

Equality Impact Assessment & the Public Sector Equality Duty

Fighting Cuts to Jobs Pay and Conditions

Interim Guidance Notes & Templates for Local Government Negotiators



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Equality Impact Assessing Cuts to Jobs Pay and Conditions

Interim Guidance Notes and Templates

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Equality Impact Assessment & the Public Sector Equality Duty

1. Who is this Guidance for?

This Guidance is intended for UNISON full-time and branch negotiators in local government. It supplements Interim Guidance produced for all UNISON branches (across service groups) on the Public Sector Equality Duty.

a. Why Interim Guidance?

The Public Sector Equality Duty (PSED) came into force in England, Wales and Scotland on 5 April 2011. It introduces a new 'general equality duty' (GED) on public authorities. This is interim guidance as the Government has yet to introduce 'specific duties' for public authorities in England to accompany the 'general equality duty'. (At the time of writing, specific duties for Scotland were yet to be finalised. Specific duties for Wales had been approved by the National Assembly for Wales.)¹

Even though specific duties are still awaited for authorities in England and Scotland (and non-devolved functions in Wales), branches should be talking to employers now about their plans for complying with the GED, including how they intend to assess the equality impact of proposals in the financial year 2011/12.

b. Equality Impact Assessment

The Public Sector Equality Duty does not impose a legal requirement to conduct an Equality Impact Assessment (EIA).² The Government has also indicated that the new Equality Duty 'should be applied in such a way as to reverse the overly-bureaucratic and burdensome approach often used under the previous duties, so as to focus on performance not process.' In their view there is not any practical need to conduct an EIA.

While it is true that ultimately it is outcomes that matter (not processes), without having robust mechanisms in place to assess impact, it is hard to see how an authority could be confident that its 'outcomes' (such as cuts) will not discriminate against particular groups.

For public authorities to comply with the GED they should continue to assess the equality impact of their 'functions' i.e. what they do, including policies, decisions, procedures and proposals for changes to service provision and/or delivery and proposed restructuring, and cuts to jobs and/or terms and conditions.

¹ Because there will be differences between the specific duties for the three countries, branches in Wales and Scotland are advised to contact the Regional Service Group for more information. (The guidance in relation to the GED applies to the three countries.)

² The specific duties which apply to relevant Welsh public authorities contain a requirement to make arrangements for assessing the likely impact of their activities on their ability to comply with the Equality Duty.

In setting their budgets for 2011/12, councils have been through a process of identifying 'savings' and implementing cuts to jobs, conditions and services (to varying degrees).

In many instances, intervention by UNISON has managed to stave off the worst effects and mitigate losses faced by members. However, many damaging cuts to services, jobs and conditions have occurred. And, in the next and subsequent budget-setting rounds, councils will again be looking to make further savings. Meanwhile the Coalition Government is pushing the 'Big Society' model – replacing direct public provision wherever possible with services provided by private organisations, including 'social enterprises',³ and volunteers.

These interim guidance notes and templates have been produced to help branches use 'equality impact assessment' (sometimes called 'equality analysis') to gauge the effect of cuts to jobs, pay and conditions which have already taken place, to seek to challenge ongoing cuts; and to resist future proposed cuts. (Worked examples on a number of specific proposals are included.)

EIAs are not a 'magic bullet' that will halt all cuts in their tracks. This Guidance is intended to help branches use EIAs as part of your negotiator's toolkit. It should be used in conjunction with the guidance on analysing council finances; fighting redundancies; and the latest guidance on campaigning against cuts. (Resources and templates are posted on the UNISON website.)

c. Important notes

It is an overriding principle that UNISON avoids entering into an arrangement that introduces or extends inequality as a result of a cuts package. Care must be taken in agreeing to changes in collective agreements or employer action to change contracts of employment. Any proposed changes to single status structures or pay related conditions must be automatically referred to Legal Services and the Service Group via your Regional Organiser.

Throughout this document reference is made to the NJC and SJC bargaining groups but other local government bargaining groups are also affected and some follow NJC/SJC conditions in part.

The sections in the Guidance relating to the law on the PSED and best practice are based on (and quote from) guidance issued by the Equality and Human Rights Commission (EHRC), principally, *The Essential Guide to the Public Sector Equality Duty*. The EHRC guidance was written in January 2011 before the Government announced new draft specific duties but (in June) the guidance is still on the EHRC website as of June 2011 and much of it remains relevant, especially in relation to complying with the General Equality Duty.

The EHRC guidance is 'non-statutory' so it does not carry the force of law, unlike a statutory Code of Practice. Nevertheless, EHRC guidance is widely adhered to by employers. It will be updated and supplemented by statutory Codes of Practice later

³ The Government defines a social enterprise as 'a business or service with primarily social objectives whose surpluses are principally reinvested for that purpose in the community, rather than being driven by the need to maximise profit for shareholders and owners' (*Building the Big Society*, May 2010).

in 2011. The Government Equalities Office has also produced a quick step guide to the Public Sector Equality Duty.

2. What is the Public Sector Equality Duty (PSED)?

a. The General and Specific Duties

The Duty comprises two parts: a **general equality duty** and **specific duties**.

The general equality duty is set out in the Equality Act 2010. The Act replaces existing anti discrimination law with a single Act. In summary, those subject to the equality duty must, in the exercise of their functions, have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not.

These are sometimes called the ‘three arms’ of the GED. Under the first arm, ‘conduct prohibited by the Act’ would include breaches of discrimination legislation.

The Act also explains that having due regard for advancing equality involves:

- Removing or minimising disadvantages suffered by people due to their protected characteristics
- Taking steps to meet the needs of people from protected groups where these are different from the needs of other people
- Encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.

The PSED requires public authorities to be pro-active in respect of equalities as opposed to responding to an equalities issue when there is a complaint or claim from an individual or group. However, the ‘need to have due regard’ is not the same thing as an obligation to achieve a result, rather, it involves deciding what weight needs to be given to each of the three arms of the GED in proportion to their relevance to a particular function.

The term ‘protected characteristic’ is new and basically it means people (in law, ‘persons’) who come within (what was often called) an equality strand or grouping. The new duty covers these protected characteristics:

- age
- disability
- gender reassignment
- pregnancy and maternity
- race, ethnic or national origins, colour or nationality
- religion or belief
- sex
- sexual orientation

The duty also covers marriage and civil partnership in respect of eliminating unlawful discrimination - but not to advancing equality and fostering good relations.

The word 'function' refers to the full range of a public authority's activities, duties and powers. A public function is a function of a public nature.

The **general equality duty** came into force on 5 April 2011 in England, Wales and Scotland.

The **specific duties** for England (and non-devolved bodies in Scotland and Wales) are not yet finalised. The Government dropped their original draft specific duties and are proposing new draft specific duties which 'aim to strip out unnecessary process requirements'. The new specific duties are expected to come into effect at the end of July.

The Government Equalities Office has published a Quick Start guide to the Public Sector Equality Duty. This indicates that the Equality Duty does not impose a legal requirement to conduct an Equality Impact Assessment and that in the Government's view there is no practical need to conduct one. It states 'compliance with the Equality Duty involves consciously thinking about the three aims of the Equality duty as part of the process of decision making. That will entail understanding the potential effects of the organisation's activities on different people, but there is no prescribed process for doing this. Keeping a simple record of how decisions were reached will help public bodies show how they considered the Equality Duty.'

UNISON takes the view that the Government's 'stripped-out' draft duties are a significant watering-down of the former draft specific duties. The latter provided a road map for authorities as to how they could comply with the new general equality duty. Without such a road map, authorities are more vulnerable to falling foul of the law and it will be left to the courts to decide what constitutes compliance with the PSED.

Good employers and authorities that genuinely value equalities will be unlikely to drop or water down their EIA processes significantly, even though the specific duties may be weaker. However branches need to seek assurances on this score. Some authorities have put substantial resources into EIAs and have improved their processes over recent years – staking their public reputation on their equality achievements and being assessed as 'high performing' on equalities. Cutting back or 'streamlining' already effective EIA processes could jeopardise progress being made and harm an authority's public standing; as well as invite questions or challenges over its compliance with the GED. Branches should check that any proposed modifications of EIA processes and/or reductions in resources for EIA will not damage or undermine the robustness of current processes.

Authorities with a poor record on equalities may try to take advantage of weaker specific duties to do less. In these authorities, branches should press to be involved in any internal review of EIA processes. Any measures or shift in resources to strip down processes should be resisted if they would result in weaker impact assessment. Branches should suggest ways in which EIA could be strengthened (as these need not be costly).

It should be emphasised to the employer that while the specific duties may be less prescriptive than before, it is the GED that must be complied with. It can be argued that the expansion of the 'protected characteristics' means the risk of non-compliance with the GED would be compounded if the authority does not have a robust EIA process.

Branches should also note that in the period before the new specific duties come into force, the GED applies – and this is the key part of the PSED that authorities must comply with. Consequently, it would be wrong (and unwise) for an authority to claim that it 'can do nothing about EIAs' or 'needs to wait' until the new specific duties come into force. UNISON will produce supplementary guidance on the specific duties once they are finalised. Meanwhile, branches should check the UNISON and EHRC websites for any updates.

b. Who is 'subject to' the general equality duty?

Those subject are:

- **Public authorities** listed in Schedule 19 of the Equality Act 2010 are covered by the GED. This includes public authorities such as local authorities, governing bodies of local authority maintained schools (and in Scotland, an education authority and the managers of a grant-aided school), health bodies, police, fire and transport authorities, and government departments.
- **Bodies carrying out public functions.** The general equality duty (but not the specific duties) also applies to other organisations who 'exercise public functions'. This will include private bodies or voluntary organisations which are carrying out public functions on behalf of a public authority.

The Equality Act defines a 'public function' as a function of a public nature for the purposes of the Human Rights Act 1998. An example of this would be a private company running a prison on behalf of the government. The company would, however, only be covered by the general equality duty with regard to its public functions, but not for other work, like providing security services for a supermarket.

UNISON's position in relation to both profit-making and non profit making organisations exercising public functions is that they must abide by the **general equality duty** in relation to those functions.⁴ While they cannot be required in law to adhere to the **specific** duties, UNISON would expect them, as service providers and employers, to have robust equality policies and practices, and to be able to demonstrate how they were meeting (or proposed to meet) the **general** equality duty, as well as their obligations as employers in respect of equal pay. However, branches are cautioned this is a legally complex and evolving area of law. Advice should be sought from the Region regarding the responsibilities of non council organisations as service providers and employers.

⁴ As employers and service providers, charities that exercise a public function are covered by the Equality Act 2010 (including the GED), although there are some specific exemptions permitting charities to restrict the provision of benefits to certain groups.

Councils should remember that the duty continues to apply to them if they have contracted out or are thinking of contracting out a function. When a service is contracted out, **both** the contractor and the public authority that commissioned the service have to give due regard to the three arms of the GED. The GED also applies to a public authority's activities in relation to allocating (or withdrawing) funding or grants to the voluntary sector.

c. Who will be subject to the specific duties?

The specific duties will apply **only** to the public authorities listed under Schedule 19 of the Act. (They will not apply to organisations that are not listed i.e. other organisations exercising functions of a public nature.) Therefore the specific duties will apply to the procurement activities of councils as it is a 'function' of a local authority. They should examine how contracting can include equality issues.

3. Carrying out Equality Impact Assessment

a. Why should authorities carry out impact assessment?

As stated earlier, there is no legal requirement for public authorities to carry out equality impact assessments (EIA) or equality analysis, as it is sometimes called. However, equality impact assessment is key to authorities being able to show that they have complied with the general equality duty, by taking the relevant 'arms' of the GED into account when making decisions affecting equalities. Further this must be done before – not after – the decision is taken.

The EHRC takes the view that analysis of the effect of existing and new policies and practices on equality 'is an important part of complying with the GED'. It is also worth reminding employers (large and small) that aside from the GED, they have obligations under the employment-related sections of the Equality Act 2010 and other employment legislation not to discriminate and EIAs are a key method to test whether policies and practices (proposed and implemented) could directly or indirectly discriminate. Moreover, as a recognised trade union, UNISON has rights to be consulted and receive workforce information for collective bargaining purposes, for example, in relation to proposals to change terms and conditions or reduce workforce numbers.

The EHRC recommends a six-step approach to EIAs based on established legal principles for compliance. Branches are advised to use the EHRC approach as a model and the basis for discussions with the employer about impact assessment. The model approach should be used as the yardstick to evaluate any moves by authorities to amend their current EIA processes, particularly where the authority is intending to 'streamline' the process in ways that would be likely to result in flawed or inadequate assessments.

b. EIA: the EHRC six-step approach

This section draws on the Commission's guide to *Equality Analysis and the Equality Duty* - you should refer to that document for full information.

The six-step approach involves:

1. Identifying who is responsible for the equality impact assessment
2. Establishing relevance to equality
3. Scoping your [the authority's] equality impact assessment
4. Analysing your equality information
5. Monitoring and review
6. Decision-making and publication

Step 1: Identifying who is responsible for the equality impact assessment

It is the responsibility of the authority (not the union) to carry out equality impact assessment. EIA is not an administrative task, but a core part of policy-making. The Commission guidance comments on who, in the authority, should be involved, for example, equality officers. It also suggests undertaking EIA in partnership with other organisations where appropriate.

Experience shows that equality impact assessment can 'fall between the cracks' or be superficially addressed in partnership arrangements. Where EIA is to be carried out across authorities (for example, in relation to shared services, or within a local strategic partnership or enterprise board) the relevant branches will need to work together and decide how and on what forums they will seek representation; and organise how they will be involved at each stage of the process.

Where an employer will not undertake equality impact assessment on the basis that they are not specifically required to by law, branches should challenge them to show how, in the alternative, they would demonstrate that they have met or would meet the GED. This situation is most likely to happen in relation to employers that are not listed 'public authorities' but bodies exercising a public function on behalf of a public authority (such as a council or police authority). Branches should press for an EIA to be carried out where (for example) the employer is a contractor who intends to make significant changes to terms and conditions of the workforce (or a section of it) or to change the mode of delivery in a way that would impact on jobs, pay or conditions.

Step 2: Establishing relevance to equality

To ensure that the authority is 'having due regard to' the aims of the duty, as a first step, it needs to consider all of its 'functions' in order to determine which of them are relevant to the aims of the duty.

The 'functions' of a public authority cover all of its powers and duties. This means everything that it is required to do as well as everything that it is allowed to do (including all its policies, both current and proposed.) Some functions will be relevant to most or all protected groups, such as recruitment. Other functions may be relevant to one 'arm' of the duty but not to others, or to the needs of some protected groups but not to others. Where an authority decides that a policy or function is not relevant to equality, it should document this, along with the reasons and information used in reaching this decision

There is no legally laid down process for determining or documenting relevance but the EHRC *Essential Guide to the PSED* sets out a useful checklist for authorities to use (at page 12).

As there is likely to be very little prescription as to how public authorities are to fulfil the specific duties, it is important for the union to be in a position to influence what is going to be done (and how) from the outset. The previous UNISON EIA Guidance recommended that the branch seek representation on the overarching EIA steering group. Authorities will still need to have strategic direction and oversight when assessing equality impact, objective setting and publication of information, so the branch should still press for representation.

Union involvement at a strategic level gives the branch an opportunity from the outset to influence the authority's approach to complying with the general and specific duties. It also puts the branch in a stronger position to negotiate over cuts proposals. Ideally, the branch should be involved in equality impact assessments wherever they are occurring within the authority but in a large council where numerous EIAs could be taking place simultaneously, this may not be feasible.

UNISON's policy is that cuts in jobs, terms and conditions, and restructuring should be regarded as having 'high relevance' and be fully impact assessed. This is supported by EHRC Guidance *Using the Equality Duties to make Fair Financial Decisions* which stated 'the equality duties are legal obligations which should remain a priority even in times of economic difficulty' and that 'changes to service delivery (including withdrawal of services) should always be impact assessed'.

'Establishing relevance to equality' could be regarded by councils as a purely administrative task, with no particular need to consult stakeholders. However, the branch should be involved when the authority revisits its current list of relevant functions and priorities for impact assessment.

Authorities may argue that they have already screened their policies for relevance (under the previous duty) but they will need to check their current list and review their priorities for EIA to ensure that they cover all the protected characteristics. This will provide a good opportunity for branches to have an input into determining which policies and functions are prioritised for equality impact assessment.

Where the branch disagrees with the authority's assessment of 'relevance' in relation to a policy or function, and/or its priorities for EIAs, it should insist that the union's objection (and reason for it) is formally recorded by the authority. This could be important evidence in the event that the authority is challenged for failing to have due regard to the GED.

Branches should press for equality impact assessments of the actual effect of the cuts to jobs and services which have been planned for and approved in the 2011/12 budget. In some authorities, the impact of proposed budget reductions were only superficially assessed or screened where (for example) it was not known or established at that time how high-level cuts would pan out at directorate and/or service level.

In England and Wales, branches should also remind the employer of the requirements of the National Agreement (the Green Book) in respect of equality impact assessment. The requirement to impact assess proposed pay and grading structures formed part of the 2004 NJC Implementation Agreement and it remains the case, under Part 3, that in 'determining any new working arrangements [required to deliver improvements] authorities **will** conduct an EIA consistent with the model [set out] in Part 4' and 'ensure that part-time workers receive equal treatment..' (Part 3, Para 2.4). Part 4.3.3. states it is 'good practice overall ... to conduct EIAs for **all** proposed changes which impact on employment and pay and conditions as a matter of course'.

Branches may need to forcefully remind some employers - whose employees are covered by the NJC/SJC national agreements - that they are not permitted to make changes locally to Green/Red Book Part 2 provisions. Any proposals by employers to amend NJC/SJC National agreement **Part 2** terms and conditions must be reported to the regional service group. This would include any proposals to move away from the national pay spine; to alter the standard 37 hour working week (outwith the provisions of Part 3); to reduce leave entitlements; and amend Part 2 provisions on sickness and maternity schemes.

Step 3: Scoping the equality analysis

Basically, 'scoping' means working out what needs to be done to carry out the EIA; the priority areas for analysis; who needs to be involved; and over what timescale. It should help in keeping the process focussed on the priority areas in terms of equality (for example, a policy might have more impact on some protected characteristics than others).

In scoping each EIA, the key questions are:

- a) How do the aims of the policy relate to equality?
- b) Which aspects have particular importance to equality?
- c) Which protected groups does the policy relate to?
- d) Which 'arms' of the GED does the policy relate to?
- e) What evidence is available for the EIA?
- f) What information gaps are there?
- g) Which stakeholders can usefully be involved to support (in the sense of assist with) the EIA?

In relation to cuts, from the union perspective, these considerations are particularly important:

- What is the purpose of the policy?
- In what context will it operate?
- Who is it intended to benefit?
- What results are intended?
- What 'savings' (to the authority) are anticipated?
- How have estimated savings been calculated?
- Why is the proposal / policy change needed?
- What might be the effects on protected groups?

Even at this early stage, consideration of the effects on protected characteristics might cause the authority to change the overall policy aim in order to take better account of equality considerations.

It is important that the aim of a policy is clearly stated in writing by the authority as this would need to be taken into account in the event of a challenge from the union (or service users) that the policy resulted in indirect discrimination. (Indirect discrimination is lawful where the provision, criterion or practice causing it is shown to be a proportionate means of meeting a legitimate aim.

Under the new PSED, so-called stakeholders have no statutory right to be consulted or 'engaged' by the authority. However, many authorities have established procedures for consulting user groups and local residents as part of their equality work, and their continuing input may be essential to carrying out robust EIAs. Branches should not under-estimate the power of public questioning on decision-making: the union is aware that the publication on council websites of impact assessments of budget proposals has generated an unprecedented level of queries and challenges from local residents in some areas. Cutting back significantly on the amount and accessibility of information that is published could merely result in many more requests to the council for information under the Freedom of Information Act 1997 – requests which are costly and time-consuming to deal with.

The EHRC guidance states 'depending on the policy that is being analysed, consider engaging with employees, service users and/or equality organisations. Trade unions are especially relevant for information on employment'. Over and above the GED, as mentioned earlier, the union has statutory rights to be consulted over a range of employment matters (such as redundancy) and under the terms of the National Agreements, the employer must negotiate over any proposals to alter Part 3 terms and conditions.

In preparation for impact assessment of any proposals or implemented changes to jobs, terms and conditions, branches should ask the employer to provide core workforce data, to build up the equalities profile of the workforce. Employers will have data on age, disability, race and sex of the workforce (and possibly other protected characteristics) but some proposals as they emerge may require collecting new data. Included in this document is a suggested template to help branches collect essential core background data immediately – see template headed 'core data request to employer'.

As proposals emerge further information could then be required to analyse each specific proposal - the data required for the assessment may be different for different proposals. Relevant contracts and collective agreements should also be assembled as part of the intelligence gathering exercise.

Step 4: Analysing the equality information

This step involves bringing all the information gathered together and asking 'what will happen or not happen if the authority does things this way?' In effect it entails gathering the evidence, evaluating the findings and deciding on the policy as follows:

i. Gathering the evidence

The Commission's guide to *Equality Analysis and the Equality Duty* emphasises that 'it will not be acceptable to simply conclude that (for example) a policy will universally benefit all service users and therefore all protected groups will automatically benefit, without having evidence to support that conclusion' (page 16). In the context of cuts, branches need to be alert to any unfounded assumptions or blanket assessments about minimal or 'neutral' effects and the omission or overlooking of consideration of impact on particular protected groups, which, on the basis of the branch's knowledge, could be affected.

Besides looking at the equality information for each policy (including proposed or actual cuts) individually, it will also be important to look at the cumulative effect of related policies, for example, the overall gender impact of cuts to NJC Part 3 terms and conditions as well as the effect of a change to a singular term.

The EHRC Guide (page 17) sets out a checklist of questions to ask at this stage including:

- Could the policy affect different groups disproportionately?
- If there is a greater effect on one group, is that consistent with the policy's aims?
- Could the policy disadvantage people from a particular group?
- Could any part of the policy discriminate unlawfully?
- Are there any other policies that need to change to support the effectiveness of the policy under consideration?

And UNISON would add, are there any other policies that need to change because they are contributing to (or preventing the mitigation of) the adverse (but not unlawful) effect of the policy under consideration?

Although it pre-dates the PSED coming into force, the Commission's 2010 guide *Using the Equality Duties to Make Fair Financial Decisions* sets out a useful checklist of questions to ask in relation to financial proposals specifically which is still relevant:

- What are the aims and objectives of the financial proposal? Does it fit in with the authority's objectives?
- How will the financial proposal impact on staff/local people
- Which group or groups of employees are affected by this financial proposal?
- Are certain groups more reliant on the proposed policy – are occupational groups more likely to work on delivering it or because certain groups access the service in greater numbers?
- What information on the likely impact of the financial proposal is available from current data?
- What are the views of key stakeholders?
- Are there any aspects of the financial proposal that contribute to narrowing future inequalities e.g. narrow the gender pay gap
- Could the change be regarded as indirect discrimination because it disproportionately impacts on/inadvertently excludes a certain equality group? In what way?

- How does this financial proposal relate to others? Could it and separate decisions contribute to a cumulative impact on an equality group?

Evidence to answer these questions could include survey results, customer feedback data, workforce data, single status data, consultation responses or available research. Regional and national research should also be drawn on especially where internal data is limited. UNISON's Bargaining Support (BIS) can help with this and provide equality agreement information to support negotiations.

ii. Evaluating the Findings

It is the employer's responsibility to carry out the EIAs and make findings. However the union will want to be satisfied that the basis for the analysis and the findings are sound. In particular, proposals (and implemented cuts) need to be scrutinised to check whether there is any potentially indirectly discriminatory impact on a protected characteristic.

The law on indirect discrimination is to be found in the Equality Act 2010, section 19. It applies to the protected characteristics of: age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; and sexual orientation.

Basically, to take the example of gender, the employer indirectly discriminates against a woman if:

- the employer applies a provision, criterion or practice to her which he applies or would apply to a man;
- it puts, or would put, women at a particular disadvantage when compared to men; it puts (or would put) the woman at that disadvantage;
- and the employer cannot show it to be a proportionate means of achieving a legitimate aim.

Establishing the right pool for comparison can be central to determining whether there is a prima facie case of indirect discrimination. Pools for the comparison must include employees who are truly comparable and the statistics must be significant as opposed to fortuitous. The aim is to spot if an employer has applied a faulty analysis of the figures and so it may not be necessary for negotiators to check the employer's calculations.

However there will be cases where union negotiators will judge they want or need to do their own analyses working from raw data. For this purpose, and for branches who feel comfortable with statistics, 12 examples of how to equality analyse possible proposals are attached to this document with four model templates covering age, disability, ethnicity and gender. Branches should extract from the template the specific data relating to the proposal to be assessed. These templates can be adapted to apply to other proposals. A model letter to send to the employer with the data request (EIA cuts model letter) is also attached. The letter is drafted as if there is no joint working on EIAs. If there has been joint working, the letter will need to be customised to take account of the progress that has been made.

Branches should ask for pay data to be provided in excel format. It should include hours and weeks worked. Some terms and conditions apply across local government bargaining groups. These employees should be included in the impact assessment where relevant. Where employees hold more than one contract, each contract should be disaggregated in the data. School-based employees need to be included.⁵

The question to be asked of the statistical analysis is whether the data shows the proposal puts or would put a protected characteristic at a particular disadvantage compared to the other group. For example, if the proposed change is that only full time workers will have access to training because the training will be for full days or a week this could indirectly impact on women because they usually form the greater part of the part-time workforce who do not work full days or a full week. The assessment will be between part-time women as a percentage of the female workforce compared to part time men as a percentage of the male workforce.

If the statistics showed that part-time women⁶ would be at a particular disadvantage, the employer runs two risks: firstly, the risk of facing claims of indirect discrimination; and secondly, persisting with this proposal could mean that the employer may breach one of the arms of the GED – the need to have due regard to eliminating unlawful discrimination.

Negotiators then need to judge whether the proposal has the potential for discrimination or significant adverse impact or there is a missed opportunity to promote equality. If the branch findings differ from the council's assessment negotiators will then need to submit their calculations back to the employers and ask for the proposal to be reviewed for alternatives. In some cases the discrimination will be obvious but all significant differences require investigation.

It is much more likely that a proposal will have the potential for indirect discrimination rather than direct discrimination. Indirect discrimination can be lawful where employers establish that the policy has a legitimate aim and it is a proportionate means of meeting that aim. There is case law on this issue and again branches should seek advice from their region.

Costs can be a justification (including indirect discrimination in pay) where there are other legitimate aims that are more than simply saving money or avoiding expense or costs. It will be more difficult for an employer to rely on costs even combined with other objectives or aims where the discrimination is obvious and substantial. It will be difficult for an employer to successfully rely on costs where the cost is the same as or less than the discrimination itself. Broadly speaking, is the employer trying to do more than simply save money or avoid expenditure and does the cost outweigh the effects of the discrimination. (Is the discrimination a price that is reasonable to be paid to achieve the wider objectives?). This represents our current understanding on costs. However, it should be noted that this is a developing area of law.

iii. **Deciding on the Policy**

⁵ In England, this applies to schools maintained by a local authority; local authority pupil referral units; proprietors of city technology colleges; city colleges for technology or the arts; and academies.

⁶ If there was no adverse impact in relation to gender, there could be a claim on the basis of less favourable treatment of part-time workers (applicable to males and females working part-time).

Having considered the potential or actual effect of the policy on equality, the authority should be in a position to make an informed judgement about what should be done with the policy. There are four main alternatives or (as the Commission now describes them) 'steps':

1. **No major change** – the analysis demonstrates that the policy is robust and the evidence shows no potential for discrimination; that all appropriate opportunities have been taken to advance equality and to foster good relations between groups.
2. **Adjust the policy** – take steps to remove barriers or to better advance equality, for example, introduce measures to mitigate (lessen) the potential effect.
3. **Continue the policy** – adopt the proposal despite any adverse effect or missed opportunity to advance equality, provided the authority has satisfied itself that the proposal does not unlawfully discriminate. In cases where the authority believes discrimination is not unlawful because it is objectively justified, it is particularly important for the authority to record what the objective justification is for continuing the policy and how the authority reached this decision.
4. **Stop and remove the policy** – if there are adverse effects that are not justified and cannot be mitigated, the authority 'will want to consider removing the policy'. If a policy shows unlawful discrimination, it must be removed or changed.

The Commission recommends that authorities should invite views on their EIA findings. The union should have already been involved especially in relation to employment-related policies.

Step 5: Monitoring and review

Helpfully, the Commission stresses that 'equality analysis [EIA] is an ongoing process that does not end once a policy has been agreed or implemented.' The actual effect of a policy will only be known once it has been introduced. UNISON's position is that the branch must be involved in monitoring the implementation of changes to employment related policies, practices and functions. (This would be expected in any event as part of local collective bargaining arrangements.) Using information on the actual effects of cuts, the branch should negotiate to try to mitigate actual adverse impact.

While it may be very difficult to have an impact on the overall scale of cuts within the current financial year, it may be possible to negotiate to lessen the impact within directorates or departments, or at service or business unit level. Branches should also be alert to factors that could trigger the need for an early review of the policy such as unforeseen consequences for a particular protected group, or new revenue sources becoming available.

The EHRC Guidance no longer refers to the need to have 'action plans' as part of the process of equality impact assessment, but it does call for authorities to make clear and specific arrangements for monitoring and reviewing the effect of policies on equality, including how stakeholders will be engaged. Branches are urged to collect evidence and keep a dossier of the impact of cuts, including hard data (such as

statistics) and quantitative data (testimonies and evidence from members and service users in protected groups who have been adversely affected by, for example, changes in working patterns and reduced or withdrawn services.) This can also be used in local media campaigns to highlight the real impact of cuts.

The EHRC guidance does not specify timescales for monitoring and review but in relation to cuts, the Commission recommended review no later than a year after implementation. In UNISON's view, reviews should be taking place in sufficient time so that the outcomes can inform and have an impact on the planning strategic options for the 2012/13 budget.

Step 6: Decision-making and publication

Once the EIA is considered 'sufficiently robust and detailed to properly inform decision-making', the Commission 'recommends that a senior manager / board member signs off the equality analysis [EIA]; and that sign-off includes 'how it has been used to inform the policy and support decision-making' (*Equality Analysis and the Equality Duty*, page 20).

If the branch takes the view that an EIA is not 'sufficiently robust and detailed to properly inform decision-making' and it fails to persuade the authority to reconsider or delay signing off or a decision being made, the UNISON Equality Duties Protocol should be followed and the appropriate model letter should be issued to the authority. This could occur where the authority has followed Commission guidance but has nevertheless produced an inadequate impact assessment.

It may be that the Protocol could (and should) be triggered at an earlier stage if the authority fails to adhere to EHRC good practice in respect of a fundamental aspect of the EIA process itself.

In order to comply with the GED, the authority's decision-making should be based on a clear understanding of the effects on equality. 'This means that the person who ultimately decides on the policy has to be fully aware of the findings and have due regard to them in making decisions' (EHRC *Equality Analysis and the Equality Duty*, page 20). This would apply to senior officers authorised to take executive decisions and elected members.

In regard to significant cuts proposals, the branch could check that the agenda papers going to councillors (with decision-making powers) enable them to be fully aware of the findings; and that they are aware of the need to have 'due regard' to the PSED. The relevant council minutes can be a useful source of evidence as to discussions that have taken place.

In general, branches should be checking with authorities that arrangements are in place for informing and/or training the relevant staff and elected members as to the requirements of the PSED and, in particular, their responsibilities.

c. A suggested 'standard format' for equality analysis/impact assessment

There is no statutory format for assessing equality impact and no legal requirement to put this information in one document. The EHRC Guide *Equality Analysis and the Equality Duty* recommends the following suggested 'standard format':⁷

- The person responsible for the policy
- The aims of the policy
- The key people that are involved, for example, decision-makers and staff implementing it
- Relevance of the policy to the different arms of the duty and the different protected groups
- What equality information is available, including any evidence from your [the authority's] engagement
- What information gaps exist
- What engagement has been done regarding this policy, and the results of this
- What the actual or likely effect of the policy is, regarding the arms of the GED and the protected groups
- What steps you will take in response to the findings of your analysis
- How you will review the actual effect of the policy after implementation
- The timescale for implementation
- Sign off of the EA by a responsible officer and a member of senior management

4. Commissioning and Procurement

Authorities must have due regard to equality considerations in order to meet their obligations under the GED. In order to comply with procurement law, they must consider the extent to which equality considerations are relevant and proportionate to the subject matter of the contract.

Therefore as part of the process of 'assessing the relevance of its functions,' the authority's procurement and commissioning policies and practices should be re-examined. For example, do they have due regard to the newly protected groups?

Whenever a function is carried out by an external supplier, the authority remains responsible for meeting the GED. This means building equality considerations into the appropriate stages of the commissioning and procurement processes, where relevant and proportionate, including contracts let under private finance initiatives.

The requirement to comply with the GED applies to all procurement regardless of value, although the value of the contract may impact upon the relevance and proportionality of equality considerations. The Commission recommends that as a minimum, authorities should include contract conditions which:

- prohibit the contractor unlawfully discriminating under the Equality Act
- require them to take all reasonable steps to ensure that staff, suppliers and subcontractors meet their obligations under the Equality Act

This includes obligations to conform to the equal pay provisions of the Equality Act.

⁷ *Equality Analysis and the Equality Duty*, page 19.

The *Interim Guidance for UNISON Branches on the Public Sector Equality Duty* states: 'Generally speaking, UNISON negotiators should be putting pressure on employers to develop procurement processes which:

- Favour the service delivery option which most fully complies with meeting the equality duty, specifically including the option to keep services in-house
- Ask contractors detailed questions about equality policies and practices. Employers should be obtaining tangible evidence that the contractor supports and promotes equality in their employment practices
- Include equality criteria when contract compliance indicators are being drafted
- Make it clear that the contractor is responsible for meeting the GED in the delivery of the services being contracted out.'

Authorities also need to have robust processes in place to review the contractor's performance generally and specifically on any equality conditions in the contract. In the section of this Guidance which sets out examples of how branches can respond to cuts proposals, example 12 covers a proposal to outsource services and gives more information on what an EIA should involve at the options appraisal stage and the short-listing or selection stage.

Contractors who are delivering services on behalf of a public authority should be asked how they intend to comply with the GED. To an extent that is relevant and proportionate, this [could include contractors carrying out EIAs](#). Apart from the PSED, as employers, contractors must abide by the provisions of the Equality Act 2010 in regard to equal pay and discrimination and other employment rights legislation.

5. Principles established in respect of the previous equality duties

The following principles established under the previous equality duties to ensure public authorities comply with the general equality duty continue to apply:

- Those who exercise its functions (for example, its staff and leadership) are aware of the duty's requirements. Compliance involves 'a deliberate approach and conscious state of mind'.⁸ This means that decision-makers must be fully aware of the implications of the duty when making decisions about their policies and practices.
- The duty is complied with before and at the time that a particular policy is under consideration and a decision is taken. A public authority cannot satisfy the duty by justifying a decision after it has been taken.
- Consideration of the need to advance equality forms an integral part of the decision-making process. The duty must be exercised in such a way that it influences the final decision.
- Any third parties exercising public functions on behalf of a public authority are required to comply with the duty, and the public authority must ensure that they do so in practice. This is because the duty rests with the public authority even if they have delegated any functions to a third party.

⁸ *R (Brown) v Secretary of State for Work & Pensions* [2008] EWHC 3158 (Admin).

- Regard is given to the need to advance equality when a policy is implemented and reviewed.

6. Challenging Equality Impact Assessment

This Guidance emphasises that branches should aim to secure their objectives through negotiation deploying legal and other arguments as part of their negotiating strategy. If this fails, branches should contact the regional service group in the first instance. This section explains the different formal routes for challenging employers.

If there are no processes in place to show that equality issues have been taken into account, there is a risk of successful legal challenge. Branches should use the UNISON equality duties protocol if the Council does provide evidence of impact assessment, undertakes an inadequate assessment or ignores the outcomes. The equality duties protocol includes model letters for branches to send to employers and UNISON's procedures for taking further action including referral to the EHRC.

Branches are reminded that litigation should not be seen as a substitute for negotiation. The priority for UNISON (and the EHRC) will be to take clear strategic cases. In addition the union will only refer to the EHRC and/or take cases on proposals affecting UNISON members rather than proposals impacting on service users.

The EHRC has responsibility for monitoring and enforcing the equality duty. It has the power to bring judicial review proceedings or issue compliance notices if it thinks a public body has not complied with the Equality Duties. However the Commission's preferred strategy is to promote compliance and it will usually only take formal enforcement action where efforts to encourage compliance have failed.

Legal advice must be taken on the merits of challenging the authority's justification for continuing with a proposal. In accordance with the Equality Duties Protocol your Regional Head of Local Government should be asked to arrange for an assessment by the Service Group and Legal Services. As previously mentioned, any proposed changes to single status structures or pay related conditions must be automatically notified to the Service Group via to Legal Services.

When forwarding the request to the regional head of local government the branch should include supporting evidence namely:

- A copy of the EIA or council's evidence of assessment of equality impact
- The employer's statement on the need for changes to terms and conditions (if not recorded in the above)
- Details of the amount that the employer believes the proposal will save and the detailed information used to arrive at that figure
- The data which shows the proposal has considerably or significantly negative impact on one protected group compared to the non protected group
- The employer's evidence (if any) on proposed steps to mitigate the adverse impact

To help assess whether the authority may have failed to comply with the GED, the UNISON Equality Duties Protocol includes a checklist for completion by any branch wishing a potential judicial review to be considered. The completed checklist must be sent with as much information as possible **within one week of the relevant decision** to the Regional Service Group who will immediately forward it to UNISON Legal Services. Branches must be aware that the test for succeeding in judicial review is very high.

It is also important for members to understand that the different routes to challenge authorities' decisions produce different remedies. In general, only employment tribunal and county (and equivalent Scottish) court claims will result in compensation for individuals (where their claim succeeds). Challenges to the administrative decisions of public authorities do not normally result in the payment of compensation to individuals – the main purpose of such challenges is to get the authority to behave lawfully, for example, to carry out equality impact assessment properly, or to re-visit a decision that (it is argued) would breach the GED in some respect.

Aside from compliance with the PSED and discrimination law, there may be relevant points to be made in negotiation concerning possible breaches of the employment rights of employees, including rights to consultation over redundancy; unlawful deduction of wages; and wrongful dismissal. Again, immediate advice should be sought if negotiations fail.

A proposal that has a disparate impact but is not legally challengeable needs to be dealt with as a collective bargaining and /or campaigning issue. This document is part of a set of guidance issued by the Service Group to help challenge cuts. Negotiators should refer to the other Service Group advice signposted in the resources section.

Branches can also write to the council's Monitoring Officer who has specific duties placed on them under the section 5 of the Local Government and Housing Act 1989. The Monitoring Officer is required to prepare a report to Council where it appears to her/him that the authority has or is about to do anything which would be in contravention of the law or which would constitute maladministration. Before publishing any report the Monitoring Officer is under a duty to consult with the Chief Executive and the Chief Finance Officer (also known as the Section 151 Officer.) Depending on whether or not the function concerned is an executive one the report has to be considered either by full council or by the executive and the publication of the report has the effect of suspending the proposed action pending consideration of the report.

Branches can also invoke the NJC/SJC disputes procedure. The Green and Red Book constitutions both set out the role of the NJC and SJC to settle differences in interpretation/ application of the national agreements and to resolve disputes where there is a failure to agree at local or provincial level. Therefore if there is a local industrial dispute the sides can agree to refer it to provincial and national level for the NJC/SJC to assist in resolving it.

The NJC and SJC will not normally have the power to impose a particular resolution of a dispute unless both sides agree to it but in matters of interpretation of the national agreements their decision is final. However, this role in settling differences in interpretation/application does not override the specific procedure set out in Part 1 of the Green and Red Book for dealing with local failures to agree Part 3 changes. This provides a procedure for ultimate referral to ACAS if so recommended by the Provincial Council or SJC joint secretaries.

Equality Impact Assessment: Cuts to Jobs Pay and Conditions

Local Government Action Plan

Scoping the Equality Impact Assessment

- Seek a meeting with management to discuss (a) the impact of this year's budget in relation to cuts and (b) the council's strategy and plans for making savings next year
- Insist that any proposals and effects of implemented cuts affecting jobs, pay and conditions, service delivery or working methods are subject to equality impact assessment (sometimes called 'equality analysis') and that UNISON is fully consulted and involved in this process from the outset.
- Agree methods for the equality analysis using the *EHRC Guidance on Equality Analysis and Making Fair Financial Decisions* as a starting point.
- Seek UNISON representation on the authority's internal group which is overseeing the EIAs and, where possible, on working groups carrying out EIAs, or at least access to the statistical data to enable the union to conduct its own analysis
- Check with the authority that it has made arrangements to train appropriate staff in regard to the requirements of the Public Sector Equality Duty and the new requirements; and that elected members will receive briefings on the PSED and their responsibilities
- If the employer does not conduct a full EIA on proposals affecting jobs, pay and conditions, service delivery or working methods stay in negotiations but reserve the union's position

Branch Recruitment and Organisation

- Lead branch officers, branch equality officers, activists and members will need to work together to develop branch input into EIA and identify negotiating strategies:
- - Lead branch officers - to lead negotiations
 - Branch equality co-ordinators - to ensure EIAs are used as a bargaining and organising tool and to act as key advisers in negotiations
 - Self organised groups – to provide experiences and understanding for negotiating on EIAs
 - Stewards – to help members get involved and evidence impact on their working lives and service delivery

- Members – to participate and use the union to express their collective view
- Identify branch negotiating team and time off, facility and training needs for branch involvement.
- Meet with your regional organiser to discuss branch involvement and training needs.
- Plan a thorough recruitment and organisation campaign to ensure that UNISON density is as high as possible in your council and that you have active stewards in every workplace.
- Aim to have equality reps in every workplace
- Get every existing UNISON member to recruit at least one non-member
- As changes are proposed and/or take effect, bring together affected members to discuss how they can get involved in the employer's consultation and alternative options for saving money or mitigating the impact.
- Brief members **and** non-members on developments and about UNISON's involvement on their behalf

Intelligence Gathering

- Read your Council's current Equality Scheme(s) and policies. NB: English authorities are no longer required to have equality schemes. The forthcoming specific duties are highly likely to require the setting of equality objective(s.) This should reflect equality priorities.
- Request and check the information which listed public authorities in England (and non-devolved listed bodies) must publish by 31 December 2011, to demonstrate compliance with the General Equality Duty.
- Use the Service Group's Guide to Local Government Finance. Arrange training on your council's accounts for key activists.
- Use the Service Group's Redundancy pack
- Map the equalities make-up of your workforce - remembering some NJC/SJC conditions may apply to other bargaining groups. Request core data broken down by bargaining group from employer using model template 1.
- Gather relevant internal survey results or customer feedback data.
- Branch Equality Co-ordinators can help branch negotiators by identifying and analysing information about the employer's equality performance

- Consult UNISON's Bargaining Information System (BIS) for relevant regional and national data.

Campaigning

- Contact service user groups on threats to services and make sure they input into the EIA consultation and are involved in any campaigns
- Remember that members are also service users and part of the local community and their experiences and contacts can be used to build up alliances
- Make sure that sympathetic councillors receive a copy of any briefings to members and service users, including information about the new PSED.
- Keep a dossier of information about the impact of the cuts on the workforce and local service users and community groups – this will be useful for media purposes.
- Make links with the local press and media and brief them regularly
- Keep your Region and the Local Government Service Group informed of all developments on localgovernment@unison.co.uk

Inputting to the EIA

- Insist proposals affecting jobs, pay and conditions, service delivery or working methods are subjected to a full EIA
- Ask the questions set out in this guidance to focus the EIA

Analysing the Council's methodology

- If the branch is conducting its own analysis, send the EIA cuts model letter, customised as necessary, to:
 - Request a statement from the employer on the need for changes to terms and conditions and the aims of the proposal
 - Request details of the amount that the employer believes the proposal will save and the detailed information used to arrive at that figure
 - Request the proposed data (using template information if applicable)
- Check the analysis on the potential for discrimination or significant adverse impact on protected groups.
- Calculate the percentage of the protected group/s affected by the changes and the percentage of those who are not. (Refer back to core workforce data requested from the employer.) Alternatively, insist that the employer does the calculations and check the results.

- If a protected group is particularly disadvantaged by the proposal when compared to another group affected by the proposal, this could be indirectly discriminatory.
- Seek advice on your analysis and findings from your regional organiser as necessary.
- Find out from those affected exactly what the changes will mean to them.
- What evidence is there of steps to mitigate adverse impact?
- Determine whether these changes are the only means of making savings or whether there are alternative proposals which could be considered.
- Use relevant information provided by members to negotiate for the retention of the current arrangements or better alternatives than those proposed.
- Any proposals to change implemented single status pay and grading structures or pay related conditions must be referred for assessment to Legal Services and the Service Group by the regional organiser.
- For all other proposals where the branch's analysis and findings differ from the council's submit the branch's calculations back to the employer and ask for the analysis to be reworked, with proposals to be reviewed for alternatives /mitigation.
- If an authority imposes cuts without consultation and/or consent, it could face claims for breach of contract, unfair dismissal and constructive dismissal.

Challenging the EIA

- Follow the UNISON Equality Duties Protocol if the employer fails to produce an EIA or performs an inadequate one, or continues with a policy where the EIA findings reveal potentially unlawful discrimination
- Seek legal advice via your Regional Organiser on whether discrimination or equal pay claims can be mounted.
- Take advice from your regional organiser if the branch thinks the authority's justification for continuing with the proposal is legally challengeable.
- Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.
- Advise the regional service group if the employer makes proposals to change any provision in Part 2 of the NJC national agreement – Part 2 conditions can only be changed at national level by NJC agreement
- Invoke the NJC/SJC dispute procedures

- Remember - an impact that is adverse but is not legally challengeable needs to be dealt with as a collective bargaining/campaigning issue.
- There may be other breaches e.g. National Minimum Wage Regulations or Health and Safety. Seek legal advice via your regional organiser.
- Keep a dossier on the effects of employment-related cuts

Monitoring and Review

- Insist on a review of the proposal as implemented no later than one year on from implementation to recheck the findings. (This may need to happen earlier for mitigation or adjustments to be taken into account in the next budget-setting round.)
- Be alert to developments that should trigger the need for an earlier review, such as changes to service provision as a result of unforeseen factors (such as Government directives or new - or withdrawn - sources of funding)
- Monitor how proposals inter-relate – cumulative impact may not be apparent where decisions are considered in isolation. Patterns of significance differences affecting an equality group should be investigated.
- The forthcoming specific duties are highly likely to require the setting of equality objective(s.) Ask the authority how EIA will influence and feed into the setting of equality objectives (which listed English public authorities must prepare and publish by 6 April 2012).

Service Group Support

- Arrange training on EIAs on cuts to jobs, pay and conditions for key activists. Contact your regional head of local government to organise this.

Equality Impact Assessment: Cuts to Jobs Pay and Conditions

Signposting to further information and guidance

UNISON GUIDANCE

❖ Equality Duties Protocol

This protocol advises branches on what to do if they believe their employer is not meeting their obligations under the equality duties.

<http://www.unison.org.uk/acrobat/B5114.pdf>

❖ Equal Pay Negotiating Strategy and Protocol

This guidance sets out UNISON's strategy on negotiating new pay and grading structures and includes the protocol for litigating equal pay cases

<http://www.unison.org.uk/acrobat/B2765.pdf>

❖ Local Government Redundancy toolkit

This branch toolkit will help you protect members and build up a local campaign. It contains all the information you need to start fighting back.

<http://www.unison.org.uk/localgov/redundancies/resources.asp>

❖ Council Finance – guide for negotiators

The Local Government Service Group has been working with branches and regions to help them understand council finances and council tax. We are beginning to get results in negotiations and campaigns over cuts and redundancies. This guide demystifies council finances. Contact your Regional Head of Local Government to arrange finance training for your branch.

<http://www.unison.org.uk/acrobat/B5124.pdf> (English version)

<http://www.unison.org.uk/acrobat/19092.pdf> (Welsh version)

Scottish and Northern Ireland versions of the Council Finance Guide will be available soon. Contact your regional head of local government for further information.

❖ UNISON Circular LG/36/10 – LGE Advice on Reducing Workforce Costs

This UNISON circular outlines the contents of LGE advice to councils on reducing workforce costs. It highlights key concerns with the approach taken and issues which branches should raise with their councillors and managers. Branches should contact

the Service Group for a copy of the LGE document if they cannot access it from the LGE website through their local authority's subscription.

<http://www.lge.gov.uk/lge/core/page.do?pagelId=119628>

❖ **UNISON Circular LG/69/2010 – Reducing Workforce Costs**

This circular provides branches with guidance about negotiating over employers' attempts to cut pay and conditions in response to the LGE advice on reducing workforce costs.

❖ **Part 3 Conditions – a guide to negotiating**

This advice is provided to help branches and regional organisers negotiate on NJC Part 3 conditions.

<http://www.unison.org.uk/acrobat/B1913.pdf>

❖ **APSE report for UNISON - the Value of Trade Union Involvement to Service Change**

This report looks at 14 case studies and covers a wide range of changes in areas such as care homes, leisure services, and IT systems. They show that early union involvement can help make sure that changes do not necessarily come at the cost of staff.

<http://www.unison.org.uk/acrobat/19226.pdf>

❖ **UNISON Bargaining Support**

Bargaining support have a wealth of advice, reports and statistics on many bargaining issues and can give you detailed reports on organisations, contracts and agreements from the Bargaining Information System. Contact bsg@unison.co.uk
<http://www.unison.org.uk/bargaining/index.asp>

NATIONAL JOINT COUNCIL FOR ENGLAND WALES AND NORTHERN IRELAND

❖ **NJC National Agreement on Pay and Conditions of Service Handbook (the Green Book)**

Branches can order copies from the Local Government Service Group by emailing k.nash@unison.co.uk Versions are available in hard copy or CD-ROM format.

The Part 1 joint guiding principles underpinning the Green Book are outlined in Part 1. These will be useful for branches faced with attacks to conditions which are likely to undermine morale, impact badly on services and result in discrimination.

The principles are to 'support and encourage':

- 'High quality services delivered by a well trained, motivated workforce with security of employment...'
 - 'Equal opportunities in employment; equality as a core principle which underpins both service delivery and employment relations...'
 - 'A flexible approach to providing services...which meets the needs of employees as well as employers'
 - 'Stable industrial relations and negotiation and consultation between local authorities as employers and recognised trade unions'.
- ❖ **NJC Part 2** sets out key national provisions which are for application by all local authorities to all employees covered by the NJC. Part 2 provisions may **not** be modified by **local** negotiation.
 - ❖ **NJC Part 4 guidance on equality impact assessments**

This advice deals with carrying out EIAs on proposals which impact on employment and pay and conditions in local government.

<http://www.unison.org.uk/acrobat/B1905.pdf>

SCOTTISH JOINT COUNCIL

Similar joint guiding principles underpinning the Red Book are outlined in Part 1 which again will be useful for branches faced with attacks to conditions. For further advice and information see

<http://www.unison-scotland.org.uk/localgovt/single1.html>

EQUALITY AND HUMAN RIGHTS COMMISSION

❖ **The Public Sector Equality Duties and Financial Decisions: An Advice Note for Public Authorities (2010)**

The Commission has produced an extremely useful advice note which emphasises that the equality duties are legal obligations which should remain a priority, even in times of economic difficulty and that public authorities should carry out robust equality impact assessments, and consult and involve relevant stakeholders, as part of the decision-making process.

http://www.equalityhumanrights.com/uploaded_files/PSD/31_psdandfinancialdecisions.pdf

http://www.equalityhumanrights.com/uploaded_files/Wales/public_sector_equality_duties_and_financial_decisions-wales.pdf

❖ **Using the Equality Duties to make fair financial decisions**

The Commission's Guide on what is expected of public authorities to comply with the public sector equality duties.

http://www.equalityhumanrights.com/uploaded_files/PSD/using_the_equality_duty_to_make_fair_financial_decisions_final.pdf

❖ **Public Sector Equality Duty (England and non-devolved bodies in Scotland & Wales)**

The Commission has produced five guides on the PSED. These were written before the Government decided, in March this year, to abandon the original draft specific duties for England, and to consult on a new, weaker version. However, the EHRC guidance on the General Equality Duty still applies and UNISON has based much of its advice on EIA on the Commission's guidance on *Equality Analysis*. At the time of writing, the guides were still on the Commission's website with a note to check for updates. UNISON will be issuing additional guidance once the new specific duties are finalised.

❖ **The Essential Guide to the Public Sector Equality Duty (2011)**

This guide to the PSED provides the main overview of the duty requirements. It covers all aspects of the new general and (now superseded) specific duties. Written for public authorities, it explains the duties; what is required (and why); and it sets out a recommended approach for authorities to follow in order to comply with the new requirements. Although it is lengthy (52 pages) it is an essential supplement to the UNISON Interim Guidance. **Note:** the content on the specific duties is no longer applicable.

<http://www.equalityhumanrights.com/>

This guide gives more detailed advice on how to carry out 'equality analysis' or equality impact assessment and best practice.

❖ **Equality analysis and the equality duty**

GOVERNMENT EQUALITIES OFFICE

❖ **EQUALITY ACT 2010: PUBLIC SECTOR EQUALITY DUTY WHAT DO I NEED TO KNOW? A QUICK START GUIDE FOR PUBLIC SECTOR ORGANISATIONS**

A Quick Start Guide which includes the unhelpful sentence about EIA at page 8 'nor is there any practical need to conduct one'.

<http://www.equalities.gov.uk/pdf/110503%20GEO%20General%20EqualityDuty%20guide%20-%20FINAL.pdf>

Example 1

Employer Proposal - a reduction in (basic) pay or a pay freeze

1. Context

The pay spine and rates of pay for each spinal column point (for authorities within NJC/SJC terms and conditions) constitute a binding Part 2 condition and should not be varied locally. Branches should be cautious in supporting employer moves to vary contractual terms (even in the short term) or agreeing changes to local agreements and should seek further advice from your Regional Organiser.

An employer who undertakes a pay freeze or reduction across the board is less likely to be acting discriminatorily than one who imposes a reduction within a selective group or by department.

Equality impact assessment is a tool which can be used to challenge changes in terms and conditions of employment. A number of possible discriminatory considerations come into play, including:

- If an employer proposes to cut or freeze pay only below a certain threshold (or to part time workers only) then this is likely to be discriminatory on gender grounds due to the high proportion of women on low pay.
- If an employer wanted to introduce a pay cut for one department and there was a disproportionate number of women or women with childcare responsibilities in that department (or any other protected group) then that might also be discriminatory.
- Careful consideration should be given to how benefits such as pension provision and salary sacrifice schemes, which are pegged to salary levels, will be affected by any cut in pay.
- Look at more than just salary. If an a local authority cuts wages but maintains a bonus scheme or PRP when cutting pay this could be discriminatory if those receiving the bonus are predominately male (looking at pay overall). This means that a higher proportion of those receiving bonuses or PRP will not be as adversely affected (likely to be male) by a reduction in basic pay.

Also check the impact on NJC /SJC pay on the lowest scale point since it is only a few pence above the minimum wage. Local authorities that cut wages face the risk of falling below the minimum wage.

2. Branch Action

Report any attempt to vary this condition to the region and the Service Group.

2.1 If the branch is doing its own analysis working from raw data use the EIA cuts model letter (customised as necessary) to:

- Request a statement from the employer on the need for changes to terms and conditions and the aims of the proposal
- Request details of the amount that the employer believes the proposal will save and the detailed information used to arrive at that figure
- The data you need will vary depending upon how the pay freeze or cut is implemented

2.2 Find out from those affected exactly what the change will mean for them.

2.3 Determine whether these changes are the only means of making savings or whether there are alternative proposals which could be considered

3. Negotiating Points

3.1 If one of the protected groups is particularly disadvantaged in comparison with another group affected by the proposal, this could be indirectly discriminatory.

3.2 Use any relevant information from members to negotiate for the retention of the current arrangements or better alternatives than those proposed.

3.3. An authority imposing cuts without consent or consultation faces claims for breach of contract. If they dismiss members and offer them new employment on reduced pay, they could face unfair dismissal claims.

3.4 Pursuing a legal action over an imposition rather than developing a mobilising and campaigning platform is less likely to lead to a positive outcome. Further advice should be sought on any proposal to reduce or freeze pay from your Regional Organiser.

4. Remedies

4.1 If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duties Protocol to challenge them.

4.2 Apply the NJC/SJC disputes resolution procedure.

4.3 Seek legal advice via your Regional Organiser on whether discrimination or breach of contract claims can be mounted and whether the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and the National Minimum Wage Regulations 1999 have been breached.

- 4.4 Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

Example 2

Employer Proposal: a suspension of Incremental Progression

1. Context

Incremental progression is an important part of the local government pay structure. Proposals to freeze increments could raise potential sex equality issues as there may be concentrations of female employees on the lower spinal column points, with male employees being concentrated towards the top end of the grades. In such circumstances, freezing incremental progression could impact disproportionately on female employees.

In legal terms, if implemented, freezing incremental progression applied equally to men and women but which puts women at a particular disadvantage compared to men would be prima facie evidence of indirect sex discrimination. Assuming the evidence did demonstrate that women were disproportionately affected, the freeze would be discriminatory unless the employer could show that freezing incremental progression was a proportionate means of achieving a legitimate aim.

If there is a right to contractual entitlement to incremental progression, then an equal pay challenge may be possible. In single status structures where job evaluation has resulted in men and women doing equal work being assimilated to the same grade, any differences in pay are only permissible if the difference is caused by a material factor which is not to do with the sex of the jobholder. If, for example, a freeze in the payment of increments meant that a female employee remained on a spinal column point below a male employee even though she had completed the minimum number of years service to qualify for the same rate of pay as him, she is being denied equal pay. The most obvious situation where this could happen is where the male comparator is on the top SCP within his grade and the female claimant is 'stuck' on the SCP immediately below him. In this scenario, she may also be able to show that females in her grade are disproportionately affected by the freeze.

It is likely that a new single status pay and grading structure will have proportionately more men will be assimilated at the top of a grade and proportionately more women assimilated at the bottom of a grade because of the traditional method of assimilation in local government. Through incremental progression, women move up the scale and any remaining equal pay gap narrows. If incremental progression is frozen or ceased this prevents a narrowing of the pay gap as shown in the worked example below. If, as a result, equal pay gaps become significant in statistical terms, the employer is at risk of equal pay claims.

Remarks by the EAT President (that were 'obiter' i.e. not part of the judgment in relation to an age discrimination case)⁹ have caused speculation that there may be scope to an employer to rely on the need to make savings in staff remuneration

⁹ *Woodcock v Cumbria Primary Care NHS Trust* BAILI case no. [2010] UKEAT 0489_09_1211

alone as a material factor defence to an equal pay claim. However, this is not established case law although negotiators should note that this is a developing area of law.

It will be more difficult for an employer to rely on costs even combined with other objectives or aims where the discrimination is obvious and substantial. It will be difficult for an employer successfully to rely on costs where the cost is the same as or less than the discrimination itself (which may well be the case if the tribunal were to find that the employer's aim is to reduce expenditure and the amount to be saved equals the loss to affected employees). It also remains to be seen whether (and in what circumstances) a temporary, short term freeze might be considered a proportionate response in achieving a legitimate aim.

The key point is that branches should ensure that any such proposal is equality analysed so that any potential adverse impact is made visible and if it is unfair or potentially discriminatory, the employer thinks again, having been made aware of the legal risks of persisting with this type of pay cut. It is also important to stress to authorities that have made commitments in their gender equality schemes, and subsequent equality objectives, to address gender pay inequality - that freezing increments is likely to widen an existing overall gender pay gap.

2. Branch Action

2.1 If the branch is doing its own analysis working from raw data send the EA cuts model letter customised as necessary and ask the employer for:

- the pay and grading structure giving the minimum and maximum scale points for each grade
- the number of employees by gender on each scale point as at a recent fixed point in time (e.g. end of the financial year - 31 March; start of the financial year - 1 April to the end of the first quarter - 30 June)

Here is a worked example of the effect on two grades. The figures have been chosen to illustrate the issue and may not be typical. It is assumed that there is a contractual right to the payment of increments. The data required for analysis is shown below:

Table 1: Increment freeze

Grade	SCP	£ PA	No of W	No of M	Total basic pay W £	Total basic pay M £
1	4	12145	0	0	0	0
	5	12312	40	1	492480	12312
	6	12489	0	3	0	37467
	7	12787	5	20	63935	255740
Total			45	24	556415	305519
2	8	13189	2	0	26378	0
	9	13589	15	1	203835	13589
	10	13874	2	4	27748	55496
	11	14733	2	20	29466	294660

Total			21	25	287427	363745
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In Table 2 the annual increment has been applied so, for example, the 40 women who were on SCP5 are now on SCP6.

Table 2: Annual increment applied

Grade	SCP	£ PA	No of W	No of M	Total basic pay W £	Total basic pay M £
1	4	12145	0	0	0	0
	5	12312	0	0	0	0
	6	12489	40	1	499560	12489
	7	12787	5	23	63935	294101
Total			45	24	563495	306590
2	8	13189	0	0	0	0
	9	13589	2	0	27178	0
	10	13874	15	1	208110	13874
	11	14733	4	24	58932	353592
Total			21	25	294220	367466

Comparing the totals in this example, women in grade 1 lose £7080 by not getting an increment while men lose £1071. In grade 2, women lose £6793 and men lose £3721 as can be seen as follows:

Table 3: Grade total pay difference

	Grade 1		Grade 2	
	£ Women	£ Men	£ Women	£ Men
Increment Freeze	556415	305519	287427	363745
Increment paid	563495	306590	294220	367466
Difference	7080	1071	6793	3721

To show that the 'increment freeze' has stopped progress towards achieving equal pay look at the next table which shows two options - an increment freeze or the increment is paid. In this example the decision to freeze increments prevents the equal pay gap in both grades being narrowed by 1%. If the increment is applied the gap narrows from 3% to 2% in grade 1 and from 6% to 5% in Grade 2.

Table 4: Grade gender pay gap

	Options	No of W	No of M	Total of W pay £	Total of M pay £	Ave W pay £	Ave M pay £	W as % of M pay
Grade 1	Increment Freeze	45	24	556415	305519	12365	12730	97%
Grade 1	Increment Paid	45	24	563495	306590	12522	12775	98%
Grade 2	Increment Freeze	21	25	287427	363745	13687	14550	94%

Grade 2	Increment Paid	21	25	294220	367466	14010	14699	95%
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3. Negotiating Points

- 3.1** Use this analysis to persuade the employer it is at risk of sex discrimination/ equal pay claims.
- 3.2** The lack of progression can impact on the morale of staff, particularly women if they cannot progress to the rate of pay of potential male comparators.
- 3.3** Experience and expertise are not being fully measured.
- 3.4** Be aware of employers introducing spot points for some grades or occupations.

4. Remedies

- 4.1** If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duties Protocol to challenge them.
- 4.2** Apply the NJC/SJC disputes resolution procedure.
- 4.3** Seek legal advice via your regional organiser on whether discrimination/ equal pay or breach of contract claims can be mounted.
- 4.4** Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

Example 3

Employer Proposal – requirement to work part time or reduced working hours

1. Context

Part-time workers have the same statutory employment rights as full-time employees. There is no requirement to work a minimum number of hours to qualify for employment rights. Workers are protected from discrimination on the grounds of their part-time status through the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

A requirement for part-time workers to work full time may constitute indirect sex discrimination. However, this situation is unlikely in the current climate with the emphasis upon reducing working time and reducing costs. A reduction in hours for those working part time and not full time is likely to be indirectly discriminatory in every local government workforce due to the high proportion of women working part time. The data requirements are straightforward (see below) in order to undertake an EA but perhaps more importantly is the strong mobilising potential of attacking the lowest paid and most vulnerable members of the workforce.

When an employer makes a reduction in working hours below an operational grade or within an occupational group and not above it could be indirectly discriminatory to impose part time working, or reduced hours, on workers below a certain pay threshold as most of those workers may be women and/or maybe part of another affected group. In addition, fewer part-time jobs are available in higher-level occupations, meaning that many highly-qualified women are crowding into lower-level part-time jobs, representing a waste of skills and experience. Therefore any change as the one just described exacerbates an already negative situation. Such a requirement would put women at a disadvantage because women are more likely to combine paid work with caring responsibilities and work non- standard hours.¹⁰ The employer will have indirectly discriminated against the woman because of her sex unless the requirement can be objectively justified.

2. Branch Action

Regardless of any proposed change to working hours it is good practice to undertake an equality analysis on present levels of part time and full time working across the workforce. You will know the number of part-time men and women from requesting the core workforce data.

2.1 If the branch is doing its own analysis working from raw data, send the EIA cuts model letter, customised as necessary. The additional data required is:

¹⁰ As tribunals note societal changes in regard to working patterns, demographics, and the sharing of caring responsibilities, the previously accepted assertion – as a matter of general knowledge – that women predominate as carers – may not be ‘automatically’ accepted by tribunals without evidence to support it.

- The % of part time men affected by grade as a % of the total male workforce (*calculate the number of part time men split by scale or grade against the total number of male employees*)
- The % of full time men affected by grade as a % of the total male workforce (*calculate the number of full time men split by scale or grade against the total number of male employees*)
- The % of part time women affected by grade as a % of the total female workforce (*calculate the number of part time women split by scale or grade against the total number of female employees*)
- The % of full time women affected by grade as a % of the total female workforce (*calculate the number of full time women split by scale or grade against the total number of female employees*)

Negotiators should also look at disability, age and race; and consider the implications for other protected groups where the branch is aware of any particular issues or if sufficient data is available currently to carry out an analysis.

2.2 The above data will help negotiators understand if discrimination has taken place through a selective reduction in hours by grade or occupational group. It could also show the reduction in hours below a certain pay threshold, and not above, is discriminatory against women because their normal working pattern below that threshold is part-time. Not extending a similar working pattern on higher scales reduces female advancement into higher paid jobs. Negotiators could ask the employer why that situation exists, perhaps as a cultural norm within the workplace, why more flexible working practices, proportionately, amongst women on higher grades is not as prevalent as it is on lower grades and what their remedy is?

In addition, one important means to estimate the 'quality' of part-time employment could be to undertake an equality analysis on the 'training hours' undertaken by full time and part-time staff, as follows:

- Training hours for male/female part time staff by occupation
- Training hours for full time male/female staff by occupation

Comparison between the training given to full and part time staff by gender and occupation will give one indication of the quality of part time work.

2.3 Find out from those affected exactly what the changes will mean to them.

2.4 Determine if these changes are the only means of making savings or whether there are alternatives proposals which could be considered.

3. Negotiation Points

3.1 If the changes impact more on one protected group than another this may represent indirect discrimination

- 3.2** Part time workers form the majority of those in work below NJC scale point 23 and below but not above. As the majority of those working part time are women it can be surmised that a lack of part time opportunities further up the pay spine is one of the substantive reasons for the gender pay gap.
- 3.3** If members' hours fall this could impact on the working tax credits they receive, pension entitlements and affect other benefits too. To fully understand this situation a member survey would need to be undertaken. Raising this issue is likely to be a strong campaigning and mobilising factor.
- 3.4** If an authority imposes without consultation and/or consent it could face claims for dismissal/ breach of contract.
- 3.5** Use relevant information provided by members to negotiate for the retention of current arrangements or better alternatives than those proposed

4. Remedies

- 4.1** If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duties protocol to challenge them.
- 4.2** Apply the NJC/SJC disputes resolution procedure.
- 4.3** Seek legal advice via your regional organiser on whether claims for discrimination/ dismissal or breach of contract or a breach of the part time workers regulations can be mounted.
- 4.4** Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

Example 4

Employer Proposal - Changes to Premium Payments

1. Context

Some employers may propose cuts or removal of unsocial hours payments, including weekend enhancements, night working, Saturday and Sunday overtime working, weekday overtime working, evening working, shift working and public and statutory holiday working. An Equality Analysis is a tool which can be used to challenge changes in terms and conditions of employment.

2. Branch Action

2.1 If the branch is doing its own analysis working from raw data send the EIA cuts model letter, customised if necessary, to:

- Request a statement from the employer on the need for changes to terms and conditions and the aims of the proposal
- Request details of the amount that the employer believes the proposal will save and the detailed information used to arrive at that figure
- Request the proposal data using the templates as applicable.

2.2 Calculate the % of equality groups affected by the changes and the %s of those who are not. (Refer back to core workforce data requested from employer at the outset.)

2.3 Find out from those affected exactly what the changes will mean to them.

2.4 Determine whether these changes are the only means of making savings or whether there are alternative proposals which could be considered.

3. Negotiating Points

3.1 If the changes impact more on one protected group than another, this may represent indirect discrimination and may result in unequal pay

3.2 If an authority imposes cuts without consultation and/or consent, it could face claims for breach of contract.

3.3 Use relevant information provided by members to negotiate for the retention of the current arrangements or better alternatives than those proposed.

3.4 Detrimental changes to premium payments could impact on service provision with fewer people willing to work unsocial hours.

4. Remedies

- 4.1** If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duties Protocol to challenge them.
- 4.2** Apply the NJC/SJC disputes resolution procedure.
- 4.3** Seek legal advice via your Regional Organiser whether discrimination, dismissal or breach of contract claims; equal pay claims or claims under the Part- Time Workers Regulations 2000 can be mounted.

Example 5

Employer Proposal - Changes to Car Allowances and Mileage Allowances

1. Context

Some employers may propose cuts to car allowances and mileage allowances as a means of making savings or moving to a greener agenda. An Equality Impact Assessment is a tool which can be used to challenge changes in terms and conditions of employment.

2. Branch Action

- 2.1** If the branch is doing its own analysis working from raw data end the EIA cuts model letter, customised as necessary, to
- Request a statement from the employer on the need for changes to terms and conditions and the aim of the proposal
 - Request details of the amount that the employer believes the proposal will save and the detailed information used to arrive at that figure
 - Request the proposal data on a casual and essential user basis using the templates as applicable.
- 2.2** Calculate the % of protected groups affected by the changes and the %s of those who are not. (Refer back to core workforce data requested from employer at the outset.)
- 2.3** Find out from those affected exactly what the changes will mean to them.
- 2.4** Determine whether these changes are the only means of making savings or whether there are alternative proposals which could be considered.

3. Negotiating Points

- 3.1** If the changes impact more on one protected group than another, this may represent indirect discrimination.
- 3.2** Use relevant information provided by members to negotiate for the retention of the current arrangements or better alternatives than those proposed.
- 3.3** If an authority imposes cuts without consultation and/or consent, it could face claims for dismissal or breach of contract.

3.4 Any proposal to pro rata car allowance payments according to hours worked will breach Part 2 key national provisions, which may be deemed to be incorporated into individual contracts. Any proposal to remove car allowances will also breach Part 2 key national provisions, which may be deemed to be incorporated into individual contracts. If so, any change could represent a breach of contract and/or a breach of the national agreement.

4. Remedies

4.1 If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duties Protocol to challenge them.

4.2 Apply the NJC/SJC disputes resolution procedure.

4.3 Seek legal advice via your Regional Organiser whether discrimination dismissal or breach of contract claims or a breach of the part time workers regulations can be mounted.

4.4 Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

Example 6

Employer Proposal – a requirement to move to shift working

1. Context

An employer may require staff to move to a shift working system and this may not suit their domestic circumstances and responsibilities.

An Equality Impact Assessment is a tool which can be used to challenge changes in terms and conditions of employment.

2. Branch Action

- 2.1** If the branch is doing its own analysis working from raw data send the EIA cuts model letter, customised as necessary, to:
- Request a statement from the employer on the need for changes to terms and conditions and the aim of the proposal
 - Request details of the amount that the employer believes the proposal will save and the detailed information used to arrive at that figure
 - Request the proposed data using the templates as applicable
- 2.2** Calculate the % of the protected groups affected by the changes and the % of those who are not.
- 2.3.** Find out from those affected exactly what the changes will mean to them.
- 2.4** Determine whether these changes are the only means of making savings or whether there are alternative proposals which could be considered.

3. Negotiating Points

- 3.1** A requirement to work shifts could be indirectly sex discriminatory as more women than men have responsibility for care.

In the case of *London Underground Limited v Edwards*, the Court of Appeal held that London Underground indirectly discriminated against Ms Edwards, who was a single parent with a young child, when it introduced a shift system which made it impossible for her to continue in her employment and care for children.

While *Edwards* is still good law, recent cases have more closely scrutinised the accepted notion that women predominate as carers and, while these cases are fact-specific, a number of women claimants have failed in successfully challenging changes to their working arrangements because the employer has succeeded on the grounds of objective justification.¹¹

¹¹ See *Shackletons Garden Centre Ltd v Lowe* [2010] EqLR 138 EAT; *Hacking and Paterson & anor v Wilson*, [2011] EqLR 18 EAT

- 3.2** Changes to shift working arrangements could discriminate against those with a disability.

In *Chief Constable of Dumfries and Galloway Constabulary v Adams*, EAT 0046/08, the claimant suffered from ME and was dismissed for being unable to carry out 24-hour operational shift duties. The argument revolved around whether night work was a 'normal day to day activity' in terms of the Disability Discrimination Act. The employer argued it was not, but the EAT held that night work was a normal day to day activity and remitted the case to the ET to proceed with A's claim that he was disabled for the purposes of the DDA.

- 3.3** If an authority imposes cuts without consultation and/or consent, it could face claims for dismissal or breach of contract.

- 3.3** Use relevant information provided by members to negotiate for the retention of the current arrangements or better alternatives than those proposed.

4. Remedies

- 4.1** If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duties Protocol to challenge them.

- 4.2** Apply the NJC/SJC disputes resolution procedure.

- 4.3** Seek legal advice via your Regional Organiser whether discrimination or breach of contract claims or a breach of the part time workers regulations can be mounted.

- 4.4** Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

Example 7

Employer Proposal – a requirement to move to compulsory flexible working

1. Context

An employer may require staff to undertake a range of atypical working practices, which do not suit their domestic circumstances and responsibilities, although of course voluntary flexible working is to be welcomed.

An Equality Impact Assessment is a tool which can be used to challenge changes in terms and conditions of employment.

2. Branch Action

2.1 If the branch is doing its own analysis working from raw data send the EIA cuts model letter, customised as necessary, to:

- Request a statement from the employer on the need for changes to terms and conditions and the aim of the proposal
- Request details of the amount that the employer believes the proposal will save and the detailed information used to arrive at that figure
- Request the proposed data using the templates as applicable

2.2 Calculate the % of protected groups affected by the changes and the % of those who are not.

2.3. Find out from those affected exactly what the changes will mean to them.

2.4 Determine whether these changes are the only means of making savings or whether there are alternative proposals which could be considered.

3. Negotiating Points

3.1 A requirement to undertake compulsory flexible working could be indirectly sex discriminatory as more women than men have responsibility for care.

(See the comments on *Edwards* and recent cases under Example 6).

3.2 Changes to shift working arrangements could discriminate against those with a disability.

(See the comments at Example 6).

3.3 If an authority imposes cuts without consultation and/or consent, it could face claims for dismissal or breach of contract

3.4 Use relevant information provided by members to negotiate for the retention of the current arrangements or better alternatives than those proposed.

4. Remedies

- 4.1** If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duties Protocol to challenge them.
- 4.2** Apply the NJC/SJC disputes resolution procedure.
- 4.3** Seek legal advice via your Regional Organiser whether discrimination dismissal or breach of contract claims or a breach of the part time workers regulations can be mounted via your Regional Organiser.
- 4.4** Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

Example 8

Employer Proposal – changes to sickness payments

1. Context

Some employers may propose cuts in sickness payments and leave. An Equality Impact Assessment is a tool which can be used to challenge changes in terms and conditions of employment.

2. Branch Action

- 2.1** If the branch is doing its own analysis working from raw data send the EIA cuts model letter, customised as necessary, to:
- Request a statement from the employer on the need for changes to terms and conditions and the aim of the proposal
 - Request details of the amount that the employer believes the proposal will save and the detailed information used to arrive at that figure
 - Request the proposed data using the templates as applicable
- 2.2** Calculate the % of protected groups affected by the changes and the % of those who are not.
- 2.3.** Find out from those affected exactly what the changes will mean to them.
- 2.4** Determine whether these changes are the only means of making savings or whether there are alternative proposals which could be considered.

3. Negotiating Points

- 3.1** Proposals to reduce the amount of sick leave or not pay for the first three days of sick leave could potentially affect two main equality strands – women and those with disabilities. Women who have caring responsibilities often have more short term illnesses as a result of their children's illnesses. Pregnant women may also require more sickness leave. People with disabilities may need to have more sickness leave as a result of their disability or may have short term illnesses related to their disability. A failure to make reasonable adjustments may breach the Disability Discrimination Act.
- 3.2** If an authority imposes cuts without consultation and/or consent, it could face claims for dismissal or breach of contract.
- 3.3** Use relevant information provided by members to negotiate for the retention of the current arrangements or better alternatives than those proposed.
- 3.4** It is a Part 2 condition which is a key national condition and may be deemed to be incorporated into individual's contract. Any change could, therefore, represent a breach of contract and/or a breach of the national agreement.

4. Remedies

- 4.1** If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duties Protocol to challenge them.
- 4.2** Apply the NJC/SJC disputes resolution procedure.
- 4.3** Seek legal advice via your Regional Organiser whether discrimination or breach of contract claims or a breach of part time workers regulations can be mounted.
- 4.4** Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

Example 9

Employer Proposal – to introduce a mobility clause

1. Context

Some employers may propose the introduction of a mobility clause requiring staff to be able to work at any location in the Council or introduce a requirement to work at home to save on operational costs.

An Equality Impact Assessment is a tool which can be used to challenge changes in terms and conditions of employment.

2. Branch Action

2.1 If the branch is doing its own analysis working from raw data send the EIA cuts model letter, customised as necessary, to:

- Request a statement from the employer on the need for changes to terms and conditions and the aim of the proposal
- Request details of the amount that the employer believes the proposal will save and the detailed information used to arrive at that figure
- Request the proposed data using the templates as applicable

2.2 Calculate the % of protected groups affected by the changes and the % of those who are not.

2.3. Find out from those affected exactly what a requirement to work at any location will mean for them including asking whether they have caring responsibilities. If the proposal is to work at home, ask members what this will mean for them.

2.4 Determine whether these changes are the only means of making savings or whether there are alternative proposals which could be considered.

3. Negotiating Points

3.1 A mobility clause can be indirectly discriminatory.

In the case of *Meade Hill and anor v The British Council* 1995 ICR 847 CA, the Court of Appeal found that the proportion of women secondary earners was much higher than that of men and therefore “a considerably smaller proportion of women than of men can therefore comply with a requirement to move their workplace to a destination which involves a change of home.” In this case, a contractual mobility clause was held to be a requirement or condition (now a provision, criterion or practice) which was indirectly sex discriminatory.

- 3.2** In some circumstances, a transfer to a new location could breach the TUPE Regulations.

In the TUPE case of *Tapere v South London & Maudsley NHS Trust* 2009 IRLR 972 EAT, a requirement to change where Ms Tapere worked as a result of the transfer was held to be a substantial change in terms and conditions which was to her detriment. The transfer meant an increased travel time and created difficulties with childcare arrangements. She was entitled to treat herself as having been dismissed under TUPE Reg. 4(9) because she established she was worse off as a result of the transfer.

Where a mobility clause is invoked unreasonably, there may be grounds to challenge it as a breach of contract.

- 3.3** A requirement to work at home may also represent a breach of contract. If the requirement impacts more on one protected group than another, this may represent indirect discrimination
- 3.4** In the case of homeworking, ensure the employer carries out a proper risk assessment and compensates staff for increased overhead costs, such as telephone and electricity charges.
- 3.5** If an authority imposes cuts without consultation and/or consent, it could face claims for dismissal or breach of contract.
- 3.6** Use relevant information provided by members to negotiate for the retention of the current arrangements or better alternatives than those proposed.

4. Remedies

- 4.1** If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duties Protocol to challenge them.
- 4.2** Apply the NJC/SJC disputes resolution procedure.
- 4.3** Seek legal advice via your Regional Organiser whether discrimination, dismissal or breach of contract claims or a breach under the part time workers regulations can be mounted.
- 4.4** Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

Example 10

Employer Proposal – to freeze vacant posts

1. Context

Not filling a job may have a disproportionate impact on some groups of staff in a variety of ways.

It may dilute the proportionate representation of protected groups in the workplace at certain levels/grades or that reflecting the local labour force population. It may reduce promotion and career opportunities and/or training and development for equality groups

It may also impact on protected groups in the workplace where they are traditionally employed and therefore now doing more work than others to cover for the unfilled vacancies. This can lead to workplace stress, damaging health. A policy of not filling vacant posts can also lead to service cuts, which can have a disproportionate effect in services which have a high staff turnover.

An Equality Impact Assessment is a tool which can be used to challenge changes in terms and conditions of employment.

The data required is to establish if a negative impact is likely to happen or has happened already. The data collected can be a snapshot of the current situation or branches can use two sets of data one from the past (e.g. a year ago) and one from the present to examine any negative trend.

2. Branch Action

2.1 If the branch is doing its own analysis working from raw data send the EIA cuts model letter, customised as necessary, to:

- Request a statement from the employer on why vacancies are not being filled and where they are not being filled by occupation and service
- Request details of the amount that the employer believes the proposal will save and the detailed information used to arrive at that figure
- Request data on staff turnover by occupation and service and an equality profile of staff by occupation and service.

2.2 Calculate the numbers, grades/levels of vacancies remaining unfilled compared to other departments where vacancies are being filled

2.3 Calculate the % of protected groups in occupations and services with unfilled vacancies and the % of where vacancies are being filled.

2.4 Find out from those affected by unfilled vacancies exactly what this means for them. Are increasing workloads creating stress? Are there reduced promotion and career opportunities and/or training and development?

2.7 Determine whether unfilled vacancies are the only means of making savings or whether there are alternative proposals which could be considered.

3. Negotiating Points

3.1 The data will enable you to assess whether a proposal to not fill vacancy is likely to be (or has been) discriminatory in respect of one (or more) of the protected groups.

3.2 Use relevant information provided by members to negotiate better alternatives than those proposed.

3.3 The employer has a duty to ensure workers health, safety and welfare at work. Ensure the employer carries out a proper health and safety risk assessment of working arrangements.

3.4 Could the cost of stress related ill health be factored in? The latest statistics from the National Institute for Health and Clinical Excellence show that 13.7 million working days are lost each year as a result of work-related illness, costing employers a massive £28.3bn a year.

4. Remedies

4.1 If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duties Protocol to challenge them.

4.2 Apply the NJC/SJC disputes resolution procedure.

4.3 Seek legal advice via your Regional Organiser on whether discrimination or dismissal claims or breaches of legislation covering health and safety, maternity, disability and part time workers can be mounted.

4.4 Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

Example 11

Employer Proposal – to make redundancies

1. Context

Some groups of workers may be more likely to be discriminated against in redundancy situations, either voluntary or compulsory, for example, disabled workers, those working part time, women, or black and young workers. For instance, cutting or outsourcing social care services may have a negative impact on ensuring equal pay for women workers. Creating a shared services centre in an out-of-town business park with poor transport links may disadvantage disabled staff. In addition, In the case of disabled people, failing to make reasonable adjustments, including adjustments to redundancy criteria and procedures, is a form of unlawful discrimination.

2. Branch Action

If the branch is doing its own analysis working from raw data, send the EIA cuts model letter, customised as necessary. The questions to ask about in order to get more detail are

- Is the makeup of the workforce under threat different from the workforce overall? (when looking at the selection pool)
- Would redundancies have a negative impact on one group in particular? (when looking at selection from the selection pool)

We need to look at both the selection pool and how people are selected from it. For example, it could be the case that people working part time, in a particular department, are the only ones put into a selection pool and then selected on the basis of a 'last in – first out' (LIFO) requirement. This has the potential to be both indirectly discriminatory on sex and age grounds due to the selection pools designation and subsequent selection from it.

The main assessment is whether the data shows the redundancy will have a more negative impact on one specific group (staff and/or service users) than another. For example if selection is solely on the basis of attendance this could indirectly impact on disabled workers if the reason for absence is illness. The assessment will be between disabled workers selected for redundancy as a percentage of the disabled workforce compared to other workers selected for redundancy without disabilities as a percentage of the overall workforce without disabilities.

Before we even get to undertaking a EIA on the process and outcomes of redundancy selection it is important to impress on the employer the need to undertake an EIA on the redundancy policy – in particular on the selection criteria.

3.1 Negotiating Points

The selection criteria might result in unlawful discrimination. An example is given above in relation to disability discrimination if illness is the reason for absence. Similarly, the traditional LIFO criterion could fall foul of discrimination laws on a number of fronts: age discrimination (younger workers are more likely to lose their jobs) and sex (women are less likely to have worked continuously due to family responsibilities). In the selection procedure it is unlawful to discriminate against fixed term or part time workers and against workers for trade union activities.

- Is the redundancy genuine e.g. have workers been replaced by apprentices, interns or volunteers?
- Have alternative options been compared and considered to minimise any discrimination?
- Can the selection pool be altered?
- Do all affected workers have genuinely equal opportunities for retraining or redeployment?
- Are the criteria (or the selection matrix) for determining who will be made redundant transparent and fair?

3.2 The impact on service users

- Which service users will be affected by any cuts?
- Will any groups be specifically affected?
- How will this negative impact be reduced?

4. Remedies

- 4.1** If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duty Protocol to challenge them.
- 4.2** Apply the NJC/SJC disputes resolution procedure.
- 4.3** Seek legal advice from your regional organiser on whether discrimination dismissal or breach of contract claims can be mounted.
- 4.4** Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

Example 12

Employer Proposal – to outsource services

1. Context

Equal opportunities is a good reason for keeping services in-house, because outsourcing a service can have a discriminatory affect of workers and users. The General Equality Duty (explained in the accompanying Guidance) applies to councils and also to contractors carrying out public functions on behalf of public authorities.

The specific duties on public authorities will not apply to contractors, so equality is better served if a service is kept in-house. To protect equal opportunities it is vital that UNISON branches are involved in any procurement process right from the start.

Because TUPE protects the terms and conditions of transferred staff (at the point of transfer), it is unlikely that UNISON will be able to take individual equality cases for members which are directly related to the outsourcing. But the equality duties still remain with the public authority which has outsourced the service. An EIA should fully examine proposals, as well as using statistical evidence.

2. Branch Action

Branches should press councils to conduct Equality Impact Assessments at two stages in the procurement process:

a. At the options appraisal stage

This is the time when a council will consider outsourcing as an option to an in-house service improvement plan. Our bargaining aim is to show that equality is better served by keeping a service in-house. The EIA should examine each option and include key general questions:

- i. Will an analytical job evaluation scheme cover all staff?
- ii. Will equal pay audits be periodically carried out and acted upon to reduce pay inequalities?
- iii. Will public reporting of equality statistics and other information be at the same high level as the council?
- iv. How will service users be able to influence equality improvements as good equality practice evolves over time?
- v. Will future policies on promoting equality opportunities be as good, or better, than existing ones?
- vi. How will the council be able to intervene if equality is not being promoted?

If the council has not implemented equal pay, then an additional question for the branch to consider is:

- vii. Have all equal pay issues been resolved?

In addition, the workforce equality profile (the gender, race, disability, and age of staff) in the service(s) under review should be compared with the workforce equality profile in the authority overall, to see if any group is disproportionately affected. The equality profile of the users of the service under consideration should be compared with the equality profile of residents in the local authority area to see if any group is disproportionately affected.

If any group is disproportionately affected, then the authority should have a plan as to how they should be protected. If the EIA shows that equality is better served by an in-house service, then ask how the council can justify outsourcing when it has a legal duty to promote equality.

b. At the shortlisting or selection stage

If a decision is made to outsource a service, then equality requirements should be specified in the contract documentation as a legal requirement. Councils are now explicitly allowed to do this. An equalities factor should be explicitly built into the scoring matrix for assessing bids. An EIA should be carried out to compare the equalities practices of companies bidding for the contract, and an in-house bid. Our bargaining aim is to get the highest possible standards, and push for an in-house bid with high equality standards in preference to outsourcing.

The EIA should include key questions, which should be included in the tender documentation:

- i. Is there an analytical job evaluation scheme for all staff? The jointly-developed NJC and SJC schemes are tailor-made for local government.
- ii. What proposals are there for changes to service delivery, and how will these affect users and staff (especially bearing in mind the staff equality profile)?
- iii. Will trade unions be involved in future job evaluation?
- iv. What is the past equality practice of bidders on different contracts? Can they evidence actions taken to increase equality and ensure equal pay?
- v. How will equality for new starters (including in pay, terms and conditions, and pensions) be ensured?
- vi. How do their recruitment, selection, training and promotion policies promote equality?
- vii. What specific proposals are there to keep up-to-date with developing good equality practice, and to introduce changes?

The bidder with the best equality proposals should be recognised, and if the EIA shows that equality is better served by an in-house service, and then ask how the council can justify outsourcing when it has a legal duty to promote equality.

3. Negotiating Points

- 3.1** If any of the protected groups are disproportionately affected the proposal could be discriminatory.
- 3.2** Use relevant information from members and the information provided by the employer to negotiate for the retention of the current arrangements or better alternatives than those proposed.

4. Remedies

- 4.1** If the Council does not perform an EIA, performs an inadequate one, or ignores the outcomes, use the UNISON Equality Duties Protocol to challenge them.
- 4.2** Apply the NJC/SJC disputes resolution procedure.
- 4.3** Seek legal advice via your regional organiser on whether discrimination or breach of contract claims can be mounted.
- 4.4** Write to the council's monitoring officer if the authority has or is about to do anything in contravention of the law or which would constitute maladministration.

EIA Cuts Model Letter (optional)

Dear

Proposal to (insert change proposed to jobs/pay and conditions/service delivery or working methods): **Information Request**

The Equality and Human Rights Commission has said that 'the Equality Duties are legal obligations that should remain a priority, even in times of economic difficulty.'

The council has indicated that it intends to consider the above proposal(s) as a way to make savings.

As you will know, your organisation is subject to the general public sector equality duty under s.149 of the Equality Act 2010. In order to comply with the public sector equality duty when carrying out this course of action, you must have 'due regard' to the need to

- i. Eliminate discrimination, harassment, victimisation and any other conduct which is prohibited by the Equality Act;
- ii. Advance equality of opportunity between persons who share a protected characteristic and those who don't share it;
- iii. Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Whilst it is the responsibility of the employer to assess the equality impact of their proposal(s), UNISON expects to be fully consulted and involved as a recognised trade union in order to satisfy our members that the data collection, methodologies and conclusions have been rigorous.

As part of this process UNISON wishes to conduct its own analysis of the statistical information and so the council is asked to provide the union with:

- A statement on the need to introduce the change and the aim of the proposal
- Details of the amount that the employer believes that the proposal will save and the detailed information used to arrive at that figure
- The data set out in the attached list or template (insert list or relevant extract from the excel template as indicated in the proposal examples given)

Where employees hold more than one contract each contract should be disaggregated in the data. School-based employees need to be included.

If you have any queries please contact me (insert contact details) Otherwise I look forward to receiving this information within 14 working days. Please also treat this request as one under the Freedom of Information Act.

Yours sincerely
Name and Branch