

NORTHUMBERLAND COUNTY COUNCIL: INTERNATIONAL PROJECTS

ADVICE ON ISSUES REFERRED TO THE STAFF AND APPOINTMENTS
COMMITTEE

Introduction

1. The background to this matter is set out in my Opinion of 15 May 2022 (see also my Supplemental Advice of 7 June 2022¹). It need not be repeated here.
2. At its meeting on 8 June 2022, the full council resolved, amongst other matters, that a meeting of the Staff and Appointments Committee (“the SAC”) should be convened within 14 days, to consider the contents of the CFO’s section 114/114A report “in relation to the payment of the International Allowance and the matters referred to it in the recommendations of the [CFO].” The relevant recommendations (at paragraphs 6.2.2 and 6.2.3 of the CFO’s report) were that:
 - (i) Payment of the allowance should remain suspended “pending consideration of further legal advice with regard to potential recovery of unlawful payments and any related issues by the [SAC] and any

¹ Although not relevant to the issues which the SAC will be considering, I take this opportunity to record that my Supplemental Advice, in dealing with the question of whether there had been adequate consultation by the CFO on her report, contained one factual statement which was based upon a misapprehension on my part (for which I should apologise, although the Advice was of necessity produced at some speed). As the Chief Executive has subsequently pointed out, she was not sent the CFO’s report in draft, as I had thought. However, this does not affect the substance of the view which I expressed, namely that the CFO had provided sufficient information about the nature of her concerns for those consulted to be able to respond to the questions raised about whether there had been unlawful expenditure by the Council. In my view this was achieved by the combined effect of the CFO’s letter to the Chief Executive of 25 April 2022, identifying the issues of concern, and my Opinion, which explained the factual and legal basis for the concerns more fully.

recommendations arising being reported to County Council for consideration"; and

(ii) That it was noted that legal (and if necessary actuarial) advice would be taken regarding any potential adjustment of pension contributions made to the Local Government Pension Scheme ("LGPS") in relation to the allowance.

3. The purpose of this Advice is to provide the SAC with the relevant legal advice for its consideration.

4. I am conscious that there has been some correspondence between those representing the Council, and the Chief Executive and her representatives, concerning other remuneration issues which can in very broad terms be seen as connected with those addressed in this Opinion. They include, in particular, the question of whether the basis upon which the Chief Executive was employed, whilst she was still an officer both of the Trust and of the Council, accurately reflected the resolution which authorised her appointment; and the question of whether it was right for the Chief Executive, without further authorisation, to have received and retained remuneration from the Council at what might be called her "full-time rate", after her employment with the Trust had come to an end. Although these are discrete issues, and are probably not part of what the full council has to date referred to the SAC by its resolution quoted above², I can see why it might be desirable for the exercise of any judgment about either ratification, or recovery action, to take account of the overall picture in relation to any doubtful or disputed payments. For the moment, I simply record the existence of these issues: I have not considered them in depth, and do not pass any comment upon them.

² I am not sure that they could accurately be described as "related issues" within the meaning of the resolution.

Executive summary

5. There are some relatively complex and interlocking issues to be considered here. In the body of this Opinion, I have sought to analyse those issues fully. However, I am conscious that the members of the SAC who will read this Advice are not lawyers. In this executive summary section, I have therefore sought to set out as clearly and straightforwardly as possible what I think, in the light of that analysis, the SAC now needs to do and decide. For an understanding of why those are my recommendations, and for various qualifications and points of detail, the Opinion needs to be read in full. I have also summarised my conclusions on the legal issues at the end of this Opinion.
6. The SAC needs to decide what recommendations it will make to the full council.
7. Before the SAC can sensibly decide anything, in my view, a letter needs to be sent to the Chief Executive asking, in effect, whether she says that the Council ought to ratify the payment of the allowance, and/or permit her to retain the past payments, and/or continue to be paid the allowance in future; and if she does, to explain the basis for that. In the light of any response to that invitation, further investigations may be necessary.
8. As matters currently stand, it is hard to see any proper basis for ratification of past payments, or continuation of payments in the future, but the position could change in the light of any justification advanced by the Chief Executive.
9. In due course the SAC will have to ask itself (for the purpose of making its recommendations):
 - (i) Whether the past payments of the allowance should be ratified. That would only be appropriate if the payments were justified at the time,

and even if they were, it would not automatically follow that they should be ratified now;

(ii) Whether there is any current justification for any allowance (or any salary uplift on account of the same matters); and

(iii) If the past payments are not ratified, whether it would be cost-effective to pursue recovery of them, and whether there is anything to displace the normal assumption that the Council should recover such overpayments if it can.

Consequences of the unlawful payment of the allowance

10. This Advice makes the assumption that there has to date, for the reasons given in my 15 May Opinion and in the CFO's report, been no legally valid decision to pay the allowance to the Chief Executive. That remains my view; and it is also the basis upon which, by resolving to agree the contents of the CFO's report, the Council has required the SAC to consider the issues referred to it.

Potential action to recover the amounts paid by way of allowance

11. In my opinion, the Council has a *prima facie* entitlement to recover overpayments made as purported remuneration of staff but without proper authority. In other words, it is entitled to do so unless the Chief Executive has a defence to such a claim. I shall consider below what defences might be in play here. In the discussion which follows, I shall assume both that the Chief Executive does not elect to return the payments made by way of allowance voluntarily, and that the matter is not addressed as part of some wider resolution of the Chief Executive's position³. I shall also begin by

³ It is hardly a secret that such a resolution may need to be discussed between the parties, both because of the Chief Executive's fairly prolonged absence through ill-health, and because of the various issues thrown up by the recent report of a review team led by Mr Max Caller. However, I am not aware that any such discussions are currently "live", and I am certainly not involved in them, nor am I tasked with advising upon those questions. It is certainly not for

assuming that there is no question of “ratification” of the payment of the allowance, a possibility to which I shall return in due course.

12. The entitlement to recovery arises under the law of restitution. There may be more than one restitutionary principle by reference to which a claim could be formulated (e.g. for recovery of payments made under a mistake, or less plausibly, recovery of payments for which the basis has wholly failed). But the most straightforward basis would lie in the principle identified in *Auckland Harbour v R* [1924] AC 318, namely that there is a right to recover payments made, without authority, out of public funds.

13. The Council is not necessarily *obliged* to bring a claim to recover such monies (even if it is advised that it probably has a good cause of action and that there is no defence which is likely to succeed). It is entitled to consider in particular:

(i) The cost-effectiveness of any such action – This may be looked at from two main perspectives.

The first is how much the claim would amount to, assuming that it were to succeed, and how that value compares with the irrecoverable⁴ legal costs likely to be incurred in pursuing it, as well as any officer time likely to be consumed in doing so. If there is any question as to the ability of the proposed defendant actually to meet an award of money, interest and costs, that will also be a relevant consideration.

me in this Advice, nor for the SAC as matters currently stand, to seek to pre-empt or predict whether such a wider resolution will occur. It will be obvious, however, that the existence, strength and value of any potential claim in restitution would need to be taken into account by the Council in deciding what, if any, terms might appropriately be agreed between itself and the Chief Executive. Conversely, also, to the extent that the public interest falls to be considered in deciding whether to pursue recovery of overpayments (see paragraph 9(ii) below), the view might in principle be taken that such recovery need not be pursued in full if that was the price of an overall settlement which was in the best interests of the Council and the public.

⁴ In the event of contested litigation, the losing party normally has to pay the winning party's costs. But in very broad terms, the rules for assessing costs generally mean that the winner will typically only recover something around 70% of its actual costs.

The second is how great the risk is that the claim would not in fact succeed (leading to non-recovery of the amounts claimed, as well as exposure to the opposing party's costs).

In short, the Council needs to ask itself whether, from a hard-headed commercial perspective, and taking account of the possibility that the claim might settle for something less than its full amount, without needing to go all the way to trial, a claim is "worth the candle".

(ii) The "merits" of the case – By this I mean, not the legal merits as such, but rather the apparent justice or otherwise of seeking to recover the monies. This may be explained, in particular, by pointing out that the circumstances in which payment of unauthorised remuneration occurs may fall within a broad factual spectrum. At one end of the spectrum, an obviously justifiable payment may have been legally invalid for reasons which can fairly be characterised as relatively technical (e.g. an understandable misinterpretation of the authority's scheme of delegation), and in relation to which the employee herself bears no blame. At the other end of the spectrum, there might have been a blatant ignoring of proper procedures, a payment of very questionable justification, and apparent culpability on the part of the employee. There are many possibilities in between. I do not consider that an authority's consideration of whether to seek recovery should properly be driven solely or even primarily by the view which it takes of these matters. But they can properly be taken into account as part of an overall assessment of whether, from a public interest perspective, recovery action is appropriate.

14.I would summarise the position in this way. If a local authority has made payments to an employee which are overpayments in the sense that they go beyond the employee's properly authorised remuneration, the starting-

point is that those monies ought to be recovered, especially if the sums involved are significant. But if there is serious room for dispute about whether the monies are indeed legally recoverable (or capable of being recovered as a matter of economic reality), then the authority is entitled to consider whether recovery action would be cost-effective; and it may also, at any rate in more borderline cases, look at where the apparent justice of the case lies, from a public interest perspective.

15. In relation to the allowance in this case, the payments which I consider to have been unauthorised are fairly substantial (presumably totalling somewhere around £180,000, depending upon the precise dates when payment of the allowance started and finished). At the moment, I consider the arguments that payment of the allowance was in fact made without lawful authorisation to be very strong, and indeed not really to be disputed by the Chief Executive (see her letter of 6 June 2022, and my Supplemental Advice). I will address other potential defences in a moment. It would be for the SAC, rather than any legal advisor, to come to a view about where the broader public interest lies here, and in any event some of the factual history which might be relevant to that assessment remains unclear. However, it is evident that in that respect there are some points to be made on both sides of the argument. On the one hand, it may be thought that the manner in which the international allowance was dealt with was on any view very unsatisfactory (in particular, there is the absence of any proper record of what had been paid or was to be paid, by which body, and why; and the apparent failure even to consider where the authority to approve such a payment lay, or to consider the pay policy statement). It might well be said that the Chief Executive, even though she obviously could not herself be party to the decision-making about her own remuneration, had some responsibility for seeing that such a matter was dealt with properly. On the other hand, senior human resources personnel were also involved, and it could be argued that at least some of the responsibility for the failure to deal with the allowance properly rested with them. It also seems that

the allowance was mentioned, albeit in passing and without detail, in reports to the full council in October and November 2017, and was referred to in the Council's accounts⁵, so it was not hidden from view; and it is said by the Chief Executive (although I am not clear how far this is accepted by the councillors concerned) that the panel which recommended her permanent appointment to the position discussed the allowance and were content with it.

16. I emphasise again that it is for the SAC, and not for me, to assess these factors and any others which may be relevant; to decide whether any further factual investigation is appropriate; and to come to a conclusion about whether the public interest tips the balance one way or another when it comes to pursuing repayment. However, I shall offer two thoughts of my own, in the hope that they might assist the SAC to focus its thinking:

(i) First, this was a substantial and recurring payment to the Council's most senior employee, and it was commenced in circumstances which strike me at least as very unsatisfactory, if only because of the severe lack of transparency as to what was done when, and why – a long way from some minor technical slip. If recovery appears to be both legally possible, and cost-effective, then it might be said that the public interest, and public confidence in the Council, demand that such recovery should be pursued.

(ii) Secondly, a potentially very important question in this respect is whether the SAC feels that the allowance was, at the time, a payment which was justified in substance (regardless of the process by which it was approved). If the SAC feels that the allowance was in fact justified, then there is an obvious case for saying that the deficiencies in the way it was dealt with at the time, however regrettable, do not make it imperative in the public interest for the money to be recovered now. Conversely, if

⁵ Although I have seen some references suggesting that the Chief Executive may have questioned the need for this at the time.

the SAC thinks that it is hard to see why the allowance was merited, that fact, coupled with the deficiencies in process, must mean that there is a strong case for pursuing recovery action if that can sensibly be done. I address what is currently known about the justification for the allowance in paragraph 18 below, in the context of a possible counter-restitution defence.

17.I now turn to potential defences. There are two that seem worthy of mention. The first would be based upon the principle of counter-restitution, which is in broad terms that a party seeking restitution must give credit for any actual benefits provided by the other party which are sufficiently closely connected with the amounts being recovered that justice requires such credit to be given: see *School Facility Management v Governing Body of Christ the King College* [2021] 1 WLR 6129. So if the Chief Executive did certain work for the Council in consideration of an apparent entitlement to the allowance, which the Council wanted to have done, and which the Council could not otherwise have required the Chief Executive to do under her contract of employment, then I would expect her to be able to claim credit for reasonable remuneration for that work, potentially up to the full amount of the allowance.

18.I must say that at the moment I am very unclear as to what the Chief Executive actually did, or what it was anticipated that she would do, in return for the allowance. Contrary to what some officers seem to have believed in the latter part of 2017, it does not look as though it was ever something that was paid by the Trust. According to the Chief Executive's letter of 6 June 2022, the payment had its origin in an uplift to her base salary effected in 2015 when she was Deputy Chief Executive (a post which she apparently took up in August 2015 at a salary of £165,000, although I am unclear as to whether the uplift is said to have been reflected in that amount, or to have been paid on top of it). This would be puzzling if the allowance was on account of what the contemporaneous documents

describe as being “commercial international lead”, since the NIA activity does not seem to have got under way in any shape at all until September 2016 (see the “narrative” prepared in March 2021, I think by the Chief Executive herself). The Chief Executive’s letter of 6 June suggests that the uplift, and later the allowance, related not only to international work, but to what she calls “extra responsibilities covering a wide set of work streams”, including certain services for the benefit of older people. But whatever the position may or may not have been in relation to any responsibilities which Mrs Lally undertook as Deputy Chief Executive that may have gone beyond her job description, at present I do not understand why any such responsibilities should not have been fully provided for in her job description as Chief Executive, and her salary set at an appropriate level to cover those responsibilities.

19. In my view it is simply not satisfactory for the SAC to attempt to speculate about these matters. The Chief Executive has been in receipt of unauthorised payments, and I think it is reasonable, if there is to be any question of her being allowed to retain those payments (or of them resuming in the future), for her or her representatives to be asked to explain in clear terms what the justification for such payments was and is. It is therefore my advice that the SAC should as a first step authorise the sending of an appropriate letter to the Chief Executive, in effect asking for an explanation of her position.

20. The second potential defence is that of change of position. In short, such a defence would arise if and to the extent that the Chief Executive had acted in good faith by reference to the allowance (in effect, in reliance on an assumption that it was something that she was entitled to receive), in such a way that restitution of it would now be inequitable. Typically, in an individual employment case, this will mean incurring expenditure that would not otherwise have been incurred (the mere fact that the money received has been spent is not enough). The relevant principles are discussed in, for

example, *Jones v Commerzbank AG* [2003] EWCA Civ 1663. If the defendant acted in good faith, the defence is not defeated by the defendant having been at fault in some other sense, such as being partly to blame for the original overpayment, or having been careless about whether it really ought to have been made: *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193. On the evidence currently available, and unsatisfactory though the history is, I see no basis for alleging that the Chief Executive failed to act in good faith.

21. As matters stand, it is not possible to offer any view as to whether a change of position defence would arise in the present case. There is no information available to me about the Chief Executive's financial affairs. The burden of proving a change of position rests with the party asserting the defence. In principle, the Council needs first to decide whether it would regard recovery action as appropriate on the assumption that there was no such defence. Before any proceedings were commenced, there would of course need to be a letter before claim. If any change of position issue was raised in pre-claim correspondence, the appropriate course would be for the Council to seek access to the relevant evidence, and to assess in the light of that evidence whether pursuit of the claim was still sensible. In fact, I have recommended (see paragraph 19 above) that information about the justification for the allowance needs to be sought from the Chief Executive at this stage. If that advice is followed, so that correspondence will be required at this stage in any event, it seems sensible to ask the Chief Executive generally (through her solicitors) whether there are any reasons why she contends that the Council is not entitled to recover the overpaid allowance. If she believes that she has changed her position in reliance upon the allowance, that would provide an opportunity for that suggestion to be raised and considered.

22. Finally, and given that the history of the allowance extends back over a number of years, I should say something about the question of limitation of

action, i.e. the time within which the Council would have to commence proceedings for recovery, if it wished to do so⁶. The starting-point is that I would expect the 6 year limitation period under s 5 of the Limitation Act 1980 to apply to any such claim. Although s 32(1)(c), which allows time to be extended in certain cases, could potentially be relevant here, the Council could not count on that. However, the 6 year period would in my view run separately in relation to each payment by way of allowance (which I understand to have occurred as part of the normal monthly payroll) – in other words, it is not the case that the whole claim would become time-barred on the sixth anniversary of the first payment. If one leaves aside any payments made to the Chief Executive before she took up that position substantively⁷, it looks as though the first payment would have been in November 2017 at earliest, so the sixth anniversary would still be some way off.

Potential ratification or approval of the allowance

23.A further, but obviously closely related question, is whether the Council should now decide to pay the Chief Executive the allowance or some similar allowance going forwards, and/or to ratify the past payments of the allowance (and the question for the SAC is whether it should recommend such a course of action).

24. So far as future payments are concerned, this is a factual and managerial matter which raises no particularly challenging legal questions. In deciding upon its recommendations to the Council, the SAC will need to consider whether it thinks that there are any reasons why the work which is now required of the Chief Executive calls for remuneration greater than her

⁶ The position might be more complex if there was some money claim against the Council by the Chief Executive, in relation to which the repayment issue was raised by way of set-off and counterclaim. But that can be left aside for present purposes.

⁷ The history of the uplift to her normal remuneration as Deputy Chief Executive is largely unknown to me, and any issue in that respect is not the subject of this Advice.

present basic salary, and (if so) how much that additional remuneration should be, and whether there is any reason for it to be paid by way of a distinct allowance, rather than by way of an increase in the amount of the basic salary. In considering these issues, it seems to me that the SAC must work (at least initially) on the assumption that the Chief Executive will remain employed in that capacity and will return to work in the foreseeable future. If there are other developments which render that assumption questionable, then those considerations may need to be separately addressed (possibly by the full council).

25. Again, the appropriate remuneration going forward is a matter for the SAC's judgment, rather than for legal advice. However, to the extent that the allowance was supposed to reflect responsibilities in connection with the international business pursued through NIA, my understanding is that this business is currently largely or entirely dormant. If that is right, and the picture is not expected to change in the near future, it is somewhat hard to see how any additional payment on account of it could be justified at this stage (obviously that would not foreclose the possibility of some further review of the Chief Executive's remuneration in the future).

26. In relation to past payments of the allowance, the basic legal problem is that it was paid without due authority. In principle, such unauthorised payments (provided that they are ones which could lawfully have been made) may be ratified by the Council. Subject to the question of whether it is possible to deal with any inconsistency with the pay policy as it stood at the time (a potentially difficult point to which I return below), it was at the material times within the Council's powers to pay such an allowance, if there was a proper justification for doing so. Although it is not normally a proper use of a local authority's powers to increase retrospectively an employee's remuneration for work already done (see *Re Magrath* [1934] 2 KB 415), it is obviously a rather different matter where the issue is whether to validate what actually purported to be the remuneration at the time.

27. I think that any question of ratification needs to be looked at from two perspectives, in terms of what recommendation the SAC should now make. The first is whether payment of the allowance was, in the view of the SAC, justified at the time when it was in fact paid. If it was not, it is hard to see how ratification could now be appropriate. I do think that it is the view of the SAC (based on all the information now available) which matters, since the starting assumption is that anyone who approved the allowance at the time lacked authority to do so. Nonetheless, an obvious starting-point for the enquiry is why the Chief Executive (assuming that she initiated the request to be paid the allowance) thought that she had a case for asking for it, and why anyone who acceded to that request thought that it was justified.

28. Again, this is at the moment something which seems to be rather shrouded in mystery. The Chief Executive has asserted (in her letter of 13 May 2022) that, at her panel interview for the Chief Executive position, the question of separate remuneration for "the commercial work" was discussed, and that she was later told by the Leader (Cllr Jackson) and the HR Director (Ms Angus) that responsibility for confirming the arrangements had been delegated to Mr Jackson. Her letter of 6 June 2022 presents the issue as one of "splitting out" the extra salary element in 2017, and refers to a meeting at which the Leader, Deputy Leader, Director of HR and Democratic Services Manager were present (although seems at odds with the further assertion) that Mrs Lally herself had no involvement in the matter. I do not know what any of these individuals say about the matter. I certainly do not know how the figure of £40,000 per annum was alighted upon. Once again, I think that these are matters which need to be clarified before the SAC can come to any conclusion about its recommendations.

29. In addition to the thinking of those involved at the time, the SAC would no doubt wish to consider what the Chief Executive actually did that went beyond her normal contractual duties (cf. paragraphs 18 and 19 above),

and perhaps also to engage in some sort of benchmarking of what might have been expected, and in return for what salary, from comparable senior employees in the sector at the time.

30. The second aspect that the SAC would need to consider is whether the Council's best interests, and the public interest, would be well served by ratifying the allowance now. At the most basic level, one might think that the answer to that question was inevitably "no", because to ratify would mean that the Council had to pay out monies which it could otherwise retain. However, that may be too simplistic an approach. It is legitimate for a local authority to want to act as a responsible (though not an extravagant) employer would do. If an employee or group of employees had been prejudiced, without fault of their own, by some defect in the decision-making process, I should imagine that most responsible employers would want to put that right if possible. However, it is an open question how far that accurately characterises the position here (cf. paragraph 15 above). If the SAC does think that the Chief Executive bears some of the responsibility for the decision-making deficiencies, it may legitimately take into account that the failure to deal with the matter properly at the time has caused the Council significant trouble and expense. In this specific case, it might also be relevant (though only if ratification was in principle justified) for the SAC or the full council to think about whether ratification might help restore the working relationship, if the Chief Executive remained at the Council, or make it easier to reach a settlement of any disputes if she did not.

31. I now return to the issue of whether ratification would be legally possible at all, given my view (see my 15 May Opinion) that the Council's pay policy as it stood at the relevant times was not consistent with the payment of such an allowance, and (see s 41 of the Localism Act 2011) that compliance with such a policy is mandatory. This is not a straightforward question, and it will only matter if the SAC is otherwise minded to recommend ratification.

32. My first reaction (as expressed in my brief Note for the CFO, of 1 June 2022, on possible consequential matters) was that I was inclined to think that retrospective amendment of the pay policy was not possible, and that the best that could be done would be to enhance ongoing remuneration to take account of the past problem, if the employment continued.
33. On further consideration, this may be too absolutist a view. The purpose of Part 1, Chapter 8 of the Localism Act seems to be to ensure that the remuneration of chief officers is fixed within a consistent framework that has been properly thought through by the full council, and is open to public scrutiny. Amendment in relation to a past period does not seem intrinsically inconsistent with that objective. The procedural provisions in s 39 of the Localism Act are somewhat ambiguous. Under s 39(1), the policy must be approved by resolution of the full council before it comes into force – this may rule out truly retrospective amendment, but in this case any amendment of the policy ought to precede any decision by full council to ratify the allowance, so it would not be retrospective in the technical sense. Again, ss 38(1) and 39(2) require the policy to be approved on an annual basis, and for such approval to occur before the start of the financial year; but s 39(4) expressly contemplates amendment of the policy after the year to which it relates has begun, and does not make the end of that year an express “longstop” to the use of the amendment power. One can also imagine cases in which the inability to put right any previously unnoticed inconsistency between remuneration decisions and the pay policy, once the year had come to an end, could be productive of significant injustice. I cannot see anything in the statutory guidance which advances the issue one way or the other.
34. On balance, I think I would now take the view that the pay policy for a given year may be amended after the end of that year, in a case (by its nature unusual) where some decision about remuneration, such as the ratification decision here, still falls to be taken in relation to that year. However, I do

not think that amending the policy so as to bring about some substantively different result, from what was considered appropriate when the policy was first adopted, is a step to be taken lightly.

Pension contributions

35. Turning to the pension position, the Chief Executive is an LGPS member in respect of her employment with the Council. My understanding is that the allowance has been treated as part of her pensionable pay under r.20 of the LGPS Regulations 2013 (as indeed it clearly should have been, if it had been an allowance validly paid).

36. However, in my opinion r.20 is on its proper construction limited to payments validly paid to the employee: cf. *Hillsdown Holdings plc v IRC* [1999] Pens LR 173.

37. If that is right, then any future pension paid to the Chief Executive by the administering authority (which is not the Council) should not take account of the allowance, unless of course it is now ratified.

38. It then in turn follows, in the absence of ratification, that excessive contributions have been paid both by the Council as employer, and by the Chief Executive as employee. The Chief Executive would have a statutory right to repayment by the administering authority (with interest) under rr. 85(5) to (7) of the 2013 Regulations. The Council has no such statutory right, so far as I am aware, but would in my view be entitled to repayment under normal common law principles of restitution.

39. I doubt that any actuarial advice is required in this respect – the matter seems to be one of relatively straightforward calculation, which will be for the administering authority in the first instance.

CONCLUSIONS

40. The Council will need to decide whether there is any current justification for paying any allowance or salary uplift to the Chief Executive going forward: see paragraphs 24 and 25 above. On present information, it is hard to see that there is such a justification, though the Chief Executive should have an opportunity to make a case if she wishes to do so.
41. The Council will next need to decide whether it should ratify the past payments of the allowance. It can only do so if three conditions are all satisfied:
- (i) There is power to do so notwithstanding that the pay policies for the relevant years would need to be amended following the expiry of those years. On balance, I think that there is such a power, albeit one to be exercised with caution: see paragraphs 31 to 34 above.
 - (ii) The Council believes that the allowance (or some part of it) was justified at the time (or some of the time) when it was paid. At the moment it is very unclear what the justification is said now (by the Chief Executive) or was perceived to be at the time by those involved. In my view it is necessary, as a first step, to invite the Chief Executive to state clearly whether she seeks ratification and on what grounds. See paragraphs 18-19 and 27-28 above.
 - (iii) The Council considers that ratification would now be the right step to take: see paragraph 30 above.
42. If the Council does not ratify the past payments, it is likely to have a good cause of action for their recovery, subject to giving credit for the value of any services rendered by the Chief Executive beyond her contractual obligations, and/or to any change of position defence: see paragraphs 11-12 and 17-21 above. As to limitation of action, see paragraph 22 above.

43. The Council is not necessarily obliged to pursue repayment. The starting-point is that it should do so unless there is some proper reason to do otherwise, but it is entitled to consider questions of cost-effectiveness, and to some extent the merits of the case, and also the potential interaction with the Chief Executive's future employment or the termination thereof: see paragraphs 4 and 13-16 above.

44. If the Council does not ratify the past payments, they should not be regarded as pensionable pay for the purposes of calculating any pension payable to the Chief Executive, and some contributions will need to be repaid accordingly: see paragraphs 35 to 39 above.

45. My executive summary of how I think the SAC should proceed is at paragraphs 5 to 9 above.

46. I shall of course be pleased to assist further if required.

NIGEL GIFFIN QC

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17 June 2022

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