

## **Equal Pay: UNISON negotiating strategy and guidance for local UNISON negotiators: Last updated: [December 2008]**

### **INTRODUCTION**

1. This document has been prepared to assist local UNISON negotiators who are in the process of negotiating for the introduction of new pay and grading structures. It sets out UNISON's strategy toward such negotiations and gives guidance on the critical issues that must be addressed. **It must be followed by all UNISON negotiators involved in such negotiations. It supercedes any previous advice issued by the union.**

2. The union's objective is to secure implementation of new pay and grading structures and with it pay equality, through negotiation. However, where negotiation is not proving effective, the union is prepared, where appropriate, to pursue equal pay claims on behalf of its members through employment tribunals and the courts.

3. Equal pay claims **must not** be lodged by the union branch, but should be referred to your regional organiser who will ensure that where agreed the claims are lodged in conjunction with head office in accordance with the UNISON protocol (Appendix 1).

4. Branches must ensure the involvement of their regional organiser in all stages of the negotiations.

5. Each service group has issued more detailed advice on specific agreements (e.g. NJC Single Status) and this should also be consulted and followed by local UNISON negotiators where appropriate. In case of doubt or conflict, this advice takes precedence.

### **MAIN ELEMENTS OF IMPLEMENTATION**

The three main elements of implementation are:

- job evaluation and pay and grading going forward,
- compensation for past inequality, and
- pay protection.

6. The key issue is to ensure that regions/branches continue to take advice in accordance with the union's legal procedures on the technical issues-job evaluation, pay and grading structure, changes to conditions etc during the negotiations.

7. It is not absolutely necessary that all three elements should be negotiated together.

However if adopting a more piecemeal approach, care must be taken to ensure that each element is dealt with properly.

8. Whichever method is adopted (piecemeal or package) there will be an inevitable link between the three elements so that what is agreed in respect of one is likely to affect the other two.

9. One of the hardest tasks facing UNISON negotiators is the need to balance the various interests of members when negotiating back pay, the new pay and grading structure and protection arrangements. The more money that is identified for back pay, the less the authorities tend to make available for the pay line and pay protection, and vice versa.

10. It is the role of the union to seek to ensure, as far as possible, that the right balance is struck between the three elements, so as to achieve the maximum practicable benefit for the greatest number of its members and that members are aware of the different elements of any package proposed by the employer.

### **JOB EVALUATION AND PAY AND GRADING**

11. A job evaluation exercise produces a rank order of jobs that should then be translated into a non-discriminatory pay and grading structure, using the equal pay review process to verify this. The integrity of the job evaluation process is critical and scores should not be altered unless there is agreement that the job evaluation process has not worked properly, or following a successful appeal.

12. The job evaluation exercise should be a joint one with the employer wherever possible, using JE schemes designed for the workforce, e.g. the National Joint Council (NJC) job evaluation scheme for local government employees in England and Wales. Some councils are also using the Greater London JE Scheme.

13. In negotiations the starting point should be to "equalise up" the pay structures so that there are no financial losers. This would mean that where a woman's job has been evaluated the same as a man's in the job evaluation process, she should receive the same pay and benefits as him, rather than the man's pay being reduced.

14. However, in practice, this will often be difficult to achieve.

15. To minimise costs and keep the pay line low, some employers will threaten redundancies, outsourcing or cuts to other terms and conditions. It is important that such threats are responded to effectively. For example in local government some employers have tried to cut the unsocial hours payments of already low paid (and predominantly female) staff to part-finance Single Status. You should point out that this is likely to exacerbate pay discrimination and insist on an 'equality impact assessment' being carried out. Outsourcing is not the answer either, since claims lodged on behalf of members before they transfer are the joint responsibility of the authority and the contractor. Contractors would be unwilling to take on such responsibility without obtaining some form of indemnity from the employer.

16. Most employers equalise "somewhere in the middle." UNISON negotiators should argue for different pay line models to be explored, and should seek to secure one that results in as many gainers and as few losers as possible. Up-to-date statistics on all aspects of pay and the workforce should be sought before the pay and grading process begins.

17. If agreement cannot be reached and your authority imposes a new structure, you will need to take immediate advice and/or action. UNISON has issued legal advice to regions and branches on the steps which should be taken in cases of imposition. This advice will be regularly updated as case law develops and UNISON negotiators need to make sure that they have the most up to date version.

### **COMPENSATION FOR PAST INEQUALITY-WHO IS INCLUDED?**

18. As part of any negotiations, UNISON negotiators must try and secure an appropriate level of compensation for those who potentially have good back pay claims.

19. It is not just women who may have equal pay claims. A man employed in the same capacity as a woman who has a good equal pay claim would be able to 'piggy back' on her claim and bring his own.

20. The best evidence of past inequality usually comes out of the job evaluation exercise. Gainers are more likely to have good potential claims. Recent cases have however clarified that the results of job evaluation will not automatically confer the right to backpay and that it will still be necessary to present claims where there are relevant merits. These claims will be equal value claims. The outcome of the JES will provide some evidence, not necessarily conclusive evidence, of equal value in relation to a period prior to the completion of the JES provided there have been no changes in the jobs of the claimants and comparators.

21. If the employer is not prepared to include all relevant groups of employees in the negotiations from the outset then equal pay claims should be lodged on behalf of those left out. **Do not agree to put off consideration of these employees to a later date.** The more time that goes by, the more they are likely to lose out.

22. If the employer is not prepared to negotiate compensation payments at all, equal pay claims must be lodged (subject to paragraph 3 above). This does not prevent you from negotiating the other elements of the pay and grading review. UNISON has circulated guidance concerning time limits for equal pay claims and the process for submitting equal pay claims. If you have any queries, please contact your regional office or the equal pay helpline on 0845 355 0845.

#### **WHAT PERIOD DOES THE COMPENSATION COVER?**

23. Offers of compensation should only be accepted in settlement of past inequality. Very rarely should members be invited to settle any possible future claims. Before consulting members or recommending such a deal branches must take legal advice from your regional organiser.

24. Under equal pay legislation an employee who wins an equal pay claim is entitled to up to six years back pay in England, Wales and Northern Ireland and five years in Scotland, plus interest. **This must be the starting point in any negotiations and all members advised in writing of their potential entitlement to back pay. The final communication to members must be signed off by Thompsons with a copy being sent to the Employment Rights Unit.**

25. Employers rarely agree to pay the full amount of claims and ultimately UNISON negotiators will have to decide whether the amount of compensation offered is both the best that can be achieved through negotiation and is reasonable in the light of the potential value of the claims including the risk and delay involved in any litigation.

26. Such a decision can only sensibly be made if careful thought has been given to the value of the claims which depends, in part, on the prospects of successfully taking the claim to the Employment Tribunal. This assessment of the prospects of success requires a focused approach to the potential equal pay claims which considers the following:-

(a) The potential comparators and whether the potential comparators receive bonuses under a genuine and valid bonus scheme and/or attendance allowances. By way of example, in *Bainbridge v. Redcar and Cleveland Borough Council*, it was established that the bonuses paid to male gardeners and street sweepers were not paid under genuine and valid bonus schemes at all but were merely part of their

remuneration. However, the bonuses paid to refuse workers were paid under a genuine and valid bonus scheme.

(b) The jobs done by the potential claimants must also be considered. The decision in *Joss v Cumbria County Council* shows that those employed in jobs where it would not be possible to establish a bonus scheme based on productivity (e.g. carers, road crossing organisers, caterers) may have greater difficulty in establishing an equal pay claim where the comparator has a genuine and valid productivity based bonus scheme.

(c) Even in cases where the potential claimants' jobs are such that they could have received a productivity based bonus (e.g. cleaners and possibly other jobs where work product can be quantified), negotiators still need to consider why the potential claimants have been treated differently from their chosen comparators. There may be good reasons for such differential treatment.

27. Even if a claim appears to have a reasonable chance of success it is legitimate to take into account the fact that litigation is a slow and inherently uncertain process. Members may prefer a smaller payment now to the chance of a larger payment later – a bird in the hand may be worth two in the bush.

28. In *Allen v GMB* the GMB was held liable for sex discrimination arising out of the approach taken by local negotiators to compensation for past inequality. The Court of Appeal upheld the decision of the Employment Tribunal that (i) by entering into a balanced deal ("agreeing to a low back pay settlement in order to release more money for pay protection and the future pay line") the union engaged in a potentially discriminatory practice; (ii) this amounted to indirect sex discrimination where the disadvantaged group were predominantly women; (iii) the balanced deal pursued a legitimate aim; (iv) however, the union failed to justify the practice because the means adopted to pursue the legitimate aim were not proportionate to the attainment of that aim. The Court of Appeal identified four principal matters of concern in relation to the proportionality of the means adopted by the union: (a) failing to pursue back pay claims at an early stage, (b) deliberately omitting to give advice about back pay or support litigation in order to progress the implementation of single status, (c) rushing headlong into an ill-considered back pay deal, and (d) failing to give the Claimants a fully informed choice about their options – no assessment of litigation risk coupled with misleading information and manipulation of members to secure support for the deal.

29. When negotiating it will rarely be appropriate to accept at face value complaints by an employer that there is insufficient money available and UNISON negotiators should scrutinise such assertions with real care. This is particularly the case since the Government's announcement of capitalisation directions for a number of English local authorities – these authorities may now have greater freedom to borrow or to realize capital assets in order to meet valid claims. UNISON negotiators should seek detailed pay bill information and carefully examine both short-term and long-term costs and potential savings from implementing any new arrangements. UNISON negotiators should make clear at the outset that implementing a new pay and grading structure that addresses current and historic pay discrimination will require employers to set aside additional resources.

## **PAY PROTECTION**

30. The union will strive to protect the interests of those members who may lose out as a result of the implementation of a new pay and grading structure. This is a legitimate objective. However care must be taken to ensure that the group of protected employees includes not only those who suffer a reduction in pay but also

those (usually women members) who should be but are not receiving equal pay when the period of protection commences. In addition since money spent by the employer on pay protection is money which is not available to compensate for past inequality or to contribute to the pay line going forward it is important that the group of protected employees is not given unnecessary or inappropriate priority in negotiations. UNISON negotiators should therefore take specific legal advice on proposed protection arrangements at the earliest possible stage. This advice will need to be relayed to members.

31. The idea behind pay protection is to ease the pain of transition, not to maintain enhanced pay for an indefinite or lengthy period.

32. Pay protection which excludes women who should be but are not receiving equal pay when the period of protection commences inevitably prolongs pay inequality for the duration of the protected period. This is unlikely to be legally permissible for the employer, and might result in the union being liable for sex discrimination if it agrees to such arrangements.

33. NO PAY PROTECTION DEALS SHOULD BE AGREED WHICH EXCLUDE WOMEN MEMBERS WHO SHOULD BE BUT ARE NOT RECEIVING EQUAL PAY WHEN PROTECTION COMMENCES. Although in the recent decision of the Court of Appeal in *Bainbridge* it was suggested that there might be exceptional situations where such arrangements could be justified (in essence a carefully crafted and costed scheme where there is no reason to suppose there will be any discriminatory effect), UNISON believes these will be extremely rare in practice and that the prudent course is to avoid any pay protection arrangements which exclude women who should have been receiving the same levels of pay as the protected group. If local UNISON negotiators believe that an exceptional situation exists they should seek specific legal advice from UNISON.

**NOTE: it is for the employer to justify any failure to extend protection to deserving women workers (not UNISON). It is for Local Authorities to persuade UNISON (backed up with evidence) that such a failure will not result in a prolonging of sex discrimination in pay for our women members. Before UNISON can agree to such limited protection schemes we need to be sure that such a scheme can be justified by the employer under the current law. As indicated above, this will be quite difficult for most employers to do. In cases where a Local Authority refuses to extend pay protection to women workers who should receive it, negotiators should explain UNISON's position on extending pay protection and seek further information or explanations from them on any justification the employer may wish to raise for not extending protection in their particular authority. UNISON has drafted a standard letter for these purposes in the negotiating advice attached as Appendix 2.**

34. Great care must also be taken when agreeing 'job enrichment' schemes. Some agreements provide for members to take on additional duties or re-train so that they can justify through those additional responsibilities and skills their original grade and pay. This is only permissible where the new responsibilities are real and genuinely necessary for the performance of the job and when all members are given the opportunity for job enrichment.

35. There should be no protection in place for new employees.

## **PROCEDURE FOR SIGNING OFF THE FINAL PACKAGE**

36. The following procedure is designed to protect the interests of branches and their members and **must** be followed:

- A copy of any **proposed** agreement should be agreed with your regional organiser who will then take legal advice before it is circulated to members (see below) to ensure that the content is legally satisfactory. Advice must be sought via Thompsons.
- The regional organiser should formally sign off any documents on behalf of UNISON.

## **INFORMING MEMBERS**

37. Subject to paragraphs 38 to 41, as the union is negotiating on behalf the membership as a whole, it is entitled to recommend a deal that does not result in the maximum benefit for certain groups of employees.

38. If and when agreement is reached - on a package or in relation to any of the three elements set out above - members must be fully and properly informed about it. UNISON negotiators should ensure the maximum possible "transparency" in the process and should present the proposal as accurately and fairly as they can. A ballot of members should be held. In any information given prior to the ballot the union can properly emphasise the collective benefits flowing from the balance that it has struck between the three elements.

39. Those who are being asked to accept compensation payments that may be worth less than the full potential value of their claim must be told this, and a brief summary given of the reasons for the Union's recommendation (i.e. assessment of prospects of success, delay and uncertainty in the litigation process etc – see paragraphs 25-6 above). At the same time, members should be advised on the time limit for any equal pay claim using standard wording which is available from your regional office.

40. Where the union is asked to explain the pros and cons of the deal to individual members this must be done in a full and fair manner, identifying any sacrifice the individual would be making in relation to any claim for back pay and any corresponding advantages which that member, or colleagues, might obtain in the new pay structure, by way of pay protection or in relation to the protection of jobs and services. All such letters must be cleared by Thompsons via the regional office.

41. The member must be allowed to make an informed decision after a fair presentation of the advantages and disadvantages, and must not be pressurised into giving up their rights. UNISON negotiators should tell such members to obtain their own legal advice if they are concerned about the offer.

## **TIMESCALES**

42. The union's objective is to secure the implementation of new pay and grading structures, and with these pay equality, through negotiation rather than through courts and tribunals. However some employers use negotiation as a way of delaying agreements with no real intention of implementing within a reasonable timescale. In many cases negotiations have been going on for some time and unless there appears to be an imminent prospect of a concluded deal it is likely to be appropriate for protective proceedings to be issued. This will not prevent the negotiations from continuing it will simply protect the claims of members.

43. Whether an employer is truly committed to implementation can be judged by progress against certain milestones. These include:

- where there is a choice, the identification of which job evaluation scheme to use,
- arranging training in carrying out job evaluation,
- carrying out any pilot studies,
- benchmarking- It is important that a benchmarking exercise covering all key jobs is carried out to establish the core of the new pay structure. Benchmarking is also important where it is impracticable to evaluate each and every job,
- the job evaluation exercise itself,
- appeals, and
- once the job evaluation exercise is complete, assimilating jobs to the new structure and setting the pay line. Discussions about compensation for past inequality and pay protection can take place at the same time as the job evaluation exercise is being carried out.

### **LEAVERS AND JOB CHANGES**

44. Implementing new pay and grading structures takes time, and there will inevitably be some members who leave their employment, change jobs (which includes either a change of job with the same employer or a change of contract with the same employer) or are transferred to a different employer whilst the negotiations are still ongoing. In order to be able to pursue a claim for equal pay under the Equal Pay Act, a member must first lodge a grievance and then a claim at the Employment Tribunal, usually within six months of termination of employment with that employer or a change of contract. This means that branches will need to publicise this amongst their members so that where a member wishes s/he can lodge a protective claim before the negotiations come to an end. This is important, since if a member fails to lodge within the six-month time limit they may be unable to pursue their claim at all. There is a possibility that claims could be brought in the civil courts up to six years in England, Wales, Northern Ireland and five years in Scotland, after the member has left, transferred employment or changed jobs. Detailed advice on these claims was issued to branches on 6 July 2007. Advice on leavers, job changers and transferred staff was issued in General Secretary's News and to members in U magazine. A more detailed advice note can be obtained from UNISON direct on 0845 355 0845. Information on time limits is available on the UNISON intranet at [http://member\\_liaison/General\\_Info\\_Resources.htm](http://member_liaison/General_Info_Resources.htm)

### **MEMBERS WHO BRING THEIR OWN CLAIMS USING OUTSIDE SOLICITORS**

45. In line with union policy branches should not agree to represent members at grievance level in relation to an employment tribunal claim or any similar matter where the member is using an external representative. This includes equal pay claims. In all other respects such members should continue to receive the same levels of support and service as other members who do not have external UNISON negotiators. A model letter has been prepared for branches to use in replying to any such queries from members. If you require a copy or have any such queries please contact your regional organiser in the first instance.

### **CONCLUDED DEALS**

**46. In relation to concluded deals which include pay protection arrangements which exclude women members who should have been but were not receiving equal pay when the protection commenced, the employer must now be asked**

**to include such women in the pay protection arrangements. Where the employer refuses to do so, the union will support equal pay claims by the excluded members.**

#### **FURTHER INFORMATION**

47. Further guidance is available on many of the topics covered in this document. Specific advice may also be available from your service group or sector. If you are unsure about any of the matters set out in this document it is important that you discuss this with your regional organiser.

## **APPENDIX 1**

### **LITIGATING EQUAL PAY CASES: UNISON PROTOCOL**

1. Achieving equal pay for women is a key UNISON objective.
2. The union's priority is to achieve equal pay through collective bargaining, but where this has been slow to achieve or employers have been reluctant to negotiate, the union will pursue claims through employment tribunals.
3. Within UNISON, equal pay litigation is a reserved issue. The union's Employment Rights Unit (ERU) at head office has responsibility for the overall management of all equal pay legal cases. This is because equal pay cases are regarded as potentially having a high strategic impact across the union and therefore it is important that we coordinate and manage cases centrally. This approach helps the union to secure the best overall outcome for our members. **HOWEVER PLEASE NOTE THAT IN LIGHT OF THE UNION LODGING PROTECTIVE BACK PAY CLAIMS FOR ALL CLAIMANTS IN LOCAL AUTHORITIES WHERE DEALS HAVE NOT BEEN CONCLUDED THIS PROTOCOL DOES NOT APPLY AND APPROVAL NEED NOT BE SOUGHT BY THE REGION.**
4. Any branch that wishes to pursue an equal pay case on behalf of an individual or group of their members must follow the procedure below:
  - I. Discuss the case with their regional organiser.
  - II. Refer any request to lodge an Employment Tribunal claim to their UNISON region. Requests will normally be directed to, and managed by the senior regional organiser for the relevant service group or sector.
  - III. The senior regional organiser, in consultation with the branch, regional organiser and relevant regional service group chair will assess the case; consider any strategic impact; confirm that a claim is appropriate given the state of any negotiations with the employer; and consider any other relevant factors. There should be no unreasonable delay in completing this procedure.
5. If the request is not supported the matter will be referred back to the branch for further consideration and discussion with a view to agreeing a way forward. Where a region, including the chair of the relevant regional service group support the request it will be referred to head office under paragraph 6 below.
6. The request will be referred to UNISON's Head of Employment Rights and the appropriate national secretary who will arrange for it to be considered by the chair of the Services to Members committee and the appropriate service group chair. In considering the request they will take into account any likely strategic impact; the merits of the case; any potential impact on negotiations at local or national level; and any other relevant factors.
7. Where region and national agree to support a case it will be referred to the ERU for action.
8. Where support is not agreed at 6 above, the decision, with reasons will be communicated to the region and the branch.