Tackling the gender pay gap

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Share Incentives analysis: In the wake of research by the Chartered Management Institute (CMI) into the gender pay gap (GPG) at FTSE 100 companies, which revealed that female CEOs earn less than half as much as their male counterparts, Sam Whitaker, counsel at Shearman & Sterling (London) LLP, examines the causes of GPGs, how companies are addressing the issue and the reliability of data on the subject.

In your experience, what are companies generally doing to counter GPGs?

Since the first GPG reports were published in the period April 2017 to April 2018, it has become widely recognised that, where significant GPGs exist, this often demonstrates an issue of under-representation of women in senior or particular roles, rather than showing unequal pay between men and women in the same or similar roles. That said, the reporting of GPG statistics in the national press has often not made this distinction clearly and, in the public's mind, GPG reports have regularly been linked with equal pay or discrimination issues. And a new YouGov survey has shown that only 30% of the UK population could choose the correct definition of GPG, with 64% thinking it meant 'women being paid less than men for doing the same job' rather than 'women as a whole being paid less on average than men as a whole'.

Although there has not been much UK research on the underlying causes of significant GPGs and under-representation of women in senior or particular roles, many organisations have concluded that one important factor may be due to women's choices about work and careers when having children. With this in mind, many employers have sought to take action to increase their attractiveness as family-friendly employers to decrease the number of women who may leave the workplace in order to have children. Such measures include enhancements of family-friendly benefits, eg increases in forms of paid parental or maternity leave, subsidising childcare costs and more encouragement of fathers to take paternity or parental leave, the greater use and promotion of agile or flexible working (particularly for more senior roles), and the use and promotion of 'returnship' programmes to encourage women to return to work after having children.

Outside of efforts to increase companies' profiles as family-friendly employers, other measures adopted by companies to try to reduce GPGs have been:

- setting targets for numbers of women in particular roles or levels of seniority
- diversity and unconscious bias training for managers
- use of sponsorship programmes within the workplace where sponsors actively seek promotion opportunities of behalf of the women being sponsored
- redesigning recruitment processes to focus more on competence and key strengths to try to reduce bias based on a candidate's social background, gender and other unconscious bias bases

There have been some other suggestions for tackling GPGs which, although they might result in a direct reduction in GPGs, would nonetheless incur risks of being held to be unlawful discrimination against men, eg giving only women pay rises or setting specific minimum numbers of women that must be on candidate shortlists.

Are there particular sectors where the pay gap is greater?

The reported data for the first year of GPG reporting has shown that there are some sectors where GPGs are the greatest, in particular football clubs, financial services firms, airlines and certain fashion houses. Football clubs in particular have very high GPGs—gaps in the range of 80% are not uncommon. These figures are heavily influenced by the very high salaries paid to the male first-team players (and male-dominated senior management), but the GPG decreases very significantly when these individuals are stripped out from the figures.

In airlines, the figures tend to be driven by the fact that very few women tend to occupy the more well-paid roles such as pilots, but do heavily dominate the less well-paid roles such as cabin crew. Similarly, in financial services, the more senior roles in practice tend to be dominated by males, which tends to result in a heavy imbalance in the GPG figures.

In your opinion, do the pay figures released by companies reflect total remuneration packages? If not, why not?

Arguably not. As discussed below, in a number of respects the legislation deems what does and does not get to be included as 'ordinary pay' and 'bonus pay' in GPG reports. Certain items which, in practice, might typically be regarded as constituting part of a person's overall remuneration, may not be included for GPG reporting because of such deeming provisions. So, for example, the legislation specifically states that benefits which are paid through salary sacrifice are ignored for GPG reporting purposes. This means that if, for example, senior male executives swap a significant portion of their salary for increased employer pension contributions through salary sacrifice, the figure reported for GPG purposes (ie salary after reduction for the salary sacrifice arrangement) will then arguably give an artificially distorted figure of what is their true remuneration figure in practice.

The CMI is calling for more transparency in regard to total pay. It has expressed particular concern in regard to 'the more opaque parts of pay, such as bonuses, long-term incentive plans (LTIPs) and perks'.

Do you think the lack of transparency is due to the legislation being unclear? If so, what changes do you think need to be made to the current legislation to ensure companies report total pay packages?

There are certainly some strange anomalies in the legislation relating to how some of these elements are treated, which arguably skews the figures for some companies. For example, it is odd that, in calculating 'bonus pay', when determining whether benefits under an employee share scheme should be included, the legislation effectively only includes those in relation to which an income tax charge arises. This means that awards under tax-approved share schemes (eg awards under save-as-you-earn schemes or share incentive plans) do not get counted as bonus pay at all for reporting purposes, whereas awards under non-tax-approved share schemes (eg share options for senior executives or LTIPs) would be counted. Equally, awards under share-related plans where tax is payable but the tax is not income tax (eg certain management share incentives in private equity-backed companies may only be subject to capital gains tax) do not get counted at all. This distinction means that, in relation to share schemes and LTIPs, what is and is not counted for GPG reporting purposes can give a distorted picture of what is actually in practice received by employees and executives through such schemes.

Equally, it is odd how the legislation can treat the same type of award in different ways depending on the purpose for which it is being reported. For example, where a bonus or share plan (eg an LTIP) is structured so that there is a performance period of more than one year (LTIPs typically have performance periods of three years), the award is treated differently for calculation purposes for GPG figures as opposed to the gender bonus gap figure. For the GPG figure, only a pro-rata proportion is included whereas, for the gender bonus gap figure, the whole amount of the paid award (assuming it is subject to income tax) is included, irrespective of the fact that it relates to more than one performance year.

It is arguable whether the legislation should or could be amended to address this. It might be said that amending the legislation to deal with all types of share schemes awards would give a truer reflection of the actual remuneration received by relevant employees. Conversely, the current arrangement has the advantage of being straightforward to operate (as the value to be taken into account is simply the value for income tax purposes, which is relatively straightforward to assess). Including tax-advantaged schemes could require mechanisms for valuing the awards which might not be straightforward.

It is not uncommon for UK executives in large international organisations which are non-UK headquartered to receive share awards or bonuses under plans which are established by the non-UK parent company, rather than the UK employing entity. The legislation is unclear as to whether such awards and bonuses are included in calculating bonus pay. It is difficult to say from published reports whether companies have erred on the side of caution and included such amounts or taken the view that they are outside the scope of the GPG reporting requirements, but it certainly does not help transparency that the legislation and guidance is not explicit on this point.

Interviewed by Robert Matthews.

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