The Agenda podcast by Lewis Silkin: Pay Attention

Pay Attention Episode 6: Sparring with Change on the Island of Ireland

Tom Heys: Hello and welcome to another episode of Pay Attention, a regular podcast coming to you from the Lewis Silkin offices in London, Belfast and Dublin. I'm Tom Heys.

David Lorimer: I'm David Lorimer.

Síobhra Rush: I'm Síobhra Rush.

Tom Heys: And once again, we've gathered around the virtual table to talk about the Pay Transparency Directive. This week, we'll be talking about Ireland, and just to re-introduce my two co-hosts today, in the green corner, he's the master of PTD compliance, avoiding legislative defiance, he'll close the pay gaps and ensure no relapse. He's as clear as transparency and always self-sufficiency - the podcast co-host who knows the most, it's David, the pay streamliner, Lorimer. And also in the green corner, because we're going double Irish today, it's the bruiser of inequality who smashes pay disparity. She'll destroy pay secrecy and knock out quartile inconsistency. She punches with clarity and counters pay inequity. The woman you can't ignore with pay transparency knowledge galore - it's Síobhra, the equalizer, Rush. So, let's get ready to rumble as we dive into the Pay Transparency Directive and see how it's going to shake up workplaces across the whole island of Ireland.

David Lorimer: Wow, how are we now going to talk about categorization? That's quite an intro, thanks Tom! So let's dive in as you suggested then. One for both you and Síobhra, I think to start off with, as is now customary on our country specials - we've got reporting obligations already in Ireland on pay transparency. How's that different to what the PTD require and what is it that applies at the moment.

Síobhra Rush: So, in terms of - and thank you also, Tom, for that introduction. I must re-record that and play it around my house when I'm walking and pottering around doing non-work-related things. So, sorry, back to pay transparency and gender pay gap. So, at the moment we have gender pay gap regulations in Ireland and they were introduced, I think we were late in implementing gender pay gap reporting regulations from a European perspective. The regulations came in force in 2021 and the first year of reporting was 2022. Our requirements broadly reflect what's in the Pay Transparency Directive from a reporting perspective.

The thresholds and the periods over which employers must report vary. So from next year, for instance, gender pay gap reporting will be required to be done by employers with over 50 employees, whereas that isn't necessarily going to be the case under the Pay Transparency Directive. They will be able to do it maybe over three years. This year is the first year that we have employers who have between 150 and 250 employees reporting. Prior to this, we had two years of reporting by employers with over 250 employees.

So it'll be interesting to see how and whether the gaps that have been reported on vary for kind of the small to medium enterprise cohort. Unfortunately, it's a little difficult to do any kind of analysis at the moment because the government is supposed to introduce a portal whereby, so a central reporting portal which is available in the UK, for instance, where all employers should upload their reports. We don't have that yet. So, at the moment, any analysis of kind of the success or otherwise of gender pay gap reporting requires people to go to the websites of the Irish employer and try and dig out their gender pay gap reports over the last two years if they've been required to report on and do that.

So at the moment, employers are required to report on their mean and median pay gaps. That includes for temporary and part-time employees. They must report on the mean and median bonus gap. They must report on gaps as between quartiles in their workforce population. They must also confirm the proportion of men and women that receive a bonus and that receive BIK. We went a little bit further than the UK in that employers are also required in Ireland to identify the causes of their gaps, and set out broadly what

measures they're proposing to take to address those. So it is possible, I suppose, to potentially look at somebody's or an employer's 2022 report and identify whether the measures that they said they would take at the end of 2022 would be taken in or whether that impacted their 2023 gap. So, to an extent, we have covered some of what's in the Pay Transparency Directive. But actually, there is a lot more to cover in terms of our implementation of the Pay Transparency Directive. And I think that people aren't as live to all the additional rights and obligations that will arise as and when we transpose it in 2026, hopefully.

David Lorimer: Great, thanks very much, Síobhra. Tom, you've been involved with Síobhra, on the front line of helping clients with complying with their current obligations. What observations have you made based on the three years' worth of reporting so far, and how might that inform PTD strategy?

Tom Heys: So I think what's most interesting from what we've seen over the past three years of advising clients in this area is how variable gaps can be. So gaps can go up and they can go down, and the reason for that very often is because of how they're calculated. So they're not just calculated from pay, they're also calculated from bonus. And so, because bonus is dependent upon individual performance and organisation-wide performance and economic conditions, it adds in an extra amount of variability, and we see that in the data. You get companies where perhaps their overall gender diversity has not actually changed over the past three years. They still have largely the same proportions of men and women in different levels of their organisation, but their gaps have gone up one year, gone down a lot the next, and that's because of the impact of variable compensation bonus. And why is that relevant towards the Pay Transparency Directive? Well, that's the same methodology that the Pay Transparency Directive requires. The gaps have to be calculated from pay and from bonus and also from the value of benefits in kind - not something covered by the Irish regulations currently.

So I think employers across Europe will likely see that, their gaps changing a lot from one year to the next, and not necessarily because of measures that they've been taking having been effective. That makes it challenging to try and tell a good story as to why your gaps are what they are. And I suppose it just relates back to the point that Shifra made about how employers have to explain the causes of their gaps. That's going to be a challenge for employers everywhere.

David Lorimer: Great, all right, thank you, Tom. That's really helpful. And I guess we can get some insight as to how the component parts of pay gaps are calculated in Ireland for PTD implementation. Is there anything else from what's currently in place, Síobhra, that we might see mirrored in the implementing legislation? So, for example, how are we going to square this circle between by the time the directive comes into force - reporting being required for organizations with 50+ with that reporting threshold being a maximum or minimum of 150 under the directive?

Síobhra Rush: Yeah, and interestingly, the threshold of 150 to 250 under the directive is every three years, whereas we have employers with more than 50 from 2025 being required to report on their general pay gap every year. Now, obviously, it's - I'm putting easier in inverted commas - because I don't think it's going to be an easy task for small to medium sized employers to report on their gap. And I think much better guidance is going to be required from government on that. But I think that requiring them to categorize in accordance with the Directive is going to be very onerous. So, it will be interesting to see whether some kind of allowance can be made for them in terms of, you know, if they're going to be required to continue reporting on an annual basis in accordance with domestic law, even though that's not what's required under the Directive, you know, will they impose the categorization piece on those employers? You know, it would be better, I think, if they didn't or if they did that, that they would do it on the three year basis just to give them, I suppose, some relief.

I really, we just don't know what's coming down the line in terms of the transposition of the Directive in Ireland. At the moment, I believe that most attention is on the minimum wage directive, which has to be implemented by November 24 here. The most, I suppose, prominent aspect of the minimum wage directive here is the fact that it does refer to collective bargaining and there is a requirement on governments to, I

suppose, encourage employers to engage in collective bargaining. Now, most listeners hopefully will be aware that we don't have mandatory trade union recognition and there's no formal request for trade union recognition, and there would be a fear, I suppose, whether this collective bargaining piece in the minimum wage directive will increase the likelihood of that coming in. I don't think it will. But obviously, it is something that needs to be addressed.

However, I'm sorry, that's a very roundabout way of saying that I don't think that enough attention has been focused on the Pay Transparency Directive. We have two years to implement it. Employers have two, I suppose, pay cycles because our report is based on a look back of one year, to have a look at their gaps within categories, adjust those gaps and then make sure that they're compliant. If we transpose on time. We may not transpose on time or we may transpose on time but actually not require the reporting to take place for another year or two, which is what happened with the gender pay gap regulations. But at the moment we're somewhat in the dark about how the government is going to go about transposing these obligations.

David Lorimer: And keen listeners will know that where we're not sure and haven't heard any noises, we ask our esteemed guests to roll the dice and place a bet. So when do you think we're going to see transposition legislation in Ireland?

Síobhra Rush: I think that we will see transposition in 2026. How that transposition looks is, I think, something that should be watched because I am aware, for instance, that there have been issues with our transposition of the CSR Directive in terms of how that aligns with local law and there are anomalies there. So, you know, I would hope that government will be really careful about how it transposes.

I then think that because there are obligations in the Directive on government to issue guidance and provide the resources to employers to facilitate them in reporting, I think that likely we will see a delay in the actual reporting commencing of maybe a year.

Tom Heys: I think though just on that guidance point, we've seen the guidance for gender pay gap reporting and it's been changed a few times over the years and not always for the better and it has made things more confusing. So, I think call me Captain Sceptical, but I'm not sure that the government guidance will help very much when or if it does come.

Síobhra Rush: I can't disagree with you there, Tom. I suppose my hope would be that by then the portal will be up. And for instance, the smaller enterprises who need the guidance might get some of that from other reports or, you know, kind of seeing what people in their industry are doing, kind of the larger employers or, how it works. I think it could be a kind of lead by example, which is what happened with the gender pay gap reporting as well.

David Lorimer: OK, look, we've already got to some of the challenges, which is great, in a kind of organic way. But one of the big prominent issues under the Directive and which we've already touched on a little bit, is around the requirement to categorize, i.e. the requirement to allocate people to categories of workers who do the same work or work of an equal value, to enable category reporting. And of course, that's essentially groups of comparators for equal pay claims purposes. So, putting workers into those categories, is there a kind of similar concept under Irish law at the minute, Síobhra, and do you expect that to be quite a big challenge in Ireland?

Síobhra Rush: I do. And I think that Irish employers will, this will be quite a challenge, I do think it will be quite a challenge. I mean, I think that, you know, lots of employers here would have their own kind of internal levels which they may seek to just roll that seamlessly into a category. But I'm not sure that that's going to wash or stand up to scrutiny under what's required under the directive.

So I think that that's going, I mean, I think that's going to be a challenge in all jurisdictions, right? Because say, for instance, in Italy, they do have, they have categories under their collective bargaining agreements, but they're very broad categories. They're like white collar, blue collar. They're just not as specific as they need to be. So yeah, I do think that's going to be a big challenge. And I think that that's definitely where

guidance would need to issue from government as to how that will look, because we're pretty light on equal pay claims to be honest and kind of the concept of equal pay for equal work. Most of the decisions in the WRC or the Labour Court would tend to focus on what European decisions and CJEU decisions. I think we would also have regard to the obviously high-profile equal pay decisions from the UK as well that have come about. But yeah, the categorization thing I think is going to be a challenge.

Tom Heys: So something that I've noticed from our gender pay gap reporting work is that there are lots of companies who already have quite sophisticated levelling in place, so then they won't be approaching this categorization issue from nothing. It will be a case of adapting what they already have. As you say, perhaps just, using it exactly as it is, for categorization, maybe changing it a little bit. But there'll be plenty of organizations, smaller organizations who don't have any levelling in place at the minute and who will have to approach this issue from nothing and will not know how to start or, you know, how to do it at all. And I think, yeah, as you say, it will be a particular challenge.

David Lorimer: Yeah, I think job levelling expertise is going to come in really useful over the next 18 months or so, it? Síobhra, you've already started to talk about the prominent role for worker reps, interestingly, under the implementing national minimum wage regulations - that historically hasn't been much of a feature of the Irish employment law landscape, I think that kind of collectivism. Do you think that the minimum wage experience might help organizations who are going to have to embrace collectivism for aspects of the pay transparency directive? You know, employee reps who are gonna have to be consulted on categorisation, on the figures, on the way those are worked out on potential joint pay assessments where there are particular gaps.

Síobhra Rush: Yeah, I mean, we're very low on kind of, you know, the position of employee reps here. When I say low, I mean, just that very low union membership levels, the role for employee reps in terms of potential and, you know, say disciplinary meetings, etc, our codes of practice say that you can have a colleague or a trade union representative with you. Other than that, employee reps are really only nominated for kind of short-term projects, for want of a better word. So, for instance, in a collective redundancy consultation, they're nominated for the 30 days, in TUPE consultation they're, for the information and consultation process, they're nominated for 30 days. So they have a kind of short lifespan, whereas here we're seeing much more involvement of the role of the employee reps, as you've outlined in terms of the equal pay assessments and the, you know, being able to test the methodology of the employer in calculating the gender pay gap, etc. I don't know that the minimum wage directive will have much impact or whether it will be a good testing ground for that because it's much more high level in terms of encouraging collective bargaining, as opposed to actually giving a role to employee reps, which the Pay Transparency Directive does much more, and again, remains to be seen how exactly it's proposed that employee reps will play that role when we transpose the Directive. Because, you know, is it going to be that you nominate reps for the purposes of the Gender Pay Gap reporting and equal pay? Are they part of an employee consultation forum? So again, lots of unknowns around that, but I wouldn't be banking on the minimum wage directive transposition to give us good guidance for as and when the Pay Transparency Directive comes in.

Tom Heys: So I think employee reps will be a particular issue for all employers across Ireland. It will be the case, and we've mentioned this on our other podcasts with our colleagues from Italy and Belgium, it will be the case that these workers' representatives will very likely not have the background in the Pay Transparency Directive and understanding of what's required, the statistical issues. So, there's going to have to be a lot of training that employers need to provide, if they are to have sensible and well-informed conversations with the workers' representatives because they have a powerful role under the Pay Transparency Directive. The representatives are essentially the decision makers as to whether or not a joint pay assessment is required. So I think that's going to be something that employers should be focusing their attention on.

David Lorimer: Okay, what about enforcement then? How does enforcement under the gender pay gap regime look? And how might that change? What will the likely enforcement models be under the Pay Transparency Directive in Ireland, Síobhra?

Síobhra Rush: Yes, I don't know how much they'll change, right? Because at the moment, the enforcement mechanisms under the gender pay gap regulations are, they don't have too much teeth. So if an employee brings a claim to the WRC that an employer hasn't done their gender pay gap report, all that can be done is that an adjudication officer will tell the employer, do your gender pay gap report. There's no compensation for an employee for having brought that claim.

Interestingly, I think we've probably had a couple of claims from employees under the gender pay gap regulations, which have been mistakenly brought and should have been brought as equal pay claims. So that's been quite interesting where they've misunderstood kind of what gender pay gap reporting means and how at the moment, the information given doesn't necessarily give you the right to bring an equal pay claim.

In terms of kind of enforcement in the Pay Transparency Directive, obviously it includes that employees should have the right to bring, to enforce their rights and the obligations regarding the principles of equal pay. And, you know, obviously those claims will lie with the WRC. Now, there's already, you know, employees can bring equal pay claims to the Workplace Relations Commission under the Employment Equality Act. So do I think that there will be a change? Possibly not necessarily, you know, so orders for equal pay can go back six years and then employees can be awarded compensation for up to two years gross remuneration, and the adjudication officers can make wider orders. So, for instance, that employers undergo, and I suppose feasibly they could potentially say, you know, well, it would be just inequitable for you to do an equal pay audit now, but it's never been done as far as I'm aware anyway.

But for breach of the kind of the individual rights that arise under the Pay Transparency Directive, it will be interesting to see how that will look in terms of compensation and enforcement. And it's more that, just I suppose what we will need to see and I think what we can expect is that enforcement under the Pay Transparency Directive will have more teeth than what we have at the moment under the gender pay gap regulations.

David Lorimer: Yeah, absolutely. And I think that's been the experience in England where, for example, freedom of information requests result in greater lights shone on pay inequalities than big equal pay claims in particular sectors tend to follow. So I guess one to watch this space.

Síobhra Rush: Definitely, I think like most of what I, when I talk about the Pay Transparency Directive at conferences or, if I'm doing internal training for clients, what you know, the main message I'm getting across is - employees will have much better information about pay and how they are paid as against their peers. You know, statistics and gender pay gap reporting can be skewed, as Tom has said earlier on, by different things like bonus or, you know, outliers. This is going to be much more specific and, for employees, information is power. And I think we're going to see a lot more in the equal pay space in Ireland once this is transposed.

David Lorimer: Absolutely.

Tom Heys: So we've covered the Republic of Ireland very well, but David, what about Northern Ireland? How will the Pay Transparency Directive affect there?

David Lorimer: Yeah, it's a really good question Tom. And I should start by saying I'm kind of no means an expert on the intricacies of how the Good Friday Agreement, the Northern Ireland Protocol, the Windsor Framework and all the principles around non-diminishing of EU protections as a condition of exiting the EU, work in practice. So let me try and keep it simple.

I think the Pay Transparency Directive probably will apply/probably ought to be adopted in Northern Ireland. I think that's because we think it would be captured by this principle called the dynamic alignment principle.

And that's an obligation that's triggered to kind of track and align with certain developments under EU law, including around the equal protection of men and women and equality directives more generally. So, it ought to be implemented in Northern Ireland and therefore it ought to apply to employers in Northern Ireland. Let's watch the space as to whether it does. There aren't really any noises from the executive that it is going to be implemented, but that still could happen, of course.

I think it's probably worth then reflecting if it's not implemented or not implemented in time in NI until someone brings a challenge, then frankly, it's our view that employers in NI would probably be well advised to just be aware that they might be challenged themselves by claimants deploying that dynamic alignment principle in equal pay and sex discrimination claims going forward. So, there's a risk of challenge even if not implemented.

And there's of course the broader pragmatic point here, which we're raising with all UK employers, which is, if you're part of a multinational group and you choose not to comply with the spirit of the Directive in any bit of your European operation, then you may well come under some scrutiny and you will certainly want to have your position ready, your reasons for why you selected to opt out of compliance in certain locations.

So I think that probably brings an end to our whistle stop tour of the island of Ireland. Thanks very much, Síobhra, for joining us and bringing us up to speed on the Republic of Ireland. Thanks as usual to Tom for co-hosting with aplomb. We'll be back with you soon for another Pay Attention pod with lots more insights on the Pay Transparency Directive. In the meantime, please feel free to reach out to any of the three of us or your usual contacts at Lewis Silkin to talk more about the PTD.