

7 December 2010

Name of Cabinet Member:
Cabinet Member (Policy, Leadership and Governance) – Councillor J. Mutton

Director Approving Submission of the report:
Director of Customer and Workforce Services and Director of Finance and Legal Services

Ward(s) affected:
All

Title:
Proposed Settlement of Equal Pay Claims

Is this a key decision?

No. In view of the extent of the proposals contained within this report a meeting of Full Council is required to consider these proposals.

Executive Summary:

The Council's Single Status Terms and Conditions were imposed in June 2005. Single Status was introduced to eliminate traditional differences in pay and conditions between former officer and manual workers and introduce Equal Pay in the Council's workforce. Approximately 10,500 employees were affected by the introduction of single status. All councils had to implement similar schemes by April 2007, in accordance with the National Implementation Agreement of 2004.

The system was based on a job evaluation scheme, which scored jobs and fitted them into a new grading system. There was a 5 year protection scheme, negotiated previously with the Trade Unions, to protect, in cash terms, losses in pay suffered as a result of the introduction of Single Status.

In February 2006 the Birmingham Employment Tribunal began to receive equal pay claims from council employees, many of whom were gainers, (i.e were being paid more as a consequence of the introduction of single status than they had been previously) who felt they had a claim for equal pay because they had previously been in receipt of lower pay levels than an equivalent comparator. The majority of claims were brought by Trade Unions on behalf of employees, although some individual claims have been brought by non union members. The number of current equal pay claims in the case in question stands at approximately 894. This multiple claim was closed by the Tribunal to new claimants after 9 August 2010. Since this date the Council have received a further 15 equal pay claims. These will be determined separately and are not the subject of this report.

Between September and December 2007 an employment tribunal heard those equal pay claims

brought by female employees comparing themselves with refuse collectors and drivers who, prior to single status imposition, were in receipt of bonus payments. The council unsuccessfully defended these claims and appealed the tribunal's decision but subsequently lost its appeal.

The trade unions, on behalf of the claimants, also argued at the tribunal that the council's five year pay protection agreement for Losers continued the inequality in pay and argued that the claimant in addition to being entitled to up to 6 years back pay were also entitled to compensation equivalent to an additional 5 years' pay protection for the years we continued to protect the comparator Losers. This issue has now been considered twice by a tribunal and on each occasion the council has successfully defended this point. However, the trade unions have now lodged a further appeal against the tribunal's decision. This could take several months to be considered.

As a result of the commitment of the new administration of the Council in May, negotiations with the trade unions began in July 2010 in respect of the settlement of the current equal pay claims against the Council.

It is recognised that given their current vulnerability to litigation Trade Unions are not willing to recommend any negotiated settlements to their members of less than 100% of the claim for fear of being sued. However, at the close of the negotiations on 23 November 2010, the trade unions confirmed that the terms of the proposed offer were such that they would not recommend rejection of the offer to their members.

The proposed settlement offer is not made to all 894 claimants. There are a number of claimants, currently 154, that are excluded where the Council is not satisfied that the claims are valid – for example where claimants are on a lower grade than their comparator; where claims are brought out of time or claimants are employed at Voluntary Aided schools, or the claims do not involve bonus earning comparators and significant further evidence is needed to determine whether there is a valid case.

The cost of settlement with the 740 of the 894 total claims totals approximately £5.6 million. The settlement of claims will be accompanied by a waiver from employees to the current and any future claims in respect of equal pay including claims against the pay protection scheme.

Discussions between the council's and Trade Union legal advisors continue with regard to the legitimacy of the outstanding 154 claims and it is envisaged that a small number of these may be added to the settlement population at a later date.

Recommendations:

1. To approve the proposed settlement offer set out in the report to the 740 claimants and within the estimated financial provision provided under section 7.
2. To delegate authority to the Director of Customer and Workforce Services and the Director of Finance and Legal Services in liaison with the Leader of the Council to accept any additional claims from those currently rejected and fund payments as outlined in the report and following recommendations from the Council's legal advisors. These additional claims are potentially drawn from the 154 rejected as referred to in section 2 of the report.
3. To allow payments to be made on the basis of the proposed settlement up to a maximum total of £7.5 million.

4. To reaffirm that this spending will be capitalised under the capitalisation direction that the Council has been granted, and will be resourced by prudential borrowing, as laid out in section 7 of this report.

List of Appendices included:

None

Background papers:

Report to Council 8 February 2005 – Implementing Single Status – Available from the Council's Website via the following link:

<http://cmis.coventry.gov.uk/CMISWebPublic/MeetingDocuments.aspx?meetingID=483>

Has it or will it be considered by Scrutiny?

No

Has it, or will it be considered by any other Council Committee, Advisory Panel or other body?

No

Will this report go to Council?

Yes, 7 December 2010

**Report title:
Equal Pay Claims' Settlement Proposals**

1. Context (or background)

Equal pay legislation requires that men and women should receive equal pay for equal work (work rated as equivalent or work of equal value). To meet this all councils were required by national agreement to review their terms and conditions for 'officers' and 'manual workers' and bring about a single set of terms and conditions which removed any inequality. This is known as Single Status and there was a requirement for all councils to do this by April 2007.

The City Council had been negotiating single status with the Trade Unions for a number of years. Negotiations broke down and the Council introduced its Single Status package in June 2005 to bring about equal pay across the Council's workforce. The system was based on a job evaluation scheme, which scored jobs and fitted them into a new grading system. Approximately 10,500 employees were affected by the introduction of single status. Employees were affected in three ways as either gainers, losers or simply assimilated into the new arrangements. The breakdown was as follows:

- Losers: 1637
- Assimilated: 5375
- Gainers: 3528

There was a 5 year protection scheme, negotiated previously with the Trade Unions and agreed by a ballot to protect in cash terms losses in pay suffered as a result of the introduction of Single Status.

In February 2006 the Birmingham Employment Tribunal began to receive equal pay claims from council employees, many of whom were gainers, who felt they had a claim for equal pay because they had previously been in receipt of lower pay levels than an equivalent comparator. The majority of claims were brought by Trade Unions on behalf of employees, although some individual claims have been brought by non union members. The number of current equal pay claims in the case in question stands at approximately 894. This multiple claim was closed by the Tribunal to new claimants after 9 August 2010. Since this date the Council have received a further 15 equal pay claims. These will be determined separately and are not the subject of this report.

Between September and December 2007 the Birmingham Employment Tribunal considered the Refuse Bonus Scheme that had been in place in Coventry City Council together with the 5 year Pay Protection arrangements that had been put in place to protect the pay of losers under Single Status. The Employment tribunal found that the Refuse Bonus was not objectively justified but that the 5 year Pay Protection arrangement was.

The Council appealed to the Employment Appeal Tribunal (EAT) in relation to the Refuse Bonus finding and the Trade Unions appealed to the EAT in relation to the Pay Protection finding. The EAT dismissed the Council's appeal and remitted the Pay Protection issue back to the original Employment Tribunal to review this, in light of the changes to case law. The Council sought leave to appeal to the Court of Appeal on the refuse bonus point, but was ultimately refused leave to appeal.

The remitted hearing to decide the Pay Protection point was heard in the Birmingham Employment Tribunal during the week commencing 23 August 2010 and was determined in the Council's favour. However the Trade Unions have recently lodged a further appeal relating to Pay Protection with the Employment Appeal Tribunal against this decision.

Setting aside the protection issue, the back pay claims are by no means all concluded and other questions need to be determined by the Employment Tribunal before the claims can be resolved and this could take many years.

For example with regards to whether or not some of the claims demonstrate equal value with their comparators. This question is the subject of a hearing set by the Tribunal in a hearing scheduled from 23 to 27 July 2012. This involves over 700 claims.

55 claimants however are not reliant on equal value and can instead rely on being rated as equivalent with their comparators under the White Book Job Evaluation Scheme (JES). These claimants have essentially made out their equal pay claim against the Council in terms of the 6 year back pay period.

The litigation to date has only been in respect of 630 claims where claimants have used the refuse workers as comparators. Further claims are now being considered by the Employment Tribunal which are using other Coventry bonus schemes and the Tribunal has set down directions which culminate with a 42 day hearing in January and February 2012.

Unlike many other Councils who have received equal pay claims, Coventry is unusual in that a number of the claimants cited officers who previously were on the same terms and conditions of service (Admin, Professional, Technical and Clerical – known as the Purple Book) as comparators with no obvious gender disparity. These claims are different from the traditional equal pay claims widely brought against the council and other local authorities which tend to use comparators from service areas in receipt of bonus payments comprising of mainly male employees. It is harder to see how these claims would be successful in Tribunal given no gender disparity or comparison with bonus payments.

The current administration prior to taking control of the Council in May 2010 had committed to bring an end to the current litigation and to negotiate with the Trade Unions to settle legitimate claims. Since May the Leader has been taking advice from officers and legal advisors about how best to achieve this and has included discussion with the Trade Unions.

In addition, the current position on the Pay Protection point is in the Council's favour and the Council remains robust in its position in defending the further appeal made by the Trade Unions. This has provided a window of opportunity to begin affordable settlements with the current claimants who the council believes, on balance, are likely to make out a valid claim.

2. Current Position

The number of current equal pay claims in the case in question stands at approximately 894. This multiple claim was closed by the Tribunal to new claimants after 9 August 2010. Since this date the Council have received a further 15 equal pay claims. These will be determined separately and are not the subject of this report.

Negotiations with the trade unions commenced in July 2010. Negotiations concluded on 23 November 2010 at which the Leader proposed an offer to settle 740 of the 894 claims. The settlement offer is not made to all 894 claimants. There are a number of claimants, currently 154, that are excluded where the Council believes the claims are not valid – for example where claimants are on a lower grade than their comparator; where claimants whose claims are brought out of time or claimants are employed at Voluntary Aided schools.

It should be noted that as work on the detail of individual claims continues, the numbers

of claimants and the numbers of potential settlements will vary slightly on a daily basis.

The calculation of the sum settled is complex and therefore we have had to take a pragmatic approach to the calculation of each claimant's potential entitlement. Backpay for each claimant goes back over their relevant employment history for up to 6 years from 1st June 2005 when single status was implemented. To calculate this accurately would involve detailed examination of individual monthly pay records for each of the 740 claimants. The approach that has been taken has been to estimate for each claimant an equivalent annual salary as at 31st May 2005 and to compare that with their equal pay comparator. This has provided an annual pay gap based on their individual service record; this has then been used to calculate each of the claimants settlement entitlement based on the timing of their claim up to a legal maximum of 6 years.

The offer to settle subject to approval by Council, is 70% of the estimated value of each actual claim as detailed above. The costs to the Council will include employers' National Insurance contributions where appropriate. Similarly, payments to individuals will be subject to tax and national insurance contributions where appropriate. The treatment of tax and national insurance is currently under discussion with HMRC. Advice from the West Midlands Pension Fund is that these payments are not pensionable.

The cost of the settlement with the 740 claimants is approximately £5.6 million. The cost will be met from a provision of £30m held by the City Council to meet the potential costs of equal pay claims. This provision is resourced by prudential borrowing based on a capitalisation direction from DCLG allowing the Council to treat these payments as capital.

It is therefore proposed that Council approve a total spending on this settlement of up to £7.5 million, in order to allow the Director of Customer and Workforce Services and the Director of Finance and Legal Services in liaison with the Leader of the Council the ability to agree any subsequent claims for settlement following recommendations from the Council's legal advisors.

It is recognised that given the current vulnerability to litigation Trade Unions are not willing to recommend any negotiated settlements to their members of less than 100% of the claim for fear of being sued. However, at the close of the negotiations on 23 November 2010, the trade unions confirmed that the terms of the offer were such that they would not recommend rejection of the offer to their members.

It is important to note that claimants who are unwilling to accept the settlement may continue to pursue their equal pay claims via the Employment Tribunal and may be successful.

3. Recommendation

Council is recommended to:

1. To approve the proposed settlement offer set out in the report to the 740 claimants and the approach to obtaining waivers from employees for current and future claims.
2. To delegate authority to the Director of Customer and Workforce Services and the Director of Finance and Legal Services in liaison with the Leader of the Council to accept any additional claims from those currently rejected and fund payments as outlined in the report and following recommendations from the Council's legal advisors. These additional claims are potentially drawn from the 154 rejected as referred to in section 2 of the report.
3. To allow payments to be made on the basis of the proposed settlement up to a maximum total of £7.5 million.

4. To reaffirm that this spending will be capitalised under the capitalisation direction that the Council has been granted, and will be resourced by prudential borrowing, as laid out in section 7 of this report.

4. Results of Consultation Undertaken

Trade union negotiations in respect of the settlement of equal pay claims commenced in July 2010 and concluded on 23 November 2010. The trade unions will not actively recommend the settlement proposal to their member claimants but it is expected that they will not recommend rejection of the offer when they advise their members.

5. Options considered and recommended proposal

The proposal contained in this report is to settle 740 equal pay claims, which is circa 83% of the total claims, having excluded certain categories of claim as detailed above. Offers are to be made on a reduced liability basis, i.e. 70% of actual claim entitlement, taking into account the benefit of secured and accelerated receipt by claimants and removal of litigation risk to the claimants. The proposed offers include no payment in relation to any liability for Pay Protection or interest and employees will be expected to pay tax and national insurance. Advice from the West Midlands Pension Fund is that these payments are not pensionable.

6. Timetable for implementing this decision

Offer letters will be sent to staff outlining the offer and the conditions of the offer by 10 December 2010. Trade Unions have indicated that between the issuing of the letter and Christmas they will meet with their members and take them through the offer. It is the Council's intention in the letter to arrange meetings for ACAS to provide advice to potential claimants and the signing of the COT3 agreements. The COT3 agreements are formal settlement agreements with potential claimants through ACAS.

7. Comments from Director of Finance and Legal Services

7.1 In May 2008 the City Council applied for a Capitalisation Direction to allow it to treat any costs arising from Equal pay claims as capital expenditure. It is proposed that the costs of the proposal in this report, estimated at up to £7.5m, be met from this provision. Without this facility, these costs would need to be met from revenue which could have a devastating effect on the Council's finance in any single year.

7.2 The City Council has drawn down a capitalisation facility of £30m which it has used to resource a provision for its potential equal pay liabilities. It is proposed that the costs of the proposal in this report, estimated at up to £7.5m be met from this provision.

7.3 The costs will be capitalised, and met from prudential borrowing.

7.4 This prudential borrowing will incur two streams of cost:

- repayment of the principal sum (the estimated costs of £7.5 million). The annual costs of this are called Minimum Revenue Provision or MRP in local government finance regulations
- interest on that sum.

7.5 The City Council's base budget includes full provision to meet the MRP on the £30 million capitalisation direction evenly over its 20 year life (£1.5 million per annum)

- 7.6 The additional cost of interest arising from these costs will be up to approximately £375,000 in a full year.
- 7.7 Because only part of the total Capitalisation Direction of £30 million is being used this additional interest cost can be funded from existing budgets identified in 7.5 above.
- 7.8 Because significant risks from equal pay claims remain, it is proposed to retain the full £30m provision at this point but to keep its future under review. It will be necessary to continue to make some low level MRP payments on this unused element to keep it in place. These, along with the interest costs can also be met by existing budgets, outlined in 7.5 above.
- 7.9 The legislation that governs equal pay is the Equal Pay Act 1970 and the Equality Act 2010. This legal framework provides the statutory obligation to pay men and women equally for equal work (like work, work rates as equivalent or work of equal value). The law implies an equality clause into contracts in order to replace less favourable contract terms for women, for example, those of more favourable terms found in contracts for men.
- 7.10 However, the equality clause does not operate if the employer shows that the difference in contractual terms is due to a material factor which is neither directly nor indirectly discriminatory and, in cases of indirect discrimination, cannot be objectively justified. If therefore an employee can demonstrate a pay disparity with a member of the opposite sex and that they carry out equal work, then without an objectively justified ground for the disparity, the employer is obliged to increase the employee's pay in line with the comparator and to pay the employee back pay for up to 6 years, which is the maximum back pay period that can be claimed for.
- 7.11 The proposed settlement is aimed at reducing the number of existing equal pay claims. Employees accepting the offer of settlement will be required to complete appropriate documentation to secure legal compliance and to end all and any claims against the Council.

8. How will this contribute to achievement of the Council's key objectives / corporate priorities (corporate plan/scorecard) / organisational blueprint / LAA (or Coventry SCS)?

These proposals will contribute to the delivery of the Medium Term Financial Strategy by reducing one of the key financial risks facing the authority in the form of its liability to equal pay claims.

9. How is risk being managed?

It is important to note that the proposal to settle a proportion of the claims does not remove all potential liability for future Equal Pay claims.

It is unlikely that all of the current offers proposed in this report will be accepted by the claimants and they will continue to pursue their claim through the Tribunal process. There are also ongoing risks to the Council of further claims being made against it both in terms of historic Equal Pay issues, and if there is a change to the existing judgement on pay protection which goes in favour of the Trade Unions, against the five year pay protection scheme introduced by the Council as part of Single Status. It is very difficult to quantify the overall potential outstanding liability. However, it will certainly be very significantly reduced if the Trade Union appeal on pay protection is unsuccessful.

As outlined above, the Trade Unions are appealing against a Tribunal decision that the Council's pay protection arrangements were appropriate. Despite this further appeal, the Council remains robust in its defence with regard to Pay Protection and the settlement proposals contain no payment for the pay protection claims. However, the settlement offers will be subject to entering into settlement agreements that contain a waiver of all equal pay claims, including in relation to pay protection, in order to settle that potential liability, as is prudent and customary in such circumstances.

Employees that agree to conclude their claims will be required to confirm as part of the arrangement that this will settle all and any claims the employee may have arising out of or in relation to the move onto Single Status terms and conditions. This removes the risk from this group of employees and provides some closure on a very long running dispute between them and the council. It does at least provide certainty in relation to claims already brought, which should not be underestimated in a legal landscape which is ever evolving.

Without settlement the litigation is set to run for at least another 20 months and the resultant cost to the council in terms of legal cost and staffing resource is significant. It is accepted that this litigation will run if not all offers are accepted, but at least this is likely to be for a significantly reduced number of claims. The case law developments in this area are making successful defence of bonus schemes very difficult even where the productivity gains of the schemes are evident and therefore settlement at this point is considered to be strategically and operationally the most practical solution.

In financial terms, as indication in Section 7, the Council will keep its full £30million provision, less any claims settled on the basis of this report to cover any future costs which may arise.

10 What is the impact on the organisation?

The payment of the claims and the need to plan for future possible liability continues to place a very large strain on the Council's finances, at a time when it is facing the most difficult financial climate in many years. The continued defence of such large numbers of claims is also putting a strain on HR services which could be better utilised on other council priorities.

11 Equalities/ EIA

Equality Impacts Assessments have been undertaken on the impact of single status implementation. Prior to single status, the impact assessment showed that in certain grades, men received at least 8% more in terms of total earnings than women. The most recent assessment was undertaken in January 2010 and demonstrated that this pay gap was now less than 1% and will continue to fall.

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Appendices