

**NORTHUMBERLAND COUNTY COUNCIL  
(NCC)**

**CHIEF EXECUTIVE  
(CEX)**

**SETTLEMENT AGREEMENT**

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**A D V I C E**

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**INTRODUCTION**

1. The EAC is considering the issue of disciplinary allegations against the Council's CEX. In my view is strong prima facie evidence that requires a disciplinary investigation and allegations to be answered. That is the subject of separate advice to that committee. The processes in relation to them are at an early stage and are well capable of continuing over a protracted period.

2. As Head of the Council's Paid Service DL has the protections of her contract, the Standing Orders and JNC provisions. She is over 55 and LGPS implications arise.

3. Part of the context is the recent Report of an Independent Governance Review in relation to the Council. The Conclusions of the Report include that (emphasis added):-

- (1) "NCC is currently operating in a dysfunctional way": paragraph 9.1;
- (2) "the behaviours and practices observed and documented fall well below good or acceptable practice and are preventing the effective transaction of business":  
ibid;
- (3) "NCC appears to have lost sight of its role and function as a Major Unitary Council providing a full range of services": paragraph 9.2;

- (4) “Given the scale of the challenges ... it is hard to see how this could be led by a CEX on a part time basis”: para 9.4;
- (5) “Services ... are starting to deteriorate due to the lack of direction and focus as the top of the organisation has lost focus on what such a unitary authority is intended to do”: paragraph 9.5;
- (6) “What is required NOW is a fundamental reset”: paragraph 9.6;
- (7) “AT THE VERY LEAST, THIS REQUIRES THE POSITION OF THE CURRENT CHIEF EXECUTIVE TO BE RESOLVED”: ibid;
- (8) “It is common ground ... that this is NOT something that she can lead on”: ibid;  
and
- (9) “BRINGING THIS EPISODE TO A SPEEDY CONCLUSION IS ESSENTIAL”: ibid.

4. My advice is sought on the scope and financial package for NCC resolving the CEX’s employment situation through a termination package and Settlement Agreement.

### **LEGAL FRAMEWORK**

5. The Council’s options include to enter into a Settlement Agreement in order to settle an actual or potential dispute once alternative routes have been considered and ruled out. A settlement payment is capable of being the most prudent and commercial use of public money. It may be the route that is least incompatible with the Council’s statutory “best value” duty to secure economy, efficiency and effectiveness (the 3Es) in the deployment of financial and other resources. Regard must be had to the Government Guidance on 12 May 2022 (the Guidance), upon which there is an ALACE Briefing Note.

6. An exit payment may be in 2 parts: (1) elements where the payment is a statutory or contractual requirement which must be met; and (2) discretionary elements. If the latter are £100,000 or more Full Council approval is required.

**THE ISSUES**

7. My Instructions identify 11 issues. I address them in turn.

**FIRST ISSUE**

8. There is a dispute as to the amount of the CEX's base pay. This is likely to be contentious. A negotiated compromise is appropriate. The Council must take a risk based approach to the likelihood of any successful legal challenge, the costs and delay of mounting such a challenge. My view is that in calculating the base pay for the purposes of notice or accrued holiday the contractual 0.5 FTE should be used, rather than a common law quantum meruit (1.0 FTE).

**SECOND ISSUE**

9. The CEX can be paid for a three month contractual notice period; or for the six months if it is she who gives notice; or there could be a compromise.

**THIRD ISSUE**

10. The CEX's pension pot should be recalculated. The pension contributions on the unlawful allowance should be stripped out; and, in my view, the salary calculation should be at 0.5 FTE.

**FOURTH ISSUE**

11. As regards the unlawful allowance:-

- (1) I do not see how it can be retrospectively paid;
- (2) It should be discontinued;
- (3) It is potentially recoverable;
- (4) Consideration should be given to its recovery;
- (5) However, NCC is not bound to seek to enforce its recovery.

**FIFTH ISSUE**

12. In giving consideration to recovery:-

- (1) On the one hand, the public interest and/or fiduciary duty support recovery;  
BUT
- (2) On the other hand, litigation risk and certainty of costs and deployment of other resources are considerable.

13. The conclusion may well be that recovery should not be pressed if in other respects agreement can be achieved, but the Council must take into consideration the overall financial package in accordance with the 3 Es.

#### **SIXTH ISSUE**

14. Her ET claim can be settled. Indeed, it should not be a loose end. A reasonable settlement will take account of the likelihood of success, the likely value of any damages, any uplift and any contributory fault or other reductions and the costs of litigation.

#### **SEVENTH ISSUE**

15. The CEX is entitled to take her pension:-

- (1) Subject to actuarial reduction; and
- (2) Without NCC's consent.

Any decision to engage the waiver of actuarial reduction must be carefully considered in terms of the overall value of the settlement consistent with the 3 Es

#### **EIGHTH ISSUE**

16. There are various potential routes by which unilateral termination of the CEX could be pursued:-

- (1) Misconduct;
- (2) Lack of capability;
- (3) "Some other substantial reason" / efficiency of the service;
- (4) Redundancy, following a senior officer restructure.

17. These would all be productive of:-

- (1) Great uncertainty;
- (2) Delay; and
- (3) Significant expenditure.

18. A Settlement Agreement is likely to be expensive, especially if pension strain costs are triggered. However, the alternatives are:-

- (1) Also likely to be expensive; and
- (2) To perpetuate other problems, especially in relation to NCC's efficiency and effectiveness.

### **NINTH QUESTION**

19. There being a disciplinary case to answer does not rule out a settlement. A broad approach can and should be adopted. The public interest to see through the formal processes is not the only public interest engaged.

### **TENTH QUESTION**

20. Nor are mediation or conciliation ruled out. Indeed conciliation should be pursued.

### **THE GUIDANCE**

21. I agree with ALACE.

22. As regards the status of the Guidance:-

- (1) NCC MUST "have regard" to the Guidance;
- (2) It MUST therefore consider it; and
- (3) Be seen to consider it.

23. However:-

- (1) NCC does not have to follow it slavishly; and
- (2) Indeed must not fetter their discretion by slavishly following it.

24. As regards powers:-

- (1) NCC has a range of duties and powers to enter into a severance agreement and make payments pursuant to it;
- (2) These powers include, but are not confined to, those to which reference is made in the Guidance;
- (3) A lawful payment is not prevented by the Guidance, PROVIDED THAT the 3 Es are taken into account.

25. As regards definition:-

- (1) A “special severance payment”, to which the Guidance relates is a discretionary payment or the discretionary element of an overall payment;
- (2) It is NOT a payment insofar as that is required by (i) legislation or (ii) contract;
- (3) PILON is caught only to any extent to which it exceeds what is contractual.

26. The Guidance makes reference to private sector comparison. I do not believe that it is for a public authority such as NCC to seek to familiarise themselves with private sector practice.

### **ELEVENTH QUESTION**

27. This is the crunch question. There is an impossible situation. It must if reasonably possible be ended and soon.

28. It is not realistic to suppose that the CEX will go quietly. Basically, in order to achieve a negotiated departure:-

- (1) A payment would need to be made to her of at least her statutory and contractual entitlements but for settlement purposes these might be calculated on the basis of 1.0 FTE;
- (2) There may need also to be a discretionary payment;
- (3) That is relatively straightforward if the amount of the discretionary element does not exceed £100,000 or exceeds only by reference to pension strain;
- (4) That is not however an unbreakable cap;

- (5) But to the extent that figure is exceeded the stronger the justification must be; and
  - (6) Full Council approval must be obtained, and the support of NCC's Chief Finance Officer, but to my mind not necessarily the involvement of a Panel including Independent Persons, which I do not consider is necessary in order to avoid a conflict of interest on the part of the CEX.
29. NCC should seek to negotiate as low a number as possible, and once it believes that such a number has been reached, should then consider whether or not to implement that number, in all the circumstances then prevailing.
30. NCC should emphasize to the CEX and her advisers that:-
- (1) NCC is subject both to External Audit and to Judicial Review; and internally to the duties of the Monitoring Officer and the Chief Finance Officer; and
  - (2) To the extent to which a payment made were ultra vires it could be recoverable.
31. I regard it as premature, albeit urgent, to come up with a "right number". Moreover, there is not a single number, but rather a series of components making up an overall total.
32. In conclusion:-
- (1) There is considerable scope for resolving the situation through a Settlement Agreement; but
  - (2) It is not possible to calculate a cash envelope.
33. That said, NCC should brace itself for the real prospect of substantial cost, taking account of any decision to waive the restitution claim referred to above.
34. I shall be happy to discuss and to advise further.

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