

WEST DUNBARTONSHIRE COUNCIL**Report by Strategic Lead – People and Technology and Strategic Lead-
Regulatory as Monitoring Officer****Council: 30 August 2017**

Subject: Equal Pay**1. Purpose**

- 1.1** The purpose of this report is to provide an update on progress to address the undernoted points in the motion by Councillor Rooney agreed by Council on 28 June 2017:

“- This Council therefore calls on the Chief Executive to review the claims process with a view to identifying individuals that have lost out.
- The Chief Executive is requested to bring forward a report identifying the numbers of staff and the cost implications to the next Council meeting for decision.”

2. Recommendations

- 2.1** It is recommended that Council:

- notes the progress and actions taken to date; and
- agrees that no further action should be taken in respect of this matter.

3. Background

- 3.1** The Council previously settled first wave equal pay claims, initially in 2006 and latterly in 2008/09. The approach agreed in both tranches in respect of claimants was to settle those with a valid claim, based on the emerging case law at the relevant time. Such settlements were agreed out-with the Employment Tribunal Service. Since 2009, officers have been involved in Employment Tribunal case management in respect of those ‘second wave’ claims lodged at Tribunal against the authority.
- 3.2** In seeking to settle these outstanding claims, in accordance with the evolving case law, the Council aims to fully address the *residual* issues arising from the implementation of single status - the point at which the Council addressed historic pay inequalities.
- 3.3** The provision being challenged in this ‘second wave’ litigation was a fundamental element of Clause 19 of the Local Government Terms and Conditions (‘The Red Book’), namely pay protection on a cash conserved basis. It is this principle and its’ application over the period 1 March 2009 – 31

March 2012, that has given rise to challenge and consequential settlements being made.

- 3.4** By virtue of s5(2)(a) of the Local Government and Housing Act 1989 it is the duty of the Monitoring Officer to prepare a report to Council where it appears to him that any proposal, decision or omission by the Council has given rise to or would give rise to a contravention by the authority of any enactment or rule of law or of any code of practice made or approved by or under any enactment. When the motion was considered by Council on 28 June 2017 the Monitoring Officer advised Council that he believed the payments suggested would be illegal. Given the significant sums of money involved, a Counsel's opinion was taken confirming the view expressed by the Monitoring Officer at the said meeting.

4. Main Issues

- 4.1** The Council has now made settlement offers to 393 claimants, 375 of whom have accepted and received payments due. The Council negotiated terms with trades unions and agreed payment of arrears, including income tax, national insurance, accrued interest and employee pension contributions. Crucially, those in receipt of a settlement required a valid comparator, i.e. a comparator in Grades 3, 4 or 5 in receipt of pay protection.

- 4.2** In addressing the motion to Council and the request to "***review the claims process and identify those who have lost out***", in the absence of a valid claim, or indeed any claim setting out the specifics, clarity is required in a number of areas.

- 4.2.1** There are a number of separate options set out below which officers have explored:

- **Option 1** – payment to those who lodged a claim but were not made a settlement offer because their claim was not valid and consequently withdrawn/struck out by the Employment Tribunal.

This would include all Grade 1 claimants who had their claims struck out by the Employment Tribunal Service as they had no relevant comparator.

Option 1 could apply to 183 employees and is essentially a literal interpretation of the motion resulting in payment to those who have no right or entitlement to receive such a settlement, i.e. they were not in detriment, as determined through a legal process.

- **Option 2** – payment to those who did not lodge a claim but who are employed in the same roles as the main claimant job groups, i.e. catering, cleaning and care.

This would apply to circa 750 employees who did not lodge a claim, circa 546 of whom are trade union members (as far as we are able to check through payroll 'check off' deductions).

- **Option 3** – payment to all employees in all claimant job groups (this would extend the group to include for example, all Learning Assistants, Coaches, Clerical/Admin Assistants, Libraries Assistants to name a few).

Note that this would apply to circa 1,082 employees who could have but did not lodge a claim, circa 796 of whom are trade union members.

- **Option 4** – payment to all employees in Grades 3, 4 & 5 (see paragraph 4.1 above for rationale, circa 2,042).
- **Option 5** – payment to all employees in all claimant groups, including those who have subsequently left the Council's employment and who could have but did not lodge a claim (circa 2,865).

5. Methodology and Identification of cost

- 5.1 The main challenge in respect of calculating indicative cost is the absence of a claim. A Claim must specify the basis on which resolution/restitution is sought, in these cases by compensation. Additionally the claim establishes the relevant period, the comparator to be used and forms the basis for any consequent settlement discussions.
- 5.2 The request for this report, while requiring the analysis of a significant number of pay records, separate consideration of each change (i.e. role(s) held, hours worked, pattern of shifts etc.); the 'assumed' period of claim (there being no actual claim), also raises the question of the legitimacy of such a payment, if that is the /decision of the Council.
- 5.3 In order to provide some *indication* of costs for options 2 – 5 above, the average gross settlement amount, based on grade, for *existing* claimants in receipt of a settlement was calculated. Using this average, the estimated cost of the options ranges from around £1million to £4 million. It is not possible to cost option 1 as these claimants were Grades 1, 2 or 6 and accordingly had no comparator and were not due any compensation.
- 5.4 It is important to note that the above costs are provided as an indication only. In order to accurately predict the overall costs, Council would have to decide to proceed with an option. This would then allow the individual records to be analysed which may result in the costs increasing/decreasing. Consideration of all factors, professional advice and organisational impact is essential in making that decision.
- 5.5 The Legal advice to Council is that proceeding with any of the options suggested would be illegal and any decision taken would be open to a

successful challenge. The Counsel's opinion obtained concluded that the payments would not be lawful because of the lack of specific power to make the payments that they would not be in accordance with the Council's duty to obtain best value as contained in s1 of the Local Government Scotland Act 2003. The proposed payments would be irrationally generous for three reasons:

- (a) there is no legal or financial duty to make any payment at all;
- (b) any historical legal obligation has been extinguished through prescription;
and
- (c) the Council would be making payment to a group it could not be confident has ever suffered a breach of the Equal Pay duty. Even were the Council to restrict payments to those who had suffered a historic breach of the duty the payments would still be irrationally generous. It is considered that the power of well-being as contained in s20 of the said act could not be used to justify the payments.

5.6 Best Value Considerations

The Council is required to understand and make decisions given appropriate consideration of its obligations with regard to economy, efficiency, effectiveness and equalities as detailed in the Local Government Scotland Act.

In relation to any Council decision to make payments to that are not legally required, legal advice is that the options would be difficult to justify as consistent with efficiency, effectiveness, economy or how they would contribute to performance.

It is also essential that such a decision be taken only with as full as possible an understanding of the impact it will have on the Council's finances, and thereby its ability to deliver Best Value services. Given that Council has no legal obligation to make payments, as is currently being suggested, to people who have no live legal claim against the Council then any consideration of this approach would require to be assessed within a framework incorporating Best Value requirements.

In terms of Risks: Financial and Reputational around Best Value: Any Council agreement to make payments as is currently being considered will result in a significant cost to the Council. As there is no budget for such costs then these costs will require to be met from within provisions and/or reserves. At present, as previously reported to Council there is a provision within the annual accounts at 31 March 2017 of £1.251m for the settlement of lodged equal pay claims. The only other source of funding would therefore be to utilise the Councils revenue reserves. As reported to Council on 28 June 2017, these sit at an unaudited position of £4.582m, with a Prudential Reserve target of £4.104m. In the event that Council authorises a payment that requires to utilise reserves and reduces reserves to below the Prudential Target then Council will require at that point to identify and agree a remediation plan to recover the position whereby reserves recover to at least the Prudential target

level. This will be an expectation of the Council's external auditors. Members will be aware that our external auditors have in the past commented on the Council's relatively low level of free reserves given the strained financial climate that the Council is operating in; any move to reduce reserve levels to fund expenditure that the Council is not legally obliged to spend will no doubt result in further external audit comment.

The Council has a duty to ensure that it makes the best use of its resources and that council taxpayers and/or service users receive value for money. It is difficult to see how making such payments would meet the Best Value criteria. If payments were authorised which resulted in use of the Prudential reserve then inevitably the Council will require to make net cost reductions to get to a position where the Prudential reserve level is recovered – this will inevitably have a negative impact on taxpayers (residents) and service users.

In addition services may require to be reconfigured generating the need to review services and their achievement of Best Value. This may lead to further reductions to the workforce by more than currently anticipated had such a decision not been made, in order to fund the recovery of the position.

- 5.7** Based on the above, and that the actions taken to date accord with the approach previously agreed by Council and legal advice, officers' recommendation is that no further action should be taken in respect of this matter. Any other Council decision to proceed with any of the options identified above will result in the need for a further report with accurate costs to a future Council to enable the Council to make a fully informed decision as to whether to proceed and if so how the cost would be funded.

6. People Implications

- 6.1** The people implications associated with this report extend to the level of data extraction required to 'build' each individual's work history beginning with the 1 March 2009/or the relevant start date, extending to the 31 March 2012.
- 6.2** An initial estimate of the time required is over 650 hours (between 4-5 months, based on a full time 35 hour working week) and involves extraction from the current workforce management system and the historic payroll system. The work required is technical and the Council has one officer with the necessary skill and experience in this complex area to undertake the work. This officer was, until this week, responsible for progressing settlement payments (as outlined in paragraph 4.1) to ensure compliance with our legally binding agreements. In the absence of another suitable resource and clarification on approach, this detailed work has not commenced.
- 6.3** As detailed above there may be a need to reduce the workforce to recover the Prudential Reserve Level should payments be made.

7. Financial and Procurement Implications

- 7.1** The currently held provision for the settlement of equal pay claims of £1.251million was made to ensure that the Council has sufficient funds to settle lodged equal pay tribunal claims, subject to supporting legal justification to do so. All claims can be settled from the existing budget provision.
- 7.2** The additional financial consequences are likely to be significant and may be beyond any the current provision. If Council decides to progress with payment to employees in lieu of a valid legal claim, the principles of best value are likely to be compromised and the cost may run to millions, as noted above.

8. Risk Analysis

- 8.1** In consideration of the circumstances, there are a number of risks that the Council is alerted to:
- that such a decision (i.e. to make 'settlement'/ an ex gratia payment such as is being suggested) is unlawful and as such, the Council is not permitted by law to make such as payment;
 - in light of the above, should the Council 'instruct', by way of a formal decision, officers to make such an unlawful payment, then this would constitute unlawful action;
 - reputational risk of making a decision where advice provided is that such a decision would be illegal; and
 - the financial risk has been identified, however there is consequential further financial risk of costs being incurred to implement any savings required to regenerate the recommended Prudential reserve value should this become breached as a result of any Council decision to make such payments.

9. Equalities Impact Assessment (EIA)

- 9.1** Given the recommendation made at paragraph 2.1 above, there is no requirement to undertake a screening at this stage. If any further report was called for, an equalities screening would likely be required.

10. Consultation

- 10.1** Discussions have taken place with the trades unions at local and regional levels. They have all intimated a concern that such a decision may cut across the legal agreement reached between parties to settle the claims, both in this wave and the last. In the absence of a claim, and any formal assessment, settlement is not achievable (there being nothing to settle).

10.2 Additionally, our joint trades unions have confirmed their respective and significant awareness campaigns at the time which included repeated correspondence sent to individual members, media advertising and publically held events. The national visibility of the issue was such that it resulted in thousands of claims lodged with the Employment Tribunal Service in Scotland.

11. Strategic Assessment

11.1 Should Council proceed with action in this regard, there is likely to be a negative impact on service delivery and therefore the organisations' strategic aims and objectives.

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24 August 2017

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Appendices: Motion – equal pay, 26 June 2017

Background Papers: Briefing note: Equal Pay Settlements – ‘2nd wave’
Draft Minute of Council Meeting, 28 June 2017
Counsel’s opinion dated 17 August 2017

Wards Affected: All Wards.

APPENDIX:

Motion – equal pay

This Council is concerned that despite the imposed settlement by the previous SNP Administration it appears that many female workers are still subject to unequal treatment.

The Council notes that all elected members received a letter from a female member of staff dated 6th June, that she along with some of fellow colleagues, have been discriminated against by West Dunbartonshire Council over equal pay.

The Council is currently in the process of making individual offers to historical claimants i.e. those with outstanding claims lodged at Employment Tribunal.

The Councils approach is that those individuals with valid claims at Tribunal are being made offers in accordance with the agreement reached with claimants' representatives. However, in the absence of any legal justification, those without claims at Employment Tribunal or those with invalid claims will be excluded from any such offer.

This Council believes that addressing the historic inequality is a moral responsibility and that every effort should be used to made to ensure that all female staff that had instigated a claim through their trade union should be entitled to the same compensation as other colleagues.

This Council therefore calls on the Chief Executive to review the claims process with a view to identifying individuals that have lost out.

The Chief Executive is requested to bring forward a report identifying the numbers of staff and the cost implications to the next Council meeting for decision.