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EQUAL PAY – THE TIME-BOMB UNDER PAY STRUCTURES IN ROMANIA

W. David Rees and Christine Porter*

Abstract

One of the major consequences of Romania joining the European Union is its obligation to implement European Directives with regard to employment protection. One aspect of that is likely to have major social and cost implications is the legislation regarding equal pay for men and women. The dimension of equal pay for work that is the same or broadly similar is relatively straightforward. The more complicated and more far reaching requirement is for equal pay for men and women for work of equal value.

In determining whether jobs are of equal value regard has to had in particular to effort, skill and decision making. Comparisons are valid with other jobs in the same organisation but not between organisations. In addition comparisons are only legally valid if they are on the basis that a person of the opposite sex is being paid more for work of equivalent value. Such comparisons are subjective and often very complicated. Job evaluation schemes can help in creating a framework for comparison but being inherently subjective are open to challenge. The situation is further complicated by the fact that comparisons can also be made on any one element of the remuneration package.

Experience in the U.K. and other member EU countries is that equal pay claims are very much on the rise, can take years to resolve and can be hugely expensive. Although legal costs can be significant the main costs are in settling group claims and the 'knock-on' effect on the rest of an organisation's pay structure. Whilst it may take time for this development to gather pace in Romania now is the time for organisations to review their pay structures and take preventative action to try and reduce the conflict that will inevitably occur.

Keywords: employment protection, equal pay, equal pay for work of equal value, pay structures

* Both David Rees and Christine Porter are former advisers to the Romanian Economic and Social Council (CES) Both also have widespread consultancy experience. David Rees is a member of the U.K. panel of independent arbitrators for the Advisory Conciliation and Arbitrator Service (ACAS) and is a visiting lecturer at the London University of the South Bank. Dr. Christine Porter is Head of the academic Human Resources Management Department at the University of Westminster Business School. This is the largest centre of post-graduate HRM teaching in the U.K. and one of the few centres of professional excellence. Contact either on w.davidrees@hotmail.com.

Introduction

On joining the European Union Romania accepted a whole raft of legal obligations. These included European minimum standards of employment protection. A particularly important aspect of the European employment protection legislation is the requirement for employers to pay men and women equal pay for the same or similar work or work of equal value. This stems from the Treaty of Rome and the European Equal Pay Directive of 1975. Member countries are obliged to introduce domestic legislation to implement these obligations. The purpose of the requirement is to eliminate pay differences based on gender. Prior to this European wide requirement employers, for example sometimes had male and female rates for the same job. The legislation is linked to requirements for the equal treatment for men and women which means that employers cannot avoid their obligations by, for example, barring women from certain jobs unless there is a justified and General Occupational Qualification.(which has proved to be a narrowly based exception). A fundamental feature of EU law is that court decisions in any countries can have a binding effect on cases in other countries. Also cases can be pursued right up to the level of the European Court of Justice – the ultimate arbiter on decisions involving European law. This process is necessary to in order to maintain, amongst other things, minimum employment standards within the EU. If one member country were to avoid these minimum standards it would be seen as gaining an unfair competitive advantage over other member countries and to be engaged in 'social dumping'.

The payment of equal pay for jobs that are the same or broadly similar is a relatively straightforward concept – even if the cost implications may be considerable. The more far reaching requirement is to pay men and women the same pay and conditions of employment for work that is considered to be of equal value to an organisation. Establishing what is of equal value, however, can be a complicated and controversial process.

It is not intended that equal value claims should be allowed to form a basis for an attack on pay differentials in an organisation – for example a man claiming that he should be paid the same as another man doing a different, but in his view, equivalent job. Comparisons are also not valid if made between employees working for different organisations – though sometimes there can be a dispute about whether associated employers are part of the same organisation or not. A comparison can be made against any element of the pay package so it is not open to an employer to say that an inequality regarding one element can be offset by another compensating advantage. Whilst the great majority of cases are raised by women, in theory a claim can be made by a man citing a more advantaged female comparator.

In the rest of this article attention is given to the use of job evaluation as a means of avoiding sex discrimination in pay structures, experience in the UK, the preventative action that employers need to consider and what general conclusions can be drawn about the likely impact of the equal pay requirements.

In the event of an employer having a claim lodged against them for equal pay it will not be sufficient to say that the pay rates are collectively agreed. Especially in the case of the workforces that are predominantly male, or where the men dominate the key bargaining positions, it would not be surprising to find that a tribunal or court found that this had led to unequal pay between the sexes. Employers can argue that differences are accounted for by market scarcity but would have to demonstrate that this accounted for the whole of a difference and was not being applied in a way that discriminated against one sex. A standard way of employers seeking to avoid or defend equal pay claims, particularly those based on the concept of equal value, is to do so by way of a job evaluation scheme.

Job evaluation

Job evaluation schemes can help in providing a framework by which jobs can be compared with one another. However, even if there is a genuine attempt to eliminate pay discrimination based on gender there is always the potential for challenging the assumptions on which a job evaluation scheme is based and/or the way in which it is implemented.

There are two basic types of job evaluation scheme – non-analytical and analytical. The main non-analytical methods re job classification and job ranking. With job classification schemes jobs are looked at as a whole and then grouped into job grades. Basic descriptions may be given of the key requirements of a job grade. Job ranking involves classifying jobs by general comparisons with other jobs in an organisation. With analytical schemes the major factors in a job are identified and then evaluated. The most common type of analytical scheme is 'points rating'. This involves giving a range of points for each factor that is identified and establishing the value of a job by the total number of points scored. Whilst the analytical approach is more time consuming it has generally proved to provide a more adequate defence than non-analytical methods against equal pay claims One of the reasons for this is the need for equal value to be established by reference to individual factors such as effort, skill and decision-making.

To further complicate matters even where employers make a genuine attempt to eliminate sex discrimination in pay structures the whole process is inherently subjective and there will always be the potential for genuine disagreements.

However, systematically a job evaluation scheme is established for example there will always be scope for argument about what factors and weights have been used. There is also likely to be scope for argument about how fairly and

consistently a scheme has been applied. A common misunderstanding about job evaluation schemes is that there is an external set of factors and weights that can be imported into an organisation that will be universally acceptable. The reality is that factors and weights have to be developed within the circumstances of individual organisations. Although a number of factors may need to influence a pay structure, the essence of job evaluation is that it is a method for establishing what the employees w*ithin an organisation* feel provides a '*felt fair'* basis for pay differentials. This is done by systematically collecting information and making judgements about what those inside an organisation feel differentiates one job from another. This process though now has to be reconciled with the requirements of the Equal Pay Directive and associated case law.

U.K. experience

The extent to which female earnings were below male earnings in the U.K. was estimated as being 13 or 17% in 2005 (according to what measure of average was used). However, there were wide variations from the average according to factors such as occupation and age. In the Civil Service and teaching there has been a long tradition of equal pay. The average gap between the male and female hourly rate however was found to increase significantly with age (Office for National Statistics)

The number of equal pay claims proceeding to an Employment Tribunal for judgement in the U.K. in 2007/8 was only 45. However, such judgements can have important repercussive effects, both inside and outside the organisation concerned. In addition the number cases referred by the Tribunals to the Advisory Conciliation and Advisory Service (ACAS) for conciliation was 54,000. Furthermore many cases were put on hold pending judgement in test cases.

A particularly important development concerned the remuneration of local government employees such as school dinner ladies in comparison with male refuse collectors. The generally male refuse collectors received a pay bonus whilst the dinner ladies did not. The jobs were held to be comparable because of the social skills required by the dinner ladies. Developments such as these led to pay agreements with the trade unions that sought to eliminate pay discrimination based on gender. Arrangements also had to be made to make good loss of pay for up to six years because of sex discriminatory pay structures.

The magnitude of these developments was such that the settlements actually made affected 400,000 local authority employees. As a consequence central government had to provide emergency funding of £450 million just to help local governments meet the costs of the equal pay adjustments, including back dating (The Times 2008).

Another costly effect of equal pay legislation occurred in Britain in the National Health Service (NHS) – the largest single employer in Western Europe.

Partly as a means of combating potential equal pay claims a national system of job evaluation was introduced in the NHS in 2006. Unfortunately control of the exercise was weak and the salaries for General Practitioners rose by 30% for doing much the same work as before. There were also significant rises for hospital consultants for doing *less* work**.** A policy decision had been taken by the government to inject significantly more into the NHS but most of the extra money went to funding such pay increases. Such increases were not on a 'one-off' basis but are ongoing.(Rees and Porter 2008 p.160).

Although the most dramatic developments in the U.K. regarding equal pay have been in the public sector the private sector is also likely to be increasingly affected. The former chair of the Equal Opportunities Commission in the U.K. commented that:

The private sector was just as vulnerable to legal action. Companies with opaque mechanisms for handing out large bonuses and which do not have performance reviews were particularly at risk. The Times (2007).

Whilst trade unions may not generally welcome what they may see as an intrusion into their bargaining prerogatives, equal pay legislation can be a very effective means of them gaining important concessions from employers. This development has come at a time when union bargaining power has generally been much less that in former years. In addition whilst trade union leadership tends to be male dominated the work force contains an increasing proportion of women which is now approaching 50% This increases pressure on trade unions to pursue the issue of equal pay. Employment lawyers are also increasingly prepared to pursue equal pay claims on a no- win, no- fee basis. Unfortunately, however, the need for employers to find money to fund equal pay claims is gathering pace at a time at a time of increased economic difficulty for all sectors of the economy. One result of this is that there may be little or no money left over to fund general increases pay increases. This is despite increases in the cost of living, particularly for energy and food.

Claims in the U.K. have often taken several years to resolve and involved significant legal costs. Employers and trade unions have often been disposed to use appeal processes if they lose a case if there is a potential significant impact on pay structures. The complexity of some cases is that employment tribunals can use the services of a specialist independent expert to advise them on technical issues. However the impact of the legislation cannot be judged simply by the cases that go to a tribunal or which involve ACAS conciliation. Employers and unions are increasingly aware of the outcome of test cases which has an influence on their decisions and bargaining positions about pay structures. Further pressure is planned under the terms of the Equality Bill, which is due to become law in

2008 or 2009. Its provisions include a requirement that public sector employers carry out equal pay audits. In addition it is proposed to inject transparency about pay structures in all organisations..

Preventative action

The scale of the adjustment in pay structures caused by European equal pay law is great. The problem is all the more for countries, like Romania, who have only recently become members of the EU because they have not had the many years to adjust to the law that most other member countries have had. Although the law may have had limited impact in Romania to date, it is not going to go away and enforcement procedures will inevitably get more robust. Consequently, it is important for employers to face up to the issue rather than assume it can be ignored. Where domestic national law has not been introduced action can be taken against governments and employers on the basis that they have not complied with European law.

The first step that employers need to take is to assess any gap between their pay structures and European equal law requirements. It may not be practicable to try and close such a gap immediately but it is likely to be both realistic and necessary to develop a long term plan about how to close it. In the meantime employers will hope that they .are not the ones who have legal action taken against them. Any plan will need to impact on policy about pay structures and any collective bargaining that takes place.

As equal pay claims can be against any one element of the pay package, employers may want to consider the extent to which they wish to harmonise conditions of employment such as working hours, holidays and sickness benefit. They may also need to consider any differences such as the age of retirement, length of service increments and age .requirements regarding selection because of European Directives regarding sex and age discrimination. The composition of groups concerned with pay determination may also need to be reviewed. This can be particularly necessary with job evaluation panels involved in both the determination of pay schemes and their operation.

If job evaluation is used as a method of pay determination it is as well to remember that their basis is subjective. No amount of statistical analysis will provide a pay structure that cannot be challenged. It may be as well to have a relatively simple scheme that can still provide an analytical defence against equal pay claims compared with a complicated scheme that perhaps because of its very complexity may give plenty of scope for argument. Relatively simple schemes may involve creating job grades out of broad clusters of jobs with relatively few jobs at the margins of a grade. It may also be necessary to have generic job titles and a provision that the content of a particular job may need to vary within the

responsibility level of a particular grade. Employers may also need to be cautious about consultants offering to introduce their own complicated 'off the shelf' schemes that have not been designed with the needs of the organisation in which they propose to introduce such schemes. A further reason for needing to beware of complex schemes is that job evaluation schemes are static models and an accelerating pace of change means that they can quickly get out of date. The simpler the model, the easier it may be to adapt.

Conclusion

One may or may not agree with the provisions of the European Equal Pay Directive and the associated case law developments. However, there is no sign of it going away, on the contrary its impact is likely to become increasingly, if inconveniently, felt. To complicate matters its likely increasing impact coincides with a worsening economic situation which employers are likely to be under to contain costs, including pay costs. Added to this is the problem of border EU countries needing to contain their costs in order to remain competitive with organisations in neighbouring countries who do not have to comply with EU legislation. Admittedly there may be some off-setting gains caused by increases in the supply, productivity and retention of female workers, particularly if they are skilled – the problem though may be in funding such expenditure especially in the short term. However, it has to be remembered that the primary purpose of the legislation is to meet the social objective of reducing pay discrimination, not to make the labour market more effective. One of the consequences of this may be that some groups of women get paid above the market rate because their contribution to an organisation is judged to be of equal value to that of male comparators. However, the U.K. experience has been that despite the legislation a significant gap between male and female earnings has remained. This may be accounted for by the existence of other factors such as the impact on career aspirations and training opportunities caused by the conflict between domestic and work responsibilities for mothers.

Given the likely impact of equal pay law employers would be well advised to take preventative action rather than suddenly find they are on the wrong end of an important legal action. The logic is for employers to try and identify significant potential illegalities in their pay structures and develop policies for dealing with them. Trade unions also need to work out the likely impact of the law. It may cause internal differences if it means that much of whatever money is available has to go to eliminating sex discriminatory pay practices with little or no funding left for general pay increases. However, unions may be more than grateful to have a means of forcing concessions from employers for at least some of their employees, particularly if their bargaining position weakens even further.

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