



COUNCIL – 27TH JANUARY 2015

SUBJECT: BUY-OUT OF ESSENTIAL CAR USER AND ANNUAL LEAVE ENTITLEMENTS

REPORT BY: INTERIM CHIEF EXECUTIVE

1. PURPOSE OF REPORT

- 1.1 To allow Members to make a formal decision regarding changes to annual leave and essential user allowances in accordance with the recommendation of the Wales Audit Office in their most recent Follow-up Special Inspection Report On Corporate Governance.
- 1.2 In December 2013 the Wales Audit Office published a Report in the Public Interest regarding the way in which decisions had been made to harmonise annual leave and essential user payments for senior officers with other staff. The Wales Audit Office had concluded that the decision was unlawful on the basis of the procedure which had been followed.
- 1.3 Members considered this report on the 29th January 2014 and agreed that “upon receipt of external legal advice a further report is submitted to a future meeting of the Council on the specific issue of the buy-out so that members can consider the options available regarding the unlawful payments and determine the appropriate course of action”.
- 1.4 It had been hoped that this matter would have been reported sooner, but as Members are aware there was a police investigation of the issue and it was not possible to report until that investigation was concluded, as to do so may have conflicted with any action taken. However, the Police and Crown Prosecution Service have recently determined that there are no grounds for criminal proceedings and the authority is now free to finalise the matter.

2. SUMMARY

- 2.1 In March 2012, the majority of council staff who had previously received essential user payments (a monthly payment in return for the authority requiring that they provide a car for use on council business) lost those payments. This had followed from an agreement in 2009 as part of the authority’s implementation of the single status agreement and job evaluation, and the officers concerned received three years protection from that agreement in 2009 to the eventual withdrawal of the allowances in 2012.
- 2.2 Single status applied to every employee across the Council who is employed under the terms and conditions set by the National Joint Council (NJC) for local government services. The Single Status Agreement did not apply to groups of employees who had their own separate agreements, for example Soulbury staff, Teachers, Directors, Heads of Service and some senior managers (who were paid HAY Grade Salaries and in receipt of the terms and conditions set by the Joint Negotiating Committee (JNC) for Chief Officers. This is normal within local government and is not peculiar to Caerphilly CBC. The staff who did not fall within the Single Status Agreement therefore retained these allowances, and this created an imbalance in the treatment of the staff employed under NJC for Local Government Services terms and those employed under JNC terms for Chief Officers.

- 2.3 In order to harmonise terms and conditions for the majority of staff, the removal of essential user payments was extended in 2012 to senior staff covered by JNC terms and conditions for Chief Officers. A decision was made that, instead of offering three years protection as had been offered to other staff who had been subject to single status, a one-off payment (equivalent to the same three years protection principle that was given to other staff) would be offered to 'buy-out' the allowance instead.
- 2.4 The principle of buy out was accepted by the unions and staff under the Single Status Agreement as a means of compensating staff for the withdrawal of certain pay enhancements from the Council's pay and grading structure such as bonus and shift allowance. The principle of a 3 year buy out was applied to staff who were placed at detriment under Single Status.
- 2.5 Some 40 officers were affected by the withdrawal of essential user payments. This represented an annual average loss to each of those officers of £1,057.68. By way of protection, which had been for three years for all other staff, these officers received an average one-off compensation payment of £2,567.72. The total one-off cost to the authority of these payments was £102,709. The annual saving to the authority, in perpetuity, is estimated at £45,800.
- 2.6 Obviously, another alternative would have been not to compensate or protect the affected staff at all and to simply withdraw the allowance following notice. However this would have involved treating these staff very differently to the majority of the workforce.
- 2.7 The principle of buy out was also applied to the annual leave entitlements of this group. National Terms and Conditions for these staff confer 33 days annual leave but the authority sought to reduce this to 28 days, in line with the majority of other staff. Again, a payment was made by way of a 'buy-out' compensation for those staff whose annual leave entitlement was reduced from 33 days to 28 days. This "buy-out" did not apply to the Chief Executive or the three Corporate Directors, who form the Corporate Management Team (CMT). They are not on the flexitime system, with the additional potential leave entitlement of 24 days which it confers, and so remained on 33 days leave. Those officers employed on CMT at the time obviously did not receive compensation payments as a result as their leave remained unchanged.
- 2.8 43 officers were affected by the reduction in annual leave entitlements from 33 days per annum to 28. By way of compensation, these officers received an average one-off compensation payment of £2,694.28. There is no direct financial 'saving' to the authority, but from the date of the agreement in 2012 the authority has received 5 additional working days from each employee. The exercise therefore provided additional resources for the Council.
- 2.9 The Wales Audit office view was that these decisions were unlawful on several procedural grounds and these are set out in full in their report which went before Members at the time. I have not repeated the reasons in full here because they are not in dispute and have been accepted by Council on the 28th January 2014 when the report was presented to Council. Matters relating to weaknesses in governance and decision-making have been the subject of extensive review and the follow-up report from the Wales Audit Office deals in detail with those matters.
- 2.10 The issue before Members today is that because the original decision on essential user allowances and annual leave entitlement was potentially unlawful, Members need to make a formal, lawful decision to put the matter in order. That said it must be recognised that a Wales Audit Office decision does not have force of law. Hence caution must be exercised when considering how best to give effect to views expressed by Wales Audit Office and to their recommendations, particularly when this involves contracts of employment with Council staff.
- 2.11 Because there was a Police investigation of these matters underway at the time, this issue has been delayed in coming before Council so as not to potentially compromise any investigation. However, the Police and the Crown Prosecution Service have now confirmed

that they do not intend to pursue any action on these matters, and the council is therefore now in a position to consider the matter.

- 2.12 Members should be mindful, however, that criminal proceedings **are** underway on other matters. Moreover, once those proceedings are concluded the Council will also need to consider pursuing disciplinary investigations in accordance with the authority's agreed procedures on the issues concerning the 'buy-out' payments. The authority should, in considering this issue, not stray into those other matters relating to any impending court case **nor** issues of individual accountability concerning these buy-out payments which might form part of a future disciplinary investigation. To do so might compromise the court proceedings, any forthcoming disciplinary investigations and might even be deemed to be contempt of court.
- 2.13 The decision required at present is merely one of **either** ratifying the previous decision to harmonise terms and conditions and the use of the 'buy-out' payment as an alternative to the three year protection which had been offered to other staff who surrendered essential car user allowances **or** to agree some other way forward.

3. **LINKS TO STRATEGY**

- 3.1 This report seeks to formalise an outstanding decision deemed unlawful by the Wales Audit Office and recommends a process whereby Members can comply with the recommendation of the Wales Audit Office, in their recent follow-up report on governance, that a lawful decision be made.

4. **THE REPORT**

Background

- 4.1 As Members will see from the history of this subject, outlined in the Summary section of this report above, there remains an outstanding requirement for the authority to regularise the situation regarding these two decisions. The authority cannot simply leave a potentially unlawful decision 'on the books' and needs to make a formal decision of some sort to put the matter in order.
- 4.2 This decision needs to cover both elements of the issue:-
- (i) whether or not to endorse the decision to harmonise and reduce the terms and conditions of officers covered by JNC Terms and Conditions to be in line with the majority of council staff with regard to annual leave entitlements and essential user payments.
 - (ii) depending on that decision, whether or not to endorse the use of 'buy-out' compensation payments as an alternative to the three-year protection offered to other staff, or to agree some other arrangements
- 4.3 So far as harmonisation is concerned, I would suggest that this was the right decision to make. Leaving these groups of staff with very different terms and conditions does not seem right from the point of view of treating our employees equally, and it could have opened up the authority to future claims from staff who felt they had been treated differently to others for no justifiable reason.
- 4.4 I would therefore strongly **recommend** to members that they endorse the principle of the original decision to harmonise the terms and conditions of senior managers with those who had previously been subject to the single status agreement.
- 4.5 The second issue is that of the compensatory payments.

- 4.6 In support of the use of a 'buy-out', compensatory payment for **essential users**, the end result for most staff would be largely the same compared to the authority's other staff who had received three years protection, and it could be argued that this one-off payment method was administratively easier and produced a more immediate 'level playing field' than if the staff had been given three years protection, which would have perpetuated different treatment of these two groups for a further three years. It also allowed the authority to meet the costs in one financial year and to begin making the savings immediately. Beyond the protection period (in this case reflected by way of a one-off payment), the staff concerned are only compensated to the principle of 3 years and of course they have lost the allowance forever.
- 4.7 Against this Members may feel that the buy-out option simply did not 'feel' right, given that it is different to the approach applied to the NJC staff. It also has the complication that, while neutral for those who remained with the authority for three years, for anyone who retired or left during that period they would have received a greater sum than they would have received under protection arrangements.
- 4.8 An important point, that does not appear to have been widely acknowledged, is that the buy-out arrangement was not invented for this particular harmonisation. On the contrary it had been used extensively under single status as the means by which NJC employees were compensated for withdrawal of enhancements. In other words, the "buy-out" was a well-established single status arrangement that had been previously utilised by the Council.
- 4.9 However, regardless as to whether we now feel that a one-off payment was the best means of effecting these changes, the fact is that these payments **were** made and were subject to individual legal agreements signed by each member of staff affected, following an extensive process where independent advice was offered to staff via the Arbitration, Conciliation and Advice Service (ACAS). An example of these agreements is attached as an Appendix to this report.
- 4.10 Undoing these agreements, even if deemed unlawful, would not therefore be a straightforward matter. Further, regardless of whether those agreements can be regarded as binding in law, they nevertheless represent what was agreed between the Council and the officers, in circumstances where the officers entered into those agreements in good faith.
- 4.11 Moreover, if council determined not to endorse the use of the buy-out payments then the authority would need to consider seeking reimbursement and asking staff to pay back the sums received. As stated above, given that the payments were the subject of signed, contractual agreements that set out the terms of the "buy-out" very clearly as well as the rates of tax to be deducted, this might prove very difficult to enforce. Also, the council would in all likelihood need to reinstate essential user payments to these staff and to refund payments not made in the three years since the original decision. The result of this would be that broadly the same amount of money would be changing hands, in both directions, with little or no overall net change. More importantly, it would place the authority in a worse position, looking ahead, because we would now be making essential user payments again and would have perpetuated the unequal treatment of these two groups of staff.
- 4.12 For these reasons I would **recommend** that Members agree to endorse the original decision to offer buy-out payments as compensation for the loss of essential user allowances to the staff concerned.
- 4.13 This is not to say that council necessarily agrees that this was the best way to have dealt with it at the time. Nor does it imply that the council would see this as a suitable means of dealing with any similar issue in the future. It simply recognises the realities of the situation where three years have passed and where any other decision would likely cost the council far more than simply endorsing the original decision and moving on. It should also be borne in mind that although the staff concerned received a buy-out payment, the long term effect is that the authority is better off financially; the staff themselves have forgone their essential user entitlement and the compensation payment was, by and large, financially no different to either

party than the three year protection offered to some staff, or the three year buy out offered to other staff, under single status.

- 4.14 The buy out payment in return for the **harmonisation of annual leave** entitlement is similar, except that in this case there is no specific financial allowance that has been lost and so the financial calculation, whereby the council is actually better off financially after the period of the buy out, is less straightforward. Nevertheless, the council has gained by having an additional five days employment from each of the staff concerned, for no increase in their salary, and this obviously has a value.
- 4.15 The impact of not endorsing the original decision would be similar to that involving the essential user payments. If not endorsed the authority will have to reinstate the higher annual leave allowance and 'refund' the affected staff 15 days leave which they have lost over the last three years. As these are key, senior staff we would not necessarily want them having to take an additional three weeks leave this year or over the next few years. We would also face the similar problem of how to legally overturn signed contractual agreements, and lead to the unenviable position of some staff agreeing to maintain the status quo, others wanting to revert to the former more generous holiday arrangements and/or having to dismiss and re-engage staff in order to achieve the harmonised position that currently exists
- 4.16 All things considered, therefore, I would again **recommend** to members that they endorse the buy-out arrangements made in 2012 relating to annual leave entitlements, subject to the same caveat that the authority is not, by so doing, implying that this is any form of precedent or approval for similar arrangements in future, unless specifically endorsed by council.
- 4.17 There are two further matters of which Members need to be aware.
- 4.18 Firstly, at the time of these new arrangements in 2012, five officers refused to sign the agreements on harmonisation of annual leave, (this is perhaps the best illustration that this buy out was not regarded as a benefit but as a detriment.) They did not receive a compensation payment and they remain on 33 days annual leave. This is not considered ideal as it retains separate terms and conditions for this small group of staff. It is **recommended** that members agree that the authority should seek to negotiate with these staff and to harmonise their leave arrangements with the main body of staff, should your decision be to ratify the current position.
- 4.19 Once this is resolved there will remain a small number of staff who continue to have different terms and conditions, including those on 'Soulbury' terms, within the education field. While numbers are relatively low it may be necessary to revisit this issue also in the future.
- 4.20 There is also an outstanding complication which has arisen since the date of the publication of the original Public Interest Report, regarding the rate of tax which was paid by officers in receipt of the compensation payments.
- 4.21 For payments made previously under Single Status and Equal Pay, for the main body of staff, a composite rate of tax and National Insurance (NI) deductions was agreed with Her Majesty's Revenue and Customs (HMRC). It was assumed that this composite rate could also be applied to these compensation payments, but this is currently being reviewed. It now appears that these deductions may have been too low and following external specialist advice a payment 'on account' has been made to reflect the potentially higher sum. The legal agreements reached with individual members of staff were inclusive of the composite rate and, given the nature of those legal agreements, it would probably prove difficult to recover any additional costs from the employees themselves as the authority had presented them with the figures on which their decision to accept the changes in their terms and conditions were based.
- 4.22 Depending on the decision of members regarding ratification of the harmonisation process, and the compensation payments, the authority will then need to seek to agree with HMRC as to the exact figure which will need to be paid. To date, the authority has paid 'on account' an

“interim” payment of £150,593.69 in relation to tax liabilities in respect to these payments which is believed to cover the ‘worst case’ anticipated liability. It is hoped that the eventual figure will be lower than this, but this depends on negotiations which have not yet been undertaken.

5. EQUALITIES IMPLICATIONS

- 5.1 This whole matter stems, in many ways, from the desire to treat all employees of the authority equally. It was not considered appropriate to offer some staff an essential user allowance because they were on a more senior grade, nor to give them more annual leave.
- 5.2 By finally resolving this matter, with a lawful decision, the authority will be closer to finalising the process of single status and equal treatment for the entire workforce.

6. FINANCIAL IMPLICATIONS

- 6.1 If agreed, the recommendations contained in this report will regularise the current status quo. All of the costs, including those relating to the payment to the HMRC in respect of tax liabilities, have been met from the existing provision for single status and equal pay and there are, therefore, no financial implications compared to the authority’s agreed revenue budget. The report outlines also the anticipated tax liability which will arise, but again this has already been paid on account and is reflected in the authority’s existing budget.
- 6.2 If Members decide to take an alternative course of action there will in all likelihood be considerable legal costs in renegotiating contracts with staff affected and the exact cost of any reclaim and reimbursement of buy-out payments made and allowances not paid (and annual leave not taken) over the three years will need to be looked at in detail once those negotiations are complete. The authority may also need to budget for a reinstatement of essential user payments for the staff concerned into the future.
- 6.3 Over time, the authority is better off financially as a result of the changes to which these decisions relate. The authority no longer makes essential user payments to this group of staff, and has secured an additional five working days from the staff concerned, for which no long term increase in remuneration has been made.

7. PERSONNEL IMPLICATIONS

- 7.1 If agreed, the recommendations contained in the report regularise the current arrangements and there are no specific personnel implications. If Members decide not to regularise matters as they currently stand there will then be implications concerning affected staff, depending on what decision is agreed.

8. CONSULTATIONS

- 8.1 The council has sought independent legal advice on this matter, and an independent legal advisor will be present at the meeting to deal with any further queries which may arise.
- 8.2 The council has also consulted the Wales Audit Office on the content of this report and any comments received will be provided at the meeting.

9. RECOMMENDATIONS

It is recommended that Members:-

- 9.1 Endorse the original principle of seeking to harmonise terms and conditions over the removal

of essential user allowances and annual leave entitlement for senior staff.

- 9.2 Agree to ratify the use of one-off payments made to staff in 2012 as an alternative to the three year protection afforded to other staff so affected under the single status agreement.
- 9.3 Agree to ratify the use of one-off payments made to staff in 2012 as compensation for the loss of five days annual leave.
- 9.4 Agree that the authority should seek to negotiate harmonisation with the few remaining staff who did not agree to the changes made in 2012.

10. REASONS FOR THE RECOMMENDATIONS

- 10.1 To comply with the recommendations of the Wales Audit Office that the authority make a lawful decision regarding these issues.
- 10.2 Because the original intention of harmonising terms and conditions was a sound one, even if procedurally flawed in its implementation as stated by the Wales Audit Office. Moreover, long term, the cost to the authority is less than before the decision was made.
- 10.3 Because with the passage of time it is neither financially worthwhile nor practically straightforward to seek to undo contractual agreements made with individual employees in 2012. To do so would potentially prove far more costly to the authority than ratifying the 'status quo' as it stands.

Author: Chris Burns, Interim Chief Executive
Consultees: Dave Regan, Finance – Lead Office, Benefits and Finance
Lisa Haile, HR – Personnel Manager

Background Papers:

Wales Audit Office: Report in the Public Interest; Chief Officer Essential Car User and Annual Leave Allowances; Caerphilly County Borough Council. 19 December 2013

Wales Audit Office: Follow Up of the Special Inspection and Reports in the Public Interest; Caerphilly County Borough Council. January 2015.

Report of the Interim Chief Executive to Council, 28 January 2014: Wales Audit Office Public Interest Report.

Appendices:

Appendix 1 Sample of the legal agreement signed by employees and the county council in respect of the 'buy-out' compensation for loss of essential user allowances and annual leave.