

UNISON

Negotiating advice for college staff

Job evaluation, grading structures and equal pay

IN COLLEGES

October 2012

UNISON
the public service union

Contents

Challenging pay inequality	2
The modernising pay agreement in further education	3
Job evaluation	3
Link to pay	4
Career families	4
Delivering equal pay through job evaluation	5
Costs	6
Back pay	6
What period does the compensation cover?	7
Leavers and job changes	8
Pay protection	8
Pay protection and concluded deals	9
Staging settlements	9
What if the college is dragging its feet?	10
Equal pay reviews	10
Procedure for signing off the final package	10
Informing members	11
Application of this advice	11

Job evaluation, grading structures and equal pay

Challenging pay inequality

Pay inequality between men and women, with its social and economic drivers, used to go unchallenged. Discriminatory pay systems developed and have persisted despite the widening role of women in the workplace. It is more than 30 years since employers became legally required to pay equal pay for work of equal value to all.

Progress has been slow, dogged by the complexity of law and the need to take individual cases rather than collective actions. During the last 10 years there have been major attempts in the public sector to redress pay discrimination. These include the single status negotiations in local government, agenda for change in the NHS, the national framework agreement on higher education and modernising pay arrangements in further education. Implementing these agreements has proved highly challenging both in terms of the scale of necessary redress and the burden of complex local negotiations.

UNISON's objective has been to negotiate implementation of new grading structures that deliver pay equality. This process will usually involve three elements:

1. job evaluation (JE) and new pay and grading structures going forward
2. compensation for past disadvantage (back pay)
3. pay protection – pay protection must be extended to all relevant groups who may be entitled to it not just those losing out under new pay arrangements (see 'pay protection', page 8).

Where negotiations are not happening or are ineffective, UNISON is prepared to pursue equal pay claims through employment tribunals and the courts. It is a hard task for representatives to balance the interests of members in negotiations when expenditure on one element may limit funds available on another and imperil the whole process.

No college representative should be expected to shoulder this responsibility without significant input from their branch and regional office. Branches must ensure the involvement of their regional organiser in all stages of the negotiations. In particular equal pay claims must not be lodged by the union branch, but should be referred to your regional organiser who will ensure claims are lodged in conjunction with head office.

The modernising pay agreement in further education

An FE pay modernisation working party was established in 2003 for England only. The trade union opening statement began:

“The wide range of occupational groups in colleges will be heartened that the problems of low and unequal pay, comparability with other workers and staff development and progression, are being addressed at long last.”

The elements of the two-year national pay agreement for England that followed were:

- a 3% rise on all salaries and allowances on 1 August 2003 and 1 August 2004
- minimum hourly wage of £5.33 (in line with local government) on 1 August 2003 to rise to £6 an hour by 1 April 2005. The minimum hourly rate of pay on the national harmonised pay scale increased to £7.01 in 2009/10
- a harmonised pay spine to be introduced by 1 August 2004 with all college staff assimilated to the nearest highest point providing additional increases of between 1.4% and 3%
- a career family (see page 4) framework for qualified lecturers with eight pay progression points (reduced from 14)
- a new advanced teaching and training salary range and access to a leadership and management pay spine for all staff.

Guidelines were also agreed as part of modernising pay on:

- job evaluation
- career family pay structures
- performance management

These documents can be downloaded from:
unison.org.uk/education/further/agreements.asp

Job evaluation

UNISON supports the use of equality-proofed job evaluation (JE) schemes as a way of exposing pay anomalies and laying the way for achieving fair pay and grading structures. Prior to the modernising pay agreement, a job evaluation scheme (FEJE) was developed by a joint management and trade union working party, administered by the Association of Colleges (AoC). It is explicitly designed to cover the full range of jobs within colleges and to meet the Equality and Human Rights Commission (EHRC) requirements. It is an analytical scheme (designed to deliver equal pay for work of equal value) that evaluates jobs in terms of demand such as effort, skill and decisions, using Gauge computer software. It aims to establish the relativity of jobs so that they can be objectively placed within a grading structure. The modernising pay joint agreement on JE recommends colleges use the FEJE scheme but says that where any other scheme is chosen or already in place, the same principles should apply. Other points emphasised are:

- Job evaluation (JE) must be a joint management-union exercise, with ground rules agreed prior to its introduction and with a fully representative and trained steering group overseeing the process. JE should be a joint exercise but ultimately it is the employer/colleges responsibility to ensure that JE and pay and grading outcomes are equality proofed.
- Training needs must be identified, as well as how they will be met. Time off arrangements, timescales, funding requirements and a communications strategy should be agreed.
- The number and nature of roles to be evaluated (sometimes called benchmark roles) must be decided and a mechanism developed for appeal by staff who do not feel that their job has been represented.
- An appeals procedure and equality-proofed pay protection arrangements must be put in place.

- There must be monitoring arrangements and full disclosure of data for all posts to the unions.
- The JE exercise and its outcomes must be subject to an equality impact assessment by the college to ensure that a particular group of employees has not been disadvantaged. The outcome of this impact assessment must be shared with the local unions.

Link to pay

The national JE agreement covers the link to pay and emphasises that the outcome of JE is a rank order of scored jobs that then has to be linked to a pay and grading structure, which should be determined through local consultation and negotiating procedures. It is possible to conduct an open and fair job evaluation exercise only to negate its positive effects by skewing the grading boundaries to the disadvantage of lower-paid staff. Expert advice must be sought from regions on any proposal concerning the link between JE rank orders and a new pay system.

There is no off-the-peg grading system that suits all colleges. It is up to individual employers to model the national harmonised pay scale in line with their circumstances but without the sacrifice of pay equity. (Download the latest version of the FE harmonised pay scale from: unison.org.uk/furthereducation.)

Local negotiations on a new grading system will have to take account of:

- The number of bands on the spine (too few, too many?).
- How the JE scores are divided and matched to the pay spine (concentration of scores at the bottom, tapering to the top?).
- The relative number of points within each band (are they the same all the way up?).
- Where do breaks occur? (watch out for the danger of grade breaks between clusters of

JE scores so that jobs with close scores are in different bands)

- Any overlapping (do the same scores appear at the top of one band and the bottom of another?).
- Unused points (are there exaggerated pay gaps because the whole scale is not used?).

These are not the only questions. College policy on pay progression should be clear, transparent (everyone can see it and understand it) and should deliver equal pay. The principles for moving through and between the bands should be the same for all staff. Access to incremental progression should be equal with no staff on fixed pay points (also known as spot salaries). Any element of discretion or performance pay should be applied equally to all employees.

Since age discrimination legislation was introduced there have been question marks over the number of incremental points there should be within a band. It is generally accepted that there should be no more than five although there can be more if it can be justified. More than five years of incremental points will however, only be acceptable if it can be justified in accordance with the principles set out in the Equality Act 2010.

Important – the question of how many grades to adopt and grade boundaries is an area that can create equalities problems. College reps and branches must seek expert advice and potentially legal assistance from their regions.

Career families

A career family structure (sometimes referred to as a job family) is a type of grading system that divides jobs into groups based on shared occupational or functional characteristics. Set against a single pay spine, jobs with the same JE score should be on the same pay point,

regardless of career family. Guidelines for the development and use of career families and pathways were jointly agreed in the modernising pay talks. Role outlines based on occupational standards were used to distinguish between Teaching and Training, Advanced Teaching and Training and Leadership and Management families.

There are no nationally agreed families for support staff, but some colleges may wish to introduce them locally. This must be a joint exercise with trade unions that aims to deliver equal pay. There is a danger that jobs will just be slotted into a box without proper analysis of their content and with artificial barriers to progression. Assigning jobs to families without the process of job evaluation is more than likely to perpetuate pay discrimination.

College reps and branches must seek advice from their regions to ensure that jobs are not unwittingly slotted into boxes that create barriers to progression or create equality and equal pay problems.

Delivering equal pay through job evaluation

Pay structures in FE should be fair, transparent and gender neutral. But redressing historic inequalities and protecting against future discrimination is a major challenge and there are often balances to be struck. The national joint agreement states that: “the general principle is that no-one’s pay should be reduced because of the job evaluation review”. But it suggests that long-term protection of future pay increments might breach equal pay law and that opportunities should be provided to enlarge jobs to enable the salary rate to be maintained. 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, as it might be indirectly discriminatory for job enrichment to be available

only to those receiving pay protection. In addition any pay protection must be extended to all relevant groups who may be entitled to it not just those losing out under new pay arrangements (see pay protection, page 8).

The following dangers that must be avoided:

- **Partial evaluation of the workforce;** to achieve equal pay all jobs in the college must be evaluated.
- **The exclusion of certain groups** such as nursery staff from JE for a lengthy period or indefinitely.
- **Cuts in other terms and conditions** that may be proposed to help fund the exercise. These might impact on particular groups, creating a secondary source of discrimination.
- **Length of pay protection** must strike the right balance and must not perpetuate unequal pay in a manner that cannot be justified. Pay protection arrangements must also be equality proofed (see pay protection, page 8).
- **Continued use of some pre-evaluation rates** for new staff.
- **Special treatment of particular occupational groups,** for example lecturers. If any college job scores on a par with the lecturers’ eight-point scale, it should advance in the same way unless there is an objective justification for not doing so.
- **Automatic progression for some staff** and not others.
- **Employers may try and negotiate away** some JE results undermining the integrity of the process.
- **Use of market supplements** for hard-to-recruit and retain staff. These must be evidence-based and monitored.

Costs

A major barrier faced by representatives who are urging the adoption of new pay and grading structures is the fear of costs by the employer. There is no doubt a cost to using job evaluation (for example, additional staff resource, software, training and communications) as in righting the pay wrongs of the past; green and red circling (improved pay and compensation and protection). Colleges may overestimate the level of expenditure required and should be asked to share their detailed estimate of set-up and implementation costs.

If an employer is presiding over a discriminatory pay structure, there is a legal requirement to invest in reforming it. There is no more choice than if a building has come to the end of its life and must be replaced. It is important that potential costs are not ignored and that a sufficient budget both for the job evaluation exercise and implementation of its results is created at the planning stage.

Back pay

Compensation for past pay discrimination must be part of local job evaluation and modernising pay negotiations. But the resulting funding implications for colleges might tempt them to try and depress scores or deter them from adopting a JE scheme in the first place.

To help local representatives deal with the difficult issue of back pay we have obtained the following legal advice which must be adhered to.

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.

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.

Evidence of past inequality can sometimes come out of the job evaluation exercise. Recent cases have however clarified that the results of job evaluation will not automatically confer the right to back pay. The results do not necessarily mean that the jobs were equal before the job evaluation took place although it is a good indicator. The results do not necessarily mean there is evidence that the previous grading scheme or pay arrangements were sex discriminatory and differences in pay were unjustified.

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 provided there is legal advice that the claims have a reasonable prospect of success. 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. Seek urgent advice from your regional organiser on this issue.

If the employer is not prepared to negotiate compensation payments at all, equal pay claims must be lodged (subject to approval by your UNISON region). 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.

College representatives would not be expected to decide upon or pursue any legal action without first referring the potential legal cases to their regional office and UNISON legal services. The decision on whether to support legal action is one that only the national executive committee (NEC) and UNISON legal services can make under the union's rules.

What period does the compensation cover?

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 via your regional organiser.

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.

In order to protect the union from the potential of being sued by No Win No Fee (NWNF) lawyers, it is important that any communications with members concerning equal pay matters are checked and signed off by your region.

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.

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 that considers the following:

(a) The potential comparators and whether the potential comparators receive additions to or enhancements of pay, for example bonuses, under valid and genuine arrangements. By way of example, in the tribunal case *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 (for example 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 productivity based bonus (for example, 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.

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.

Branches must take legal advice on these issues via their regional organiser.

Please note that in the tribunal case *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.

This ruling underlines the absolute necessity for college reps and branches to seek legal advice from their regional organiser on the issue of back pay.

Leavers and job changes

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 Equality 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 UNISON's weekly activists email, efocus and to members in U magazine. A more detailed advice note can be obtained from UNISON direct on 0845 355 0845.

Pay protection

UNISON representatives should 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.

Where roles have been found by the job evaluation exercise to have been relatively overvalued the college should be urged to agree a period of pay protection for the affected employees (they will be red circled) rather than immediately reducing their pay.

The purpose of any pay protection scheme is to provide an initial period of protection during which an employee is able to adjust to a reduction in earnings. To be lawful any pay protection scheme must however, be equitable and not continue discriminatory arrangements.

Pay protection is therefore only legitimate subject to the following condition:

- Any protection scheme must be gender neutral or such protection arrangements must be extended to those female workers who have been regraded where there is a comparable male receiving pay protection.

In practice this means a female employee who has been historically underpaid, in comparison to a male colleague with the same JE score, must not only get an immediate upgrade and back pay but also the same protection payments given to her male colleague.

Pay protection that 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.

No pay protection deals should be agreed that 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 v Redcar & Cleveland Borough Council* 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 that 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, not UNISON, to justify any failure to extend protection to women workers who should receive it. It is for colleges 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 consider whether 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 college 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 the college. UNISON has a standard

letter for these purposes in its negotiating advice for branches. Please contact your branch and region for a copy of this letter.

UNISON negotiators should take specific legal advice from their region on any proposed protection arrangements at the earliest possible stage. This advice will need to be relayed to members.

Pay protection and concluded deals

In relation to concluded deals that include pay protection arrangements that exclude women members who should have been but were not receiving equal pay when the protection commenced, the college must now be asked to include such women in the pay protection arrangements.

Where the college refuses to do so, the union will support equal pay claims by the excluded members.

If you are a representative in a college where a pay protection deal has been concluded prior to this guidance please contact your branch and regional organiser for urgent assistance.

Staging settlements

New pay arrangements should apply to all staff at the same time to comply with equal pay principles. But financial implications may lead the employers to propose phasing in improvements to pay. Proposals that would lead to partial implementation should be resisted and would still leave the college vulnerable to equal pay claims. No deal on staging should be agreed until both the advice, and agreement, of your regional office has been secured. UNISON regions will also seek legal opinion on such cases.

What if the college is dragging its feet?

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 mean lodging protective back pay claims for all claimants in those negotiations where deals have yet to be concluded. This will not prevent the negotiations from continuing it will simply protect the claims of members. If this situation applies in your college then speak to your branch and region urgently about the course of action to take.

Equal pay reviews

Before the final job evaluation and pay and grading package can be concluded, and put to members, the college must conduct an equality impact assessment.

The purpose of negotiating job evaluation and new pay and grading structures is to deliver fair and equal pay to all staff. Equality legislation covers race, disability, sexual orientation, religion and belief and age. Employers must now fulfil their public sector equality duty.

Public sector bodies must have due regard for the need to advance equality of opportunity the need to eliminate discrimination including in pay. The impact of new pay and grading proposals on particular groups must be born in mind throughout, including fixed-term, part-time and term-time workers.

The Equality and Human Rights Commission toolkit for conducting equal pay audits at: <http://www.equalityhumanrights.com/advice-and-guidance/tools-equal-pay/> should be used to check that any proposed pay and grading structure is non-discriminatory

Trade unions should be fully involved in the review, identifying pay gaps and causes. The initial focus will be on basic pay and total earnings (including any contribution-related pay and bonuses), but other benefits, such as holiday entitlement, sick pay and pensions should also be reviewed. Data gathering and analysis should be followed by a diagnostic stage where the reason for gaps and differences are identified. Remedial action must be agreed, which may include amending the college's equal pay policy. Action plans should be monitored for effectiveness in closing pay gaps and eradicating discrimination.

Procedure for signing off the final package

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 'informing members', page 11) to ensure that the content is legally satisfactory.
- The regional organiser should formally sign off any documents on behalf of UNISON.

Informing members

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

If and when agreement is reached on a package – or in relation to any of the three elements (a new pay and grading system, back pay and pay protection) – 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,

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 (ie assessment of prospects of success, delay and uncertainty in the litigation process etc). At the same time, members should be advised on the time limit for any equal pay claim using standard wording that is available from your regional office.

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. You must identify any sacrifice the individual would be making in relation to any claim for back pay and any corresponding advantages that 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 the regional office which in turn will have the letters checked by UNISON legal services.

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.

Application of this advice

This advice in this booklet is intended to assist college representatives who are faced with negotiating modernising pay agreements. The principles described should also apply to colleges in Wales, which have a separate agreement and in Scotland where bargaining on pay takes place locally. Representatives in sixth form colleges should also be able to draw on the advice if in discussions about job evaluation or wishing to tackle pay inequality. There is a two-day training course on the modernising pay agenda, focused on job evaluation and pay modelling. Representatives can find out if their region intends to run it and when. More detailed advice notes on some of these issues can be obtained from your region and UNISON direct 0845 355 0845.

Notes

Contact:
email: education@unison.co.uk
[unison.org.uk/education/further education](http://unison.org.uk/education/further_education)

UNISON

Join UNISON online today at
unison.org.uk/join or call
0845 355 0845

IN COLLEGES