

Protection of Terms and Conditions for Existing Employees

There are a number of areas within the public sector where agreement has been reached through collective bargaining for new terms and conditions for new starters whilst protecting the terms and conditions of existing staff. Similar arrangements exist in the private sector and, indeed, amongst many Trades Unions.

In legal terms, the employer has a defence against claims of discrimination if the introduction of a pay protection policy for existing staff is a proportionate means of achieving a legitimate aim (in this case sustainability, affordability etc) and is due to a genuine material factor that is not the difference in sex (or in future any one of the protected characteristics to be covered by an Equality Bill). This is often referred to as "red-circling." This position was endorsed in a recent UK case, which confirmed that pay protection arrangements can be lawful and do not always have to be implemented in such a way that the differences in pay are eradicated over time.

The longer pay protection lasts, the more chance there is of a tribunal concluding that it is no longer a material factor explaining a pay differential. This would be a particular concern were the employee able to continue to receive the former pay scales even when they are promoted, as this would be protecting not just their existing pay arrangements but those they might aspire to achieve in years to come and which do not currently apply. For that reason we have been unable to establish a clear legal protection for current employees to continue to receive promotion to roles, on current pay scales. It is for that reason that we have had to seek to modify this area of the agreement for current employees.

From the legal advice that it has obtained, Government is confident that its approach is defensible. However, to strengthen its position further, it is intended to include an enabling power in Manx legislation (through the Equality Bill) in relation to equal pay to allow Government to make (subject to Tynwald approval) further provision in subordinate legislation about circumstances which may constitute a proportionate means of achieving a legitimate aim for the defence of a material factor, including the concept of "red-circling".

The purpose of this provision would not be to undermine the overall aim of equality in pay or compliance with the Island's international obligations, but to allow further legal clarity to be provided, if necessary; either in advance of the equal pay for work of equal value provisions coming into operation; or subsequently if particular issues do arise that require clarification.

The agreement which has been reached demonstrates Government's continuing commitment to minimising, so far as is possible, the negative impact on staff employed prior to the commencement of this agreement, of changes required to ensure the ongoing financial sustainability of the public service.

It is also important to note that the Public Services Commission Act contains Protection of rights of public sector employees who become employees of the Commission, and states that a public sector employee who becomes an employee of the Commission by virtue of an Order made under Section 7 of the Act is employed on the same terms and conditions that applied immediately before he or she becomes an employee of the Commission. This is current legislation which guarantees legal protection for current employees.

Office of Human Resources
August 2015

Revised Version