

# Equality of Opportunity Committee

## EOC(3)-05-10 : Paper 1

### WLGA / SOLACE Evidence to the Welsh Assembly Government's Equality of Opportunity Committee's Scrutiny Session on Equal Pay

#### Single Status Implementation in Local Government - Update

##### Introduction

1. On 15<sup>th</sup> January 2009 the Welsh Local Government Association (WLGA) gave evidence on local authority progress on Single Status implementation to the National Assembly for Wales' Health, Wellbeing and Local Government Committee. Detailed evidence papers were prepared for that meeting and further copies have been supplied to the deputy committee clerk to provide relevant background information for the Equality of Opportunity Committee's meeting.
2. This paper will update the Committee on progress and issues since that time until the present.
3. As the Society of Local Authority Chief Executive's (Solace) has also been invited to give evidence, this paper is presented as a joint one between Solace and WLGA.

##### Issues Arising Since July 2009

4. Two main issues have arisen since around July 2009 which have served to place considerable additional burdens on local authorities, both financial and in terms of extra work and difficult obstacles to overcome. These are as follows:

##### Second Generation Claims

5. The trades unions have been very active in seeking and taking additional equal pay claims across many authorities, including even those authorities such as Neath Port Talbot and Torfaen for whom they have expressed praise for the manner in which the Single Status process was carried out and implemented. These claims are different to those based on the payment of historic bonuses to mainly male employees.
6. Some of these claims are on the basis of pay protection paid to those employees who are losing pay. The claimants cite as comparators those of the opposite gender who have been rated as equivalent but are pay protected at a higher level for a period to cushion the effect of losing pay following implementation of the new pay and grading structure.
7. However, the claims taken with regard to pay protection are not just around traditional express pay protection, but also around implied pay protection. For example where, in order to reduce 'red circles' people have been assimilated to the top of a grade band rather than the bottom.
8. The trades unions have also been very active in seeking out retrospective Job Evaluation Scheme (JES) claims from those who have gained as a result of the job evaluation exercise- 'Gainer' claims. These relate to employees who are graded higher and therefore earning more following job evaluation, and can cite a comparator of the opposite sex at the same level who was also earning more than them beforehand. There is no automatic entitlement to 6 years back pay in these circumstances but it can be argued via an 'equal value' claim that they should have been paid the same for the last 6 years. Publishing the JES results gives the information on which equal value claims can be made.

##### Trades Unions Refusal to Enter into Collective Agreements on Single Status

9. The most recent development affecting progress is that the Trades Unions have decided at a National level that no more collective agreements on single Status can be entered into without the inclusion of what is being referred to as the 'Fareham clause' (see paragraph 10). This is because of concerns regarding the risk of action against any union on the basis that the agreement that was entered into was in some way discriminatory against their women members. While this was initially a Unison decision it is understood that an agreement has now been entered into between all the three relevant local government trades unions.
10. The Fareham clause (presumably so called as first used at Fareham Borough Council) is a form of words which seeks to tie the local authority into effectively proffering a blank cheque with regard to settling equal pay claims. The WLGA has obtained Counsel's advice on the wisdom of councils' incorporating this clause within a collective agreement on Single Status, and the advice is that it would be very unwise indeed.
11. The impact of the union's decision regarding collective agreements is that local authorities now cannot implement Single Status locally without separately consulting each and every employee employed under 'green book' terms and conditions, and obtaining their individual agreement. This is because implementing a new pay structure and terms and conditions would involve a change of contract which can only be lawfully affected by either a collective or individual agreement, and a collective agreement is no longer an option.
12. Where employees do not agree to the change the only option available to the employer to effect the change is dismissal and re-

engagement on the new contract terms. This situation is now putting authorities in the position of having to undertake a great deal more work to implement Single Status, as well as leaving them open to unfair dismissal and / or breach of contract claims from any employees dismissed and re-engaged.

13. Three authorities are currently affected by this latest development. Two have had a successful ballot of staff only to find that the unions will not enable their member's democratic vote to be implemented by signing the collective agreement. The other had reached agreement in principle and was expecting to move on to the ballot stage only to find that the unions wish to insert the 'Fareham clause' into the collective agreement and are refusing to ballot otherwise. However, all the remaining authorities that have yet to complete the Single Status process will be affected in due course.

### **Progress to Date**

14. Despite the succession of obstacles places in their way, authorities have still managed to make progress over the period since July 2009. Nine local authorities have now made equal pay compensation payments. These are Blaenau Gwent, Caerphilly, Cardiff, Gwynedd, Merthyr, Neath Port Talbot, Rhondda Cynon Taff, Swansea and Torfaen. (However, it must be recognised that this does not mean that the issues are resolved for any of them, because of the all the additional second generation claims that have been taken as described earlier in this report).

15. Five councils managed to obtain collective agreements on Single Status and new pay and grading structures before the shift in the trades unions position. These are Caerphilly, Gwynedd, Neath Port Talbot, Torfaen and Wrexham. Another two would have done so and a third most probably would be on the verge of doing so had that shift not taken place.

16. All other councils have substantially finished their first round job evaluation exercises. However, diminishing budgets and the requirement for efficiency savings has meant that for most re-structuring is a constant exercise. They are therefore forever trying to play 'catch up' with the process of re-evaluating hundreds of jobs after re-structuring.

<p><b>Anna Freeman</b> <b>WLGA Director of Employment</b></p>	<p><b>Alison Ward</b> <b>Chief Executive Torfaen CBC</b> <b>SOLACE HR Lead</b></p>
---	--

### **Appendix**

**Paper that was produced for the Health, Wellbeing and Local Government Committee hearing last year on equal pay in local government, as useful background reading on the issues.**

#### **Single Status Implementation in Local Government**

##### **Background**

1. The vast majority of equal pay issues in local government relate to the application of bonus schemes within male dominated occupations. The history of such schemes is far from one of deliberate discrimination against women. In 1967 the then National board for Prices and Incomes addressed the need for higher productivity, linking this with the relatively low-paid groups within public sector manual workforces. It was recommended that higher wages could be achieved in a time of pay-freeze if productivity was improved. Schemes were to be based on properly undertaken work studies. The trades unions were active and supportive in their implementation.

2. The concentration of work study effort was on jobs which lent themselves most easily to measurement and productivity improvement. Employees in these areas of work tended to be full time male manual workers. Over time a situation developed where the majority of jobs done by mainly full-time male manual workers were paid bonus while jobs done by mainly female manuals were not. (Few part time workers whether male or female received bonus).

3. A job evaluation scheme for manual workers was introduced in the 80's (the White Book Scheme) and this was used to assimilate all manual jobs onto the new scheme. As a result many of the female dominated manual occupations were rated 'as equivalent' to various male dominated manual occupations. The resultant grading and basic rate of pay was therefore the same, but many of the male manual occupations had an additional 'bonus' component to pay, while the female dominated jobs generally did not. It is this job evaluation exercise and the difficulty in addressing the bonus anomalies that has led to the current equal pay crisis, but the complexities that have accrued in recent times have compounded the problems.

4. Compulsory Competitive Tendering Legislation had a major impact on bonus schemes. As a result many schemes were re-shaped in the early and late 80's following the CCT legislation. Across many areas of the UK bonus ceased to be a local government problem as large areas of manual work were outsourced to the private sector. However, within Wales there has been a strong commitment to the Direct Labour Organisation which has generally kept the work, and the problems, in house.

5. Within Wales and as a consequence of Local Government Reorganisation the terms and conditions of staff from the former outgoing authorities were transferred under Statutory Order to the new Unitary successor councils including prevailing bonus / productivity schemes. The 1997 Single Status Agreement within local government brought former 'manual' and 'white collar' staff on to a single pay

spine and committed local authorities to harmonising terms and conditions (including, and importantly, pay) for the two groups. This included a review of local grading structures to ensure that they were fair and non-discriminatory. It was recognised that job evaluation was the only way to ensure that new structures were equal pay proofed. It was agreed that all local authorities would review their grading structures under the single status agreement.

6. However, the trades unions have naturally been very unwilling to agree that bonus must go where this would mean a pay cut for their members and at that point also extended the retention of the schemes under TUPE protection arrangements. On the other hand consolidating bonus and bringing female comparators up to the same level would be impossibly expensive for local authorities (particularly as it would need impact on pay levels across the whole pay structure or otherwise distort new job evaluated pay and grading structures). This difficulty resulted in deadlock on the issue of bonus for many years.

7. While some of this history may suggest that women working in some manual occupations in local government have fared very poorly in terms of pay it must be remembered that generally the rates of pay have been considerably above those offered by the private sector for equivalent roles. Also, more significantly, women working in the large female dominated area of care have had greater access than the men to premium rates of pay for Saturday and Sunday working as part of their normal working week. While there needs to be greater legal clarity over what counts as pay for the purposes of the EPA and equal pay claims, this additional element has in reality served to close any actual pay gap considerably.

### **The Barriers to Progress on Pay and Grading Reviews**

8. Across the UK progress on job evaluation was slow before the 2004 Local Government Pay Agreement. The reasons for this were many and various. For example:

The 1997 agreement set no timetables

The Single Status agreement laid down that the trades unions should be fully involved in the pay and grading review, and local authorities have generally adopted a partnership approach. However, as an outcome job evaluation has tended to be treated almost as an individual employee right not a management tool. The high numbers of jobs evaluated has made the process very resource intensive and the outcomes difficult to manage

Job evaluation was not seen as a priority early on (by unions or Employers) so resources were often not allocated to what was a very resource intensive exercise

There were difficult industrial relations issues regarding bonus, the unions would not agree to it being removed, consolidating it would not resolve the problem and the employers could not afford to do this anyway. Other solutions such as job enrichment to justify maintaining the higher rate of pay have been utilised but have not always been practicable.

There were industrial relations issues relating to Single Status as the unions were generally opposed to any cost savings on terms and conditions to be made to cover the increased cost on the pay bill of new pay and grading structures.

High commitment to Direct Labour Organisations in Wales, opposition to outsourcing, and relatively high union membership resulted in deadlock on bonus in many authorities.

9. The 2004 three year Local Government Pay Agreement provided for a timetable of April 2007 for the completion of Job Evaluation and the implementation of new Pay and grading structures. Within Wales the resources allocated to the job evaluation process increased considerably with teams set up to manage the process and many new job analysts employed. The vast majority of Welsh authorities have now completed or are in the process of completing their job evaluation exercises.

10. Completing Job evaluation is only part of the process however, as once this is complete a new pay and grading structure needs to be developed and agreed with the trades unions, including the level at which it will be funded (and from the unions perspective proposals for equal pay compensation payments if not already made). This is in itself a very difficult exercise in terms of trying to limit the number of people who are 'red circled' i.e. identified to lose pay, and keep costs within affordability limits. It is made even more difficult in terms of seeking union agreement. Pay protection for 'red circled' jobs is also another significant cost, legal worry and negotiating issue.

### **Equal Pay Claims**

11. The current equal pay problems have been brought about by the historical situation being taken advantage of by Steffan Cross, an ex-Thompson's employee setting himself up as no-win no fee solicitor in 2003. Starting in the North East of England (and continuing in Scotland and the Midlands) he has taken countless numbers of equal pay claims against authorities, effectively unpicking local collective agreements on new pay and grading structures.

12. The cases mainly involve claimants and comparators graded under the old manual workers Job Evaluation scheme, where male comparators have been paid more through bonus or other incentive schemes. Claimants are women workers such as carers, cleaners and school cooks. The main thrust of these claims has been the statutory right of those women receiving a pay raise under the grading review who have an equal value pay claim, to 6 years back pay at the level of their male comparator.

13. Cases have also been taken against the trades unions on the grounds that they did not broker the best deal for the women members in terms of their statutory entitlement to back pay and gave undue weight to pay protection, which is not a statutory right, in the negotiation process. GMB finally lost a high profile case - Allen v GMB and have been denied leave to appeal to the House of Lords

14. The result of the Allen v GMB case has been that the trades unions have taken action to protect their position in the future by taking strong centralist national (UK) control over Single Status negotiations as follows:

All local Single Status deals to be agreed by the unions at a national level

No Single Status deals to introduce new pay and grading structures can be agreed by the TUs unless they include provision for equal pay compensation payments

All local deals to be put to a ballot of union members

Thousands of equal pay grievances and claims have been lodged against local authorities by the trades unions all over the UK including Wales

15. The result (quite apart from the millions of pounds of costs) has been that it has become very difficult to obtain Trades Union agreement on Single Status deals with long delays being experienced once proposals has been sent to the national trades unions. So while the employers may have finished job evaluation and pay modelling and be ready to roll out new structures, the national trades union circumstances may well contrive to prevent progress.

## **The Legal Landscape**

16. The fact that equal pay case law has been constantly changing and evolving over this period has not helped the position. However, what has become clear is that not all bonus schemes are automatically unlawful under the Equal Pay Act. Application of bonus schemes to a particular area of work (which women were not precluded from working in) could not be direct discrimination. As indirect discrimination, bonus schemes are capable of justification. For example where they can be shown to have retained a link to productivity and the work done by women in jobs rated as equivalent is not suitable for the application of productivity related bonus schemes (e.g. care or school meals).

17. The way in which bonus schemes have developed varies considerably from authority to authority. Where legal advice points to a strong defence against equal pay claims, local authorities have a duty to protect the public purse and the local taxpayer from financial costs and their impact on jobs and services. Some authorities have offered a lower level of compensation payment to reflect the strength of their potential defences at tribunal, some may decide to defend claims and others are still investigating their legal position.

18. One line of defence that has been developed in Wales relates to the validity of the White Book JES post local government re-organisation where claimants (mainly previously employed in county councils) and comparators (mainly previously employed in districts) were not job evaluated in the same exercise or authority. A Preliminary Hearing Review was planned to decide this issue in March 2009. However, Thompsons have recently withdrawn all their 'rated as equivalent' claims on behalf of GMB and Unison (quite probably due to the strength of the argument), deciding to pursue 'equal value' claims instead. This may mean even longer and further drawn out procedures in the tribunals as independent experts are called to decide on questions of equal value.

19. A further legal issue is that of pay protection with the recent decision in the Bainbridge case making it very difficult to give pay protection at all to those who lose an element of pay which might have been discriminatory, unless any potential claimant is also 'pay protected' at the same level. There is now a very difficult situation where the Single Status Agreement says those losing pay will be pay protected, and not to do so could amount to breach of contract by the Employer, but the trades unions will not sign up to a collective agreement which includes pay protection. In one authority for example only a handful of male employees on bonus remain, and to 'pay protect' the many hundreds of female employees that they are the potential equal pay comparators of would be both disproportionate and completely unaffordable.

20. Schools are another area of difficulty as local authorities do not control the pay and grading structures of non-teaching schools based staff, but are still treated as the Employers in law, with female non-teaching schools based staff able to make equal pay claims comparing themselves with local authority based male employees. It can be seen then that the legal twists and turns of case law are making it much more complicated, costly and difficult to resolve the issues.

## **Funding of Single Status and Equal Pay costs**

21. Local authorities have ploughed considerable financial and time resources into the Single Status process with the employment of sizeable job evaluation teams and management time taken in co-ordinating and negotiating on all aspects of the process.

22. The Welsh Assembly Government provided a notional 1.5% per annum (approximately) increase on the headline Welsh non-teaching pay bill for each of the financial years 2005/6, 06/07, and 07/08. At this time increases on the local authority pay bill resulting from single status implementation were running at around 3- 5% on average coupled with increased Employer contributions to Pension scheme and National Insurance schemes. The Local Government Employers advise that this figure is now running at more like 7% due to implementation in greater numbers of large and more complex councils.

23. Central government has recognised the need for a higher ceiling on capitalisation to meet equal pay compensation payments, and to date all bids from Welsh authorities have been granted in full by the Welsh Assembly Government. However, in relation to capitalisation it must be recognised that while this may make settlement of equal pay claims, where appropriate, possible, it is not a panacea. Capitalisation is only borrowing and as such must be repaid. There are also revenue costs in terms of interest payments. Capitalisation is therefore not without a potential impact upon jobs and services, particularly in the current economic climate.

## **Current Local Authority Positions**

24. To date eight local authorities have made equal pay compensation payments to settle actual or potential claims. These are Blaenau Gwent, Rhondda Cynon Taff, Cardiff, Gwynedd, Merthyr, Neath Port Talbot, Swansea and Torfaen. All except Gwynedd and Rhondda Cynon Taff have applied for and been granted capitalisation directions to fund these payments.

25. Gwynedd has introduced their new pay and grading structures. Most other authorities have finished the job evaluation process with some still developing their new pay and grading structures and several on the verge of going forward to implementation, dependent on getting agreement. This may be voluntary agreement with staff as opposed to the trades unions due to the difficulty of getting a collective agreement in the current climate.

## **Impact on the Pay Gap**

26. There is research to by the Institute of Economic Affairs which suggests that discrimination is not a significant cause of differences in pay between men and women. The gaps in pay that exist are principally explained by differences in the work and career choices of individual men and women. For example:

Career breaks to raise a family are mainly taken by women, thus delaying career advancement

Men tend to seek higher pay and career success, while more women seek job satisfaction

The public sector has a reputation for good work life balance policy and practice, but the opportunities for high earning are less than the private sector's (compare solicitors for example). The public sector employs high numbers of women

Men tend to put in more overtime than women with twice as many male as female managers working more than 48 hours a week

27. In addition it should be noted that within local government the gender pay gap may be far less affected by the implementation of new pay and grading structures than might be expected. As there are high levels of women employees overall, significant numbers of women will be amongst those employees losing pay as a result of the job evaluation exercises.

## **Conclusion**

28. Clearly, with hindsight, neither local government employers nor trades unions would allow themselves to be in this position again. However, it is not possible to turn back the clock and the complexities of the current situation make resolution very difficult and costly. Local authorities have and continue to expend considerable time and effort in completing job evaluation and pay modelling exercises and trying to negotiate acceptable and affordable solutions (to both employees and the tax payer) with their trades unions, taking in to account their widely differing circumstances.

29. Considerable progress continues to be made by Welsh local authorities against all the odds, but as explained in the body of this report, the speed of that progress is often not in their hands.

Anna Freeman

Director of Employment