Population Estimates for the UK and Regions 2013" (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254552/13-92-business-population-estimates-2013-stats-release-4.pdf) reveals that 99.2% of businesses are small (under 50 employees), 0.6% are medium (between 50-249 employees) and only 0.1% are large (250 employees and over). The scope and, therefore, the impact of the regulations may be drastically reduced if they cover only 0.1% of businesses.

Moreover, the larger the group of employers covered by the proposed regulations, the more meaningful the data and subsequent analysis will be and, therefore, the more likely it is that employers will take steps to address any gender pay gap issues identified within their business. Overall this will have a greater impact on reducing the gender pay gap, which, after all, is the purpose of the regulations.

We note, from the consultation itself (paragraph 3.2), that several EU member states have a lower threshold than 250 employees. For example, Austria's is 150, Finland's is 30 and Sweden's is only 24.

Further still, the "Examples of action at a national level" from the EU's Gender Equality Gender Pay Gap http://ec.europa.eu/justice/gender-equality/gender-pay-gap/national-action/law/index_en.htm demonstrate that Belgium's threshold is only 50 workers.

While we consider that a lower threshold may be aligned with achieving the stated objective of addressing the gender pay gap, the imposition of a lower threshold may cause some employers difficulty in complying with confidentiality and data protection obligations in respect of individual employees. The extent to which such risk manifests will depend on what data the regulations require employers to publish. For example, if the regulations require data to be broken down by role or grade, the risk of employees being able to identify individual pay data increases where the relevant employee population is smaller.

Subject to the concern set out above, our view is that the quantity of the threshold could decrease incrementally year on year. This was the pattern that was followed by Austria, which had compulsory equal pay reports with a threshold of 1000 employees from 2011, 500 from 2012, 250 from 2013 and 150 from 2014. Again subject to the concern set out above, our recommendation would be to introduce the 250 threshold this year with consideration of a reduction, to 150, from next year.

Further consideration as to a lower threshold should be considered following the second publication of gender pay data.

We would also welcome clarity in the regulations as to when and how the threshold figure is met. For example do employees based outside the UK count towards the threshold? How will the threshold operate within larger corporate groups where there are a number of employing entities but where none of the employing entities employ more than 250 employees (or such lower threshold as is set)? ELA also seeks clarity as to whether the 250 threshold relates to headcount rather than full time positions."

Whilst ELA understands that the 250 employee threshold arises from primary legislation, in order to satisfy the objective of introducing mandatory gender pay gap reporting, amendments to the primary legislation may be considered depending on the outcome of reporting arising out of the draft regulations in the next few years. As there is a provision that the regulations and their impact are likely to be reviewed within five years (Reg 10(3)), ELA is of the view that it would be an appropriate time to consider lowering the employee threshold triggering reporting at the time the first report is published.

<u>Bonus pay</u>

In order to avoid uncertainty ELA recommends that consideration be given to making the definitions of "pay" and "bonus pay" more exhaustive by using the word "means" rather than "includes" at the beginning of regulations 2(1) and 2(2).

We appreciate that the definition of bonus pay is derived from ONS methodology. However, as drafted we consider that the definition may lead to inconsistent results and/or pushback from employers. This is because there is some uncertainty over the valuation of awards under long term incentive plans and the cash equivalent value of shares (regulations 2(2)(b) and (c)). For example, it is not clear whether awards which vest (but are not exercised) in any year should be taken into account. We would recommend that consideration be given to adjusting the drafting to fit the valuation of long term incentive awards for the purposes of reporting under the existing directors' remuneration reporting regime and guidance.

The definition of bonus pay is unclear as it currently stands as it includes "payments received and earned" which is two-fold. An employee can earn a bonus and receive notification that a bonus has been earned, but it may be some time before it is actually received. Employers need to understand if they are required to report both on a bonus earned (notified) and a bonus received. It would seem logical that a bonus earned is the most relevant point at which the information is captured as employees may not then go on to receive the bonus for several reasons, including departure.

In regulation 6 we recommend clarifying that the calculation of mean bonus pay should take account of all those who were eligible for a bonus rather than just those who earned or received a bonus. Such an amendment would reduce the risk of employees being excluded from the calculation (and as such the figures being distorted) because employees received no bonus (or a zero bonus) despite being eligible to receive one. We think it is important that this information is captured. For example, if a higher proportion of one gender does not earn a bonus despite being eligible to earn one, that is a matter that the Regulations are intended to capture and address.

We note that the relevant date for the purposes of the Regulations is 30 April in each year. Employers may welcome an amendment so that the relevant date is 5 April (the end of the tax year), so that calculations conducted for tax reporting (e.g. for the P60 and P11D forms) coincide with calculations for gender pay reporting. This may save employers time and expense. It is also worth noting that, for the purposes of the directors' remuneration reporting regime, data is calculated by reference to the relevant company's financial year end (e.g. for the comparison of CEO to general employee changes in remuneration). This means that employers will be gathering employee pay data for different purposes on different dates, which will add to the compliance burden. We expect that anything which can be done to reduce the compliance burden will be good news for employers increasing the chances of accurate reporting.

Duty to publish – sanction/enforcement/remedy

It is ELA's view that many large employers will comply with the duty to publish their gender pay gap. However, at present, there is no provision to combat failures to do so. Whilst the requirement for senior management to authorise the content of the report is a positive step towards ensuring compliance, there may be some concern amongst the workforce that without underlying information and/or narrative, employers could exclude relevant information without sanction.

As per our earlier consultation response, ELA's view is that without some form of sanction, employers may not give their duty the true consideration it is due. ELA recommended that "naming and shaming" was likely to be the most effective way to ensure compliance. ELA also considered whether the EHRC would have a role in ensuring compliance and being given enforcement powers in respect of those employers who failed to comply with the duty on a regular basis. It would also be appropriate to give Employment Tribunals and Courts the express power to draw adverse inferences in equal pay cases where a Respondent under obligation has failed to publish its gender pay gap.

Finally, it is feasible that a relevant employer does not have a website and further options to upload its reporting figures to a separate external system should be available.

Narrative

It is understood that GEO intends to publish some non-statutory guidance to assist employers with providing narrative to explain the underlying information which gives rise to the gender pay gap calculation. Without context, it will be difficult for meaningful analysis of the figures to take place.

ELA would welcome the opportunity to be involved in the drafting of that guidance before it is published.

As stated in the original consultation response, "*in terms of what narrative should be included, we suggest that the demographics of the workforce are reported alongside the gender pay gap figure, as well as information relating to the corporate hierarchy. This will illustrate companies and/or industries with mixed demographics yet still publishing a large gender pay gap. Further, it will identify organisations and industries that are male/female dominated and allow further work in terms of encouraging males and females into these areas.*

We suggest that the non-statutory guidance also recommends that employers include a range of steps that will be taken to rectify any pay gap that exists. The benefits of this will be seen particularly after the initial publication as employers will be able to narrate what if any measures have been put in place since previous publication".

A further consultation on the non-statutory guidance alongside the draft regulations would be welcomed to ensure that there is full understanding as to what is required from employers.

Finally, there has been some concern raised amongst ELA members that the publication of a table setting out the gender pay gap for companies would not capture the narrative and may not, therefore, be contextual. Any table published, therefore, should also make provision to link to the accompanying narrative to ensure that information published by GEO or any other relevant body is complete.

Final considerations

It is ELA's view that mandatory reporting, whilst welcome and necessary, is more likely to lead to legal advice being sought by senior management prior to publication of the gender pay gap and narrative. It is likely, in our view, that mandatory reporting may attract more employee attention than voluntary reporting and in may in some cases lead to challenges. In our view, the need for legal advice will most probably be highest in the earlier years of reporting until employers become familiar with the processes and subsequent reactions from the workforce.

In years where the gender pay gap has increased from previous years, we expect employers will seek legal advice in those instances. In short, whilst such advice is not compulsory, in practice many employers will feel obliged to take it in the early years.

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