

SINGLE STATUS

Trade union side
guide to **local**
government
grading and pay

2005 Edition

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Introduction

The trade union sides of the National Joint Council for Local Government Services and the Scottish Joint Council for Local Government Employees (UNISON, GMB and TGWU) are committed to achieving single status and equal pay in local government through local grading and pay reviews.

Although there are separate national agreements in Scotland and the rest of the UK and different job evaluation schemes, this advice applies equally in Scotland. The legal principles underpinning the equal pay legislation are identical and those underpinning single status pay and grading reviews are also the same.

This guide aims to allow the Scottish Joint Council (SJC) and National Joint Council (NJC) trade union sides to approach pay and grading reviews in the same way and share experience and knowledge in the process.

Wherever possible, the unions want to negotiate agreements in preference to taking legal action against employers. Our strategy is to ‘educate, negotiate and litigate’, and to litigate only as a measure of last resort.

For many union representatives, undertaking an authority-wide grading and pay review will be a new and challenging experience. This guide takes you through the key ‘technical’ decisions to be made and the issues likely to arise in carrying out local grading and pay reviews. It aims to demystify the process and explain the jargon. It sets out best practice and alerts union representatives to the main pitfalls in carrying out local grading and pay reviews.

A key message is that while job evaluation and modelling new grading and pay structures have a technical side, it is important not to lose sight of the overall purpose of the local review. This is to remove pay discrimination and create a fair, equal pay-proofed structure for the future. Branches will need to take a strategic approach to the

implementation of single status. Applying good negotiating and organising skills is just as important as understanding the technical issues.

This guide updates an earlier publication, the “Trade Union Side Guide to Local Government Grading and Pay” (2001). It adds new sections on equal pay and related equality legislation, equal pay audits and equality impact assessments. The section on implementation has been expanded and outlines important legal advice obtained by the unions on key issues such as payment of arrears for past pay inequality and consultation with members. The updated guide also draws on authorities’ experiences of undertaking local grading and pay reviews.

Note: the guide does not cover how to carry out a job evaluation exercise. Separate guidance has been issued on the approved job evaluation schemes and best practice in evaluating jobs. Technical advice notes have also been issued on the National Joint Council (NJC) Single Status Job Evaluation Scheme (JES) by the joint national Job Evaluation Technical Working Group. Please see your union’s web-page and the Employers’ Organisation website (for England, Wales and Northern Ireland) for more information and lists of publications.¹ While the grading and pay review is taking place (or after it concludes), negotiations may be happening on other aspects of implementing single status. The guide refers to some of these issues but it does not cover them in detail. Further advice and information should be sought from your regional officer.

¹ www.unison.org.uk; www.gmb.org.uk; www.tgwu.org.uk; www.lg-employers.gov.uk

The starting point for grading and pay reviews

The guiding principles

The guiding principles of the National Joint Council Job Evaluation Scheme (NJC JES) and the Scottish Joint Council (SJC) JE Scheme are: single status; equal pay and equality; openness and jointness. These apply just as much to developing grading and pay structures as to carrying out a job evaluation exercise.

Single Status

To achieve single status, there must be a common system for grading all jobs in scope of the national single status agreements to replace the different methods used for former manual and administrative, professional, technical and clerical (APT&C) staff.

New grading and pay structures must be appropriate to the integrated group of ex-manual and ex-APT&C employees.

The national single status agreements are known as the Green Book (the NJC agreement for England, Wales and Northern Ireland) and the Red Book (the SJC agreement for Scotland).

These agreements replace the former national agreements for manual workers and APT&C staff. They provide a national pay spine based on annual wages or salaries (in the case of the NJC agreement) and hourly rates of pay (in the case of the SJC agreement). These pay spines must be used by authorities which are parties to the Green or Red Book as appropriate. However, the national agreements do not have national grades – new grading structures have to be agreed locally.

Sticking with the old grading methods, or simply bolting the old manual grades onto the APT&C structures (by moving them into the bottom scales) would not only breach the principle of single status, it would also be unacceptable for the following reasons:

The APT&C grading structure grew out of historical classifications of employees into principal officers, senior officers and the rest—this

is outdated and not suited to a modern service providing organisation. For example, it was very hierarchical, providing, as it did, for two layers of employees (senior officers and principal officers) between clerical and administrative staff and chief officers - like ranks in the armed forces.

Movement between the layers was extremely difficult. And each of the layers was divided into a large number of sub-layers or grades, between which movement was less difficult, but still limited, resulting in an inflexible structure. This was often not well-suited to the delivery of efficient services.

- The APT&C structure was not based on job evaluation and is almost impossible to reproduce without manipulating the results of a modern job evaluation scheme.
- The APT&C structure is not consistent with current good practice in developing grading and pay structures. It was designed to give outcomes which reflected post-war thinking about the hierarchical management of public services, life-time careers for white collar men, and the secondary role of women and male manual workers in the workforce. Apart from a number of nationally agreed grading descriptions, the grading of most APT&C jobs has been at the discretion of management locally.
- The APT&C structure does not conform to equal pay principles (this is explained below).

Ideally, all local government employees should be covered by the local grading and pay review, even though they are covered by separate national agreements. This is because council staff could cite workers from any of these groups in their authority as comparators in equal pay claims, especially craft workers who often receive bonuses.

Schools-based staff must be included in the local grading and pay review. The nationally agreed profiles for teaching support roles, or any variations agreed locally, can be evaluated in the same way as other generic jobs. Model evaluations

have been published by the unions in guidance on the school remodelling agreement but these may need to be adjusted to take account of agreed local conventions. The results of these evaluations can be included in the rank order and modeled into the new grading and pay structure in the same way as other jobs (see later sections of this Guide).

Equal pay and equality

The national agreements state that ‘the pay and grading of jobs must be fair and non-discriminatory, complying with equal pay legislation and associated codes of practice’.

They also state that ‘employees will be afforded equal opportunities in employment irrespective of disability, gender, race, religion, age, sexuality, and marital status’, (and in the NJC agreement) parental status, caring responsibilities and hours of work’. In addition, councils ‘will ensure that discriminatory practices are identified and removed and non-discriminatory practices introduced in all areas of employment...’ To achieve this, the unions maintain that employers must carry out equal pay audits and equality impact assessments (see later sections).

The starting point for the local grading and pay reviews is to recognise that the existing grading and pay structures do not conform to equal pay principles. This is why (with the exception of the national pay spine) the national agreements only allow them to continue until local grading and pay reviews are completed. Until this happens, there can be no certainty that jobs are being properly graded and paid in relation to each other, leaving the employer vulnerable to equal pay claims (where women and men are doing equal work but are not being paid the same).

Until the demands of these different jobs are measured and compared alongside each other using a common method (by using a job evaluation scheme which complies with the principles of the NJC JES) it is not possible to know which ones are of equal value and whether they are being paid more or less than each other.

Even if there was no necessity to compare ex-manual worker and APT&C jobs (for example, because an authority does not employ any manual

workers), it cannot be assumed that the previous national grading arrangements deliver equal pay for work of equal value. The national APT&C structure had defined national grades for some jobs and local employer discretion in grading most other posts. Typically, within authorities, there were no common criteria for measuring the demands of all APT&C jobs, so there is a danger that APT&C jobs of equal value have not been identified and are paid wrongly.

While the manual worker grades were based on equal value-based job evaluation introduced in 1987, many jobs have changed markedly over time so their worth or value is likely to have changed – relative to each other and relative to APT&C jobs. Understanding of what makes a job evaluation scheme fair and non-discriminatory has also developed since 1987. And a job evaluation scheme designed solely for ‘white collar’ jobs will not be appropriate for evaluating manual jobs.

Some authorities used job evaluation in the past for APT&C posts, but where job evaluation schemes have not been reviewed recently with the union to check that they conform to equal pay principles and are agreed to be fit for purpose, it cannot be assumed that there is no equal pay problem.

Openness

Openness is a key principle of the NJC and SJC job evaluation schemes. In contrast to many job evaluation schemes that have been used in local authorities, the union approved schemes allow employees to know how the scheme works and how the score for their own job has been arrived at. (See trade union side guidance for detailed advice).

The principle of openness and transparency applies as well to the resulting grading and pay structure.

The European Court of Justice has ruled that pay systems must be transparent. To quote the Equal Opportunities Commission Code of Practice on Equal Pay, this ‘means that pay and benefit systems should be capable of being understood by everyone (employers, employees, and their trade unions). Employees should be able to understand

how each element of their pay packet contributes to total earnings in a pay period' (paragraph 39).

Under the APT&C structure, methods of grading and paying jobs were sometimes secretive. This is not permissible with single status arrangements.

Once the review is completed, employees must be provided with full information on their new grade and pay point, assimilation arrangements, how progression through the grade will work; arrangements for back-pay and protection (as appropriate), and any other proposed changes to their terms and conditions. If the proposed collective agreement on the revised pay and conditions package is the best that can be achieved by negotiation but falls short of what some employees might reasonably expect to receive should they pursue equal pay or other valid legal claims, this needs to be explained. Members can then make an informed choice when they vote on the deal. (Note: these issues are covered in more detail in the implementation section of the guide).

Jointness

The Green Book agreement states 'local authorities should review their local grading structures....In conducting such a review, representatives of the recognised trade unions should be fully involved'. The national unions take the view that locally the unions must be fully involved (as indeed the Red Book requires in Scotland). Under the terms of the NJC and SJC job evaluation schemes, job evaluation must be carried out on a joint basis; and it makes no sense to curb trade union involvement at the next stage of modelling options for new grades and setting the pay line.

Experience shows that those authorities which have completed their grading reviews successfully have done it jointly. For example, the joint team at West Sussex County Council (the first county to complete the review) has publicly stated that joint development of their new structure was key to reaching agreement.

Outside Scotland, there may be authorities that attempt to move away from the joint approach when it comes to converting job evaluation scores into a pay structure. They may want to exclude the unions from modelling different grading and pay

options. As modelling different options is part of the review, this is not acceptable. Alternatively, some employers may be willing to involve the unions in pay modelling, but exclude them from deciding the final pay line on the basis that, at the end of the day, the employer reserves the right to determine pay. Our advice is to ensure that jointness continues by arguing that the authority is unlikely to succeed in implementing a new structure without joint ownership and input throughout the whole process.

Developing a grading and pay structure is a technical exercise in which many options need to be tested to achieve the optimal solution. Unless unions are involved in this, they will not appreciate why certain options have been rejected or be satisfied that the final proposal really is the best option. If employers accept it is a joint exercise until it comes to deciding the final pay line, exclusion of the unions at this late stage is bound to create suspicion and concerns that the employers are unfairly manipulating the outcomes to suit their purposes. They may also be in danger of opening themselves up to rejection of the offer and/or potential equal pay claims.

Grading reviews create uncertainty. It is important that union representatives are able to explain both the process and outcomes to members. This is particularly important where previous grading exercises have been carried out solely by management. Without being involved in identifying and analysing the impact of various grading and pay structure options, union negotiators will not be able to assure members that the best one has been selected.

The principle of jointness has been reiterated and strengthened by the NJC 2004 Implementation Agreement. It states:

- 'both sides in individual authorities will enter into negotiations, with a view to reaching agreement on new local pay structures and systems by April 2006' (para1)
- 'in keeping with the 1997 agreement, the NJC encourages a joint approach to pay reviews (para 2).
- 'the national agreement requires local

employers to produce comprehensive proposals by a specified date; requires both parties to negotiate towards a settlement by a date to be agreed and requires an agreed mechanism for dealing with situations where progress cannot be made....Both sides of the NJC affirm their preference for negotiated outcomes at local level and agree to use their best offices to promote these' (para 3).²

It is clear from the 2004 Implementation Agreement, that jointness should extend beyond the job evaluation exercise to modelling and finalising grading and pay structures, as well as any associated changes to terms and conditions of employment; and that unilateral action by the employer (or the union) is to be avoided.

Doing nothing is not an option

Progress has been slow in implementing local grading and pay reviews since the national single status agreements were reached in the late 1990's. But the national agreements make it clear that recalcitrant employers (and, in some cases, branches) do not have the option of sticking with the old manual and APT&C grading and pay arrangements.

The new national implementation agreement negotiated as part of the 2004 pay settlement for England, Wales and Northern Ireland states that 'local pay reviews must be completed and implemented by all authorities by 31 March 2007'.

In Scotland, the joint circular SJC/13 states that councils should have completed job evaluation by 31 March 2004, with employees being assimilated onto the national pay spine of hourly rates. As a significant number of councils in Scotland had not completed the local grading and pay reviews at the time of writing, the trade union side of the Scottish Joint Council (SJC) is pressing the employers to achieve implementation without further delay.

Doing nothing is not an option for employers or the unions. Nationally, the trade unions have maintained this message since the single status agreements were signed. Following the report of the independent Local Government Pay Commission in October 2003 and in the face of a

spate of equal pay challenges from no-win no-fee lawyers in particular, the national employers have become more active in spreading the same message. In addition to earlier trade union advice, new joint NJC Part 4 advice has been issued on undertaking pay and grading reviews. Branches should ensure they obtain and act on this advice.

Branches should be aware that the Employers' Organisation (EO) issued its own guidance 'Reviewing and modernising pay frameworks' in September 2004, updating earlier guidance. The unions have circulated the 2004 guidance along with a critique produced by the NJC Trade Union Side.

'Reviewing and modernising pay frameworks' advised employers (in England, Wales and Northern Ireland) to understand the impact of a local pay review before committing themselves to any particular approach to it. Accordingly, the EO recommended that 'risk assessments designed to identify equal pay hotspots' are carried out as soon as possible.

A purely risk assessment approach is not supported by the unions. Firstly, it is not a joint exercise. Secondly, there is a danger that some authorities might assume they have no 'hotspots' or there is minimal to low risk and therefore there is no need to carry out a local review. Thirdly, it will not necessarily lead to adopting a satisfactory method to 'equal pay-proof' the pay structure. Where employers want to go down this route, branches should argue that it has been superseded by the NJC advice issued in spring 2005. This joint advice is intended to provide guidance that both sides can use when undertaking a pay and grading review together. It does not recommend the risk assessment approach.

The national trade union side position is that if a pay structure has been implemented prior to the 2004 pay settlement without an equal pay audit, then this should be undertaken as soon as possible to ensure that the pay structure that has been implemented can be demonstrated as being properly equality proofed. Otherwise, it will not be necessary to conduct an equal pay audit at the outset of the local grading and pay review – in fact, at this stage, it would be time-consuming and

² *New implementation agreement, NJC Circular 4/04 14 July 2004*

slow down the review. Also in local authorities, it is not really possible to do an equal pay audit until the job evaluation exercise has been undertaken and pay modelling discussions are about to begin.

Undertaking an equality impact assessment of each proposed change and the final overall proposed pay package (including any changes to Part 3 provisions) before it goes out for consultation should show whether there are any equal pay problems with the proposed new structure. If there are indications this is the case, negotiations will need to be re-opened on any aspects of the proposed package shown to be discriminatory or unfair.

The first equal pay audit should be carried out once the new structure has been in place for a year (unless the local pay and grading review was completed more than a year ago, in which case it should be done as soon as possible). However, authorities should be ensuring that systems for data collection and analysis are put in place and are operational as soon as possible, if this has not already been done.

(The guide covers equal pay audits and equality impact assessments in more detail in later sections.)

Apart from the issue of equal value, doing nothing is not an option, because local authority pay structures are out-dated and not suited to the demands of present-day service requirements.

For branches too, doing nothing is not an option. This has been affirmed and clarified by the 2004 implementation agreement.

A frequently asked question is ‘during the national negotiations on single status, why wasn’t a new national grading and pay structure devised and agreed then?’ The answer is that at national level, it would have proved impossible to decide, in advance of evaluating all the jobs, where to put jobs on the pay spine. There could be no guarantee that jobs would have been paid on the basis of equal pay for equal work – defeating a key objective of single status! In theory, it might have been possible to divide the spine into grades and to specify ‘points to pounds’ so each grade equated to a prescribed number of job evaluation

points. But because it would have retained a form of national grading, this alternative was rejected by the national employers’ side.

In any event, the employers refused to make it compulsory for authorities to use the NJC JE scheme – so having a national ‘points to pounds’ pay spine was not possible.³ The employers insisted on having the flexibility at local level to decide the number of grades, whether to have increments or fixed rates of pay (or a mix), and the method they would propose using to determine the relative size of jobs.⁴ In response, the unions won certain safeguards against unilateral action by employers (for example, that the unions be involved in grading reviews and that protection arrangements must be agreed); and ensured that the requirement that local grading and pay must conform to equal pay and anti-discrimination legislation is central to the national agreements. Joint advice on equal pay and grading was also included in the Green Book (NJC Agreement) and Red Book (SJC Agreement). But because the national agreements allow for local flexibility within these constraints, it is crucial that union representatives (as well as employers) understand the principles of equal pay; what constitutes good practice in job evaluation and determining grading and pay structures; and the pitfalls to watch out for.

The recommended options for job evaluation

Why job evaluation?

There are no feasible alternatives to using a job evaluation scheme as the basis for the single status local grading review in most councils, given the requirement that the pay and grading structures must be fair, non-discriminatory and transparent, and must also accommodate the diversity of jobs in local government. Job evaluation establishes the value of jobs within a council in relation to each other and therefore helps protect the council from potential litigation if carried out properly.

Which job evaluation scheme?

Nationally, UNISON, TGWU and GMB only support the use of the following schemes which have been designed and/or approved by them at

³ However, the Greater London Provincial Council JE scheme has ‘points to pounds’ pay spines for Inner and Outer London which authorities are recommended (but are not obliged) to use.

⁴ This should be job evaluation. The Green Book includes the NJC JES in Part 4. The Red Book Part 2 recommends the use of the JES developed for Scottish councils.

national level:

- The NJC Job Evaluation Scheme (included in Part 4 of the Green Book)
- In Scotland, the JES developed for Scottish councils, recommended for use by the Red Book.

In Greater London, the unions have agreed to use the Greater London Provincial Council Scheme (the GLPC Scheme) which was developed by the employers' side of the Provincial Council with some input from the trade union side. This scheme adapts the former joint job evaluation scheme for APT&C staff. It includes a 'points to pounds' formula for Inner and Outer London indicating grades for ranges of job evaluation scores. Nationally, the unions take the view that the GLPC Job Evaluation Scheme should not be used elsewhere in the UK.

Other schemes which have not been designed and/or approved on the above basis may be acceptable only if they meet the test recommended by the Local Government Pay Commission. The Commission stated in its report:

'The presumption [that the NJC scheme will be used in England, Wales and Northern Ireland] should be retained but we also feel that more flexibility should be shown where the principles and safeguards which are found in the NJC scheme are demonstrably present in another scheme'.

Advice is available from the national Job Evaluation Technical Working Group on the principles of the NJC JES. If employers propose other schemes they must meet these principles in order to satisfy the Pay Commission's test. If an alternative scheme can be demonstrated as meeting the principles of the NJC JES, the Local Government Pay Commission held that union representatives should not oppose its use (or insist on the NJC JES) on those grounds.

Critiques of some other schemes are available from union head offices.

The strengths of the NJC JES are:

- it was jointly developed by the trade unions and the employers, in line with the principles of

single status

- it was specifically developed, and tested, to cover the whole range of local government jobs
- it was designed on the basis of 'equal value' principles; and this is reflected in the factor plan and weightings (see the resource list for reference to the Technical Note of the national Job Evaluation Technical Working Group on the JES factors and weightings)
- it is an open and transparent job evaluation scheme (unlike some schemes which do not reveal all aspects of their design and scoring systems to job holders)
- it is accompanied by comprehensive jointly agreed advice for users which includes equality considerations (in the Green Book and advisory Joint Circulars and Technical Notes from the national Job Evaluation Technical Working Group)
- it must be operated on a joint basis by trade union representatives and management locally
- it is available for use in computerised or paper-based form
- the scheme and the user manual are available free of charge to NJC authorities
- it is the most commonly adopted job evaluation scheme by NJC authorities.

How many job evaluation schemes?

A number of local authorities have proposed using one job evaluation scheme for senior posts—often Hay—while agreeing to use the NJC JES for all other jobs. This is inevitably the case where a local authority uses the Hay job evaluation system for chief officers in line with the national agreement for that group. The issue of using two job evaluation schemes is covered in new NJC Part 4.9 advice on pay and grading reviews. Paragraph 2.24 states 'where a local authority uses more than one scheme it will increase the risk of legal challenge, as well as presenting practical difficulties in application.'

The problems mainly arise where authorities seek to use the Hay system also for some or all ex-APT&C principal officer (PO) level jobs and in a few cases for senior officer (SO) jobs as well. The

difficulty with this option concerns jobs at the boundary between the two schemes. First, it is necessary to agree a procedure for dealing with jobs which evaluate within a specified number of points from the maximum of the NJC scheme range, which would normally be to evaluate these jobs also using the senior job scheme.

However, this can be problematic, if the two schemes give different weight to features of the boundary group jobs, so that, for example, some jobs scoring exceptionally well on the NJC JES do not score well on the senior job scheme. If the jobs affected are female-dominated, then this could give rise to equal pay claims.

The positioning of the boundary is important. If only the most senior jobs (i.e. chief officer posts) are evaluated under a second scheme, then the problem will be restricted and the risks of equality issues arising limited. If, on the other hand, most managerial and professional jobs are to be evaluated on the senior job scheme (for instance, if the boundary were at the lower PO grades on the old APT&C structure), then the boundary group will be large and probably mixed in gender—and the problems described above could be significant. (This issue is discussed in more detail in the equal pay section of the guide).

While the large majority of councils using Hay have restricted its use to chief officer posts, some have sought to move the boundary between the two schemes much lower down for cost reasons. This has caused technical problems and raised equality issues. Nationally, the trade unions have issued advice to branches and regions that any second scheme should be restricted to chief officer posts and where the council wishes to lower the boundary much below chief officer level, this should be resisted vigorously. Advice should also be sought on the possible equal pay considerations that may arise where this is done. (See below for more detail).

Nil cost is not feasible

Some local authorities have approached single status with the view that it must be implemented at nil cost. While appreciating the cost constraints on many local authorities, it must be understood that this is simply not feasible, whatever job

evaluation scheme is used. If only a few jobs are upgraded relative to others, and any relatively downgraded jobs are protected, then there is a cost to the employer. If significant groups of jobs are upgraded relative to others - a probable outcome of evaluating ex-manual jobs alongside ex-APT&C jobs - then there is a significant cost. Even taking into account any possible savings, in practice there remains a significant cost implication.

At West Sussex County Council the cost was estimated at 5% to 7% over the planned five year implementation period. At Solihull Metropolitan Borough Council the quoted cost was £4 million over five years: this included £0.75 million for introducing the 37 hour week for all employees, but also takes into account savings expected from changes to some Part 3 terms and conditions.

Employers should be warned strongly that robbing Peter to pay Paul (or Pauline), (eg) by lowering salaries for professional and managerial jobs, in order to fund increases for ex-manual and social services jobs, will invite disputes involving key staff, and possible legal claims, for example, for failing to consult the unions over terminating contracts of employment and re-engaging staff on worsened terms and conditions. It could also damage the ability of the authority to recruit and retain personnel.

A more common response has been for employers to seek to contain or claw back the costs of improved basic pay for groups whose jobs have been upgraded by attacking Part 3 terms and conditions. This issue was raised by the unions before the Local Government Pay Commission and the report of the Commission noted that part-time women workers were particularly likely to be adversely affected by cuts in enhanced rates of pay for weekend working and unsocial hours. The Commission recommended the adoption of equality impact assessment and the 2004 implementation agreement has put this in place as a protective measure. As mentioned later in the guide, as a consequence of the 2004 NJC negotiations, Part 3 has been strengthened to deter unilateral action by employers and to protect branches from having to accept changes to Part 3 in order to secure improvements for many (mainly

women) members whose jobs have been upgraded.

(There will be a national joint review of Part 3 paragraphs 2.1 to 2.7 to report to the NJC by 1 April 2007. Branches should resist agreeing to adverse changes at local level on the basis that the employers nationally will be seeking changes after the conclusion of the local reviews in any event. To concede local changes while this is going on will give employers ‘two bites at the cherry’ and also weaken the bargaining position of the national trade union side).

The recommended approach to handling the issue of cost, which is explained in more detail in the rest of this Guide, is to develop sensible draft grading and pay structures to suit the needs of the organisation, then to cost the proposals and then to discuss how they can be implemented. Initial costings may lead to refinements to the proposed grading and pay structure, but it is important that it is this way round and that the reasons for any changes are clearly understood by all.

It is also important to identify separately the costs of implementation and the ongoing revenue costs.

Equal pay law and local grading and pay reviews

Equal pay and single status

The grading and pay of jobs must conform to all anti-discrimination legislation and equal pay law.

The guide focuses on gender-based pay inequality, but branches should also be alert to other forms of unlawful pay inequality, based on race or disability, for example. (Anti-discrimination legislation is summarised in an appendix to the guide).

What is the evidence that there is an equal pay problem in local government?

An objective assessment has been provided by the independent Local Government Pay Commission. It noted that women comprised the majority of the workforce and that a high proportion (mainly women) worked part-time, as the following table shows.

Employees covered by the National Joint Council (NJC) 2002

Full-time total	Full-time Male	Full-time female	Part-time total	Part-time male	Part-time female Headcount	Full-time and Part time	Full-time Equivalent
700,359	309,850	390,509	872,250	80,617	791,633	1,572,609	1,026,126
44.5%	19.7%	24.8%	55.4%	5.1%	50.3%	100%	100%

Source: Table 2.7, Report of the Local Government Pay Commission, October 2003.⁵

Examining figures on earnings, the Commission identified a 'gender pay gap' in local government. In 2002, average female full-time weekly earnings were 81% of the full time male average weekly earnings – a gender pay gap of 19%. A more accurate picture is given by the comparison of hourly earnings because it takes into account the fact that, in general, men work more hours than women. It also enables comparison of full and part-time earnings. The pay gap between female part-timers and male full-timers was 39% (on the basis of average hourly earnings) rising to 42% when it is calculated using median hourly earnings.

The Equal Opportunities Commission attributed this pay gap to three main factors:

- occupational segregation – part-time women workers are overwhelmingly located in jobs towards the bottom of the pay spine

- the unequal impact of family responsibilities
- discrimination in pay.

On the face of it, the causes of pay discrimination can be hard to pinpoint largely because sex bias in the way jobs are valued and paid is often hidden in pay structures put in place many years ago. For example, traditionally, the emotional demands made on those doing caring jobs have gone largely unrecognised because of unspoken assumptions about them being in the nature of 'women's work' or 'women's natural abilities', whereas heavy physical effort – traditionally associated with certain men's jobs – has long been recognised as a component in the earnings of those workers. Knowledge gained through studying for an academic or professional qualification has always been valued in the grading and pay of senior APT&C posts (mainly held by men), while

⁵ The Report is at <http://www.lgp.org.uk>

knowledge gained through life experience or comparable activities has not been recognised in the same way, for pay purposes, in lower graded jobs (mainly held by women).

Equal value-based job evaluation aims to eliminate sex bias in the way jobs are valued, but gender discrimination can creep back into the grading and pay structures unless negotiators take care – the pitfalls are outlined later in this guide.

No single measure will close the gender pay gap in local government – the unions recognise that action is needed on all fronts; and issues such as occupational segregation, access to training and development, family-friendly policies, work-life balance, are being addressed (for example) in national bargaining and through political campaigning. Tackling pay discrimination also involves a multi-faceted campaign. This Guide focuses on ending pay discrimination through local grading and pay reviews.

Equal pay legislation - why is it important?

Before starting the grading and pay review process, it is important that you understand equal pay legislation and some of the key cases on interpreting the law. This will help you impress upon the employers the need to carry out the grading and pay reviews, what we want to achieve and what rights have already been established. Knowing your way around the law will help you to prevent employers from cutting corners or trying to include measures that undermine equality principles. It can also help in explaining to members why certain options are acceptable or not, in legal terms.

The section of the guide on equal pay law is included as an appendix. It sounds very technical, but please read it – it contains essential information for union negotiators. It takes you through the law step by step, focusing on issues that are likely to arise in negotiations over the grading and pay review. (Note: it does not cover tribunal procedures and lodging tribunal or court claims as these are matters for which each union has its own protocols).

Principles for developing grading and pay structures

Having an equal pay policy

The EOC Code of Practice on Equal Pay encourages employers to adopt an equal pay policy. Branches should ensure that employers adopt an equal pay policy which would (among other things) commit the organisation to carry out equal pay audits and to monitor pay regularly on a joint basis with the unions.

(The EOC model policy is set out in the appendix).

Having an equal pay policy is also a requirement of the Equality Standard for Local Government. (This is covered later in the guide).

Negotiating guiding principles

Before the start of the pay and grading review, the union side is strongly advised to propose a set of guiding principles for this exercise to management. These should encapsulate what this review is really about and what is critical about the way it is to be done. By beginning the review with a dialogue and agreement over guiding principles it will help to:

- identify joint interests as well as differences
- draw out and surface each side's agendas - not just negotiating positions but also expectations and concerns
- flag up at the outset what might be "show stoppers" for each side, so that you can start to think how these can be defused before they blow up
- provide clear joint direction for what is likely to be a protracted and at times very technical process (where there is a danger of "not seeing the wood for the trees")
- lay down a sound basis for joint working throughout the review
- provide an agreed yardstick against which both sides can judge the validity or acceptability of disputed positions at whatever stage in the

review they might arise

- build trust in each other.

Guiding principles are not detailed statements or protocols. Here is an example from West Sussex:

- joint ownership of all phases of the work with the union
- commitment to an open and transparent process for deciding new grades
- recognition that both sides were committed to finding a solution which would ensure that equal pay for work of equal value considerations were fully met
- commitment that grades would be based, on relative job size; and that market issues would be addressed separately.

Be wary about importing bargaining objectives into guiding principles e.g. about nil cost. As this guide argues, cost is an implementation issue, not a guiding principle. The underlying principles of the single status agreement provide a basis for pay and grading review guiding principles. But, as with the review itself, there is no "one size fits all" in terms of the wording. To carry weight, guiding principles must be owned at local level, by both sides. This means that the wording needs to suit local circumstances, as in the West Sussex example. They can be added to at key stages of the review, as sub-sets of the overarching guiding principles, but be careful to ensure there are no contradictions.

You should not concede on points of principle, but in bargaining hard to adhere to a principle, you can be open to options about how it can be realised. Without this "firm on principle, flexible on possible solutions" approach, it is going to be very difficult to complete the review with a mutually acceptable outcome.

To carry out a pay and grading review successfully, both sides are going to have to work together

constructively, be imaginative, take risks and resolve a range of conflicts along the way. Openness and transparency should apply to the conduct of the review, as well as to what it produces. In authorities where there is a climate of distrust and or little history of genuine joint working, it will be even more important to start with guiding principles. If both sides are unable to “get started” but are willing to commit to doing a review, outside assistance should be considered. In any case, your regional officer should be working with you on the grading and pay review and together you will be able to draw on advice and support from your national office. In some cases, it may be agreed with the employer to get assistance from an accredited NJC (JES) associate consultant.

When the NJC single status agreement was signed in 1997, joint union guidance was issued about the implementation of the single status agreement, which covered pay and grading. The national employers were reluctant to issue advice because they were adamant that local authorities should be as free as possible to negotiate their own arrangements at local level. (The situation was slightly different in Scotland and Greater London). In fact, inaction over single status at local level has caused the national employers to revise their stance to some degree, prompted by the recommendations of the Local Government Pay Commission, pressure from the unions nationally and the very real threat of widespread legal action over equal pay.

The NJC 2004 Implementation Agreement gives more guidance on what the review should and must cover.⁶ This section highlights the new provisions.

Both sides in individual local authorities must enter negotiations, with a view to reaching an agreement on new local pay structures and systems by April 2006.

Local pay reviews must be completed and implemented by all authorities by 31 March 2007. (paragraph 1)

The 1997 implementation agreement still applies. It is supplemented by the following:

‘Local pay and grading reviews should include:

- the approach to be used to determine the ‘relative size’ of jobs to be included in the review
- proposals for protection
- proposals for premium rates of pay
- proposals for progression (through the grade/s)
- proposals for back pay (in resolving equal pay issues)
- proposals for appeal against assimilation proposals
- an Equality Impact Assessment of proposed changes to grading and pay and other conditions
- an Equal Pay Audit where local pay reviews have been completed without such an audit
- proposals for bonus and other performance payments
- proposals for any cost savings or productivity improvements required to offset the cost of implementation of the new grading and pay arrangements
- a timetable for implementation by 31 March 2007
- resources necessary for the pay review and their estimated cost (paragraph 5).

These are the issues that either side can place on the negotiating table. Employers cannot refuse to start a review because (for example) there is no demand for it coming from employees or because they do not want to commit resources to job evaluation or because they do not believe there is an equal pay problem locally or they cannot afford it. Equally, branches cannot refuse to start negotiations on the review because (for example) certain groups of members do not agree with single status or because the employer wants to propose changes to premium rates of pay. (To protect the interests of union members against cuts to Part 3, safeguards have been negotiated as part of the 2004 settlement. These are referred to elsewhere in the guide).

However, branches will need to take a strategic

⁶ At the time of writing, there was no equivalent agreement in Scotland.

approach to the negotiations overall and decide how they will respond to the employer's agenda (within the terms of the national Implementation Agreement) and what positive proposals they will be putting forward, not only on pay and grading but also on work-life balance, equalities at work and workforce development.

The Implementation Agreement also states that:

- the local timetable will include a date at which any outstanding issues will be referred to an assisted bargaining process (involving an agreed third party)
- local employers will propose a timetable for regular pay audits.

Further advice on the 2004 Implementation Agreement is available from the union regional/head office.

The process and principles of carrying out a grading and pay review are broadly the same, whatever job evaluation scheme is used, although some schemes come with a 'points to pounds' formula which provide ready-made grades. Equal pay audits and equality impact assessment should also be carried out (at appropriate times) in all cases.

When?

Although detailed grading and pay structure proposals cannot be produced until virtually all the job evaluation results are available, it is essential to start considering the options at a much earlier stage—even before the job evaluation exercise is under way.

Job evaluation is only a tool for putting jobs into an overall rank order. It is a means to achieve a new grading and pay structures. It is not an end in itself.

A sensible approach might look like this:

- outset of the exercise - consider principles, for new grading and pay structures, for example, agreement to use the national spine, flat rate salaries or pay scales, method for pay progression (see below)
- after benchmark exercise—test main options; make ball-park cost estimates; move towards preferred option

- after evaluation exercise complete—refine and cost option(s) and draw up detailed proposals.

What sort of pay structure?

Your employer may raise some of the following questions of principle:

- is the local authority going to pay individuals according to going market rates only, without considering internal relativities (i.e. the relationship between salaries within the authority)? This type of system is used in some private sector organisations. You should argue against this, as it is very difficult to operate and is unlikely to meet with 'equal value' criteria (this does not preclude 'market supplements', if required—see below).
- is the new pay structure going to be based on the nationally agreed spine? A local authority might want to design its own pay spine instead of using the national one. You should argue against this, as the authority would be breaking away from the national agreement (and arguably breaching individuals' contracts).

Key first stage questions

Initial proposals from the employer may also address the following issues:

- fixed (spot) rates or pay scales? If pay scales, what sort of progression system?
- how many grades in the new structure?
- more, the same or fewer than at present?

Step 1:

There are a number of pay structure options for consideration. The first question is whether the new structure should be based on fixed points or salary scales:

(a) Fixed points (or spot salaries or rates): this is the system historically applied to manual workers in local government, where each grade is associated with a single rate of pay (designated in pounds per hour, but could be a rate per week, month or year). There is no progression up to the 'rate for the job' and no progression beyond it.

The perceived advantages of fixed point salaries are:

- everyone is paid the 'rate for the job' from day one, so it is the fairest and least discriminatory system

- it is simple to understand and ‘transparent’.

The potential disadvantages are said to be:

- there is no reward for the additional expertise which comes from experience in a job
- employees may be de-motivated by the absence of salary progression; this may affect recruitment and retention
- additionally, a fixed point system probably means not using all the available points on the nationally agreed spine
- salary scales: this is the system historically used for most ex-APT&C employees, where the scale for each grade runs from a minimum to a maximum point on the spine, with a number of scale points between up which the individual has the opportunity to progress.

The perceived advantages of salary scales are the reverse of the disadvantages of fixed point salaries:

- the system allows for acknowledgement that experience (and training) lead to higher levels of expertise
- the opportunity to move up the salary scale provides an incentive to employees to remain in post, and thus assists with recruitment and retention
- additionally, the national salary spine is of the type, which comfortably accommodates a scale system.

The potential disadvantages are said to be:

- it may take some years to progress towards what is understood as the ‘rate for the job’ (especially if this is regarded as being the maximum point of each scale).
- the system is less transparent than a spot rate system, rather more complex and open to challenge on discrimination grounds (particularly where the scale is long).

The single status agreement makes clear that the old system of scales for APT&C employees and spot rates for manual workers is no longer tenable. The new structure must normally adopt one or other system, and there will need to be clear objective justification for any exceptions to the overall structure.

In general we recommend using incremental scales rather than fixed points, and that these should not exceed four or five points. Many of the local authorities, who have finalised their new structures at the time of writing, have adopted short salary scales of from three to five points per scale.

A number of authorities have introduced pay structures with varying numbers of incremental points. The new grading structure at West Sussex County Council, for example, has three substantive spine points for each of the bottom six grades, but four spine points for the top six grades. At Gosport Borough Council, most of the 11 grades have four incremental points, but grades 7, 8 and 9 have five points each. However, greater variations have been suggested, for example, two spine points for the lower grades and six for the top grades.

Taking a purist line, on equality grounds, suggests that all grades should have the same number of points. This would avoid female dominated grades, or those with disproportionately high numbers of black and ethnic minority employees towards the bottom of the structure, being disadvantaged by having fewer incremental opportunities than white male dominated grades at the top of the structure. However, a pragmatic approach would be to accept small variations in numbers of incremental scales, as at West Sussex and Gosport, in order to reduce the need for protection, but not to allow larger variations.

An incremental scale with up to four or five points would probably be justifiable where it could be shown that up to four or five years service could be equated with the time it takes to achieve full proficiency or competence in the job. But longer incremental scales could be indirectly discriminatory, in that women (and possibly other groups) may have less opportunity to acquire the necessary length of service to reach the better paid, higher levels of the grade, unless the length of time it would take to reach the top end of the scale could be justified by an objective reason.

Step 2:

There are a number of options for pay progression, which your employer may propose

and which it will be helpful for you to have considered in advance of discussions:

- incremental scales, where employees progress annually from entry point to maximum of scale, so if there were 5 incremental points this would take five years. This is often the preferred option because it allows minimal, if any, discretion to line managers.

Most incremental progression systems have provision for increments to be withheld for less than satisfactory performance or accelerated for exceptional performance, although these provisions are very rarely activated. Some authorities, which have adopted incremental progression for their new grading and pay structures, have sought to re-activate such provisions.

- performance related progression (PRP), where employees progress if their performance is assessed as satisfactory or above, generally by their line manager and usually, but not always against a set of published performance criteria. Institute of Employment Studies research has shown that there are real risks of discrimination with this type of system. Research has also shown that performance related pay systems can have a very detrimental effect on employee motivation and morale. Unions have generally opposed PRP because of the degree of discretion allowed to line managers. Fortunately, bad experiences with PRP systems in local government and elsewhere in the late 1980s mean that this is not a popular option with most local government employers either. Better PRP systems are also expensive to administer
- competence related progression, where employees progress if their competence levels are assessed as meeting either objective criteria (like NVQ/SVQ) or behavioural criteria. Competence related pay progression is relatively new in Britain and there are not many examples of its successful implementation. However, this is an option being considered by some local government employers.
- contribution-based pay where progression depends on a combination of individual or

team performance and improvements in individual competence. This is uncommon in local government because it requires the employer to have a sophisticated system of performance management in place and it is expensive and time-consuming to set up and administer. Nevertheless, as part of the 'total reward management' approach, it is gaining support in local government, especially with the national employers, as central government pressures local councils to progressively modernise and make ongoing efficiency gains. The trade unions do not support this approach, believing that it is likely to lead to unfair discrimination

- combined systems – for example, incremental progression for some parts of the pay scale, but competence or performance related progression for the remainder. This is the option agreed for the new Agenda for Change pay system in the National Health Service, where there are competence related gateway assessments for progression at the bottom and towards the top of the pay scale, but with standard incremental progression for the intervening points

A simpler version of a combination approach might be, for example, pay scales with a small number of traditional incremental points plus additional points dependent on competence (or performance) assessment.

To be acceptable, any method of progression needs to be transparent, fair and non-discriminatory, with clearly stated criteria for progression.

How many grades?

There is no single right answer to this question. A number of factors should be considered, for example:

- (a) **Absolute Numbers:** Many large local authorities currently have upwards of 20 grades (five or six ex-manual grades; six ex-APT&C clerical grades; two Senior Officer (SO) grades; and anything from four to ten principal officer (PO) or management grades).

The trend in the private sector is to reduce historical numbers of grades to reflect flatter organisational structures. Public sector organisations are moving in the same direction. Scottish Power Generation Wholesale Division moved from a very large number of grades down to six to cover all jobs from cleaners to power station managers.

Reducing to five or six grades is probably too great a culture shock for most local authorities (except possibly the smallest?). It would imply that the jobs of some supervisors/managers and those they supervise would be in the same grade; it would seriously restrict promotion opportunities and it would inevitably mean moving away from traditional incremental scales, as these would become astronomically expensive.

However, a reduction from current numbers of grades, say to between 10 and 15, could be consistent with a sensible single status organisation.

In coming to a view on a desirable number of grades for the new structure, it may be worth examining some of the larger job families in the authority (e.g. finance; residential care; housing maintenance) to see how many layers these currently have and to take a view on how many they should have under single status and Best Value and Comprehensive Performance Assessment structures.

(b) Job evaluation implications: the decision on how many grades may be influenced by the job evaluation scheme adopted. In the case of the NJC JES:

- The realistic range of total weighted scores is from 200-250 (because every job scores at least level one on every factor) to about 750-800 points for the full range of local government jobs up to but not including chief officer jobs (because no job scores at the top level on every factor)
- A recognisable difference in overall job demand would probably be represented by one Knowledge step plus one Initiative and Independence level plus one or two Responsibility levels. This is equivalent to

around 40 to 50 points. These features in combination suggest 10 to 15 grades of 40 to 50 point widths.

A possible grading structure based on a rank order of evaluated local government jobs from a hypothetical council is set out at Table 1. (see page 25) (Note: the scores are intended to be reasonably realistic but they should not be used as a guide to what real jobs in local authorities with these job titles should score!)

The trade-off between type of pay structure and numbers of grades

Although the type of pay structure and number of grades are distinctly different aspects of the new structure, there is an element of trade off between the two. Other things being equal, the fewer the number of grades, the more likely it is that the local authority will wish to move away from traditional incremental scales.

The arithmetic to demonstrate this is simple. If, for example, six grades are agreed to be sufficient, then this implies seven or eight spine points per grade on the 46 point spine. If all employees have access to all these points through incremental progression, the resulting structure will be extremely expensive in the short to medium term. There is then an incentive to employers to restrict movement in some way, for instance, through making at least some part of the progression subject to assessment of performance or competence.

If, on the other hand, it is agreed that 12 grades are sensible, then these could be fitted onto the spine with three to five spine points per grade. Incremental progression on such scales is less costly, so there is less incentive to change. Diagram 1 (see page 23) illustrates the different approaches. This seems to be borne out by experience to date. For example, the new West Sussex structure has 12 grades, with three or four spine points each. Gosport Borough Council's preferred option has 11 grades, with from four to six spine points per grade. In both cases progression will be by traditional annual increments.

In contrast, Solihull MBC has a somewhat smaller number of grades (10) with longer pay scales. In

this case, the authority proposed introducing a 'contribution' related pay progression scheme.

To overlap or not to overlap pay scales?

The obvious principle of a job evaluated pay structure is that more demanding jobs (with higher evaluation scores) are always paid more than the less demanding jobs in the grade below. This leads to the theoretical conclusion that pay scales should not overlap.

In practice, pay scales often abut, that is, the maximum of the lower pay scale is the same spine point as the minimum of the next higher grade. This is generally tolerated on the basis of the argument that an individual on the maximum of the lower scale has several years experience, which probably means that they are doing work of equal value to a new starter in the higher grade.

In some structures scales do not just abut, but overlap. Diagram 2 (see page 24) shows abutting and overlapping scales.

Overlapping pay scales raise the problem of individuals doing work of greater value, in the legal sense, than colleagues in the lower grade, but potentially being paid less. The problem is clearly more likely, the greater the degree of overlap. One point overlap may be acceptable, as relatively few individuals will be disadvantaged in this way at any one time, and only for one year. A greater degree of overlap, as in many broad banded structures (see below), is impossible to justify and may be open to challenge under the equal pay legislation.

Our advice is not to have overlapping pay scales, but if this is absolutely necessary for other reasons, it is important to minimise the degree of overlap.

This advice relates to permanently overlapping pay scales. It does not preclude using overlapping scales as a temporary measure, as a means of phasing in the new structure, as long as the overlapping points are 'rolled up' on an annual basis and thus eliminated over time. However, care needs to be taken to secure the agreement of those affected by the phasing in, as this is effectively delaying their achievement of equal pay for work of equal value.

Diagram 1: relationship between numbers of grades and number of scale points

	A. 12x3/4 point scales	B. 9x5 point scales	C. 6x7/8 point scales
49			
48	12		
47		9	
46			
45			6
44	11		
43			
42		8	
41			
40	10		
39			
38			5
37		7	
36	9		
35			
34			
33			
32	8	6	
31			4
30			
29			
28	7		
27		5	
26			
25			3
24	6		
23			
22		4	
21			
20	5		
19			
18			2
17		3	
16	4		
15			
14			
13			
12	3	2	
11			
10			1
9			
8	2		
7		1	
6			
5	1		
4			

Diagram 2: relationship between numbers of grades and number of scale points

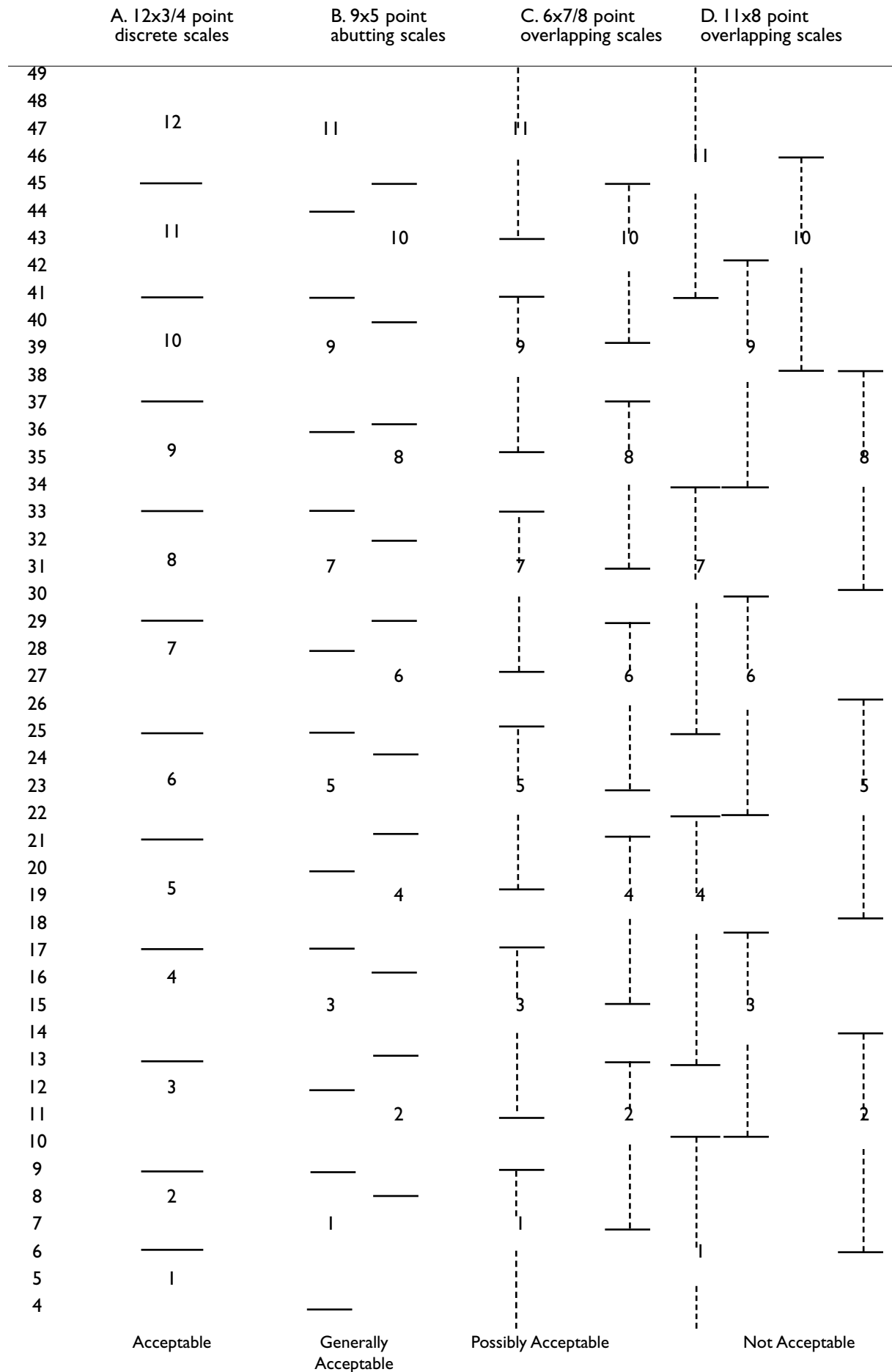


Table 1: A possible grading structure

JOB TITLE	JE POINTS	POSSIBLE GRADE
Head of Trading Standards	763	I
Head of Support Services	724	H
Home Care Service Manager	690	H
Leisure Centre Manager	611	G
Senior Engineer	606	G
Senior Policy Development Officer	586	F
Social Worker	586	F
Home Care Area Manager	585	F
Solicitor	577	F
Residential Care Shift Leader	568	F
Senior Residential Social Worker	542	E
Area Play Development Worker	538	E
Branch Librarian	529	E
Environmental Health Officer	510	E
Building Control Officer	510	E
Assistant Leisure Centre Manager	502	E
Advanced Skills Teaching Assistant	499	E
Housing Estates Officer	499	E
Day Centre Officer	473	D
Playworker	460	D
Senior Home Care Worker	453	D
Residential Social Worker	450	D
IT Help Desk Technician	443	D
Creche Supervisor	430	C
Rehabilitation Assistant	427	C
Cook Supervisor Secondary	423	C
Catering Supervisor Leisure Centre	423	C
Gardener Cemetery Attendant	421	C
Site Manager Secondary School	417	C
Senior Care Assistant	417	C
Gardener Greenkeeper	412	C
Administration Assistant	410	C
Home Carer	384	C
Care Assistant	358	B
Library Assistant	351	B
Caretaker School	335	B
Gardener Driver	332	B
Assistant Cook Secondary	325	B
Refuse Loader	319	B
Gardener	319	B
Midday Supervisor	286	A
Kitchen Assistant	286	A

Equal pay audits and equality impact assessments

Equal pay awards (EqPA)

The 2004 NJC implementation agreement states that local negotiations ‘should include an equal pay audit where local pay reviews have been completed without such an audit’. NJC guidance on equal pay audits was issued in spring 2005 and is available on the Employers’ Organisation website and from the trade unions.

In an ideal world, the equal pay audit would be carried out both before and after the grading and pay review to identify the problems and then measure whether the new grading and pay structure has rectified them. However, for most local authorities who have not previously carried out job evaluation across all NJC jobs, it is genuinely difficult to carry out the first substantive step of the equal pay audit, which is to identify where men and women are carrying out equal work.

When the job evaluation exercise has been completed, it is possible to identify equal work, but still difficult to calculate average basic pay until the new grading and pay structure proposals are available. Once new grading and pay structure proposals are on the table, it is possible to calculate both average previous and proposed basic pay for men and women doing equal work (that is, in the same proposed new grade) and to check that the gender pay gaps are significantly reduced by the proposals. (This then takes the form of an equality impact assessment – covered in the later sections of the guide).

After the new structure is put in place, it should be subject to regular joint monitoring and annual equal pay audits to check that no inequality has re-surfaced or been created. Annual audits should show a steady decline in gender pay gaps.

It is important to note that a full equal pay audit should eventually cover not only the single status NJC group, but also all other employees of the

local authority. For practical and political reasons, it may be sensible to leave this full-scale audit to the end of the NJC employees’ grading and pay review, in order to help identify what still needs to be done to move towards equal pay for work of equal value across the authority. However, the wider equal pay audit should be planned into the overall work programme for the exercise. The NJC guidance indicates that equal pay audits should be undertaken across the authority.

The EOC recommends a five-step model for carrying out an equal pay review. The term, ‘equal pay review’ means the same thing as an ‘equal pay audit’. The NJC uses the term ‘audit’ to distinguish the checks involved from the grading and pay ‘review’ itself.

The EOC model comprises:

- Step 1: deciding the scope of the audit and the data required
- Step 2: determining where men and women are doing equal work
- Step 3: collecting and comparing pay data (that is, calculating average basic pay and total earnings for men and women doing equal work) to identify equal pay gaps
- Step 4: establishing the causes of any significant pay gaps and addressing the reasons for these.
- Step 5: developing an equal pay action plan and/or reviewing and monitoring

The EOC Equal Pay Review Kit and guidance notes explain how to carry out an equal pay audit, using the model.

Branches are strongly advised to ensure that carrying out an equal pay audit (and equality impact assessment) is built into the unions’ and management’s project plan for the local grading and pay review.

Much of the information and data needed to

undertake an audit will be required for grading and pay modelling and costing proposals in any event, so its collection and analysis should not impose an additional burden for the personnel/human resources (HR) team.

Branches should be fully involved in the conduct of the audit, as it will form part of the local grading review. The actual data collection and number crunching can be carried out by HR, but the union side should have access to the analysis and be fully involved in discussions on any gaps identified, the causes and how the local review and single status implementation will rectify the situation.

Equal pay audits should not be restricted to checking only for gender-based pay inequality. Local authorities are obliged by the Race Relations (Amendment) Act 2000 to adopt a race equality scheme which should ensure that the equal pay audit examines whether there are any pay gaps between workers from different ethnic groups as well as the gaps between men and women's pay.

In carrying out the local review and audit, attention needs to be paid to the position of disabled staff. The Disability Discrimination Act 2005 imposes a new positive duty on authorities to promote equality of opportunity for disabled people and regulations expected to come into force in December 2006 will require public authorities to produce a disability equality scheme. (See the appendix for more information).

Consideration also needs to be given to the scope of the audit in relation to age (age discrimination in employment will be unlawful from 2006) and sexual orientation (as it is termed in law) and religion or belief (already covered by anti-discrimination legislation in the field of employment and vocational training). Most authorities are unlikely to have data on the pay position of employees on the basis of sexuality or religion / belief and they may not have robust systems in place for gathering and analysing detailed pay information. Decisions will need to be made on establishing appropriate monitoring arrangements.

In brief, the EOC model could be applied in local authorities as follows:

Step 1: Deciding the scope of the audit and the data required.

■ The equal pay review (i.e. audit) should cover all the employees of the local authority, including chief officers, craftworkers, burgundy book staff such as schools advisers, youth and community workers and all schools based employees. As a first pass, the review might be restricted to cover employees in scope of the Green Book (including schools-based staff, temporary and casual workers and staff whose jobs may be transferred/ outsourced). Consider including other workers who may be deemed to be in the 'same establishment or service'. However, eventually the review will need to be extended to cover any employees omitted at the outset.

■ Pay information and related data should include: all elements of pay, including premium and unsocial hours payment, bonus, allowances pensions and benefits (such as holiday entitlement) personal characteristics of each employee (gender, full/part-time, hours worked (and when and where these are worked), starting salary; length of service, role and time in grade and performance or competence or contribution assessments and payments (if applied).

Step 2: Determining where men and women are doing equal work.

A comparison of the results of the job evaluation exercise (i.e. the rank order of scores) with current wages or salaries will reveal if and where any equal pay gaps exist on basic pay and on total earnings (including unsocial hours payments, bonus and any other plus payments). When extending the audit to non-Green Book employees, it will be necessary to evaluate at least a sample of their jobs to obtain information on where men and women are carrying out equal work across these groups also.

Where the job evaluation exercise has been carried out and grade boundaries identified, then these can be used as the basis for the pay calculations in step 3 below. (Where grade boundaries are not yet

agreed, it would be necessary to identify some sensible points ranges, for example, every 50 points on the NJC JES, to be treated as delineating equal work).

Step 3: Identifying equal pay gaps

This step involves comparing pay information for men and women doing equal work by:

- calculating average basic pay and total earnings and
- comparing access to and amounts received of each element in the pay package.

(The EOC guidance notes explain the different statistical analyses that can be used.)

Local government has a high proportion of part-time workers and staff working different patterns of hours. The comparison is best done by grossing up part-time workers' hourly rates of pay to their full-time equivalent salaries. This provides a better basis than hourly rates for looking at the pro-rata rates for annual salaries and holiday pay, for example.

Any gender pay gaps will then need to be identified. It is important that union representatives are involved in this process and particularly in deciding what pay gaps are significant enough to warrant further investigation.

The EOC says that gaps of 5% or more are to be treated as significant and further investigated, but also that a pattern of gaps of 3% or more should also be investigated as being potentially indicative of systemic pay discrimination.

Step 4: Establishing the causes of any significant pay gaps and addressing the reasons for them. If the step 3 analyses identified a significant pay gap between women and men doing equal work, you need to establish:

- in which elements of pay the gaps are occurring – is it basic pay, bonus, amount of overtime etc?
- what is causing the gap in relation to basic pay: is it starting pay, performance assessments, market supplements? In relation to other earnings, is it access to bonus, differences in acceptances of overtime opportunities between

men and women etc?

You can then assess whether the gap is justifiable and, if not, plan to close it (see below).

The EOC Guidance Notes provide a useful set of checklists for Step 4 covering:

- overall pay structures
- pay on entry, pay protection, mechanisms for pay progression
- performance-related pay schemes
- market factors
- benefits
- working time payments.

Many of the issues covered by the checklists are mentioned elsewhere in this guide. However, branches are strongly urged to use the checklists and to get the employer to use them. They are not difficult to use and guide you through the process on a question and answer basis. If the employer is reluctant to use the checklists, branches should point out that the equal pay review model is set out in the EOC Code of Good Practice on Equal Pay; and while the code is not legally binding, it is admissible in evidence in any proceedings under the Sex Discrimination Act 1975 and Equal Pay Act 1970. This means that a tribunal may take into account an employer's failure to act on its provisions.

Once any unjustifiable gaps have been identified, the negotiations over the implementation of Single Status (i.e. the design and implementation of the new grading and pay structure and any other changes to terms and conditions) should address how the gaps are to be closed or done away with.

While a fair and non-discriminatory job evaluation exercise will put men and women doing equal work in the same grade, the common practice of assimilating employees to the nearest point on the new scale means that they are not necessarily in the correct position on the scale for their experience or competence, so gender pay gaps are likely to remain. Especially if large, these could form the basis of equal pay claims, so the employer needs to demonstrate that such remaining gender pay gaps will be eliminated over a reasonable period.

Equality Impact Assessments (EqIA)

NJC guidance on equality impact assessments was produced in spring 2005 and is available on the Employers' Organisation website and from the trade unions. The trade union side recommends that an equality impact assessment on all the key elements of the proposed package must be completed before the offer goes out to consultation. Effectively, this amounts to a two-stage process:

The equality impact assessment checks that the proposed new structures and terms and conditions are free from past inequality⁷ and do not create any new equal pay problems (in so far as they can reasonably be foreseen).

It is very important to note that EqIAs of proposed changes to Green Book Part 3 working arrangements and premium rates of pay are mandatory. As these conditions have been the focus for cuts, the requirement to undertake an EqIA is intended to deter employers from pushing through changes which would impact disproportionately and adversely on women workers, particularly part-timers, black workers and disabled workers.

It should be noted that a job evaluation exercise can be carried out in accordance with best practice, but the resulting grading and pay structures might be indirectly discriminatory. Particular care needs to be taken over the placing of grade boundaries; assimilation arrangements onto the new grades; arrangements for progression; protection and phasing-in arrangements; future arrangements for dealing with bonus; the payment of market supplements and access to benefits. Again, the EOC checklists are very helpful in identifying potential problem areas.

At the time of writing, there was no explicit reference in the Scottish Joint Council Agreement to carrying out equal pay audits or equality impact assessments (EqIA). However, even where not specifically required, they should be carried out. Audits should not necessarily entail considerable extra work as the information and data needed for an audit will have to be compiled for the grading

and pay review in any event. Having invested significantly in carrying out job evaluation and the local review, the employer should see the merit in taking steps to ensure that the new structures are soundly based and 'equal pay-proofed'.

Carrying out equal pay reviews and EqIAs is a requirement of the Equality Standard for Local Government. (See the appendix for more information on the Equality Standard. Note: The Standard applies only to authorities in England)

⁷ *Allowing for lawful short-term phasing in and/or protections.*

Developing detailed grading and pay structures

Pay modelling packages

Once the principles of the new grading and pay structures are agreed and sufficient job evaluation results are available, then it is possible to look at detailed options. Perhaps the best time to do this would be after the benchmark exercise is complete, and certainly when most of the results are in.

It will be necessary to examine a large number of options to obtain the best overall balance between the agreed grading and pay structure principles, the evaluation results, numbers of 'gainers' and 'losers' and costs of implementation.

A pay modelling software package can assist in this process, because it allows many options to be tested and costed relatively quickly. It does not, however, take away from those developing the new structure the need to specify the parameters for the options to be tested. This is particularly important in relation to cost parameters. Unlike spreadsheet pay structure development, where the cost is an outcome of the exercise, with pay modelling software it is possible to specify total cost as one of the parameters. This has led some authorities to specify a total cost ceiling and not to model any options costing even a little more than this, even when such options could significantly reduce the number of 'losers' or were substantially better in some other respect.

Particularly in large councils it is essential to use a software package to model options for grades and pay lines otherwise the exercise is in danger of being unmanageable. The Link pay modeller system, developed for use in conjunction with the NJC JES, has been used by a number of councils and been found to be extremely helpful. A cautionary note is that it is necessary to have someone specifically trained to get the best out of the system - the trade unions recommend at least one person from each side, as a minimum. Gosport Borough Council developed their own

pay modelling system and again found it valuable in developing their pay structure proposals. Pilat UK Ltd, the company that developed the computerised version of the NJC JES, also has a simple version of a pay modeller, which can be used in conjunction with the NJC scheme. This version is particularly useful early on when considering what possible grade structures might look like rather than the more detailed options that will come later in the process.

We recommend that where pay modelling systems are used, at least one and preferably more employer and trade union representatives are trained in their use. You will also need to ensure that the trade union side has access to the raw payroll data which is going into the pay modeller and that all assumptions are fully discussed before they are input.

Grading/pay structure options for pay modelling

The Employers' Organisation has produced for their members a number of grading/pay structure options for modelling. Clearly, without actual job evaluation results and in the absence of local payroll information, these can be neither modelled in detail, nor costed. However, they provide some idea of the options likely to be under consideration by local government employers.

The models fall into groups:

(1) those with incremental scales and no overlap between scales (next scales starts one spine point higher than the previous one), ranging from 16 grades of three increments to five grades of 10 increments

Comment: these models provide an acceptable basis for discussion from a trade union perspective, although 16 grades is likely to be too many.

(2) Those with incremental scales which overlap (where the next scale starts below the maximum of the previous one), for example, eight grades of eight increments or seven grades of 10 increments

Comment: some of these models, particularly those with the greater degree of overlap, are open to criticism and possible challenge on equality grounds, as explained above

(3) Broad banded salary ranges (see below), **with a set differential**, for example, eight salary ranges based on a 20% differential gives ranges with band minima at spine points 4, 10, 16, 23, 29, 34, 41, 49 and 55

Comment: the 20% range model included among the options gives eight scales each with six, seven or eight non-overlapping scales, so could provide a basis for discussion, depending on the method of pay progression proposed. Salary range models with higher percentage ranges would inevitably involve significant overlap, so would be subject to the criticisms already identified.

(4) Broad banded structures based on 'reference points' (effectively the rate for the job), with one 'development point' below the reference point, two traditional increments above, with further upward movement dependent on performance

Comment: these models are likely to be seriously defective because of the high degree of overlap. There is further comment on broad banding in the next section.

(5) Spot systems using only selected points on the national spine, with, for example, 11 or 14 spots:

Comment: these models are not subject to the same criticisms as those with overlapping scales, but are less acceptable than short, non-overlapping, incremental scales, not least because they do not make full use of the national pay spine.

Under- valued and over-valued jobs

For many local authorities, the job evaluation exercise will reveal a sizeable minority of relatively under-valued jobs. This is most likely to be the

case for authorities with significant numbers of ex-manual jobs, which are known to have been under-graded in the past. It will also be true for those authorities with large social services departments and other client-related services, such as leisure, education and housing, where equality audits have never been undertaken and there have been no equal value claims.

Some authorities may have a significant minority of jobs which have been well-graded by comparison with the majority. This tends to occur where past grading decisions have been made in an unsystematic and inconsistent manner over time and happens in district councils as much as in larger authorities.

The extent of outlying jobs can easily be identified by plotting job evaluation results against previous salaries (include bonus payments but not overtime or unsocial hours payments for this purpose) and then multiplying the outlying jobs by the number of employees covered by the relevant job evaluations. A pay modelling system can do this automatically and if suitably programmed, can identify which of the under- and over-valued jobs are male- or female-dominated. Diagram three opposite shows a scattergram with both under-valued and over-valued outlying jobs.

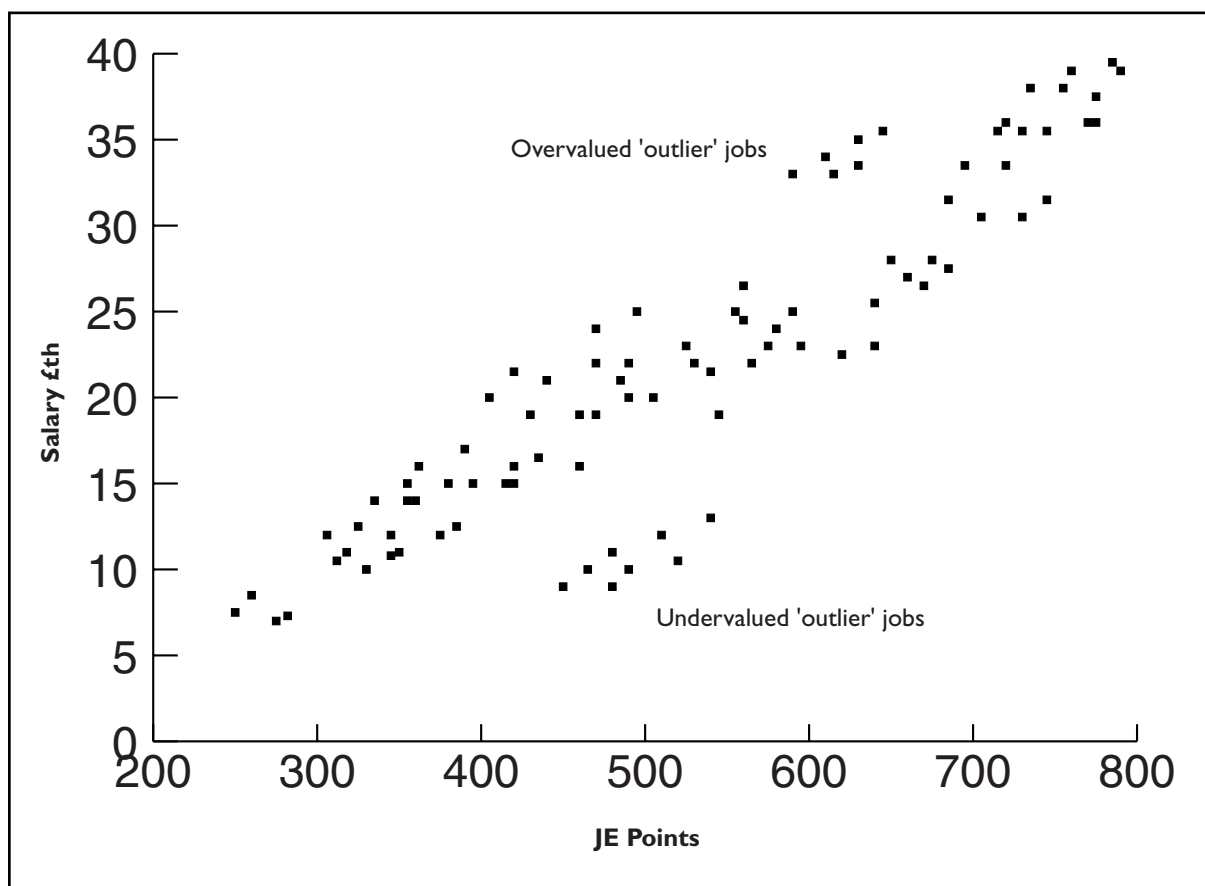
Don't let the tail wag the dog

Moving all historically under-valued jobs to the pay levels of the majority at the date of implementation of the new structure, while protecting relatively over-graded jobs, can be expensive. Employers are suggesting a number of ways of dealing with this:-

(1) Lowering the payline

In response to efficiency reviews and a need to upgrade significant numbers of ex-manual employees, some local authorities appear to have seriously considered lowering salaries generally to pay for the increases. Often using salary modelling systems, they calculate what reduction in salaries across the board ('lowering the previous payline'), or at particular parts of the structure, would give an overall nil, or minimal, cost outcome ('altering the payline slope or gradient')

This is an extreme example of allowing the future

Diagram 3: Scattergram of je points against previous salaries, showing outliers

pay structure (dog) to be determined (wagged) by initial implementation issues (the tail).

It is inappropriate and short-sighted, for the following reasons:-

- unless salaries can be shown to be above market rates generally, which is unlikely, then lowering the payline will result in recruitment difficulties in the short to medium term. Authorities adopting this approach will not be able to recruit staff of sufficient calibre to deliver high quality services
- in order to resolve recruitment and retention problems, authorities will be forced to introduce labour market supplements (see below) to groups who are not in short supply generally, but for salary reasons only. Such supplements will prove expensive in the medium to long term, because it will be very difficult to remove them
- proliferating labour market supplements will also become sources of grievance between

employees and of pay inequity. They could be open to future legal challenge. They also represent a major administrative burden

- Lowering the payline will demoralise affected staff, be seen as unjust, and possibly give rise to disputes and legal actions such as breach of contract claims, claims of unlawful deductions from wages and constructive dismissal
- there may be 'leap-frogging' of staff between jobs in neighbouring authorities because pay is better (or worse) if there are several authorities in a relatively small geographical area. This creates retention problems, is destabilising, potentially expensive and will affect morale of remaining staff.

(2) Broad banding

This involves setting overlapping wide pay scale boundaries to accommodate all or most of the historical salaries and then assimilating employees at their previous salary levels (except for extreme outliers, whose salaries are increased to the

minimum of the broad band). This option looks attractive to employers: it appears to avoid lowering the payline, but provides a minimum cost approach to the introduction of a new pay system, because, in the first instance, the great majority of employees remain on their previous salaries.

This is an approach which has frequently been adopted in the private sector and in the civil service in the early 1990's, where it also matches the generally more discretionary management techniques in use. However, from a local government perspective, there are a number of problems:

- because broad banding involves wide salary ranges, it is inevitably associated with a mechanism to restrict movement up the salary scale, for example, performance or competence related pay, or the introduction of qualification or other barriers to progression. If these mechanisms are applied rigorously, they become another way of lowering the pay line through the back door, and have all the same disadvantages
- broad banding is also associated with much more line management discretion than has historically been the case in local government, in relation to progression within the band and to the positioning of new recruits on the relevant scale
- there is a real risk of perpetuating unequal pay between female dominated jobs (often assimilated towards the bottom of the broad band because of their historically lower pay) and male dominated jobs (more likely to be assimilated in the middle or towards the top of the band)—unless there is a specific mechanism for movement towards equal pay, i.e. pay increases weighted towards those in the bottom section of the pay band
- as explained above, there are also equality issues in relation to those in a higher evaluated band being paid less than those towards the top (perhaps for historical reasons only, unrelated to experience or performance) of the lower band.

(3) Partial implementation

In order to limit costs, some local authority employers have proposed implementing single status only for certain groups of employees, generally ex-manual workers and employees in the lower ex-APT&C. grades, perhaps up to old scale 3 or 4. Sometimes this is put forward as the first stage of implementation, with other groups of employees to follow at a later date. This may look seem a practical implementation issue, but is more likely to be have cost-containment motives.

Whatever the arguments used, this is a high risk strategy for union representatives as well as for employers, for the following reasons:

- it assumes that all the jobs to be covered by the partial implementation are less demanding than all other jobs (for example, that no ex-manual jobs are as demanding as jobs above the cut off grade). While it may be generally true, there are likely to be some exceptions and these could give rise to equal pay claims.
- it does not deal with equal value issues among the jobs excluded from the partial implementation, which could also give rise to equal pay claims
- it places an artificial ceiling on the exercise, which could give rise to appeals and grievances, not necessarily equality related, at a later date.

(4) Phasing in

An alternative to the previous options is to develop an appropriate and acceptable grading and pay structure covering all employees and then to devise a method of phasing in any pay increases to spread the cost. Employers may be attracted to phasing in for this reason and obviously this is likely to be an acceptable option to members faced with threatened cuts to terms and conditions and/or services to 'pay for' single status. Crucially, it also avoids the outlier issue (tail) from determining (wagging) the nature of the pay structure (dog).

There are a number of possible methods to phasing in, for example:

- 'green circling': In this approach, the difference between the actual salary and the minimum point of the appropriate scale for the job is divided by an agreed number of years (usually

two or three), with affected employees receiving half or a third of the difference each year (in addition to their annual settlements) until they reach the correct salary scale. This approach would be particularly suitable if a fixed (flat) rate pay structure is adopted

- ‘rolling up’ incremental points: in this approach overlapping incremental scales would initially be introduced, wide enough to accommodate the previous salaries of all or most employees. Each year one increment would be ‘rolled up’ (eliminated), as employees on it moved up incrementally, until the agreed number of increments per scale was reached. This is the approach adopted by Solihull MBC. If this approach required very long scales, then it might be necessary to give double increments to those on the bottom point and ‘roll up’ two increments per year to give a reasonable timescale

- the ‘West Sussex’ approach: This is a variation on the above, involving a four point ‘transitional’ zone below each of the agreed three or four point substantive scales, to allow incremental movement towards the substantive scale for the job. In this option, those below the transitional zone move immediately to the minimum point of that zone, giving an immediate cost, but regulating the transition period to an agreed number of years.

It is important that members give their consent to phasing in by voting in favour of it and that, prior to a ballot, they understand how it would affect them as individuals. There is no statutory guidance on an acceptable period for phasing in a new grading and pay structure to achieve equal pay. Technically, members entitled to equal pay could take a claim during the phasing in period because during that time they are not receiving equal pay for equal work. However, if this is genuinely a time-limited, transitory arrangement, designed to enable equal pay to be achieved, and it has the support of the majority of members, it minimises the risk of a successful legal challenge. Phasing in should occur over a short timescale – ideally one or two years, so that affected employees can see exactly when they will be paid on the correct scale

for their jobs. (It should also be remembered that acceptable transitory arrangements do not cancel out entitlement to compensation (back pay) for past pay inequality. This issue is fully discussed in a later section of the guide).

Proposals to phase in the new structure in ways that would exclude certain under-paid groups for long periods should be rejected, as this could give rise to equal pay claims. Phasing in arrangements should treat all employees equitably and not be used as a form of partial implementation of single status.

The NJC 2004 Implementation Agreement states that local pay reviews must be completed and implemented by all authorities by 31 March 2007.

Protection issues

In any job evaluation exercise, there will be some employees whose jobs have evaluated at a lower level relative to other jobs than their previous salaries indicated. This happens when the overall demand of jobs, relative to others in the organisation, has decreased. This could be as a result of re-organisation of work or the introduction of new working methods or equipment, or because the starting salary for the post was set at a level which was out of line with similarly demanding jobs.

It is important to distinguish these genuine relative down-gradings from the situation where the employer is effectively lowering the pay line, where the number of jobs proposed for protection could be much larger. Genuine down-gradings should be few in number and restricted to situations where the reason for the relative down-grading can be easily identified.

Paragraph 12.2 of the original implementation agreement of the Green Book states that ‘in conjunction with local grading reviews the authority and the unions shall agree the terms on which there should be protection against loss of remuneration’.⁸

Protection arrangements must be fair and non-discriminatory and in particular they must not breach equal pay law. In this regard, the EOC Code of Practice on Equal Pay states:

⁸ It is also important to note that if there are no agreed arrangements for protection, it is unlikely that an employer can unilaterally impose the new grading and pay structure onto employees (through changing their contracts of employment) without breaching the contract. This was suggested by the Court of Appeal judgment in *Griffiths and another v Salisbury District Council* 2004 (unreported).

‘Any ensuing pay protection (red circling) should ... be free of sex bias and should be phased out as soon as is practicable’ (paragraph 58).

Pay protection should be:

- applied to those jobs whose overall demand has decreased relative to other jobs. It should not be used as a method for cutting the cost of the exercise or finding a ‘nil cost’ solution, by reducing salaries of higher paid jobs in order to pay for the increases of upgraded employees. Such an approach would be very short-sighted. It would probably mean reducing salaries for some jobs below their market rates, inevitably leading to recruitment and retention problems in the short to medium term - and the inability to deliver services of the required quality
- agreed in principle at the outset of the exercise, although it may be appropriate to leave consideration of the details until a later point, when information about the numbers affected is available
- time limited - particularly in situations where the posts to be protected are held mainly by men doing equal work with job holders who are predominantly women.

There is no statutory definition of the maximum period for lawful protection. In local government, most transitional arrangements have been negotiated for between two and five years.

The Scottish national agreement provides for protection at assimilation onto the new spinal column point for all employees, including bonus earners, for three years’ protection on a cash conserved basis. This means that the occupier of a down-graded post would receive the cash value of their pre-review earnings (wages/salary plus allowances and bonus) for three years, but no national pay awards or incremental progression in that period. At the end of three years, the post moves onto the ‘correct’ spinal column point for the job (as evaluated and graded by the review) but at the current basic pay for that spinal column point (i.e. as uplifted by national pay awards over the past three years).

The West Sussex agreement provides for an ‘extension zone’ above the substantive scale for each grade (to match the transition grade below each scale). Within the extension zone, no further increments were payable after any due in the year beginning April 2000, but employees received all future pay settlements. The small number of posts above the relevant extension zone had their pay frozen at 31 March 2001 until subsequent pay settlements brought pay to the top point of the extension zone or the protected post-holder took on a more responsible role or left the authority.

Where no possible equal pay or sex discrimination issues might arise, there is no imperative to limit the period of protection, apart from the fact that, it is generally contrary to good industrial relations practice to prolong it for a very lengthy period or indefinitely. This is perceived as being unfair to new starters and other non-recipients doing the same or similar work for less money and could give rise to equal pay claims in the future if the gender pattern of the protected group changed over time.

Because local government grading and pay reviews are intended to tackle pay inequality which will mainly affect groups of women workers, it is highly unlikely that protection issues can be removed from considerations of sex bias. This will need to be explained to members who may not readily appreciate why long-term or life-time protection is not an option. If, for example, jobs held mainly by men score the same as lower paid jobs held mainly by women, the women have a technical right to equal pay immediately, and protection arrangements must not have the effect that the women’s pay can never catch up, or that the pay gap remains in being for a lengthy period. Women staff must be able to see when their pay will equal that of the men’s jobs.

All staff must be fully informed about the proposed phasing and protection arrangements and how they will affect them; and the proposals must be put out to consultation (see the Implementation section of the guide).

There is very little case law to guide local government negotiators in the scenarios they may

encounter.⁹ The EOC Guidance Notes state that red-circling should not be used in such a way that it amounts to sex discrimination. In any cases brought before them, tribunals would 'have to make a careful study of the circumstances of each case, taking into account:

- the length of time the red circle has been in operation;
- whether the initial reason for the pay discrepancy remains justifiable;
- whether the employer acted in accordance with good industrial relations practice and
- whether their actions were based upon any direct or indirect sex discrimination'.

The gender pattern of the protected and unprotected groups should also be examined.

The EOC guidance notes suggest the following questions for negotiators:

- how many jobholders have had their wages/salaries red circled or personally protected?
- how many of these are men and how many are women?
- if the proportions of men and women are significantly different, can you justify this in terms of the features of the job evaluation scheme and job demands?
- in particular, if the numbers and proportions of men whose wages / salaries are red circled or personally protected in the new salary structure is significantly greater than the numbers and proportions of women, can you demonstrate that the red circling is not a means of evading paying the higher rates to women?

The EOC Guidance Notes for the Equal Pay Review Kit suggest the following options for protection:

- maintaining the current terms and conditions of the job holder but when he or she leaves the post it reverts to its evaluated rate (i.e. personal protection) - provided this does not amount to sex discrimination
- phasing the jobholder's pay into line with the rest of the grade (for posts with equivalent scores) by withholding or restricting future

wage increases (i.e. mark time protection).

The EOC Guidance Notes for the Equal Pay Review Kit suggest that phasing the jobholder's pay into line with the rest of the grade (for posts with equivalent scores) by withholding or restricting future wage increases (i.e. mark time protection) is an acceptable protection arrangement.

Other variations which have been negotiated locally involve increasing the responsibilities of the post (with the job holder's agreement) so that the protected salary equates to the demands of the job; and providing opportunities for training and development to enhance protected job holders' opportunities for securing new posts at an equivalent salary to their protected post. (Note: care must be taken to ensure that such opportunities are genuine and not simply a device to maintain pay for down-graded staff and that such any arrangements are non-discriminatory in terms of their operation and access to them).

More complex problems can arise where groups of employees currently enjoy protection by virtue of past agreements. The employer may argue that these arrangements amount to a genuine, material factor defence. As a general rule, if they perpetuate sex discrimination in the new structure, these historic arrangements are not likely to provide a genuine material factor (GMF) defence.

Staff who have been transferred to the authority may have protected terms and conditions under TUPE (the Transfer of Undertakings Regulations 1981). If TUPE-protected terms and conditions gave rise to unequal pay in the new grading and pay structure, the employer could argue that TUPE protection provided a GMF defence. In *King's College v Clark* (EAT 05/09/03; 1049/02) the EAT accepted that TUPE transfers of 1993 and 1998 did provide a GMF in relation to the difference in pay between the claimant and her comparator. Generally, a tribunal would need to consider all the circumstances of the case, including the length of time the TUPE protection had applied and whether the TUPE term in question acted to perpetuate sex discrimination. It would not necessarily be the case that TUPE would provide indefinite protection if that

⁹ The leading case, *Snosell and Davies v Vauxhall Motors Ltd.* EAT [1977] IRLR 123 EAT dates from just after the implementation of the Equal Pay Act in 1975. The employer used a red circle for men as a means of preserving the pay difference between them and women staff doing equal work, when the women's pay should have increased. The EAT held that red circling cannot be used as a defence if past sex discrimination is the cause of the difference in pay.

protection had the effect of breaching the fundamental principle of equal pay for equal work.

(See also the section on market supplements later in the guide).

‘Career grade’ issues

A frequently asked question is whether the old APT&C ‘career grade’ systems can be continued, allowing employees in particular occupations to progress through a number of grades and associated pay scales as they undertake formal training (e.g. day release courses) and more responsible duties.

So, for example, a school leaver might be appointed to a scale one or two post in the highways department, attend college on day release to acquire relevant City & Guilds, HNC and HND qualifications and be given gradually more responsible work. The individual would progress through the APT&C scales from two, possibly up to SO1, SO2 or even Principal grades, over a lifetime of employment with the local authority. In some cases or over some grades the progression might be automatic. In other cases there might be promotion bars, where it was necessary to go through a formal promotion procedure to verify that the individual was suitable for the higher graded work.

The problem with such schemes, which resulted in a number of successful equal pay claims, was that the level of work undertaken by individuals did not always match the periods of automatic progression from one grade to another. So, individuals might be being paid on higher ‘career grade’ scales than was commensurate with the level of work being undertaken.

The answer to whether career grade systems can continue is a qualified ‘yes’. The main qualification is that the career steps must match the job evaluation scheme outcomes, which may mean re-designing or re-calibrating the career progression scheme to deliver appropriate levels of responsibility at each grade/pay scale. This means that all existing career grade systems must be reviewed in the light of the job evaluation results.

There are two other qualifications:-

- each employee should actually be undertaking work commensurate with the grade at which they are being paid, not just having the training to allow them to potentially undertake such work, as may sometimes have been the case in the past
- career progression systems should be available to all comparable groups and not restricted to male-dominated groups, as was previously true in some local authorities.

In fact, single status agreements should facilitate the concept of career progression for a wider range of occupations, for instance, in home care and grounds maintenance (where the division between manual and APT&C may have provided barriers in the past), as well as in highways engineering and building control (see also Part 4.4 of the Single Status Agreement Green Book for jointly agreed advice on this issue).

To be consistent with the emphasis of the Single Status agreement on training and development, there should be career progression systems in all areas where work is undertaken at a number of levels within the employing authority, for example, in finance, libraries, school catering.

Additions to basic pay

A key aim of a single status grading review is to consolidate extra payments – sometimes known as “off structure” payments and allowances into basic pay, as these have often been sources of grievance and pay inequities in the past. The only significant potential continuing, additional “off structure” payments are:-

- working arrangements – premium payments for non-standard hours (for example, overtime premia; shift, weekend, night, on call payments, sleeping-in duty allowances)
- payments for performance (bonus/ productivity payments)
- labour market supplements
- schools – retainer pay and allowances. (The unions have produced separate negotiating advice on school support staff issues. Branches should contact their union for details).

Working arrangements and premium payments for non-standard hours

Job evaluation, job grades and the associated basic pay relate to the job undertaken during ‘normal’ working hours. It is perfectly legitimate to make additional payments to those required to undertake the same job duties out of normal hours, both to compensate the individuals for the inconvenience and to provide an incentive to staff to work the unsocial hours. Above a certain level in an organisational hierarchy, it is common for the basic salary to cover such working hours as are required to fulfil the job requirements.

Employees who are required to work non-standard patterns of work must be compensated as per the national provisions in Part 3 of the Green and Red Books.

The national Part 3 provisions apply unless they are modified locally by negotiation, following the procedures set out in the national agreements.

As a consequence of the NJC pay settlement in 2004, there have been important changes to Part 3 in respect of working arrangements and premium

payments. Proposals to change working arrangements (and/or any of the payments listed in Part 3.2.3 to 3.2.5) can only be valid if they can be shown to be required to deliver improved services. In other words, the case for any proposed changes must be made out on this basis (not cost cutting); and employers are obliged to:

- seek to meet employees’ work-life balance needs
- conduct an EqIA
- ensure that part-time workers receive equal treatment and
- ensure that arrangements are consistent with equal pay legislation (Green Book Part 3.2.4).

‘Working arrangements’ includes remuneration i.e. premium rates of pay and enhanced rates of pay (see Part 3.2.3 for the full list). Part 3.2.2 makes it clear that where no local agreement concerning premium rates is reached, the national provisions set out at Part 3.2.6 and 7 will apply. In other words, in the absence of local agreement to change the national premium rates, it would be a breach of the national agreement to impose any changes and it would leave the employer vulnerable to breach of contract and/or Wages Act claims.

Part 3 does allow for an inclusive rate of pay to be paid as an alternative to premium payments and enhancements for working non-standard hours. Branches will need to consider whether there is any case for rationalising or simplifying such payments in an acceptable manner, for example, by converting them into annual amounts for particular working pattern arrangements, which could reduce administration costs. This should only be addressed as part of a package which includes progress towards an acceptable grading and pay structure - it should not be put as a pre-condition by the employer. Proposals for an inclusive rate of pay should also be subject to an EqIA, as they are usually put forward by the employer as a cost-cutting measure or to fund

single status and the affected employees may be worse off overall on an inclusive rate of pay.

Where the union wishes to propose changes to working arrangements to improve employees' work-life balance, there must also be a demonstrable case that the changes will improve service delivery. Any proposals must be subject to an EqIA as well.

Changes to working arrangements should also reflect NJC Part 4 guidance on local workforce development plans (including training and development for staff).

Note: this section gives outline advice only on working arrangements and changes to Part 3 of the Green Book. Branches are strongly advised to obtain further information from the union office. Scottish branches should check the current position with the regional office in Scotland.

Payments for performance (bonus/productivity payments)

Genuine payments for performance can justify differences in pay between individuals undertaking work of equal value, even where those concerned are of opposite gender.¹⁰ However, the ECJ, in accepting that performance differences could justify pay differences, said that over a reasonable number of employees doing work of equal value, average performance payments to women should be expected to be equal to average performance payments to men.

The problems with the old manual worker bonus schemes, which have been the subject of challenge in a number of equal pay claims, is that many of them no longer pay for additional productivity and they are often only paid to male-dominated groups. They are unlikely to be justifiable under the new grading and pay structure arrangements. Methods of removing them were considered by the NJC Technical Working Group on Bonus in 1998. Essentially, these are:

- consolidation, where possible, into new grade salary rates
- buy-out - of whole bonus or part of bonus which cannot be consolidated
- current bonus payments to be subject to

protection arrangements for existing staff and phased out completely as new employees are recruited.

New bonus or productivity payment schemes are only likely to be justifiable if they meet each of the following criteria – that they are:

- accessible to all employees, or at least to all employees in a comparable position, for example, to school meals and home care employees as well as to grounds maintenance and refuse staff and to associated administrative and clerical support staff, as well as to the front line service providers
- directly related to output and/or quality of service, on either an individual or team basis: this would be reflected by variations in payment between individuals/teams; possibly variations over the year; holiday bonus payments calculated as an average of payments over an agreed preceding period
- paid at a level which genuinely reflects variations in output and/or quality, so probably not a major component of total pay
- subject to ongoing monitoring of outcomes to ensure that average bonus payments are broadly equal for male-dominated and female-dominated groups
- subject to regular review to ensure that the scheme continues to meet these criteria.

Labour market supplements:

As described above, the new salary structure should be pitched at a level which will recruit and retain employees to the great majority of jobs. Even where this is the case, there may be some jobs for which it is not possible to recruit and retain staff at the grade-related salary. This happens when the group is in short supply, either nationally or locally. Examples of current shortages include social work, homecare, planning, environmental health, trading standards officers, and communications systems specialists and managers. There are also local shortages in some areas of plumbers and electricians, cleaning and catering staff

Historically, market shortages were often responded to by upgrading the jobs in short

¹⁰ *Handels-og Kontorfunktionærernes Forbund i Danmark v Danske Arbejdsgiverforening (acting for Danfoss) [1989] IRLR 532 ECJ*

supply, for example, systems programmers and analysts in the early 1980s. Salaries determined in this way were open to challenge at a later date, when the higher payment was no longer justified by the market situation.

The more sensible and recommended approach is to pay an off-spine labour market supplement (normally as an annual lump sum, which can be divided by 12 for monthly payment purposes). The labour market theory behind such a supplement is that the higher than average salaries will attract more people into that occupation, thus relieving the shortage and allowing the market supplement to be reduced or eliminated over time.

To be defensible in case of internal or external challenge, any labour market supplement should meet all of the following criteria:

- the need must be demonstrable at the time the supplement is introduced, for example, evidence of inability to recruit at the evaluated grade salary range, national or local market data showing higher salaries
- the supplement should be regularly reviewed to ensure that payment continues to be justified
- the supplement should be paid to existing employees (effectively as a retention supplement) as well as to new recruits (as a recruitment supplement), otherwise there is a danger that supplements are paid only to more mobile employees, which could be indirectly discriminatory
- once the need for the supplement ceases, existing payments can be made subject to protection arrangements, but new recruits or transfers should not receive the payment.

The unions should be involved in deciding which jobs should attract market supplements and in reviewing the need for supplements. There should also be agreement as to the sources of labour market and pay data that will be used in these exercises.

A difficult issue is whether labour market supplements should be taken into account in calculations for unsocial hours or overtime payments and whether they should be pensionable. In theory, all labour market supplements should be

short-term, so do not need to count for other payments or be pensionable. In practice, some shortages, for example, of communications and IT specialists may not be quickly remedied, so there could be justification for including the supplement with basic salary for other calculations.

Market supplements should not be used to restore the pay of those jobs that have been down-graded in the review, unless justified by the criteria set out above. An annual equal pay audit should show if this happened and enable it to be put right.

Implementation

Implementation steps

The message of this guide is that development and implementation of new grading and pay structures should not be based on irrational assumptions, such as ‘nil cost’, ‘minimal turbulence’ or ‘no change’, but should be carried out jointly and following a logical sequence. Early experience suggests that delegation of the exercise to ‘someone in personnel’, without a corporate approach, including the active involvement and co-operation of senior managers in all departments, is doomed to failure.

Likewise, on the union side, the exercise needs to be supported by a team (not lone individuals) working together in a planned and coordinated way. It is also important that key councillors (such as finance and HR committee members) are kept on board.

Branches should also share information with each other on experiences and outcomes elsewhere in the region and nationally. The unions’ local/regional and head offices can assist in this.

In broad terms, the recommended key steps are:

- consider principles and aims - at outset of the job evaluation exercise
- carry out job evaluation
- model realistic options for a new grading and pay structure, which suit the agreed needs of the local authority
- carry out an equality impact assessment
- cost most feasible options
- agree protection arrangements and finalise proposals for payment of backpay
- develop mechanisms to deal with assimilation issues, such as outlying jobs
- consider phasing options and any other consequential issues, for example, bonuses, working time arrangements.
- undertake an Equality Impact Assessment of the proposed new pay and benefits package (re-

negotiating on any elements shown to be likely to have an unacceptable adverse impact)

- consult members fully on the proposed deal, including an individual ballot.

Key implementation issues Equality Impact Assessment (EqIA)

EqIA looks at proposals for new grading and pay structures and any changes to terms and conditions, ie possible future arrangements, while equal pay audits look at the past and existing arrangements.

In the UK, the concept of EqIA was first applied in Northern Ireland and it was then adopted by the Commission for Racial Equality as a tool for public authorities to use in checking that their policies and functions were not having a disproportionate, adverse and possibly unlawful impact on any racial group. The concept was then taken up by the Equality Standard for Local Government and expanded to cover all the equality strands of the standard.

The new NJC implementation agreement 2004 states that local grading and pay reviews should include an equality impact assessment of proposed changes to grading and pay and other conditions. In addition, Part 3.2.4 states that ‘...In determining any new working arrangements required to deliver improvements authorities will ... (ii) conduct an Equality Impact Assessment consistent with the NJC model that will be set out in Part 4’. As mentioned earlier, this requirement also applies to proposals in regard to premium rates of pay and remuneration for working non-standard working arrangements.

The 2005 NJC Part 4 guidance on Equality Impact Assessment should be read alongside the guidance. Its principles apply equally to negotiations in Scotland.

What is EqIA?

EqIA is a systematic method of assessing (and recording) the likely differential impact of

proposed policies, initiatives or changes to services and the council's practices and procedures on different groups in the community and the workforce covered by the council's equality policies or statutory duties.

The aim is to find out whether any proposed change (for example, to the grading and pay structure) might have a differential and adverse effect on a particular group, and if so, to amend the proposals to deal with it. This process helps to protect the authority (and the union) from implementing changes which could be detrimental to particular groups and possibly unlawful. It also shows that councils are being pro-active in putting their equality and diversity policies to the test by checking on what is happening in practice. In the context of the grading and pay review, problems with current practices re terms and conditions of employment should be picked up by the equal pay audit.

It is important to appreciate that EqIA covers all equality strands, for example:

- gender
- race
- disability
- sexual orientation
- religion or belief
- age
- main occupational groups
- full-time staff
- part-time staff
- temporary employees

For some strands, the authority may have little or no monitoring data (for example on sexual orientation or religion). This can hamper the process but the authority can also consult staff and relevant organisations to gather qualitative information to take into account.

In brief, the EqIA has three main stages. In relation to the local grading and pay reviews, the TU Side recommends that the process be conducted on a joint basis, in keeping with the principle of jointness which underpins the national single status agreements:

Stage 1 – scope of the assessment:

- what are the aims and objectives of the proposal?
- how does the proposed change fit in with the authority's objectives? Does it support the authority's objectives on equality? Or if it supports some other objective, is this compatible with its equality policies?
- how does the proposed change fit in agreed objectives on single status, including the requirements of the national agreements?
- which group or groups are affected by this proposal?

Stage 2: assessment of impact:

- what information on the likely impact of the proposal is available from current data?
- what are the views of key stakeholders (employees, unions, managers)?
- how is it likely to affect the 'target groups' i.e. groups covered by the equality strands?
- is there any evidence that this proposal will disproportionately impact on any of the above groups?

Stage 3: decision and recommendation:

- is the impact adverse?
- if so, can the proposal be changed to remove any adverse impact? (Note: if it is potentially unlawful, it must be changed unless it is justifiable)
- can the negative consequences be counter-balanced by other measures?
- if not, are there alternative proposals which better or more safely meet the policy objective?
- if not, is there an acceptable justification for continuing with the proposed change?
- if yes, for what reasons?
- agree and record the decision on the proposal with justification if required
- make arrangements for jointly monitoring and evaluating the agreed proposal (assuming that employees have voted for the package) and its impact as part of regular audits.

It will be seen that this process was originally devised as a management exercise, with input from

unions and staff as ‘stakeholders’. As grading and pay reviews should be jointly conducted, EqIA – as part of that process – must be jointly carried out. For the union side, the value of EqIA is that it requires the employer to expose its proposals to a structured, equality-led analysis of their likely effects, so it may act as a brake on harmful proposals and open up the negotiating agenda to consideration of better alternatives. Unions should insist that all proposals, alternatives and alleged justifications are carefully scrutinised. There may be an argument that EqIA will be too time-consuming and can be dispensed with. As mentioned earlier, carrying out EqIA needs to be built into the project plan for the local review. HR should be gathering information for the equal pay audit and EqIA at an early stage.

Compensation for arrears (back pay)

As mentioned earlier, compensation for past pay discrimination can be awarded up to a maximum of six years (five years in Scotland) from the date that proceedings were filed with the employment tribunal. Following a successful challenge in the courts to the two year time limit, English law was changed in 2003, to increase the maximum period for the payment of arrears to six years.¹¹

In negotiations concerning equal pay, particularly local grading and pay reviews, the trade union side should try to secure the maximum compensation for everyone it considers has a potentially good equal pay claim. This will be evident from the results of the grading and pay review where job evaluation has been used. Jobs which have scored the same or similarly, i.e. that have been shown to be of equal value, can be compared against the pre-review remuneration for those jobs. Where, in the past, women job holders have been paid less than male job holders for equal work they would have a potentially good claim if the matter was pursued to the tribunal.¹²

Strictly speaking, men who have been under-paid relative to other men doing equal work only have legal entitlement to compensation if they can find a female comparator. However, in the interests of fairness and in light of the potential for valid claims from men (who could compare themselves with women doing equal work who receive

arrears), the trade union side should seek to secure compensation for all affected workers, regardless of sex.

As its opening position, the union side should try to secure six years arrears (five in Scotland), to be negotiated as a compensation package as part of the agreement on the local grading and pay review. By addressing past and future pay discrimination in this way, the employer and the union are trying to resolve all outstanding equal pay issues without employees or the unions having to resort to litigation.

Factors that can be taken into account in assessing the payment of arrears include: whether the women and men have been doing equal work for the entire period of six years (five in Scotland) or a shorter period. Is there any information which would indicate that the value of the jobs being compared may have differed over the past six years to the extent that they were unequal for some of the period? If there is a lack of hard evidence on this point, there will need to be a reasonably robust basis for deciding the position, in order to assure individual employees that back pay has been calculated on a fair and legally sound basis. (Information gathered for the grading and pay review will be useful in this regard, including data on individuals’ length of service, date of appointment / promotion to post.)

A settlement on compensation can take into account the risk, difficulties and delays involved in litigation. It may also take into account the benefit of receiving compensation upon the signing of the agreement (as opposed to having to await the uncertain outcome of a tribunal claim). In this regard, it should be noted that under the statutory dispute resolution procedures, some delay is built into going to the tribunal as the first step in that a (current) employee must lodge a grievance with the employer and wait 28 days for a response before she is entitled to submit a claim to the employment tribunal (so she will lose at least 28 days back pay at the outset).

A careful assessment will need to be made of any shortfall permissible in the payment of compensation to take account of the disbenefits of litigation. Further advice and clearance should

¹¹ *Equal Pay Act 1970 (Amendment) Regulations 2003. (The leading case that led to the change was Levez v T.H. Jennings (Harlow Pools) Ltd [1999] IRLR 36 ECJ).*

¹² *While the employer may concede equal pay on basic rates, he may argue there is a genuine material factor defence in relation to any other unequal elements of the remuneration package. As these issues will need to be resolved in order to implement a new grading and pay structure, they should not hamper finalising an agreement on compensation.*

be sought from your union's local or regional office on any proposed deal.

The operative date for the payment of compensation is negotiable. It would be logical to use the date on which the new grading and pay structure takes effect. If this is over a phased period, payment of compensation should at least commence on the earliest date on which the new structure is introduced i.e. when employees move across to the new grades even if for some staff this is to a transitional pay point or grade.

It is not advisable on tactical or legal grounds to put the issue of compensation to one side until the end of the negotiations on the grading and pay review. Firstly, it may leave the union side 'boxed in' whereas if the issue is dealt with during the review, it leaves both sides more options to work with. Secondly, it may cause a prospective draft agreement to unravel (owing to the need for re-costings) or cause the employer to panic and try to instigate or impose drastic cuts. Unions should be able to show that they have put the compensation issue on the agenda and have sought to secure the best possible settlement for members over the negotiations.

Union negotiators will need to make a judgement about whether the amount of compensation offered is less than six (five in Scotland) years is the best that can be achieved by negotiation. For the reasons mentioned above, some element of shortfall is likely to be acceptable. However, if the proposed deal on the grading and pay fails to address the issue of compensation, the unions will generally wish to support members with potential good equal pay claims.

It has been suggested that if the union is complicit in agreeing a deal which excludes the payment of arrears for equal pay, it may be exposed to claims for negligence from members with good claims and possibly also enjoined with the employer to a sex discrimination claim. Although this is open to debate, local representatives need to be aware of this argument and should seek advice at an early stage on how best to deal with proposals from employers to exclude payment of arrears for equal pay.

Consulting with members

Members must be kept well briefed on developments during the job evaluation exercise and throughout the negotiations on the grading and pay review.

Before reaching any agreement the unions must fully consult their members, comprehensively and competently. Branches need to plan and prepare for how this will be done. The plan needs to take into account how the branch will communicate with members (particularly non-activists) over the negotiations and the proposed agreement. It will also need to address any weaknesses in branch organisation, such as pockets of non-membership and under-representation of significant groups such as part-time workers, ex-manual workers and lower APT&C grades. This will be needed to be better able to resist 'divide and rule' tactics by the employer and to manage the situation where there are likely to be members who are downgraded (often from well represented, vocal groups) and members who are upgraded (often from under-represented, less powerful groups).

Each union has its own consultative procedures. In general, every member must be given every reasonable opportunity to vote in secret on the proposed agreement in a consultative ballot. Care must be taken to include members who are off work on long term sick leave; staff on maternity/maternity support or career breaks; those on secondments; tele-workers and members working in isolation; and members requiring information in special formats to meet their particular needs (for example, large print, Braille, in different languages).

The unions should be striving to achieve the maximum legal entitlement to compensation and 'levelling up' for all workers so that no one is downgraded in the grading and pay review who will require protection. Where this is not possible and compromise becomes necessary, the unions should be able to demonstrate to members that their starting point was to press for the maximum possible under legislation and in its bargaining proposals.

It is important that the union side keeps good records of its proposals to the employer and the

employer's responses over the period of the negotiations. This information will be vital in explaining to members why the final offer is the best achievable by negotiation. The details of the offer must be fully set out and explained to members, spelling out the pros and cons.

Some employers may want to close down the possibility of any further claims from individuals, by inviting each individual employee to sign a 'COT3' or compromise agreement.¹³ Members who are being asked to enter COT3 or compromise agreements as part of any settlement must be advised of the value of any potential claim that they might have and the difference between that and the sum agreed as part of any settlement. They should also be advised of their right to seek independent legal advice.

If a majority of members accept any new agreement and compensation in a consultative ballot, the union would be entitled not to pursue equal pay tribunal claims on behalf of dissatisfied members who do not accept the outcome and/or who refuse to sign a COT3 or compromise agreement. These members retain their individual legal right to pursue a claim – domestic law does not permit the union or employer to sign away such rights. In these circumstances, if a dissatisfied member asks the union for legal assistance, the union should advise the member to seek independent legal advice. Care must also be taken not to victimise any dissatisfied employees for intending to pursue or taking a claim.

Employers cannot impose new arrangements which are to the detriment of certain groups even where protection may have been agreed when they fail to abide by their legal duty to consult the union over plans to dismiss staff and re-employ them on less favourable terms. Failure to consult the unions will result in councils having to meet compensation bills which could be substantial in large authorities. At the time of writing, Leicestershire County Council was facing a £1.5 to £4.5 million compensation bill as a consequence of an employment tribunal decision over failure to consult (subject to appeal).

Approving draft local agreements

Each of the unions has its own arrangements for

the region and/or head office to scrutinise and approve draft local agreements on single status (including the new grading and pay structures) and compensation before they go out to members for consultation. The region and / or head office will check the draft agreement to ensure it complies with union policy and avoids potential equal pay pitfalls and potential claims from members against the union. The vetting process will also enable good practice to be shared and 'health warnings' on employers' tactics to be made available to other local negotiators.

Union representatives are encouraged to consult regional and head office officers, as appropriate, at an early stage where negotiations run into major difficulty, for example, where the employer is indicating that it will impose a settlement; or where influential members are indicating willingness to accept a potentially discriminatory settlement.

Practical options for dealing with common scenarios

The national single status agreements were never just intended as a grading and pay structure mechanism. One of the aims of the negotiators was to develop a tool which would facilitate the removal of outdated working practices linked to the old pay structures and the introduction of innovative ways of working to meet modern service requirements. To date, it has mostly been employers who have taken the initiative in this regard, often as a means to cut costs. Branches are strongly urged to bring positive proposals to the negotiating table. The scenarios outlined below (based on real situations) demonstrate how this might be done.

Example 1

Scenario: Even with the revised job evaluation guidance on policy development and advisory responsibilities, local authority A finds that social services policy jobs evaluate lower, so should be graded lower, than field social worker posts. Previously, policy postholders have usually been recruited from among senior social workers.

First reaction: blame the NJC job evaluation scheme for being flawed in its design and start thinking about creating market supplements.

¹³ A COT3 is the name of the form used by an ACAS conciliator in finalising a legally binding full and final settlement. A compromise agreement achieves the same end. It requires a solicitor's advice or it can be signed off with advice from a trade union official.

More considered reaction: Reflect on the comparative evaluations and consider whether the field social worker post is not genuinely more demanding overall, because of the high direct responsibility for clients plus emotional and possibly physical and working conditions demands. More fundamentally, consider also whether policy and practice development might benefit from input from direct service providers.

Possible solutions: consider alternative policy development mechanisms, which may be more effective, for example, one or two year fixed term secondments to policy development work with secondees remaining on their substantive grade (thus also providing personal development opportunities for the relevant individuals); creating project teams, with appropriate release from field duties, for policy development activities; changing the recruitment policy for policy development jobs and recruiting at the evaluated grade rate.

Example 2

Scenario: street cleaning jobs, previously towards the bottom of the manual worker structure, but subject in local authority B to an attendance-related bonus, evaluate at levels which result in somewhat higher basic pay, but not sufficient for consolidation of all of the bonus.

First reaction: street cleansing manager claims employees will not turn up for work without the attendance bonus; manager and employees believe that it will not be possible to recruit new staff at the new basic rate without bonus and that experienced employees will leave before their protection expires.

More considered reaction: manager and union reps conduct joint review of street cleaning services, carry out customer survey.

Possible solutions: consider extending role to include, for example, reporting street lighting failures, or checking on vulnerable members of the community, which would also have implications for the evaluation and grading of the job.

Introduce National/Scottish Vocational Qualifications (NVQs/SVQs) to promote career development and absence management scheme to maintain attendance. Re-evaluate the developed

role before the end of the protection period.

Example 3

Scenario: home care jobs, subject to intense competition last time the compulsory competitive tendering contract came up for renewal, evaluate significantly higher than their current grade rate in local authorities C and D.

First reaction: social services managers and elected members in both authorities say that the service will have to be outsourced, and that this is all the fault of the NJC job evaluation scheme and the unions who supported it.

More considered reaction: managers in local authority C reflect that turnover levels in home care have been high and recruitment very difficult recently, especially in the area where a new retail development opened last year; in local authority D, in a less prosperous part of the country, the managers conduct a survey of private sector residential and home care wage rates in the area and discover that there is a difference, but not as great as anticipated (perhaps because of the introduction of the statutory minimum wage).

Possible solutions: in both authorities, implement the new grade rates and discuss possible developments with union representatives. One option might be to introduce NVQ training and assessment for home care staff, together with a longer term career progression scheme within home care or for social services more generally, to improve or maintain recruitment and retention. An internal pre-review of home care provision, in advance of Best Value review, recognising, especially in local authority D, that Best Value might have meant tough decisions, even without single status and the NJC job evaluation scheme could be another option.

Appendix

This appendix provides background information on:

- equal pay and sex discrimination legislation
- legal issues – time limits; TUPE and time limits
- pregnancy and maternity leave
- other legislation that is relevant to local grading and pay reviews – Race Relations Act 1976, – Race Relations (Amendment) Act 2000, Disability Discrimination Act 1995, Disability Discrimination Act 2005, Data Protection Act 1998, Part-Time (Prevention of Less Favourable Treatment) Regulations 2000, Fixed-Term Employees ((Prevention of Less Favourable Treatment) Regulations 2002, Fair Employment and Treatment (Northern Ireland) Order 1998
- Equal Opportunities Commission model equal pay policy
- the Equality Standard for local government.

Equal pay and sex discrimination legislation

It should be emphasised that this appendix gives general guidance only. When dealing with specific issues and/or individual cases, branches and officers are advised to obtain legal advice in accordance with the union's protocol.

As equal pay and anti-discrimination law often changes over short periods of time, it is very important to ensure that you obtain the latest advice on the most recent judgments, particularly on appealed cases, and up-to-date information on new or amended legislation.

What does the law say?

The principle that a woman (or man) is entitled to equal pay for equal work¹⁴ is set out in European Union (EU) and UK legislation (sometimes called domestic legislation).

Why is European Union legislation important?

As a member of the European Union, the UK Government must ensure that domestic legislation

conforms to the requirements of EU 'directives' (or legally binding instructions to member states). The courts in the UK must interpret domestic equal pay and anti-discrimination law in light of EU law, as it is interpreted and set out in the decisions of European Court of Justice (ECJ).

The principle of equal pay for equal work is set out in Article 141 of the Treaty of Amsterdam 1999. Article 141 (which was Article 119 of the Treaty of Rome) requires member states of the European Union to ensure 'that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.

Article 141 (2) states that 'pay' means:

'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly from his employer'.

Because the meaning of 'pay' is much wider than basic pay, in carrying out local negotiations on single status, union representatives must be careful to consider all aspects of remuneration, including less obvious elements of 'pay' such as car allowances and (contractual) paid time off for training and development. (A more extensive list is set out below).

For the purposes of equal pay and sex discrimination legislation, occupational pensions are also treated as pay.

The Equal Pay Directive of the Council of the European Communities 1975¹⁵ spelt out in more detail what was required of Member States to apply Article 119 (now 141). It is now incorporated within Article 141.

Article 1 of the Equal Pay Directive states:

'The principle of equal pay for men and women outlined in Article 119...means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration'.

¹⁴ 'Equal pay for equal work' is used in the Guide (as it is in the EOC Code of Practice on Equal Pay) as a shorthand term to cover the different bases for equal pay claims: 'like work', 'work rated as equivalent' and work of 'equal value'. However, in Article 141, the term 'equal work' is distinguished from work of 'equal value'. This distinction was later to force the UK Government to amend the Equal Pay Act 1970 in 1983, to allow specifically for equal value claims.

¹⁵ Council Directive 75/117/EC on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women.

Article 1 added: 'In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex'.

For example, this means that job evaluation schemes must be non-discriminatory in the way they value jobs done by predominantly one gender.

Overall, the intent of the Directive was to require member states to abolish any discrimination contrary to the principle of equal pay arising from their laws, regulations and administrative provisions and to take the measures necessary to ensure the principle is applied.

Article 4 required member states to take 'the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements, or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended'. The implications of Article 4 are discussed later – the important point is that the principle of equal pay (and equality) is more powerful, in legal terms, than the principle of free collective bargaining.

What does the Equal Pay Act 1970 say?

The Equal Pay Act applies in England, Wales and Scotland. Northern Ireland has its own equivalent equal pay and sex discrimination legislation.

The Equal Pay Act 1970 provides for the right to equal pay for equal work. Although a man can make a claim for equal pay, generally unequal pay affects women, so the guide assumes that the complainant (or "claimant"¹⁶ in employment tribunal proceedings) is a woman, and the person she is comparing her pay with (the comparator) is a man. The Act cannot be used to make comparisons between workers of the same sex.

The employer can only pay a man more than a woman for doing equal work if there is a genuine and material reason for doing so which is not related to sex, that is, the reason must not be tainted by sex discrimination. (A later section deals with the defences available to an employer).

The Equal Pay Act requires men and women in the same employment to be treated equally. If the woman (or man) does not have an equality clause in her contract of employment, the Act inserts this clause, so the contract of employment is deemed to include it.

If she is doing equal work with a man in the same employment, the Act entitles her to equality in pay and other contractual terms and conditions of employment. This means that if she succeeds in her claim (through negotiation or through taking a case to the employment tribunal):

- her pay, including any occupational pension rights, must be raised to that of her male comparator
- any beneficial term in the man's contract but not in hers must be inserted into her contract
- any term in her contract that is less favourable than the same term in the man's contract must be made as good as it is in his contract.

In addition, she is entitled to compensation in the form of back pay (for arrears of pay), if the claim is about pay, and/or damages, if the complaint is about some other contractual term. It is very important in negotiating new grading and pay structures that women who gain equal pay as a result also receive compensation for having been paid unequally in the past. If this issue is not dealt with properly, a woman could still pursue a claim.

Because a woman can compare any term in her contract with that of her comparator, if her claim is about pay, each element of the pay package has to be looked at separately. So, for example, a woman whose basic rate of pay was lower than her male comparator could make a claim even though her total pay package was more favourable than his. (This was established by the House of Lords judgment in the case *Hayward v Cammell Laird Shipbuilders Limited* [1988] IRLR 257 HL.)¹⁷ In a more recent case, the Employment Appeal Tribunal has ruled it is not possible to treat 'sub-components' of basic pay as separate terms for the purposes of making the comparison.¹⁸ What constitutes 'basic pay' will depend on the facts in each case.

¹⁶ The term 'the applicant' has been replaced by 'the claimant' in all employment tribunal proceedings including equal pay claims. The term 'judgment' is now used to describe tribunal decisions as well as rulings of the Employment Appeal Tribunal, Court of Appeal and House of Lords.

¹⁷ Employment tribunal decisions do not set legal precedents. They can only be appealed on points of law to the EAT. The higher courts can overturn judgments of the lower courts. So judgments of the EAT are binding on tribunals; judgments of the Court of Appeal are binding on the EAT and ETs. (A parallel system operates in Scotland). (In Northern Ireland, there is no EAT). Judgments of the House of Lords bind all the lower UK courts. Ultimate legal authority in employment cases governed by EU law rests with the ECJ.

¹⁸ *Redcar and Cleveland Borough Council and anor v Degan and ors* 0321/04 EAT

Who does the Equal Pay Act apply to?

The Act applies to all employers regardless of their size and whether they are in the public, private or not-for-profit sector.

The Act covers:

- all ‘employees’ (including apprentices) whether on full-time, part-time, casual or temporary contracts of employment, regardless of length of service and
- other ‘workers’ (e.g. self employed) whose contracts require personal performance of the work.

What is ‘pay’?

The Equal Pay Act covers all aspects of the pay and benefits package including:

- Basic pay
- Non-discretionary bonuses (as defined earlier)
- Overtime rates and allowances
- Payments for other non-standard working arrangements
- Performance related pay
- Sick pay
- Holiday pay
- Car allowances
- Hours of work
- Severance and redundancy pay
- Access to and benefits under pension schemes
- Fringe benefits such as interest-free loans, travel concessions

Maternity leave is ‘pay’ within the meaning of Article 141, however the ECJ has held that women taking maternity leave are in a special ‘protected’ position, so their situation is not comparable with that of men or women actually at work. Therefore they are not entitled under Article 141 to full pay during maternity leave, although they must receive pay rises awarded before or during maternity leave. (*Gillespie v Northern Health and Social Services Board* [1996] IRLR 214 ECJ). See the section in the appendix on maternity leave for additional information.

Equal pay for equal work

The term ‘equal pay for equal work’ is used as shorthand for the different bases for a claim under

the Equal Pay Act:

- ‘like work’ – the woman and her comparator are doing the same or broadly similar work
- ‘work rated as equivalent’ – the work of the woman and comparator is different but is rated under a job evaluation scheme as being equivalent
- ‘work of equal value’ – the work of the woman and comparator is different but it is of equal value in terms of demands such as skill, effort and decision making.

If the woman and man are doing like work, or work rated as equivalent or work of equal value, then she is entitled to equal pay (subject to the employer not having a lawful defence).

What is ‘like work’?

‘Like work’ means the same or broadly similar work; it does not depend on the jobs having the same job titles – they can be different, yet the work could still be broadly similar. Any differences between the jobs are not taken into account if they are not of practical importance in relation to terms and conditions. The EOC Code gives the example of a woman cook preparing lunches for directors and a male chef cooking breakfast, lunch and tea for employees.

What is ‘work rated as equivalent’?

‘Work rated as equivalent’ means that the jobs of the man and woman have been assessed under the same job evaluation scheme as being of equal value, in terms of the demands made on the worker under various headings or factors such as effort, skill, decision making. In practice, this means the jobs have scored the same number of points or they fall into the same grade because they have similar job evaluation scores. Such claims could arise in a local authority where a man and woman score the same or around the same job evaluation points but her job is assimilated to a lower grade than his job.

This highlights the importance of branches and regional officers being centrally involved in the job evaluation process and for the negotiators to obtain a list of the final points scores for the evaluated jobs, since they could provide a basis of work rated as equivalent claims if the employer

fails to reflect the job evaluation outcomes in the new grading and pay structure, or refuses to proceed once the evaluation exercise has been completed. (The employer cannot lawfully withhold this information from the recognised union where it is sought for collective bargaining purposes or for pursuing equal pay claims). If an employer wants to abandon using the NJC JES once the benchmark sample of jobs has been evaluated (because, for instance, the results suggest the need for significant upgradings) and intends to or does use another scheme instead, there may also be scope for work rated as equivalent claims, for example, where there was unjustifiable delay in using an alternative scheme.

Following an equal value-based job evaluation exercise within an authority, care must be taken in designing and implementing the new grading and pay structure to avoid the risk of work rated as equivalent claims. (Reference to 'equal value-based' job evaluation means that the job evaluation scheme has been designed to measure the worth or value of different jobs, based on an analytical and non-discriminatory assessment of the demands made by those jobs).

The other situation in which there might be a 'work rated as equivalent' claim is where the women's job and man's job have been evaluated and graded the same with the same basic pay, but where other aspects of the pay package are unequal. This is how claims arise in relation to male ex-manual workers whose jobs were evaluated under the 1987 manual worker job evaluation and received bonus payments in addition to basic pay, who are the comparators for female ex-manual workers whose jobs evaluated similarly received the same basic pay but no bonus.

What is 'work of equal value'?

'Work of equal value' means the jobs done by the woman and her comparator are different, but can be assessed as being of equal worth or value, by comparing the job under headings such as skill, effort and decision-making. Usually, there will not be a job evaluation scheme in place. (Or it may be that the claimant's and comparator's jobs have been evaluated under different job evaluation schemes). Examples of successful 'equal value'

cases include comparisons between speech therapists and clinical psychologists; cooks and carpenters; and nursery nurses and architect assistants

The unions' clear preference is to resolve equal pay issues in the context of single status through negotiation and agreement. Pursuing cases to the tribunal carries risks associated with delay and uncertainty as to the outcome. For the union and the employer, dealing with individual equal pay claims is resource-intensive, laborious and time-consuming. However, should it prove necessary, the unions will be prepared take cases on behalf of members. Where this happens, union representatives - lay and full-time officers - must abide by the protocols applying within their union for taking tribunal cases.

Who can be a comparator?

The claimant must have a comparator – a person of the opposite gender with whom she compares her pay.

For an equal pay claim, the comparator can be:

- someone (of the opposite gender) with whom the claimant is working or has worked (in the same employment) at the present time or in the past
- her predecessor, however long ago he did the job, or her successor.

The woman can name more than one comparator. He cannot be 'hypothetical' for the purposes of the Equal Pay Act – the comparator must be a real person

If her claim is successful, her pay is raised to the same level as his – there is not a reduction in the comparator's pay and benefits

What does 'same employment' mean?

A woman can claim equal pay with a man working:

- for the same employer at the same workplace
- for the same employer but at a different workplace, where common terms and conditions of employment apply. For example, the claimant and comparator work for the same council covered by the same collective agreement (although their individual terms and conditions are not identical) at different sites

(she works in the office – he works from a depot)

- for an associated employer, for example, she works for the parent company – he works for a subsidiary).

The second type of ‘same employment’ is significant in local government because unequal pay is likely to be found mostly among men and women doing different jobs in different workplaces within the authority. The landmark case on the meaning of ‘common terms and conditions’ was *Leverton v Clwyd County Council* [1989] IRLR 28 HL, in which the House of Lords allowed a nursery nurse to bring an equal value claim comparing her work with male clerical workers working in different establishments where their terms and conditions derived from the same collective agreement, even though there were differences between their hours of work and annual leave.¹⁹ A subsequent House of Lords case, *British Coal Corporation v Smith* [1996] IRLR 404 HL, confirmed that ‘common terms and conditions of employment’ means terms and conditions which are substantially comparable on a broad basis - not the same terms and conditions with minor differences.

What about the meaning of ‘same employment’ under European law?

Privatisation, new forms of joint working with other public sector bodies and different approaches to grading and pay reviews across councils raise the question of whether equal pay comparisons can be made across councils or private contractors and in-house staff.

Some (limited) scope exists for cross-employer comparisons where the terms and conditions of the claimant and her comparator derive from a “single source” i.e. from legislation or a common collective agreement or from common management of a corporate group. However, in situations where the claimant and comparator are in the same service (but with different employers or under different contracts of employment) recent case law is unhelpful and branches and officers would need to take legal advice before attempting to make such comparisons in tribunal cases.

The ECJ has ruled that Article 119 (now 141) allows for a broader interpretation of ‘same employment’ in that it requires equal pay for ‘equal work which is carried out in the same establishment or service’ (in *Defrenne* (No 2) [1976] ECR 455). While this enables a broader comparison than was allowed by the Equal Pay Act, by allowing equal pay comparisons across employers in the same service, it is subject to strict limitations.

In *Scullard v Knowles & Southern Regional Council for Education and Training* [1996] IRLR 344, the EAT permitted Ms Scullard, a unit manager employed by a Regional Council, to name as her comparators male unit managers employed by other such bodies, all of which were independent of the Secretary of State for Employment but funded by the Department of Employment. This case, in particular, raised the prospect that ‘same employment’ claims might serve to curb gender-based differences in pay for equal work arising from different outcomes of local grading and pay reviews in different authorities, though this possibility currently seems remote as explained later.

In *South Ayrshire Council v Morton* [2002] IRLS 256 CS, the Court of Session in Scotland ruled that a female head teacher employed by a local education authority in Scotland was entitled to bring an equal pay claim relying on Article 141 to compare her pay with that of a male head teacher employed by a different local education authority in Scotland. The Court decided the claimant and comparator were in the ‘same service’ as they were in the same branch of the public service and were subject to a uniform system of national pay and conditions set by a statutory body whose decision is binding on their employers.

The ‘same service’ argument was deployed by UNISON to attempt to compare outsourced and in-house staff for equal pay purposes. *Lawrence & others v Regent Office Care Ltd & others* [1999] IRLR 148 EAT eventually went to the ECJ, where the claimants lost. The women workers - school meals staff - were transferred from North Yorkshire County Council to a private contractor. They ended up working on less favourable terms

¹⁹ The claim subsequently failed because it was held that the difference in the claimants’ and comparators’ annual salaries was due to and could be explained by the difference in the hours they worked in the course of a year and had nothing to do with the difference in sex.

and conditions than men still employed by the Council whose jobs had been ‘rated as equivalent’ in value to their jobs by the local government Manual Workers’ job evaluation scheme. The union argued that even though the women were no longer working for the council but for a different employer, they were entitled to equal pay because they were still working in the same service – the provision of school meals.

The ECJ held that where differences in pay cannot be attributed to a single source, equal pay claims will not be in scope of Article 141. To put it more simply, in the words of the original tribunal’s decision, ‘the person who discriminates has to be in control both of the women’s wages and the comparator’s wages’. In this case, the employers argued successfully that there must be a common source from which the terms and conditions of both the claimant and comparator derive (as when different employers are required to apply the same collective agreement, or where terms and conditions have been laid down by statute or a regulation).

Furthermore, it was argued that unless the difference in pay can be traced to a single source, the employer who is accused of sex discrimination (because he pays women workers less than the male comparator’s employer) is not in a position to explain the difference or to explain why that difference is objectively justified. The Advocate-General’s opinion (adopted by the ECJ) put it in this way: ‘...Article 141 is addressed to those who may be held responsible for [the pay difference i.e.] the legislature, the parties to a collective works agreement and the management of a corporate group...On the other hand, if differences in pay arise [where] respective employers are separately responsible for the terms and conditions ...within their own undertaking or establishment, they cannot possibly be held individually accountable for any differences in the terms and conditions ...between those undertakings’.

Even if, as in local government, the women’s and the comparators’ employers were party to the national agreement, grading and pay would be determined by local collective agreements rather than a ‘single source’, suggesting that claims across

authorities under Article 141 would be ruled out. The situation might be different if the claim for equal pay was in relation to a contractual term derived from Part 2 of the national agreement, as it is binding on all NJC authorities. However, the ECJ judgment in *Lawrence* does appear to rule out comparisons between authorities that have opted out of national agreements and NJC authorities; and between local authorities and contractors. (However, this should not prevent branches lodging claims as a protective measure or as a deterrent to outsourcing prior to an actual transfer)

In *Allonby v Accrington & Rossendale College and Others* [2004] IRLR 224 ECJ, the ECJ ruled that a lecturer employed through an agency could not claim equal pay with lecturers employed directly by the college. This case dealt with the question: could a woman and a man, working at the same establishment, but with different employers, be regarded as working in ‘the same employment’? Ms Allonby had been employed originally as a part-time lecturer on a series of short term contracts. As a cost-cutting measure, her contract was not renewed and she was re-engaged as a sub-contractor of an agency, as a self-employed person. Her fee and some other benefits were then reduced compared with directly employed lecturers. The fact that her fee was influenced by the amount the college paid the agency was not held to meet the ‘single source’ requirement – it was ‘not a sufficient basis for concluding that the college and ELS [the agency] constitute a single source to which can be attributed the differences identified in Ms Allonby’s conditions of pay and those of the male worker paid by the college’.

In reinforcing the *Lawrence* judgment, the ECJ seems to be shying away from the far-reaching economic consequences of allowing cross-employer comparisons in the similar (and often privatised) services or industries as it could be seen as going beyond the interference with the free market as is currently permitted in EU law. The *Allonby* judgment appears to limit the scope for successful equal pay claims within an authority, where a contractor’s employee (or an agency

worker) is being paid less than a directly employed worker (of the opposite sex) for equal work.

In *Robertson & others v Department for Environment, Food and Rural Affairs* (2005 EWCA Civ 138) the Court of Appeal upheld a judgment of the EAT that a group of male civil servants were not entitled to compare their pay with women civil servants working in another government department. Technically, they have the same employer (the Crown), but pay negotiation is delegated by the Crown to each department or agency. The employment tribunal had decided that the Treasury had material control over the terms and conditions to such a degree that it could properly be regarded as being a 'single source'. The EAT and the Court of Appeal disagreed. The Court held that working for the same employer is not sufficient to establish common employment for the purposes of an Article 141 claim. Neither the Treasury nor the Cabinet Office was involved in negotiations within different departments and there was no coordination between the different sets of negotiation. Therefore the Crown could not be said to be the body which is responsible for the inequality and which could restore equal treatment – thus it was not permissible to use comparators from different government departments for the purposes of an Equal Pay Act or Article 141 claim.²⁰

The *Lawrence*, *Allonby* and *Robertson* judgments on the 'same employment' issue are a setback because they will inhibit the use of Article 141 claims to challenge gender-based pay inequality across authorities and between contracted-out and in-house staff.

Even if the door was open wide to such claims, there would be difficulties for unions in running cases where, potentially, members would be challenging the contractual outcomes of collective agreements negotiated by different branches of the same union or by different trade union sides. Any subsequent unravelling of agreements could also cause difficulties with members who had voted for the settlement.

The employer's defences to an equal pay claim

What is the 'no reasonable grounds' defence?

Until 1 October 2004, a tribunal could strike out an equal value claim where it was satisfied there were 'no reasonable grounds' to determine that the work of the claimant and her comparator were of equal value. The 'no reasonable grounds' defence was removed by the Equal Pay Act 1970 (Amendment) Regulations 2004. The tribunal has other powers to deal with claims which are without merit and there have been concerns that the 'no reasonable grounds' defence put an unnecessary obstacle in the way of valid claims.

Can using a job evaluation scheme be a defence against an equal pay claim?

A tribunal will strike out an equal value claim where the claimant's job and the comparator's job have been evaluated by an analytical job evaluation study and given different values, i.e. where the jobs have been rated as unequal.

To enable this defence to be run, the job evaluation study or scheme must be 'analytical' i.e. the jobs are broken down into components or factors and scores are awarded for each factor. The final total gives an overall rank order of scores. A non-analytical scheme does not provide a defence against an equal value claim. (The EOC Guidance Notes for the Equal Pay Review Kit and the National Job Evaluation Technical Working Group provide further information on acceptable methods of evaluating jobs to comply with the Equal Pay Act 1970 in this regard.)

The 'job evaluation defence' in the Equal Pay Act 1970 has attracted employers to carry out job evaluation in order to protect themselves against equal value claims. A tribunal is obliged to rule out a claim if the jobs have been rated as unequal, unless the tribunal has reasonable grounds to suspect that the evaluation is itself based on a system which discriminates on the grounds of sex or (since 1 October 2004) if it is 'otherwise unsuitable to be relied upon'.

In the past, it has proved very difficult to challenge proprietary job evaluation schemes on the grounds

²⁰ *At the time of writing, a petition to appeal before the House of Lords had been lodged.*

that they may be indirectly discriminatory or sex-biased to such a degree that they are unsound or would fall foul of equal pay law; although some elements of job evaluation schemes have been modified following criticisms by the tribunal or concerns expressed about their suitability on the part of unions. In the absence of case law, at the time of writing, it is difficult to assess what impact the new route for challenging job evaluation schemes may have. It might be possible to challenge a job evaluation scheme as ‘unsuitable to be relied upon’ if it failed to meet key criteria set out in EOC Guidance Note No. 4: Job Evaluation Schemes Free of Sex Bias. For example, it could be argued that a job evaluation scheme designed specifically for ‘white collar’ employees would be unsuitable to cover manual as well as APT&C jobs because the factors do not cover all the important job demands. This may apply to existing schemes that are amended to be able to deal with former manual jobs for example if the amendments fail to account properly for the demands of the manual jobs and under-value features of those jobs relative to ‘white collar’ jobs.

What if the employer wants to use two job evaluation schemes?

Where two schemes are used to cover employees in scope of the Green Book, there is an increased risk of an equal pay or sex discrimination challenge. The ‘danger zone’ exists when the cut-off point on the spinal column between the two schemes results in jobs predominantly being done by women in a lower grade, or in an overlapping grade on lower pay, where the women are able to show that their jobs are of equal value to higher paid jobs evaluated under another scheme. In these circumstances, the job evaluation defence is not available to the employer where the claimant and comparator’s jobs have been evaluated under different schemes. Another possible scenario is that by acting to exclude predominantly women’s jobs from the scope of a job evaluation scheme that would have put their jobs in a higher grade occupied mainly by men, the employer has indirectly discriminated against women.²¹ Provided it was accepted by the tribunal that this was *prima facie* sex discrimination, the employer would have to meet the test of objective justification.

To avoid destabilising equal pay or sex discrimination claims, and in the interests of fairness (in the sense of all the jobs being treated the same way for evaluation purposes), branches should resist the use of two schemes for jobs in scope of the national agreement, particularly where the employer wants to set a cut-off point for the NJC JES at the mid-to-upper end of the Principal Officer grades or lower.²²

If two job evaluation schemes have been used, it does not automatically follow that the resulting pay and grading structure will fall foul of equal pay requirements. It may be that a better and fairer outcome could have been achieved using just one scheme, but it should be remembered that the Equal Pay Act 1970 cannot be used simply to get a better outcome or the best outcome for women (or men) from a grading and pay review where there is no gender-based pay inequality. This note of caution applies generally to the outcomes of pay and grading reviews - the proposed new structure may be seen as unfair or less advantageous than the unions’ preferred option, but if the job evaluation scheme/s used or the resulting structure are not unlawful, the Equal Pay Act and the Sex Discrimination Act do not assist.

What is the genuine material factor defence?

Where an employment tribunal finds that there is a difference in pay or terms between a woman and man doing equal work, it will then ask whether the difference is due to sex discrimination or some other factor²³ that does not amount to sex discrimination. An employer can pay a man more than a woman doing equal work if the factor that accounts for the difference is free from sex discrimination. This is known as the genuine material factor defence (or GMF defence).

In some cases, a tribunal might proceed to consider this defence first, proceeding on the assumption that the work done is equal although that question has not actually been determined. This is most likely where cases of equal value are being pursued that involve a reference to an independent expert appointed by the tribunal. Proceeding to consider the GMF defence as a preliminary matter may ensure that there is not

²¹ Further technical advice on the use of two JE schemes is available from the national trade unions. .

²² For more information and examples of jobs where this problem arises, see UNISON circular ULG/92/2004

²³ ‘Factor’ is used here in its general sense, not its JE meaning.

undue delay in resolving the issues in a particular case.

Once a woman has proved she is doing equal work but is being paid or treated less favourably, the burden passes to the employer to demonstrate an explanation for the variation between her contract of employment and his that is not tainted with sex.

The courts have set out the requirements of the GMF defence as follows:

- the reason or explanation for the difference must be genuine i.e. not a sham or pretence
- the less favourable treatment is due to this reason (not some other reason)
- the factor relied upon must be the cause of the disparity between her pay and his; and it must be 'material' i.e. a significant and relevant factor in explaining the difference
- the reason is not the difference of sex (directly or indirectly)
- the factor must be a 'material difference' (in a like work or work rated as equivalent case). So a short term difference in pay while phasing in a new grading and pay structure might not be regarded as a material difference.

In a case where a woman is claiming that the two jobs are of equal value and that her job is done by a much higher proportion of women than the comparator's job, a *prima facie* ('on the face of it') case of indirect sex discrimination will have been made out where she produces evidence that there is a significant disparate (adverse) impact on women. If the jobs are found to be of equal value, the employer will have to provide 'objective justification' for the pay difference between the two kinds of jobs.

What is 'prima facie sex discrimination'?

In the context of Single Status, it is imperative that the proposed new grading and pay structure is checked to ensure that there is no *prima facie* sex discrimination, by checking that men and women doing equal work have been placed in the same grade and/or are receiving the same rate of pay.

Prima facie discrimination exists where, on the

face of it, there is indirect sex discrimination occurring.

'Indirect discrimination' is defined by the Sex Discrimination Act 1975 (SDA). It occurs if an employer:

'applies to her [the worker] a provision, criterion, or practice which he applies or would apply equally to a man, but –

- (i) which is such that it would be to the detriment of a considerably larger proportion of women than of men, and
- (ii) which he cannot show to be justified irrespective of the sex of the person to whom it is applied, and
- (iii) which is to her detriment'. (SDA Part I section 1(2) (b))²⁴

In checking for indirect sex discrimination, the questions to ask are: do the statistics indicate any adverse impact on women doing equal work with men, that is, are substantially more women than men in the disadvantaged group? What is the reason for the pay disparity? If so, can this position be rectified by changing the grade boundaries or pay line? Is it temporary in order to phase in the new structure? If not, is it objectively justifiable?

What does 'objectively justifiable' mean?

The test for objective justification has been held to require the employer to show that:

- the purpose of the provision or practice (causing the difference) is to meet a real business need
- the provision or practice is appropriate and necessary as a means of meeting that need.²⁵

The 'business need' must be real (not made up) and demonstrable – although it can be a justification that did not figure in the employer's decision making processes at the time, i.e. 'after the event' arguments are permissible. The measure taken which gives rise to an adverse impact on women must be fitting for the purpose – it must not be a sledge hammer to crack a nut, for example, that results in more adverse impact than is unavoidable to meet the business need. The test

²⁴ As a consequence of the requirement to amend the SDA 1975 to implement the revised Equal Treatment Directive 2002/73, the definition of indirect discrimination will be changed, with effect from 1 October 2005. The amended definition will bring the SDA into line with the provisions on indirect discrimination in employment in regard to race, religion or belief and sexual orientation. Further advice on the changes will be issued by the unions when the regulations amending the SDA 1975 are finalised.

²⁵ *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317 ECJ.

itself is prone to interpretation by the courts. For example, the Court of Appeal held in *Cadman v Health and Safety Executive* [2004] IRLR 971 CA that the test is whether the means used are ‘reasonably necessary. In other words, it does not require the employer to establish that the measure complained of was necessary in the sense of being the only course open to him.

The House of Lords has held that if the employer proves the reason for the difference in pay is not the difference of sex, it is not obliged to objectively justify the pay difference. In other words, if the employer proves the absence of sex discrimination, it does not have to also prove a ‘good’ reason for the pay disparity. (*Glasgow Corporation v Marshall* [2000] IRLR 272 HL.)

The ECJ has ruled that normally the burden of proving the existence of sex discrimination in pay lies with the worker. The onus shifts to the employer to prove the difference is objectively justified once:

- the employee has shown that the measure ‘has in practice an adverse impact on substantially more members of one or other sex’; or
- where a pay system lacks transparency (i.e. where it is not possible for an employee to know how her or his pay package has been made up and what each of its elements comprises), the employee must establish ‘in relation to a relatively large number of employees, that the average pay for women is less than that for men’; or
- the employee must establish a prima facie case of sex discrimination, on the basis of statistics which are ‘valid and appear to be significant’.

In the latter case, the ECJ held in *Enderby v Frenchay Health Authority* [1993] IRLR 591 that it is for the national court (including the tribunals) to assess whether it may take into account the statistics produced in evidence, ‘that is...whether they cover enough individuals, whether they illustrate purely fortuitous or short term phenomena, and whether, in general, they appear to be significant’. In *Enderby*, the ECJ found that NHS speech therapists were doing work of equal value with hospital pharmacists and that ‘significant statistics’ disclosed an ‘appreciable

difference’ between the two jobs, ‘one of which is carried out almost exclusively by women (speech therapy) and the other predominantly by men’.

In *Home Office v Bailey and ors* [2005] EWCA Civ. 327 (renamed *Clemens and Pollack v Home Office*) the claimants were women higher executive officers (HEO’s) in the prison service and their comparators were prison governors and principal officers. It was accepted that they were employed on work rated as equivalent by a job evaluation scheme, but the employer argued (as the material factor defence) that they were in different grades owing to historically different collective bargaining arrangements. The lower grade comprised men and women (including the claimants) in approximately equal numbers, while the higher grade (the comparator group) was predominantly male.

Using the approach set out in the indirect sex discrimination case of *Seymour-Smith*,²⁶ the claimants identified a pool for comparison: all HEO’s and the comparator group. It was then shown that the proportion of women within the pool who were disadvantaged was much higher than the proportion of men who were disadvantaged. This established a prima facie case of indirect sex discrimination. The Court of Appeal held that this statistical approach was permissible in determining whether there was prima facie discrimination (provided the tribunal is satisfied as to the validity of the statistics and the appropriateness of their use). In this case, the presence of a significant number of men in the disadvantaged group did not defeat the argument that there was prima facie discrimination requiring justification by the employer.

Possible objective justifications for differences in pay could include, for example:-

- reasonable transitional personal pay protection and/or phasing of equal pay levels
- differences in working patterns or arrangements (e.g. shift work premia, unsocial hours payments, overtime)
- differences in performance or productivity
- differences in length of experience, for example, on a traditional incremental pay scale (provided it was not an unduly lengthy scale).

²⁶ *R. v Secretary of State for Employment ex parte Seymour-Smith and anor. ECJ 1999 ICR 447*

However, it is important to note that such job features will only provide an objective justification for differences in pay if they are applied to all those who meet the relevant criteria, which must be non-discriminatory in design and implementation.

Cost as a defence to an equal pay claim

Branches should be aware that there is nothing to stop an employer arguing that financial constraints explain or justify a pay disparity. And while it is clear from ECJ judgments that member states and regional governments cannot rely on budgetary considerations alone to justify indirectly discriminatory pay structures,²⁷ the position is not so clear cut for private respondents. The tribunals may attempt to do a balancing act between rectifying gender inequality on the one hand and accommodating market principles on the other, by taking financial constraints into account in considering the test of objective justification, for example. For negotiating purposes, branches should argue that budgetary considerations alone cannot justify pay inequality, on the basis that councils are public authorities (and emanations of the state) on whom the courts have bestowed higher standards for complying with equality legislation.

However, branches need to be alert to the strategies that employers are likely to adopt in taking into account the cost of compensation as part of the overall settlement. It may lead some employers to reduce their offer on protection as a trade-off; to 'lower the pay-line' for some or all grades; or to attack Part 3 terms and conditions, or all of the above. Branches will need to be prepared to challenge these types of proposals in negotiations, for example, by insisting on equality impact assessments of proposals to test for any adverse impact on women (or men), part-time and temporary employees, different ethnic groups and disabled staff. Such proposals are also likely to pit the interests of different groups of members against each other. In these circumstances, branches must ensure that all members have access to information about the progress of negotiations and make efforts to build organisation within the branch so that a wide cross section of members

can participate in the branch's decision making structures.

Equal pay awards

If a woman succeeds in her equal pay claim, she is entitled to:

- an order from the employment tribunal declaring her rights
- equalisation of contractual terms for the future (if she is still in employment)
- compensation consisting of arrears of pay (if the claim is about pay) and / or damages (if the complaint is about some other contractual term)
- in addition, the tribunal may award interest on the award of compensation.

The very important issue of compensation for arrears (sometimes called 'back pay') for members who have been paid unequally in the past is dealt with in the section on implementation in this guide. However, it should be emphasised that the issue of payment of arrears will have to be put on the negotiating agenda at an early stage – so although it is covered in the guide in the implementation section, it should not be treated as an issue that can be left until near the end of the local review.

Arrears of pay can be awarded up to a maximum of six years (five years in Scotland) from the date that proceedings were filed with the employment tribunal. English law was changed in 2003, to increase the maximum period for the payment of arrears from two to six years.²⁸ (These time scales derive from English and Scottish civil law (of contract).

What could happen if a collective agreement is discriminatory?

Branches and officers need to be aware of the serious consequences of signing up to collective agreements which perpetuate discrimination and/or pay inequality; or introduce new forms of it, even inadvertently. If, for example, a key term or terms in an agreement on a new grading and pay structure were held to be discriminatory, striking out by the tribunal could cause the whole agreement to unravel if not collapse, forcing

²⁷ *De Weerd Case C – 343/92* [1994] ECR I-571; *Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] IRLR 368 ECJ; *Jørgensen v Foreningen af Speciallaeger* [2000] IRLR 726 ECJ; *Steinicke v Bundesanstalt für Arbeit C-77/02* [2003] IRLR 892 ECJ

²⁸ *Equal Pay Act 1970 (Amendment) Regulations 2003*

negotiators back to the drawing board while contending with angry members.

A separate but related piece of legislation, the Sex Discrimination Act 1986, allows a person to challenge a term in a collective agreement or an employer's rule if she considers that it 'provides for the doing of a discriminatory act' and it might at some time have effect in relation to her. For example, she might challenge an agreed protection arrangement which gave indefinite protection to down-graded posts (now of equal value with hers) held mainly by men. If a complaint to the employment tribunal in respect of a discriminatory term in a collective agreement is upheld, that term is struck down in its application across the board.²⁹ By contrast, section 77 of the Sex Discrimination Act 1975 which provides for declarations by the tribunal that a contractual term is unenforceable, permit such declarations only in respect of the claimant herself, where she is a party to the contract in question.

However, a successful challenge of a term or terms in a collective agreement does not result in 'levelling up' that is, extending the benefit to those denied it on discriminatory grounds³⁰. For example, a woman part-time worker could successfully challenge a term in a collective agreement that indirectly discriminated against mainly women part-time workers. However, section 6 of the SDA 1986 would not extend the more beneficial term enjoyed by full-time mainly male workers to the part-time workers. Section 6 does not have the effect of changing the workers' contracts of employment. While the discriminatory term in the collective agreement is void, it is not removed from individuals' contracts of employment (where incorporated) until a new non-discriminatory term is agreed and then incorporated into the contracts of employment; or until women secure levelling up by taking individual equal pay (or sex discrimination) claims. But in extreme cases, a challenge under the sex discrimination legislation might prevent employers imposing a discriminatory agreement.

Union representatives and employers need to check that proposed agreements are not discriminatory in any way. Sometimes this is called

'equality-proofing' an agreement. By carrying out an 'equality impact assessment' it is possible to gauge the effect proposed changes in terms and conditions of employment will have on different groups in the workforce and to check whether any group might be affected adversely. Equality impact assessment is explained in more detail in the main part of the guide.

Is there protection against victimisation in equal pay cases?

The Sex Discrimination Act 1975 protects workers from being victimised for making a complaint to the employer about equal pay or sex discrimination or for intending to make a complaint to the tribunal. Anyone who assists her is also protected, notably the union representative and her comparator.

The case of *St Helens MBC v Derbyshire & 38 others* examined how, in anticipating an equal pay claim, the employer had deployed arguments on cost, and whether it amounted to victimisation. The claimants (school meals workers) had not accepted the deal on offer to settle their equal pay claims (unlike most of the catering staff). Two months before the tribunal hearing, the employer wrote a letter to the claimants stating that the authority could not withstand any immediate increases in pay rates. The employer also wrote to all the catering staff commenting on the costs of a successful claim and the viability of the service. It would be forced to consider ceasing the service, only providing free school meals thus requiring 'a very small proportion of the existing workforce'.

The claimants alleged they had been victimised – the letters had caused them distress and some of them had been reproached by other catering staff. They argued that the employer's intention was to intimidate them into dropping their equal pay claims. After two tribunal and EAT hearings, it was held that they had suffered a detriment and less favourable treatment than the staff who had settled their claims. The reason for less favourable treatment was that the claimants were continuing with their claim. The tribunal upheld their claims, and the Council's subsequent appeal to the EAT was dismissed.

²⁹ If, however, she challenges a discriminatory term in a contract of employment under the SDA 1975 (section 77), and is successful, the term will be declared unenforceable only in respect of herself, where she is a party to the disputed contract).

³⁰ There have been no precedent cases on the point in the UK but *Kowalska v Freie und Hansestadt Hamburg Case C-33/89 [1990] ECR I-25* has been mentioned by some lawyers as indicating that UK law falls short of the requirements of Article 141 in this respect.

The Council then appealed to the Court of Appeal, which, by a majority of two to one, allowed the appeal. The Court of Appeal held that the council did not victimise the claimants by sending them a letter warning of dire consequences if their claim were to succeed. The Court held that sending the letter was ‘an honest and reasonable attempt by the council to compromise the proceedings’. It was held that the council was free to conduct its defence in an honest and reasonable manner. At the time of writing, the case has been remitted for the tribunal to determine whether the council’s actions fell within the scope of that principle.

The Court of Appeal decision suggests that there is a very fine line between what is to be regarded on the one hand, as an honest attempt to compromise proceedings by a respondent employer, and on the other, as a form of victimisation. It is therefore likely that each case will very much turn on its own facts.

What is the relevance of the Sex Discrimination Act 1975 to equal pay?

The Sex Discrimination Act 1975 (SDA) sometimes has a bearing on equal pay issues. In the field of employment and vocational training, under the SDA, a person discriminates against a woman if ‘on the ground of her sex he treats her less favourably than he treats or would treat a man’. This is known as ‘direct discrimination’. To give a hypothetical example, if an employer gave all male workers paid time off to watch a football match but denied it to women workers, that would be direct discrimination.

The definition of indirect discrimination is set out earlier in this section of the guide.

Unlike direct discrimination which is always unlawful, indirect discrimination can be lawful if it is objectively justified. As outlined above, the ECJ has set out a test for objective justification – pay structures which have a disparate and adverse impact on women are permissible only where they ‘correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end’.³¹

An example of unjustified indirect discrimination would be changing rostering arrangements to include early starts for staff which made it impossible for single parents, the majority of whom were women, to continue working their shifts; when the employer could have taken into account the reasonable demands of the affected employees in changing working arrangements and not incurred damage to his business plan.

It can sometimes be difficult to know whether to take a claim under the Equal Pay Act or the SDA. This is because the SDA covers non-contractual issues, including non-contractual pay matters; whereas the Equal Pay Act covers pay or benefits provided under a contract of employment. (Where there is doubt, claims can be drafted as being pursued under both statutes in the alternative).

Non-contractual issues might include recruitment procedures, job selection and promotion criteria, training arrangements and access to a workplace nursery. (In local government, provisions of any collective agreements which have been incorporated into individuals’ contracts of employment would be covered by the Equal Pay Act – otherwise they are covered by the SDA). The SDA also covers any payments which are not contractual but are made at the employer’s discretion. It is possible for a claim to involve both Acts. For example, decisions made by an employer in appraising the performance of workers which discriminated indirectly against women could be challenged under the SDA, while the differences in pay that resulted and any contractual terms of the performance appraisal scheme could be challenged under the Equal Pay Act, where the men and women were performing equal work. (NB this is not a matter which branch representatives would need to determine. In considering any such claims (and how they might be drafted) advice must be sought from your regional office who will confer with head office in approving cases for submission to the tribunal).

Legal issues - Time limits

If the changes introduced in a single status package are such to amount to the termination of the previous contract of employment and the introduction of a new contract, then any equal pay

³¹ *Bilka-Kaufhaus Case C-170/84 [1986] ECR 1607*

cases need to be lodged within six months of the implementation of the single status package. Workers not covered by this situation must submit any equal pay claims they might have while they are employed by the relevant employer or within six months of the termination of their contract of employment or of the ending of the employment relationship.³² (Note: sex discrimination claims have a three-month time limit from the point of discrimination, unless it is continuing). This has implications for some members (such as those nearing retirement or being transferred out) where negotiations are in progress but where the union may have to end up pursuing tribunal claims. To protect these members' position, it is necessary to lodge proceedings to prevent the union being negligent.

Time limits and term-time workers

The Equal Pay (Amendment) Regulations 2003 address the position of term-time workers and time limits for lodging equal pay claims. A claimant employed under a 'stable relationship' can bring a claim either during that relationship or within six months of its end. When employed on a series of non-consecutive contracts, the six month time limit will run from the end of the employment relationship.

TUPE and time limits

The Court of Appeal has ruled that where there has been a TUPE transfer, time begins to run for the purposes of taking an equal pay pension claim against the transferor (the 'old employer') from the date of the transfer, not the date when employment ends with the transferee (the organisation the employee is transferred to).³³ This does not affect equal pay claims which are not related to pensions.

Note: Each of the unions has its own protocols for seeking legal advice and lodging claims. These protocols must be strictly observed.

Pregnancy and maternity leave

During the period of ordinary maternity leave, a woman's contract remains in place and all of her contractual terms and conditions must continue, except for her normal pay. When she is on additional maternity leave, her contractual terms

cease to apply (with some exceptions), even though her contract remains in place. However, her entitlement to paid leave under the Working Time Regulations continues to accrue and in some circumstances it may be contrary to the Equal Pay Act or SDA to treat a woman on maternity leave differently from other workers. Detailed legal advice should be sought on the particulars of any such case.

Other legislation that is relevant to local grading and pay reviews

This section of the guide mentions some important pieces of legislation which are relevant to equal pay and local grading and pay reviews. However, it is not comprehensive and union representatives should seek further information and advice on issues related to these laws.

Race Relations Act 1976

Less favourable treatment on racial grounds is direct discrimination. Indirect discrimination occurs when an employer applies to a person, a provision, criterion or practice which he applies or would apply equally to others not of the same race or ethnic or national origins as that person, which puts or would put those of same race or ethnic or national origins as that person at a particular disadvantage when compared with others; and puts that person at that disadvantage; and which the employer cannot show to be a proportionate means of achieving a legitimate aim.

It is important that proposed new grading and pay structures are checked for signs that there may be direct or indirect discrimination occurring. For example, the reasons for these outcomes would need to be investigated further:

- employees from minority ethnic groups whose jobs scored similarly to white colleagues are being paid less because their jobs fell disproportionately into a lower or (long-term) overlapping grade
- employees from minority ethnic groups were assimilated to lower pay points in the same grade as other colleagues whose jobs scored similarly. (Note: the example above and this example could be regarded as *prima facie* racial discrimination)

³² This can be extended in certain circumstances in relation to concealment by the employer and disability (by virtue of the Equal Pay Act (Amendment) Regulations 2003).

³³ Preston No. 3 reported under the name of *Powerhouse Retail Ltd and ors v Burroughs and ors EWCA Civ. 1281*. Note: an appeal to the House of Lords against the Court of Appeal judgment is listed for February 2006.

- access to off-spine payments is not open to the same extent for employees from a particular ethnic group compared with others in the same situation
- employees from a particular minority ethnic group consistently score lower performance ratings and are awarded lower performance-related pay (PRP) than white colleagues in the same grades. (Note: there is a statutory duty on authorities to monitor PRP scheme outcomes by ethnicity). Competence or contribution-related schemes should also be monitored.

In making a claim of indirect race (or sex) discrimination, the claimant has to prove facts from which the tribunal could conclude that he or she has been unlawfully discriminated against in the absence of a reasonable explanation from the employer. Firstly, the claimant has to establish that the 'provision, criterion or practice' in question has had a disproportionate adverse impact upon her racial group (or sex). *Nelson v Carillion Services Ltd.* [2003] IRLR 428 CA.

Race Relations (Amendment) Act 2000

The Act places a general duty on specified public authorities to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. The statutory Code of Practice on the duty to promote race equality advises authorities to assess how all its relevant functions (including employment) and policies affect race equality. The process involved in making this assessment is often referred to as 'equality impact assessment' and the concept has been adopted by the Equality Standard for Local Government to apply to the other statutory equality strands.

In addition, most public authorities³⁴ are subject to specific duties on employment under the terms of the Race Relations Act (Statutory Duties) Order 2001 (and the equivalent Order in Scotland). The Orders impose a duty to carrying out ethnic monitoring. In respect of pay, authorities (with 150 or more full-time staff) are obliged to monitor the numbers from each racial group 'who benefit or suffer detriment as a result of its performance

assessment procedures'.

Disability Discrimination Act 1995 (DDA)

Discrimination in relation to pay, means, without justification, treating a person less favourably for a reason related to his or her disability. Direct discrimination is no longer capable of justification and employers can no longer argue that a failure to make reasonable adjustments can be justified. The Disability Discrimination (Employment Field) (Leasehold Premises) Regulations 2004 revoked a provision in the DDA which allowed differences in performance-related pay in certain circumstances. Since 1 October 2004, a disabled person cannot be treated less favourably under the terms of a performance-related pay scheme which makes payment wholly or partly dependent on a person's performance for all the staff covered by it, but which is not defined by reference to any disability. In other words, where the employer operates a PRP scheme which has no reference to disability in its rules, and the scheme covers the disabled person and other staff, the disabled person cannot be penalised where their performance is affected by their disability.

Disability Discrimination Act 2005 (DDA 2005)

The DDA 2005 makes important changes to the definition of disability and introduces a new positive duty on public authorities in England, Wales and Scotland to promote equality of opportunity for disabled people. The changes to the definition of disability – involving mental impairment and progressive conditions – are expected to come into force in December 2005.

Local authorities will have a specific duty to produce a Disability Equality Scheme. Among other things, this must set out how the authority will assess the impact of its policies and practices, or the likely impact of proposed policies or practices, on equality for disabled persons. The provisions in the Act on positive duties are expected to come into force in December 2006, however, 2005 NJC guidance on Equality Impact Assessment advises authorities to cover disability, as does the Equality Standard for Local Government, in light of existing obligations under

³⁴ Schools are subject to separate provisions. The specific duties on employment do not apply to them, but to the education authority.

the DDA 1995 and local equality and diversity policies. At the time of writing, the Disability Rights Commission had issued a draft Code of Practice on the duty to promote disability equality. The Code is intended to give practical advice and guidance on the law.

Data Protection Act 1998

It is important that the conduct and implementation of the grading and pay review complies with the authority's policies on data protection and is compliant with the Data Protection Act 1998 (DPA) and the Information Commissioner: Employment Practices Data Protection Code, particularly Part 2: Employment records (2002) and Part 3: Monitoring at work (2003).

Under the DPA, pay is 'personal data'. Personal data can only be disclosed in accordance with data protection principles. Data that is 'personal and sensitive', such as ethnic origin, is subject to special safeguards. (The Code Part 2 sets out the provisions on equal opportunities monitoring).

Details of an employee's salary are likely to be covered by the DPA but information on the entire workforce's salary structure, given by grade, where individuals are not named and are not identifiable would not be likely to be covered by the Act.

The ECJ has held that pay systems must be transparent. This means that pay and benefit systems should be capable of being understood by everyone. Employees should be able to understand how each element of their pay packet contributes to total earnings in a pay period but an employee does not have an automatic right to know what another person's job scored and what they are paid.

During the local review, data protection issues will need to be addressed at a number of stages including:

- gathering and analysing job information from job-holders
- recording and holding information on evaluations of jobs
- disclosure of scores on provisional evaluations
- carrying out equal pay audits and equality

impact assessment

- deciding what information to put out to job holders on the proposed package for consultation
- arrangements for notifying individual employees of their new grade and pay point, assimilation arrangements and any new terms and conditions
- arrangements for appeals including access to information about comparator's JE score and remuneration
- arrangements for publishing information on the outcomes and monitoring of the local review

Part-time (Prevention of Less Favourable Treatment) Regulations 2000

The regulations give part-time workers (men and women) a right not to be treated less favourably than full-time workers unless any difference in treatment can be objectively justified. The regulations apply to all aspects of pay and benefits (contractual and non-contractual). The part-time worker's comparator must be a full-time worker (not an employee) and a part-time employee's comparator must be a full-time employee. The comparator can be of either sex. But the scope for equal pay claims is limited to claims involving the same or broadly similar work (not equal value) and there are more restrictions than under the Equal Pay Act. Given the gender disparity in part-time working in local government, a woman part-timer is more likely to find the Equal Pay Act and /or the SDA provides a better avenue for protecting her rights if negotiation fails.

Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002

The regulations apply to 'employees' not 'workers'. They give fixed-term employees the right to the same pay and terms and conditions of employment as permanent employees on broadly similar work, unless their less favourable treatment can be objectively justified. An employee can make a comparison with an employee of the same or opposite sex, but the range of comparators is more restrictive than under the Equal Pay Act. Unlike the Equal Pay Act, the regulations allow

employers to justify a difference in treatment by showing that overall the fixed-term employee's pay package is at least equal to that of the permanent employee. Presumably this is because fixed term employees have often received poorer benefits but a comparatively higher rate of pay (particularly in higher grades jobs).

The regulations do not apply to agency workers. At the time of writing, the government was being pressed to improve employment rights for agency workers. As mentioned earlier, an agency worker can be a 'worker' for the purposes of Article 141 but in equal pay cases where the agency worker is the claimant, there can be a problem identifying the body responsible for the unequal pay and rectifying it when the comparator is a man directly employed by the local authority.

Temporary employees (but not 'workers') are protected by the local government national agreements in that they 'must receive pay and conditions of service equivalent to that of permanent employees'. However, temporary workers (as well as employees) are entitled to protection under equal pay and sex discrimination legislation where they would qualify as a 'worker' either under the domestic legislation or Article 141 (see the section on the Allonby case).

The Green Book makes no reference to casual staff. If they are 'employees', they will be covered by the national agreements as temporary employees. If they do not have a contract of service with the authority, they will not be 'employees' and will not be in scope of the Green Book. If their employment status is not clear, an employment tribunal would look at the evidence as to the nature of the employment relationship and determine whether or not there is an implied contract of employment.

The Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) The FETO applies only in Northern Ireland. It prohibits discrimination on the grounds of religion or political opinion. (FETO amends and consolidates the 1976 and 1989 Fair Employment Acts). A specialist tribunal, the Fair Employment Tribunal, was set up to deal with fair employment cases.

The Northern Ireland Act 1998 (NIA) imposes an obligation on public authorities, in carrying out their functions relating to Northern Ireland, to have 'due regard to the need to promote equality of opportunity' on grounds of sex, race, religious belief and political opinion, age, marital status or sexual orientation, disability and responsibility for dependants. Section 75 of the NIA puts into statutory form the Policy Appraisal and Fair Treatment Guidelines 1994 (PAFT). Their purpose is to ensure that the emphasis on equalities is mainstreamed, so that before decisions are taken on all policies and programmes, 'an analysis is made of the effects on protected groups'. In effect, this analysis is an exercise in equality impact assessment.

FETO and the NIA go further than the current positive duties on English authorities, in that the statutory duty to promote equality of opportunity applies to not only to race, sex and disability, religion and political opinion, age, marital status, sexual orientation and the presence or absence of dependants. FETO also covers the provision of goods, facilities, services and premises as well as employment. (At the time of writing, in England, Wales and Scotland, statutory positive duties on local authorities to promote equality only apply to race, with disability pending (see the section on the DDA 2005). A public sector duty in regard to sex discrimination was proposed in the Equality Bill which fell just before the 2005 general election). Under FETO, the duty entails workforce monitoring, and on a limited basis, contract compliance and affirmative action.

The NIA also brought about the merger of the Northern Ireland equality bodies (the Fair Employment Commission the EOC and the CRE for Northern Ireland and the Northern Ireland Disability Council) into the Equality Commission for Northern Ireland. (There is a separate Human Rights Commission).

Scotland and Wales

The Scottish Parliament and the National Assembly for Wales have taken steps to positively address inequality at the level of national and local government. Advice should be sought from the head offices in Scotland and Wales on the detailed

provision and how it might impact on the implementation of single status.

Equal Opportunities Commission Model Equal Pay Policy

The following model policy is set out in the EOC Code of Practice on Equal Pay (2003).

“We are committed to the principle of equal pay for all our employees. We aim to eliminate any sex bias in our pay systems.

We understand that equal pay between men and women is a legal right under both domestic and European law.

It is in the interest of the organisation to ensure that we have a fair and just pay system. It is important that employees have confidence in the process of eliminating sex bias and we are therefore committed to working in partnership with the recognised trade unions. As good business practice we are committed to working with trade union/ employee representatives to take action to ensure that we provide equal pay.

We believe that in eliminating sex bias in our pay system we are sending a positive message to our staff and customers. It makes good business sense to have a fair, transparent reward system and it helps us to control costs. We recognise that avoiding unfair discrimination will improve morale and enhance efficiency.

Our objectives are to:

- eliminate any unfair, unjust or unlawful practices that impact on pay
- take appropriate remedial action.

We will:

- implement an equal pay review in line with EOC guidance for all current staff and starting pay for new staff (including those on maternity leave, career breaks, or non-standard contracts)
- plan and implement actions in partnership with trade union/ employee representatives
- provide training and guidance for those involved in determining pay
- inform employees of how these practices work and how their own pay is determined
- respond to grievances on equal pay as a priority

- in conjunction with trade union/ employee representatives, monitor pay statistics annually”.

Equality Standard for Local Government

The Equality Standard for Local Government (ESLG) is a performance standard on equalities in employment and service delivery. It was developed by the EOC, the Commission for Racial Equality and the Disability Rights Commission with the Employers’ Organisation for Local Government and the Audit Commission. The standard became a Best Value Performance Indicator for English local authorities in 2002. It is also supported by the National Assembly for Wales.

The ESLG comprises five levels of achievement in delivering equality in relation to the statutorily based strands of race, gender and disability, with sexual orientation and religion or belief to be added in 2005. NJC guidance on equality impact assessments (EqIA) recommends that assessments (which are a component of the standard) should also cover age, and the main occupational groups and part-time staff (as the latter two groups are likely to be made up of predominantly one gender). Authorities are also free to add other equality strands covered by their policies. The standard is intended to be a tool to help authorities integrate or mainstream work on equalities so that good practice becomes incorporated into every aspect of their activities.

To achieve level one of the standard, authorities must have a comprehensive equality policy and a demonstrable commitment to developing a corporate equality plan. They must make a corporate commitment to a fair employment and equal pay policy and to earmarking specific resources for improving equality practice. They must consult and involve staff and stakeholder groups (including recognised unions) on all aspects of equality policy and the development of the corporate equality plan. They are required to commit to workforce profiling and an equal pay review.

At each level of the standard, there are specific requirements relating to employment and training. The requirements of each successive level build on those below, so that at level two, for example, work

should have started on the equal pay review. All employment procedures (not just policies) should be consistent with current legislation and associated Codes of Practice. To achieve level three, the equal pay review should have been conducted and plans should have been developed to correct any pay inequality identified by the review. Equality guidelines should be in place on pay, for example on starting pay and pay on promotion. To achieve level four, the authority should be using equality data to monitor the use of all personnel procedures, to enable it to check whether there is an adverse impact on any particular group. To achieve level five, the authority must be able to show that it is paying its staff equally for work of equal value. These are a few examples of the requirements of the standard – it is very comprehensive and detailed.

It is not a statutory requirement on authorities to adopt the standard, but as it is a BVPI, individual authority's action on it (or inaction) can affect their Comprehensive Performance Assessment. Branches in England should check whether their authority is using the standard and if so, what level it has claimed to have achieved or been externally audited as having achieved. In some authorities, branches should be able to use compliance with the Standard as a lever (carrot and /or stick) to move the equalities agenda forward and more specifically, to help overcome resistance (where it may exist) to carrying out equal pay audits and addressing pay inequality. Branches should also check that authorities are not citing commitment to carrying out job evaluation and a grading review (or doing it) as satisfying the requirement to carry out an equal pay review. As mentioned above, the two processes are closely related, but they are not the same thing.

Resource List

NJC Joint Guidance

NJC Green Book and Pay Implementation Agreement 2004 (NJC circular 4/04)

NJC Part 4 guidance on pay and grading reviews

NJC Part 4 guidance on equal pay audits

NJC Part 4 guidance on Equality Impact Assessments

NJC guidance on workforce development

NJC Guidance on work/life balance – Finding the Balance (being updated.)

Trade Union Side Guidance

Trade Union Guide to NJC JE Scheme

Trade Union Guidance on Bonus Schemes

Websites

GMB – gmb.org.uk

TGWU – tgwu.org.uk

UNISON – unison.org.uk

Employers Organisation – www.lg-employers.gov.uk Website includes comprehensive list of NJC JES documents. Administers NJC Associate Consultancy Scheme on behalf of the NJC.

Link pay modelling - www.link-reward.co.uk

Pilat pay modelling - www.pilat-hr.co.uk

EOC Equal Pay Review Kit – www.eoc.org.uk

EOC Code of Practice on Equal Pay – www.eoc.org.uk

Equality Standard for Local Government – www.lg-employers.gov.uk

EOC Code of Practice on Sex Discrimination - www.eoc.org.uk

Equal Pay Questionnaire Procedure - <http://www.eoc.org.uk/eoceng/eoccs/advice/equal-pay-questionnaire.asp>

CRE Code of Practice on the duty to promote racial equality & the four non-statutory guides – www.cre.gov.uk/duty/index.html

DRC Code of Practice on employment and occupation and DRC Guidance on matters to be taken into account in determining questions relating to the definition of disability – www.drc-gb.org/thelaw/practice.asp

Notes

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