

**Irish Congress of Trade Unions and the EC Year of
Equal Opportunities for All 2007**

Equal Pay - Overview Analysis

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Final report

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1. Introduction

As part of the EU Year of equal opportunities for all, Congress decided to produce and promote five policy briefing papers and guidelines for action on key themes of relevance to its membership. One of the key themes identified by Congress was that of equal pay.

Congress requested an overview analysis which would develop an evidence-based policy brief on the issue of equal pay to help formulate the trade union agenda going forward. The analysis aims to:

- identify topical issues in relation to equal pay,
- compare how Ireland's situation differs from other EC countries,
- and to develop an agenda for change (and trade union support for this) to ensure more equality of opportunities and less discrimination in Irish workplaces.

The analysis covers not only equal pay on gender grounds but all the nine grounds covered by Irish equality law. The prohibited grounds of discrimination are:

- gender,
- marital status,
- family status,
- sexual orientation,
- religion, (which includes absence of religious belief)
- age,
- disability,
- race, (including colour, nationality, national or ethnic origins), and
- membership of the Traveller Community.

Research approach

The research methods included the following:

1. Literature review of Irish and international publications in relation to equal pay;
2. A comparison of how Ireland's situation relates to that in other EU countries drawing on the international literature and equality contacts in other European countries;
3. Consultation with ICTU members in relation to identification of problem areas, good practice, etc.

This would then lead to the development of recommendations and guidelines for action.

Literature review

I carried out an extensive review of the national and European research concerning pay on equality grounds including publications by the European Commission, European Foundation for the improvement of living and working conditions, ESRI and other organisations (see references).

Legal review

I also carried out an extensive review of the legal position concerning equal pay in Ireland in Europe including a review of EU and national legislation and case law (before the equality officers, Labour Court, High and Supreme Courts, and the European Court of Justice). The bulk of the case law has been in relation to equal pay for men and women and there has been relatively little case law to date in relation to the more recent legislation extending equal pay entitlements to other grounds of discrimination. I also reviewed the Irish and international legal literature in relation to equal pay entitlements.

Consultation

In addition to a range of material provided by ICTU, I contacted a number of key informants concerning the project to inform them of my research and to seek their views and inputs.¹

Structure of report

Part 2 of the report sets out the information available as to the reality of (un)equal pay in Ireland. Part 3 sets out the legal position in relation to equal pay. Part 4 looks at why unequal pay continues - despite the legislation – drawing on a range of studies which have been carried out both nationally and at EU level. Finally part 5 sets out conclusions and recommendations.

¹ I would like, in particular, to thank David Joyce and Esther Lynch of ICTU, Mags O'Brien of SIPTU, and Carol Baxter, Brian Darcy and Eilis Barry of the Equality Authority for their assistance.

2. Equal pay in Ireland – the reality

This part looks at the available information in relation to equal pay under the nine equality grounds. There is considerable data both nationally and at an EU level in relation to the gender pay gap. Data is available in relation to the levels of pay received by men and women in EU countries and has been analysed to take account of factors which might explain differences in pay such as different levels of education. Data is also available in relation to payments by age but such data has not yet been analysed in an Irish context to take account of the factors which might explain the differences which occur, e.g. extra pay on the basis of length of work experience. In the case of disability, a recent study by the National Disability Authority and the Equality Authority provides important information in relation to earnings received by persons with a disability. However, little if any data is available for many of the other grounds (such as religion). This section sets out the basic data and the reasons for the differences in pay are discussed in more detail in part 4.

The gender pay gap

It is well established that there remains a gap between the earnings of men and women in Ireland and that this gap is one of the highest in the EU.² The importance of the gender pay gap as a policy issue has recently been recognised in the *National Women's Strategy 2007-2016* (Ireland, 2007). The most recent available earnings data shows that in 2006 male industrial workers received an average of €15.90 per hour compared to only €12.32 for women (77.5%) while men received an average of €656.26 per week compared to €452.80 for women (69%) (CSO, 2007). Of course, there may be factors which could explain some of this differential and these issues have been examined in a number of studies.

Research by the ESRI shows that in 2000 the mean gross hourly wage for men was 15% higher than that on women and that there had been a very small decrease in the gap since 1997 (Russell and Gannon, 2002).³ The ESRI research examined differences in earnings having regard to factors such as age, education, hours of work, work experience, and occupational sector. They found that when all job and personal characteristics were taken into account women still received a 12% lower hourly pay.

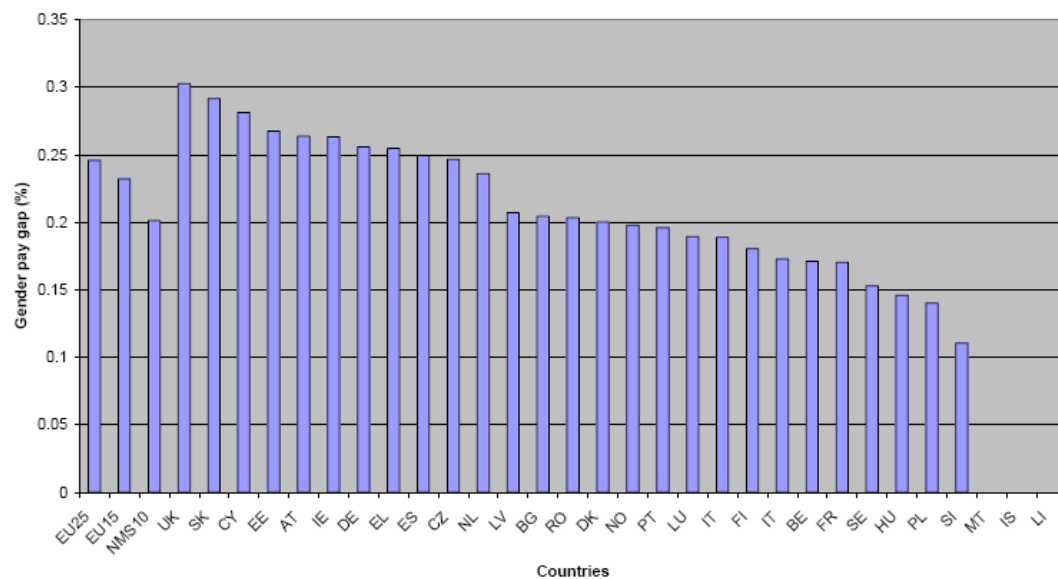
Studies at an EU level show that the gap between the pay of men and women is higher in Ireland than in most other EU countries. As can be seen in figure 1, a recent study for the EU Commission found that the gender pay gap in Ireland in 2002 (for private sector workers) was over 25% - a figure much higher than the EU average and higher than all other EU countries except the UK, Slovakia, Cyprus and Austria (Plantegna and Remery, 2006).⁴

² This is reflected in a number of recent motions on equal pay adopted by Congress (see appendix 1).

³ There have also been studies of the gender pay gap at a sectoral level (Indecon, 2002).

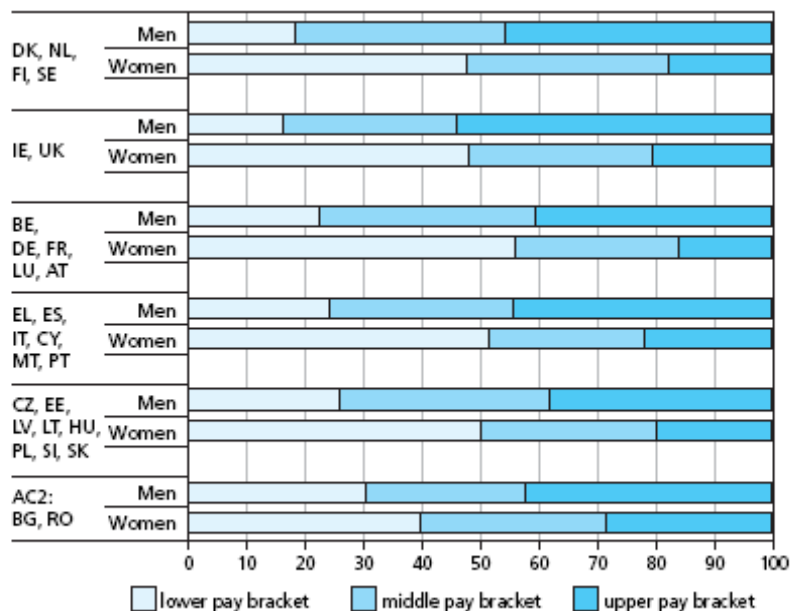
⁴ More recent EU data (reported in CSO, 2006) show Ireland with a much smaller pay gap of only 11%. However, as the CSO points out the data exclude persons working 15 hours or less who are mainly women and are not comparable with other data presented on gender pay

Figure 1: Gender pay gap in EU25, Romania, Bulgaria and Norway, 2002



This finding is confirmed by recent research by the European Foundation for the Improvement in Living and Working Conditions (EFILWC, 2007) on the basis of a European working conditions survey carried out in 2005.

Figure 2: Gender differences in pay by country group, 2005



comparisons such as that derived from the Revenue Commissioners. Eurostat points out that as a new data series they are subject to quality review. Given that the most recent data is not consistent with almost all other data series, it would be unwise to assume that it indicates a narrowing of the gender pay gap pending further examination of the reason for the different findings. The suggestion in the National Women's Strategy (Ireland, 2007, 30) that it may reflect the impact of the national minimum wage is not consistent with earlier work which suggested that it would have relatively little effect (Russell and Gannon, 2002, 78).

As in the earlier survey, the UK and Ireland tended to be more unequal than most other EU countries with a higher proportion on women in the low pay bracket and a higher proportion of men in the upper pay bracket. Even taking account of the fact that women are more likely to work part-time than men, the research found that the gender wage gap was still very important (EFILWC, 2007, 86).

Age and earnings

Data is available as to earnings by age. Table 1 sets out the findings of the National Employment Survey as to earnings by age and gender.

Table 1: Median hourly earnings by age group and gender, 2003

	Male	Female	All
15-24	9.63	8.97	9.30
25-29	13.76	12.40	13.09
30-39	16.06	13.09	14.83
40-49	16.91	12.72	15.10
50-59	16.78	11.88	14.80
60+	14.85	10.17	12.81

Source: National Employment Survey, 2003

As can be seen, earnings tended to rise with age (to the 40s in the case of men and the 30s in the case of women) before falling back. Similar findings can be seen in a range of other national studies (Russell and Gannon, 2002). However, an analysis of the different personal and job characteristics of those involved has yet to be carried out in an Irish context. This we cannot say whether the pattern observed can be explained in terms of, for example, productivity of workers at different ages or whether other factors are involved.

Disability and earnings

A recent study carried out by the ESRI for the National Disability Authority and the Equality Authority provides important information on the earnings of people with disabilities (Gannon and Nolan, 2005). Perhaps surprisingly, the study found that in 2001 there was no difference in average earnings for men between those with or without a chronic illness or disability. For women the study found that women reporting such an illness or disability earned 5% less per week than those without but because they worked significantly fewer hours they actually earned a *higher* hourly rate than women without a disability.

The study also analysed these findings in more detail to look at differences in factors such as education levels and experience.⁵ This analysis found that having an illness or disability and being hampered in daily activities did not

⁵ This was carried out for men only due to the small number of women employees in the sample.

have any (statistically significant) effect on earnings *once education and experience were taken into account*. However, the study also found that illness and disability had a negative impact on educational attainment and work experience so the persons with a disability were “being penalised in earnings terms for the additional time they have spent not in work, compared with others of the same age” (Gannon and Nolan, 2005, 43). The authors point out that only a small proportion of people with disabilities are in employment and suggest that their finding as to a lack of pay inequality may be because of the fact that the persons with disabilities have particular characteristics not observed in the data. Taking account of this possible “selection bias” they suggest that there is an earnings gap for those with illness or disability.

Marital and family status,

Detailed research has not been carried out specifically on the impact of marital and family status on earnings. Nonetheless a number of studies of the gender pay gap have examined these issues. Russell and Gannon (2002, 75-6) found that being married increased wages overall by 13% but that the impact was different for men and women. They found that being married had a positive effect on male wages but little effect on female wages. Taking account of a range of factors they found that single women earned 5% less than single men but that married women earned 19% less than married men. Single men earned 20% less than married men and single women 25% less than married women. Similar findings have emerged from a EU-wide study of gender earnings (EU Commission, 2003, 39).

Nationality, national or ethnic origins

Possible discrimination on grounds of nationality (which includes race, colour, nationality, national or ethnic origins) is of increasing importance in Ireland given the significant increase in the number of persons born in countries other than Ireland in the Irish labour market in recent years. Only limited data is currently available on this issue and given that widespread in-migration is a relatively recent feature of the Irish labour market it will take some time before trends become fully apparent. However, a recent study (Barrett and McCarthy, 2006) of data for 2004 found that, controlling for education and work experience, immigrants earn 18% less than native workers and that immigrants from non-English speaking countries were at a 31% wage disadvantage compared to native workers.

Membership of the Traveller Community

There do not appear to be any detailed data on the earnings of members of the Traveller Community. However, anecdotal evidence and the data contained in the 2002 Census report as to the educational attainment of Travellers would make it very unlikely that members of the Traveller Community receive pay at the same level as that paid to other employees. However, more detailed data would be required to assess this and examine the factors involved.

Other grounds

There do not appear to be any detailed earnings data available on the basis of a person's sexual orientation or religion.

Conclusion

In conclusion we can see that for most groups for whom detailed data is available, we can see clear evidence of unequal pay which is not explained by factors such as education or work experience. In particular:

- ✚ when all job and personal characteristics are taken into account women still receive 12% lower hourly pay
- ✚ being married increased wages overall by 13% but the impact is different for men and women - being married has a positive effect on male wages but little effect on female wages
- ✚ controlling for education and work experience, immigrants earn 18% less than native workers and immigrants from non-English speaking countries are at a 31% wage disadvantage compared to native workers.

3. Equal pay – the legal position

This section looks at the legal position in relation to equal pay (under the nine grounds) both at EU level and in Ireland. Having outlined briefly the key legal texts, we examine some of the key issues concerning the operation of equal pay law in Ireland.

EU law

There are long-standing rules in EU law against discrimination on the basis of gender and nationality. More recently, on the basis of Article 13 of the EC Treaty, the EU has introduced directives on discrimination in relation to race and ethnic origin, and in relation to religion or belief, disability, age and sexual orientation.

Gender

Article 141 of the EC treaty states that

Each member state shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

The European Court of Justice has held that this provision is directly effective in national law.⁶ In addition, there is an EC directive which provides further guidance in relation to the implementation of the principle of equal pay (75/117/EEC).⁷ The Equal Pay Directive develops the principle of equal pay and, for example, provides that:

- any job classification system which is used for determining pay must be based on the same criteria for both men and women and be so drawn up as to exclude any discrimination on grounds of sex
- there must be no provisions which are contrary to the principle of equal pay in legislation, administrative rules, collective agreements, wage scales or individual contracts of employment
- employees must be protected against victimisation for taking steps aimed at enforcing compliance with the principle of equal pay

Nationality

Article 39 of the EC treaty provides that

1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

⁶ Case 43/75 *Defrenne* [1976] ECR 455.

⁷ There are also further directives in relation to equal opportunities at work (76/207/EEC), equal treatment in social security (79/7/EEC) and equal treatment in relation to pensions (REF).

In implementation of this article, Regulation 1612/68 (which is directly effective in Irish law) provides that

7.1 A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment

Thus, EU law directly prohibits pay discrimination on the basis of nationality.

Race and ethnic origin

Council directive 2000/43/EC, which is adopted on the basis of Article 13 of the EC treaty, provides that

2.1 For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

Article 3.1 (c) of the directive specifically provides that it applies to pay.

Religion or belief, disability, age or sexual orientation

Council directive 2000/78/EC, also adopted on the basis of Article 13EC, establishes a general framework for equal treatment in employment and occupation in relation to religion or belief, disability, age or sexual orientation. Article 2.1 of the directive provides that

For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 [i.e. religion or belief, disability, age or sexual orientation].

Again this directive specifically applies to pay (article 3.1 (c)).

Irish law

These EU rules are implemented in Irish law by the Employment Equality Act, 1998 (as amended).⁸ This replaces the Ant-discrimination (Pay) Act, 1974 which had applied only to gender equality. The Employment Equality Act prohibits discrimination in relation to equal pay on the grounds of:⁹

⁸ A consolidated copy of the Employment Equality Act (which includes amendments) is available at <http://www.equalitytribunal.ie/uploadedfiles/AboutUs/ConsolidatedEmploymentEqualityActs2004.pdf>

⁹ The Act also provides for a range of other employment-related equality issues including access to employment, sexual harassment, etc.

- gender,
- marital status,
- family status,¹⁰
- sexual orientation,
- religion, (which includes absence of religious belief)
- age,
- disability,
- race, (including colour, nationality, national or ethnic origins), and
- membership of the Traveller Community.¹¹

The Act provides that it shall be a term of the contract under which a person is employed that he or she is entitled to the same rate of pay for the work which he or she is employed to do as another person (of different gender, etc.) who, at that or any other 'relevant' time, is employed to do like work by the same or an associated employer.¹² However, the Act does provide for a number of specific savings and exemptions in relation to the family, age and disability.¹³

Implementation of the principle of equal treatment

The basic approach of the Employment Equality Act relies on a process of individual complaints by employees who feel that they are not receiving equal pay. In general, a person who feels they are being discriminated against may apply to the Director of the Equality Tribunal. If it appears to the Director that the case is one which could be resolved by mediation (and if the parties do not object), the Director must refer the case for mediation to an equality mediation officer. If the case is not referred to or resolved by mediation, it is investigated by the Equality Tribunal – normally by an equality officer who gives a legally binding decision in relation to the claim. A person who is dissatisfied with such a decision may appeal to the Labour Court and a further appeal on a point of law lies to the High Court (with the possibility of yet further appeal to the Supreme Court).

There are a significant number of equal pay cases each year before the Equality Tribunal.¹⁴ It is difficult to identify trends on the basis of these numbers as, in practice, one case may concern a single individual or a claim which will have an impact on several hundreds (or even thousands) of workers in similar employment. Relatively few cases appear before the High or Supreme Courts. Cases may be referred to the European Court of Justice

¹⁰ i.e. being pregnant or having responsibility as a parent or person in loco parentis for a person under the age of 18 or as a parent or primary carer for a person over that age with a disability who requires care or support on a continuing, regular or frequent basis.

¹¹ Traveller Community is defined for the purpose of the Employment Equality Act 1998 as "the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions, including, historically, a nomadic way of life on the island of Ireland").

¹² Sections 19 and 29 of the Act.

¹³ Sections 34 and 35 of the Act.

¹⁴ In 2005, 400 cases were referred to the Tribunal under the Employment Equality Acts (including both equal pay and other claims).

by the equality officers, Labour Court or superior courts for an interpretation of EU law and a number of such cases have been referred from Ireland.

Equality reviews

The Employment Equality Act introduced an interesting innovation in the form of equality reviews and action plans.¹⁵ An equality review is defined as

- (a) an audit of the level of equality of opportunity which exists in a particular business, group of businesses or the businesses making up a particular industry or sector of industry, and
- (b) an examination of the practices, procedures and other relevant factors (including the working environment) of the business to determine whether they are conducive to the promotion of equality of opportunity.

An equality action plan is a programme of actions to be undertaken in a business or businesses to further the promotion of equality of opportunity.

Such reviews are generally voluntary and the Employment Authority may invite a particular business, group of businesses or a particular industry or sector thereof to (a) carry out an equality review; and/or to (b) prepare and implement an equality action plan.¹⁶ However, the Authority may also, if it thinks it appropriate, itself carry out an equality review and prepare an equality action plan in relation to a particular business, group of businesses or a particular industry or sector thereof where the business has 50 or more employees.

The Equality Authority does have certain powers in relation to the enforcement of equality action plans. If it appears to the Authority that there is a failure to implement any provision of an equality action plan, the Authority may require an employer to take such action as is reasonably required for the implementation of the plan and it is within that person's power to take.

To date the Equality Authority has carried out an Equality Review and Action Plan (ERAP) scheme (funded by the Department of Justice, Equality and Law Reform through the Equality for Women Measure of the National Development Plan, 2000-2006). The scheme is a voluntary initiative designed to promote equality and diversity in the workplace. The scheme provides support for a comprehensive examination of the policies, procedures, practices and perceptions which operate within the workplace with regard to their contribution to equality outcomes. The scheme has a baseline focus on the gender ground alongside the other eight equality grounds included in the Employment Equality Act. There is a particular focus on a gender pay gap assessment as part of the Review. The ERAP scheme also provides for a follow-up assessment to be made within 12 to 18 months of the initial review

¹⁵ Sections 68 to 72 of the Act.

¹⁶ Section 69(3).

and action plan to help ensure the scheme's longer term impact within the company.

Employment equality reviews examine and highlight areas where equality outcomes can be improved in a workplace and diversity better accommodated in the workforce. The subsequent action plan, prepared in cooperation with the business, identifies the measures that it should take to achieve equality and accommodate diversity. Reviews are conducted by an equality auditor chosen from a panel of consultants selected and trained by the Equality Authority.

Reviews have been completed or are ongoing in:

- Irish Aviation Authority;
- Cope Limited;
- University College Dublin;
- Exchange House Traveller Service;
- Aer Rianta;
- An Bord Pleanála;
- Dublin Port Authority;
- Waterford Crystal;
- Dublin City University;
- Kerry Education Service;
- South Kerry Development Limited;
- Galway City Partnership;
- Siemens Ltd;
- Leitrim County Council.

The Authority is currently carrying out an evaluation of the ERAP.

Key issues¹⁷

In this section we look at a number of key issues in relation to the operation of equal pay legislation in Ireland based on a review of the case law, the literature and on the consultation process.

1. Individual v group enforcement

The structure of Irish employment equality legislation is based around individual complaints by individual workers who seek to show that they personally are engaged in like work with a comparator. In practice, grouped claims are often brought by trade unions and these may have broader implications for a wider group of workers involved in the same employment. Nonetheless the structure of the enforcement process is individual.

¹⁷ This section does not purport to be a comprehensive analysis of all possible issues in relation to the equal pay legislation but focuses on a number of key issues highlighted in the research process. Other issues not discussed here include the approach to job evaluation and classification systems, the question of the need for statistical data in indirect discrimination cases, and the interpretation of the concept of objective justification.

ICTU has consistently argued that the legislation would be more effective if it included provision for class action remedies.¹⁸ The issue of such class (or multi-party) actions has recently been considered by the Law Reform Commission (LRC, 2005). The Commission recommended that procedures to allow for multi-party litigation should be introduced into the general Irish court rules. A similar approach could usefully be adopted in relation to claims before the Equality Tribunal drawing on the approach set out by the Law Reform Commission.

2. A right to information

A key part of enforcing a right to equal pay is the ability to know whether there is a pay difference. In many employments, there may be an absence of transparency in relation to pay terms. At present, the Employment Equality Act allows a person to seek relevant information from the employer but the employer is not obliged to provide this information. While the courts and tribunals can draw inferences from a failure to provide such data,¹⁹ it would significantly improve the ability of individuals to establish whether there was a difference in pay if, as recommended by the Equality Authority, a right to information was provided for in the Act.

3. Establishing like work

As discussed above, in order to make out a claim for equal pay a person must show that she “is employed to do like work” as another person of the opposite gender (or without a disability, of a different age, etc.). The EU and Irish courts have held that the comparator must be an actual person and it is not possible to make a comparison with a “notional” comparator, i.e. with what a, for example, male comparator *would* be paid for the work. This can create difficulties in segregated employments where it is difficult to find an appropriate comparator.

In addition, it is necessary to show that the person is engaged in “like work” (i.e. work of equal value). Thus the Act only provides for equal pay for work of equal value. It is not possible to claim that one is carrying out work which is, for example, worth 80% of that of the comparator but that one is only being paid 70% of the comparator’s wages. This inability to bring claims concerning work of proportionate value may become increasingly important as more claims for equal pay are brought under the age and disability grounds.

On the one hand, it is clear that the obligation to show like work with a comparator has led to the failure of a significant number of equal pay claims (Consultative Group, 2002, 22). The Equality Authority has suggested that the need for a comparator should be limited through new approaches. In Ontario, for example, proxy comparisons have been allowed in a limited number of

¹⁸ The Equality Authority has also argued that group cases and/or class actions should be allowed.

¹⁹ As in *Diageo v. O’Sullivan* (ADE/05/13).

cases (in public sector employments with mostly female employment where it is not possible to use direct comparisons).

On the other hand, however, the need to show some equivalence in terms of work with some comparator (notional or not) will inevitably form part of any complaint-based system (and indeed of even a more proactive approach).²⁰ And a number of important recent Irish decisions have taken a broad approach to the requirement of comparison. For example, in *Diageo v. O'Sullivan* (ADE/05/13) the Labour Court held that it was entitled to infer evidence of like work from the respondent company's failure to provide details about the working conditions of a nominated comparator (and from the unexplained exclusion of the complainant from the grading structure). As the respondent had produced no evidence to rebut this presumption the complainant's claim for equal pay was successful. In *14 named female employees v Department of Justice, Equality and Law Reform* (DEC-E2005-057), an equality officer ruled that female clerical officers were performing like work with Gardaí involved in clerical duties and that the respondent had failed to justify objectively the difference in pay. Similarly an equality officer recently found that directors of public health nursing were entitled to the same pay as directors of mental health nursing (DEC-E2007-05).²¹

The possible difficulties in this area are, however, exemplified by the decision of the Labour Court in *Midland Health Board v Irish Nurses Organisation* (AEP/02/3) in which the Court held that overwhelmingly female (95%) general nurses could not claim to have been discriminated against compared to mental health nurses (engaged in like work) who received better superannuation allowances as 70% of the latter group were also female. However, it could also be argued that this determination is incorrect and failed to have sufficient regard to the historical background and to the fact that the percentage of psychiatric nurses actually availing of the benefits was predominately male.

On balance, it is suggested that issues of comparability will always be intrinsic to any system of equal pay legislation and that the equality officers and the Labour Court tend, in general, to adopt a balanced approach to the interpretation of the legislation. There are clearly areas such as differences in pay between mainly female employments; objective justification; and the developing case law on pay discrimination on the eight "new" grounds which raise conceptually difficult issues. However, it is not necessarily clear that these can better be resolved by legislative change rather than by a continued evolution of the case law at EU and national level. Nonetheless, the need for legislative change should be kept under review particularly in the light of experience with the "new" equality grounds.

²⁰ As can be seen by looking at the decisions of the Ontario Pay Equity Hearings Tribunal at <http://www.labour.gov.on.ca/pec/peht/index.html> See also the recent article by McColgan (2006) critical of the 'comparator' approach which does not, however, suggest a clear alternative.

²¹ See also *Irish Aviation Authority v CPSU* (ADE/06/6) in which the Labour Court upheld an equality officer's decision that the comparator did not have to be in the same *place* as the complainant (although this had been required under the 1974 Act).

4. A more proactive approach

As discussed above, the current approach to the implementation of equal pay is based on individual cases brought by workers affected. A number of organisations, including the Equality Authority, have argued there would be a value in moving towards a more positive obligation on employers to promote equality including a requirement on employers to carry out and respond to regular pay audits.

This approach has been adopted in a number of other jurisdictions. For example in Ontario all employers with more than 10 employees are required to examine their pay determination systems and, if any inequalities are found, to rectify these (Gunderson, 2002; Weiner, 2002). Similarly the Swedish Equal Opportunities Act provides that employers who employ ten persons or more are required to survey annually and analyse pay practices and differentials and to prepare a plan of action for equal pay (Plategna and Remery, 2006). Under Finnish legislation on equality between women and men, which came into force on 1 June 2005, an employer must draw up a gender equality plan in cooperation with staff when employing at least 30 workers on a regular basis. The content of the gender equality plan covers pay and other terms of employment. Norwegian legislation requires employers to set out in their annual reports any gender pay differentials and the positive action measures which will be taken to address these.

This type of proactive approach recognises that pay inequality is not (or not primarily) about individual discrimination but rather reflects the systemic nature of such inequalities which are often based on broader societal assumptions about the role and value of different groups. It has the value for employers of providing greater certainty in relation to pay obligations and removing the uncertainty of retroactive payments (Weiner, 2002, S106). However, it also involves an extensive administrative and cost burden on employers.

A recent independent review of UK law recommended that a similar positive duty to review pay should be set out in law (Hepple et al., 2002). The report of the Independent Review recommended that employers with more than 10 full-time employees should be obliged to conduct a periodic pay audit (once every three years) covering both full- and part-time employees, and to publish this in the company's report, and to inform employees or their representatives. If, following an audit, an employer found a significant disparity between predominantly female and predominantly male job classes, it would be obliged to draw up a pay equity plan in negotiation with trade unions with a view to reaching a collective agreement, or where no union is recognised, after consultation with employees or their representatives. The failure of an employer to conduct an audit would be admissible in evidence in any proceedings for pay discrimination, and the tribunal would be entitled to draw an adverse inference from this fact, having regard to the size and administrative resources of the employer.

In the Irish case, the equality reviews and action plans provided under the Employment Equality Act go a certain way towards a more proactive approach. As noted above, the Equality Authority is currently evaluating the effect of the initial equality review process and this may provide important lessons for the future. However, whatever the outcome of the evaluation, it would seem likely that the scope of the current review process – even if highly successful in individual cases – will be insufficient to have any discernable effect on overall pay inequalities in Ireland. Thus, drawing on the evaluation of the initial process, a major ramping up of the scale of equality reviews and the possible exercise by the Authority of its powers under section 69 of the Act should be an essential first step to a more proactive approach.

5. Agency workers

One particularly blatant example of unequal pay remains in relation to agency workers. A case brought before the Equality Tribunal on the grounds of race involved a number of Czech workers who were employed in a meat factory doing, they claimed, the same work as Irish workers but receiving significantly lower pay (DEC-E2004-19). However, the Czech workers were employed by an employment agency while the Irish workers were employed by the meat factory itself. Under the Employment Equality Act the workers must be employed by the same or an associated employer and this does not include agency workers.²² Accordingly the claim was dismissed. The result of this is that a group of workers who may be doing exactly the same work as Irish workers may be paid a lower rate of pay because they are employed by an agency and not by the same (or an associated) employer.

The case in question related to the position before 2004 when the Czech Republic joined the EU. If a similar case occurred today, involving EU nationals (or others falling within the scope of EU law), it would appear that it would be in breach of Article 39EC (see above) which is directly effective in Irish law and does not require to be implemented by national legislation. However, the situation would remain unequal for non-EU nationals. While there are a range of broader issues in relation to agency workers (ICTU, 2007), it would be a relatively simple matter to amend the Employment Equality Act to prevent discrimination against such workers where they are engaged in like work. This could also be addressed through agreement of the draft EU directive on temporary agency workers.²³ The proposal establishes the principle of non-discrimination in working conditions, including for pay, between temporary agency workers and comparable workers in the same employment.

²² On the facts the equality officer ruled that there was no suggestion that the employment agency was “associated” with the meat company.

²³ COM(2002) 149 final.

4. Why does pay remain unequal?

As set out in the previous part, there is fairly extensive European and national legislation on equal pay. Yet, as we saw in part 2, significant differences in pay still remain - even in the case of men and women where the legislation dates back to 1974. Why is this the case?

There have been a number of recent studies which have looked at the extent to which differences in pay can be explained by factors such as education or work experience and the extent to which such differences remain unexplained. It should be noted that it should not be assumed that “explained” differences are not discriminatory while “unexplained” differences are. On the one hand, some of the explained differences – such as differences in educational attainment or length of work experience – may involve discriminatory assumptions in relation to, for example, the type of subjects which girls should study. Similarly, women’s shorter work experience (on average) may – at least in part – be due to inadequate provision of maternity leave and childcare. Conversely, some of the unexplained differences may be due to characteristics which are not observed in the study (as opposed to discrimination). Nonetheless such studies do provide a very useful analysis of the factors related to differential pay.

Such an analysis is primarily available in relation to gender and, to a lesser extent, nationality and disability. Obviously the factors related to differences in pay vary according to the groups examined.

Gender

An EU study of the factors related to pay of men and women identified a number of key factors (EC Commission, 2002): The study found that the factors that contribute to increasing the gender pay gap in the EU are:

- the higher employment shares of women with short experience and tenure on the job, in non-supervisory positions and in smaller firms, as well as in relatively low paying sectors;
- the lower remuneration for married women with children;
- the lower remuneration for women with previous career interruptions;
- the lower remuneration for women in female-dominated sectors and occupations;
- the lower remuneration for women with high educational background, in part-time employment and in supervisory job status.

Conversely the factors that contribute to reducing the gender pay gap in the EU are:

- the higher employment shares of women with high educational background, in part-time employment and, in particular, in the public sector;
- the more compressed earnings distribution across occupations for women compared to men;

- the higher remuneration for women staying with their employer; and
- the higher remuneration for women working in small firms and in the public sector.

Up to half the gender pay gap in Ireland was found to be the result of differences in personal and job characteristics between men and women.

The EU study recommended that to reduce the pay gap, the following factors need to be addressed:

- differences in activity and employment rates between men and women
- differences in the wage structure
- differences in the workforce composition and
- differences in remuneration between men and women.

Russell and Gannon (2002) have examined the gender pay gap at a national level. In general their conclusions are in line with those of the EU study. They found that years of work experience and years out of the labour market were an important influence on the pay gap in Ireland. This suggested that policies to reconcile work and family life (such as parental and maternity leave, and childcare) and measures to reintegrate women returning to the labour force would be necessary to reduce the gender pay gap. The study also suggested that the segregation of male and female employees in different occupations and industrial sectors increased the pay gap. This indicates that policies to reduce gender segregation in employment would also be an important component of a strategy to reduce gender pay inequalities.

In a very interesting recent study Russell et al. (2005) looked at the earnings of recent graduates. As the authors point out, this study is worthy of note because the group are both highly educated and just starting their careers so one would not expect to find significant differences in earnings between men and women. However, although the study found no difference in hourly pay in the public sector, there was a significant gap in pay in the private sector with women earning 8% less than men per hour. On a weekly basis, women earned 11% less and there was a pay gap in both public and private sectors (because women tended to work fewer hours than men). The study also found that a higher proportion of men received bonuses and that men received 25% higher bonuses.

This study highlights the systematic inequalities which remain even amongst this relatively advantaged group. The authors' analysis indicated that the area of education had a strong influence on pay with lower earnings for arts graduates affecting mainly women while higher earnings for engineering graduates benefiting mainly men. Men – for unexplained reasons – tended to receive higher pay for higher qualification levels and to get a higher reward for length of work experience.

The study highlighted the need to focus not only on actual participation in the labour force but also on career choice and early career integration. It emphasised the fact that the process that channels female and male graduates

into different jobs begins at the junior cycle of secondary school. Therefore, the authors argued that “attention needs to be focused on giving students information about and access to a wide range of subjects at each transition point (junior cycle, senior cycle, college entry)” and that “third level students need access to information on a wide range of employment opportunities” (2005, iv).

It also suggested that employers continue to play a role in reproducing gender segregation and gender inequality in the labour market. It appeared that public sector employment, which includes formalised and transparent employment practices such as formal pay scales and recruitment and promotion practices, and the operation of explicit equality policies, leads to greater gender equality. However, many of these features were absent in the private sector.

Nationality

As we have seen (in part 2), a recent study has found that non-nationals receive significantly lower wages than Irish workers (controlling for education and work experience) and this gap is particularly large for workers from non-English speaking countries (Barrett and McCarthy, 2006). This is the first study of its type and it is difficult to identify the reasons for such differences (i.e. whether they actually reflect differences in human capital such as language skills) and obviously not yet possible to identify trends over time. Initial low pay for immigrants would not be unexpected. It has been argued that immigrants may initially lack location-specific human capital (such as language). This analysis would expect immigrants’ earnings to converge with those of Irish people over time. However, whether this thesis is correct and whether convergence will occur in practice remains to be seen.

Other areas

As we saw in part 2, the main study to date on people with disabilities did not identify pay inequalities (although it suggested that this was due to the fact that the rather small percentage of people with disabilities in employment are not representative of people with disabilities as a whole). Although patterns in relation to the age-related pay are clear, there do not appear to have been any Irish studies to date as to the factors related to these patterns. Nor is there any detailed data in most other equality grounds.

Conclusion

As can be seen from the studies quoted above – particularly in relation to gender – (un)equal pay is a much more complex issue than simply ensuring equal pay for equal work (which is the focus of EU and national legislation). Rather it goes back to educational choices which are made at an early stage in secondary school (if not before). It also involves the (highly unequal) structure of the Irish labour force in terms of occupational segregation, and the need to reconcile work and family life. Of course, the need to actually ensure

equal pay for equal work is also an important factor. These issues are discussed in the final part of this report.

5. Conclusions and recommendations

In this part we summarise briefly the conclusions of this overview analysis and set out a range of recommendations.

Conclusions

The studies outlined in part 2 of this overview show that, despite the legislation in relation to equal pay, the reality remains that for most groups for whom detailed data is available, we can see clear evidence of unequal pay which is not explained by factors such as education or work experience. In particular:

- ✚ when all job and personal characteristics are taken into account women still receive 12% lower hourly pay than men (Russell and Gannon, 2002), and
- ✚ controlling for education and work experience, immigrants earn 18% less than native workers and immigrants from non-English speaking countries are at a 31% wage disadvantage compared to native workers (Barrett and McCarthy, 2006).

The detailed analyses of the factors related to pay (outlined in the last part) show that equal pay is a much more complex issue than simply ensuring equal pay for equal work (which is the focus of EU and national legislation). Research shows that the processes giving rise to unequal pay go back to educational choices which are made at an early stage in children's education. Pay inequality is influenced by the high level of occupational segregation in the Irish labour force and by the lack of appropriate policies to reconcile work and family life.

Recommendations

In this section, drawing on the research carried out, we identify a number of key recommendations.

A commitment to change

Because unequal pay is caused by a wide range of different factors, a co-ordinated range of measures will be needed to reduce pay gaps. In the area of gender, the recent *National Women's Strategy* clearly identifies the gender pay gap as a priority. However, it is less specific on the steps which will be taken to address it. This is in contrast to the approach in some other EU countries. In Finland, for example, the government published an equal pay programme (May 2005) which aims to reduce the wage disparity between women and men by at least five percentage points by the year 2015. The programme includes measures focusing on remuneration systems and on wage and collective bargaining policies in general, redressing the gender imbalance in industries dominated by men or women, career development of women, temporary work, gender equality planning, harmonising work and family life, improving the compilation of statistics and enhancing the social

responsibility of businesses and organisations. A similar level of commitment will be required in Ireland if we are to address unequal pay. This should include a range of policy measures which are discussed below.

Research

Firstly, while research is available in relation to the gender pay gap and, to a lesser extent, in relation to nationality and disability, there is an absence of research and analysis on many of the grounds covered by the Employment Equality Act. If we are to identify whether there is an issue in relation to pay inequalities and, if so, what are the factors which need to be addressed it is essential that policy makers and interested organisations should have this type of basic information. Therefore, existing research should be updated on a regular basis to identify pay gap trends (and new avenues of research explored where necessary)²⁴ and research should be carried out in those areas which have not been studied to date drawing, where possible, on existing data sources such as EU-SILC, the QNHS and the National Employment Survey.

Education choices

Russell et al (2005) have shown that the factors behind the gender pay gap can begin at the junior cycle of secondary school whereby choices made at that stage lead young men and women into different careers. Similar issues are likely to apply to children of persons falling within some of the other equality grounds including race, (i.e. colour, nationality, national or ethnic origins), and membership of the Traveller Community. Children from other disadvantaged groups such as lone parents (family ground) and people with disabilities are also likely to be effected by (lack of) educational opportunities. This highlights the importance of equality at all stages within the education system in terms of future life outcomes. It also shows that, as recommended in that study, the education system needs to ensure that students are given information about and access to a wide range of subjects at each transition point (junior cycle, senior cycle, college entry) and that third level students be provided with access to information on a wide range of employment opportunities.

Equality at work

The studies clearly show the extent to which equal pay is affected by issues such as work experience (or lack of it) and occupational segregation. The length of work experience is, in turn, related to factors such as the reconciliation of work and family life and policies to support women returning to the labour force.

Thus policies to reconcile work and family life (such as parental and maternity leave, and childcare) and measures to reintegrate women returning to the

²⁴ In the gender area, such research is currently being carried out by the ESRI for the Equality Authority.

labour force should form an important part of a strategic approach to reducing the gender pay gap. Policies to reduce gender segregation in employment would also be an important component of a strategy to reduce gender pay inequalities. These issues are being addressed in other strands of the Congress initiative and will not be discussed in more detail here.

One specific equality-related issue arises in relation to people with disabilities in sheltered employment. Such workers currently receive welfare benefits topped up by the 'employer'. Congress has consistently called for this system to be replaced by one of proper pay and employment conditions. A draft code of practice was drawn up under social partnership agreements but has yet to be finalised. It is recommended that the code of practice should be agreed as a matter of urgency in order to address the pay entitlements of this group of vulnerable workers.

Equal pay and the law

As we have seen in this study, equal pay is a much broader issue than simply ensuring that one person is paid the same rate as another doing equal work. Nonetheless the need to actually ensure equal pay for equal work is also an important factor. This study has identified a number of areas where legal reform would assist in the implementation of equal pay:

- 1) *Group actions* – Given that unequal pay is a systemic rather than an individual issue, procedures to allow group multi-party claims should be introduced in relation to equal pay claims drawing on the approach recommended by the Law Reform Commission for such claims in the general courts (LRC, 2005)
- 2) *Right to information* – the Employment Equality Act should be amended to include a clear right to information.
- 3) *Developing the case law* – There is clearly a need to develop the case law in relation to the new grounds under the Employment Equality Act such as age and disability. Issues such as how to identify discrimination on the basis of these grounds and possible objective justifications clearly raise important conceptual issues. The development of case law in this area might be assisted by legal research into the approach in other jurisdictions and (albeit limited to date) at EU level. In addition, there will clearly be a need to continue to develop the courts' and tribunals' understanding of concepts such as appropriate comparators, indirect discrimination, and objective justification. Again this might be assisted by legal research and seminars.
- 4) *A more proactive approach* – International experience would suggest that a more proactive approach could make an important contribution to achieving equal pay. It is recommended that employers with more than 10 full-time employees should be obliged to conduct and publish a periodic equality pay audit. Where an audit showed a significant disparity between groups covered by the equality grounds, the employer would be obliged to draw up a pay equity plan in negotiation with trade unions.

The failure of an employer to conduct an audit should be admissible in evidence in any equal pay claim. Such audits should draw on the experience already gained through the equality reviews and action plans carried out under the Employment Equality Act. It is also recommended that the Equality Authority should explore the possibility of the existing provisions of the Act to their full extent (and be provided with the necessary resources to do so).²⁵ The trade union movement, as in the UK, should consider supporting such an initiative.

- 5) *Agency workers* – Finally the position of agency workers is one area where blatant inequality can still remain between national workers (employed by a company itself) and non-nationals (employed by an employment agency) who are doing precisely the same work but receiving different pay. This is not a conceptually difficult issue and could be addressed by a simple amendment of the Employment Equality legislation and/or by agreement of the draft EU directive of temporary agency workers.²⁶

Role of trade unions

Finally, it is clear that trade unions have and can play a very important role in the achievement of equal pay. In an Irish context, trade unions have been to the fore in bringing many of the gender pay cases. ICTU has also produced a very useful “Toolkit” to assist in negotiating equality claims. Given the broader context of employment equality, trade union should also play an important role in achieving equal pay in these areas.

The European Foundation has carried out a study on *Strengthening and Mainstreaming Equal Opportunities through Collective Bargaining* (Bleijenbergh, et al., 2005).²⁷ This study, drawing on examples across Europe, suggests that social partners (at the appropriate levels) should:

- Improve their expertise on equality issues by establishing equality officers or expertise centres within their organisations at national, sectoral and/or company level.
- Take positive action to ensure women’s proper representation within their organisations and to improve women’s participation in the bargaining process both in terms of quantity (increasing the number) and quality (increasing women’s influence).

²⁵ The recently published *National Women’s Strategy 2007-16* includes a commitment to extent the programme of equality audits and suggest the establishment of a quality mark for organisations which have carried out such an audit (Ireland, 2007, 61)

²⁶ As argued above, such inequality of pay would appear to be in breach of EU law insofar as EU nationals (or others falling within the scope of EU law) are concerned. However, persons not covered by EU law would appear to have no remedy at present under national law.

²⁷ This project includes a range of case studies. See also UNICE/UEAPME, CEEP and ETUC (2005) which includes case studies on social partner agreements and practices at national, sectoral and/or company levels in relation to equal opportunities.

- Develop equality guidelines or manuals for their negotiators, to promote equality on the bargaining agenda and to help mainstream equality in all agenda items (as done by ICTU in its Toolkit).
- Provide training to develop equality awareness of negotiators.
- Develop an equal opportunities scan as an instrument for gender-proofing collective agreements.
- Ensure that agreements include provisions for implementation and monitoring of equality measures.
- Set up joint equality bodies on national, sectoral or company level with responsibility for overseeing the implementation and elaboration of equality provisions.
- Conclude general framework agreements on equality issues, on European, sectoral and national level, as appropriate, to tackle, for example, the gender pay gap or sexual harassment.
- In order to integrate an equality perspective in all collective bargaining, focus, for example, on the creation of good quality new jobs and on the inclusion of flexible and part-time workers in all collective arrangements.

Specifically on equal pay a recent study identified a number of ways in which the social partners have contributed to reducing pay gaps (Jurczak, 2006; see also Ranftl, 2006). These include:

- Combating the gender pay gap by giving funds to the female dominated/and or low-paid sectors through central level negotiations – for example, in the case of an equality-pay increment included in the national wage agreement in Finland in 2006 (appendix 2). This involved the payment of an additional equality increment on the basis of the extent to which a particular employment was female-dominated and low paid.
- Evaluating jobs, or classifying the quality of jobs (based on objective criteria with a gender perspective) could lead to a favourable valuation of typically female occupations – for example, the job evaluation methodology developed in Lithuania in 2004;
- Promoting voluntary pay audits: in the UK, the Trades Union Congress (TUC) undertook a pilot project in 2003 in which hundreds of workplace equal-pay representatives were trained to address the gender pay gap and carry out pay reviews. An evaluation of the project suggested that it had played a significant part in pushing equal pay up the negotiating agenda and in prompting employers to agree to equal pay audits.
- Concluding national intersectoral agreements on gender equality and gender balance in workforce composition, such as the one concluded in France in 2004: it addresses such matters as narrowing the gender pay gap, preventing maternity leave from adversely affecting women's career development, and tackling labour market segregation.

These examples highlight a number of areas which Irish trade unions could consider as part of their contribution to achieving equal pay.

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Appendix 1: Congress resolutions on the gender pay gap

Conference welcomes the work to date carried out by the ICTU in developing the Gender Pay Gap campaign.

Conference believes insufficient action is being taken by both the Government and employers to address 'unequal pay', the voluntary approach to solve this issue is not working.

Conference notes that trade unions, relative authorities and various surveys have reported slow progress on equal pay reviews. The majority of organisations have no plans to do so.

Conference believes that mandatory pay audits would represent better regulation of equal pay legislation.

Conference believes the Government needs to address this issue now. It is vital that there is support to the individual through collective bargaining to address equal pay. This requires a strengthening of equal pay legislation. Conference calls on the ICTU to strengthen its campaign and to call on the Government to:-

- introduce mandatory equal pay audits for all employees and that employers should take and report action on equal pay in their annual reports;
- extend the duty to promote equality in all sectors;
- introduce the right for trade unions to take class actions on behalf of a group of members and lead on tackling equal pay through public procurement

AMICUS

The INO is increasingly disappointed that despite 30 years of equal pay legislation, horizontal and vertical segregation together with institutionalised discrimination continues to ensure that women earn less than men. In particular women in the caring industry/professions, including nursing, continue to suffer inferior pay and conditions of employment when compared with male workers. The INO calls on Congress to take a stronger position in addressing these fundamental issues.

Irish Nurses' Organisation

Conference notes with alarm the findings of the recent ESRI study highlighting the fact that women graduates are paid substantially less than their male counterparts within three years of joining the private sector. Conference call on Congress to prioritise the issue of pay in the private sector and particularly that of women who are doubly discriminated against because they work in the private sector and are female. Conference mandates Congress to initiate a detailed strategic campaign that will satisfactorily address the imbalances of women's pay in the private sector as part of negotiations with Government and the other Social Partners and present a detailed report of progress on this work to the next ICTU Women's Conference.

Irish Bank Officials' Association

Appendix 2: Equality pay increment – the example of the Finnish national wage agreement

The current Finnish national incomes policy agreement, which was signed in December 2004 for two and a half years (2005–2007) includes a range of measures to promote gender equality at work, including an equality pay increment.

The agreement provided for a 2.5% average wage increase in 2005 and 2.1% in 2006. The structure of pay increases was based on a compromise between the aims of the Central Organisation of Finnish Trade Unions (Suomen Ammattiliittojen Keskusjärjestö, SAK) and the Finnish Confederation of Salaried Employees (Toimihenkilökeskusjärjestö, STTK), on the one hand, and the central employer organisations, Finnish Industries (Elinkeinoelämän keskusliitto, EK) and the Confederation of Unions for Academic Professionals in Finland (Akateemisten Toimihenkilöiden Keskusjärjestö, AKAVA), on the other. The solidarity pay rise was advocated by the unions, SAK and STTK, whereas the employer organisations, EK and AKAVA, supported a pay increase model that would have widened the wage gap by applying only percentage wage increases and by rejecting equality increments.

Equality increment

The purpose of the allowance is to raise the remuneration of women whose pay is not consistent with the requirements of their work and with the education and training they have, and to bring remuneration into line in sectors that are relatively low-paid. The precise amount of the increment depends on the extent to which a sector is female-dominated and how low-paid the employees are. The female percentage of total employment within the collective agreement in question is multiplied by 0.45. Then the percentage proportion of employees within the collective agreement earning less than €10.67 per hour or less than €1,782 euros per month (the minimum wage) is multiplied by 0.15. The results of these two calculations are added together. The result gives the level of increment payable up to a maximum of 0.6% (i.e. $100\% \times 0.45 + 100\% \times 0.15$). For example, in the female-dominated municipal sector, the equality increment is 0.5%.

The increment could be agreed at union level or at company level, through local bargaining between employer and employees. If the increment is used to address unequal payment systems, it is allocated to all employees in the sector, including men. The equality increment has usually been included in the incomes policy agreement since 1977.

Source: European industrial relations observatory (European Foundation for the Improvement of Living and Working Conditions); www.sttk.fi