

NORTHUMBERLAND COUNTY COUNCIL: INTERNATIONAL PROJECTS

SUPPLEMENTAL ADVICE

1. I advised on this matter in my Opinion of 15 May 2022, and do not repeat the background here. This brief Advice is in effect by way of update, in the light, in particular, of further exchanges which there have been between the CFO and the Chief Executive, arising in particular from the fact that the CFO consulted the Chief Executive, in her capacity as Head of Paid Service, about the CFO's proposed s 114/s114A report. To undertake such consultation, so far as reasonably practicable, with both the Head of Paid Service and the Monitoring Officer is of course a statutory requirement. The CFO has supplied them also with my Opinion, which has indeed now been put into the public domain as an annex to the CFO's report. The Monitoring Officer has essentially concurred with the CFO's views, and I need not say anything further about her comments here.
2. Various comments have been made by the Chief Executive. I have discussed these informally with my Instructing Solicitor as necessary over recent weeks, so this Advice serves simply as a brief formal record of my views on the relevant points. I have considered, in particular, letters from the Chief Executive dated 13 May 2022<sup>1</sup>, 18 May 2022 and 6 June 2022. I have also seen an Opinion dated 12 May 2022 from Timothy Straker QC: however, that Opinion is concerned with the role of the Head of Paid Service when consulted about a s 114/s 114A report, and not with the substance of the issues to which my own Opinion related.

---

<sup>1</sup> I had in fact seen this letter before I formally signed off my Opinion, although since the Opinion was already finalised subject to certain typographical and factual corrections, and the letter did not change my views, it was unnecessary to refer to it.

3. I shall comment on three specific issues. However, my “headline” conclusion is that nothing in the further comments which I have seen has materially changed the views set out in my Opinion.
4. I emphasise that my Opinion, like the CFO’s report, is directed towards the question of whether there was in fact unlawful expenditure – the issue of who, if anyone, was at fault in what occurred, and in what respects, is not one to which I have turned my mind (and that would obviously not be a purely legal question in any event). It strikes me, and I mean no criticism by this, that most of the Chief Executive’s comments are directed towards the question of fault or non-fault – all that may be relevant to some of the further inquiries which the reports before members recommend, and what the Chief Executive has said may be right or it may be wrong, but so far as I can see it is not relevant to the immediate question of whether there was unlawful expenditure.
5. The first issue is whether there was unlawful trading here (i.e. expenditure incurred for a commercial purpose other than through a company, and not authorised by any power other than the general power of competence). My view remains that there was such unlawful trading, and indeed the Chief Executive’s letter of 6 June 2022 accepts (as I read it) that what occurred was “incorrect”. She suggests that some of the figures set out in my Opinion as to the value of contracts are not the correct ones, and that suggestion may possibly be right (I myself had noticed that there were various inconsistencies between the figures quoted at the time of these transactions). However, it is immaterial to the present issue, which is that the Council had no power to incur the expenditure, regardless of its precise amount.
6. To be absolutely clear on the matter, I will address shortly some points referred to by the Chief Executive:

- (i) It is immaterial whether the trading activity gave rise to a net surplus or a net deficit. If it was undertaken outside the Council's powers, then the expenditure undoubtedly incurred in support of it was unlawful expenditure.
  - (ii) Although I note the suggestion in the 6 June 2022 letter that a view was taken in 2021 that the trading was lawful "as it was based on supporting health and wellbeing and was undertaken in a partnership with the NHS", I am not aware of any power for a local authority to "support health" for a commercial purpose. The Chief Executive has not suggested that I was wrong to conclude, at paragraph 19 of my Opinion, that there was no evidence of NIA activities being undertaken to improve the health of the people in the Council's own area. Nor has she suggested that I was wrong in my assessment of the evidence as pointing to the Council having throughout had a commercial purpose.
  - (iii) The 13 May 2022 letter makes some reference to the use of a company having been unnecessary "until the business was established and providing income." I do not understand this point. The point at which a local authority must start to act through a company is the point at which it does something, for a commercial purpose, which it has no power to do apart from the general power of competence. If one is talking about a trading enterprise, that point would normally come when the enterprise was first created, and certainly at latest by the time that any contracts were signed. When, if ever, those contracts actually start to generate a return is nothing to the point.
7. The second issue is whether there was any lawful decision to pay what I shall continue to call the international allowance, although the Chief Executive has indicated that it may have been paid on account of other matters beyond NIA. Again, my view remains that there was no such decision, and hence the money was paid without authority and amounted to unlawful expenditure. In this respect, also, I understand the Chief

Executive, in her letter of 6 June 2022, now to accept that proper authorisation for the payment did not in fact occur – as she puts it, there is “a process issue which needs to be rectified”. Process is of course important in this context, especially if “process” includes complying with the published pay policy statement unless and until it is duly amended; and in any case whether this is or is not aptly characterised simply as an issue of process may depend on what substantive justification there was for such a payment. Further, whether “rectification” is appropriate may depend on precisely what is meant by that, whether the full council in due course considers any such step to be appropriate or not, and indeed upon to what extent, if at all, it is legally possible for a local authority to act in a way which might require retrospective amendment of its pay policy statement. But all these questions are ones for another day, and not ones which fall to be considered at this stage.

8. Again, I shall deal briefly with some specific points made in the correspondence:

(i) The 13 May 2022 letter contains a suggestion that a proposed draft contract of employment specifically providing for the international allowance was physically placed before the full council on 1 November 2017. That could have been material if it was correct, although its relevance might have depended upon the extent to which it could be said that the draft contract was part of the report to that meeting. However, my instructions were and remain that this is not something which is likely to have occurred, and that there is no evidence of it having in fact occurred. No such suggestion is repeated in the 6 June 2022 letter, and it may be that what was said about this in the 13 May 2022 letter was simply based upon an error of recollection.

(ii) It is suggested in the correspondence that payment of the allowance was approved by the panel which interviewed the Chief Executive (as

she now is) prior to her permanent appointment to that post. I cannot comment upon that as a matter of fact, but if true, it would not change my opinion. A panel of elected members has no decision-making power unless it is a properly constituted committee or sub-committee to which the relevant decisions can be and have been delegated (making recommendations to full council about, for example, whom to appoint may be another matter). I understand the 6 June 2022 letter to accept (in the final paragraph before the heading "Summary") that there was no such proper constitution and delegation here. For reasons given in my Opinion, this was probably in any event a matter that would have needed to go to full council.

(iii) It is suggested in the 6 June 2022 letter that the allowance had in fact started to be paid from 2015, as an uplift to base salary on account of extra responsibilities undertaken as Deputy Chief Executive, and was "split out" as an extra allowance in 2017. Again, I cannot comment on the factual position in that respect, save to say that it is not an account of events which seems to have been recorded at the time when the allowance was being discussed. But it is immaterial. When the Chief Executive was appointed, the full council decided what her base salary should be; it did not approve any additional allowance on top of that base salary; and no subsequent lawful decision was taken to pay such an allowance, as is apparently now accepted.

9. The third issue does not relate to my original Opinion. It concerns the possible suggestion (I say "possible", because the correspondence is not very clear about this) that the CFO's consultation of the Chief Executive before issuing the s 114/s114A report was inadequate, either because inadequate time was given for a response, or because the Chief Executive needed to be supplied with all the documents that were provided to me, as well as my instructions, and so on. If that is the suggestion then, on the

information which I have, I would not agree with it. I will summarise my reasons for that view briefly as follows:

- (i) The relevant issues here (i.e. those relevant to whether there was unlawful expenditure), are actually fairly straightforward –
  - (a) In relation to the NIA activity, they are: first, whether the Council was in fact acting predominantly for a commercial purpose, i.e. to make money; and secondly, if so, whether it had any statutory power to rely upon for doing so, given that the general power of competence could not assist;
  - (b) In relation to the international allowance, they are: first, by whom that was authorised, and whether that person had any delegated authority to do so; and secondly, whether the payment of the allowance was consistent with the pay policy statement.
- (ii) Consultation of the two other statutory officers by the CFO under s 114 is not an elaborate exercise, and should not be confused with some sort of natural justice-based disciplinary process or the like, simply because one of those officers happens to have been personally involved in the relevant events. It is designed to ensure that before a report of this serious nature goes to members, any views which those senior officers may have about the relevant matters are taken into account and potentially included in the report. Whilst there are no specific time limits for the issue of a s 114 report, it is implicit in the statute that, in relation to a matter of any seriousness (and especially one involving ongoing payments) the CFO should act with reasonable promptness. Against that background, and the point made in (i) above, and taking account of the Chief Executive's existing extensive involvement in these matters, my view is that the period between 25 April 2022 (when the CFO wrote setting out her views) and 23 May 2022 (when the report was issued) seems to have been ample for consultation. I am not aware of any

reasoned request by the Chief Executive for any specific extension of time. The Chief Executive has of course had the opportunity to make further comments during the period between the report and its consideration by members.

(iii) I believe that the Chief Executive was supplied with my Opinion fairly soon after it was written. She of course had the CFO's report in draft. It is not clear to me why anything else should have been required for her to address the relevant points as identified in (i) above. Again, I am not aware of any reasoned request having been made for sight of specific relevant documents, as opposed to the very general requests in fact made.

10. It follows that I see no reason why members should not proceed to consider the report. Indeed, I think it is their duty to do so.

NIGEL GIFFIN QC

11KBW

7 June 2022

11 King's Bench Walk  
Temple  
London EC4Y 7EQ