



XpertHR Podcast

Original XpertHR podcast: 31 March 2017

- Susan Dennehy: Hello and welcome to this week's podcast with me, Susan Dennehy. This week we're looking at gender pay gap reporting for the public sector. I'm joined by Nicky Green, a lawyer from Capsticks. Hello, Nicky. [0:00:22.2]
- Nicky Green: Hello.
- Susan Dennehy: Gender pay gap reporting, it's finally here. It seems to have been in the background for a long time. Are you getting many queries on this, or is it the calm before the storm? [0:00:30.5]
- Nicky Green: We've had a few queries on this. We've had people asking what it means for them? Is there anything they need to do now? But generally I'm hoping that because there is such a long lead-in time before the final publication date of 30th March 2018, we've got twelve months, I think that's going to be enough time for people to be able to work out all the calculations without a storm.
- Susan Dennehy: Shall we start by looking at the technical, legal framework? [0:00:49.7]
- Nicky Green: Yes, sure. Public authorities are going to be subject to the new gender pay gap reporting, which I am going to refer to as GPGR from now on. This is quite wordy, so I am going to refer to them as Regulations as well from now on, but it's the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 and those Regulations come into force on 31st March 2017, so today. The regime for the public sector largely mirrors that for the private and voluntary sectors, but those regulations come into force a little bit later, on 6th April 2017. The GPGR forms part of the Public Sector Equality Duty, which exists under the Equality Act. There's a general duty and there are also specific duties which public authorities need to comply with and the GPGR, rather than being a standalone obligation as it is for private and voluntary sectors, forms part of this Public Sector Equality Duty. The GPGR applies to public authorities which are listed in Schedule 2 of the Regulations, where those authorities have 250 or more employees on the snapshot date of 31st March. So the key points to remember for public authorities is that it applies to those listed in the schedule which have 250 or more employees on the snapshot date.
- Susan Dennehy: 31st March, that's a different date to the date for the private and voluntary sectors. Briefly why is that the case? [0:02:01.2]

Nicky Green: The date was originally the same as the private and voluntary sectors, but there was a consultation exercise and some of the responses noted that it didn't really tally with the public authorities' financial years and so the date was changed to 31st March and as a consequence of this the information must be published on 30th March and they've also made a change to the date on which some of the information [0:02:20.2] pursuant to the Public Sector Equality Duty needs to be published. Those dates have been changed and also brought forward to 30th March as well.

Susan Dennehy: So it's going to be a lot easier? [0:02:29.2]

Nicky Green: It should be a lot easier, yes. More streamlining.

Susan Dennehy: The first job for any employer will be to work out whether or not the duty will apply to them. Where can employers find out? [0:02:36.2]

Nicky Green: The first place to look is Schedule 19 of the Equality Act and that has been amended by Schedule 2 of the Regulations and that sets out the list of public authorities. The list also includes police forces, police officers and cadets will be considered employees for the purposes of GPGR and for the education sector, Schedule 19 deals with education and includes governing bodies of further education colleges. If you think about independent schools, they're going to be caught by the private sector regulations, where they have 250 or more employees.

Susan Dennehy: That's very helpful. What about the territorial jurisdiction of the Regulations? Can you tell us a bit about that? [0:03:08.8]

Nicky Green: Yes. The Regulations apply to public authorities in England and to non-devolved functions of public authorities in Scotland and Wales only. We've been told, though, that there will be separate regulations for Wales and Scotland they'll be introduced at a later date.

Susan Dennehy: So employers on Schedule 19, they are the employers that have to report. What if you're not on that list? [0:03:25.6]

Nicky Green: If you're not on that list, you may still need to comply because you could be a private sector or voluntary organisation and you need to think about whether you need to comply if you have 250 or more employees on the snapshot date.

Susan Dennehy: And looking at the head count, where an organisation is listed as being covered by the public sector regulations and has a number of different departments, for instance a Hospital Trust might have outpatients' departments, mental health services. Can we talk briefly about the position where an employer has got workers in those various departments and how that feeds into what they're including in their head count? Would it be per department or is it for the whole Trust? [0:03:58.2]

Nicky Green: The key thing to remember is that threshold of 250 employees on the snapshot date of 31st March is assessed per employing organisation, rather than per site, per place of work or per department. So in the scenario that you've just given, you would include the workers in all

the departments at all the sites, including the mental health sites and the outpatients' sites.

Susan Dennehy: And that leads on then to who is included when you're including your employees into this head count? [0:4:20.9]

Nicky Green: The Regulations use the same definition of employment as that that is set out in the Equality Act in Section 83. So employment under a contract of employment, a contract of apprenticeship or a contract to do work personally, so that will include employees, workers and apprentices and may include interns depending on their employment status.

Susan Dennehy: Can we look at those in a bit more detail? You mentioned there casual workers, are they included in the count? [0:04:42.9]

Nicky Green: Well casual workers, contractors and zero-hours workers who are directly engaged by the employer on an assignment during the snapshot date will fall within the scope of the Regulations and they'll count towards that 250 employee threshold. However, where you've got a casual worker who is not engaged on an assignment on the snapshot date, and there is no mutuality of obligation during periods of no work, they won't need to be counted. Where there is an umbrella contract which exists during periods of no work, they will form part of the threshold calculation. So essentially it's going to be really fact specific.

Susan Dennehy: And what about outside contractors? Because lots of hospitals and public services have a lot of their services contracted out. Are they included in the head count? [0:05:20.1]

Nicky Green: Contractors who aren't obliged to perform work under their contract personally, i.e. they can send in a substitute to carry out the work, they are not going to be included. And also those that conduct their work via a personal services company, they also won't need to be counted towards the threshold.

Susan Dennehy: And another issue for lots of public sector employers is of course agency workers. Are they included? [0:05:39.9]

Nicky Green: There was a big debate about this and the conclusion that was drawn was that agency staff are employed by the agency and so they will be counted within that agency's threshold, so where the agency employs 250 or more employees they will be reported in that way and there shouldn't be a double-counting of these individuals. So, no, you won't need to include agency staff within your threshold.

Susan Dennehy: And are there any types of employees that aren't covered? [0:05:59.2]

Nicky Green: Yes. It won't include truly self-employed individuals and it won't include volunteers. For the head count purposes you do need to include people that are on leave, so those who are on maternity leave and they will count towards that 250 threshold. But for the purposes of calculating pay, they won't be. It's a slightly complicated area that one.

Susan Dennehy: And once you've calculated your employees, you've got your head count, how do you go about calculating their pay? Does it follow the same rules as for the private sector? [0:06:23.7]

Nicky Green: Yes, it does. The same rules apply. You calculate mean and median rates of pay for men and women and you look at the bonus payments and pay will include basic pay, paid leave including annual leave, sick leave, maternity, paternity, adoption or parental leave (when that's at full rate) and other allowances, such as shift premium pay, pay for piece work and bonus pay.

Susan Dennehy: And you told us there about ordinary pay and what that includes. What is excluded from pay? [0:06:47.2]

Nicky Green: It doesn't include overtime pay. It doesn't include expenses, that being payments made to reimburse expenditure wholly and necessarily incurred in the course of employment such as mileage or for use of a vehicle. It won't include remuneration in lieu of leave and that's going to be something that is used quite a lot within public authorities which is the rolled-up holiday pay. That's something that comes up time and time again. And it won't include the value of salary sacrifice schemes and benefits in kind, such as childcare vouchers and pensions. It also won't include redundancy pay and tax credits.

Susan Dennehy: So it's important to remember that it doesn't include some types of payment. Like you say it doesn't include salary sacrifice. [0:07:21.6]

Nicky Green: No, that's right. Where an employee makes a salary sacrifice, the pay used in the calculation should be the pay after the deduction has been made. It was found through the consultation that including such payments would be difficult, as many benefits in kind are typically non-cash benefits and the value of the salary sacrifice schemes is not necessarily equivalent to the agreed reduction in salary.

Susan Dennehy: And how about on-call payments? Because a lot of employers in the public sector pay on-call payments. How are they treated? [0:07:45.7]

Nicky Green: So the gender pay gap calculations would include shift premium pay or shift allowances such as an on-call payment, and the reason being that these payments are generally a component of an employee's regular pay used to compensate them for working undesirable or inconvenient hours. But it is important to remember that that is different from overtime payments and they're excluded as there seem to be additional payments for extra hours worked on an ad hoc basis.

Susan Dennehy: And when you're calculating pay, you're using the gross hourly pay calculation? [0:08:11.6]

Nicky Green: Yes, it is gross pay you are looking at and there's the same six step formula that's set out in the private sector regulations to calculate the differences between men and women.

Susan Dennehy: And it's quite different, isn't it, for the head count and your actual pay calculations? Some employees are included for the purposes of the head count, some employees are actually left out for the purposes of the pay calculations? [0:08:28.7]

Nicky Green: Yes, that's right. As we talked about earlier, the Regulations provide that the pay calculations should not include those who are being paid at a reduced rate or nil as a result of being on leave during the relevant pay reference period. So that's going to include employees who are on maternity, paternity, adoption, parental or shared parental leave. Therefore employees on maternity leave or other family leave should be included only if they're in receipt of full pay during the pay reference period.

Susan Dennehy: And employers have to calculate the mean and median pay and employers need to calculate the mean and median bonus pay. Is that the same as for the private and voluntary sectors? [0:09:03.1]

Nicky Green: That's exactly the same. Bonus pay is defined as any remuneration that is in the form of money, vouchers, securities or options and relates to profit sharing, productivity, performance, incentive or commission.

Susan Dennehy: So those calculations are pretty much the same for both? [0:09:15.2]

Nicky Green: They'll be the same. Yes.

Susan Dennehy: And now, looking at the quartiles, we haven't mentioned those yet, they are causing quite a lot of consternation for employers? [0:09:25.3]

Nicky Green: Public authorities are going to be asked to publish details about the positioning of male and female employees according to quartile bands. So once you've got the hourly rate of pay for all employees, you rank them from lowest to highest, and then you need to divide those into four, so four quartiles. And the bands need to be equal, but only as far as possible. So an example that is given on the Government website is if you have 322 employees, you can't split them equally, you have bands of 80 and then two remaining, so the suggestion that is made on the Government website is that you add those two employees, you split them between the lower band and the middle and higher bands to make it as even as you possibly can.

Susan Dennehy: So it's not really an exact science. [0:10:01.0]

Nicky Green: It can't be an exact science. No.

Susan Dennehy: Moving on now, can we look at reporting? Where do you have to report your figures? [0:10:07.5]

Nicky Green: The information is going to need to be published on the public authority's website in a way that's accessible to both employees and the public, so it's no good putting in on the intranet, it needs to be on the internet so the public have access to it as well. The important difference between the Regulations for the public authorities and those with the private sector is that in the public sector the CEO or another official officer isn't required to make an accompanying statement or sign off on the figures that are published.

Susan Dennehy: And that's one of the key differences, isn't it? No one has to sign off on those figures for the public sector, but they do for the private and

voluntary sectors. But those figures must also remain on the site?
[0:10:40.6]

Nicky Green: That's right. There is nothing in the regs that require the sign-off. It was felt that as the data that is currently published under the Specific Equality Duty does not need to be signed off, it didn't make any sense for the GPGR to be signed off as well. But, yes, that's right, they need to remain on the site for three years.

Susan Dennehy: And will public employers have to put that information into the Government portal? [0:10:58.6]

Nicky Green: Yes. They have to do both. They put it on their own website and they put it into the Government portal.

Susan Dennehy: You can just publish those figures and no more. Some people have been wondering whether or not to include more information than the minimum. The possibility of a narrative to explain that information is very much optional. What's your take on it? [0:11:12.9]

Nicky Green: That's right. To comply with the Regulations, public sector employers could just publish a series of numbers which wouldn't really mean very much to many people, but I think public sector employers are aware that they're under a lot of political scrutiny as to exactly what their gender pay gap is and I think there is going to be a lot of comparison between employers and I think where the gender pay gap has been distorted, for example by the extent to which employer contracts workers out, so if you've got contracted out a largely female population of cleaners or caterers all at a lower end of the pay scale, you might want to make very clear that's because, at least in part, you're committed to employing people directly rather than sending them out to a contractor. Employers in the public sector, are not going to be obliged to publish a narrative, but they may feel it's necessary where there's a significant difference in pay which they feel warrants an explanation.

Susan Dennehy: You have to report pay, bonus and quartiles. Going back to the NHS structure with all those different departments, presumably where you've got various departments reporting, they're going to want to report fairly consistently. It's worth communicating with each other about how your hospital, for example, is going to go about reporting, isn't it? [0:12:13.0]

Nicky Green: Yes, I agree. Where departments are going to be responsible for reporting their own figures to HR rather than HR doing the work centrally, I think now is the time to consider perhaps creating a template for departments to populate with relevant information and also providing training to those people who are going to be responsible for the work.

Susan Dennehy: A couple of really good practical tips, aren't they? And what about young workers, do you think young workers are going to be looking at these statistics and may decide, 'I don't like the look of that public sector employer and somebody else is doing a bit better, I might work there instead.' [0:12:39.7]

- Nicky Green: Not just young workers I don't think. I think all potential employees, so all applicants are going to start looking at this data. It's a great opportunity for public authorities to put their side across of where they're taking positive steps to tackle any differences in gender pay gap. Essentially, again, it's a communications issue, but I think it's an issue where HR has an important part to play in making it clear to the communications people exactly why the position is as it is.
- Susan Dennehy: The first time round for gender pay gap reporting for most employers, it sounds like quite a task. What steps can organisations be taking now? You mentioned there about having or creating a reporting template and training. Is there anything else? [0:13:15.3]
- Nicky Green: Steps that could be taken include looking at the breakdown of gender in an organisation at this point, especially through the higher levels of seniority, which is where you tend to find the bigger difference. A key driver for the Regulations is the fact that there are far fewer women than men employed in higher paid positions and if that's the case with your organisation, I think now is the best time to start looking at why that's the case? Are there certain blocks that are in place which mean that women cannot progress through to those more senior positions?
- Susan Dennehy: Lots of public sector employers may be thinking, 'We've got pay bands for all our jobs, so we're not really going to be affected by this duty.' What would you say to that? [0:13:45.5]
- Nicky Green: I think it's a really important point to remember that this isn't about equal pay, it's not about like pay for like work, this is about the gender pay gap and that's about the average salaries of men and women in the workplace. So you may have pay bands that apply to staff, but just because men and women are paid at the same level, it doesn't mean there isn't a gender pay gap problem and it's important not to confuse the two.
- Susan Dennehy: Just a couple of things before we finish. When must the first report be published for the public sector? [0:14:08.0]
- Nicky Green: The first date for publication is no later than 30th March 2018, so you can publish before that date, but that's the final date you've got to publish on.
- Susan Dennehy: And what about enforcement, there was a lot of talk early on about quite draconian enforcement measures. They haven't made their way into the Regulations? [0:14:24.0]
- Nicky Green: There is some uncertainty about enforcement actually. There is a difference between the private sector regulations and those in the public sector. But in the explanatory notes to the public sector regulations, it makes clear that the Equality and Human Rights Commission have powers to issue a compliance notice if a public authority fails to publish their data.
- Susan Dennehy: Thank you very much for that, Nicky. That wraps up our look at gender pay gap reporting for the public sector. For more information we have a topic on gender pay gap reporting on our website, which you can access through our topics page. Go to topics, pay and benefits, pay levels and awards and you'll find gender pay gap there.

That brings us to the end of this week's podcast, which you've been listening to with me, Susan Dennehy. We're back again next Friday, but until then it's goodbye from us.