



TUC response to further consultation on equal pay audits.

Further consultation on equal pay audits

Introduction

The TUC is the voice of Britain at work, with 53 affiliated trade unions representing over 6 million workers across all parts of the British work force. Our member unions have extensive experience in bargaining for and taking legal action for equal pay.

The TUC welcomes the new provision in the Equality Act requiring tribunals to order equal pay audits where an employer has been found to have breached an equal pay law. However this will only apply to a very small number of employers, and even then, only in a reactive way. Further, the exclusion of small businesses and start-up companies from the provision as well as the range of exemptions from being required to conduct an audit under s.139A(5) are all unnecessary, further weakening the already limited application of the section.

The TUC therefore continues to call for compulsory equal pay audits as required by section 78 of the Equality Act 2010 – a part of the Act the government has never enacted. In this regard we echo the recent recommendations of the BIS Select Committee in calling for the provision to be enacted and for the Equality and Human Rights Commission (EHRC) to be tasked with ensuring compliance with this provision. At a minimum, the government should review the current voluntary approaches to ensuring equal pay which the TUC believes are not leading to the level of change needed.

Q1. Should the regulations cover anything else? If so, what is this and please explain why the regulations should cover this.

The TUC is concerned that the circumstances under which a tribunal must not order an equal pay audit are too broad (s.139A(5)).

Firstly, s.139A(5)(a) would exempt an employer from conducting an audit if it had completed one in the previous three years. However, such audits are most likely to be substandard or have been ignored by the employer, given that the employer in question will have breached an equal pay law. Further new instances of pay discrimination may arise in the three years since the audit was carried out.

Therefore the regulations should provide that for an audit to satisfy s.139A(5)(a) it must meet the same requirements as an audit conducted under the s.139A (s.139A(1) and s.139A(4)) i.e. both the audit and its recommendations have been complied with to the satisfaction of a tribunal judge. Regulations should also provide the tribunal with the discretion to order an audit where an older audit may not have picked up on newer instances of pay discrimination.

Secondly, regulations should make it clear that any assessment of “disadvantages” in s.139A(5)(d) includes an assessment of the disadvantage to employees of not conducting an equal pay audit.

The TUC disagrees with exempting small and start-up businesses from s.139A. The right to equal pay for equal work is a fundamental right and one not dependent on the size or age of the employer. There is also support and guidance available to help businesses of all types. The exemption for start-up businesses, which may be very large, will do nothing to encourage them to establish transparent and non-discriminatory pay practices from the beginning. If the government is intent on exempting start-up businesses the specified period should be for a short time, for example 6 months.

Regulations should make clear that the workforce, and any recognised trade unions, should be involved in the audit process. Regulations could also encourage the involvement of the EHRC in assisting employers to carry out the order.

Q2. In order to ensure basic clarity and understanding of what is required, we believe that regulations should set out minimum requirements for the content and form of an equal pay audit while allowing employment tribunals to specify detail such as timing and employee coverage, on a case by case basis. Do you agree with this proposal? If not, please explain your answer?

Regulation should make it clear that an order for an equal pay audit applies to the entire workforce unless it can be shown that a separate part of the workforce has already been subject to an appropriate audit. In the experience of trade unions, pay gaps are typically due to discriminatory practices that cut across an entire organisation.

Regulations should also make it clear that employers the subject of an order need to comply both with ensuring the audit is carried out and that the audit recommendations have been completed in a satisfactory manner. The regulations should therefore provide indicative time limits for complying with both of these stages that tribunals can alter if necessary.

Tribunals should also be required by regulation to use the EHRC Code of Practice as the basis for any audit.

Q3. When completed, who do you think should sign-off equal pay audits - independent auditors or employment tribunal judges? Why do you think these individuals should be responsible for signing off equal pay audits? If neither of them, what process do you think should be put in place to ensure that equal pay audits comply with the required standards?

Currently Employment Tribunal judges often make decisions on equal pay claims after considering audits, and having heard representations from both parties as to the soundness or otherwise of the audits. This system works well and could be formalised to cover audits ordered under s.139A. Further, a tribunal judge who has decided on the original matter and made the order would be best placed to determine whether or not it had been complied with.

The TUC does not support independent auditors having “sign-off” on such Tribunal orders. To do so credibly, such auditors would have to demonstrate that they are appropriately qualified to perform the task, and be held to account for their decisions. That would require an additional system of regulation which would be far more costly and less credible than the preferred option of getting judges to perform this task. To be clear, independent auditors could still perform the task of auditing, but it would be for a tribunal judge to sign off on it.

Finally, the Equality and Human Rights Commission (EHRC) could play a role in advising employers on how best to meet a tribunal order to conduct an equal pay audit.

Q4. Do you agree that limited disclosure rather than publication of equal pay audit results is the right approach? If not, why?

Disclosure of the initial order, and the audit itself should be made to the workforce, any recognised trade unions and the EHRC at a minimum. This would ensure that those with a direct entitlement to receive equal pay or a direct interest in ensuring equal pay, are engaged in the process of conducting an audit from the beginning and can help ensure that problems are identified and addressed.

The workforce should be informed because it will include those affected by the order and any outcome of an equal pay audit, plus it will be a member or members of the workforce who will have the power to enforce an order either by taking a potential new claim of unlawful discrimination arising out of a failure to do an order or by taking a subsequent equal pay claim.

Recognised trade unions need to know as they advise and represent members with potential equal pay claims and such information is necessary for collective bargaining on any proposals to amend the pay system to ensure equal pay in the future.

The EHRC should also be informed of the audit results as they have unique enforcement powers that could be used such as the issuing of compliance notices or the possibility of undertaking formal inquiries, particularly if it became apparent that other employers were commonly using similar pay practices as those found to be discriminatory in the offending employer. They may also be able to assist the parties in carrying out the order.

Q5. Do you foresee any difficulties with the disclosure of the results of an equal pay audit from a Data Protection Act point of view? If you do, what are these?

No. Section 35 of the Data Protection Act already permits disclosures required by law or made in connection with legal proceedings with certain key exceptions. Further, the EHRC's guidance on "Pay audits and data protection" provides very helpful overview of the issues. See online at:
<http://www.equalityhumanrights.com/advice-and-guidance/tools-equal-pay/checklists-equal-pay-in-practice/15-pay-audits-and-data-protection/>

Q6. Does the EHRC guidance on voluntary pay audits provide a suitable basis for guidance to employers who have been ordered to undertake an equal pay audit by an employment tribunal? Is additional guidance needed? If so what more should it cover?

The existing EHRC guidance is clear, authoritative and appropriate to all types of employers. It has been developed and updated by experts with broad experience in equal pay law, pay auditing, pay systems and job evaluation. There is no need for additional guidance.

Tribunal orders should require employers to undertake equal pay audits based on the EHRC Code or Practice.

Q7. Are you aware of any relevant research on settlement behaviour in equal pay cases? If so, could you please provide a reference.

The government indicated in its last consultation on equal pay audits that it would conduct research on how equal pay claims progress from workplace disputes to settlement or resolution and what happens following a finding at tribunal. This still seems like a good idea, which the TUC would support. Unions have extensive experience with taking and settling equal pay claims and would be happy to support and be included in such research.

CONFIDENTIALITY

It may be useful for us to share your response with other people, are you happy for us to do so. - YES WE ARE.

Please tick the appropriate box if you would like your response to be confidential.

No

Thank you for taking an interest in the Equal Pay Audits consultation paper. To help us understand who is responding to this consultation, we would like to know a little about you.

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Type of Organisation:	Trade union
Are you responding as an:	On behalf of an organisation
Size of Organisation: (large, medium or small)	The TUC has 53 affiliation unions who collectively represent some 6 million workers across all parts of the UK labour force.
Number of Staff:	
Location:	Great Britain