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Northumberland County Council

STAFF AND APPOINTMENTS COMMITTEE

Strictly confidential and subject to legal professional privilege

27th July 2022

Resolution of Employment Issues with the Chief Executive

Report of the Deputy Chief Executive, Executive Director of Finance (Section 151 Officer) and Director of Governance (Monitoring Officer)

Purpose of report:

This report seeks the approval of the Committee to the terms of a comprehensive settlement of the employment dispute that exists between the Council and the Chief Executive, and the termination of the Chief Executive's employment. The Committee is invited to consider the contents of the report, the signed heads of terms, the external legal advice and to make a recommendation to the County Council which has been summoned to meet at 2pm on 27th July 2022.

Recommendations:

1. To consider the Heads of Terms negotiated with the Chief Executive and her representatives, to terminate her employment on 31st July 2022 and to settle all outstanding disputes as between the County Council, its members and officers and the Chief Executive, including the withdrawal of any and all complaints that any of the parties have against each other.

2. To recommend the terms of the settlement as set out in the Heads of Terms at Appendix 1 to the County Council for final approval.

Link to Corporate Plan:

The Corporate Plan includes a commitment to financial prudence and effectiveness. The County Council is also committed to being a good employer and to manage legal claims effectively and efficiently.

Key issues

1. There are long standing employee relations issues between the Chief Executive and the County Council. Members will recall that in the summer of 2020 the Chief Executive was suspended from her duties. A Disciplinary investigation commenced but was terminated on legal advice, and the Chief Executive returned to work.
2. The Chief Executive has made a significant number of complaints under the dignity at work, grievance and member code of conduct policies, and she has commenced a claim in the Newcastle Employment Tribunal alleging detriments arising from alleged 'whistle-blowing'.
3. This Committee received updates on the progress of these claim in February, April and June 2022 and those reports are referred to as background papers.
4. On 23 May 2022 the Chief Finance Officer issued a report under Ss114 and 114A of the Local Government Finance Act 1988. The report included two issues in relation to which the Chief Executive has particular responsibility - unlawful expenditure arising from the Council participating in a trading activity otherwise than through a company: and the payment of an allowance to herself of £40,000 per annum.
5. In June 2022 the Council received a Report on its Corporate Governance from Max Caller CBE. Mr Caller reported on the irretrievable breakdown in the relationship between the Council and the Chief Executive and recommended that immediate action was needed to resolve her employment position in order for the Council to move on.
6. In June, this Committee wrote to The Chief Executive seeking her comments in relation to her unlawfully paid allowance and whether and to what extent it should be repaid to the Council. There was no substantive response.
7. The Employment (Appeals) Committee also wrote to the Chief Executive to invite her representations in relation to matters that could form the basis of disciplinary allegations identified from the Caller Report and S.114/114A report.
8. The Committee has also received reports regarding the health and well-being of the Chief Executive. The Committee will recall that the Chief Executive has been in poor health for much of this year and has been in receipt of a medical certificate continuously since March 2022. She has been referred to the Council's external Occupational Health Service and regular updates provided to the Committee. The

last report from Occupational Health included advice that the Chief Executive would be unfit to resume her duties for the foreseeable future.

9. At its meeting on 20th June 2022 the Committee received written advice from James Goudie QC on the scope for settlement of the claims. The advice outlined the relevant factors to be weighed and balanced if the Council were to consider a settlement of the various issues and claims as between the Council and the Chief Executive. For members' convenience, that advice is set out again at Appendix 2 to this report.
10. The Committee agreed to delegate authority to the interim Deputy Chief Executive to progress settlement discussions with the Chief Executive and her representatives in consultation with the Chairman of SAC, Executive Director of Finance (Section 151 Officer), interim Director of Governance (Monitoring Officer) and interim Service Director HR & OD.
11. Subsequent to the 20th June meeting, a formal approach was made to the Joint Secretaries of the JNC, to see if they might be able to offer any advice or conciliation. Following correspondence between Mrs Lally's representatives, the Council's external strategic legal advisers (Greenburgh & Co), and your officers, it was concluded that such joint secretarial conciliation was not possible, but the Chief Executive's representatives indicated a willingness to return to the mediation table.
12. On 18th July 2022 the Committee nominated members to a cross-party delegation to a mediation meeting with the Chief Executive and her representatives which took place on 19th July 2022 in York. The Council was represented by Mr Greenburgh, of Greenburgh & Co, and the three statutory officers were also in attendance, either in person or virtually.
13. After many hours of detailed negotiation, Heads of Terms were agreed which would terminate the employment of the Chief Executive on the grounds of her ill-health and provide for a comprehensive settlement of all of the various claims and counter claims between the Council, its officers, its members and former members, and the Chief Executive. The objective in reaching this settlement is to draw a line under all of the issues in a final way and allow both parties to move forward.
14. At the conclusion of the head of terms, your officers referred the head of terms to James Goudie QC for confirmation that the terms meet the Council's legal obligations and that the contents of the report were consistent with the Council's Best Value obligations and, that the contents provided sufficient information of the options available to enable members to make a lawful decision. Mr Goudie has confirmed this and his advice is at Appendix 3.
15. Members must now evaluate the proposal to ensure that, in their opinion, it is the best option for the Council to pursue and that the financial and non-financial terms represent best value to the Council.
16. Under the proposed settlement, the Chief Executive will receive a cash sum of £209,000 comprising the following elements:

Contractual/Statutory payments

Payment in lieu of notice (3 months' notice at 0.5FTE) £25,000

Pay in lieu of accrued but untaken holiday entitlement £15,000

Discretionary

A payment to settlement the ET claims £75,000

A contribution to the CX legal costs in relation to ET claims £50,000

Lease car early termination costs £4,000

A discretionary payment made on account of injury/disability £40,000

Total cash value of settlement £209,000

17. The cash value of the settlement is roughly equivalent to one year's full-time salary for the Chief Executive, (excluding the international allowance but including employer's pension contributions and other oncosts).

18. Under the Local Government Pension Scheme Regulations, at the point the Chief Executive leaves the Council she would be entitled to immediate release of her accrued pension benefits. That does not require the Council's consent and is at no cost to the Council as the pension benefits are subject to actuarial reduction.

19. The Chief Executive will decide whether she wishes to apply for ill health retirement under the pension scheme rules. If she does and is successful, on Tier 2 or above, the Pension Scheme will meet any additional costs of providing the ill health retirement pension. For clarity, that means zero cost to the Council in terms of pension strain.

20. If the Chief Executive does not apply, or is unsuccessful in her application for ill health retirement, the Council will make available a further £50,000, to be paid at the Chief Executive's direction, into her pension scheme, or in cash to her.

21. Members will note that the tax consequences for the Chief Executive have been minimised through the utilisation of various tax concessions that are available to employees in these circumstances, but that the Chief Executive will provide the Council with a full indemnity to any tax liabilities which are found to apply. In this scenario, the cash value of the settlement would be £259,000.

22. As part of the overall settlement, the Council agrees to waive its right to bring a claim for recovery of the £179,032.08 international allowance that was not properly authorised and paid contrary to the published Pay Policy Statement. However, the Council will seek to recover £79,032.08 of this sum from contributions paid in respect of the allowance to the Local Government Pension Scheme and HMRC, with the remaining £100,000 being written off. This represents a further non-cash

value of £100,000, bringing the overall value of the settlement to between £309,000 and £359,000.

23. Whilst this is a substantial sum, it must be remembered that the Chief Executive is on a high salary, and that pursuing any other option is likely to be costly, time consuming and sapping of both officer and member resources. For example, whilst there may be a strong prima facie case to commence a disciplinary investigation, it will be necessary to appoint an independent investigator, for the investigation to take place, a report to be made, a committee to hear the evidence, and a separate independent panel to make a recommendation to full Council. That process could well take 5-6 months, during which time the Council will be paying the Chief Executive's salary in any event and incurring substantial legal costs.
24. Pursuing an ill health dismissal would be quicker but would still result in the payment of notice and accrued holiday, and without the settlement of the Tribunal claims much of the advantage, of 'clearing the decks' and allowing the Council to move on, would be lost.
25. Members should be aware that the estimate from Mills & Reeve Solicitors, who represent the Council in the Tribunal, is that the costs of taking the case to trial is in the region of £362,000 to £398,000 based on a 5-week hearing. Costs are not usually recoverable in the Tribunal, so even if the Council were to successfully resist all of the claims, it would still be left with a substantial legal bill.
26. Turning to the issue of recovery of the amounts paid to the Chief Executive by way of an international allowance, the matters for consideration are set out in Nigel Giffin's advice of 17th June 2022 attached at Appendix 4, which the Committee received at its meeting on 20th June. The first is the cost effectiveness of any such action - i.e. the likely value of a successful claim compared with the likely costs of pursuing it, both irrecoverable legal costs and officer time. As a rule of thumb, Mr Nigel Giffin's advice is that the rules for assessing costs generally mean that the winning party will typically only recover around 70% of their costs in the courts. The risk that the claim would not succeed leading both to a failure to recover the amounts claimed and exposure to the other party's costs must also be taken into account.
27. The second consideration is the merits of the case. The arguments on restitution are more finely balanced than might at first appear to be the case. On the one hand, it could be argued that the Chief Executive as Head of Paid Service had responsibility for ensuring that her allowance was properly approved. On the other, senior members were aware that an allowance was being paid and the expenditure appeared in some form in the published accounts in each year from 2018 onwards. The extent to which senior HR and Governance officers at the time were aware is as yet unclear but remains subject to the further investigation that the Audit Committee is supervising.
28. The Council's strategic legal adviser, Mark Greenburgh has advised that the costs associated with litigation to recover the full value of the international allowance would be high – potentially of the order of £100,000 - and that Chief Executive would have a reasonable prospect of defending at least part of any such claim

meaning that the Council might only recover 60% of the amount claimed (£107,000). For these reasons, it is the view of your officers that recovery of £79,000 (approximately 44%) of the allowance paid to the Chief Executive as part of an overall settlement is both more cost effective than pursuing litigation and carries less risk to the Council. Further detail on the litigation risks and costs will be provided orally by our external legal adviser to the meeting.

29. As previously advised, in reaching any settlement, members must have regard to the Statutory Guidance issued by the Secretary of State in relation to Special Severance Payments (attached as Appendix 5) . In approving special severance payments, the guidance requires local authorities to consider whether such a payment would be a proper use of public money and consistent with their best value duty with respect to economy, efficiency and effectiveness.
30. In this instance, there is no feasible prospect of the Council exiting the Chief Executive at a lower cost. The settlement has been reached following protracted negotiations and represents a significantly lower outlay than the original sum demanded by the Chief Executive and subsequent offers to settle based on legal advice at that time. The Chief Executive has repeatedly made clear that she would not be willing to leave the organisation with her statutory and contractual benefits alone.
31. Whilst the potential value of the claims brought by the Chief Executive is relatively modest the costs of defending them would be very substantial. A current estimate of legal costs of between £362,485 and £397,485 submitted by Mills & Reeves is attached as Appendix 6. It should be noted that this estimate excludes disbursements, any associated fees associated with strategic legal advice and senior officer time involved in management of and attendance at tribunal proceedings. If the Chief Executive were to be dismissed on the grounds of conduct or capability it is very likely that further claim would be advanced against the Council in the Employment Tribunal adding Disability Discrimination to the claims the Council must meet. In the event of that claim succeeding, the damages that can be awarded to the Chief Executive would be uncapped and would include future pension loss.
32. Members will be mindful of the views expressed by Mr Max Caller that the improvement journey on which the Council has now embarked in the wake of the corporate governance review is not one which the Chief Executive can lead on, and that bringing the current situation to a speedy conclusion is essential. Any attempt to bring disciplinary action against the Chief Executive would, as Mr Caller has pointed out, result in a protracted period during which things are likely to get much worse, further undermining the Council's ability to discharge its duty of best value and carrying significant reputational risks.
33. Dismissal on the grounds of ill health capability in the absence of a settlement agreement would allow a relatively swift exit of the Chief Executive at lower cost based on statutory and contractual entitlement only but would not allow the organisation to draw a line under these matters and would carry the risk of continued protracted litigation, with all of the attendant costs and risks outlined above. A further consideration is the substantial number of stress risk assessments

that have been undertaken to support other officers affected by the situation. This number continues to grow while this situation remains ongoing.

34. In the absence of a resignation by the Chief Executive the only other way to end her employment would be by way of redundancy/re-organisation. However, the Council must have a Head of Paid Service, and even if it were to move to a Managing Director model, that would not meet the needs of the organisation identified in the Caller Review, and it would trigger a pension strain costs of £330,000 as the Chief Executive would automatically become entitled to an unreduced pension under the terms of the Local Government Pension Scheme. This would not appear a cost effective alternative to consider.

35. Taking all these considerations in the round, it is the unanimous advice of your officers that the proposed settlement represents the best outcome for the Council and one which can be justified on value for money grounds. It also met with unanimous support and approval from the cross-panel group of members nominated by this committee at its meeting on 18th July 2020.

Implications

<p>Policy</p>	<p>As noted above, the Corporate Plan requires financial prudence and that decisions should be made taking account of best value considerations.</p> <p>The Council sets out to be a good employer, and to act fairly in accordance with its duties.</p>
<p>Finance and value for money</p>	<p>The best value duty, as set out in section 3 of the Local Government Act 1999 (“the 1999 Act”), provides that “A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness”. The best value duty is relevant to local authority duties to deliver a balanced budget (Part 1 of the Local Government Finance Act 1992), provide statutory services and secure value for money in spending decisions. This will include decisions to make Special Severance Payments.</p> <p>The costs impact and value for money considerations set out in the body of the report and its appendices should be noted. The costs of the settlement can be met from the 2022/23 Contingency Fund.</p>
<p>Legal</p>	<p>Full legal advice is contained in the external advice of Leading Counsel and the external advisers present at the meeting.</p>

Procurement	Not directly applicable. External legal support has been subject to appropriate waivers where required.
Human Resources	These are covered in the body of the report
Property	N/A
Equalities (Impact Assessment attached) Yes <input type="checkbox"/> No <input type="checkbox"/> N/A <input type="checkbox"/>	
Risk Assessment	This is included within the report
Crime & Disorder	N/A
Customer Consideration	N/A
Carbon reduction	N/A
Health and Wellbeing	This is covered in a separate report to Committee
Wards	N/A

Background papers:

N/A

Relevant related background reports from the following Staffing and Appointments Committee

17 February 2022

7 April 2022

20 June 2022

18 July 2022

Report sign off.

Authors must ensure that officers and members have agreed the content of the report:

	Full Name of Officer
Monitoring Officer/Legal	
Executive Director of Finance & S151 Officer	
Relevant Executive Director	
Chief Executive	
Portfolio Holder(s)	

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