
Report to
Council

19 May 2009

Report of
Director of Customer and Workforce Services and
Director of Finance and Legal Services

Title
Equal Pay Claims – Current Position and Proposal to Appeal to the Court of Appeal

1 Purpose of the Report

- 1.1 To report to Council the outcome of the appeal against the original Employment Tribunal decision in the equal pay claims case Ms Nicholls and others -v- Coventry City Council heard by the Employment Appeals Tribunal on 1-3 December 2008 and seek agreement to taking forward an appeal against part of that judgement to the Court of Appeal. This report needs to be read in conjunction with the associated private report on this agenda on the legal advice to the Council.

2 Recommendations

Council are asked to

- 2.1 Note the outcome of the Employment Appeals Tribunal decision and its implications for the Council.
- 2.2 Agree the taking forward of an Appeal to the Court of Appeal against part of the Employment Appeals Tribunal judgement in relation to the refuse bonus scheme should leave be granted.
- 2.3 To delegate authority to Cabinet in consultation with the Directors of Finance and Legal Services and Customer and Workforce Services and taking into account advice of the Head of Legal Services and the Council's external legal advisers to determine whether or not to appeal against any future decision that may arise in relation to any claims or otherwise for equal pay before an ET or any appellate court.
- 2.4 Have regard to the contents of this report when considering the recommendations contained in the report relating to this matter in the private part of the agenda for this meeting.

3 Information/Background

- 3.1 Following the job evaluation exercise and subsequent introduction of Single Status in June 2005, in December 2005 the Birmingham Employment Tribunal (ET) started to receive claims for equal pay against the Council, claiming that the Council had breached an equality clause in the Equal Pay Act 1970. The claimants were members of Unison and Unite (formerly Amicus and the T&G).
- 3.2 Claims continued into 2006 and there are currently 643 equal pay claims. In addition to the volume of the claims, rather than quote one comparator against whom the claimant is comparing their difference in pay, a large number of the claims are quoting multiple comparators which make the claims more complex. Of the claims 479 quoted refuse workers as a comparator. Of that number approximately 186 compared themselves only to refuse workers.
- 3.3 It was agreed for the initial ET:
- a) to 'bundle' claims together on the basis of their comparators; and
 - b) to hear the claims where claimants were citing refuse as a comparator either in isolation or as part of a group first.
- 3.4 Using the comparator of the refuse scheme would determine the largest number of claims in one tranche. It was also determined to hear the case in relation to the Council's 'genuine material factor' defence in respect of all of these claims before hearing any of the individual equal pay claims (referred to further below).
- 3.5 The trade unions' challenge to the Council was based on the following:
- Whether it was sex discrimination to have a bonus scheme in the refuse service (before Single Status) which did not apply to some other services employing more women;
 - Whether the Council's pay protection scheme (implemented as part of Single Status) should apply to the "gainers" as well as the "losers";
- 3.6 In addition to hearing the Council's defence on these two points, the Council put forward an overarching argument, which would have created a new potential defence, as follows:
- That the Council had a defence against equal pay claims (in connection with pay arrangements before Single Status) because of the efforts it had made over so many years to implement Single Status and which had been frustrated by the trade unions.
- 3.7 The original ET which sat in December 2007 found against the Council in respect of its 'overarching' defence and the refuse bonus scheme but found for it in respect of the pay protection issue. The Council appealed to the EAT on the two issues it lost and the trade unions cross appealed on pay protection point that they had lost. The EAT hearing was held between 1-3 December 2008 and judgement was received on 27 February 2009.
- 3.8 The EAT upheld the ET decision on the overarching defence and the refuse bonus and, additionally, remitted the pay protection issue back to the same ET that heard it previously. The issues can be outlined as follows:-

- 3.9 •**Refuse Bonus Scheme** - The claimants alleged that female workers in different service were unfairly paid less than the (male) refuse workers because of their gender. In other words claiming the refuse workers were paid more (i.e. a bonus) because they were men. The Council explained that this was not the case; the refuse bonus was put in place to improve the refuse service by incentivising and rewarding better productivity and performance. The ET agreed that the Council's refuse bonus scheme, (put in place in 1999), was a genuine, transparent and well monitored scheme that was about delivering a better service through increased productivity. This bonus scheme along with all others was abolished on the introduction of Single Status in 2005 which implemented pay equality. However the EAT upheld the ET's position in that the Council should at least have considered alternative methods of achieving its management objectives other than by payment of a bonus and it also considered whether it could apply similar schemes to groups of employees with a larger female workforce. As a result the ET found against the Council. It is the advice of Leading Counsel that the ET has erred in law for the following reasons. In order for the Council to justify the payment of the refuse bonus, it need only show that it was not caused by indirect sex discrimination and that it was instead caused by a need to improve the service by increased productivity and reduced absence.
- 3.10 The ET also failed to consider each of the claimant groups and their comparators in order to determine whether or not it was feasible for the refuse bonus scheme to be applied to them. Instead, the ET/EAT took a generic approach and held that there was no reason why the scheme could not be applied elsewhere.
- 3.11 The ET/EAT did not take into account Council evidence that the management techniques used to reduce absence levels were not successful and which provided further support to the introduction of the bonus scheme.
- 3.12 In view of the short timescale within which to appeal the Council made an application for leave to appeal to the Court of Appeal on 20 March 2009 on the outcome of the refuse bonus. Leave on the papers was refused on 27 April 2009. In view of this an application for leave, by way of an oral hearing, was made on 1 May 2009. A date has not been identified for the oral hearing. It is on this aspect that authority is being sought to continue with the appeal to the Court of Appeal should leave be granted.
- 3.13 The outcome of the two remaining issues are as follows:-
- 3.14 • **Pay Protection** - In addition to their claim for back pay, the claimants also claimed a sum equivalent to the pay protection the Council had paid the 'losers' in Single Status in order to cushion them from the pay reduction they received under Single Status. The issue was whether this should have been extended to those employees who should have received equal pay before the job evaluation scheme was introduced but did not do so (the 'gainers'). The claimants lost this argument. The ET had upheld the application of the Council's pay protection scheme which was introduced as part of the Single Status arrangements to protect the pay of those employees who had been re-graded at a lower level.
- 3.15 However, the EAT did not make a decision on this point and has reverted the matter back to the ET that heard the matter in the first instance. The reason provided for doing so was that the ET had made its decision on certain case law (the *Surtees* case) which found that it was justified not extending pay protection to 'gainers' because it could potentially be financially prohibitive to the Council and would have undermined the ability to reach agreement with the trade unions on the making of the job evaluation scheme. It was felt therefore that this principle could be applied by all tribunals dealing with similar multiple equal pay claims. However, the conclusion in that case was subsequently found to be unjustified by the Court of Appeal. The Court of Appeal found that the ET should make a

decision based on the facts of the individual case and whether an employer's decision not to extend the pay protection to 'gainers' can be objectively justified. As a result, the pay protection point remains undecided.

- 3.16 It is important to note that the EAT did not dismiss the Council's position on this point straight away and neither did the EAT determine that the Council's case is bound to fail when it is again presented to the ET. Therefore it is open to the original ET to re-confirm its original finding in favour of the Council. It is currently not known when the ET will review the pay protection issue.
- 3.17 • **Overarching defence** – The Council put forward an overall defence of the claims to the effect that the Council would not have been in receipt of these claims had it not been for the frustration of the trade union during the many years of negotiation to get a collective agreement and introduce Single Status. This would have been a new defence in law and would have set a significant precedent for local authorities and other employers. The Council had a significant weight of evidence on this issue but the ET and EAT were not persuaded by this argument and considered that the reasonable efforts made over many years by the Council were not a relevant consideration under the Equal Pay Act. This element of the Council's defence is not being pursued further on the advice of the Council's legal advisers and Leading Counsel.

4 Current Position

- 4.1 It is important to point out that at this stage the Council does not yet face any financial liability as no successful equal pay claims have yet been made. The ET and EAT have only heard the general defence against these claims as opposed to the individual defence on each claim. Claimants have yet to demonstrate on an individual basis that they are entitled to additional payments from the Council.
- 4.2 Potential liability pre June 2005 is for back pay. The maximum potential liability under the Equal Pay Act is for six years. However this period runs from the date the claim was submitted so for the majority of the claims this will be a maximum of 5.5 years, as the claims were submitted in February 2006 and there is no liability for the period from June 2005 after Single Status was implemented. However approximately 175 claims were not submitted until more than 12 months later, and therefore for those claimants, the maximum would be 4.5 years.
- 4.3 In any event the claimant would have to show that their work was rated as equivalent under an analytical Job Evaluation Scheme or that their work was of equal value for the entire period of back pay claimed. These are complicated areas that claimants will need to overcome as part of their claims. For example, in order to establish work of equal value it is quite an arduous process as ET special rules will apply in governing the appointment of an independent expert to report to the ET on the claimants' jobs and the comparators jobs to assist the ET in deciding whether the work was of equal value or not.

5 Key Issues

- 5.1 The key issue is whether the Council should appeal against that part of the judgement in relation to the refuse bonus referred to above.
- 5.2. After careful consideration by the Council's legal advisers and Leading Counsel and senior officers including the Head of Legal Services the recommendation to elected members is that the Council should appeal to the Court of Appeal should leave be granted. This advice

is being given after considerable thought following receipt of Leading Counsel's advice that is attached to the private report on your agenda. As can be seen from this report and Counsel's advice, there remains merit in appealing the EAT's decision. Succeeding on appeal would place the Council in a much stronger position to defend equal pay claims or to negotiate any settlement. In addition, the financial provision required to appeal is proportionate when compared to the potential liability to the Council were it not to appeal.

5.3 In summary, the legal and financial position of the Council and the potential liability of Council Tax payers are best served by appealing the EAT judgement on the refuse bonus scheme, should leave be granted.

6 Other Options

6.1 The other options available to the Council other than to appeal to the Court of Appeal on the refuse bonus issue are:-

6.2 Alternative Option 1: to await trade union pursuit of the individual equal pay claims through the legal process following the EAT judgement. However given the legal advice and the Council's responsibility to minimise the overall financial burden to the council tax payer, officers would advise continuing to pursue the issue through to the Court of Appeal stage for the reasons given above.

6.3 Alternative Option 2: to reach agreement with trades unions without resorting to further appeal. However, given the legal advice in relation to the Council's case, officers would not advise seeking to settle without challenging the EAT judgement in the Court of Appeal.

6.4 Under either Option, there also remains the pay protection issue to be decided which could further strengthen the Council's position.

7 Other specific implications

7.1

	Implications (See below)	No Implications
Best Value		<input type="checkbox"/>
Children and Young People		<input type="checkbox"/>
Climate Change & Sustainable Development		<input type="checkbox"/>
Comparable Benchmark Data		<input type="checkbox"/>
Corporate Parenting		<input type="checkbox"/>
Coventry Sustainable Community Strategy		<input type="checkbox"/>
Crime and Disorder		<input type="checkbox"/>
Equal Opportunities	<input type="checkbox"/>	
Finance	<input type="checkbox"/>	
Health and Safety		<input type="checkbox"/>

	Implications (See below)	No Implications
Human Resources	<input type="checkbox"/>	
Human Rights Act		<input type="checkbox"/>
Impact on Partner Organisations		<input type="checkbox"/>
Information and Communications Technology		<input type="checkbox"/>
Legal Implications	<input type="checkbox"/>	
Neighbourhood Management		<input type="checkbox"/>
Property Implications		<input type="checkbox"/>
Race Equality Scheme		<input type="checkbox"/>
Risk Management	<input type="checkbox"/>	
Trade Union Consultation	<input type="checkbox"/>	
Voluntary Sector – The Coventry Compact		<input type="checkbox"/>

8 Equal Opportunities and Human Resources

- 8.1 The claims made allege that the Council sexually discriminated against female workers prior to the introduction of single status in June 2005. The employment tribunal and the courts will determine whether or not an equality clause incorporated into contracts by virtue of the Equal Pay Act 1970 was breached prior to single status.

9 Finance

- 9.1 The legal fees for the Appeal are currently estimated at £30,000, which, even when added to the legal expenditure to date of £1,164,877, provides for proportionate expenditure when compared against the potential liability to the Council.
- 9.2 The budget setting process for 2008/09 identified a sum of £500,000 to support the cost of continued legal support on Equal Pay Claims. Approximately half this sum has been spent within 2008/09 and the remainder will be set aside to support any continuing costs in 2009/10 and beyond. The costs of £30,000 outlined above report will be funded from this sum.

10 Legal

- 10.1 The Council has sought appropriate expert legal advice on this issue and that is referred to in this report and the private report on your agenda

11 Risk Management

- 11.1 The legal and financial risks of pursuing the Appeal have been assessed by officers and the legal advisers to the Council. Whilst there could be a risk that the judgement that went in favour of the Council on pay protection initially could be overturned, the Council will review its position once the outcome is known. The risks of pursuing this Appeal on the refuse bonus needs to be assessed against the outcome. If the Council was successful at

challenging the judgement in relation to the refuse bonus then several hundred claims would be dismissed thus reducing the Council's liability and that of the Council tax payer.

12 Trade Union Consultation

12.1 This issue has not been consulted on with trade unions given the formal legal processes currently being undertaken which the trade unions are involved in.

13 Monitoring

13.1 Monitoring of progress will be undertaken through the Leadership of the Council, Cabinet Member (Finance and Value for Money), Directors of Finance and Legal Services and Customer and Workforce Services and the Heads of Legal Services and Human Resources.

14 Timescale and expected outcomes

14.1 There are currently no hearing dates set for the oral application for leave to appeal to the Court of Appeal on the refuse bonus or the determination of the pay protection issue at the ET.

	Yes	No
Key Decision		
Scrutiny Consideration (if yes, which Scrutiny meeting and date)		
Council Consideration (if yes, date of Council meeting)	√ 19 May 2009	

List of background papers

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Papers open to Public Inspection

Description of paper	Location
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