



AGENDA ITEM NO. 8(4)

## COUNCIL – 19TH NOVEMBER 2013

**SUBJECT: FINANCIAL ACCOUNTS – UNLAWFUL EXPENDITURE**

**REPORT BY: INTERIM CHIEF EXECUTIVE**

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### 1. PURPOSE OF REPORT

- 1.1 The purpose of this report is to explain the background to the unlawful payments and assist Members understand the issues more fully.

### 2. INTRODUCTION

- 2.1 The Wales Audit Office (WAO) have expressed a view that expenditure arising from two procedurally flawed “decisions” is unlawful i.e. the senior pay award in September 2012 (£270,000) and the buy-out of essential car user allowances and holiday pay in respect of senior staff in March/April 2012 (£218,563). Members became aware of the unlawful nature of senior pay in March 2013 (WAO public interest report) but the determination of unlawfulness regarding the buy-out of car allowance/annual leave only became known shortly before the Special Council on the 25th September 2013.
- 2.2 Following Council on 25th September 2013 there was considerable speculation regarding the unlawful payments and what action the Council was likely to take. As a result, at Council on 8th October 2013 I gave a verbal update so that Members could see the issue in context. Since that time I have received a number of questions from councillors, residents and staff seeking clarification of these issues with particular emphasis on whether (because the payments were deemed unlawful) the Council will seek to recover the amounts made from individuals.
- 2.3 In order to form a proper judgement on these issues the Council will need to await all the relevant information from various enquiries i.e. Police investigations, PWC investigations and any subsequent internal enquiries. However, notwithstanding the sensitivities around these issues (and in particular the potential for action against individuals) the principle features surrounding the decisions are not secret and it is everyone’s interests that they are made clear. The purpose of this report is to aid that understanding.

### 3. THE REPORT

#### Unlawful Expenditure

- 3.1 The determination of the payments by the Auditors as “unlawful” is naturally emotive. As explained in subsequent paragraphs it refers to the payments having been made without the required formal processes of approval by the Council. It does not of itself mean that the payments are unreasonable or illegal (criminal) and where (as in this case) the payments relates to individual staff contracts it does not automatically mean that the payments can be withdrawn from individuals who have benefited from the payments.

- 3.2 At this stage the determination of "unlawful payments" is separate from any investigation into the actions of individuals. We know that the Wales Audit Office has deemed the payments unlawful but that is not to say that any individual acted unreasonably or criminally. The determination also relates to the decision making process and not to whether or not the individuals contracts of employment and agreements reached with individuals are valid. Members need to understand that distinction.
- 3.3 Clearly if any individual(s) are found guilty of criminal or inappropriate action then the Council view on their personally benefiting from their actions and ability to recover any payments from them is potentially different from a view on those who may have benefitted but had little if any involvement in the decision process.

#### **Senior Pay**

- 3.4 Members are well aware of the details of the senior pay issue so I will not repeat them here – particularly as there are on-going police investigations etc. However, when Members considered the issue in January 2013 legal advice was considered and it was resolved that the decision should be revised and a negotiated agreement entered into with all the individuals concerned. The result of this negotiated agreement was that the new grading structure was retained but with all Chief officers moving to the lowest increment level. There was no revision to the grading structure and it was confirmed that the incremental steps would not progress until April 2014. There was no provision in the agreement for payments to be returned.
- 3.5 The revised salaries were not implemented until April 2013 and therefore the staff involved benefited from the original (September 2012) decision from August 2012 – March 2013. From April 2013 the payments accord to the January 2013 decision and are therefore lawful.
- 3.6 The WAO have determined that the payments made for the period August to March were unlawful. Notwithstanding the auditor determination the decision of Members in January 2013 (that a negotiated agreement should be made with staff) was made without consideration of staff being required to repay the sums paid prior to this date.
- 3.7 If Members wish to pursue a repayment of any or all of that "unlawful" payment then there would be a need to reopen the negotiated agreement reached with staff in January 2013 which provided the basis for the revised arrangement being implemented. Given the nature of the agreement the Council would need to take specialist advice as to whether that would be possible (and if so the potential costs and risks).

#### **Buy Out of Car Allowances and Annual Leave**

- 3.8 This arrangement was arrived at some six months prior to the original decision on senior pay (i.e. March/April 2012).
- 3.9 As explained at Council on 8th October 2013 this issue arose because some 40 staff were, at that time, receiving higher non-pay benefits than most other staff whose terms and conditions for car allowances and leave had been standardised as part of the Single Status Agreement. A proposal came forward to regularise the position by withdrawing these higher terms from this group of staff. As is often the case in circumstances such as this there were options around giving due notice for a period of time (i.e. phasing it out) or making an equivalent payment up front i.e. buying it out.
- 3.10 Whilst questions may be asked around the detail of this action (such as timing, period of compensation and the decision to buy out rather than give notice etc.) the principle itself does not seem unreasonable and in the medium term (i.e. 3 years +) is clearly of financial benefit to the Council. Until the Council receives the PWC report and undertakes any necessary investigations then I am unable to comment further about the auditor's unlawful determination.

- 3.11 As with senior pay it should be noted that the determination of "unlawful" by the auditors does not automatically mean that the Council could unilaterally recover the payments from individuals. A decision of the Council can be procedurally flawed but this does not necessarily invalidate the variation of an employees' contracts of employment. All the individuals signed settlement agreements with the Council which agreed to the Council buying out these elements of terms and conditions for a lump sum. The Council would again need to take expert legal advice to determine whether or not the contracts of employment were validly varied and if the agreements can be withdrawn. If it is determined that the contracts have been validly varied it is unlikely that the agreements can be withdrawn and therefore it is unlikely that the payments can be recovered.
- 3.12 In addition, any decision to recover the payments is likely to place the Council in a worse financial position than if it endorsed the original "decision" because it is inevitable that if the unlawful payments are recovered then there would be a need to reinstate the previous terms and conditions and pay the car allowances (and agree previous leave entitlements) accordingly. If the Council then wished to harmonise arrangements with the staff (and save costs in the longer term) then there would be a need to renegotiate. In all probability that would be more costly than ratifying the original decision and honouring the previous agreements.

### **Conclusion**

- 3.13 The term "unlawful" is a determination by the auditors in the context of the financial accounts and is understandably emotive - particularly given the current circumstances. However, as previously indicated it does not of itself mean that the decisions were criminal or unreasonable or that the employment contracts of individual members of staff were not varied appropriately.
- 3.14 The Council will not be able to ascertain all the facts for some time given the on-going investigations, complexities and potential interaction between the two separate issues.
- 3.15 This report hopefully gives enough detail to enable Members to see the issues in the broader context. It may also be helpful in giving Members an understanding of the potential complexities around a key issue of should the Council seek recovery of any payment.
- 3.16 As previously indicated it is my intention to bring detailed reports on all these issues so that Members fully understand what happened, why it happened and who was involved. However, it is unlikely that I will be able to provide this level of detail for some time.
- 3.17 In the context of potential recovery then there will firstly be a need to clearly ascertain the facts and then take expert legal advice. It is quite possible that there will be differences between the two issues and there may also be differences in respect of those staff who demonstrably (and unreasonably) contributed to the decision(s) and those who had little if any involvement but were simply beneficiaries of the actions taken.

## **4. EQUALITIES IMPLICATIONS**

- 4.1 This report presents information for noting and so there are no equality implications arising from this report.

## **5. FINANCIAL IMPLICATIONS**

- 5.1 This report presents information for noting and so there are no direct financial implications arising from this report.

**6 PERSONNEL IMPLICATIONS**

- 6.1 This report presents information for noting and so there are no direct personnel implications arising from this report.

**7. RECOMMENDATIONS**

- 7.1 Members note the report.

**8. REASONS FOR RECOMMENDATIONS**

- 8.1 To ensure that Members are properly informed.

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