



Briefing 08 /45 October 2008

This briefing is provided to Chief Executives, Council Leaders and APSE contacts in England and for information to Scotland, Wales and Northern Ireland Contacts.

Equal pay capitalisation; 34 more councils will be permitted to capitalise back pay costs

Key issues

34 more councils will be permitted to capitalise the costs of equal pay back pay settlements

Communities Minister John Healey will allow councils to raise £455 million to meet one off back pay liabilities

Total value of capitalisation directions reaches £1.1 billion.

1. Introduction

The numbers of equal pay cases lodged by trade unions is now in excess of 40,000. The ability for trade unions and employers to settle claims has been fettered by a series of high profile legal judgments which have meant that many settlements are at risk of being effectively unpicked.

One such key ruling was that of Sheila Allen and Others against the respondent trade union the GMB. In the Allen and GMB case the Court of Appeal held when allowing the appeal of the claimants, Sheila Allen and 25 others, against the decision of the Employment Appeal Tribunal on 31 July 2007 whereby it (i) upheld the decision of an employment tribunal sitting at Newcastle upon Tyne on 6 June 2006, that the respondent trade union, GMB, had indirectly discriminated against the claimants within ss. 1(2)(b) and 12(3) of the Sex Discrimination Act 1975, as in force at the relevant time, but (ii) allowed the union's appeal from the tribunal's decision on the basis that the union's conduct had been justifiable within the context of s.1(2)(b)(ii) of the Act.

In the negotiations which led to the deal, the GMB gave priority to those of its members needing pay protection and to achieving equality and better pay for the future rather than to maximising claims for past unequal pay.

The deal provided some women with compensation for historical inequalities in the region of 25 per cent of the full value of successful equal pay claims and some women with none at all.

Lord Justice Maurice Kay said that indirect discrimination arose under section 1(2) (b) of the 1975 Act, as in force at the relevant time, when a person applied to a woman a provision, criterion or practice which he applied or would apply equally to a man but which was such that it would be to the detriment of a considerably larger proportion of women than of men.

The Allen and GMB case has meant that compensation payments in settlement of historical pay inequalities have now come to the fore of any settlements to be reached by local councils, trade unions and employees. This has left many councils either struggling financially or unable to meet their obligations to pay back pay which often runs into tens of millions of pounds

2. Use of capitalisation

As councils have struggled to fund the costs of one-off back pay settlements Government has allowed on a gradual basis, for the use of 'capitalisation' as a means to fund one-off back pay. Capitalisation allows councils to raise money through either borrowing against or selling assets in order to raise the money to fund equal pay back pay payments. Capitalisation is not a route by which to fund future pay costs which would need to be met from the overall pay envelope.

In 2007 the Government moved to help councils speed up equal pay for women working in local government by allowing significant amounts of equal pay back pay to be treated as capital expenditure. This enables them to spread the cost or fund from receipts. In 2007 an allocation of £500m equal pay capitalisation directions to 46 authorities in England provided financial flexibility to make one-off back payments to thousands of employees - mostly women. However local councils and trade unions have been pressing for further directions to enable more authorities to reach settlements on equal pay back pay.

3. The latest announcements

Local Government Minister John Healey announced on Friday 26 September that in order to enable councils to speed up their long-term commitments to achieving equal pay for staff that a further 34 councils would be able to raise £455m to meet equal pay liabilities, either by borrowing against or selling assets. This will enable them to make one-off back payments to thousands of employees - mostly women on low pay.

This latest announcement brings the total value of directions for capitalisation approval to over £1.1bn over a three-year period. This has been widely welcomed by local government and trades unions as practical support that enables councils to meet their commitments as employers.

In announcing the moves Local Government Minister John Healey said:

"Work of equal value deserves equal pay. Local government workers have the legal right to fair pay like anyone else, but some council have let unequal pay persist for decades.

"I'm determined to see councils settle their equal pay obligations. Local government workers should get the equal pay to which they are entitled.

"Good progress has been made over the past year. But this is not a new obligation on employers and I now want to see even greater progress made, and the momentum of the past year maintained.

"I know this can mean some tough financial decisions. So to support this, I am allowing 34 councils to raise £455m either by borrowing against or selling assets, giving them the financial flexibility they need to make this happen.

"I want to see councils go further and faster, working closely with the trades unions, to see fair pay for all staff."

4. Progress on equal pay

It is envisaged that as a result of this latest round of capitalisation progress on equal pay will speed up.

The Local Government Employers reported that in July 2007 only around two in five of authorities had either implemented or completed their local pay reviews, but by the end of July 2008 it had reached three in five.

The Authorities to which the department has issued directions are:

Basildon	Erewash	Portsmouth
Birmingham	Hampshire	Redcar and Cleveland
Blackpool	Harrow	Salford
Bolton	Havering	Sandwell
Bradford	Kingston upon Hull	South Tyneside
Brent	Knowsley	Torbay UA
Brighton and Hove	Leeds	Wakefield
Bury	Liverpool	Wear Valley
Coventry	Middlesbrough	Wolverhampton
Croydon	North Tyneside	York UA
Cumbria	Northampton	
Dudley	Northamptonshire	

5. APSE comment

Capitalisation has proven to be a useful mechanism in allowing councils to reach agreement on funding one off back pay claims. There is a disproportionate impact of equal pay back pay compensation payments in areas employing predominantly female part time employees such as social care, building cleaning and catering. However in terms of issues such as pay protection the impact is most harshly felt amongst former male manual dominated areas, such as refuse and environmental services and administrative areas, where highly proceduralised work has resulted in relatively low scores under job evaluation. Therefore councils have continued to struggle to contain the costs of equal pay as a result of overall compensation levels and problems of affordability still remain in relation to future pay costs on the total pay envelope for councils

Current equal pay laws are deficient in a number of areas and do little to help employers, employees and trade unions in satisfactorily settling historic and new equal pay issues. The artificial nature of equal pay laws, which in UK terms are out of kilter with those operating within the EU, do not allow for a hypothetical comparator. For many women pursuing claims this is particularly an issue where reorganisation may occur during the process of a claim as the whole process has to be started again. This leads not only to frustration on the part of the claimant but considerably increases the cost to employers, both in possibly defending a claim, or in determining how they are able to 'equal pay proof' their organisation and pay and rewards structures. Moreover as the benefits of a successful claim are currently limited to the claimants' outcomes of case law can produce random results which

equally have a random impact on employers who are forced into certain actions without being able to consider their overall strategic approach to achieving an equal pay proofed working environment.

Existing case law has also led to considerable frustration in the ability of unions and employers to negotiate effective collective agreements. The current inability for representative actions to be taken means that the employment tribunal system is creaking with claims that are awaiting resolution.

With representative action, which differs to US style class action, individuals would be able to still pursue their own legal claim as is their right under EU law but trade unions would merely act in their capacity as representative bodies to make enforcement of that right easier in certain circumstances. One of the key potential benefits to representative action includes cases progressing more quickly, and potential settlements benefiting all workers rather than individuals.

Pending an overall review of equal pay law the capitalisation directions, whilst welcome in terms of assisting settlements of one off back pay claims, will not realistically relieve councils of the burdens that they face in complying with their clear legal obligations to ensure pay and rewards systems in local government are free of gender discrimination.

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