



# **UNITE GUIDE TO BARGAINING PAY SYSTEMS**

Guidance for Unite ~~Amicus~~ Section Officers  
and Workplace Representatives

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Workplace Representatives**

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## ■ INTRODUCTION

Achieving pay improvements is one of the fundamental reasons for joining a trade union. Due to the interest which most members have in the subject of pay, this is also a valuable area for organising opportunities. A well considered pay campaign allows for communication and consultation with members, demonstrating the relevance of their union and keeping them involved.

This guide will explore the different elements which go to make up a pay system. It will look at how these elements are seen by employees, union representatives and management and provides advice on handling new pay systems.

Following the decision in *Allen v GMB* in 2006, a case that considered the obligations of trade unions in relation to collective bargaining and equal pay issues in some detail – see later, all unions have also been obliged to reconsider their approach to collective bargaining. This guide examines those issues that will arise throughout the bargaining process.

## ■ TRENDS IN PAY SYSTEMS

Most members, when asked, would say that negotiating pay and conditions is the main role of their trade union. However, the development of pay systems which replace all or part of a general pay increase with one linked to an individual's performance, or their market rate or their competence to do the job, has reduced unions' influence over the pay increase that each individual receives. Such pay systems are now used in many companies where Unite members work. As a result, general increases and incremental systems are now much less common. However, such trends far from reducing Unite's role and relevance place the union in a central position in terms of influencing employer's decisions, insisting on transparent, fair and equitable pay systems and negotiating the best outcomes for our members.

For many employers, pay systems are a question of following fashion. It is often the case that a particular form of pay system will sweep across industry with little actual evidence of its effectiveness or applicability. Performance-related pay is a good example of this.

Pay systems are more complex than in the past and therefore rarely belong to one category or another. It is more helpful to think of pay systems as being made up of many interchangeable elements which allow for a wide range of practices.

Pay systems are also much more sophisticated than in the past. They may now be based upon an employer's view of two things, inputs and outputs. Inputs are the skills and abilities which an individual brings to the job. Outputs are the results in quality or quantity which the individual achieves. A focus on inputs has created the ideas of 'performance management', 'competency based pay' and 'skills based pay', which are examined below. Employers are giving greater emphasis to the attributes individuals possess and less attention is paid to length of service or to the job that is being done.

## ■ WHAT MANAGEMENT WANTS

Management looks to pay systems to achieve a number of objectives which can be summarised as follows:

- recruit and retain the best employees;
- motivate their workforce;
- strengthen line managers' authority;
- achieve the organisation's goals and objectives

Experience has shown that we can add some other objectives to this list:

- wanting to reduce the role of trade unions by exercising greater discretion over pay increases and reducing the ambit of collective bargaining;
- wanting to reduce the pay bill;
- giving high awards to favoured individuals;
- flexibility to change jobs and structures more easily.

Another objective has been the wish to encourage staff to perform well, particularly at a time of reduced promotion opportunities stemming from flatter structures and de-layering. Promotion opportunities have traditionally been one of the ways in which employers have sought to motivate their employees.

The new pay systems have largely failed to meet the first four objectives above and, in particular, have failed to motivate staff. However, they have, unfortunately, been more successful in meeting the other objectives.

## ■ WHAT TRADE UNIONS WANT

The trade union approach is to seek fair pay. This includes:

- pay levels comparable with other appropriate companies or organisations;
- fair internal relativities and range of earnings;
- pay increases in line with company financial performance and movement in the cost of living;
- equal treatment of all employees in pay and grading;
- job content as an important aspect of salary determination;
- people performing the same job satisfactorily getting the same salary.

These objectives apply to whatever form of pay system is in operation, but it is Unite's experience that inequalities are greater where pay systems seek to link pay to performance, competency and other subjective criteria.

In conclusion, what we should aim for is a system:

- where pay decisions are objective, rather than subjective;
- where principles are explicit, clear and straightforward;
- which is free of favouritism and treats all staff in the same way, regardless of gender, ethnicity, age, grade and so on;
- where outcomes can be measured.

## ■ JOB EVALUATION

### What is job evaluation?

Job evaluation is a method of comparing different jobs to provide a basis for a pay structure. It links pay to the job duties, the knowledge and skill required to carry them out and the necessary working environment. It provides a set of techniques for analysing and comparing jobs. Jobs are analysed, for example, according to the degree of skill they require, the responsibility exercised, the effort expended and so on. The information to be analysed is set down in a job description or job information questionnaire. A scoring system is used to assist the comparison between jobs and to record the results. Jobs with similar scores can then be grouped into grades and these in turn are used to form the basis of the pay structure.

### Why job evaluation is an issue for trade unions

Job evaluation techniques are not new and job evaluation exercises are not something which Unite representatives can afford to stand aside from.

Job evaluation is used by employers:

- to create an internal hierarchy of jobs which can be used as the basis of a new pay structure
- to achieve equal pay by ensuring that job demands are measured fairly and objectively
- to defend themselves against claims for equal pay for work of equal value

### Trade union aims and job evaluation

#### The design of a job evaluation scheme

A job evaluation scheme should be based upon the fundamental principle of fairness and must be capable of evaluating all of the significant characteristics of the jobs involved.

This means that the scheme must recognise the professional and technical skills and knowledge required for the job; the responsibilities associated with the job and the various mental and physical demands that the job makes on the postholder.

The acid test for a valid job evaluation scheme that should be applied by a Unite member is “Does it evaluate fairly all the significant characteristics of my job accurately?”

#### Equal pay for work of equal value

Traditional pay structures were often based on the relationships between jobs in a particular occupational group. They were not designed to allow comparison between occupational groups. It is likely, therefore, that for some groups the pay system does not fully take into account the skills and knowledge, responsibilities, mental and physical demands of their jobs.

UK employment legislation requires a pay structure to provide equal pay for work of equal value. As job evaluation is based on an objective analysis of the job duties, required knowledge and skills and mental & physical job demands, it can be an effective way of implementing the equal pay principle. However, the job evaluation techniques must themselves be free of sex bias to have any chance of achieving this.

#### Trade union involvement

Some employers have attempted to pre-empt union involvement in job evaluation. Such employers have been particularly keen to keep unions away from decisions about the design or selection of job evaluation schemes. One way in which this has been done is through the setting up of

management teams, often working with a firm of management consultants, to develop a job evaluation scheme. The first indication Unite representatives may get that their employer has signed up for a job evaluation exercise is when individual job holders are asked to complete job descriptions or fill in job information questionnaires.

Moreover, it is unlikely that many employers will develop their own job evaluation scheme. The common practice at present is for employers to consider buying a ready-made scheme from management consultants.

Unite representatives should try to make sure that they are involved in the decisions to begin a job evaluation exercise. The basis on which the exercise will proceed and the procedures for choosing and implementing a scheme, should all be matters for joint discussion and negotiation between the employer and the unions.

#### **Key points for workplace representatives**

1. Make sure your members are aware of, and understand, the importance of job evaluation. If they are asked to fill in job descriptions or job information questionnaires or have an interview with a job analyst they should let you know. It may be the first sign that a job evaluation exercise is underway.
2. Get in touch with your Regional Officer. Unite can provide detailed advice, information and training about job evaluation. Your Regional Officer is the contact point for this.
3. Make contact with other Unite representatives in your workplace, company or organisation. If you do not know who the other representatives are, or if there is no established machinery for liaising with them, your Regional Officer will be able to help.
4. Contact representatives from other unions. A co-ordinated union response to job evaluation is important. Again, if there is no established machinery for doing this, your Regional Officer can help.

The trade union objective for job evaluation is that the scheme must:

- evaluate all significant characteristics of a job accurately and fairly
- be designed to provide equal pay for work of equal value
- allow trade union involvement in its design or selection and implementation

## How job evaluation works

### The job evaluation process

#### The Steering Committee

The first step in a job evaluation exercise is usually to set up a steering committee whose function is:

- decide on the type of job evaluation scheme to be introduced,
- decide the procedure for its implementation
- monitor and review the implementation procedure

The steering committee has a choice of:

- developing its own job evaluation scheme, with or without external advice
- modifying a scheme already in use elsewhere
- buying a ready-made scheme from a firm of management consultants

Once a job evaluation scheme has been chosen the steering committee can set up the implementation procedures. The following steps are typically involved:

- Job analysts must be selected and trained. Their job will be to interview job holders and write up job descriptions or fill in job questionnaires, or to advise and assist job holders to do this for themselves. (See section below on the importance of job descriptions)
- If the job description or job questionnaire is not a ready-made part of the job evaluation package the steering committee will have to decide on its final format.
- A set of benchmark jobs must be selected. The benchmark jobs must be a representative sample of the range of jobs to be evaluated in terms of the organisational levels involved, the different functions covered, the types of jobs, and the gender composition of the workforce.
- Job descriptions must be written or job questionnaires filled in for the benchmark jobs. This information will be used to test whether there are any problems with the job evaluation scheme and to develop the evaluation standards for its use.
- Evaluation panels must be selected and trained. Their job is to evaluate the benchmark jobs (and eventually all the others). This stage may be eliminated if a computer-assisted job evaluation package is being used
- The benchmark jobs must be evaluated and the results examined for anomalies, inconsistencies and sex bias.

Note: Care must be taken to select job analysts and evaluation panel members who are representative of both genders and the different ethnic groups working in the organisation.

Once the steering committee is satisfied with the job evaluation scheme, job descriptions or job questionnaires can be completed for the rest of the jobs which are then evaluated using an analytical method. This is sometimes a slightly different process from that used for the benchmark jobs.

When the exercise has been completed the results must be examined for anomalies, inconsistencies and sex bias. Any outstanding queries resulting from this exercise must be investigated and any errors corrected. If there is a fair reason for the anomaly, the process continues. At this stage there will be a list of jobs ranked in terms of their job evaluation scores. This will be used as the basis for grouping jobs into grades. A pay structure will then be developed from this list. The steering committee will not necessarily be involved at these last stages. One thing the steering committee will have to do, however, is to set up a system so that job holders can appeal against their job evaluated grading if they wish.

Finally, the steering committee should set up a monitoring and review system to deal with future appeals, new or changing jobs, and the general maintenance of the job evaluation system.

## The importance of job descriptions

### Designing and using job descriptions

The collection of information about jobs is vital to the whole process of job evaluation. If job descriptions or job questionnaires are badly designed, difficult to complete or miss out significant aspects of a job then the resulting evaluation is likely to be incorrect. It is particularly important to avoid sex bias in the preparation of job descriptions.

### Collecting job information

Job evaluation requires a clear understanding of what is involved in each job and the job description or questionnaire should therefore:

- cover the essential content of the job
- be free from sex bias
- avoid technical jargon
- be precise, concise, and comprehensive
- identify what is done, how it is done and why it is done. For physically demanding tasks it is also helpful to identify the frequency and duration of the task.
- be agreed by the job holder and their manager

The information about jobs may be collected in a number of ways:

- job holders may be asked to write their own job description - job analyst may help or advise
- job holders may be asked to fill in a detailed job questionnaire about their jobs. If a computer programme is used to analyse this information the questionnaire will ask detailed "closed" questions and be very long
- job holders may be interviewed by a job analyst, working either on their own or in pairs, who then complete a job description or job questionnaire
- job descriptions or questionnaires may be completed by managers instead of job holders. In this situation, the content should always be discussed and agreed by the job holder.

### Advising members

When the job description or job questionnaire has been compiled, the job holder should sign it to indicate that it gives a comprehensive and accurate description of their job. Jobholders must ask themselves whether the job description or questionnaire gives them a good understanding of their job or whether it has missed significant elements of what they do. If they are unhappy with the job description or questionnaire they should not sign it.

Answering questions about your job is not easy and it helps if job holders spend time before the meeting with the job analysts to think about their job duties. What do they do in a typical week or month and what do they do at specific times of year?

Unite representatives should make sure that their members understand the importance of job descriptions and questionnaires and know how to increase their awareness of these issues.

### Key points for members

1. Make sure that you have guidance notes on how to complete the job descriptions/questionnaire forms.
2. Make sure you have been given a copy of the job description questionnaire form well in advance of being asked to complete it so that you can think about how to present the information required clearly and comprehensively.
3. Make sure you are given sufficient time away from your job to complete the job description/questionnaire.
4. Always complete the questions fully to ensure that aspects of your job are not left out. Do not include unnecessary details however as this detracts from the relevant information.
5. Do not sign the job description/questionnaire if you are unhappy with it in any way. Do not sign it if you think a job analyst has misinterpreted your job.
6. If you have any queries or need any help contact your workplace representative.

## Job evaluation schemes

There are two main types of job evaluation schemes, non-analytical and analytical methods.

**Non-analytical schemes** - These schemes compare whole jobs with each other using either ranking or paired comparison methods. These types of scheme are particularly prone to sex discrimination because where whole jobs are being compared there is a tendency for evaluators to take account of other things, such as the traditional status of the job and subjective views concerning the people who typically carry out the job.

**Analytical schemes** - Modern analytical job evaluation schemes try to overcome the problems illustrated above by dividing jobs up into their component parts, known as factors and assessing each of these parts against an agreed framework. For schemes based on factors, this framework is typically made up of written level definitions for each factor and is known as the Factor Plan.

- **Factors** - A factor plan consists of a number of different factors. Sometimes they are grouped into factor "families". Here is an example of 14 factors grouped into four factor families.

Knowledge and Skill	Knowledge, Training and Experience Physical Skills Analytical Skills Communication Skills Planning Skills
Effort	Physical Effort Mental Effort Emotional Effort
Responsibility	Information Human Resources Financial and Physical Resources Organisation and Development Health, Safety and Well Being
Working Conditions	Hazards and Environment

- **Factor definitions** - Each of the factors must be clearly defined so that objective judgements can be made. This is done in two ways, the overall meaning of the factor is set out and a number of different levels are identified within the factor. The number of levels a factor has should be sufficient to describe the range of demands required in any of the jobs being compared. Typically, each factor level definition scores a specific number of points.
- **Scoring** - The factor plan is used to evaluate each job on the basis of the information provided about it. Each job is scored factor by factor, and the total score obtained by adding the scores of all the factor level definitions selected. This allows job comparisons to be made based on these points. A job evaluation scheme which works in this way is known as a points rating scheme.
- **Weighting** - Once the factors and factor level definitions have been agreed, it can be seen that these are not all of equal importance to the organisation. A weighting is therefore usually applied to the factor scores to reflect the importance of the various factors to the organisation. This process is subjective and must be carried out very carefully as it is easy for discrimination to creep into the process at this stage. All weighting decisions must be thoroughly discussed and tested to ensure that they are objective and free from bias.

### Checking the design of a job evaluation scheme

The selection of factors and design of the factor plan is crucial to the whole job evaluation process. The outcome of the job evaluation exercise will be affected by the number and nature of the factors used, the factor definitions and the scoring weights given to them. These are the "design choices" for a job evaluation scheme. Who makes these choices and the aims they want to achieve in making them can strongly influence the outcome of a job evaluation exercise. A job evaluation scheme which is designed to be as free as possible from sex bias will be a scheme which seeks to evaluate all jobs fairly. Good design principles therefore must be based on the principle of equal pay for work of equal value.

### The following is a checklist for negotiators:

- 1) **The aims of the scheme**
  - The reasons for introducing job evaluation should include the achievement of a pay system which provides equal pay for work of equal value
  - An analytical job evaluation scheme should be used
  - All of the jobs in the organisation should be covered by the scheme
  - There should be a commitment to review the scheme at least every three to four years.
- 2) **The factors used and problems to look out for**
  - omitting relevant factors
  - counting the same job feature more than once in a scheme under different factor headings
  - combining more than one distinct job feature within a factor thereby preventing it being measured separately.
  - ensure that the factors are representative of the full range of job functions (e.g., mental, manual, interpersonal and physical skills) and are relevant to the full range of jobs to be covered by the scheme.
  - ensure that factor level definitions are expressed in clear and unambiguous language and use terms and language relevant to actual work tasks
  - ensure that the factors are not totally hierarchically determined (e.g. lower-level jobs can score highly on some factors)
  - ensure that the factors are free from sex bias in terms of the factors used, their description, the factor level definitions and the weightings that they carry.
- 3) **Factor levels**
  - a. Check that factor level definitions are clear and the difference between the levels clearly defined.
  - b. Ensure that the factor level definitions refer to aspects of jobs typically found in both male and female dominated jobs.
  - c. Check that evaluators are clear how to score jobs, since this is evidence of clarity on the definitions.
  - d. Check that there are enough levels within each factor. A clustering of jobs at one or two levels may indicate insufficient levels within the factor to clearly distinguish between jobs.
  - e. Check the distribution of scores of male and female dominated jobs across the factor levels to see if unjustified assumptions are being made about which jobs should score at which level within each factor.
- 4) **Testing the scheme**
  - a. The factors should be tested against a representative sample of benchmark jobs to see if they work.
  - b. Check that the benchmark jobs are representative of the whole range of jobs in the organisation, including all levels and types of jobs and jobs which are predominantly occupied by a single gender.
  - c. Establish clearly where men and women work and the jobs they do to make sure that relevant job features have not been omitted from the job evaluation scheme
  - d. Check the benchmark jobs' scores to ensure the factors and factor weights are not unfairly discriminating against any particular group of jobs. If it is found that the system is discriminating against particular jobs, adjustments will need to be made to remove these biases.
- 5) **Who is involved**
  - a. It is important that those involved are representative of the workforce and have been properly trained.
  - b. Check that the steering committee is representative of the workforce in terms of jobs, levels within the current hierarchy, the unions involved and the gender composition of the workforce.
  - c. Check that members of all committees and panels have been trained in job evaluation and in avoiding sex bias in job evaluation.
  - d. Training in committee skills may also be needed. If management consultants are being used, check the extent of their knowledge of, commitment to and experience of equal value and avoiding sex bias. Establish their previous involvement in job evaluation and find out how much training they have had in avoiding sex bias.

### Establishing a pay structure

One of the main purposes of job evaluation is to help establish a pay structure. This involves a number of steps:

- producing an internal hierarchy of jobs based on the job evaluation total scores
- grouping jobs into grades on the basis of the job evaluation scores
- deciding on the pay differentials within the structure
- linking pay levels for the grades to market rates
- deciding the basis for pay progression within a grade.

### Checking the job evaluation results

A simple test to check the job evaluation results is to ask if any job is obviously out of place in the rank order. If it is it should be investigated. This process is often called soreshuffling. It should not be assumed the rank order is wrong just because it does not match the existing hierarchical structure of jobs.

There are two possible explanations for anomalies. One is that there has been an error in the job evaluation process, either through inadequate job descriptions or poor evaluation judgements. In this case the jobs would have to be re-evaluated.

The other explanation is that some jobs could be currently “overpaid” for the work they do, while others could be “underpaid”. There may be other explanations for an apparent overpayment of some jobs. For example, there may be an unsocial hours element included in certain jobs. If, however, jobs are in fact paid above the evaluated value relative to comparable jobs the issue of salary protection will need to be addressed. (See later section on equal pay).

### Establishing grades

A grading structure will group similar jobs (i.e. jobs with similar scores) into the same pay bands. This task may be relatively easy if the job scores show distinct breaks between job score ‘clusters’, since this indicates clearly distinct job families.

In many job evaluation exercises the total scores of jobs will fall naturally into groups, called “clusters”. Grade lines should be drawn above and below clusters of jobs, never across the middle, especially where that means that women’s jobs come below the line and men’s above. This may sound obvious but it has been shown to happen in practice. It is unlikely that all jobs will fall neatly into the main clusters; some will be scattered in between. Here too, it is important to position the lines so that they do not leave women’s jobs just below the grade boundary line. The points range span should show a rational progression and each points range should be linked to a discrete job grade.

Key questions to be asked by negotiators:

- Are there groupings of women’s jobs below a particular grade line?
- Can the placing of the grade line at that point be justified in relation to the differences **between the jobs?**

### Minimum and maximum pay levels

Once the grade boundaries have been decided, the pay range for each grade can be established by setting minimum and maximum pay levels for each grade. Care must be taken when doing this not to infringe those provisions of the Employment Equality (Age) Regulations 2006 which stipulate that service related pay in some situations may be age discriminatory and unlawful. (See Unite guide on Age Regulations for more details).

### Salary modelling

All of the analysis just described can be carried out on a computer. Software packages for salary modelling are offered by all the main management consultancy firms. They allow the user to try out a wide range of pay and grading options and to cost the results. Workplace representatives should ensure that they have access to information where such systems are used.

### Pay policies

A pay structure is developed within the framework of an organisation’s pay policy. This will take account of how the organisation wants to relate its own pay levels for particular jobs to market pay rates and how the organisation wishes to provide for pay progression within a grade.

### Getting involved in job evaluation

There are a number of safeguards which workplace representatives should be aware of when job evaluation is being introduced. These cover:

- disclosure of information
- training for workplace representatives
- Unite participation
- protecting individuals

### Disclosure of information

In circumstances where the union is recognised by the employer but has not been involved in the development of a job evaluation scheme it is important that key information is established at the earliest opportunity.

As soon as it is apparent that a job evaluation scheme is being considered or is underway management should be asked for full disclosure of information about their proposals and about any scheme which has already been prepared or selected. The information about the scheme required is:

- the factor plan, including the full definitions of each factor and its factor levels, the scoring system, and the weightings of the factors
- the manual or guidance notes for job evaluators
- the manual or guidance notes for job analysts
- the job description or job information questionnaire.

Any scheme which has already been developed ought to have all of this documentation. In addition the scheme is likely to have already been tested on a set of benchmark jobs. Therefore the following information should be requested:

- a list of the benchmark jobs on which the scheme has been tested and from where and how these benchmarks were selected
- the job evaluation scores for each of these benchmark jobs
- any analysis which has been done on these benchmark scores which implies a particular grading structure
- a list of the benchmark jobs which will be used by the employer

There is a legal right to this information under the Trade Union and Labour Relations (Consolidation) Act 1992 backed up by the ACAS Code of Practice on Disclosure of Information to Trade Unions for Collective Bargaining Purposes. In addition, if an employer is to show that its pay structure is based upon equal pay principles it must be able to demonstrate the transparency of its pay system, and this means it will have to disclose the details of how its job evaluation scheme works.

The 1992 Act provides that every employer who negotiates with independent trade unions must provide to them information in their possession:

- without which unions would be materially disadvantaged in conducting collective bargaining with the employer; and
- which is related to matters the union is recognised to negotiate on for that group of employees.

If an employer refuses to disclose information, a union can seek a ruling from the Central Arbitration Council requiring the disclosure. (This step should only be taken following advice from the full time official).

The Act does not specify exactly what information should be disclosed, but an ACAS Code of Practice on “Disclosure of Information to Trade Unions for Collective Bargaining” sets out some of the items which would be relevant to bargaining. It specifically identifies job evaluation systems and grading criteria as information which should be disclosed.

This is what the Code says about the kind of pay and benefits information which should be disclosed:

- principles and structure of pay systems;
- job evaluation systems and grading criteria;
- earnings and hours analysed according to work group, grade, plant, sex, out-workers and homeworkers, department or division, giving, where appropriate, distribution and make up of pay, showing any additions to basic rate or salary total pay bill;
- details of fringe benefits and non-wage labour costs.

### Training for workplace representatives

Trade union representatives have a legal right to time off with pay to go on union training courses. Unite representatives should ensure that they are not hindered from attending job evaluation courses provided by the union. Courses may also be run locally. If you meet any difficulties in getting time off for union training contact your Regional Officer.

The employer may suggest joint union management training sessions. These may be about either job evaluation generally or the specific details of the job evaluation scheme being proposed. In such cases the training should not be dominated by the views of management and Unite representatives should get agreement that they can invite trade union speakers or independent experts of their choice to participate. Your Regional Officer will be able to advise you on this.

### Unite participation

Unite representatives must get involved at all stages of the job evaluation process along with other trade union representatives. Participation in the exercise is a way of protecting members' interests whilst acknowledging the union's responsibilities to meet both individual as well as collective objectives and of achieving broad trade union aims for job evaluation.

As far as is possible participation should take place before key decisions are reached on:

- the design or selection of the job evaluation scheme
- the procedures for its implementation
- the selection and training of job analysts and members of evaluation and appeals committees

As these key issues are normally the responsibility of a Steering Committee it is important that Unite representatives are members of the Steering Committee. Trade union representatives should make up at least half of the Committee.

Problems may arise when decisions about the design or selection of the job evaluation scheme have already been taken and the Steering Committee is being asked only to oversee its implementation. In these circumstances, workplace representatives should stress to management that any participation in the Steering Committee does not commit them to accepting the results of the job evaluation exercise if these are found to be unacceptable.

Unite representatives should not accept any job evaluation scheme at face value. Some of the schemes are badly designed. Some do not provide adequate information about the way they work (this may be a particular problem with computer-assisted job evaluation). It may be necessary to ask your Regional Officer to obtain an expert review of the scheme. Alternatively, the employer could be asked to provide an independent review of the scheme. (ACAS maintains a list of independent experts on Job Evaluation). If the employer is unwilling to take on board trade union concerns about the scheme, either through the Steering Committee or through the collective bargaining procedure, Unite representatives should seriously consider whether continued participation in the scheme's development or implementation is appropriate and whether they are able to recommend its acceptance to their members.

Involvement in negotiations on future pay structures arising from job evaluation may result in issues relating to current pay differentials which need to be addressed. Such issues should be the subject of discussion with a regional officer of the union who will obtain legal advice regarding the conduct of negotiations. The union's objective will be to achieve a pay structure based on the principles of equal pay for work of equal value.

However, if a pay review or job evaluation finds that some members are 'over paid' compared to others, and the employer is refusing to level the lower paid members up to the level of the higher

paid, then it may amount to indirect sex discrimination if the union takes a negotiating stance which is totally opposed to any reduction in the pay of the higher paid members, particularly if it does not provide adequate information to and consult its members. Workplace representatives should always seek advice without delay, through the regional officer, from union solicitors about the conduct of the negotiations if an employer refuses to "equalise up" on equal pay issues, even if members locally have strong views on their bargaining position.

Unite participation is also required because no matter how much care is taken in the job evaluation design it is equally important that the scheme is fairly applied, establishing all the equality principles to guard against unfair bias and discrimination. In effect this is maintaining the agreed scheme and monitoring outcomes to ensure they comply with our principal objectives.

If workplace representatives are not able to establish acceptable grounds for participation, or if the employer actively refuses to allow trade union involvement, then an alternative strategy based upon obtaining full disclosure of information, monitoring the results of the job evaluation, and alerting our members to the issues raised, needs to be adopted. In some cases a strategy based on the non-completion of job descriptions or job information questionnaires may cause management to reconsider their attitudes to trade union involvement.

Where it is believed that the job evaluation scheme is unfair and/or discriminatory it will be necessary to make sure that all members are aware of the problems identified by the union and assisted in mounting appeals against allocated gradings if they are not happy about them.

### Protecting Individuals

The nature of any job evaluation exercise is that individuals may be affected in different ways including the possibility of jobs being placed at a lower graded level.

If following a job evaluation exercise there are groups of workers who have been historically better off and who would, without protection, suffer a pay cut when moving on to a new scale it may be appropriate to consider a red circling, or pay protection arrangement.

The law on red circling is not straightforward and whether a red-circle is appropriate will depend on factors such as:

- Whether the red circling is temporary or permanent;
- Whether the origin of red circling is to be found in sex discrimination;
- Whether the group being red circled is historical in origin or has resulted from recent organisational changes;
- Whether the red circle has been the subject of negotiations with representatives of the workers and the views of the less advantaged taken into account;

Unite takes the view that it is entitled to argue in the first instance that employees should maintain their contractual pay when moving to a new wage structure. It is more difficult to argue that employees should be entitled to receive a period (particularly an indefinite period) of continued annual increases, as this will tend to perpetuate any wage gap.

It is important to note however, that if the contractual rights of one group can only be maintained by failing to pursue the rights of another group (e.g. by failing to pursue equal pay claims including back pay for those who have been historically undervalued), then the union may not be entitled to maintain the stance of "equalisation up". The union needs to take a realistic view based on the information provided by the employer.

For the time being, because the specific nature of the union's duty to groups of members in this regard remains uncertain, any proposed pay protection arrangements under new pay structures should be referred to the regional officer who will seek advice from the union's Legal Services Department.

Workplace representatives and the full time official should also always fully consult with all affected groups (including those who are not receiving pay protection), recording their views and balancing them accordingly when conducting negotiations.

Advice on red-circling is available on the EHRC web site at:  
<http://www.equalityhumanrights/Redcircling>

## Information to members regarding their rights and after negotiations

If you believe that a member may have any kind of legal claim resulting from the design or implementation of the job evaluation scheme, you should contact your full time official who will advise on how to obtain legal assistance from the union.

A job evaluation study may provide evidence of members having been paid less than others doing work of equal value. Therefore workplace representatives need to be particularly vigilant during and after such studies regarding members' potential claims for equal pay. Members must be given clear advice about how any proposed deal may affect them and will need to be advised in writing if it appears that they may have a claim, but in all cases you must seek advice from the full time official who can obtain legal advice prior to writing to members.

It may be appropriate to prepare a document and send it to each member to explain a proposed deal and the implications for different groups of workers. If this is not done then steps must be taken to ensure that all members will not only be able to see, but are likely to read, such a document (so, for example, if you use a union notice board you have to be confident that all members actually read what is on there, and that it is an appropriate way of giving advice, even though this might have to be different for different members.)

Again this must be done in conjunction with the full time official who will have access to appropriate legal advice on the construction and content of such a document.

There should be a right of appeal for all job holders if they are unhappy with their initial grading. Adequate information should be provided to individuals to allow them to understand the way their jobs have been evaluated. The principle of transparency means that the connection between the information in the job description or job information questionnaire and the eventual job score and grading must not only be clear to the individual job holder but also be objective.

### Summary of key points for workplace representatives

1. There should be full disclosure of information to Unite representatives.
2. Training for Unite representatives should be organised and time off with pay provided for this.
3. Unite representatives should be involved at all stages of the job evaluation exercise. In particular they should be involved in steering committees to implement, maintain and monitor the scheme.
4. All pay protection issues and issues about legal claims resulting from the design or implementation of the job evaluation study and possible equal pay claims which become evident before, during or after the job evaluation study must be referred to a full time official.
5. There should be a right of appeal against the results of a job evaluation exercise, which should highlight the aspect complained about e.g. inaccurate information in the job description.
6. Any deals and their consequences/impact upon members must be explained to members with the assistance of a full time official. In addition, members' views on the deals should be taken and considered before any decisions are reached.

## Job evaluation and equal pay

### Equal pay legislation

The way that the Equal Pay Act is framed means that a claim for equal pay for work of equal value cannot be pursued if work has been rated differently under an analytical job evaluation scheme, unless it can be shown that the scheme itself is discriminatory. An analytical job evaluation scheme evaluates jobs in relation to a series of factors such as skill, effort, and decision-making.

In many cases, therefore, the mere existence of an analytical job evaluation scheme will act as a barrier to any assessment of whether equal pay is being paid for work of equal value and will be an effective defence against a legal claim for equal pay for work of equal value.

### Transparency

A minimum condition that a job evaluation scheme must meet in order to have any chance of being free of discrimination is that it must be transparent.

The principle of transparency was set out in an important decision of the European Court, *Handels-og Kontorfunktionaerres Forbund i Danmark v. Dansk Arbejdsgiveforening 1989*, which is generally referred to as the Danfoss case.

A transparent pay system means that employees must know

- the criteria by which their pay is determined
- how these criteria are applied to them

The implications for job evaluation schemes are that an individual job holder must be able to see how their job has been placed in a particular grade on the basis of the information on the job description or questionnaire. In other words the way the scheme works and how it has been applied to them must be clearly demonstrated. This will require disclosure of information about the detailed working of the scheme and about the reasoning or rules behind the evaluation judgement on a particular job.

### **Avoiding sex discrimination**

Transparency alone, however, is not in itself sufficient to achieve a non-discriminatory job evaluation scheme. The scheme must also be able to demonstrate, in an objective way, that it is free from sex discrimination. Mere assertions that it is are not enough. The scheme should be able to demonstrate clearly that it has been designed and implemented with the aim of avoiding sex discrimination in job evaluation and of tackling any discriminatory pay practices in previous pay structures.

Sex discrimination can enter a job evaluation scheme at several points, including:

- choosing the scheme to be used,
- developing the scheme,
- selecting factors with which to evaluate jobs,
- weighting the factors,
- analysing jobs and writing job descriptions,
- selecting benchmark jobs,
- evaluating jobs,
- constructing job grades from evaluation scores and allocating jobs to them,
- maintaining and reviewing the job evaluation scheme.

Sex discrimination can be reduced by paying careful attention to the design of the job evaluation scheme, by having a high level of trade union and employee involvement, and by providing training for all those involved in how to recognise and avoid sex bias.

### Key points for negotiators

1. How the job evaluation scheme works should be clearly demonstrated (i.e. it must be transparent).
2. The job evaluation scheme must demonstrate that it is free from sex discrimination at every stage in its design and implementation.

Unite representatives should also get a copy of the booklet "Job Evaluation Schemes Free of Sex Bias", which is obtainable from: EHRC, Arndale House, The Arndale Centre,

Manchester, M4 3AQ. Telephone 0161 829 8100 or online at:<http://www.equalityhumanrights/jobevaluationfreeofsexbias>

## ■ PERFORMANCE MANAGEMENT

Performance management refers to a range of management techniques aimed at 'managing the performance' of employees. The most common ones are appraisal and performance related pay, mission statements, communications with employees about business plans, total quality management and the use of performance targets.

Performance-related pay is one of the most widely used techniques. It can mean anything from simple piecework to complicated systems of target setting and appraisal. In piecework, pay is simply linked to output. In modern performance management systems, measurement is made of the more complex elements of individual skills and attributes as well as output. In pay systems given the name of performance management, pay is performance-related.

The elements of a typical performance management process are as follows:

- Performance plan agreement
- Performance monitoring
- Performance review
- Pay
- Development and training

All of these elements are crucial to the integrity of a process which relies heavily on the trust of all participants.

### Performance plan agreement

The performance plan agreement will define the job, the results sought and the measures to be used in assessing performance. It will refer to both inputs and outputs, i.e. quantified targets as well as competencies such as interpersonal skills, leadership, initiative, etc. At this stage, the aim is to ensure that individuals understand clearly what is expected of them. It is also important that individuals understand the measures against which their performance is to be assessed, e.g. income generation, turnaround times or quality standards.

This stage must focus on the need for agreement. Imposed targets will undermine the necessary level of faith in the process, although management imperatives will undoubtedly feature in the agreement.

### Performance monitoring

Performance management must be seen as an on-going process. Monitoring must take place throughout the year with opportunities for feedback and review along the way. Employees should be encouraged to monitor their own performance and to prepare for the formal review.

### Performance review

The purpose of the review is two-fold. Firstly, an assessment is made of the individual's performance against the agreement which will lead to a pay level being established. This should focus on realities and not subjective judgements. The second purpose of the review is to identify an appropriate programme of development and training for the next year, as well as to reach a new performance agreement.

### Problems with performance-related pay and dealing with it

This is a theoretical model of the performance management process. For local union representatives the reality may be quite different. Performance management does not by definition have a clear link to pay. There is an argument that a focus on pay contaminates the whole process and restricts open discussion on areas for development.

In workplaces with a traditional annual 'across the board' pay round, performance management can cause something of a culture shock.

The focus is entirely on the individual with little room for collective pay bargaining at all. The trick for union representatives is to retain a role in pay setting. This can be achieved by an agreement to monitor the process itself. It may be possible to achieve an advisory role in an appeals procedure or to participate in an annual negotiation over pay scales.

Unite has always been opposed to pay systems such as performance-related pay. However, where they have been introduced, the priority has been to retain a large influence in pay bargaining. Our advice can be summarised in these seven negotiating targets:

1. A minimum increase for all staff reflecting inflation, company success and external comparators.
2. The lowest ratings only to be awarded when formal warning of dissatisfaction has already been given.
3. An appeals procedure at all stages, with right of representation.
4. Clear, reasonable and achievable targets, skills or competencies agreed in advance with the jobholder.
5. A clear link between assessments or ratings and pay.
6. Monitoring the effect of the system
7. Keeping members informed

In practice, negotiators have achieved many of these targets. But monitoring has shown up how these pay systems can discriminate between different people in a number of ways which are not related to how well they are perceived to do their job. A number of general conclusions can be drawn from the operation of most performance-related pay systems. These are:

- Older people do less well than younger people;
- More highly graded staff are likely to get higher performance assessments;
- Men and women are treated differently. In particular, in rating men and women, managers look at different attributes;
- Part-time staff are rarely rated anything other than 'average' or 'effective';
- Targets are unrealistic, imprecise or over-generalised;
- The assessment is often unrelated to the targets and there is no clear link between the assessment and pay increases;
- Staff are demotivated as 'the few gain at the expense of the many';
- What is often measured in a performance assessment is hard to quantify, for example 'quality of service';
- Teamwork is undermined due to the emphasis on individual performance.

## ■ COMPANY PERFORMANCE PAY

Individually based elements of pay may be set alongside company performance-related elements. These may take the form of team performance-related pay, productivity pay, profit-related pay or employee share options schemes.

Team pay schemes provide for bonus payments distributed equally or proportionately to members of a team in relation to defined targets. It may be used as an optional adjunct to performance management in order to counterbalance the strong individual focus of such arrangements. However there are potential problems with team pay schemes. Teamwork may suffer as pressure is applied to team members considered to be substandard and the level of control exerted by the team on workflow and patterns may be low overall or different between team members.

Productivity, defined as the ratio of inputs to outputs, is another possible basis for bonus payments. Less common these days than in the past, it still occasionally appears in pay bargaining.

Profit-related pay is diminishing in importance as the tax relief which it attracted has been phased out. Tax relief still applies however to profit sharing schemes, which may include share options. These schemes are common and tend to be very popular with employees.

The share incentive plan ("SIP") was introduced by the government as part of the 2000 Finance Act. SIPs can include four types of shares:

- Free shares - companies can give up to £3,000 worth of shares a year to each employee.
- Partnership shares - employees can buy up to £1,500 worth of shares a year.
- Matching shares - companies can reward this commitment by giving up to 2 matching shares for each partnership share an employee buys.
- Dividend shares - companies can provide for dividends paid on free shares, partnership shares and matching shares to be reinvested in further shares.

Companies can award some or all of their free shares on the basis of performance - so long as they satisfy certain criteria laid down by the Inland Revenue (for more information visit [www.inlandrevenue.gov.uk/shareschemes](http://www.inlandrevenue.gov.uk/shareschemes) or telephone 020 7438 6718).

## ■ COMPETENCY BASED PAY

Instead of paying an individual according to the job that they do, competency-based pay, or skills-based pay, remunerates an individual according to the skills that they bring to the job, recognising that skill level contributes fundamentally to performance.

Competency frameworks can be used in a variety of ways by an organisation. They can be used as a part of the performance management process or they can be used to identify training and development needs and not be linked to the pay system at all.

There is a great deal of debate as to whether competency frameworks are good or bad for employees. The principles of a competency approach are sound, that is, that employees should be rewarded for the skills that they bring to a job and that they should have the opportunity to develop their skills within that job. However, like most pay systems, the devil is in the detail and in how a company chooses to implement the framework.

### Defining competency

There are a number of different forms of competency. Competency can refer to behavioural or technical skills. Behavioural skills are based on attitudes and personality and can include skills such as leadership, team working, presentation and communication skills. Technical skills, or standards related criteria, refers to professional and other qualifications.

The majority of competency frameworks that have been introduced focus on behavioural competencies. From an employer perspective, behavioural competencies are a way of defining the behaviours and skills that an organisation values and requires from its employees.

### Behavioural competency

There is no established list of behavioural competencies. Organisations determine the competencies that they desire by analysing where they wish their company to go and by determining what skills they will require in order to get there. Whilst companies develop their own individual competency frameworks, a number of common competencies have emerged. These include:

#### List of common behavioural competencies

- |  |                     |
|--|---------------------|
| • Achievement drive/ Results orientation | Customer focus      |
| • Influencing skills                     | Communication       |
| • Business/Commercial awareness          | Judgment            |
| • Change orientation/flexibility         | Decisiveness        |
| • People development                     | Teamwork            |
| • Leading others                         | Conceptual thinking |
| • Analytical thinking                    | Strategic vision    |
| • Technical knowledge                    | Concern for quality |
| • Interpersonal skills                   | Initiative          |
| • Confidence/Self awareness              | Problem-solving     |
| • Planning and organisation              | Decision-making     |
| • Project management                     | Resilience          |
| • Innovation                             |                     |

### Technical competency

Another form of competency system is one that is based on the attainment of measurable technical skills. Skills can consist of formal qualifications and skills gained from on the job experience or training.

Technical competencies are more desirable from an employee perspective because they give an employee a recognisable, portable skill. With many employees feeling insecure in their jobs as a result of organisational change, mergers and competition, recognition of skills is increasingly important in order to maintain employability.

### The problems with competency frameworks

Many organisations are introducing new pay structures based on market related pay and broadbanding of job roles – that is, reducing the number of grades and introducing larger salary ranges within the new grades. The danger with these pay systems is that there is less and less collective control over an individual's pay.

Pay systems based on market rates and broadbanding can also make individual career progression difficult. One answer is to introduce competency into the pay structure, where attainment of new levels of skill results in salary progression. A competency framework requires that an employee's skills are regularly assessed and therefore provides the opportunity for employees to progress in their roles.

Furthermore, as part of assessing skills and competencies, a competency framework can lead management to focus on skill development and training. It can provide the opportunity to recognise the many skills individuals bring to their jobs for which they are not rewarded.

There is no doubt that the major proponents of competency frameworks have been employers who wish to extract greater flexibility from their workforce without increasing their pay bill.

Where employers believe that there is likely to be constant change within an industry or within their own company, they may perceive that a competency framework can provide greater control over their workforce. Such employers are likely to favour an approach based upon behavioural competencies. The problem with any pay system that is based upon behavioural skills is the potential for bias and discrimination when assessing an individual's skill.

In dealing with competency frameworks, Unite advises that the same general approach should be adopted as for performance-related pay. The equality bargaining strategy described later (page 33) is an important way of handling the problems competency frameworks cause.

## ■ FLEXIBLE BENEFIT PACKAGES

Pay systems that allow individuals to determine the make up of their own pay and conditions are known as flexible benefits packages. They work by calculating the overall cost of all pay and benefits and attaching a monetary value to each benefit. So, for example, a day's holiday might be worth 0.4% of an individual's total remuneration.

In fact, no system in operation allows total flexibility. There will usually be a group of common core benefits which everyone will get and there will be maximums and minimums for each benefit. But part of remuneration will be ring-fenced as a flexfund from which employees 'purchase' their choice of benefits. The size of the flexfund will depend on the scheme but it could be around 10% of salary.

These will vary from scheme to scheme but some common examples are:

Holidays	Enhanced pensions
Private health care	Childcare support
Improved mortgage subsidies	Cash
Extended holidays	Parental leave
Company cars	Car parking

Are they being introduced merely as a cost cutting exercise by the employer or do they contain some real improvements for staff?

This will require careful analysis of the proposals and consideration of the balance between the package and the rest of the remuneration. There are also taxation issues involved since some of the benefits (holidays, pension contributions) are not taxable while others (cash, company cars) are.

Would members be better off if some of the existing benefits were re-negotiated rather than replacing them with a package?

There may already be some flexibility in the present system – for example, the ability to pay added voluntary contributions to the pension scheme or perhaps a possibility to take unpaid leave. These are two ways in which cash can be or could be transferred to benefits. Development of this sort of flexibility would be simpler than a package.

A key issue will be which benefits become part of the scheme and which will continue to be provided for all employees? Would it be fair or equitable, for example, for women to concede any improvement on the statutory minimum for maternity leave only to have to buy it back as extra holiday from their flexfund?

Many of the items in schemes are enhancements to existing conditions. Careful consideration needs to be given to appropriate maxima and minima for benefits to protect staff. It will also be important to consider health and safety issues. Are we sure that employees are not being put at risk by reducing core benefits?

## ■ AN EQUALITY BARGAINING STRATEGY FOR PAY SYSTEMS

### Using the Code of Practice on Equal Pay

There is a real need for workplace-led campaigns on equal pay. Recourse to the law through an equal pay claim lodged at an employment tribunal is not the only, nor the best means, of securing improvements in women's pay. All significant equal pay advances have been achieved with union support. For over a century Unite and its predecessors have fought for equal pay. The former Equal Opportunities Commission (now the Equality and Human Rights Commission) and the European Commission have produced the following easy-to-use guidelines on reviewing and changing systems of pay in order to address the pay gap and remove pay discrimination:

- The EHRC Code of Practice on Equal Pay
- The EHRC Equal Pay Toolkit with guidance notes
- The European Commission's Code of Practice on the implementation of equal pay for work of equal value for women and men.

The aim of these guidelines is to advise employers and negotiators on how to move towards systems of pay which are fair and which value the entire workforce. They give detailed examples of different sorts of pay systems and how they can discriminate against women. Training on equal pay issues is also available for negotiators.

### The Gender Equality Duty

This was introduced in April 2007 as an amendment to the Sex Discrimination Act by the Equality Act 2006, and broadly introduces a statutory duty on all public authorities to pay what is termed "due regard" to the need to eliminate sex discrimination (including discrimination in relation to equal pay) and harassment, and to promote equality of opportunity between men and women. In addition, specific duties are introduced, which apply to major listed public authorities, and which set out the steps that the authorities need to take to help them comply with the general duty to eliminate sex discrimination. Briefly, the specific duties are as follows (although there are some differences that apply in relation to authorities in Wales and Scotland):

- To prepare and publish a gender equality scheme that sets out a plan for how the organisation intends to fulfil the general and specific duties upon them and includes the organisation's gender equality objectives;
- To consider, when preparing the objectives, the need to have objectives to address the causes of any gender pay gap;
- To collect and use information on how policies and practices affect gender equality;
- To consult employees, service users and others including trade unions;
- To monitor and assess the impact of current and proposed policies and practices on gender equality;
- To implement the actions set out in the gender equality scheme;
- To report about the scheme every year and to review the scheme at least once every three years.

There are similar duties in relation to disability and race equality. As mentioned, the duty only applies to public bodies (which includes most arms of local and central government and organisations like the RAF), or in some cases to private and voluntary sector bodies who carry out public functions (e.g. privatised utilities).

The introduction of these duties is an important development as it places a specific duty on the employer to be proactive and consider and address equality issues, rather than on the individual to raise the issue by way of raising a formal/informal complaint. Where you are dealing with a public body, you may be able to rely upon this duty as a negotiating tool where an employer refuses to undertake an equal pay audit for example, or where you have concerns about how an audit has been implemented, or its results. It may also be a useful negotiating tool in relation to settlement offers that are made by an employer that is subject to this duty. You should seek advice from the Legal Services Department via your full time official about this duty.

### Identifying pay system problems

Sex discrimination can operate at different levels of a pay system. Without an equal pay audit no company can know if their pay system is discriminatory. It is important to regularly review each element of a pay system, such as performance ratings, appraisals, ratings, bonuses, job evaluation, benefits, grading, as well as employment practices relating to recruitment and promotion. This information should be broken down according to relevant criteria such as sex, age, ethnicity, length of service, full-time or reduced hours, and parental status.

### A step-by-step approach

The Code of Practice on Equal Pay recommends the following step-by-step approach to conducting a review:

STEP 1:	Deciding the scope of the review and identifying the data required
STEP 2:	Identifying where men and women are doing equal work
STEP 3:	Collecting and comparing pay data to identify any significant equal pay gaps
STEP 4:	Establishing the causes of any significant pay gaps and deciding whether these are free from discrimination
STEP 5:	Developing an Equal Pay Action Plan or reviewing and monitoring

It is recommended that a review considers 'like work', 'work rated as equivalent', and 'work of equal value'. The EHRC suggests that any audit must include all employees, whether they are full-time, part-time, a casual employee, a temporary worker, a contractor or are self-employed. An audit should also look at factors where discrimination might affect pay.

### A workplace policy on equal pay

Many employers have equal opportunities policies in relation to employment issues. The EHRC recommends that employers introduce an equivalent Equal Pay Policy, stating their commitment to equal pay for all employees, and setting out clear objectives and priorities for action. The policy should include a commitment to training for managers and staff involved in decisions about pay and provision for monitoring of new pay systems to ensure continuing effectiveness.

## MAINTAINING AND IMPROVING PAY

The process of pay negotiations should be properly planned. A well-argued and successful claim is an excellent recruitment and organising initiative.

### The right to information

There is a legal requirement to provide information to recognised trade unions. The Trade Union and Labour Relations (Consolidation) Act 1992 states that every employer who negotiates with independent trade unions must provide information to them:

- without which unions would be materially handicapped in conducting collective bargaining with the employer; and.
- which is related to matters the union is recognised to negotiate on for that group of employees.

The Act does not specify exactly what this information should be but the ACAS Code of Practice on 'Disclosure of Information to Trade Unions for Collective Bargaining' sets out some of the relevant items.

In addition, public sector employees may be able to rely upon the Freedom of Information Act 2000, (the FOIA), which came into force on 1st January 2005 and imposed huge new responsibilities on government.

The FOIA provides a right for any individual or organisation to access all recorded information held by a public authority in the course of carrying out its public duties, subject to various conditions and exemptions. It is not necessary for the person making the request to provide a justification or explanation for the request. Nor is there a formal procedure for making requests. Any written request, (via letter, email or fax), is sufficient. Any request made should contain a description of the information sought. It is not necessary to state formally that a request is made under the FOIA although it is advisable to do so.

Once received, the authority is required to respond to the request within 20 days. It is not permitted to charge for the information, although where the cost of providing the information would exceed £600, (over 3 days' work at £25 per hour), in the case of central government, or £450, in the case of local government, the authority may refuse to provide the information. If an authority intends to refuse access to information under one of the FOIA's exemptions, it must identify the exemption. (So, for example, there is an exemption relating to the disclosure of information about the security and intelligence services, and in relation to disclosing information contained in court documents. In addition, a request may be legitimately refused if the public interest in maintaining secrecy outweighs the public interest in disclosure). An applicant can then challenge the decision to withhold the information, first with the authority and, ultimately, with the Information Commissioner and the Information Tribunal, (which has been set up to adjudicate upon and enforce the new access rights). In its early decisions, the Tribunal has shown itself perfectly willing to go against the advice of the Commissioner and the Department of Constitutional Affairs.

The provisions of the FOIA may therefore be a useful tool if you are seeking certain types of information about a public sector employer. However, you may want to speak to your full time officer before making a request under the FOIA to ensure that the information being requested does in fact fall within the remit of the FOIA – remember that the duty to disclose only applies to information held by public authorities in the course of carrying out their public duties.

## The pay claim

The background to pay negotiations consists of existing terms and conditions and members' expectations. In some organisations national agreements, links to external pay scales or phased implementation of earlier agreements will be factors that influence the claim. However, the general factors that influence all members' expectations and which will form an important part of negotiators' arguments for a particular size of increase are:

- the cost of living;
- pay elsewhere, particularly in comparable companies or organisations; and
- profitability or financial background of your company or organisation.

In the rest of this section consideration is given to these three factors and the information that is available to help negotiators.

## The cost of living

The accepted measure of the change in the cost of living is the retail price index. This is produced every month and published on the Unite website at:

<http://www.amicustheunion.org/NegotiatingFacts>

The information collected covers virtually all types of household spending on goods and services from all over the country. The calculations involved in producing the index aim to reflect the spending of a typical household.

The index measures price changes and is currently based upon January 1987. This means that the index number for January 1987 is 100. So an index figure of 134.1 for a particular month suggests that £134.10 would buy the same amount in that month as £100 did in January 1987. The figure usually quoted is the change in prices compared with the same month in the previous year. This is often referred to as the annual rate of inflation.

## Pay information

There are a number of sources of pay information, which include:

- National statistics produced by government, such as the average earnings index and the New Earnings Survey.
- Surveys produced by commercial organisations. If your employer uses surveys to determine pay levels then you can use the disclosure of information provisions to get the information from them.
- Bargaining information from the Labour Research Department (provided online through the Union's websites), and Incomes Data Services (details available from Unite Research Department). Every Unite regional centre has access to these services.
- A range of publications from Unite and a number of industry specific publications which provide pay information.

## Financial information

Information about the financial performance of companies or organisations appears in a number of forms. In all companies and organisations some form of annual accounts will be produced and in public limited companies a published annual report and accounts will be produced for shareholders. A copy of this can usually be obtained from the company head office. Your full time officer can obtain a more detailed analysis of your company's financial position.

The finances of your organisation are an important factor both in the ability to meet your pay claim and in the distribution of profits between shareholders, management and employees.

## ■ THE LESSONS OF GMB -V- ALLEN

At all stages of the collective bargaining process, negotiators must bear in mind the issues contained in the Allen case in terms of a union's responsibilities towards its members.

The Allen case related to collective negotiations leading up to the implementation of a new pay system following a job evaluation study. The tribunal found that whilst the union had a legitimate aim in wishing to protect its members' previously negotiated terms and conditions, it had not properly advised its female members in terms of their potential equal pay claims before recommending that they settle those claims for relatively small amounts. The tribunal found that the GMB had therefore failed to justify a policy which had disadvantaged its female members, which amounted to indirect sex discrimination.

Negotiators should bear in mind that although the original decision in Allen has been overturned by the Employment Appeal Tribunal, the principles discussed in the case and the law are currently unsettled. In particular, the latest Allen decision is being appealed. Unite has therefore adopted a policy to help Officers and representatives to avoid the pitfalls highlighted by the Allen decision during collective bargaining. A copy is included as appendix 1 to this guide. In addition, appendix 2 to this guide is a circular to full time officials advising specifically on how to deal with local government job evaluation and the single status job evaluation scheme, and how to advise members about settlement offers that are/may be made to them as a consequence of single status. Appendix 3 is a circular to full time officials on the GMB v Allen case and provides further specific advice on equal pay and age discrimination issues that must be considered when negotiating on pay.

Negotiators must follow Unite's policy. Any failure to do so puts Unite at risk of claims not only for sex or age discrimination, but also negligence, misrepresentation or breach of contract.

## Important points to remember

### a) Equal pay

The most important points to remember are:

- Negotiators must be extremely cautious when pursuing bargaining strategies which seek to protect one group of members at the expense of another.
- Try to maintain separate negotiations about pay going forward on the one hand and claims for past discrimination on the other. Inform the employer that Unite will not, in principle, collectively agree to settle claims for past discrimination.
- If the employer offers to settle potential equal pay claims, refer the matter for legal advice without delay. Members must be provided with appropriate and accurate advice as to their individual rights.
- Negotiators must not recommend any deals on the basis of misleading information. For example, do not claim that rejection of any deal will lead to job losses if it is uncertain (as it usually will be) that this is the case. The recent EAT decision in Allen suggests that members may have claims against their union for negligence, misrepresentation and/or breach of contract if they are misled into accepting deals by inaccurate or deficient advice.
- Individual members must be kept properly informed and must be consulted about the outcome of negotiations, particularly in terms of the probable impact on their individual rights. You could adapt the letter on page 33 for this purpose, although negotiators should refer any draft letters to their full-time officer for legal advice prior to sending.

## b) Age discrimination

Similar issues will arise where an employer is seeking to pay or benefits which potentially discriminate on the grounds of age. It is important to remember that Unite's policy applies as much to collective negotiations in this respect, particularly if any age group stands to "lose out" as a result of any deal.

For example, the link between age and length of service means that deals which involve service entitlements (the most obvious example being redundancy agreements) will impact upon different age groups of workers in different ways.

If an employer wishes to change or introduce age- or service-related benefits, negotiators should therefore bear in mind the following:

- In the first instance, take care to retain a neutral position with employers until you are able to seek legal advice and the views of the membership on the proposed terms of any agreement.
- Consult any affected members and hold a ballot. Try to minimise the risk of Unite being exposed to age discrimination or other claims by any members who may be disadvantaged by a proposed agreement because of their age or length of service.
- Ensure that members are aware of the issues, including the fact that any proposals are potentially discriminatory and could give rise to an employment tribunal claim against their employer.
- If, in light of that information, the majority of members vote in favour of an agreement, and negotiators seek to conclude the agreement, Unite is more likely to be able to defend any claims brought against it – for example, by any younger, minority member with relatively shorter service.
- If the majority of members have longer service, it may be that a proposed agreement which rewards longer service works in their favour. On that basis, whilst any proposals may potentially discriminate on the grounds of age, it may also be appropriate for Officers to try to "reassure" the employer that it would be able to defend any claims of age discrimination – that is to say, on the basis that its proposals either fulfil a business need, or are otherwise justifiable.
- However, do not enter into any agreement to the effect that Unite would not support any age discrimination claims raised by any of its members.
- In the event that any member considers that they have claims for age discrimination against their employer as a result of the implementation of any collective agreement, seek legal advice in the usual way.
- If the majority of members will not benefit from a proposed change, subject to the views of the membership as a whole, seek to resist those changes. If the employer is determined to implement the change, then attempt to negotiate a "levelling up" of the arrangements if members do stand to lose out, seeking advice on any revised and/or incentive terms offered where appropriate.

## How to identify GMB v Allen issues in collective bargaining [flowchart]

Is it likely that an existing or proposed pay system results or will result in members or groups of members losing out?

No → No Allen issues

Yes

↓

Is it likely that the group of members losing out will include a significant number of a particular category of workers (for example, according to gender or age)?

No → No Allen issues

Yes

↓

Is it realistic to expect that you can "equalise up"? For example, if a pay system favours older workers, is the employer prepared to increase benefits for younger disadvantaged workers to the same level?

Yes → No Allen issues

No

↓

Will it cause problems if the members who lose out bring employment tribunal claims? For example, is the employer likely to use these claims as an excuse to reduce pay and benefits across the board?

No → No Allen issues

Yes

↓

Seek legal advice but, before doing so, try to identify a proposed course of action and the reasons for this.

Negotiators should also ensure that the members are consulted through all stages of the process in terms of what a particular arrangement or deal might mean for them and take soundings from all groups on an ongoing basis. Keep accurate notes of what has been said and keep those notes in a file.

Long delays in collective bargaining or commencing legal claims, or failing to keep members informed, places Unite at risk.

### Raising equalities issues with employers

If there are potential equalities problems with collective agreements, such as equal pay or age discrimination issues, raise this with management at the earliest opportunity.

The following letter should be adapted for this purpose. However, this letter may not be appropriate for very large scale restructuring exercises. Negotiators should therefore seek legal advice for more complex circumstances. Remember that training is available for those involved in equal pay discussions, consultations and/or negotiations.

## Template letter 1 - for raising issues of concern re: equalities with employer

Dear [Name]

### COLLECTIVE BARGAINING – OUTSTANDING ISSUES

We write to raise our concern in terms of an [equal pay/age discrimination/other] issue which we have identified as arising in the above negotiations.

[State what the issue is, why it is of concern and how you propose the issue should be addressed (e.g., job evaluation study, equal pay audit, raising the wages of underpaid members).]

We are keen to address this issue with you as it appears that you may be liable for individual employment tribunal claims as a result. Clearly, addressing this issue on a collective basis will not prevent individuals from pursuing any existing legal claims, but it may help to address the issue going forward.

[Use this paragraph in the case of equal pay claims] Individual employees may have claims for back pay if their equal pay claims were to be successful. We would not, in principle, collectively agree to settle claims for past discrimination but we would invite your assurance that you will be in a position to meet your liabilities in relation to such claims. Also, whilst you may wish to negotiate collectively in this respect, it may well be that our members choose to enforce their rights through legal proceedings instead.

We look forward to hearing from you with a view to establishing whether you are willing to deal with the above concerns through the collective bargaining process.

Yours faithfully

### NEGOTIATING TEAM

#### The end of the bargaining process – providing information to members

If there are potential equalities problems with proposed collective agreements once the bargaining process has concluded, explain this to the members and seek their views. Provide the following information:

- Give a short history of the bargaining process
- Explain why Unite considers that it is at the end of the negotiating process
- List the main points of the deal
- Identify any issues which could not be agreed
- Explain the advantages of the deal either to all members or groups of members
- Explain the disadvantages of the deal either to all members or groups of members
- If Unite is recommending the deal, explain why and give reasons. If the deal potentially disadvantages a particular group or groups, explain why the recommendation is being made. If the recommendation is to reject the deal, state why this is and give reasons.
- Explain any legal claims that Unite reasonably believes that the members might have, either if Unite recommends the deal or otherwise, including:
  - o the deadline for pursuing each type of claim, and
  - o how compensation would be calculated.
- Tell the members to seek advice as soon as possible if they believe that they may have a claim.

The following letter can be adapted for the purpose of consultation following job evaluation. However, seek legal advice in any event or if the circumstances are more complex. Remember that training is available for those involved in equal pay issues.

## Template letter 2 – to advise members about a proposed offer

Dear [Name]

### NEGOTIATED PAY DEAL – BALLOT PAPER ENCLOSED

We are writing to you to explain the main points of the deal that we have reached with [EMPLOYER] over pay and conditions and to explain to you why the Union is recommending the deal.

This agreement is the product of [SPECIFY PERIOD]'s of negotiation. It has required all parties to compromise. This means that not all of the points which the Union would have wanted in the final agreement have been incorporated. However, we genuinely believe that this deal is the best that we can negotiate in the circumstances and that we have gone as far as we can to address the various issues arising through collective bargaining.

The main points of the deal are as follows:

#### JOB EVALUATION AND EQUAL PAY

- A job evaluation study will be undertaken for a single wage structure within [EMPLOYER]. In this way, we hope to address equal pay concerns on a broader level than we would be able to if we concentrated on litigation alone.
- Under the new structure, all employees' jobs will be evaluated. Those people whose jobs are found to have been undervalued will be placed on to their new higher rate. [EXPLAIN IF PAY INCREASES ARE TO BE PHASED IN.]
- Those who are matched to a job which is lower than their existing grade will be "red-circled" and have their current salary preserved for [SPECIFY PERIOD], and nationally negotiated pay increases [will/will not] apply. [A number of measures have been agreed to assist red-circled employees to maintain their salary. However, this may not be possible in all cases.]
- We cannot guarantee that this agreement will deliver equal pay, which is the employer's responsibility to ensure. However, we consider that implementing this system makes it much more likely for us to be able to tackle any equal pay issues.
- Those employees who are placed on a higher grade of pay may, after being evaluated and placed into the new structure, have an equal pay claim, including a claim for up to 6 years' back pay. [This might include a claim for the period during which their pay rise is implemented.] This will not always be the case, and depends on a number of legal factors, some of which are highly complex. For example, they will need to be able to point to an appropriate comparator of the opposite sex. An equal pay claim can be brought at any time while in a stable employment relationship or up to 6 months' afterwards. Changing employment status – e.g. from temporary to permanent – or getting a promotion may well start time running, so you should seek advice promptly from your Regional Officer if in doubt.
- The Union will be investigating potential equal pay claims once the job evaluation process is complete. If you consider that you may have such a claim once

- the process has been completed, you should approach your local representative for further advice.
- On the issue of pay protection, it is of course never ideal when members have to suffer potential pay cuts. However, we do not believe that full "equalisation up" – i.e., increasing everyone else's pay – is a realistic goal in light of [EMPLOYER]'s resources. Too long a period of pay protection is likely to entrench pay differences between men and women, and we want to make sure that we avoid this if possible. On the other hand, we recognise that if a job has been historically overvalued, this is not the fault of the person doing that job. They will have adjusted their lifestyle and made plans assuming a certain level of income, which in turn justifies a decent period of pay protection.
- Our aim is to implement a system which supports equal pay, within our overall framework of doing the best that we can for all members and protecting, where possible, previously negotiated terms and conditions.

[Set out here:

1. All other proposed changes – pay, conditions, etc.
2. Whether any members will lose out. If so,
3. Why Unite is recommending the deal – for example, in the interests of the majority of the members.
4. Any other issues that Unite wanted to agree on but could not.]

#### WHY UNITE IS RECOMMENDING THE DEAL

One collective agreement cannot change everything that is unfair about our pay and conditions. However, we consider that, in the circumstances, we have been able to strike a deal which is to the advantage of the majority of our members and which begins to address equal pay issues. On this basis, we recommend it to you.

Yours faithfully,

NEGOTIATING TEAM

## ■ *USEFUL WEBSITES*

### **Unite**

[www.unitetheunion.com](http://www.unitetheunion.com)

Gives direct access to labour research department online publications and payline service (database of pay settlements).

### **ACAS**

[www.acas.org.uk](http://www.acas.org.uk)

Gives online access to view ACAS publications on pay trends and systems as well as all other topics.

### **Government Statistics**

[www.statistics.gov.uk](http://www.statistics.gov.uk)

Provides immediate access to latest inflation and earnings survey figures.

### **TUC Worksmart**

[www.worksmart.org.uk](http://www.worksmart.org.uk)

A TUC service providing up to date developments and changes in bargaining information.

### **Pay Wizard**

[www.paywizard.org](http://www.paywizard.org)

A site offering salary/wage comparisons.

### **EHRC**

<http://www.equalityhumanrights.com>

Online version of the Code of Practice on Equal Pay and Equal Pay Toolkit.

### **Additional Unite publications:**

Guide to Shiftworking: <http://www.amicustheunion.org/shiftworking>

Guide to Standby and Call Out: [http://www.amicustheunion.org/standby & call out pay](http://www.amicustheunion.org/standby%20&%20call%20out%20pay)

## ■ *APPENDIX 1*

### Equal pay and age discrimination: the lessons of the GMB v Allen decision

#### The Union's policy and protocol

##### Introduction

The Union's continuing fight for equal pay necessarily involves balancing the collective interests of all our members.

Following the Employment Tribunal decision in Allen v GMB in 2006, all unions were obliged to re-evaluate their approach to collective bargaining. In the Allen case, the Tribunal found that whilst the union had a legitimate aim in wishing to protect previously negotiated terms and conditions, and the pay line going forward, it had not properly advised its female members in terms of their potential equal pay claims before recommending that they settle those claims for relatively small amounts. The Tribunal found that the union had therefore failed to justify a policy which had disadvantaged its female members, which itself amounted to indirect discrimination.

The Union has adopted the following policy to help you to apply the principles set out in the Allen decision to any issues which you will encounter during collective bargaining. Most importantly, you should bear in mind that although the original decision in Allen has been overturned by the Employment Appeal Tribunal, the principles discussed in the case and the law is currently unsettled. The Union's officers and representatives must therefore continue to follow this policy. Any failure to do so puts the Union at risk of being sued not only for sex discrimination, but also negligence, misrepresentation or breach of contract.

You should also be aware that, since October 2006, it has been unlawful for unions to discriminate against their members on grounds of age. It is therefore important to remember that the issues set out below apply as much to collective negotiation in this respect, particularly if any particular age group stands to "lose out" as a result of any deal. In particular, the link between age and length of service means that deals which affect contractual service entitlements will impact upon different age groups of workers in different ways. Further guidance will be provided and updated as it becomes clear how Tribunals intend to deal with such issues.

##### Action required

###### Negotiations with employers

- Reps and officers should continue to follow our policy of seeking to achieve equal pay in all workplaces. This means raising the issue as part of pay negotiations, and pressing for equal pay audits pursuant to Equal Opportunities Commission (EOC) guidance.
- Where an employer has agreed in principle to deliver equal pay (for example, by implementing the local authority Single Status agreement) the employer should be pressed to comply as soon as possible.
- Negotiations should be undertaken proactively and not allowed to drift. You should ensure that reps and officers involved in any pay audit are adequately trained, and if necessary expert help is obtained (for example, by the employer appointing an independent consultant to advise on the process of job evaluation).
- Notes should be kept of all meetings and reps/officers who are due to attend should prioritise doing so, arrange cover or seek to have the meetings rearranged. It is advisable to keep a file for each set of negotiations so that we can track what we have done and if there has been any delay, the reason for it.

- Those involved in negotiations regarding equal pay/job evaluation should ensure that they are properly trained in this complicated area and are up to date with recent developments in the law, such as how to recognise a genuine and justifiable productivity bonus arrangement. The Union offers training and guidance and, if in doubt, assistance should be sought from Union solicitors.
- The Union wishes to defend the hard won and legal rights of all members in all instances wherever possible. It is therefore possible in the first instance, to argue for “equalisation up”. However, if a pay review or job evaluation finds that some of our members are “overpaid” compared to others, and the employer is refusing to level the lower paid members up to the level of the higher paid, then, according to the Allen decision, it may amount to breach of the implied term of fair representation, misrepresentation and/or negligence if the Union takes a negotiating stance which is totally opposed to any reduction in the pay of the higher paid members, particularly if the Union provides inadequate or misleading information or advice to its members. Although the EAT has overturned the Tribunal’s original decision in Allen that the union’s actions in that particular case amounted to indirect sex discrimination, officers and reps should not assume that the law in this area is now settled. Advice should therefore be taken without delay via the officer from Union solicitors about the conduct of the negotiations if an employer refuses to “equalise up” on equal pay issues, even if the members locally have strong views on their bargaining position.
- We should not, without legal advice in each instance, enter into negotiations or recommend a pay deal which will require our members to give up rights to back pay arising from equal pay claims. Employers should be told this clearly at the start of negotiations.
- Some unions have a policy of keeping negotiations about back pay entirely separate from other negotiations. This can be a helpful way of ensuring that arguing for ongoing or future rights does not detract from legally enforceable rights to back pay. However if an employer’s resources are genuinely limited, then one such set of negotiations may inevitably affect the other. Negotiators should be aware of this and seek legal advice if in doubt. In particular, employers should be required to substantiate claims that they cannot afford to pay full back pay, or that job losses or outsourcing will result if members enforce their rights to full back pay.
- Recognition must also be given to the substantial sums at stake for many members with back pay claims. In the Allen case, the Tribunal believed that concluding a deal which sought to protect current or future rights, whilst settling back pay claims for far less than they were worth, amounted to indirect sex discrimination because the union had presented its recommendations in such a way that the unfavourable implications of the deal for those with back pay claims were not clear to its members. The EAT has decided that the actions of the union in the Allen case did not amount to indirect discrimination, but may have given rise to claims for breach of the implied term of fair representation, misrepresentation and/or negligence.
- Thus, to fairly and properly represent all groups of members, it is crucial to avoid such deals and to seek legal advice early, in order to balance the competing interests of our members within the law. If full back pay is not delivered through collective negotiation, our members should not be denied their individual legal rights to bring claims against their employer, or to have an individual equal pay claim considered in the normal way by the Union, and must be advised as described below.

#### Seeking approval of collective agreements

When informing members about an offer from management that they are to vote on, it is essential that they are given clear and honest information about how the deal will affect them individually.

Care should also be taken not to mislead members by creating unfounded fears of what might happen if the deal is rejected. For example, do not say that there will be mass job losses if there is no real evidence for it. If we suspect that this may be the case we can say so, but explain that it is a suspicion and not inevitable.

The points to focus on are:

- Members must be given clear advice about how any proposed deal may affect them. This means that if some members may lose out under a deal they should be clearly notified of this if there is a chance that they are being asked to sacrifice their legal rights. The implications of the deal should be explained in any meeting convened to advise members, and also in writing. You should keep a note of advice given and copies of information given to members. Advising members fully and accurately is the single most important thing that you can do to protect the Union in relation to any Allen-style claims. Whilst you are probably doing this already, it is important to keep a record of what has been advised in case the quality of the Union’s advice is challenged at a later date.
- You should attempt to get the employer to write to each member spelling out the exact financial implications for them in terms of any proposal. If the employer wants the Union to confirm the position, detailed legal advice should be sought via the officer. The members should be encouraged to press the employer for details of the individual financial implications of the deal.
- You may have to send each member information to explain a proposed deal and the implications for different groups of workers. If you need assistance or advice about the content of such a document, you should contact the Legal Services Department. If you do not send information to your members, you must be sure that all members will not only be able to see, but are likely to read, the information. So if there is a Union notice board you should be confident that all members actually read any notices posted, and that it is an appropriate way to give advice (for example, do different members need different advice?).
- Officers should seek advice from a solicitor via the Legal Services Department on any proposed collective agreement which purports to deliver equal pay or limit rights to pay or back pay. The solicitor should assist in advising on written information to the members.
- No agreement should be entered into which attempts to limit an individual member’s right to pursue a legal claim. This is most likely to come up in relation to an employer seeking agreement that the member will not sue them for 6 years’ back pay, or that the Union will not support such claims. We should be bargaining from a premise that members who have a right to back pay under equal pay law should receive their 6 years’ back pay in full. If the employer offers a compromise, advice should be sought from a Union solicitor in each such case as the position is likely to change with developments in the law. Note that different unions are taking different views on how much back pay must be delivered, so do not simply agree with another union without first seeking advice. Note that this applies equally to the TGWU Section of Unite at this stage, as our approach may currently differ from theirs – although we will shortly have discussions with them so that a similar view and approach is in due course taken by the whole union in relation to this issue.
- Negotiations should not prevent the issue of Employment Tribunal proceedings if the member will lose out on potential back pay claims due to any delay. If you believe that any members have potential equal pay claims, you should ensure that you seek advice from Union solicitors. Where it is considered that there is no claim with reasonable prospects of success and that the Union will not be providing legal assistance, you should ensure that each affected member is informed in writing of their right to bring a claim and time limit issues in the same way as you would with other types of claim.

## Pay protection

If job evaluation takes place, there may be groups of workers who have been historically better off and who would, without protection, suffer a pay cut when moving on to a new scale. In such circumstances, it may be appropriate to consider red circling or pay protection arrangements.

The law on red circling is not straightforward and whether a red circle is appropriate will depend on factors such as:

- whether the red circling is temporary or permanent;
- whether the origin of red circling is to be found in sex discrimination;
- whether the group being red circled is a closed group;
- whether the red circle has been the subject of negotiations with representatives of the workers and the views of the less advantaged taken into account.

The Union takes the view that it is entitled to argue in the first instance that employees should maintain their contractual pay when moving to a new wage structure. It is more difficult to argue that employees should be entitled to receive a period (particularly an indefinite period) of continued annual increases, as this will tend to perpetuate the differences in pay.

The EAT has confirmed that a union may be justified in pursuing certain contractual rights (for example pay protection and/or rates of pay going forward) at the expense of others (for example, equal pay claims including back pay for those whose jobs have been historically undervalued). This is likely to be the case particularly if a union is seeking to maximise the number of members who benefit overall. However, it is important to note that in certain circumstances the Union may not be entitled to maintain the stance of "equalisation up". The Union needs to take a realistic view based on the information provided by the employer.

Because the specific nature of the Union's duty to groups of members in this regard continues to remain uncertain, any proposed pay protection arrangements under new pay structures should be referred to the Union's Legal Services Department for advice.

Officers and representatives should also always fully consult with all affected groups (including those who are not receiving pay protection), keeping a note of their views and balancing them accordingly when conducting negotiations.

## Providing information to members

If you believe that a member may have any kind of legal claim you should advise them of this and of how to obtain legal assistance from the Union. In the case of a successful equal pay claim, the member will have a right to back pay for up to 6 years from when the claim was first made, plus interest. Claims can be made in the Tribunal at any time whilst the member suffers unequal pay or up to 6 months from the end of the contract under which they received unequal pay. The member will also need to lodge a grievance before their Tribunal claim.

Members should therefore be encouraged to apply for legal assistance through the officer if their contract is or has changed (for example, on outsourcing, or a change of status from permanent to temporary, or on promotion), or where the period during which they have suffered unequal pay is approaching 6 years. If the member has suffered unequal pay for more than 6 years, the value of their claim may be diminishing every day that there is a delay in submitting their equal pay claim. Such delay was part of the reason for the Tribunal's original finding that the GMB was guilty of indirect sex discrimination in the Allen case. Although this decision has been overturned, the EAT did comment that the issue of delay was more relevant to claims for negligence against the union.

Job evaluation studies may provide evidence that members have been paid less than others doing work of equal value. Therefore reps and officers should be particularly vigilant during and after such studies in terms of members' potential claims for equal pay. Members should be advised in writing if it appears that they may have such a claim, but in most cases you should seek legal advice prior to writing to members.

It may be helpful to use a questionnaire to help identify who has a claim. You should obtain legal assistance in drafting any questionnaire. Before circulating any questionnaire ensure that you have a clear plan, with dates and actions allocated in order to ensure that the questionnaire is followed up quickly and that missing responses are chased. Again, please keep copies and a diary or note of action.

Members are better off taking a Tribunal claim with the assistance of Union lawyers because if they win their claim they will keep all their damages. If they use a private law firm they will either have to pay up front, or a percentage of their damages (often 25%) is kept by the lawyer. If members nevertheless do use private legal help, they should still be provided with the same support and information as other members in every other respect of Union services (for example, they should be kept up to date about relevant negotiations, and are entitled to representation at internal hearings).

## COT3s and compromise agreements

The advice of a Union solicitor should be sought before any members sign away any of their rights to sue.

Officers and reps are already aware that they must not sign compromise agreements for members, but should pass them to our solicitors via the legal department.

It is vital that the member is fully advised on what rights they are forfeiting (in financial terms in comparison to the offer on the table) before any COT3 or compromise agreement is signed. The solicitor should be given information by the union representative via the officer in order to check that assessment. That assessment should be confirmed to the member in writing before they sign the COT3 or compromise agreement. If the member signs a COT3 without assistance from the Union and a rep or officer becomes aware of it, a note should be kept for possible reference later. It is normal for the employer to pay for the work done by the solicitor advising on a compromise agreement. Usually the employer will only pay a limited sum, such as £350 plus VAT.

## Working with other unions and recruitment

Huge numbers of claims have already been lodged against other unions on the basis that they have breached the law as defined by the Allen case. The Union believes that workers are best served by a strong trade union movement, so we are opposed to exploiting this situation so as to damage other unions. We are committed to following TUC policy against poaching members from other unions.

Where possible we should be seeking a common negotiating strategy with other unions. Where this is difficult to achieve locally it is worth contacting an officer or senior officer to see whether higher level contact can help achieve harmony.

If members seek to join the union with a view to having us pursue existing equal pay rights for them they should be reminded of our Rule 9 that they are not entitled to legal assistance until they have been a member for 26 weeks, and that they are not entitled to representation in respect of problems which arose before they were entitled to union benefits. If the problem genuinely arose after they joined but before they have been a member for 26 weeks then the officer can approach the legal department as to whether discretion can be exercised to allow them benefit. As per standard policy for all types of claims, members should not be told that they can be treated as 'in benefit' by paying 26 weeks contributions before they have been a member for that long, or by having those contributions waived.

## Further developments

The Union's review of our strategy remains ongoing. The Allen issues are at the forefront in the Local Authority sector, but potentially apply in all sectors; both public and private. Look out for further guidance and guidance particular to your sector.

## ■ APPENDIX 2

### LOCAL GOVERNMENT JOB EVALUATION AND SINGLE STATUS

Officers who have responsibilities in the local government sector will be aware that certain Union members are employed under the National Agreement on Pay and Conditions of Service (“the Green Book”), to which the Union is not a signatory. Many local authorities are in the process of implementing the Single Status job evaluation scheme (“the JES”) which is appended to the Green Book.

As a result of the outcome of job evaluation, and the ongoing implications of the decision in GMB v Allen, employers are offering to settle the potential equal pay claims of those members whose jobs have been rated as equivalent to other higher paid roles within the local authority.

Offers are usually based on a matrix using current contractual hours of work and completed years of service, subject to a maximum payment. The calculation makes no reference to actual salaries. However, many Councils are claiming that these offers are the best that can be achieved, in order to minimise any impact of the cost of settlements on jobs or services, and are made in full and final settlement of claims for compensation.

Following the Allen decision, unions recognised under the Green Book are often refusing to conclude collective agreements in respect of the implementation of Single Status. In the circumstances, employers are requiring individual employees to sign COT3 agreements in settlement of their potential claims. Councils are acknowledging that, in the alternative, employees may pursue equal pay claims, although they are maintaining that such claims will be “vigorously defended”.

Employers are advising individual members to seek legal advice in relation to any offers made. Officers will therefore need to seek legal advice, and often at short notice, on this basis.

#### **Advising Union members**

In the circumstances, members should first be advised that if they accept any offer and sign a COT3, they will be unable to pursue any claim for equal pay and/or sex discrimination against their employer for back pay.

Officers should then seek specific advice from Legal Services in relation to any offer made, bearing in mind the time limits set out below.

However, on a practical level, it is very often the case that members will be unable to provide sufficient information at this stage in order to be fully advised as to the prospects of success and/or the likely value of their potential claims. Officers should therefore make it clear to members that, in considering their employer’s offer, it will be by no means certain that:

- they will be able to identify suitable comparators in respect of a potential equal pay claim, or that any defence that their employer raises will not be successful;
- any offer that their employer makes now will be open for acceptance at a later date if it transpires that their potential claim does not have reasonable prospects of success.

In terms of time limits, claims for equal pay can be brought at any time during an employee’s employment and within 6 months of the termination of their employment.

However, “employment” in this context means “contract of employment”. Therefore if a member has signed a new contract with their employer as a result of the JES, for example, and they decide to reject any offer in settlement of their potential claim, Officers should seek advice as soon as possible in order to establish whether time has started to run in the member’s case.

## ■ APPENDIX 3

### GMB -v- ALLEN – EQUAL PAY AND AGE DISCRIMINATION

Officers will be aware that, following the Employment Tribunal decision in Allen v GMB in 2006, all unions have been obliged to reconsider their approach to collective bargaining.

In the Allen case, the Tribunal found that whilst the GMB had a legitimate aim in wishing to protect its members’ previously negotiated terms and conditions, the union had not properly advised its female members in terms of their potential equal pay claims before recommending that they settle those claims for relatively small amounts. The Tribunal found that the GMB had therefore failed to justify a policy which had disadvantaged its female members, which amounted to indirect sex discrimination.

Officers should bear in mind that although the original decision in Allen was recently overturned by the Employment Appeal Tribunal, the principles discussed in the case and the law is currently unsettled. In particular, the latest Allen decision is likely to be appealed. The Union has therefore adopted the attached policy [which is at Appendix 1] to help Officers and representatives to avoid the pitfalls highlighted by the Allen decision during collective bargaining.

Officers and representatives must follow the Union’s policy. Any failure to do so puts the Union at risk of claims not only for sex or age discrimination, but also negligence, misrepresentation or breach of contract.

#### **Equal pay**

The most important points to remember are:

- Officers must be extremely cautious when pursuing policies that seek to protect one group of members at the expense of another.
- Officers should try to maintain separate negotiations about pay and benefits going forward on the one hand and claims for past discrimination on the other. Inform the employer that the Union will not, in principle, collectively agree to settle claims for past discrimination.
- If the employer offers to settle potential equal pay claims, Officers should refer the matter for legal advice without delay. Members must be provided with appropriate and accurate advice as to their individual rights.
- Officers must not recommend pay deals on the basis of misleading information. For example, do not claim that rejection of any deal will lead to job losses if it is uncertain (as it usually will be) that this is the case. The recent EAT decision in Allen suggests that members may have claims against their union for negligence, misrepresentation and/or breach of contract if they are misled into accepting deals by inaccurate or deficient advice.
- Individual members must be kept properly informed and must be consulted about the outcome of negotiations, particularly in terms of the probable impact on their individual rights. A sample letter for this purpose is attached, although Officers should refer any draft letters to members to Legal Services for advice prior to sending.

#### **Age discrimination**

Officers should be aware that similar issues will arise where an employer is seeking to change age- or service-related benefits on the basis that they potentially fall foul of the Employment Equality (Age) Regulations 2006 (“the Regulations”). Since October 2006, it has been unlawful for unions to discriminate against their members on grounds of age.

It is therefore important to remember that the issues set out in the attached policy document apply as much to collective negotiations in this respect, particularly if any age group stands to “lose out” as a result of any deal. For example, the link between age and length of service means that deals which affect contractual service entitlements (the most obvious example being redundancy agreements) will impact upon different age groups of workers in different ways.

If an employer wishes to change or introduce age- or service-related benefits, Officers should therefore bear in mind the following:

- In the first instance, Officers should take care to retain a neutral position with employers until they are able to seek legal advice and the views of the membership on the proposed terms of any agreement.
- Officers should then consult any affected members and hold a ballot. This is necessary in view of the fact that the Regulations also apply as between trade unions and their members. Care should therefore be taken to minimise the risk of the Union being exposed to age discrimination or other claims by any members who may be disadvantaged by a proposed agreement because of their age or length of service.
- Officers should ensure that members are aware of the issues, including the fact that any proposals do potentially fall foul of the Regulations and could give rise to an employment tribunal claim against their employer.
- If, in light of that information, the majority of members vote in favour of an agreement, and Officers seek to conclude the agreement, the Union is likely to have greater prospects of defending any claims brought against it – for example, by any younger, minority member with relatively shorter service.
- If the majority of members have longer service, it may be that a proposed agreement which rewards longer service works in their favour. On that basis, whilst any proposals may potentially fall foul of the Regulations, it may also be appropriate for Officers to try to “reassure” the employer that it would be able to defend any claims of age discrimination under the Regulations – that is to say, on the basis that its proposals either fulfil a business need, or are otherwise justifiable.
- Officers should, however, be careful not to enter into any agreement to the effect that the Union would not support any age discrimination claims raised by any of its members.
- In the event that any member considers that they have claims for age discrimination against their employer as a result of the implementation of any collective agreement, Officers should seek advice from Legal Services in the usual way.
- If the majority of members will not benefit from a proposed change, Officers should, subject to the views of the membership as a whole, seek to resist those changes. If the employer is determined to implement the change, then Officers should attempt to negotiate a “levelling up” of the arrangements if members do stand to lose out, seeking advice on any revised and/or incentive terms offered where appropriate.

Further guidance will be provided and updated as it becomes clear how Tribunals and Courts intend to deal with the above issues. In the meantime, specific training on equal pay is available for those involved in collective bargaining in this area.





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