The Role of Equal Pay Auditing in Resolving Unequal Pay: More Hindrance than Help?

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ABSTRACT

The introduction of the Equal Pay Act 1970 in Great Britain had an immediate effect on the incidence of unequal pay for equal work. 50 years on however, unequal pay remains an intractable issue, partly due to a pervasive culture of pay secrecy that prevents women from discovering potential instances of pay discrimination. A wide range of regulatory measures under the banner of "pay transparency" are often proposed to combat this problem. One such measure is equal pay auditing. This chapter examines the Equality and Human Rights Commission's (EHRC) recommended method for conducting voluntary equal pay audits. The EHRC tells employers that this method will establish whether their organisation is compliant with the Equality Act 2010. However, this chapter argues that there is a disconnect between the EHRC's method and equal pay law, which prevents employers who conduct an audit from identifying individual cases of unequal pay for equal work. Given this disconnect, this chapter argues that the EHRC's auditing method may be counterproductive, as it may mislead employers and employees about the existence of discriminatory pay.

INTRODUCTION

Unequal pay for equal work is one of several barriers to achieving gender pay equality. While often conceptualised as one of many factors contributing to the gender pay gap (GPG), the practice of an employer paying one or more emloyees less than colleagues of the opposite sex who perform equal work is better thought of as a standalone issue. Unequal pay for equal work became illegal in Great Britain with the introduction of the Equal Pay Act 1970,[1] and (unlike the GPG) it is sometimes assumed that because it is illegal, unequal pay is not very common (see Parliament. House of Commons, 2018, p. 6). Yet the volume of equal pay claims in employment tribunals reveals that equal pay is still not a reality for many UK employees (Ministry of Justice, 2021).[2] The true extent of discriminatory pay is disguised (both from employers and employees) by opaque pay structures and an ingrained culture of pay secrecy (Romney, 2018, p. 279; IDS, 2021, paras 9.66-9.77). In an effort to combat the persistence of unequal pay, the Equality and Human Rights Commission (EHRC) encourages employers to voluntarily conduct equal pay audits to ensure that their pay systems are not harbouring discriminatory pay. Auditing, employers are told, reduces the risk of costly and damaging litigation, and can result in financial gain through enhanced corporate image, improved staff productivity and the ability to draw more fully on 'the range of skills and experience that women bring to the workforce' (EHRC, 2011, p. 48). The EHRC's recommended method for conducting such voluntary audits has been in place for 20 years, yet in that time has received limited scholarly attention.[3] This lack of scrutiny is surprising, given the ubiquity of the model. The Advisory, Conciliation and

Arbitration Service, trade unions, and reward consultancies recommend the EHRC's model to employers. Sector-specific guidelines are largely (or entirely) based on the EHRC's model (see New JNCHES, 2018; NHS Employers, 2020). An analysis of the EHRC's auditing method is therefore vital and long-overdue.

This chapter begins by examining the reasons for continued low compliance with equal pay law, and calls for the use of equal pay auditing to address those reasons. It then considers the reasons that employers have for conducting voluntary auditing, and the impact of those reasons on the incidence of auditing. It then examines the auditing process itself, focusing primarily on one step in the EHRC's method. This analysis exposes a fundamental disconnect between the method and equal pay law, which prevents employers who conduct voluntary audits from identifying individual cases of illegal wage discrimination. While there are some broad potential benefits to equal pay auditing, current practice is problematic, as it leads employers to produce the wrong data for the problem they are expecting to address. Rather than strengthening compliance with equal pay law, it is argued that the EHRC's method may actually be counterproductive, by giving employers and employees the wrong impression about the existence and extent of pay discrimination.

LOW COMPLIANCE WITH EQUAL PAY LAW

The right to equal pay is afforded to women and men who perform equal work for a shared employer. Section 65(1) of the Equality Act 2010 provides three definitions of "equal" work, which are *like* work, work *rated as equivalent*, and work of *equal value*. When the right to equal pay was first introduced under the Equal Pay Act 1970 (which was originally limited to like work and work rated as equivalent), there was an immediate and transformative effect. Separate pay scales for female and male workers in the same job were eliminated, and minimum pay rates for women were increased (Deakin *et al.*, 2015, pp. 386-387; Fagan and Rubery, 2018, p. 310). As a result of the introduction of new anti-discrimination legislation, and the implementation of the right to equal pay by collective agreement (Zabalza and Tzannatos, 1985), women's average gross hourly earnings increased rapidly from 63.1% of men's in 1970, to 75.5% by 1977 (Hepple, 2014, p. 118). However, once rates of pay were equalised, the impact of the Equal Pay Act 1970 stalled. 50 years later, equal pay claims are one of the most common lodged in employment tribunals, with approximately 25,000 claims lodged between April 2019 and March 2020 alone (Ministry of Justice, 2021).

There are two main reasons for continued low compliance with equal pay law. Firstly, many UK employers believe that they already provide equal pay, and therefore perceive little need to act (Adams, Hall and Schäfer, 2008, p. 30; IFF Research, 2015, p. 5). This assumption is not necessarily surprising, given that some (though not all) causes of unequal pay are unconscious (Fredman, 2011, p. 47; Grimshaw and Rubery, 2007). For example, roles dominated by women within an organisation may have been undervalued by the employer in relation to roles dominated by men (Bisom-Rapp and Sargeant, 2016, pp. 141-142). Further, several common pay practices that appear gender neutral, such as pay protection, market-based pay or discretionary bonuses, can disproportionately impact employees of one sex, and can therefore lead to inappropriate pay differences (EHRC, 2011, p. 50). Given that employers have no positive duty to evaluate their pay practices – a process which might disabuse them

of the notion that they already provide equal pay – they are likely to maintain the belief that they are already compliant with equal pay law.

Secondly, the burden of gathering evidence and bringing equal pay claims falls largely on individual employees (Fredman, 2011, p. 238; Iyengar, 2019, pp. 34-35), and the process of discovering whether they have a legitimate claim can be prohibitive. Three in ten women do not know what male colleagues in the same or similar roles earn (Fawcett Society, 2019, p. 14). Formal routes for gathering information about the pay of potential comparators prior to lodging an equal pay claim no longer exist.[4] Instead, women tend to discover that they are paid less than male colleagues who they believe perform equal work when pay details are mistakenly shared, or when male colleagues choose to disclose pay information (Fawcett Society, 2019, p. 15). Further, those that discover or suspect that they are not receiving equal pay may be inhibited from bringing a claim for fear of victimisation by employers, and the substantial financial and emotional costs of negotiating with employers and pursuing the claims process (Hepple, 2011, p. 316; Department for Business, Energy & Industrial Strategy, 2020, pp. 69-71). Thus, while equal pay claims are very common, there are many potential instances of discrimination that will never be examined.

In response to these issues, and in particular the challenges posed by the individual claims-based method of enforcement, there has been ongoing attention in anti-discrimination law scholarship on the potential of reflexive regulation – that is, measures that impose positive duties on employers to resolve entrenched discrimination (see McLaughlin, 2014; Hepple, 2011; Morgan and Yeung, 2007; Ayres and Braithwaite, 1992). One set of measures attracting increasing attention are pay transparency mechanisms (European Commission, 2014a). These include a wide range of policies that involve disclosure of pay information to various stakeholders in order to raise awareness and understanding of the existence and causes of pay inequality. By shining a light on pay practices, the expectation is that employers will be forced to make changes or risk legal action and public censure (Testy, 2002; Estlund, 2014).

Equal pay auditing is one form of pay transparency. Still a largely voluntary measure in Great Britain,[5] equal pay auditing requires employers to compare the pay of female and male employees performing equal work to ensure that there are no illegal pay differences. It is generally assumed that equal pay audits have the power to address the two main reasons for low compliance with equal pay law. Firstly, it is assumed that audits will demonstrate to employers whether they are compliant with the law, and if not, that the audit will identify those employees whose pay requires adjustment. The EHRC (2011, pp. 50-51), for example, insists that conducting an audit is the most effective method of 'establishing whether an organisation is in fact providing equal pay' and 'ensuring that a pay system is free from unlawful bias'. Secondly, it is assumed that audits will inform employees about whether they are receiving equal pay with colleagues in equal work, without the need to gather evidence personally (Hofman *et al*., 2020, p. 14). If audits can achieve these apparent goals, the result would presumably be that employers would know whether their pay practices are discriminatory, and could be more likely to face litigation if they failed to rectify them, as greater access to pay data would reduce the information-gathering burden on claimants, thereby addressing one of the barriers to bringing equal pay claims. Thus, widespread equal pay auditing *should* prompt employers to ensure that their pay

practices are non-discriminatory and *should* therefore address low compliance with equal pay law (Hofman *et al*., 2020, p. 14; European Commission 2014a, p. 113). An examination of the reasons employers have for undertaking auditing, as well as of the method of auditing itself, reveals that this may not be the case.

THE IMPLICATIONS OF VOLUNTARY AUDITING

Recommendations from the independent Cambridge Review (Hepple, Coussey and Choudhury, 2000) and the Equal Pay Task Force (2001) for the introduction of mandatory auditing in the UK have largely been resisted. The Cambridge Review acknowledged that employers perceive equal pay legislation as expensive to implement, and are reluctant to be the first to introduce equal pay policies for fear of competitive disadvantage (Hepple, Coussey and Choudhury, 2000, p. 74). The reviewers therefore deemed necessary a mandatory system that would put employers on an even footing with competitors. Similarly, the Equal Pay Task Force (2001, p. xi) concluded that there would be 'little or no progress in closing the pay gap unless employers take the essential first step of examining whether they have inequalities in their pay schemes'. However, concern about the administrative burden that compulsory auditing would place on employers has kept mandatory auditing off the political agenda (Department for Communities and Local Government, 2007, p. 54). Instead, measures have been established to encourage employers to audit voluntarily. In 2003, the former Equal Opportunities Commission (EOC) released the *Equal Pay Review Kit* to guide employers in voluntarily conducting equal pay audits. After the EHRC was established and assumed the EOC's role, it released the *Equal Pay: Statutory Code of Practice*, which included the same auditing guide as that released by the EOC. These guides, along with contemporaneous policy documents and business literature, frame the production of regular equal pay audits as corporate social responsibility (CSR) best practice. Employers are encouraged to audit on the basis of a 'business case' – that is, that auditing will enhance employee satisfaction and productivity, and attract high calibre employees, consumers and investors who are drawn to fair and transparent organisations (EHRC, 2011, pp. 48-58).

CSR considerations seem to have been the main driver for those employers who conduct voluntary auditing. A series of surveys commissioned by the EOC and EHRC between 2003 and 2008 found that the two main reasons consistently cited by employers for conducting voluntary auditing were that they want to be seen as good practice employers and they see it as good business sense (Brett and Milsome, 2004; Schäfer, Winterbotham and McAndrew, 2005; Adams, Carter and Schäfer, 2006; Adams, Hall and Schäfer, 2008).[6] The ubiquity of these motivations, consistent across construction, manufacturing, private services and the public sector, suggests that most employers who conduct auditing voluntarily are attuned to the business case for doing so. However, while the business case may be a strong driver for those employers who audit voluntarily, it has not been compelling enough for the majority of UK employers to conduct auditing (Adams, Hall and Schäfer, 2008, p. 30; IFF Research, 2015, p. 5). In 2008, 76% of surveyed employers reported that they had never conducted an equal pay audit and had no plans to conduct one in future (Adams, Hall and Schäfer, 2008, p. 12). The reason for this low uptake is likely associated with the fact that the business case generally only influences those organisations aiming to project the image of leadership in equality, but not those 'who for economic or social reasons are resistant to change' (Hepple, Coussey and Choudhury, 2000, p. 57). Thus, larger organisations,

especially well-recognised brands dealing directly with consumers, tend to experience greater scrutiny from activists and the public, and are therefore more likely to engage in voluntary initiatives which might strengthen their legitimacy (Kagan, Gunningham and Thornton, 2011, p. 43). On the other hand, small or low-visibility organisations often perceive themselves as 'beneath the radar' of public scrutiny (Gunningham, Thornton and Kagan, 2005, p. 311), and thus are less likely to see commercial value in voluntary auditing. This explains why surveys found that small employers were the least likely to have conducted auditing, with only 15% of employers with 25-99 employees having completed an audit by 2008, compared with 32% of employers with 500 or more employees (Adams, Hall and Schäfer, 2008, p. 18). Amongst employers that had no plan to conduct auditing, the main reason consistently given was that they believed their organisation already offered equal pay. Other reasons included that employers did not have the time or financial reasons to carry out an audit. While the expenses and time needed would vary considerably depending on organisational size and context, government estimates suggest it could take up to eight weeks for an audit to be conducted internally, with wage costs and cost of external legal advice amounting to approximately £13,000 (GEO, 2014, p. 16). These costs may once have been deemed reasonable to those employers driven by the promise of higher productivity and sales resulting from an audit. However, with the introduction in 2017 of compulsory GPG reporting for employers with 250 or more employees, the motivation that employers had to voluntarily conduct equal pay audits in addition may have waned. Any desire to invest the time and money needed to audit is likely to have diminished now that these employers can seek the same reputational benefits through the considerably less onerous and costly (European Commission, 2014b, p. 4) production of GPG reports.

Given that the business case is the primary inducement relied upon by the EHRC and business groups to encourage employers to voluntarily audit, it can be expected that the incidence of voluntary auditing will decrease over time. At least at first glance, this dwindling interest in auditing is extremely troubling, particularly because GPG reporting and equal pay auditing are intended to address different issues. However, as the following section reveals, the method which most employers use to conduct auditing does not necessarily lead to stronger compliance with equal pay law. Indeed, following the EHRC's model may be creating more harm than good in relation to the elimination of wage discrimination.

THE EHRC'S EQUAL PAY AUDIT MODEL

The EHRC's *Statutory Code of Practice* sets out a five-step equal pay audit method to guide organisations with 50 or more employees in conducting a voluntary audit. The five steps are as follows:

> *Step 1:* Decide the scope of the audit and identify the information required.
>
> *Step 2:* Determine where men and women are doing equal work.
>
> *Step 3:* Collect and compare pay data to identify any significant pay inequalities between roles of equal value.

Step 4: Establish the causes of any significant pay inequalities and assess the reasons for them.

Step 5: Develop an equal pay action plan to remedy any direct or indirect pay discrimination.

Broadly, the method requires employers to determine which of their employees are conducting work that would be defined as equal under the Equality Act 2010, compare the pay of men and women in those equal roles, and investigate the causes of any pay differences deemed to be 'significant'. Employers then develop an action plan to address the causes of those significant gaps. While each step is worthy of attention,[7] this chapter focuses primarily on step 3. The way in which employers are instructed to compare pay data to identify pay inequalities constitutes the most significant flaw in the EHRC's model. While the EHRC insists that employers will know after conducting an audit whether or not they are providing equal pay for equal work, this is made impossible by a fundamental mismatch between step 3 and the Equality Act 2010.[8]

At step 3, employers compare the pay data of all male and female employees performing equal work to identify any pay gaps. For each equal work category identified in step 2, employers must calculate the average basic pay and total earnings (which includes basic pay, bonus pay and allowances) of male employees, and separately of female employees. These averages in basic pay and total earnings for men and women are compared, and the percentage differences calculated. Whether in favour of female or male employees, any difference of 5% or more or 3% or more recurring over multiple audits is deemed 'significant', and it is only these significant gaps which are investigated at step 4. As an example of the results produced by step 3, the following table shows the findings of one UK employer's equal pay audit.

Pay grade	**Headcount**	**Difference in basic pay**		**Difference in total earnings**	
		Median	**Mean**	**Median**	**Mean**
2	139	0.4%	0.2%	0.4%	2.4%
3	379	-2.8%	-1.0%	5.2%	4.5%
4	967	-6.5%	-5.9%	-2.5%	-3.0%
5	1,638	-1.2%	-0.2%	3.5%	4.3%
6	849	-1.7%	-0.2%	0.4%	1.0%
7	6,270	4.1%	3.9%	6.5%	5.4%
8	3,638	0.7%	1.6%	0.7%	1.6%
9	1,939	5.5%	4.4%	5.2%	4.4%
10	1,731	3.4%	4.0%	2.7%	3.7%
11	596	4.5%	7.0%	4.0%	6.2%

Table 1.1: Example audit results showing median and mean pay differences by grade

In this audit, it was assumed that every role within a pay grade was of equal value – meaning, for example, that each of the 139 employees in pay grade 2 performed equal work.[9] The table shows the percentage differences in average (both mean and median) basic pay and total earnings for male and female employees in each pay grade. A positive figure indicates a percentage difference in favour of men, while a

negative figure indicates a percentage difference in favour of women. Thus, in pay grade 2, the median man is paid 0.4% more than the median woman, and men are paid on average 0.2% more than women. This particular employer concluded that the only significant gaps worthy of investigation were in grade 4 (due to the median percentage difference in basic salary of -6.5%) and grade 9 (due to the median percentage difference in base salary of 5.5%). No explanation was given as to why the mean percentage difference in base salary of 7% in grade 11, or any of the mean or median percentage differences at or above 5% in base salary plus allowances, did not warrant further investigation.

This employer's choice to rely solely on median percentage differences demonstrates a flaw in the EHRC's auditing model, in that the flexibility of the model can be used to an employer's advantage. The EHRC (2020) explains that employers can opt to calculate either or both the mean or median pay, though it suggests that calculating both mean and median percentage differences can give a more balanced overview of the situation in each equal work category. While the mean gives an overall indication of pay differences between men and women, it will be distorted by especially high or low salaries. The median is therefore useful in indicating the typical situation in the middle of the category. Yet the ability for an employer to choose which measure to rely on may allow them to obscure particularly extreme pay of individual employees. Consider, for example, a hypothetical equal work category in which there are five men and five women. The five men earn the following hourly wages: £14.50, £15, £17, £17.20 and £21. This results in a mean pay of £16.94 per hour and a median pay of £17. The five female employees earn the following hourly wages: £13, £13.50, £16.20, £16.50 and £17. This results in a mean pay of £15.24 per hour and a median pay of £16.20. The percentage difference in mean pay between the male and female employees would be 10.57% in favour of the male employees. By contrast, the percentage difference in median pay would be 4.82%. Although overly simplistic, this example demonstrates that the median difference (4.82%) generates a considerably more favourable impression of the pay gap between male and female employees in this equal work category than the mean difference (10.57%). Relying exclusively on the median percentage difference, this hypothetical employer could argue that the gap is not significant by the EHRC's standard, and therefore does not warrant investigation. The flexibility of the EHRC's auditing model therefore allows employers to adopt whichever of the two measures is most flattering, and to avoid the need to investigate potentially problematic gaps.

Whilst average pay differences might allow employers to obscure pay differences, there is a much larger issue in the use of average measures, that is, that using *any* form of average measure is inconsistent with equal pay law. Section 66 of the Equality Act 2010 reveals that average differences in pay between men and women play absolutely no part in equal pay law:

66 Sex equality clause

(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.

(2) A sex equality clause is a provision that has the following effect—

(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;

(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

The Equality Act 2010 calls for the comparison of the terms of *one* employee (A) with *another* of the opposite sex (B). B is not the entire group of male employees performing roles equal to that performed by A and the rest of her female colleagues. Rather, B is one male employee of A's choosing, with whom A believes she shares an equal role.[10] Section 66 of the Equality Act 2010 requires the comparison of each term of A's employment with each term of B's employment. If any of those terms are not the same, the effect of the sex equality clause is that they are made the same, provided there are no legitimate reasons justifying the difference. Thus, a woman who is being paid less than any one of her male colleagues who performs equal work, or who is employed on different terms, is entitled to claim the same pay and other employment terms as that male colleague (*Thomas v National Coal Board* [1987] ICR 757). However, an equal pay audit based on the EHRC's model compares the average wages of groups of male employees with groups of female employees in equal work. As can be seen in the table above, the data produced using the EHRC's model does not demonstrate whether an *individual* woman is being paid equally to each *individual* male counterpart. There is, therefore, a fundamental disconnect between the EHRC's model and equal pay law. Within each equal work category, every male and female employee may have a different salary, bonuses and other contractual terms. Some differences in terms between certain members of an equal work category may be justified, while others may not. Unless the terms of individual male employees are compared with the terms of individual female employees in equal work, the audit cannot uncover individual cases of unjustifiable differences in terms. Thus, the EHRC's (2011, pp. 50-51) claim that an audit will *prove* whether an employer is compliant with the law is false.

Instead, step 3 of the EHRC's model actually leads employers to identify the extent of the GPG within each equal work category, rather than the incidence and extent of unequal pay for equal work. While identifying unequal pay involves a comparison of two *individual* workers of the opposite sex, the GPG is the difference between all male and female employees' average earnings, expressed as a percentage of male employees' earnings. Given that the EHRC's model requires employers to generate differences in average pay between male and female employees in equal work, employers conducting voluntary auditing are in effect producing GPG calculations for each equal work category. Thus, the table above merely shows the GPG between male and female employees in each pay grade. Although this might have assisted the employer in narrowing down sources of its organisational GPG, it cannot confirm the existence, location or causes of unequal pay. While the two may coexist, the presence of a GPG does not indicate the presence of unequal pay, and vice versa. There is sometimes cross over in the causes of GPGs and unequal pay, but the two are different concepts, and crucially, only unequal pay is illegal. An employer may, for example, have a minimal GPG and still be found to pay some staff unequally for equal work. Consider for example, Glasgow City Council, which had a low GPG of –2.95% in favour of women in 2017 (Glasgow City Council, 2017), but has nonetheless settled approximately 14,000 equal pay claims. Conversely, fashion retailer Phase Eight had an exceptionally high GPG of 54.5% in 2017, but attributed this gap not to unequal pay for equal work, but to the fact that the few male staff it employs work in corporate head office, and are therefore highly paid in comparison with the bulk of its staff, most of whom are female retail staff (Phase Eight, 2017). Therefore, an audit showing the

existence of a GPG within equal work categories cannot be taken as an indication of the existence or extent of illegal sex-based wage discrimination within that category.

Not only are audits that use average measures inconsistent with equal pay law, but relying on average measures is likely to *obscure* cases of unequal pay. Even where a significant gap (i.e. a gap of 5% or more, or 3% or more recurring over multiple audits) is identified in an equal work category, there is no indication of who (if anyone) in that category is in receipt of discriminatory pay, or which of their colleagues' terms of employment ought to be included in their own employment contract. Further, the EHRC's insistence on investigating only significant gaps means that women in receipt of discriminatory pay may be hidden within equal work categories with gaps in average pay of less than 5%. Consider, for example, pay grade 8 in the table above. The difference in pay grade 8 is deemed insignificant by the EHRC's model, because there is only a 1.6% mean difference, and a 0.7% median difference in pay between men and women in that grade. However, among that group of 3,638 employees, there may be individual women who are paid less than individual men, or vice versa. Under the EHRC's model, those instances of unequal pay would remain hidden, and their causes would not be investigated and addressed. Nevertheless, individuals in grade 8 would be led by the results of the audit to believe that they receive equal pay. The employer would also be led by the EHRC's assurances to believe that there are no potential instances of illegal pay discrimination lurking in that pay grade. Given its potential to obscure pay differences and cause misunderstanding among employers and employees, use of the EHRC's auditing model might be considered counterproductive.

A COUNTERPRODUCTIVE MODEL

While the EHRC has not explained why it chooses to rely on average pay differences as opposed to individual pay comparisons, its model appears to conform to a wider trend in employment regulation in both the UK and the EU,[11] whereby pay transparency measures are designed to be 'soft' and flexible in order to reduce burdens on employers and encourage wider uptake (Benedi Lahuerta and Zbyszewska, 2018, p. 171). It should be noted that, although the EHRC had a budget of £70 million in its first year of operation, its current budget stands at just 26% of this figure (EHRC, 2021). This has seen the EHRC shift its practice away from ensuring compliance with the law (e.g. through instituting or intervening in legal proceedings) (Hepple 2012, p. 58), and towards promoting 'systemic change by encouraging organisations to go beyond formal legal requirements and achieve a higher standard of implementation' (Barrett, 2019, p. 248). While the EHRC's (2019) current strategic plan emphasises its power to litigate on a range of equality matters, it clearly does not have the resources to intervene in every equal pay claim. As such, the EHRC is understandably invested in encouraging as many employers as possible to voluntarily analyse their pay systems. To achieve this aim, it therefore needed to develop an auditing model that at least *some* employers would be likely to adopt.

Instructing employers to undertake individual analyses of employees would likely be considered unreasonable, particularly for those with large workforces. The additional economic and administrative burden of such granular analyses might have dissuaded some employers from auditing voluntarily. Further, employers are likely to be reluctant to conduct more detailed audits on the basis that doing so might reveal cases of unequal pay for which they would be liable (Adams, Carter and Schäfer, 2006, p. 40;

Deakin, McLaughlin and Chai, 2012, p. 124). A method of auditing based on average pay differences across pay grades would appear far less risky and onerous to employers than one relying on individual comparisons of employees. The EHRC's guidance is clearly not directed at identifying each individual case of unequal pay, but is instead directed towards shifting organisational culture and pay practices in the hope that this will move more employers towards achieving full compliance. It clearly expects that through broad statistical analysis, employers will initially rectify the most conspicuous gaps in average wages, and over time that this might facilitate the elimination of those unconscious behaviours and indirectly discriminatory policies that cause individual cases of unequal pay to arise.

However, neither of the two reasons identified earlier for low compliance with the law are assisted by the EHRC's auditing model. Firstly, the model is liable to reinforce the false assumption made by many employers that their pay systems are not discriminatory. As the statistics produced by an audit bear little relevance to the existence of unequal pay between individuals, the goal of eliminating discrimination from pay systems over time is not aided by auditing. Even if an employer engages in auditing in good faith, and does not intend to obscure pay gaps through the strategic adoption of mean or median measures, the auditing process will nevertheless cause them to miss potentially problematic pay practices or possible cases of unequal pay. Indeed, reliance on average measures is likely to be counterproductive by obscuring illegal pay differences, and further entrenching confusion among employers about their obligations to employees. An employer will be led by the EHRC's assurances to believe that they have proved their compliance with equal pay law. Even by calling the process an *equal pay* audit, employers are likely to be persuaded that an audit that finds no significant gaps is definitive proof of their compliance with equal pay law. This could impede the learning process and behavioural change that the EHRC seems to be trying to prompt.

Secondly, the task for individuals of enforcing equal pay law is made no easier by the presence of an equal pay audit. Part of the presumed benefit of equal pay audits is that they could demonstrate to unknowing victims that they have a potential claim. It is also assumed that the implicit threat of legal action by employees will prompt employers to correct discriminatory pay. However, these assumptions are flawed. It is very rare that an employer that conducts a voluntary audit releases the resulting report to employees, and even if it does, it is unlikely that such a report will include individualised pay data. As such, employees are highly unlikely to have access to data that will demonstrate whether they are in receipt of discriminatory pay. Further, even where an audit report is released publicly, an employee is unlikely to have sufficient time and knowledge of their employer's pay structure and equal pay law to be able to comprehend the report (Fung, Graham and Weil, 2007, pp. 54-65). Indeed, if an employer produces an audit on the basis of the EHRC's model that finds no 'significant' pay gaps, a typical employee may be convinced by the mere presence of that audit that they are not suffering from pay discrimination, even if that is not the case. Given that the EHRC's method of equal pay auditing does not address the two main causes of continued low compliance with equal pay law, and may in fact exacerbate those causes, auditing may actually inhibit the enforcement of equal pay law, rather than improve compliance. The confusion and disinformation that it could spread may make it preferable for employers to avoid auditing altogether.

CONCLUSION

The current momentum towards greater pay transparency is a necessary element of achieving gender pay equality (BEIS Committee, 2018, p. 26). In order to rectify pay disparities, it is vital that employers have methods of interrogating and modifying their pay practices. However, voluntary equal pay audits, as they are currently framed and promoted to employers, cannot lead to widespread systemic change. Hart (2010, p. 591) argues that, while reliance on the business case to encourage voluntary action on workplace equality 'is an improvement over employers not being alerted to workplace inequality at all', there are serious limits to what it can achieve. The reliance on the business case to prompt employers to voluntarily audit ensures that uptake will dwindle over time as cheaper and less burdensome forms of pay transparency become normalized. Further, due to its voluntary nature, employers are given freedom to manipulate data to create a more flattering narrative. It can be expected that some will present misleading or inaccurate information (Deegan, 2002, p. 298), and that they will feel limited pressure to take follow-up action. Much like the presence of equal opportunities policies (Ahmed, 2017, pp. 104-105), the existence of an equal pay audit is often accepted as evidence of an organisation's commitment to equality, such that the policy itself often becomes 'a substitute for action'. Employers can reap reputational rewards from having conducted an audit, without having identified and resolved discriminatory pay practices. By relying on the business case, and convincing employers that analysis of their pay structures and policies is beneficial primarily on a commercial basis, 'fundamental organizational change' is foreclosed (Litvin, 2002, p. 160). Moreover, the incongruity between the EHRC's model and equal pay law means that an audit is incapable of uncovering individual cases of unjustifiable differences in pay and terms of employment. An equal pay audit that considers average wage differences cannot prove an employer's compliance with the law and may actually mask illegal pay differences and inhibit necessary change. It is worth considering, then, the possibility that equal pay audits are more hindrance than help in securing compliance with equal pay law.

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[1] Equal pay provisions under the Equal Pay Act 1970, and its replacement the Equality Act 2010, apply in England, Scotland and Wales, but not in Northern Ireland. Equal Pay Act 1970 s. 11(3); Equality Act 2010 s. 217.

[2] In the 2019/20 financial year, equal pay claims accounted for 14% of total jurisdictional complaints made in employment tribunals (24,697 claims). They were the second most common claim after Working Time directive claims, which accounted for 15% of total complaints (26,680 claims). This high volume is mainly associated with mass equal pay claims, most recently against supermarket chains and local authorities. See, eg, *Asda Stores v Brierly* [2021] UKSC 10; Case C-624/19 *K v Tesco Stores* [2021] ECLI 429; *Glasgow City Council v Unison Claimants* [2017] CSIH 34. On mass equal pay claims, see Deakin *et al*., 2015.

[3] Chicha (2006, p. 17) makes a cursory comment on the flaws of the EOC's (2003) *Equal Pay Review Kit*, suggesting that the choices left to employers and the ambiguity of terms such as "equal work" might explain why the guidelines were not being accurately followed. Most academic discussion of the model fails to critique the steps themselves (see Jones, 2004; Larter, 2004).

[4] Prior to 2014, employees could send their employer a questionnaire to obtain the pay information of their chosen comparator (Equality Act 2010, s. 138).

[5] Employment tribunals are empowered to order employers to conduct an equal pay audit where they have been found to breach equal pay law, although this power has only been used once (Equality Act 2010, s. 139A; Patrick, forthcoming).

[6] More up-to-date statistics on equal pay auditing trends have not been collected by the EHRC, whose research focus has now shifted towards employers' experiences of GPG reporting. However, employers' reactions to GPG reporting suggest employers continue to be motivated by the business case for pay transparency (see Murray, Rieger and Gorry, 2019), which corresponds with general findings from CSR literature concerning voluntary disclosure (see Hart, 2010; Vogel; 2005; Adams, 2002; Deegan, 2002).

[7] For instance, the freedom for employers to *choose* which of their employees to include in the audit in step 1 severely hampers the efficacy of auditing, and limits the potential for roles of equal value across an organisation to be identified.

[8] The accurate identification of roles of equal value is notoriously contentious, and has been the subject of extensive litigation (Allen, 2020). That employers may not be able to consistently identify roles of equal value is another potential flaw of the EHRC's method. This is beyond the scope of this chapter.

[9] Whether or not this is a legitimate method of identifying equal work categories could be subject to challenge.

[10] While men can also experience unequal pay, I refer to women here as a reflection of the fact that the majority of equal pay claims are lodged by women (Iyengar, 2019, p. 29).

[11] A proposed Directive on mandatory pay transparency measures was tabled by the European Commission in 2021, which would oblige Member States to introduce legislation requiring certain employers to report pay information, including the pay gap between female and male workers performing the same work and work of equal value. This requirement mirrors the EHRC's auditing model, in that it would lead to the identification of average wage differences between groups of employers (Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms COM(2021) 93 final, art 8(1)(g)). Following Brexit, the Directive will not take effect in the UK, although developments in EU best practices must at least be considered in Northern Ireland, meaning there is potential for audits to become mandatory (Protocol on Ireland/Northern Ireland art 2(1)).