

## **Equal Pay in Scottish Councils**

### **Report by Gary Fairley, Head of Finance and Integrated Support Services**

#### **1 Purpose of Report**

- 1.1** The purpose of this report is to inform the Committee of the key findings in the Accounts Commission report '*Equal Pay in Scottish Councils*' published on 7th Sept 2017 (the 'AC Report') and the actions taken by the Council in relation to the issues identified in the report.

#### **2 Background**

- 2.1** The aim of the law on Equal Pay is to ensure that women and men doing equal work receive Equal Pay (and other contractual terms and conditions of employment) for it. An employer, who does not comply with their legal obligations on Equal Pay, leaves itself open to the risk of Equal Pay claims being made to an Employment Tribunal.
- 2.2** Historically, the concept of Equal Pay derived from the Equal Pay Act 1970 and the Sex Discrimination Act 1975. Both these Acts were repealed and replaced by the Equality Act 2010 which imposed the public sector equality duty on local authorities with effect from April 2011.
- 2.3** The public sector equality duty requires local authorities to take a proactive approach to tackling discrimination, such as pay inequality. Additionally, the Scottish specific duties were introduced in 2012 and an update to this, published in July 2016, requires councils to publish a formal statement on Equal Pay every 4 years.
- 2.4** In 1997 the Single Status Agreement (SSA) was agreed. This was viewed as an important step towards eliminating pay inequality in local government. The aim was to harmonise employment terms and conditions across all Councils, by grading the previous APT&C, Manual and Craft employees on the same salary scales and terms and conditions. It did not encompass Teaching Council for Teachers (SNCT) conditions. Scottish Councils and trade unions negotiated the Scottish version of the SSA in 1999.
- 2.5** In their study, the Accounts Commission focussed on the following five themes during financial years 2004/05 to 2015/16:
- how Councils implemented the SSA;
  - how much Councils have spent settling Equal Pay claims;
  - how Councils demonstrate that they are dealing effectively with Equal Pay claims and minimising future risks;

- how effective the governance and oversight arrangements of the SSA are; and
- what lessons can be learned for the future.

### **3. Key Messages from the Accounts Commission**

#### **3.1** The key messages in the AC Report are:

- Implementing the SSA was a complex process that required all Councils to undertake a large-scale job evaluation exercise. Councils under-estimated the challenges involved and all but one missed the agreed implementation date of 2004.
- It was not until 2010 that all Councils in Scotland had Single Status in place. This was 11 years after the agreement was signed, with implementation taking twice as long as initially planned.
- There has been a lack of collective national leadership to overcome the challenges and address Equal Pay issues in a timely way.
- Councils initially worked on the basis that they could offset the costs of implementing Single Status with savings from changes to staff conditions and by improving staff productivity.
- Councils received no additional funding to implement their new pay and grading structures. In reality, Single Status brought significant costs and some Councils and Trade Unions found themselves balancing the risk of industrial unrest with affordability. This meant that some of the approaches taken by Councils when implementing Single Status did not always prioritise pay equality and were later found to be discriminatory.
- Councils sought to compensate workers who had historically been unfairly paid by offering payments if they signed compromise agreements. Councils paid around £232 million to approximately 50,000 workers in this way. The payments made were often of a relatively low value compared with the difference in pay over time, so some people refused them. Even while Councils were implementing Single Status, they continued to receive thousands of Equal Pay claims for historical pay discrimination.
- All Councils received Equal Pay claims after implementation. There were many reasons for these claims, for example claims against pay and bonus protection given to predominately male workers and discrimination in job evaluation schemes.
- Since 2004, around 70,000 Equal Pay claims have been lodged against Councils. The cost of compensation agreements and settling claims, along with legal fees, amounts to around £750 million.

- The number of claims made against Councils varies widely. Some of this variation can be explained by how actively ‘no-win no-fee’ lawyers have encouraged claims in different Council areas. There are almost 27,000 live Equal Pay claims and workers could potentially still make new claims against Councils.
- Councils need to be confident they have fair and transparent pay arrangements and take necessary action, such as regular Equal Pay audits, to deliver pay equality in line with their public sector equality duty.
- Elected Members need to continue to oversee, scrutinise and challenge Councils’ approaches to delivering Equal Pay and reducing the gender pay gap.

#### **4. COSLA’s Response**

- 4.1** COSLA welcomed the AC Report as it recognised the complex judicial processes and huge costs that Councils have faced as they have worked hard to meet their Equal Pay obligations. Councillor Gail Macgregor, COSLA’s Resources Spokesperson stated that:

*“As employers, Councils take their responsibilities to achieve Equal Pay very seriously, and we are frustrated that there remains a high number of claims outstanding. This is in large part down to complex and nuanced legal issues which can frustrate the process and act as barriers to quicker outcomes. Councils have endeavoured to settle all legitimate claims as quickly as possible. It is worth noting that cases can remain ‘live’ in the Employment Tribunal system even when settled and we have no control over when these are taken down. Also, many other remaining cases are ‘class actions’ where the settling of a single test case will resolve a larger number of cases in one go.”*

#### **5. The Midlothian Context**

- 5.1** As was the case with most other Councils at local government re-organisation, Midlothian inherited pay arrangements which included a number of groups of employees whose earnings included non- performance related bonus payments.
- 5.2** These payments were terminated on 30 April 2009. Subsequently, the Council implemented the SSA on 29 June 2009 putting in place a non discriminatory pay and grading structure. As a consequence, the Council has not been subject to claims based on ‘ring fenced’ pay protection arrangements.
- 5.3** Whilst there were negotiations with the Trade Unions prior to then these did not result in a collective agreement and the Council had to implement the SSA by offering new terms and conditions to staff. This in itself was a resource intensive exercise. The Council’s Job Evaluation Scheme, which was used to implement the SSA, has not been found to be discriminatory.

- 5.4** The historic arrangements exposed the Council to significant Equal Pay liabilities which fell into five broad categories:
- The Council has accepted that the non performance related bonus arrangements discriminated against predominantly female workers who carried out Like Work or Work Related as equivalent to bonus earners;
  - The Council also accepted that these same non performance related bonus arrangements discriminated against a smaller number of male employees who were on the same grade as bonus earners but did not receive bonus payments;
  - in addition, a number of Employment Tribunal claims were submitted from former Administrative, Professional Technical and Clerical (APT&C) staff seeking compensation on the basis that they carried out work of Equal Value to bonus earners who were paid more than them;
  - “Bonus Buyout” claims which were based on the termination payments made to those employees in receipt of bonus prior to 30 April 2009;and
  - “Piggyback” claims which arise from settling the above claims.
- 5.5** From 2008, all employees in the first two categories were offered compromise agreements (COT3s) via ACAS and approximately 89% settled on this basis with the remainder seeking compensation through the Employment Tribunal process.
- 5.6** As shown in exhibit 4 (pg.17) of the AC Report, the Council has received 988 Employment Tribunal claims for Equal Pay. Glasgow City received the highest number of claims (22,730) with Orkney Council receiving the lowest (14).
- 5.7** In 2011, through negotiations with Unison and Fox Cross Solicitors, a position was reached where both accepted that offers be put to the claimants they represented as being the best that could be achieved through negotiation.
- 5.8** In 2013, through negotiations with Unison, a position was reached that offers be put to claimants in the third and fourth categories which represented the best that could be obtained through negotiation.
- 5.9** In addition to the Equal Pay claims set out above, a collective claim ‘Blair and Others’ was submitted to the Employment Tribunal by Unison on behalf of staff formerly in receipt of bonus payments. The claim related to the cessation of these payments on 30 April 2009. In April 2014, the Employment Appeal Tribunal decided not to uphold Unison’s appeal. This confirms the earlier Employment Tribunal decision that the Council’s action to cease bonus payments on 30 April 2009 was legitimate. Consequently, the discriminatory bonus pay elements were not carried forward into new pay and grading structure.

- 5.10** The Council has been proactive in seeking to resolve Equal Pay claims. The AC Report at exhibit 7 (pg.21) confirms that as at 30 September 2016 Midlothian had 86 live Equal Pay claims remaining. To date that number has been reduced to 71 and includes 28 'Bonus Buyout' claims. This equates to around 7% of the total number of claims lodged against the Council and is well below the Scotland average of 37.4% for outstanding claims.
- 5.11** The Council's Legal Services Team, supported by colleagues in Employment and Reward, HR and Finance have worked closely with Employment Law specialists from Brodies and ACAS in order to settle Equal Pay claims and will continue to do so in seeking to resolve the remaining claims.
- 5.12** The AC Report at exhibit 5 (pg.18) notes that the Equal Pay bill for Midlothian is £12 Million. This includes legal costs, costs of Equal Pay claims and settlement/compromise agreements. As noted on page 15 of the AC Report, Midlothian obtained consent from the Scottish Government to borrow up to a maximum of £9.091 million for equal pay. The actual costs capitalised were £4.254 million. The remainder of the settlement was met from available reserves, with legal costs being met from the revenue budget in the year they were incurred.

## **6. Best Practice Recommendations on Equal Pay**

- 6.1** The AC Report at exhibit 9 (pg.25) emphasis that Councils must ensure they are fulfilling their public sector equality duties in relation to Equal Pay. This includes:
- publishing an Equal Pay statement and Equal Pay policy;
  - assessing the impact of any changes that may affect Equal Pay; and
  - publishing gender pay gap information.
- 6.2** In complying with good practice, Councils should:
- use Equality & Human Rights Commission (EHRC) guidance: for example, when undertaking Equal Pay audits and developing Equal Pay policies;
  - use Close the Gap's guidance on meeting the public sector equality Duty; and
  - ensure their risk registers are up to date.

For those Councils using the SJC job evaluation scheme, they should ensure they implement the most recent edition.

## **7. The Council's Position**

- 7.1** At their meeting on 29 August 2017 the Council considered and noted a report which advised on the new Midlothian Equality Plan 2017 – 2021 and Midlothian Equality Outcomes & Mainstreaming Progress Reports 2015 – 2017, as required to meet statutory requirements in the Equality Act 2010 and related legislation.

- 7.2** All the reports referred to in section 6.1 above have been prepared taking cognisance of the EHRC and Close the Gap guidance. The reports have also been published in the Equality and Diversity section of the Council's website.
- 7.3** At section 9 of the Mainstreaming Progress Report (MPP) it is noted that the gender pay gap between average hourly rate of pay for male and female – all Council employees as at 31st March 2017 was 2.96%. It is intended that information on the gender pay gap be reported annually. This is an improvement on the last figure published nationally in 2015/16 of 4.58% and improved our ranking from 18 to 16 out of 32 local authorities.
- 7.4** Section 10 of the MPP contains the Council's Equal Pay policy statement which is fully reproduced in the Appendix to this report.
- 7.5** As set out in the policy statement, the Council is committed to ensuring that it has fair and non-discriminatory pay and progression systems and has robust monitoring arrangements in place. These include:
- conducting regular audits to monitor the impact of our pay structure;
  - providing training and guidance for those involved in determining pay;
  - being transparent with staff around how their pay is determined;
  - responding in a timely way to grievances on Equal Pay; and
  - working in partnership with Trade Unions on Equal Pay matters.
- 7.6** Equal Pay considerations are fully taken into account when assessing the impact of any changes that may affect pay, including:
- considering disparate impact (where a greater proportion of one gender than the other is affected) and addressing it where no genuine material factor exists to justify the difference in pay;
  - undertaking an independent Equality Impact Assessment on pay models to identify clusters of gender dominated roles on/or near grade boundaries;
  - restricting pay protection where proposed to non-discriminatory elements of pay; and
  - equality impact assessing each pay element to ensure that discrimination is not perpetuated.
- 7.7** As regards the SJC job evaluation scheme, the Council currently applies the latest third edition of the scheme. Indeed, the Council had initial representation on the technical working group and led the pilot to test the material impact of the update on evaluated roles.

## **8 Report Implications**

### **8.1 Resource**

None arising directly from this report.

**8.2 Risk**

There is significant financial risk associated with defending Equal Pay claims at the Employment Tribunal. The Council's approach of seeking to agree settlement of the claims has significantly reduced that risk.

**8.3 Single Midlothian Plan and Business Transformation**

Themes addressed in this report:

- Community safety
- Adult health, care and housing
- Getting it right for every Midlothian child
- Improving opportunities in Midlothian
- Sustainable growth
- Business transformation and Best Value
- None of the above

**8.4 Key Priorities within the Single Midlothian Plan**

Not applicable.

**8.5 Impact on Performance and Outcomes**

None arising directly from this report

**8.6 Adopting a Preventative Approach**

Not applicable.

**8.7 Involving Communities and Other Stakeholders**

It is not felt relevant to undertake consultation for this report.

**8.8 Ensuring Equalities**

None arising directly from this report.

**8.9 Supporting Sustainable Development**

None arising directly from this report.

**8.10 IT Issues**

None.

**9. Summary**

- 9.1** The Accounts Commission recognises that implementing Single Status has been a long and complicated process with Councils receiving around 70,000 claims at an estimated cost of £750 Million. Midlothian has been proactive in the settlement of historic Equal Pay claims with only around 7% of the claims remaining to be resolved. The Council has appropriate policies and procedures in place to seek to eliminate pay inequality.

## **10 Recommendations**

**10.1** The Committee is invited to note the:

- (a) key messages in the AC Report;
- (b) current positive position of the Council with regard to the issues and questions raised by the Commission;
- (c) relatively small number of remaining claims which Legal Services are seeking to resolve; and
- (d) actions being taken for governance and oversight of equal pay in the future.

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**Background Papers:**

The Accounts Commission report *'Equal Pay in Scottish Councils'* published on 7th Sept 2017.

Report to Council 29 August 2017 together with new Midlothian Equality Plan 2017 – 2021 and Midlothian Equality Outcomes & Mainstreaming Progress Reports 2015 – 2017.



## Appendix

### Midlothian Equal Pay Statement

Midlothian Council believes in equal opportunities in employment and is committed to the fundamental principle that procedures to determine the pay and conditions of employment of all our employees do not discriminate unlawfully and aims to eliminate any sex bias or any form of discrimination. The Council recognises that in order to achieve equitable pay it should operate a pay system which is transparent and based on objective criteria.

The Council believes that pay is one of the key factors affecting motivation and relationships at work and therefore considers it important to develop pay arrangements that reward employees fairly. The Council will work with Trade Unions to develop fair and non-discriminatory pay and progression systems which are understood and accepted by employees and by the managers who operate the system. All aspects of the pay package will be reviewed and monitored regularly to ensure it delivers Equal Pay. Any pay inequalities which cannot be justified will as far as is possible be eliminated.

The Council will aim to:

- Continue to use objective, justifiable and proportionate job-related information and an analytical job evaluation scheme to determine the salaries of jobs and the Council's salary structures.
- Monitor existing and future pay practices and the impact or potential impact on men and women.
- Assess and review the findings of monitoring activities and take action where necessary.
- Provide development and guidance for managers and others directly involved in decisions about pay and benefits.
- Continue to work with the recognised Trade Unions on Equal Pay and equalities in employment.
- Inform employees of how our pay practices work and how their own pay is determined.
- Respond promptly and investigate where necessary grievances on Equal Pay.

Our commitment to Equal Pay extends to both race and disability and whilst able to monitor this as our systems are developed to check for bias we will be in a position to more accurately report this in late 2017.