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Equal Pay Audits

Response from the Employment Lawyers Association

18 July 2013

Equal Pay Audits – Consultation Response

Employment Lawyers Association

Introduction

The Employment Lawyers Association (“ELA”) is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA’s role to comment on the political merits or otherwise of proposed legislation, rather than to make observations from a legal standpoint. ELA’s Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee, chaired by Brona Reeves, was set up by the Legislative and Policy Committee of ELA, to respond to the GEO Consultation on Equal Pay Audits. Names of the members of the sub-committee can be found at the end of this submission.

Q1. Should the regulations cover anything else? If so, what is this and please explain why the regulations should cover this. [Maximum word limit – 250 words]

As set out below, we believe that to be effective the Regulations on equal pay audits (**EPAs**) should cover, in some detail, what is required by employer’s to comply with an equal pay order. This will ensure parties can be clear on what may be required of them at an earlier stage and should reduce litigation.

However, information on a limited number of additional areas may assist employers and employees assess their position in relation to Equal Pay, including information on steps which an employer already takes to ensure it implements equal pay, and information on formal flexible working requests made within the relevant population (and the number which have been accepted) as well as information on the number of employees with part time or other alternative working patterns and arrangements.

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? [Maximum word limit – 250 words]

In part, but:

- (a) The greater the uncertainty as to the scope of an EPA which may be ordered by a Tribunal, the greater uncertainty for the parties and increased pressure (on employers) to settle claims;
- (b) Broad Tribunal discretion is likely to lead to satellite litigation.

In giving more certainty for parties, ELA believes that there needs to be clarity as to the purpose of EPAs.

At one end of the spectrum are EPAs which review broad data and themes (e.g. average gender based pay in an organisation). At the other end are EPAs which specifically compare pay of men and women in like work, work rated as equivalent or of equal value.

Once the purpose is clear, there needs to be a clear statutory path for the parties to follow. Mere guidance will guarantee disputes.

The current ECHR advice is that audits should cover the entire workforce. As the recent case of *North v Dumfries and Galloway* demonstrates a decision to exclude sections of the workforce can lead to further

litigation, even when the same comparators were relied upon by the claimants. Equally, employers are likely to want to restrict a compulsory EPA to the smallest group possible.

ELA believes that a balance needs to be struck. EPAs need to be useful and not just “thematic” to advance equal pay, but the more comprehensive the obligation the greater the likelihood that employers will settle claims. Whilst this may be advantageous to individual claimants, it is unlikely to assist in addressing equal pay more broadly.

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? [Maximum word limit – 250 words]

Given the requirement for EPAs to comply standards set by the Tribunal itself, ELA can see that a mechanism to “sign off” may be useful. In determining who should perform this function, the Government should consider the costs and efficiency with which either independent auditors or judges could carry out this role.

Independent auditors may be able to “sign-off” an EPA quickly if parties have freedom to select an auditor with the necessary capacity.

However, the ELA believes that “sign-off” should be carried out only by a Tribunal:

- a Tribunal is likely to be less costly for business than an independent auditor;
- it acknowledges that only judges can legitimately sign off on whether an order has been complied with;
- it is consistent with current practice in equal value cases where a judge approves the independent expert’s report after representations are made by both parties; and
- it removes the increased risk of inconsistency in what standards may be demanded of independent auditors in the production of reports.

However, we note that judicial “sign-off” would use Tribunal resources which are already under significant pressure.

Alternatively, the EHRC could review and sign off on EPAs or it could be assumed, unless shown otherwise, that the EPA is compliant. The latter option could be supplemented by ‘spot checks’. We are cautious, however, about these alternatives: the EHRC is unlikely to have the resources to carry out this role and there may be a high level of non-compliance if sign-off is not required in every case.

Q4. Do you agree that limited disclosure rather than publication of equal pay audit results is the right approach? If not, why? [Maximum word limit – 250 words]

ELA broadly agrees that limited disclosure, rather than publication, is the correct approach. It is unclear what benefits publication would provide over limited disclosure, since it seems unlikely that publication of the results of an EPA for a group of employees within one employer would assist any other organisation to identify problems with their own pay policies, or another group of workers problems with their pay structures, even if other organisations routinely check other companies’ websites or annual report for this information. That said, we do not consider that publication will necessarily be more onerous than disclosure – depending upon the scope of the obligation, it is likely that the employer will need to go to similar lengths to share the results of the EPA.

Notwithstanding ELA’s view identified above, we consider it is likely that the results of an EPA will almost inevitably end up in the public domain even if limited disclosure is adopted. Recipients of the results may

share the information externally and employers in the public sector are still open to receive Freedom of Information Act requests. In our view it will not be possible for employers to disclose to relevant parties on the basis that they keep the same confidential, as this may offend against the pay gagging provisions set out in s.77 Equality Act 2010.

We also suggest that the Government (1) specifies what "results" must be disclosed / published – the entire report, a summary, or something else; and (2) considers how publication / disclosure will be policed.

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? [Maximum word limit – 250 words]

The processing of the data to carry out an EPA is likely to be “processing” under the Data Protection Act (DPA). Publishing the results of the EPA would also be processing under the DPA, if individual “personal data” was identifiable.

Whether any issues arise under the DPA will depend on the scope and content of the EPA. Where identification of an individual's information is unavoidable (for example where the scope of the EPA is small) the employer will either need employee consent or to rely on s.35(1) of the DPA which covers disclosure required by order of a court.

On this basis, the ELA does not consider that issue under the DPA will cause significant problems in EPAs. However, where personal data may be identifiable the Tribunal should be able to take into account any impact on individuals, in the terms of the order requiring an EPA to be carried out.

ELA notes that on 8th July the Supreme Court will hear the case of *South Lanarkshire Council (Appellant) v The Scottish Information Commissioner (Employer) (Scotland)* regarding a request under the Freedom of Information (Scotland) Act. The council refused to supply the information because they felt the individuals could be identifiable. The Court of Session held that the information should be released because the legitimate interest of the person requesting it coincided with wider public interest in gender, effectively overriding the interests of the data subjects.

Q6. Does the EHRC guidance¹ 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? [Maximum word limit – 250 words]

Please see response to Q2. ELA believes that it is important to establish the purpose of EPAs before providing guidance to employers, as the nature of the EPA depends on the purpose of the audit.

ELA is aware that some representatives believe that the ECHR toolkit has a number of flaws. Specifically:

- The basic five step structure of the guidance is admirable but the recommendations within each section are a matter of dispute. These have never been tested and are not the subject of either parliamentary or judicial authority or approval.
- Step one correctly identifies the need to gather comprehensive data on individuals terms and conditions and pay rates by gender. If this was a statutory requirement it would be covered by section 35 of the DPA.
- Problems arise from steps 2 onwards. The identification of jobs of equal value can be very difficult and contentious. ELA is concerned that this alone would generate significant dispute (and potential satellite litigation).
- Step 3 then focuses on identifying statistical “pay gaps” based on groups and averages. The value/relevance of this will depend on the purpose behind an EPA (see Q2).

¹ <http://www.equalityhumanrights.com/advice-and-guidance/tools-equal-pay/equal-pay-audit-toolkit/>

- Step 5 requires an action plan. The ECHR guidance includes paying back pay. This is again likely to be contentious as claimant representatives will want to input into the decision and employers are unlikely to want to be seen to accepting liability under an EPA.

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

We are not aware of any relevant research.

In the future, if you lose an equal pay claim brought against you, an Employment Tribunal will make an order for an equal pay audit to be undertaken (unless one or more of the exceptions applies). Taking this into account, as an employer:

Q8. How likely are you currently to settle an equal pay claim brought against you before it reaches a full Employment Tribunal hearing?

	Very likely
	To some extent
	- Not at all

The ELA cannot answer this question directly. However we are able to set out some of the factors that employees and employers are likely to take into account in considering settlement where a Tribunal has the power to order an EPA.

When considering settlement employers typically take into account:-

- The nature of the claim pleaded by the claimant (for example equivalent work, like work or work of equal value) and how this relates to its broader population of employees.
- The potential success of any defence (and its wider relevance to employees).
- The value of potential damages (if any).
- The likely legal cost to be incurred.
- The length of time it may take to resolve matters through the Employment Tribunal system.

Claimants advisers would consider the following when considering settlement:

- The value of the claim pleaded.
- The likely legal cost and time spent to resolve matters.
- The potential success of any defence.

The Employment Tribunal statistics recently published demonstrate that the vast majority of equal pay claims tend to be settled currently.

Q9. How likely would you be, under the new law, to settle an equal pay claim brought against you before it reaches a full Employment Tribunal hearing?

<input type="checkbox"/>	Very likely
<input type="checkbox"/>	To some extent
<input type="checkbox"/>	- Not at all

ELA believes that the fact that an Employment Tribunal Judge could order an EPA, will impact significantly on settlement discussions. As set out above, key factors for employers are the broader implication of a claim and the costs of defending this. An EPA, by its nature, will have a broader impact on employers and, if the scope of the EPA is wide, may involve very significant costs.

Whilst this may be advantageous in the short term, gender pay discrimination is unlikely to be advanced, if the majority of individual claims are settled at an early stage.

Q10. How likely are you currently to carry out a voluntary equal pay audit?

<input type="checkbox"/>	Very likely
<input type="checkbox"/>	To some extent
<input type="checkbox"/>	Not at all

ELA's experience is that employers are less likely to carry out an EPA voluntarily, because of (real or perceived) risks that an EPA will give rise to claims.

Q11. How likely would you be, under the new law, to carry out a voluntary equal pay audit?

<input type="checkbox"/>	Very likely
<input type="checkbox"/>	To some extent
<input type="checkbox"/>	- Not at all

ELA does not consider that the new law will make employers more likely to carry out an EPA, in the short term. Negative publicity or actual or perceived risks with EPAs may be increased in the short term. In the long term, if EPAs ordered by the Tribunal do not give rise to significant risks, this may in turn increase employer's likelihood of carrying out an EPA on a voluntary basis.

Further comments

We have some concern that using EPAs as a sanction may deter employers from proactively auditing staff pay and lead to more settlements. This will not lead to the change intended by these proposals. An individual employer, while responsible for helping resolve the problem of pay inequality, is not wholly responsible for its cause which may have been influenced by other factors such as occupational segregation.

For this reason the Government may wish to consider how employers (particularly in the private sector where there is no impetus from the Public Sector Equality Duty) may be encouraged to audit pay. One suggestion may be to consider whether allowances should be made if the losing organisation has signed up to Think, Act, Report. Although organisations have a great deal of flexibility as to the disclosures they choose to make and how often they make them under this initiative, if an organisation can show to the satisfaction of the employment judge that it is already taking some remedial steps, this could be taken into account in any subsequent EPA order.

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Type of Organisation:	This response is submitted by the Employment Lawyers Association (the "ELA"). The ELA is a UK based association with a national membership of over 6,000 lawyers who specialise in employment law. It operates to represent the needs and views of employment lawyers and frequently participates in consultation exercises.	
<ul style="list-style-type: none"> • Business representative organisation / trade body; • Charity or Social Enterprise; • Business; • Legal representative; • Local Government; • Professional body; • Public Sector; • Trade Union or Staff Association; • Other, please specify 		
Are you responding as an:	Individual	On behalf of an
Size of Organisation: (large, medium or small)	6,000	
Number of Staff:	Not applicable	
Location:	<ul style="list-style-type: none"> • England • Northern Ireland • Scotland • Wales • Other, please specify 	

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