
an LGE report

November 2006

pay, pensions
and
employment
solutions

unblocking the route to equal pay in local government



executive summary

1. Local government is committed to ensuring equal pay, although any mechanism for doing so must not cause problems for its primary task of improving local services. Without a solution to the equal pay problem, authorities are much less able to plan the future of the services they provide. Local Government Employers (LGE) and the Local Government Association (LGA) believe that the best way to deliver equal pay is through agreement, which will guarantee stable pay systems for the future and facilitate the wider modernisation of pay systems. This report details the reasons why it has become virtually impossible for local authorities to reach agreement on equal pay with local trade unions.
2. The report considers a narrow range of possible solutions against a number of financial, legal and employment relations issues. A set of interrelated solutions, which could apply to all public sector employers, is proposed. This prepares the ground for the review of equal treatment in the European Union in 2010.
3. LGE and LGA are of the firm belief that there is a shared employer, government and trade union interest, which can be dealt with through this set of solutions. Granting legal status to collective agreements is at the centre of the solutions.
4. LGE has conducted a reasonably wide, though discreet, consultative exercise on the proposals set out in this paper. Some key local authorities have been consulted at a senior level as well as some regional employers' organisations. None of those consulted felt that the concerns expressed in the paper were misplaced and all felt that the basic proposals needed to be explored further. Naturally there were some concerns over practicalities and areas of detail. These have been reflected where possible and some of the main points raised are set out later, where they have not been incorporated.
7. Problems have arisen with financing this agreement due to back pay and pay protection issues, and the need for employers and trade unions to defend themselves against legal challenge. So far, only 33 per cent of authorities have implemented new pay structures. This represents 25 per cent of the local government workforce. In addition, authorities which have not yet completed the exercise have realised that they will have to consider much larger potential settlements to achieve agreement on pay reform.
8. These fears have been prompted by high profile cases brought by no-win no-fee solicitors. Cases have been brought against local councillors, senior officers, union officers and ACAS officials, which claim they have denied full rights to individual employees.
9. It is clear, as recently updated research set out in this paper demonstrates, that settling the crisis, which has arisen from the need to bridge the equal pay gap, will be very costly across the public sector. However, legal developments have produced a situation where money alone will not solve the problem. Unions and employers need to be confident that the money is being distributed in a way that is not open to challenge.
10. The financial, industrial relations and legal issues will need to be considered.
11. The **financial** issues are significant. The **pay bill** could see a permanent increase of up to five per cent to introduce new equality proofed pay structures. However, the following factors will have a further detrimental effect:
 - a) The **'back pay' liability already identified** is estimated at almost £3bn. One authority alone estimates costs of £250m to include the cost of back pay and implementation.
 - b) Much of this liability will need to be accounted for in financial year 07/08, the final year of the CSR04 settlement.
 - c) Last year, **HMRC** issued a letter informing local government that tax and NI had to be paid on back pay settlements. This has increased settlements by approximately 26 per cent, although HMRC has been helpful in arranging composite rate single payments.

the issues

5. The 2004 NJC agreement set a timetable for all authorities to have completed and implemented equal pay reviews by 31 March 2007. The agreement was designed to take into account the findings of the Local Government Pay Commission, which argued that local government had an equal pay, rather than low pay, problem.
6. The agreement envisaged local authorities negotiating with unions on the basis of comprehensive proposals to introduce new 'equality-proofed' pay structures.



- d) Government has issued a letter stating that bids to capitalise back pay settlements will be subject to an overall cap (approx £200m). This will affect the ability of some authorities to fund back pay costs, especially as the figure covers all items permissible for capitalisation.
- e) There will be further effects on the ability to outsource services if potential partners are unwilling to take on uncertain liabilities for equal pay costs in transferred workforces. Where staff transfer under TUPE, the independent sector provider is likely to inherit liability for any assimilation process, if this is underway, as well as for any outstanding liabilities under the Equal Pay Act.

12. **Industrial relations** issues are two-fold. On the one hand, trade unions are becoming paralysed due to legal action from no-win no-fee solicitors. This is preventing local 'deals' from being agreed. On the other hand, the collective bargaining process is being further undermined by recent employment tribunal decisions. Legal action has been taken against authorities, individual councillors and trade unions and is undermining the ability of local employers to negotiate. Fundamentally, even where negotiations are continuing, the approach has to some extent been forced on unions and is making deals less and less affordable.

13. **Legal** issues concern the latest tribunal decisions, the activities of no-win no-fee solicitors, and a counsel's opinion, sought by Sunderland City Council. A summary of the *Allan v GMB Employment Tribunal* case, which has contributed most to the changed landscape, is provided in Annex A for convenience. Each case has its own effect on the process, but the outcome is that unions feel obliged to seek the maximum possible amount of back pay. Employment tribunals are not making assessments based on the ability of the authority to pay because their primary role is to ensure equal pay in line with current employment law.

14. While the GMB is due to appeal the Allan decision, it must not be assumed that an outcome in their favour would mean a return to the former collective bargaining environment. A litigious culture has now been created, where officials on both sides are going to be ever more cautious in their dealings. The judgement of a number of observers is that this change is irrevocable.

recommendations

15. LGA and LGE's recommended solutions therefore involve a balanced commitment of financial flexibility around the use of local government's own resources, and a change of emphasis in legislation to give primacy to collective agreements as well as ensure that the tribunal system works more coherently if it has to be used. The solutions are not sector-specific and could offer an opportunity for the wider public sector to tackle equalisation and avoid hefty tribunal awards in future.

financial solutions:

- a) better understand the potential liabilities;
- b) increase the level of capitalisation permissions; and
- c) explore options for increasing resources available to employers, such as use of reserves held in schools.

industrial relations/legal solutions:

- a) introduce a system of voluntary binding arbitration for collective equal pay settlements, with the results protected against individual action;
- b) improve the chances of obtaining agreements that stick, by increasing the capacity of ACAS to facilitate individual conciliation; and
- c) consider exemptions from legal challenge for a wide range of actions in support of equal pay.

16. The combination of these financial, industrial relations and legal solutions would provide the best opportunity not only to unblock the route to future agreements, but also to prepare the ground for 2010, when the European equality agenda roadmap is reviewed. Gender pay audits will also be required in positive action plans that set goals and timetables to reach pay equity in companies and organisations.

contents

financial issues	5
back pay	5
permanent impact on the pay bill	5
managing this pressure	6
balances	6
capitalisation	6
schools	7
industrial relations/legal solutions	7
how the solution might operate	7
benefits of the solution	8
role of ACAS	9
other alternatives	9
context and background	10
schools	11
outsourcing	11
current advice	11
annex a	12
the employment tribunal decision on Allan v GMB	12
annex b	13
survey of authorities	13
recent estimates of back pay costs	13
annex c	14
LGE survey of the impact on the pay bill	14
annex d	15
consultation	15

financial issues

back pay

17. LGE has estimated the back pay liability to be almost £3bn. Previous estimates have ranged from £1-5bn.
18. This estimate is based on a recent survey, conducted through regional employers' organisations, which takes into account a number of assumptions (further details in Annex B).
 - a) authorities agreeing to pay the full sum of up to six years' back pay to groups of staff that are acknowledged to be entitled to it;
 - b) payments are subject to tax and NI;
 - c) this has added up to 26 per cent to costs, judging by HMRC offers to some authorities.
19. Clearly this figure is significantly higher than the original estimate of £1bn. The original figure was based on an extrapolation of the earlier settlements, which were lower – in some cases as little as 20 per cent of the full six year liability. The activities of no-win no-fee solicitors and the Allan v GMB Employment Tribunal decision have resulted in unions feeling obliged to seek the maximum possible amount of back pay, and this has led to a significant increase in likely costs.
20. There is concern as to whether the £3bn is an underestimate, given the sensitivity around authorities revealing likely payouts and the upward trend in settlements being negotiated. There is also some concern that authorities which have already settled could be open to further additional claims.
21. The original upper end of the range (£5bn) is therefore still possible. Certainly, if future settlements are in line with the likely settlement of one authority (estimated at £250m), then this is a possible outcome. Clearly there is a degree of uncertainty around the figures, as the situation changes almost daily. Given the sheer scale of the estimates, and the options for managing this, it is perhaps sufficient to conclude the pressure is significant. It is therefore more important to consider what tools local authorities have to manage this immense liability.
22. The profiling of these costs is uncertain, as it is dependent on progress in local negotiations. Negotiations have stalled somewhat given the reluctance of unions to negotiate. It is reasonable to expect, however, that these costs will be significantly felt after the deadline for implementing equal pay reviews in April 2007, and will be accounted for in 2007/08. This is relevant when considering options for managing this pressure.

permanent impact on the pay bill

23. In addition to the costs of back pay there is likely to be a significant permanent impact on the pay bill as a result of job evaluation.
24. Evidence collected by LGE surveys since 2001 (Annex C) shows that, in authorities that have already undertaken job evaluation, there has been an average permanent increase in the local government services pay bill of 3.7 per cent. The average for upper tier authorities is higher, at 4.3 per cent. Most of these larger authorities have implemented the new structure more recently, which could indicate an upward trend. Authorities that were able to complete reviews at an early stage tend to be the ones with fairly uncomplicated staff structures. In these cases, job evaluation produced less costly structural adjustments.
25. If the 3.7 per cent average figure is applied to the local government services pay bill of those authorities yet to implement job evaluation, the estimated permanent increase in the pay bill is approximately £500m. This figure could range up to £700m if the higher average figure of the more recent settlements applies, and the 2004/05 local government services pay figure is updated.
26. New pay structures tend to cost more because of the need to avoid too many 'losers'. Having a significant number of 'losers' would not make good sense in terms of managing the outcome of the membership ballot, which each of the unions will conduct before reaching a collective agreement. Even though there are always losers, there are temporary costs incurred in protecting their pay, estimated at about one per cent of the relevant pay bill each year for about three years. Equally, the 'pay line' has to be set at a level that ensures the authority can compete for staff in relevant labour markets. It must be remembered that this will also impact on pension costs.

27. There is clearly uncertainty around the potential impact on the pay bill and the variation in impact across authorities, depending on their starting point. It is reasonable to expect, however, that there will be some impact from 2007/08 and into the CSR07 period, which will place considerable pressure on local authorities' budgets.

managing this pressure

28. Job evaluation and back pay are clearly major issues facing local authorities. To some extent local authorities have been preparing for this pressure through accumulating reserves. The pace with which these issues and costs have escalated, however, means a number of local authorities are facing a totally unmanageable burden. Local government is not looking to central government to provide additional resources to fund this pressure. The scale of the problem means this is unrealistic, not only because resources are expected to be scarce for CSR07, but it would divert resources from services also under pressure. Local government is, however, looking to central government to work with us to ensure a viable solution is found to an issue that will affect the entire public sector (as the recent NHS judgement has shown).

balances

29. Local authorities will have made some provision for back pay in reserves, although there is concern that the escalating costs may mean this provision will be insufficient. At the end of 2005/06, local authorities held nearly £12bn earmarked and unallocated reserves (this excludes school balances and is clearly not all for equal pay). Ahead of any employment tribunal, authorities are understandably sensitive about exposing the amount held in reserves, in order to minimise potential liabilities. Once cases have reached employment tribunal stage, the tribunal is unable to make an assessment of affordability, as its primary duty is to apply employment law. It is therefore difficult to assess what potential there is for this to be funded through reserves. Anecdotal evidence from a number of local authorities suggests that reserves alone will not be a solution, and with capping preventing council tax from increasing to fund liabilities, authorities are looking to capitalise expenditure.

capitalisation

30. Local authorities that are unable to use revenue funding (through balances or otherwise) may be able to 'capitalise' expenditure, and therefore use prudential borrowing or capital receipts. This is subject to DCLG approval and must fall within the capitalisation limits set by HM Treasury.
31. Government has issued a letter stating that bids to capitalise back pay settlements will be subject to an overall cap (approx £200m). With one council's liability alone standing at £250m, this is clearly insufficient and will significantly affect the ability of some councils to fund back pay costs, especially as the figure covers all items permissible for capitalisation.
32. Authorities have also expressed concern at the uncertainty created by the capitalisation 'gate' system, which means there is a considerable delay between setting the budget and council tax (February/March 07) and receiving approval to capitalise (Jan 08). If local authorities are reliant on capitalisation to fund the expenditure and this is not permitted, there will be a significant impact on their budgets.
33. The LGA understands that capitalising costs has implications for the 'golden rule', and that increasing the capitalisation limit will have implications for other capital spending. The sheer (and largely unexpected) scale of this problem means it is simply unrealistic to avoid providing local authorities with appropriate levers to manage this issue. The LGA therefore asks government to reconsider the capitalisation limit.

schools

34. Approximately 30 per cent of the local government services workforce is employed as support staff in schools. These support staff are largely female, which represents a risk since the employer relationship rests with local authorities but pay is increasingly determined at school level. It is not clear what portion of the £3bn liability would apply to schools.
35. With funding to schools now 'dedicated' there is a question as to whether schools, rather than the local authority, should incur this liability for the staff they are funded to employ. In terms of the permanent uplift in the pay bill, this will clearly need to be funded by DSG.
36. With the level of balances held by schools totalling £1.5bn, it is worth considering whether this could be used to fund the school staff liability, or indeed if DfES should be responsible for funding the liability. Where individual schools are not able to cover the cost, existing local management schemes enable schools to borrow from the aggregate school balances to spread the costs.

industrial relations/legal solutions

37. There is a potential solution which would involve action being taken by government to alter regulations in such a way as to make certain types of collective agreement safe from legal challenge. In this way, the parties involved can be more comfortable in agreeing deals where less than the maximum six years of back pay is involved, thus reducing the financial impact described above.
38. LGE proposes setting up a system of legally binding voluntary arbitration, with scope to suggest compromise deals, which unions could sign up to without fear of being sued.
39. There may be scope for a standing arbitration board to deal with collective disputes on issues connected to equal pay. It is not suggested that such a system should have a unilateral right of access. But bilateral access, where both parties enter into the process voluntarily but are then bound by the outcome, may have a place in some cases.
40. There are bound to be legal hurdles to be overcome in setting up such a system, including those at a European level. But the principle of achieving a negotiated solution, while preserving the rights of individuals, is important and should be explored further.

how the solution might operate

41. A standing arbitration board might comprise an independent chair together with a member with an employer background and a member with a trade union background, and perhaps a specialist from the Equal Opportunities Commission.
42. The board would also have standing terms of reference. These would require the board to make an award, which would be binding on the parties, that would cover the amount of back pay (and possibly length of protection) having regard to:
 - a) the potential claim that individuals might make to an employment tribunal;
 - b) (possibly the protection sought by trade unions);
 - c) the employer's affordability considerations.
43. In reaching its award the board would therefore be required to strike a reasonable balance between legitimate, but potentially conflicting, positions. It would consider those issues that have surfaced as a result of the GMB case in Middlesbrough and would make a judgement that would, for example, weigh up individual entitlements to back pay against affordability and therefore, potentially, job security.
44. The most important element of such an arrangement, however, would need to be that it is legally binding and cannot be unpicked by a third party. We believe this is defensible on the basis that:
 - a) The trade union would have conducted a membership ballot before deciding whether to commit itself to an arbitration award that may compromise some of its members' claims.
 - b) The board would have taken account of all the relevant factors as required by its terms of reference.
 - c) It is in the public interest to weigh up affordability (and therefore the impact on public services) against employees' aspirations. The available funds would be declared at the outset and be part of the terms of reference of the arbitration process. This would fit with the community leadership role of authorities and reduce the negative publicity around settlements.

benefits of the solution

45. The board's award would provide closure on the back pay (and possibly pay protection) issues arising from an equal pay review. It would not cover disputes on new pay structures in themselves, although of course 'normal' arbitration is always available to the parties in such cases.
46. It is recognised that this proposal would have implications beyond local government and would probably require primary legislation.
47. There are examples where the process of arbitration already enjoys long-term government support. For example, in the Police Negotiating Board (PNB), either side has a unilateral right of reference to arbitration on pay and conditions of service issues. This is in recognition of the unusual circumstances of it being illegal for police officers to take strike action. There is a standing Police Arbitration Tribunal, appointed by government, whose awards are automatically regarded as an agreement of the PNB.
48. The real difficulty with the current position is that there is no incentive for employers to make positive steps to narrow the gender pay gap. As soon as employers do take steps, private solicitors use this as an admission that there has been discrimination in the past. Solicitors then seek full pay going back six years and want the same level of protected pay as those high earners who will lose money by agreement. We believe the law should recognise that:
 - a) where an employer is found to be working towards equality, protection arrangements are a legitimate and lawful means of achieving equalisation, provided proper measures are in place to close the pay gap; and
 - b) where any difference in pay remains, the employer must show (i) the genuine reason for paying A more than B and (ii) that the reason is due to real business need.
49. A further incentive for authorities to take part in binding arbitration could be a government guarantee that using binding arbitration would qualify an authority automatically for capitalisation. The cap placed on capitalisation is known to be causing considerable difficulty for authorities in making decisions about affordability of settlement offers. This incentive would not mean, of course, that those authorities which do not wish to use an arbitration mechanism would be prevented from using local discretion and applying for capitalisation permission. Such cases would, as usual, be treated on their merits through the revised filtering mechanism set out by DCLG earlier in 2006.
50. We are aware that local government trade unions have also proposed to HM Treasury that collective agreements, and other acts aimed at achieving equal pay, be exempt from legal challenge. Importantly, it is clear from this proposal that all those working to find solutions to the equal pay problem have concluded that changes to regulations will be necessary.
51. LGE sees particular merit in the arbitration proposal because it involves third party verification of the reasonableness and affordability of settlements. However, all such proposals are worth discussing.
52. The proposed voluntary arbitration process should not be seen as an exclusive solution but may apply in the most difficult cases. Where authorities choose to continue with standard collective bargaining, there would be advantages in ensuring that ACAS can provide conciliation leading to a COT3 agreement without fear of action. Some form of indemnification for ACAS could be explored. It is vital, however, to introduce some third party verification of affordability for any local plan because the local parties may always be subject to challenge.

role of ACAS

53. ACAS has helped some authorities to move towards implementation of new structures with the development of COT3 agreements to deal with back pay where necessary. A COT3 is the form that individuals sign to waive their right to take an equal pay claim. The basis of the agreement can be negotiated collectively, but individuals need to sign off their own version. However, the general mood is that settlements are becoming ever more difficult to achieve.
54. ACAS explained to LGE in the early spring of 2006 their fear that, if there was a sudden rush of requests for help in reaching COT3 agreements from summer 2006 onwards, they might not have the capacity to help. This would lead to a stall in processes, and the possible collapse of agreements.
55. The problems described by ACAS stem from recent cuts in their operational grant which resulted in the loss of 115 experienced conciliators. ACAS has sought to mitigate the effects by explaining to employers that cases will be dealt with on a first come, first served basis, but there are clear risks to the aim of dealing with equal pay agreements in 2007. LGE is supporting the efforts of senior ACAS officials to obtain at least a temporary grant to alleviate the situation.
56. Any increase in the capacity of ACAS to deal with a large number of COT3 situations would obviously be of assistance.
57. In its activities in recent COT3 processes, ACAS has made it clear that the risk they feel of action being taken against them means they have to be cautious about the type of documents they are prepared to sign off. It would help ACAS if they were given some protection from action when they are involved in conciliation. It might also be of assistance if government legal officers could prepare guidance on COT3 documents which they think would be safe from any challenge.

other alternatives

58. One idea is that of arbitration, as outlined above. However, other alternatives exist.
59. For example, Sunderland city council asked Seamus Sweeney of Plowden Chambers to consider what legislative changes would be needed to provide a period of grace during which a local authority could make the necessary changes to its pay structures without facing equal pay challenges.
60. Sweeney advocates that such a period of moratorium could be granted in equal pay cases where there is inequality in pay but where the disparate impact on women's wages is due to extraneous forces that are not caused, directly or indirectly, by the discriminatory behaviour of the employer.
61. In such cases, it is suggested that the employment tribunal declares that there is an unacceptable difference in pay. It should also make an order that the employer take steps to rectify the difference within a defined period. During this period all equal pay claims would be stayed and, if the employer successfully rectifies the inequality, the claims should fall.
62. The proposed arbitration system and 'Sweeney' style periods of grace should not be seen as either/or options. Situations could be envisaged where a period of grace needs to be granted in order for the parties to move back into negotiation, which may lead to arbitration.

context and background

63. The local government pay system is both voluntary and increasingly devolved. Because it is voluntary, each authority decides whether to incorporate the NJC's terms and conditions into employees' contracts. About 30 authorities do not do so (mainly district councils in the South East but also Kent county council, one of the largest authorities in the country). These 'opted-out' authorities are therefore not bound by NJC agreements but are, of course, still subject to legislative considerations such as the Equal Pay Act. The 1997 single status agreement harmonised the conditions of service of manual and white-collar employees, who had previously had their own separate agreements. The first stage was to complete the harmonisation of working time with the phased reduction of manual workers' hours from 39 to 37 per week.
64. The 1997 agreement also abolished all national pay scales and replaced them with a pay spine. It required authorities to conduct equal pay reviews but did not set a completion date. Pending local reviews, authorities continue to use the old national scales.
65. Equal pay case law has developed significantly in the last few years and the 2004 NJC agreement set a timetable for all authorities to have completed and implemented equal pay reviews by 31 March 2007. The agreement was designed to take into account the findings of the Local Government Pay Commission, which argued very broadly that local government does not have a low pay problem as the unions had suggested, but does have an equal pay problem.
66. The 2004 agreement envisaged individual authorities negotiating with unions on the basis of comprehensive proposals to introduce new 'equality proofed' pay structures. The agreement also acknowledged the need to address back pay following the experience gained in the North East.
67. Back pay liability is limited to six years (depending on length of service and hours worked by the individual employee) as this is the period of 'remedy' awarded by employment tribunals. However, rather than being seen as a limit, it has now become the trade unions' aim in local negotiations.
68. Equal pay claims, in general, are from former female manual workers (eg in care and catering posts) whose jobs have been rated as equivalent to posts generally occupied by former male manual workers (eg refuse collectors, grounds maintenance etc) and where the male workers were also receiving bonus payments to their salary.
69. The increasing cost of settlements is driven by trade unions, who are caught between the need to win ballots, which require the best possible deal on protection, and the need to defend themselves against legal challenge over their pursuit of the maximum back pay settlement. Many local employers, including those that have not yet experienced equal pay problems, are also realising that they have to consider much larger potential settlements to achieve agreement on pay reform.
70. These fears have been prompted by high profile cases brought by no-win no-fee solicitors. Cases have also been brought against local councillors, senior officers, union officers and ACAS officials, with qualified success, claiming that they have denied full rights to individual employees. No-win no-fee activity has now spread to Yorkshire & Humber, the North West and the West Midlands. Wales and Scotland also have considerable problems.

schools

71. A sizeable part of the local government workforce is employed as support staff in schools. These support staff are largely female, which represents a risk since the employer relationship rests with local authorities but pay is increasingly determined at school level.
72. Under the terms of the School Staffing Regulations 2003, there are less stringent requirements on governors to consult the local authority before making decisions about support staff appointments. There is no longer a requirement on the governing body to consult the local authority in all cases where they are appointing a member of support staff, in advance of making a formal recommendation to the authority to confirm an appointment. Schools are, however, advised to consult the local authority in all cases where issues of pay and grading may not be straightforward. The local authority has a new right to make representations, in writing, after receiving a recommendation if there are any outstanding concerns about pay and grading. This is because the local authority remains the legal employer and, in particular, remains responsible for ensuring that the requirements of equal pay legislation are complied with. A decision made by one school may have implications for others within the authority. The governing body must consider the representations of the local authority. If, in the light of the authority's representations, the governing body decides to leave its recommendation unchanged it must provide a written explanation to the authority, which confirms the reasons why it considers its own recommendation to be appropriate.
73. While the local authority continues to be the employer for school staff in community schools, there are clear advantages to clarifying how schools should be included within the overall strategy for implementing equal pay.

outsourcing

74. The potential effects of transferred equal pay liabilities in outsourcing situations have not been fully researched. Research is necessary, but it is essential to deal with the equal pay problem quickly so that any assumed risks do not deter the development of new service delivery arrangements. Legal opinion suggests that the right to have a pay review completed is not a matter that can be incorporated into individual contracts, so new employers could not be sued for failing to complete pay reviews. However, LGE has evidence that some authorities have delayed outsourcing decisions pending progress on pay reviews. Further complications might arise if back pay is eventually agreed to be pensionable and adjustments need to be made for staff who have since transferred.

current advice

75. LGE's current advice is that authorities should carry on with job evaluation exercises and maintain trade union involvement in the development of pay proposals as much as possible. A level of trust is vital if negotiations are to produce viable agreements. The evidence is that authorities are not having insurmountable technical problems with pay reviews. Many are reaching a point where the final sticking point is the level of back pay and/or protection, depending on their underlying workforce profile.

annex a

the Employment Tribunal decision on Allan v GMB

76. Allan v GMB was brought as a sex discrimination case by an employee of Middlesbrough council, and not as an equal pay case. GMB lost on the grounds of indirect discrimination and victimisation.
77. GMB were criticised for placing more attention on pay protection (for men) than back pay (for women).
78. The case had the effect of forcing the trade unions to tighten up their processes to place a greater emphasis on ensuring that councils genuinely either could not afford a higher settlement, or, that a higher settlement would put jobs and services at risk. It also led to the view that trade unions could argue for a greater share of any available resources to go towards back pay rather than pay protection.
79. The decision does not make a COT3 settlement at less than six years' back pay unlawful or discriminatory.
80. The claimants had signed COT3 agreements and accepted compensation in full and final settlement of any claims arising against their employer.
81. The claimants were therefore unable to proceed with their equal pay claims. They were also unable to challenge the validity of the COT3 agreements or to pursue any relevant complaint against the employer. Instead, the complaint that was brought was that the GMB had unlawfully discriminated against them by failing to properly fulfil its duties to its female members with regard to the right to receive equal pay.
82. The tribunal held that the GMB did indirectly discriminate against its female members. In essence, the GMB had placed too much emphasis on protecting the pay of its male members and too little emphasis on securing the back pay rightly due to its female members for the past inequality in the authority's pay structure.
83. The tribunal found that the determining factor against the GMB was the 'way in which the back pay offer has been sold to the membership'.
84. The tribunal listed the factors which the GMB should have explained to its members, but failed:
 - a) That the deal on offer was substantially less than they were likely to receive if they were successful before an employment tribunal;
 - b) The chances of success at a tribunal;
 - c) That part of the reason they were being asked to accept a smaller figure than their full entitlement was so that some of the available money could be used to protect the pay of losers in the job evaluation scheme, including male bonus earners. There was nothing wrong with asking individuals to make sacrifices, but they should understand why they were being asked to make them.
 - d) That another reason for accepting the deal on offer was that it would result in a better pay line for everybody in the future, which would be relevant to those expecting to retire in the near future.
85. We have seen some initial advice which questions the simplistic approach to the 'pay pot' adopted by the tribunal, but nevertheless the tribunal was very critical of the GMB.
86. The tribunal found that:
 - a) The GMB rushed headlong into accepting an ill-considered back pay deal, accepting the authority's plea of poverty;
 - b) There was a striking contrast between the union's approach to pay protection (it took legal advice) compared to the assessment of the back pay offer;
 - c) It should have established equal value in the pay system and then sorted out back pay. Instead the union agreed that the authority could keep back pay settlements low and then move to establishing an equal pay system;
 - d) GMB (along with the authority and ACAS) manipulated unsophisticated union members with alarmist information which suggested that a refusal to accept the offer would involve job losses and make them traitors to their colleagues.
87. In summary, the GMB indirectly discriminated against its women members by pushing for acceptance of the offer without releasing the full facts upon which an informed decision could be taken.
88. The tribunal also held that the union victimised the claimants by encouraging the authority to settle later, and perhaps at a lower sum than the authority may otherwise have done, with those of its members who had instructed no-win no-fee solicitor Stefan Cross to represent them.
89. However, the discriminatory action of the union should not invalidate the COT3.

annex b

survey of authorities

recent estimates of back pay costs

90. Authorities are naturally reluctant to make such information readily available because the financial outcomes will be subject to extremely delicate negotiations and there is a need to avoid the risk of liability assessments being made public.

91. Two regions - the South East and East of England - suggest that liabilities will be low. This is not unreasonable given the extent to which the riskiest services have been outsourced in these regions. But some authorities in these areas are known to have on-going difficulties, so estimates are likely to increase.

92. The best current estimates show that the heaviest costs are likely to be incurred in the West Midlands, North West, Yorkshire & Humber, and North East:

93. Figures marked (*) are full projected estimates based either on samples or other forms of estimation by the region concerned. The other figures are in effect running totals of expected liabilities to date.

94. The lowest current estimate of back pay (almost £3bn) is lower than the crude figure of £5bn suggested earlier. The £5bn figure was based on an extrapolation from the situation in the North East, which is proportionately the worst affected region to date and so took no account of the lower potential liabilities in some regions. Given the developing nature of the equal pay problem, August 2006 is the earliest date at which first estimates could be developed in most regions.

£millions

South West	100*
East of England	18
South East	35
London	123*
Yorkshire & Humber	371*
North East	300*
North West	740*
West Midlands	928*
East Midlands	83
Wales	305

All regional estimates are valid for August 2006 except the Welsh figure, which has been revised in November 2006 and is subject to further amendment)

annex c

LGE survey of the impact on the pay bill

The survey has been conducted annually since 2001 and asked the following question: Please give an indication of the permanent costs of upgrading, estimated or actual, consequent upon implementation of your new pay structure,

expressed as a percentage of your total pay bill for staff covered by the pay review immediately prior to implementation. The cumulative results are presented anonymously here.

type	per cent	type	per cent
English Unitary	7.2	Shire District	5
English Unitary	4.3	Shire District	5
English Unitary	3.38	Shire District	5
English Unitary	3	Shire District	5
English Unitary	3	Shire District	5
English Unitary	2.4	Shire District	5
English Unitary	2	Shire District	5
English Unitary	2	Shire District	4.71
English Unitary	2	Shire District	4.5
English Unitary	2	Shire District	4
English Unitary	1.5	Shire District	4
English Unitary	1	Shire District	3.5
English Unitary Average	2.89	Shire District	3.5
London Borough	2	Shire District	3.5
London Borough Average	2	Shire District	3.5
Met District	7	Shire District	3.2
Met District	7	Shire District	3
Met District	7	Shire District	3
Met District	5	Shire District	3
Met District	4.8	Shire District	2.9
Met District	4	Shire District	2.7
Met District	4	Shire District	2.7
Met District	3.75	Shire District	2.6
Met District	2	Shire District	2.6
Met District	2	Shire District	2.5
Met District Average	4.73	Shire District	2.5
Shire County	8	Shire District	2.5
Shire County	7	Shire District	2.5
Shire County	6	Shire District	2.4
Shire County	5.3	Shire District	2
Shire County	5	Shire District	2
Shire County	3.75	Shire District	2
Shire County	3.5	Shire District	1.84
Shire County	2.8	Shire District	1.6
Shire County	2.5	Shire District	1.6
Shire County	5.7	Shire District	1.5
Shire County	5.6	Shire District	1
Shire County Average	5.01	Shire District	1
Shire District	11	Shire District	1
Shire District	10	Shire District	0
Shire District	7.5	Shire District	0
Shire District	7	Shire District	0
Shire District	6	Shire District	0
Shire District	6	Shire District	0
Shire District	5.4	Shire District	3
Shire District	5	Shire District average	3.45
		grand average	3.70

annex d

consultation

95. LGE consulted a range of its stakeholders on the content of this report. Those consulted overwhelmingly endorsed the main principles and made helpful points regarding emphasis and practicality, which we have made every effort to encapsulate in the body of the report. For information, other key issues raised by respondents are given below:

a) How authorities might present an assessment of affordability and how an arbitration board would make a judgement on that.


If ministers believed that this solution warranted further exploration, LGE would be prepared to take soundings and discuss it with ACAS and others. For example, a list of factors could be compiled which would need to be taken into account, such as the use of reserves to a permitted safe level; abandonment of capital projects if this was possible and expenditure had not yet started; minimal protection arrangements in implementation of the new pay structure; activation of savings on areas like sick pay if negotiated as part of a local pay deal.

b) The likelihood of primary legislation being passed quickly enough.

LGE is of the opinion that only primary legislation would offer a high enough degree of protection, but an exploration of all avenues for secondary regulatory amendment would be welcomed.

c) Difficulties over the capitalisation timetable.

There is such uncertainty over the Allan case appeal that many authorities will be unclear as to the level of capitalisation they should apply for until it is too late. Clearly, LGE will be checking which authorities will be submitting requests and for how much.



LGE
Local Government House
Smith Square
London SW1P 3HZ
email info@lge.gov.uk
web www.lge.gov.uk

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