

CONSULTATION ON MODERN WORKPLACES

iv) Equal pay

MAY 2011

6. Equal pay

This chapter sets out proposals for further action to tackle the gender pay gap. We aim to ensure that employers who have breached the law on equal pay take appropriate action to rectify the problem. We therefore propose to require employment tribunals to make an employer, who is found to have discriminated on pay, conduct a pay audit (unless the tribunal feels this would not be productive). By focusing on those employers who have failed to comply with the law, this approach ensures we do not add burdens for employers that follow good practice on equal pay.

Current situation

1. The legal framework requiring equal pay for equal work between men and women has been in place since the Equal Pay Act 1970 came into force in 1975. Yet there is still a significant gender pay gap: women who work full time in the public sector are paid on average 10 per cent less than men and that figure rises to 19.8 per cent in the private sector.¹
2. There are many different causes of the pay gap such as occupational segregation and the impact of taking time out of the labour market to have children. We are committed to addressing these underlying causes through our other proposals in this consultation on extending the right to request flexible working to all and introducing a new system of flexible parental leave. We will also work to improve careers advice to women and girls to ensure that they are aware of the options open to them and the consequences of career decisions.
3. To help drive change further we will promote transparency across the public and private sector. In October we brought into force legislation to make so-called ‘gagging clauses’ unenforceable to allow employees to discuss pay if they are concerned that they may be victims of discrimination. But we want to go even further, which is why we are asking private and voluntary sector employers to help tackle the gender pay gap through greater transparency on pay and other issues. We are working with the CBI, TUC and others to develop a framework for voluntary gender equality reporting.
4. At the same time, where an employer has been shown not to be complying with equal pay law, we need to ensure that any systemic discrimination underlying an individual case is identified and corrected. Currently, individually enforceable rights do not always enable challenge to wider or systemic unfairness in pay and reward, because the resolution of a

¹ 2010 Annual Survey of Hours and Earnings, ONS (2010).

single case does not necessarily expose all the sex-related pay inequality within the workforce.

Causes of the gender pay gap

The causes of the pay gap are complex. Research published by the Government Equalities Office (GEO) in February 2010 found the key causes of the pay gap were the impact on wages of having previously worked part-time or of having taken time out of the labour market to look after family, and the different industries and occupations in which men and women tend to work.²

Further studies have looked at why these issues still persist and have found that women's choices in the labour market are still constrained by a range of factors, notably the availability and affordability of childcare and the availability of family-friendly working. These constraints contribute to withdrawal from the labour market, occupational downgrading, reduced hourly pay and temporary working.³

However, there remains 36 per cent of the pay gap which cannot be explained by observable factors, so where discrimination has been shown to take place it is important to find out the reasons and take action to prevent further cases of discrimination occurring.

The case for change

5. It is important that the employment tribunal process works to resolve equal pay disputes effectively. There is currently relatively little information available on the progress of equal pay cases from the initial dispute in the workplace to resolution at tribunal. We will address this by conducting research which will improve our understanding of how cases progress, in what circumstances parties settle claims and what happens following a finding by a tribunal that an equality clause has been breached.
6. Where employers have been found guilty of pay discrimination it is right that action can be taken to ensure maximum transparency and address any wider unfairness in the employers pay and reward structure, helping to avoid further cases of discrimination in future. So where there has been a breach of equality of terms, or discrimination because of sex in non-contractual pay matters, we believe that action is needed to ensure that other members of the employer's workforce are not being treated just as unfairly. Such an approach will supplement the voluntary approach we are taking to encourage companies to publish relevant pay data.
7. Together with our work to promote voluntary equality reporting, we believe this will lead to far greater transparency in pay matters, in turn giving employers and employees greater confidence that their pay systems are fair.

² The gender pay gap in the UK 1995-2007, GEO (2010).

³ Ibid.

Our proposals

8. We are proposing new legislation that will require tribunals which have found an employer to have discriminated because of gender in relation to contractual terms or non-contractual pay matters to order that employer to conduct a pay audit.
9. However, we would also welcome views on our overall approach, and any evidence relating to the subject matter that can be provided with responses. In particular, we would welcome views and evidence on the barriers to improving transparency in pay matters and the business benefits which can be realised through greater transparency. We will use the responses to help us refine our proposals and to consider whether further steps are necessary.

Pay audits

10. Equal pay audits involve comparing the pay of women and men doing equal work, investigating the causes of any potential discrepancies, and closing any gaps that cannot be satisfactorily explained on grounds other than sex. They are the most effective way of establishing whether an organisation is providing equal pay and rewarding employees fairly.

Should the requirement apply to all employers?

11. Whilst we believe that a tribunal should be able to require those who have broken the law on equal pay to conduct a pay audit as a matter of course, there may be some cases in which requiring a pay audit is less productive, for example where a pay audit has already been conducted recently or transparent pay practices are already in place. We are also concerned to ensure that these proposals do not hinder economic growth, particularly in the small business sector. A balance therefore needs to be struck to ensure conduct of an audit is required only where it will benefit either the employer or employees. There are a number of ways this balance might be achieved.
12. It might be possible to specify in legislation that the obligation to conduct an audit will apply to some employers but not others. For example, it could apply only to those with over 50 employees. However, it may be that in some cases an audit would be very useful to a smaller company with a complex workforce, but not to a larger company which has clear, transparent pay structures. Alternatively, we could allow the tribunal to impose an audit only where it considers it is useful to do so, or we could require the tribunal to impose an audit except where it would not be productive.
13. We consider the best approach is to limit the *circumstances* in which the audit requirement could be applied, but not to rule out entirely application of the requirement to any particular class of employer.
14. In setting out these circumstances, we have focussed on the key issue of whether or not the employer has already taken action appropriate to the nature of the enterprise to ensure his pay system is generally not discriminatory. We consider that a tribunal should not order that an audit be conducted where:
 - An audit has already been conducted in the last three years.

- The employer has in-place another means, appropriate in the circumstances, of ensuring that the pay structure is non-discriminatory. This would take into account, for example, clearly transparent pay structures.
 - The tribunal does not consider it would be productive to order an audit in the particular circumstances.
15. The last of these restrictions would give the tribunal discretion not to make an order in particular cases where it would serve no useful purpose, for example in the case of micro-employers or where the breach of the law is clearly not indicative of underlying structural pay inequality.
16. The tribunal might, of course, need guidance as to what to take into account when considering whether the last of these exceptions applies. We could set out in guidance, or in the legislation, a non-exhaustive list of the matters which a tribunal should bear in mind when deciding whether it is required to impose the audit requirement on an unsuccessful respondent in the particular circumstances of the case. We are also conscious of the need to ensure that the tribunal's discretion is structured in such a way as to minimise the risk of appeals against an order imposing an audit requirement, or refusal to make an order.
17. We consider that the tribunal should probably also consider matters such as the number of employees the respondent has, and whether the pay systems of the employer are already transparent to the employees, for example because relevant information is published. We would welcome views on this approach, and what other matters a tribunal should bear in mind when deciding whether the exception set out in the third bullet applies.

Consultation Questions

46.	Do you agree with the principle that greater transparency is required where an employer has been found to have breached the law? Please explain your response.
47.	Do you agree that where employers have breached the law, requiring employers to conduct equal pay audits is an effective way to increase transparency? Please explain your response.
48.	Do you agree the obligation to conduct an audit should apply to all employers found to have breached an equality clause except in specified circumstances? If you do not agree, to which employers should it apply? Please explain your response.
49.	Do you agree that audits should not be ordered if one has been conducted in the last three years; there is another means in place of ensuring the pay structure is non-discriminatory; or the tribunal does not consider it would be productive? Please explain your response.
50.	Do you think that the size of an employer is a factor that the tribunal should bear in mind when deciding whether it would be productive to order an audit? Please explain your response.

51.	Do you think there should be an exemption from the requirement to conduct an audit for micro-employers (fewer than 10 employees) and/or small employers (fewer than 50 employees)? Please explain your response.
52.	What factors do you think that the tribunal should bear in mind before deciding it would not be productive to order an employer to conduct an audit?

Which unlawful actions should give rise to the pay audit obligation?

18. A claim relating to sex discrimination in pay can arise in two ways under the Equality Act 2010: by means of a discrimination claim if it relates to non-contractual pay, and by means of a claim relating to a breach of an equality clause (an equal pay claim) if it relates to contractual pay. On the whole, systemic disadvantage will lead to an equal pay claim, but discrimination in a non-contractual pay matter could also be a symptom of wider discrimination. Therefore we propose that a pay audit should be required following a finding that the employer has breached the Act in either of these ways.

Consultation Question

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| 53. | Do you agree with our proposal to impose pay audits following findings in claims relating to equality of terms and claims relating to non-contractual pay discrimination? If not, to which claims do you think the obligation should attach? Please explain your response. |
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Publication of audits

19. Where an employer is required to conduct a pay audit we propose that they should also be required to publish the results. This will make it easier for employees to tell whether the requirement has been complied with. It will also ensure that the employer takes any necessary corrective action, since publication will make it easier for other employees who are similarly being unfairly disadvantaged to bring claims of their own.
20. In order to conduct an audit properly, the employer will generally need to involve staff or staff representatives in the process. The audit will also involve proposing steps to correct any unjustified inequalities that are shown up. We consider that an overly rigid publication requirement might not take account of the need to give the process the best chance of reaching resolution without further litigation. For example, where negotiations with a staff association or trade union are ongoing, it seems sensible that the publication requirement should be flexible enough to ensure that publication takes place in a context where the results can be explained and next steps set out clearly, with a view to promoting negotiated settlement and avoiding litigation.
21. The extent of information to be published will clearly have to respect data protection principles. The details of the publication requirement will be the subject of further consultation.

Consultation Questions	
54.	Do you agree with our proposal that these pay audits should be published? Please explain your response.
55.	Should publication requirements include a period of grace, within which pay changes could be agreed, before publication takes place? Please explain your response.

Sanctions for failing to comply with the requirement to complete and publish an audit

22. So that the requirement cannot simply be ignored, we consider it necessary to set out the sanction that should be applied if the requirement is not met. There is a range of possible sanctions including:
- allowing a future tribunal to take the failure into account when considering a future claim (by drawing an inference as to the reason for that failure);
 - making the failure to comply itself an act of unlawful discrimination;
 - making the employer subject to a criminal fine; or
 - applying a civil financial penalty.
23. Allowing a tribunal to take failure into account at a later date would avoid the need for separate enforcement action. Making the failure a separate act of discrimination, which could be raised either by the original complainant or possibly by other employees, would provide a stronger remedy; however, there might be questions as to whether an individual who has not suffered personal disadvantage as a result of failure to complete an audit should be able to claim damages.
24. Allowing a criminal fine would be unusual but not unknown in areas generally dealt with under civil law. For example, fines at level 5 of the standard scale (up to £5000) already apply at summary conviction to an offence of knowingly or recklessly making a misleading statement under section 112 of the Equality Act 2010. Opting for a civil penalty would involve an authority monitoring performance of audits, pursuing employers who fail to do them, and taking the necessary enforcement action. Although there are attractions to a civil penalty of this kind, we will need to consider this in close conjunction with the separate consultation on modernising the employment tribunal system, which includes a proposal to introduce financial penalties.⁴

Consultation Question	
56.	What do you think would be the most appropriate sanction for failure to comply with an audit requirement?

⁴ Resolving workplace disputes: a consultation, BIS (2011).

Content of the audit

25. We must be clear about the required scope of a pay audit, for example, to which employees it is to apply, the timescale in which it is to be implemented, and whether it includes action to remedy any inequality. To help the employer avoid future breaches of the law, the audit must deal with those issues likely to arise in a future case, such as:
- which jobs are alike, rated as equivalent, or of equal value (requiring that a job evaluation be done);
 - whether justification of particular differences in pay or reward is required; and
 - whether there is gender imbalance in particular parts of the workforce.
26. The content of the required audit must provide the raw material to enable these issues to be explored. There are established models of pay audits on which to draw. For the purpose of this consultation, we propose the key elements of an audit would be:
- identifying jobs within that employment involving similar levels of skill, effort, decision-making, and knowledge (work of equal value);
 - comparing the terms of women and men doing like work, work rated as equivalent, and work of equal value;
 - determining the reasons for any inequalities in terms that are identified; and
 - deciding what action, if any, is needed.
27. There are several ways in which we could set out what is required from an employer directed to conduct a pay audit. We could set out a definitive list of what an audit should consist of in all cases, or alternatively set out a range of specific options which could be imposed by a tribunal to ensure the requirements are appropriate to the company’s circumstances. We propose to set out what an audit should consist of in secondary legislation. This element of the proposal will be subject to further consultation, but nevertheless we would welcome early evidence to help develop options.

Consultation Questions	
57.	Do you agree with the proposal that the detailed content of the proposed audit should be set out in secondary legislation following a further consultation? Please explain your response.
58.	Do you have any suggestions as to what should be included in the proposed audit?
59.	Do you have any suggestions as to the best way of ensuring the requirement is appropriate to the circumstances of the employer?

Unintended consequences

28. As with all proposed new legislation there is a risk of unintended consequences. For example, a respondent could simply settle a case rather than run the risk of being made subject to an audit requirement which might result in further claims. If this were common, fewer opportunities might arise for potentially discriminatory practices or issues of law to be exposed through the tribunal process, even though cases would appear to be resolved more swiftly. There could also be a risk that unmeritorious claims would arise or be settled as a result. It is hard to predict accurately the likely scale of behavioural effects of this kind. Given the relatively concrete nature of the right to equality of terms, we think effects on initiation of claims and settlement behaviour are likely to be slight.

Consultation Questions	
60.	Do you consider there to be a risk of unintended consequences? If so what do you think these could be and how do you think they could be mitigated?
61.	Do you have any further comments or suggestions relating to our proposals or impact assessment on equal pay?

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