

**EXTRAORDINARY MEETING OF THE
COUNCIL OF THE CITY OF COVENTRY**

19th May, 2009

PRESENT

Lord Mayor (Councillor Matchet)

Deputy Lord Mayor (Councillor Harrison)

Councillor Adalat	Councillor Lapsa
Councillor Andrews	Councillor Lee
Councillor Arrowsmith	Councillor Mrs. Lucas
Councillor Asif	Councillor Maton
Councillor Auluck	Councillor McNicholas
Councillor Bailey	Councillor Mulhall
Councillor Bains	Councillor J. Mutton
Councillor Mrs. Bigham	Councillor Mrs. M. Mutton
Councillor Blundell	Councillor Nellist
Councillor Charley	Councillor Noonan
Councillor Chater	Councillor O'Boyle
Councillor Cliffe	Councillor O'Neill
Councillor Clifford	Councillor Miss. Reece
Councillor Crookes	Councillor Ridge
Councillor Mrs Dixon	Councillor Ridley
Councillor Duggins	Councillor Ruane
Councillor Field	Councillor Sawdon
Councillor Foster	Councillor Skinner
Councillor Gazey	Councillor Skipper
Councillor Harvard	Councillor Smith
Councillor Mrs. Johnson	Councillor Mrs. Sweet
Councillor Kelly	Councillor Taylor
Councillor Kelsey	Councillor Townshend
Councillor Khan	Councillor Mrs. Waters
Councillor Lakha	Councillor Williams
Councillor Lancaster	Councillor Windsor

Public Buisness

128. Declarations of Interest

The following Members declared personal interests in the matter referred to in Minutes 131 and 132 below relating to "Equal Pay Claims – Current Position and Proposal to Appeal to the Court of Appeal" as those Members were also members of trade unions:-

Councillor Mrs. Bigham
Councillor Chater
Councillor Clifford

Councillor Duggins
Councillor Field
Councillor Harrison
Councillor Kelly
Councillor Khan
Councillor Lakha
Councillor Lapsa
Councillor Mrs. Lucas
Councillor McNicholas
Councillor Mrs. Mutton
Councillor Mulhall
Councillor Nellist
Councillor O'Boyle
Councillor Windsor

The Members indicated remained in the meeting and took part in the decision thereon:-
129. **Exclusion of Press and Public**

RESOLVED that under Section 100A(4) of the Local Government Act 1972, the press and public be excluded from the meeting for the item of business referred to in Minute 132 below relating to "Equal Pay Claims – Current Position and Proposal to Appeal to the Court of Appeal" on the grounds that that item involves the likely disclosure of exempt information as defined in Paragraph 5 of Part I of Schedule 12A of that Act.

130. **Debate – Children Services**

Councillor Kelly moved the following Motion, which was seconded by Councillor Mutton:-

"Children Services in Coventry has been criticised in serious case reviews that have taken place in Coventry. It is clear that there has been a lack of political leadership, and a lack of political will to implement recommendations and improvements in practice. This Council calls on Councillor John Blundell, as Cabinet Member responsible for Children, Learning and Young People, to resign forthwith."

The following amendment was moved by Councillor Townshend, seconded by Councillor Mrs. M. Mutton and, under Paragraph 4.1.62 of the Constitution, accepted by Councillor Kelly, the mover of the original motion:-

"That the following words be inserted at the end of the Motion set out above:-

" and if he will not do so, then to submit to an independent external assessment of the adequacy and safety of child protection services, policies and procedures in Coventry."

RESOLVED that the Motion be not adopted.

(NOTE: In respect of the above, a recorded vote was required in accordance with Paragraph 4.1.71 of the City Council's Constitution. The Councillors voting for and against the motion were as follows:-

For	Against	Abstain
Councillor Asif	Councillor Adalat	Councillor Nellist
Councillor Auluck	Councillor Andrews	Councillor Windsor
Councillor Bains	Councillor Arrowsmith	
Councillor Mrs. Bigham	Councillor Bailey	
Councillor Chater	Councillor Blundell	
Councillor Clifford	Councillor Charley	
Councillor Duggins	Councillor Cliffe	
Councillor Harrison	Councillor Crookes	
Councillor Harvard	Councillor Mrs. Dixon	
Councillor Kelly	Councillor Field	
Councillor Khan	Councillor Foster	
Councillor Lakha	Councillor Gazey	
Councillor Lancaster	Councillor Mrs. Johnson	
Councillor Mrs. Lucas	Councillor Kelsey	
Councillor McNicholas	Councillor Lapsa	
Councillor Maton	Councillor Lee	
Councillor Mulhall	Councillor Noonan	
Councillor J. Mutton	Councillor O'Neill	
Councillor Mrs. M. Mutton	Councillor Ms. Reece	
Councillor O'Boyle	Councillor Ridge	
Councillor Ruane	Councillor Ridley	
Councillor Skipper	Councillor Sawdon	
Councillor Mrs. Sweet	Councillor Skinner	
Councillor Townshend	Councillor Smith	
	Councillor Taylor	
	Councillor Mrs. Waters	
	Councillor Williams	
	Lord Mayor	

(Result:
24 for,
28 against
2 abstentions)

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

The City Council considered a joint report of the Director of Customer and Workforce Services and the Director of Finance and Legal Services which detailed the outcome of the appeal against the original Employment Tribunal (ET) decision in the equal pay claims case Ms. Nicholls and others v Coventry City Council, heard by the Employment Appeals Tribunal (EAT) on 1st to 3rd December 2008 and which sought agreement to taking forward an appeal against part of that judgment to the Court of Appeal. The Council noted that a corresponding private report, detailing confidential

aspects of the issue, had also been submitted to this meeting (Minute 132 below refers).

Following the job evaluation exercise and subsequent introduction of Single Status in June 2005, in December 2005 the Birmingham Employment Tribunal 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). Claims continued into 2006 and there are currently 643 equal pay claims. In addition to the volume of the claims, rather than quoting one comparator against whom the complainant is comparing their difference in pay, a large number of claims are quoting multiple comparators which makes 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.

In consultation with both parties, the Tribunal decided to bundle claims together on the basis of the comparators and to hear the claims where claimants were citing refuse workers as a comparator either in isolation or part of a group first. The basis of the Tribunal approach was that the Unions were challenging the Council on whether it was sex discrimination to have a bonus scheme in the refuse service (before Single Status) which did not apply to some of the services employing more women; and whether the Council's pay protection scheme, implemented as part of Single Status, should apply to the "gainers" as well as the "losers".

In addition to hearing the Council's defence on these two points, the Tribunal also agreed to hear an overarching argument put forward by the Council, which would have created a new potential defence, as to whether 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.

The original ET sat in December 2007 and 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 that it lost and the trade unions cross appealed on the pay protection point that they had lost. The EAT upheld the ET's 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. These issues were outlined as follows:-

Refuse Bonus Scheme - The claimants alleged that female workers in different services 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 to increase 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 had 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 had erred in law for the following reasons:-

- 1) 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.
- 2) The ET also failed to consider that 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) The ET/EAT did not take into account the 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.

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 25th March, 2009 on the outcome of the refuse bonus. Leave on the papers was refused on 27th April 2009. In view, of this an application for leave, by way of an oral hearing, was made on 1st May, 2009. A date had not yet 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.

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 that 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 complainants 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 regraded at a lower level.

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 which found that it was justified in 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, who 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.

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 reconfirm its original findings in favour of the Council. It is currently not known when the Employment Tribunal will review the pay protection issue.

Overarching Defence - The Council put forward an overall defence of the claims to the effect that the Council would not have in receipt of these claims had it not been for the frustration of the trade unions during the many years of negotiations to get a collective agreement and introduce Single Status. This would have been a new defence in law and would have set a precedent for local authorities and other employers. The Council had a significant weight of evidence on this issue but the ET and the EAT were not persuaded by this argument and considered that the reasonable efforts made over many years made by the Council was 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 advisors and Leading Counsel.

The report indicated that it was important to point out at this stage that 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 were entitled to additional payments from the Council. 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 that 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 these claimants, the maximum would be 4.5 years.

In any event the claimant would have to show that their work was rated as an 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'S special rules will apply in governing the appointment of an independent expert to report to the ET on the complainants' jobs and the comparators' jobs to assist the ET in deciding whether the work was of equal value or not.

The key issue is whether the Council should appeal against that part of the judgment in relation to the refuse bonus scheme referred to above. After careful consideration by the Council's legal advisers and Leading Counsel and senior officers including the Head of Legal Services, the report recommended that the Council should appeal to the Court of Appeal, should leave be granted. This advice was given after considerable thought following receipt of Leading Counsel's advice that was contained in the private report relating to this matter (Minute 132 below refers). 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. The report detailed the following other options available to the Council other than to appeal to the Court of Appeal on the refuse bonus scheme:-

- (1) Option 1 – To await trade union pursuit of the individual pay claims through the legal process following the EAT's judgment. 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 the Court of Appeal stage for the reasons given above.
- (2) Option 2 – To reach agreement with the trade unions without resorting to a further appeal. However the legal advice in relation to the Council's case, officers would not advise seeking to settle without challenging the EAT's judgment in the Court of Appeal.

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

Councillor Foster Cabinet Member (Finance and Value for Money), gave an oral update at the meeting on the total legal fees for, both single status and equal pay tribunal matters which currently stood at £1,237,870. Expenditure in 2008/09 was £248,209 and there was no expenditure to date in the current financial year.

An amendment was moved by Councillor Townshend, seconded by Councillor Mutton and lost that the recommendations contained in the report be amended to read as follows:-

- "2.1 Note the outcome of the Employment Appeals Tribunal's decision and its implications for the Council.

- 2.2 Defer 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 for such a period of time as the Court of Appeal may be minded to stay the appeal to afford the parties to the proceedings to explore Alternative Dispute Resolution in respect of the matters which are the subject of such an appeal.
- 2.3 To require the authority of the Full Council 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 Employment Tribunal or any appellat court.
- 2.4 Have regard to the contents of this report when considering the recommendations as contained in the report relating to this matter in the private part of the agenda for this meeting.
- 2.5 Require the appropriate Cabinet Member to report to the Full Council at every meeting as to the ongoing financial cost to the Council in respect of the issue of equal pay claims."

RESOLVED:-

- (1) That the outcome of the Employment Appeals Tribunal decision and its implications for the Council be noted.**
- (2) That approval be given to 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.**
- (3) That authority be delegated 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 decisions that may arise in relation to any claims or otherwise for equal pay before an Employment Tribunal or any appellat court.**
- (4) That regard be given 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 (Minute 132/08 below refers)**

Private Business

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

Further to Minute 131 above relating to the public aspects of this matter, the Council considered a joint report of the Director of Customer and Workforce Services

and Director of Finance and Legal Services which detailed 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 1st to 3rd December 2008. The report sought agreement to take forward an appeal against part of that judgment to the Court of Appeal.

A copy of the legal advice provided on the merits of appealing was appended to the report submitted.

An amendment was moved by Councillor Townshend, seconded by Councillor Mutton and lost that the recommendations contained in the report be amended to read as follows:-

- "2.1 Consider Leading Counsel's advice.
- 2.2 Defer 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 for such a period of time as the Court of Appeal may be minded to stay the appeal to afford the parties to the proceedings to explore Alternative Dispute Resolution in respect of the matters which are the subject of such an appeal.
- 2.3 Require the appropriate Cabinet Member to report to Full Council at every meeting as to the ongoing financial cost to the Council in respect of the issue of equal pay claims."

RESOLVED that, having considered Leading Counsel's advice agreement be given to the taking forward of an Appeal to the Court of Appeal against part of the Employment Appeals Tribunal's judgment in relation to the refuse bonus scheme, should leave to appeal be granted.

133. **Thanks to Lord Mayor**

Members of the City Council paid tribute to the work undertaken by Councillor Matchet during his Mayoralty Year 2008/09 particularly in relation to his work a unity, diversity and cohesion issues and his impartial chairing meetings of the City Council.