



Glasgow City Council

City Administration Committee

Report by Director of Governance and Solicitor to the Council

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Item 1

17th January 2018

Equal Pay

Purpose of Report:

To update Committee on the current position in relation to the litigation on equal pay.

Recommendations:

It is recommended that Committee notes the report and reaches a decision on whether or not to seek leave to appeal to the Supreme Court.

Ward No(s):

Citywide: ✓

Local member(s) advised: Yes No consulted: Yes No

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1 Background

- 1.1 Recognising that the Council's then pay and grading system did not provide equality in terms of pay between men and women, in 2006 the Council commissioned consultants to prepare a new workforce pay and benefit system following a review ("WPBR") to meet the requirements of the Red Book Single Status Collective Agreement.
- 1.2 The new system was implemented with the objective of creating a pay and grading system that was free from any gender bias. Implementing WPBR increased the Council's pay bill by £57m. In addition, the Council paid £82m in settlement of equal pay claims arising prior to the implementation of the WPBR. In completing this process the Council believed it had both compensated those employees who had been under-paid in the past and had put in place a robust system to ensure that this would not happen in the future.
- 1.3 For a transition period of up to 3 years, the Council protected the pay of those who were going to earn less under WPBR ("pay protection").

2 Legal Process

2.1 Employment Tribunal and Employment Appeal Tribunal

- 2.1.1 From 2009, claimants represented primarily by Action4Equality (Stefan Cross), UNISON and the GMB have presented employment tribunal claims challenging the Council's WPBR and the pay protection arrangements which accompanied its introduction.
- 2.1.2 The grounds of challenge were, in respect of pay protection, that the Council should have extended the benefit of the pay protection arrangements to female employees who were entitled to equal pay with those men who did benefit from pay protection.
- 2.1.3 In relation to the WPBR, the principal grounds of challenge as the litigation has progressed have focused firstly, on the separation of those work demands that produce a core pay grade and those which produce a WCD score; and secondly, on the use of role profiles and the Allocation Toolkit as proxies for actual jobs when evaluating the demands of work.
- 2.1.4 These challenges were considered by an Employment Tribunal ("ET") which heard evidence from all parties over 37 days, with additional legal submissions, from October 2012 – 31 May 2013. Dr Stephen Watson, a lead consultant on the WPBR team and a member of the ACAS panel of experts for the determination of equal value, gave evidence on the Council's behalf as to the basis of the WPBR.

2.1.5 The ET found that the WPBR was a valid job evaluation scheme (“JES”) under equal pay legislation. This meant that the Council effectively had an automatic defence to any equal value claims. The ET also found the Council had been justified in making pay protection arrangements to protect the pay of those who would earn less under WPBR. The ET found that in some cases the protected pay included elements of former discriminatory bonus. Nonetheless the ET found that the pay protection arrangements were justified. The ET did not decide on 3 other issues that the claimants’ representatives challenged as being potentially discriminatory – the Employee Development Commitment, Non-Standard Working Patterns and whether there was discrimination against part-time workers. These issues remain outstanding.

2.1.6 The Action4Equality (Stefan Cross) and UNISON claimants appealed this decision to the Employment Appeal Tribunal (“EAT”). By a decision dated 15 March 2016, the EAT found that the ET had been entitled to find that the WPBR was a valid job evaluation scheme. However, the EAT did not agree that the Council has justified its pay protection arrangements. The EAT found that the failure to extend the benefit of pay protection to female claimants who compared themselves with the protected former male bonus earners was not justified.

2.2 Inner House of the Court of Session

2.2.1 The Action4Equality (Stefan Cross) and UNISON claimants further appealed the decision on the WPBR to the Inner House of the Court of Session and the Council likewise appealed the decision on pay protection.

2.3 Pay Protection

2.3.1 By a decision dated 30 May, the Inner House agreed with the EAT’s decision on pay protection.

2.4 Workforce Pay and Benefit Review

2.4.1 By a decision dated 18 August, (overturning the ET and EAT) the Inner House found that the Council had not established that the WPBR was a valid job evaluation scheme. Central to the court’s decision was that Dr Watson had given evidence to the ET as a witness of fact and not as an independent expert entitled to express an opinion. It found that in the absence of additional independent expert evidence the ET had erred in law when it accepted that the Council’s JES was compliant with section 1(5) of the 1970 Equal Pay Act, and that the decision of the EAT to uphold that decision also amounted to an error of law.

2.4.2 The Inner House remitted all of the claims to the ET to be heard as equal value claims, which will determine whether, and if so to what extent, the Council’s current pay and grading arrangements breach equal pay legislation. The decision on whether to recall the cases before the ET rests in the first instance with the claimants, and, in light of the decision of the Inner House, the Council no longer has an automatic defence to equal value claims.

2.4.3 On 21 December 2017, the Inner House considered an application by the Council seeking permission to appeal its decision of 18 August 2017 to the Supreme Court. The Council's principal grounds were that the Inner House had erred in its application of the onus of proof in relation to the validity of a job evaluation scheme; that the Inner House's treatment of Dr Watson's evidence was wrong and that it had not been entitled to interfere with the ET which had heard the evidence. Having considered the Council's application, the Inner House issued a decision that day and refused to grant the Council permission to appeal its decision of 18 August 2017 to the Supreme Court. The reasons for refusal are set out in the appendix to the report. The Council now has to decide whether to apply direct to the Supreme Court for permission to appeal.

3 Options

3.1 There are 3 options currently available to the Council:-

- 1) Seek leave to appeal the decision of the Inner House to the Supreme Court and proceed with the appeal if leave is granted;
- 2) Follow the decision of the Inner House and run the claims through the ET as directed by the Inner House;
- 3) Continue negotiations with the representatives of the claimants, with reference to an agreed expert and/or the ET where agreement cannot be reached on specific points. This option can be pursued in parallel with either option 1 or 2.

3.2 Local authorities are corporate bodies created by statute (Local Government (Scotland) Act 1973) and must make corporate decisions ie Full Council, unless otherwise delegated. Legislation allows Full Council to delegate most decisions to committees or sub-committees or officers and these are set out in our Scheme of Delegations. If the delegation is not made, then it remains as a decision which is required to be taken corporately.

3.3 The CAC has a wide remit to discharge all council functions, except those specifically reserved to Full Council or as otherwise delegated by Full Council. In relation to equal pay, the scope and scale of the potential consequences for the Council and the public purse are such that they do not fall within a delegation to a committee other than CAC.

3.4 The immediate decision required by the Council is in relation to whether or not to seek leave to appeal the decision of the Inner House to the Supreme Court, as any such application to the Supreme Court must be received by 18 January 2018.

3.5 Seeking leave to appeal to the Supreme Court is a 2-stage process. You first have to apply to the Court whose decision you are seeking to appeal and, if that is not successful, you may then apply to the Supreme Court itself.

- 3.6 If permission to appeal is granted by the Supreme Court, we can anticipate that the appeal will be heard in approximately spring/summer 2019.

4 Implications of lodging an Appeal to the Supreme Court

- 4.1 Pursuing an appeal allows the Council to retain the possibility of reinstating the original ET decision on the WBPR and to have again the automatic defence to equal value claims. This is likely to lead to the avoidance of very significant financial costs. Additionally, obtaining permission to appeal, and thereafter pursuing an appeal, does not preclude ongoing negotiations with the claimant groups.
- 4.2 In the event that the Supreme Court did not find in favour of the Council, the decision of the Inner House referred to at section 2.4 would stand.

5 Implications of not lodging an Appeal to the Supreme Court

- 5.1 This legal avenue is closed to the Council and cases would be remitted to the ET, which will seek the views of both parties as to whether the cases should proceed. It is open to both parties to agree to continue negotiations instead of reopening cases with the ET.
- 5.2 If recalled to the ET, the claims would proceed as equal value claims. To assist in the determination of equal value claims, the Employment Tribunal would appoint one or more independent equal value experts to assess claimant and comparator posts. In litigation of this size, determining equal value claims through the tribunal process is likely to take a number of years.
- 5.3 In order to accelerate the timescale, the Council would continue to engage with the claimants' agents in mobilising option 3 (additional information below).
- 5.4 If no leave to appeal is sought from the Supreme Court, if leave is sought but refused, or if the Supreme Court rejects an appeal after a hearing, the Council would need to put in place a pay and grading scheme for the whole Council family compliant with current legislation to enable it to resist future equal value claims. The introduction of a new scheme could have additional financial and industrial relations implications.

6 External Advice

- 6.1 The advice from the Queen's Counsels (John Bowers and Brian Napier) who have been representing the Council is that the Council should seek leave to appeal and, if granted, should pursue an appeal because, in their opinion, we have arguable points of law which may be successful and, additionally, because the amounts at stake are very large indeed.

7 Discussions with Claimants' Agents

- 7.1 Prior to the Christmas and New Year break, Council Officers and the claimants' agents met on two occasions. During these meetings they agreed to meet each second Tuesday throughout 2018 in order to progress structure negotiations on the wider issues. Parties have agreed that the initial meetings would focus on pay protection and reaching an agreement on an interim settlement. This means that progress can be made without either side necessarily conceding on any point of principle that might be relevant to any wider settlement on WPBR.
- 7.2 During these initial meetings claimants agents made clear that in their view for litigation to cease, assuming appeal route is closed to the Council, a financial settlement is required and the Council will need to put in place a new pay and grading scheme. Negotiations on these points continue.

8 Policy and Resource Implications

Resource Implications:

Financial: Although Action4Equality has publicly referenced payouts of £500m, there are numerous elements that might attract cost. The council has not therefore identified figures for settling either pay protection or WPBR.

Legal: The Council is advised by two QCs and an external firm of solicitors, who are experts in equal pay legislation.

Personnel: It is too early to identify any personnel implications

Procurement: N/A

Council Strategic Plan:

Equality Impacts:

Does the proposal support the Council's Equality Outcomes 2017-22 An EQIA was carried out on the Council's pay and grading structure prior to approval in 2006.

What are the potential equality impacts as a result of this report? The report relates to the Council's response to a legal challenge to the Council's existing pay and grading structure. In the event that the Council

decides to implement a new pay and grading structure, an EQIA will be carried out.

Sustainability Impacts:

Environmental: n/a

Social: n/a

Economic: n/a

**Privacy and Data
Protection impacts:** None

9 Recommendations

- 9.1 It is recommended that Committee notes the report and reaches a decision on whether or not to seek leave to appeal to the Supreme Court.

Application to appeal to UKSC

Decision

We do not accept that this case raises arguable points of law of general public importance such as merit determination by the UKSC at this time. It seems to us that the case is highly fact specific. To a considerable extent, it is difficult to identify any real point of law in the grounds of appeal, which largely seem to address the question of this court's understanding of the tribunal's decision on a highly selective basis rather than looking at the assessment in its whole context. Many of the grounds themselves seem to require a gloss to be placed on the opinion of the IH. On the specific points said, in the permission to appeal stage, to create a point of law of public importance:

(i) the argument contained in the 1st part of the permission to appeal section does not seem to accord with the basis upon which the appellant argued the case

(ii) it is an incorrect reading of the opinion to suggest that the IH suggested some novel standard of proof

(iii) the court did not say that the section 1(5) test could only be met by leading expert evidence. The observations of the court on this matter must be read in the context of the tribunal itself stating that it did not have the necessary expertise to determine the issue. From what has been advanced to us it seems that the nub of this argument relates to a dispute as to the way in which the IH interpreted what the tribunal said upon this matter which does not seem suitable for the UKSC

(iv) we cannot see this point as relating to the construction of the statute rather than simply to the factual situation before the court

(v) this is not insisted on: it is in any event a point of procedure not of law

(vi) we do not think any arguable point of law arises having regard to the terms of section 2A(2A)

(vii) Given the extent to which this case is fact specific we do not consider this point to be relevant

(viii) and (ix) The fact that significant sums may be involved does not create a point of law nor, of itself, does it create an issue of public importance. The latter suggests an issue which affects the public at large rather than one affecting only the interests of individual parties.