

This document contains the full quotes of the participant. Questions or context are provided in square brackets.

[What are your thoughts on gender pay gap reporting?]

*"As you probably know, I'm a gender pay gap reporting sceptic. I do not believe that they amount to transparency in any way, shape or form. They help gender discrimination if used properly, but they are not pay transparency."*

[Would you say that local authorities subject to mass equal pay claims have relatively transparent pay structures?]

*"The grading structures are relatively transparent in the sense that the people know that they exist. And they are publicly available. However, once you go onto a more granular level, you find that it's not transparent at all. If anything, it's a mirror. You're looking in, but you're not actually seeing... It's not a window because it's shining back at you. If I can give you an example. So Glasgow adopted, when we started the litigation 2005, we had to establish what the pay arrangements were. So the first thing that that means is that that's not transparent because we had to go digging. If it was transparent, it would have been readily available to us. And it certainly wasn't. For a substantial part of the manual worker workforce, they have a job evaluation study which was 20 years old by then. And because they had a job evaluation study, people thought that pay was equal. But in fact, it wasn't equal at all. It was very, very substantially different. The problem was that the ordinary workforce simply did not know that that was the problem. And by using mechanisms that existed at that time, but no longer exist, we were able to extract some information to get a broader picture. But that's because we knew what we were looking for. So we were in a position of being able to ask the right questions, as it were. They had a job evaluation-based pay structure where grades were open, but they in fact had over one hundred and twenty different schemes for men, none of which applied to the women. What you have is a visage of pay transparency, but in fact, the reality was something that was completely different. Moving on much later, we won in the Court of Session in 2017, on the third round of that litigation, and it was only at that point that we actually got full disclosure from the council. And it was only at that point that we were truly able to do straight comparisons between men and women working within that organization. So that took 12 years to get pay transparency, and that was only after God knows how many hearings, six appeals, hundreds of days in tribunal and them losing an appeal for them to actually open up their books. They have over a hundred and eighty different pay lines in their pay structure. So actually doing the analysis of pay for the various men and women in that organisation involves millions and millions of lines of code for us to be able to... So it's only the fact that I employ someone who is a data specialist who was able to extract that information, refine it and compare it...something that neither the council nor anybody else had ever even attempted to do... that we were able to start demanding the money ...discussing settlement of those sums. Now, that's a council that says it has pay transparency. So when people think about transparency, I don't think that the vast majority of people have any idea as to what pay transparency actually involves. It's certainly not an average statistic over a 12-month period because it just doesn't work like that. The bigger the organization, the more complicated the pay is, the less transparent it is."*

[Should there be a duty on employers to analyse their pay structures?]

*"Well, that would be a start. I think that the workforce needs to have access to that data. The problem is, and this is a major psychological problem, is that employers themselves don't believe they discriminate. And they are incredibly nervous about somebody else claiming that they are discriminating. The BBC is a brilliant example of this. So the BBC, when they were required to disclose, and all they were required to disclose was the pay of the top one hundred and fifty people in the organisation. They employ several thousand people. So they were being required to disclose less than two percent of the organisation's payroll. And as soon as you made it public, everybody could see what the discrimination was and people started*

do the analysis. The BBC have never spotted it. And their position was that even though they had the data and even though they have the analysis, they couldn't see the discrimination. And even when it was public, they denied that there was any discrimination. And what they then did was to get external bodies, which they were paying for, to tell them what they wanted to hear. And that's exactly what happened. So PwC goes in and gives them a public report that says, well, it's not all brilliant, but we haven't found any obvious evidence of discrimination. Well, I mean, if you look at that from a claimant perspective, you'd say exactly the opposite to that. And, of course, one of those women, Samira Ahmed, takes it all the way to the tribunal. And it turns out their defence is that the man's got a glint in his eye. I mean, you laugh at that. But the reality is they paid hundreds of thousands of pounds in legal fees to run that defence. And it's because employers just can't see the mote in their own eye. And that is the problem. Local authorities accepted a legal requirement to have a gender audit, provided its of other people. They'll be really good at doing audits of other organizations. And they will be absolutely terrible about doing it themselves. So a requirement for an employer to do something is you have to trust employers to do it. And I don't trust employers to do it because my experience over 30 years is they don't do it and they can't see it even when it's presented to them in as obvious way as possible, they can't see it. If it was just employers having to do it themselves, it won't work, in fact, it will be counterproductive because they'll produce reports saying how good they are, and they'll literally choose and pay for consultants to come in and give them a clean bill of health. I saw it many, many years ago, Bournemouth Council. When we first started the litigation in the Northeast. We weren't even suing them at the point. They paid for an external consultant to come in and look at their pay arrangements and they gave them a clean bill of health. I actually got a copy of the report, and there was this little footnote at the end that said, "we've examined their pay structures, but we've not included their bonus system". Well, what the hell was the point that? They paid tens of thousands pounds for these consultants and they obviously identified what the problem was and then took it out with the report. And that's exactly what the BBC did. They secretly identified what the problem was and for something that was going to be made public, they excluded that particular piece of information. So it was a complete waste of time. Not surprisingly, Bournemouth ended up paying tens of millions of pounds in compensation several years later when the unions did sue them. But so it will inevitably result, if it's just the employers doing it, it will inevitably result in the vast majority of employers paying consultants to cover over the cracks. And it will not reveal sex discrimination in the vast majority of cases. There will be the occasional I mean, just like gender pay gap reporting, there are organisations that are genuinely committed to using the information and trying to do the right thing in inverted commas. But they're very, very tiny minority. Before they introduce gender pay gap reporting, they had a voluntary system." [The Think, Act, Report system] "Only three hundred employers out of ten and a half thousand signed up for it. And only four, or it might have been five in the end, actually reported any gender pay gap numbers, and every single one of them was wrong. And three of them got awards for their false data, just because they did it. I was present at one of the award ceremonies. I said, those figures cannot possibly... if you come out with a zero percent gender pay gap, you're lying. And they did. And it turned out to be 25 percent when they actually had to... But that was the reality. So you set up a system. So only three hundred employees even wanted to do it, and less than one percent of them reported and they all lied. So it does if there's no external validation, then it's not going to work. It's why the Iceland system is ...when the data finally comes through it's going to be really interesting."

[Do you see potential in a certification system organised by an external regulatory like in Iceland?]

"I think it's a significant step forward. Provided there's the ability to challenge the difficulties, even within that sort of system. There is a tendency towards the status quo. I mean, it's far better than anybody else by a long stretch. But I just think that when you're dealing with these issues, there's just this psychological barrier that's always getting in the way of a proper objective analysis. So it's a great system. But you do have to be able to delve down into the data to see whether things can be agreed. And just, for example, the basis of the Iceland scheme is an agreed job evaluation basis. So the question would be, well, should you just take it on trust that that job evaluation system hasn't itself had biases within it that are reinforcing the status quo? Because that's what happens with a hell of a lot of job evaluation schemes. It's why we end up having to constantly litigate over it. What looks like an objective scheme often isn't objective. It's like the stuff that these AI reports that are coming out now where you'd think that a computer wouldn't ... how can a computer be sex discriminatory? Yeah, but if the algorithm itself is false, then you end up with false results, so you end up with a position where the Home Office have just had to withdraw its AI visa system

*because it was full of racist assumptions. And Caroline Criado-Perez, in The Invisible Woman, gives lots of examples of where algorithms have been based upon previous data and the previous data turns out to have been discriminatory. When do you check down it says, "well the women were really difficult to get data for, so we did not include any data for women". So you do have to constantly think of these challenge in the schemes that are being used. So I don't know how good or bad the Icelandic job evaluation scheme is and whether there's any sort of AI type problems with it. But as a scheme, being objective and being done by the government with agreement of the trade unions is a massive, massive step forward. But we will have to see how the results pan out. If they use gender pay gap as the basis for their analysis, though, which is what they did at the beginning, they are going to be disappointed because it's not measuring the same thing. I mean, it's like the Scandinavian countries, everybody thinks the Scandinavian countries are going to be leading in this regard, but they have very high gender pay gaps. And Italy has a very low one, which doesn't make any sense whatsoever."*

[What is your opinion on regulatory literature suggesting that collaboration between regulators and employers can enhance compliance?]

*"Cosy relationships with regulators never sounds like a very good system of regulation. To me, it sounds like the system's corrupted itself. Simply by those relationships. ...And if you promise not to upset their reputation, they will comply? When you start with a new system, it tends not to go for earthquake, it tends to go for slow evolutionary reform as a basis, so early decisions after big changes are never very revolutionary. The early decisions on, for example, disability discrimination, equal pay, age discrimination, by the courts and the regulators, they've always been incredibly cautious and detrimentally so in the long run. And I think regulators are a similar beast in that they worry about their relationships with the organisations rather than actually achieving the necessary objective. That would be my gut feeling. I suppose you've also got to think about, with regulatory organisations often the problem is resources. They often worry that if they've got very limited resources, they can't afford to spend it on aggressive relationships. So in terms of maximizing the benefit of their resources, they tend to argue that it's better to create, to build relationships and trust between the regulator and the regulated to get a better system compliance. So carrot works better than stick, but that's only because the stick is so small and under resourced. And that is a genuine problem. And the other problem is the resources of the regulator are often dwarfed by the resources of the regulated. So it tends to be the smaller fish that get fried rather than the bigger organisations. So you do get a tendency amongst most regulators to be more far stricter over those that aren't going to fight back than the bigger organisations. There are examples in every form of regulation that I've ever been involved with that tends to be the position. So the Solicitors Regulation Authority, for example, will come down like a ton of bricks on a BME small firm solicitors, but won't touch the magic circle because the magic circle will outspend them. And that means that regulation is a lopsided vehicle, and the regulators will use exactly the argument that you just used, which is we need to build relationships and trust with these organisations and precisely because they're the big players. The FCA is another one where they'll put big fines on people who they don't work with, but when it comes to the chief executive of Barclays undermining a whistleblowing case they decided that it only deserves a fine and a slap on the wrist, and you'll not persuade me that they had nothing to do with the fact that it was Barclays and that they had a relationship issue with the FCA as opposed to some small or smaller organisation. I'm not saying that any subsequent regulators shouldn't have built up relationships, but I tend to think that it'll produce less dramatic results if it starts off being a cosy relationship with these regulators. And the trouble is that claimants, all the people in the workforce, are going to put enormous trust in an external system of validation. So the external system of validation can actually create another hurdle because the employers are saying, well, we've got external validation. So unless the external validation is really robust, you can actually make things worse."*

[What are your thoughts on the EHRC's guidelines for equal pay auditing?]

*"Fundamentally flawed. It goes completely wrong in the middle. Steps one and two are brilliant. Step three is a complete disaster. And once you've screwed it up with step three, step four or five are a bit pointless. I think it's really important to expose this because it is one of the easiest things for politicians, who will latch onto the idea of equal pay audits, and think that they are a ... magic bullet. Going back to the point I was*

*just making about it being...the problem with ... a flawed external validation is a bigger problem than no validation at all. And flawed equal pay audits are worse than no equal pay audits at all, because if you get them wrong, then the employer simply turns around and says, we've done an equal pay audit and the burden of proof is now on you, person with no access to the data, to prove that we're wrong. As difficult as it is now, you add that massive hurdle in the front. So equal pay audits are really potentially dangerous. But politicians never want to know the details. They just they want an easy solution. And equal pay audits sound like a great solution. Once they follow the EHRC guidelines they are going to be disaster.*

[Do employers have the capacity to conduct job evaluation studies?]

*"No, it is also one of the problems with gender pay gap analysis. Equal pay is a process of comparison. And it's a process of comparison person by person, which always creates a problem, and these days creates an even bigger problem with everybody worried about data protection and privacy. But the actual core of equal pay is literally a comparison between a man and a woman and all the steps in relation to gender pay gap and the EHRC's code of practice on equal pay, removes that individual analysis and tries to make it non-specific, which is just a complete waste. As that's the core idea of equal pay, to take out of any analysis is nonsense. So we're doing our equal pay cases. We are comparing home carers with refuse people. When the original scheme was done in the early 80s, those two jobs came out the same. But the problem was that the refuse drivers actually got paid twice as much in many cases in reality. So what employers did is they didn't give the women twice as much money. What they did was to regrade the men, and make the men not in the same grade. And that's because they started from the position of preserving the status quo. And if the very first question is "who are you comparing" and you haven't done a job evaluation system which hasn't been challenged, what you end up with is the employers comparing refuse drivers to a different job, or not comparing the home carer to the refuse driver and then saying, well, we've done an equal pay audit, but they haven't actually done that comparison. The reverse, however, let's be practical. The reverse is that there are two massive resource problems with it if you do a proper analysis. One is that you would have to in some way or another analyse every job compared to every other job. And that is incredibly difficult, and it takes years, particularly the bigger the organisation. We are now because Glasgow lost, we are now doing this with their pay system. They thought it would take two years. Obviously the pandemic's made a bit of a mess of that. But it was never going to take two years. And even within that structure, that process, they have to bunch jobs together. So they're not actually doing an analysis of three and a half thousand different jobs with three and a half thousand other jobs. They're doing an analysis of 120 jobs, in which, within that 120 they've already bunched jobs which they think are on the same level. So if they've got that rule to start with, it's all completely up the Swanee. So the EHRC is absolutely correct that the best way to do it is to have a proper job evaluation for the whole of the workforce as a starting point for any job evaluation analysis. Otherwise, it's not going to work. But that is a huge undertaking for a lot of employers. And because it's going to take a lot of time, it will be very expensive. And there simply aren't the experts or people are trained to do it, it's a bit of a problem. The other alternative is that you then guess. So you start with the position that even within a properly organized job evaluation system you're making guesses as to which jobs are going to be benchmarked with which other jobs. If you don't have a job evaluation scheme, you're basically just going to say, well, whatever grade we given somebody is the correct grade, which means there's no analysis of pay comparison between people who are not on the same grade. What's the point of that? I mean, this is self-defeating, but it also creates this additional hurdle if you do it, because most people don't realize that, you know, that the information you've put in to start with is the wrong information. And you know that home care it was, the employers will come out and say, well, the home care is paid equally to everybody. That's on the same analysis as that, because that's where we started from. And it is really, really difficult to get employers to think that that great structure is incorrect and indeed is a big problem with the trade unions. Well, because the status quo really embeds itself psychologically and it is a bit like a domino. You take one piece out of the process, lots of other jobs fall because you decide that a grade three job, for example, actually should have been compared to a grade five job. You've got a whole stack of every grade three job, for every grade five job is then caught out because none of them will get paid correctly. By having one set of comparisons done in correctly. And there will be resistance because those that have been used to being on grade five, for example, will not like the idea that they are suddenly being told that they were not really worth grade five. Because the employer's*

*position will be not to raise the woman to five. It'll be lower them to three. And you get all the consequences, you get all the industrial relations problems that flow from doing that. So the even the very first step of an equal pay audit is problematic."*

[Step 3 of the EHRC's auditing guidelines requires average comparison by job categories, making it impossible to identify individual cases of unequal pay. Is this a failure on the part of the EHRC?]

*"The thing about equal pay has got nothing to do with averages. You insert the word average into your analysis, you're not doing an equal pay comparison. First of all, it's not averages. And secondly, it's not global. Under the legislation you're required to examine term by term. It's all sorts of data. For the obvious example, the NHS nursing cases where you had the nurses comparing themselves with engineers and the employer's defence was, well, if you have any doubt that the various packages they actually were, she was actually better off than him. But the reality was that she was greater than him on a grading analysis. But he got time and a half for all his overtime and shift allowances. She didn't get shift allowances. She got time and a third. So if you just simply followed the EHRC step two, you wouldn't have had an equal pay case because their averages of the of their pay, between the two of them would have actually been he'd have had a claim against her if he was on the same grade and he was not on the same grade. But she succeeded because the law requires them to have each term to be the same. So why was she only getting time and a third doing overtime when he was getting time and a half? The litigation that was successful was that. And if you, you never found it in an equal pay audit if you followed the EHRC guidance because they just looked at the total salaries over the year, and that's if you did it actually person by person rather than group by group... We had another example we had against North Lanarkshire where the employers had a bonus scheme. The men had varying bonuses, so each of the men on the same job were getting different amounts of bonus payments. They accepted the position that the woman, who was a home carer (same as a refuse worker) – they accepted that that was a valid comparison. They argued that she should only be entitled to the average bonus that the men received. And our position was, no, that's completely wrong. Unless you can justify it, she's entitled to receive the bonus of the highest paid man. They were prepared to argue that until the day of the court and then abandoned it because we stood on the ground and we said legally the position is, unless you can justify why the highest paid man is paid more than either his colleagues or more than the women, the position is, you have two jobs of equal value where the man's job is done entirely by men, the women's job is done entirely by women. And you've got to justify the difference. And we're entitled to claim the pay of the highest paid man. Not of an average man. The cost to the council, between the two of them, is literally tens of millions pounds. Because if they could take in the average, essentially the highest paid man would have got away with it and they wouldn't have to do anything. And the woman only gets what the average man gets. And if you're an average paid woman, you wouldn't get anything. It comes back to this thing – it's got nothing to do with averages. If you find a job that's done by a man, unless you can justify each turn, the whole point of audit when you've got the data is that you can see that. If you're doing a proper analysis, what you would have is a list of the men doing job A, and what they were being paid. And you could see that Mr. A at the top of the list was getting more than anybody else. And then, you would have to go step forward to say, well, what's the justification for that? And they didn't have one, because they didn't know why he was getting that much money. And then you need to have an argument about the justification. But unless the claimants' reps had the same list, they would not be able to tell from the average figure that was being given by the employers was actually discriminatory."*

[Are equal pay audits always doomed?]

*"It's a form of manipulation. A pure equal pay ought to be a comparison of each woman's pay and each element of the woman's pay compared to each element of the man's pay. And if you got a hundred jobs done by men and one hundred jobs done by women, then that's 10,000 comparisons. And if you've got 10 elements of pay, that's 100,000 comparisons. But that's what it ought to be. Everything else is a compromise based upon either the resources or some other justification for not having not looking at the true position."*

[Guidelines for higher education require comparison not just by gender, but also other protected characteristics e.g. race and gender. Is there utility in having a broad remit in an equal pay audit?]

*"I don't have a problem with it in terms of pure analysis. The difficulty in any of the other protected characteristics is lumping a whole stack of different factual scenarios into a single block. The obvious one is BME. As the coronavirus statistical analysis shows, you get different results if you just do BME as a single category, and if you break it down by different racial characteristics and you get vastly different results. If you think of BME as a single category, you're going to end up with a potentially flawed analysis. My problem is not the principle. The difficulty is exactly the same as for doing it by for equal pay is that the amount of granular analysis that you have to do is substantially more than simply lumping all BME people together or lumping all disabilities together, because obviously the position in relation to disabilities is going to be different if your disabilities are wheelchair disability or this is a mental health disability. The problem with a proper order is it's a massive task. If you add in other protected characteristics where you're essentially oversimplifying what is a very complicated picture and you are ending up with potentially an analysis that doesn't mean anything or is simply false, as you do with gender pay gap statistics, because you're amalgamating a whole load of different criteria into a false picture. Yeah, and that is the problem. Equal pay requires specific comparisons. Gender pay gap analysis ends up with figures that relate to no human beings whatsoever. Nobody meets that criteria. Even the ONS analysis of gender pay is not actually one person. Nobody is actually the median person. So it gives a false picture, and I'm very wary about giving false pictures."*

[Thoughts on mandatory equal pay auditing for all employers?]

*"I think a proper equal pay audit would be incredibly valuable. The problem is that a half-baked equal pay audit is a disaster. Most people don't realize how complicated and difficult that is. If the EHRC can't see that there's a problem, how the hell is any a major employer (who's going to be biased anyway) going to be able to do it? If the EHRC doesn't know equal pay law that says, then the rest of us are up shit creek."*

[Thoughts on the new power for employment tribunals to order an equal pay audit?]

*"I don't think there's ever been an order made. The last time the MOJ answered that question, the answer was no. None had been ordered. And what on earth would a tribunal order? I mean, it's such a sop, an order is never going to happen. And when you order it, well, who's going to monitor the compliance with the order? You will have keep going back to the tribunal. There are new regulations that say how an audit should be conducted or how it should be checked, and what were you would do if you didn't agree with how it would be done. It is just a waste of time. Honestly. But it looks good, I mean, the worst thing is they think they've done something. I mean, I have been doing this for over 30 years now, and I can count on one hand the number of cases that have actually got to a final remedy hearing and an equal pay case. You would only ever get that order made if you went to a final remedy hearing. And then you have to ask the question, if the tribunal is just granted you a remedy, why do you need an equal pay audit? What is the point? The only point would be to order an audit of people who had not been involved in the litigation. But nobody is going to say, no you shouldn't do this because it just sounds so bad, but it's a complete waste of time. It is worse than doing nothing, really, because it looks as if you've done something when you haven't done anything."*

[Thoughts on the right to know?]

*"I think is a really brilliant idea because it was mine. It's the one thing that unites the disparate interests involved, on the trade union campaigning and litigator's side is the fact that there is no right. There is literally no right to pay transparency at all in the UK now, because the only thing that the Tories have done in relation to equal pay is to abolish the equal pay questionnaire. So there is literally no right to pay information. They say, well we brought in gender pay gap regulations and the answer to that is that's got nothing to do with equal pay. In fact, it's got so little to do with equal pay that your consultation document says specifically*

that – that it doesn't have anything to do with equal pay. You've got it in black and white. But don't tell me there's got something to do with equal pay. So they've literally done nothing about equal pay, actually equal pay, except make it worse and more difficult. The one thing this conversation illustrates, is that once you get over the statements of the obvious and you get down to looking at the nitty gritty, these are really, really difficult things. This is really difficult stuff. It's complicated, it's hard and it's contentious – all things that the politicians don't like. But we were able to unite around the need for having real pay transparency and politicians will very, very happily say, yeah, we agree with transparency. We're trying to sort of boomerang it back on themselves in the sense that the inability to look at the details is actually a good thing when it comes to this, because pay transparency is not straightforward. But you can't run an equal pay case without having pay information. I mean, it's absolutely basic, but when you get down to it, it's really quite difficult. I mean, go back to the BBC. They only had to disclose one hundred and fifty people and look at all the trouble that's caused. If you really want to tackle equal pay, then you can't do it without starting pay transparency. Everything else is then a diversion and a cul de sac, which, like the equal pay or order, makes you think you've done something when in fact you've done absolutely nothing. So pay transparency is absolutely core. What they weren't able to do was to find an easy solution to how long these cases take. It's the longest formal litigation of any type in the country and in the world I think. I mean, look at the Asda case in the Supreme Court. Well, one of the interesting things was the timetable. So that started in 2014 and they're not going to have... well, they have no idea. It doesn't look as if they will have a decision before 2030. And it's likely that Asda will stick it out, because that's what they did in America. So you've got 16 years before you got a single result. Well, that's just ridiculous. That's just totally unfair. What other form of litigation can you think of where you say, when you start, "we won't get a result for 16 years"? And they have never done an equal audit either. I think the pay transparency, equal pay audits, they sound straightforward, and they are the right things to do, but they're not straightforward.