



WALES **AUDIT** OFFICE
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Chief Officer Essential Car User and
Annual Leave Allowances
Caerphilly County Borough Council
Report in the Public Interest

Chief Officer Essential Car User and Annual Leave Allowances

This report in the public interest has been prepared in accordance with Section 22 of the Public Audit (Wales) Act 2004.

No responsibility is accepted in relation to any officer, member or any other person in their individual capacity or any third party.

The PWC team that assisted me in preparing this report comprised Lynn Pamment and Ian Davies.

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This report is issued in the public interest under Section 22 of the Public Audit (Wales) Act 2004. I have issued this report to draw the public's attention to a failure in governance arrangements and inadequacies in the processes adopted by Caerphilly County Borough Council to determine the buy out of Essential Car User Allowance (ECUA) and Annual Leave Allowance (ALA) of Chief Officers. As a result of such failures the Council has, in my view, acted unlawfully with regards to these payments.

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Summary and Recommendations

- 1** This report is issued in the public interest under Section 22 of the Public Audit (Wales) Act 2004. The Act requires me to consider whether, in the public interest, I should make a report on any matter which comes to my notice in the course of the audit, in order for it to be considered by the audited body or to be brought to the attention of the public.
- 2** I have issued this report to draw the public's attention to a failure in governance arrangements and inadequacies in the processes used to determine the buy out of the entitlements to Essential Car User Allowance (ECUA) and Annual Leave Allowance (ALA) for Chief Officers. As a result of such failures the Council has, in my view, acted unlawfully with regards to these payments. I believe it is important that the public has a full and proper awareness of these events concerning the Council. I also consider it appropriate to give the Council an opportunity to explain the important steps it has taken to improve arrangements and to ensure that the risk of such failures recurring is reduced to a minimum.
- 3** In April 2013 the Council's Section 151 Officer drew my attention to their concerns about the processes adopted to make payments ('buy outs') to Chief Officers in order to harmonise their terms and conditions with those of other staff at the Council in relation to entitlements to ECUEs and ALAs. The arrangement involved the surrender of benefits due to the Chief Officer group under their existing Joint Negotiating Committee (JNC) terms and conditions of employment in return for a one-off payment under a compromise agreement. I subsequently received correspondence setting out concerns in this area from a member of the public in my capacity as the statutory auditor of the Council. The concerns raised included matters of governance and probity. I determined that several of the issues raised were matters which fell within my statutory remit and should be investigated.
- 4** In the course of my audit investigation, I sought to reach a conclusion on whether the Council has lawfully made these payments to Chief Officers. I have concluded that the payments made to Chief Officers to buy out both the ECUA and the ALA were unlawful. There are three matters that lead me to this conclusion.
- 5** The first matter is the authority to make the decision to buy out the allowances. At the time the decision was made, only the Council had the power to take decisions regarding such payments to the Chief Executive. The Chief Executive at that time did have delegated powers to make such decisions regarding other chief officers. In the event, however, there is no clear record of how the decision was made and by whom. It is clear that the decision was not taken by a formally constituted members' body and this alone makes the decision in respect of the Chief Executive unlawful along with any consequent payments to him.

- 6** The second matter relates to the participation in the decision making process by persons who held a pecuniary or personal interest. Each Chief Officer had a conflict of interest as they held a pecuniary or personal interest in the decision. Consequent to the lack of a formally recorded decision, there are no records of any declarations of interest. These factors would also render the decision unlawful along with any consequent payments.
- 7** The third matter relates to the requirement in the Council's constitution that a decision, made under delegated powers, must be published if the decision is to be lawful. There is no evidence that the decision to buy out these allowances for Chief Officers and to make a compensatory payment in order to do so, was publicised. Again, this alone means that the decision was unauthorised and unlawful along with any consequent payments.
- 8** I consider that there are lessons to be learnt by the Council in respect of the processes followed in the decision to buy out the Chief Officers' entitlement to ECUA and ALA. These events occurred in 2012. Since then the Council has taken action to address governance weaknesses identified in my previous report in the public interest. These actions are being assessed as part of the Corporate Governance Inspection being undertaken by the Auditor General for Wales.

Recommendations

I made a number of recommendations in my Public Interest Report of March 2013. I have not repeated those recommendations in this report, although many are relevant to my findings in this report.

Records of decisions

- R1** Clear records of all decisions should be retained, identifying the decision made, who made the decision and when the decision was made. Furthermore, as decisions are taken there should be proper consideration of whether these decisions should be recorded in the Council's decision log. This consideration should be documented.

Implementing decisions

- R2** Officers should not proceed to implement decisions unless they are clear as to who has made the decision. Officers should retain evidence of this consideration.

Statutory officer advice

- R3** When making decisions, decision-makers should consider whether a formal view is required from the S151 Officer or Monitoring Officer and whether this view has been given. Where a formal view is required, there should be a process in place to ensure that the statutory officer is provided with all of the relevant information required to take that view. Officers should also record how this advice was followed.

Reports

- R4** Reports which are produced to support decision-making processes should follow a standardised format, in particular noting the author of the report and who has been consulted. Reports should contain a comprehensive list of available options.

Background

- 9 My audit team was informed by the Council's S151 Officer on 11 April 2013 that, following discussions with the Acting Chief Executive, she wished to inform us that payments had been made as a result of a buy-out of the ECUA and ALA for Chief Officers in April 2012. A Freedom of Information request had been made to the Council in relation to the ECUA buy out. The S151 Officer considered that this was a matter that I would wish to consider as part of my audit, along with the buy out of the ALA.
- 10 It was explained to us that the Council, as part of its process to harmonise terms and conditions of Council employees covered by National Joint Council (NJC) terms and conditions, had removed the ECUA from the majority of staff at 31 March 2012, following an agreement in 2009 which allowed these staff a 3 year protection period. This arrangement did not include Chief Officers at the time who were covered by JNC terms and conditions. Chief Officers also had an entitlement to additional ALA in accordance with JNC national terms and conditions.
- 11 The arrangement for the buy out of both these allowances was that the sum which would be paid to individual Chief Officers would be equivalent to the value of 3 years' worth of each allowance, where the officers were entitled to the allowance under their existing terms and conditions. Corporate Directors and the Chief Executive were only offered the buy out of ECUA and not ALA. Late in the process however, other Chief Officers were offered the option of retaining their existing terms and conditions in respect of their ALA. Five Chief Officers took up the option to retain their existing terms and conditions in respect of ALA.
- 12 The payments were eventually made in April 2012, following a presentation to the officers involving ACAS and the receipt of signed compromise agreements by the Council. The purpose of such agreements was to signify the acceptance of the compensation and to indemnify the Council against any claims for breach of contract in relation to the buy outs from the Chief Officers. The arrangement involved the immediate surrender of benefits by Chief Officers in return for compensatory payments.
- 13 Of particular concern to the S151 Officer was that there was no evidence that the payments had been subject to any formal approval process, but did include a payment to the Chief Executive.

The decisions taken to make payments to buy out the ECUA and ALA were unlawful

- 14** Over the period from March 2011 to April 2012 there were various discussions and meetings in relation to the buy outs of ECUA and ALA, involving the Chief Executive, the Deputy Chief Executive and the Head of Human Resources.
- 15** In December 2011 the Council received legal advice stating that the Council's legal advisers agreed with the Council's view that the necessity to have uniformity and 'Single Status' in relation to arrangements such as ECUA was soundly based, as there was a risk that such benefits could be a target of future equal pay claims by those doing work of equal value but not receiving the benefits. The legal advisers also agreed that an approach which compensated individuals who surrendered this benefit appeared proportionate and that it was logical to treat this approach on the same basis as other single status compensation payments.
- 16** On 10 January 2012 the Monitoring Officer advised the Deputy Chief Executive and the Head of Human Resources by email that it would be possible for the Chief Executive to use his delegated powers to determine a review of annual leave and essential car users allowances for Chief Officers. Most Chief Officers who had been recruited or promoted since 2009 did not receive these allowances. The Monitoring Officer has informed us that he had assumed that the Chief Executive who was promoted in 2010, was not in receipt of the ECUA. The Monitoring Officer also advised that the decision of the Chief Executive would not need to be placed on the intranet for members but that it would be necessary for consultation to take place with the Leader of the Council, his Deputy Leader and the Cabinet member for Human Resources.
- 17** On 19 January 2012 a report was discussed at an informal Corporate Management Team meeting (which followed the formal Corporate Management Team meeting), which set out proposals for the buy outs. Present at the meeting were the Chief Executive, Deputy Chief Executive, Director of Social Services, Director of Education and Head of Human Resources. The report was prepared by the Head of Human Resources. There was no agenda for this meeting and no minutes were taken.
- 18** The report included three options for addressing the different entitlements between Chief Officers and other staff groups in respect of ECUA and also proposed a buy out of ALA.
- 19** There is no written record of the meeting on 19 January 2012. Two of the officers present were of the view that it was agreed that the Chief Executive would talk to the Leader of the Council on the proposals. It is evident from interviews we have conducted that no consultation took place with the Leader or with his Deputy Leader or with the Cabinet member for Human Resources. Furthermore, I have seen no written evidence that any consultation (as advised by the Monitoring Officer) took place.

- 20 The proposals were put to the Leadership Team (consisting of Heads of Service and the Corporate Management Team) on 2 March 2012, and the equal pay claim risks attendant on not proceeding with the proposals were emphasised. Following this, a number of Chief Officers lobbied for retention of existing terms and conditions in respect of the ALA. It is not clear who took the decision to offer this as an option, due to the lack of formal documentation of the decision. I was informed by the Deputy Chief Executive and the Head of Human Resources that the Chief Executive took the decision to make a late change to the proposal to include this as an option. The Chief Executive informed me that this was a decision taken by either the Deputy Chief Executive or the Head of Human Resources.
- 21 Five Chief Officers took up the option of retaining existing terms and conditions for ALA.
- 22 There is a lack of clarity over who made the decision to proceed with the buy-outs although it is clear that it was not a member decision. The decisions made under delegated powers were not placed on the decisions list on the intranet and were not available for call in by members.
- 23 The Council's constitution authorises the Chief Executive or any director and head of service to exercise the powers of the Cabinet in relation to the terms and conditions of employment of officers. This does not include the Chief Executive's terms and conditions, which must be approved by members. Where, however, there is a conflict of interest then the decision should be made by whichever body had delegated the power to make that decision. In this case it would be the Cabinet.
- 24 If a lawful delegated decision is to be taken then it must be published, including where possible by electronic means, and must be available at the main offices of the Council normally within two days of being made. For certain categories of decision, the person responsible for publishing the decision must send the chairmen of all overview and scrutiny committees' copies of the records of all such decisions within the same timescale.
- 25 Once a decision has been made and published it may be implemented on the expiry of three working days unless the decision is called in. In addition, decisions taken under an officer's delegated powers in relation to certain categories must be recorded in writing and notified to members by way of an Information Bulletin.
- 26 The evidence points to there being one decision made affecting all Chief Officers (i.e. the decision regarding the Chief Executive's entitlement was not dealt with separately to that of the other officers). There is no clear evidence to indicate who took the decision. It is clear that it was not a decision taken by members.
- 27 There are three matters that lead me to conclude that the decision to make these buyouts was unlawful.
- 28 The first matter is the authority to make the decision to buy out the allowances. At the time the decision was made, only the Council had the power to take decisions regarding such payments to the Chief Executive. The Chief Executive at that time did have delegated powers to make such decisions regarding other Chief Officers. There is a lack of a clear record of how the decision was made. It is clear that the decision was not taken by

a formally constituted members' body and this alone makes the decision in respect of the Chief Executive unlawful along with any consequent payments to him.

- 29** The second matter relates to the participation in the decision making process by persons who had a pecuniary or personal interest. A person is disqualified from participation in a local authority decision-making process if there is a real possibility that he or she would be influenced by a pecuniary or personal interest in the outcome of the decision (see *R v Secretary of State for the Environment ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304; *Porter v Magill* [2002] 2 AC 357). Disqualification from participation in a decision-making process applies to an officer providing written or oral advice to a decision-making Committee or Board. These factors would also render the decision unlawful along with any consequent payments.
- 30** The Chief Officer Group had a pecuniary or personal interest in the decision. These interests were not declared and one or more of these individuals participated in the decision-making process. In general, the participation in a decision-making process of a single individual with a disqualifying interest will make void the decision arrived at (see the *Kirkstall Valley* case and *R v Hendon RDC ex parte Chorley* [1933] 2 KB 696). This is reflected in the Council's constitution.
- 31** The third matter relates to the requirement in the Council's constitution that a decision, made under delegated powers, must be published if the decision is to be lawful. There is no evidence that the decision to buy out these allowances for Chief Officers was publicised. Again, this alone means that the decision was unauthorised and unlawful along with any consequent payments.
- 32** The Monitoring Officer in his e-mail of 10 January 2012 states that 'the decision of the Chief Executive Officer would not need to be placed on the intranet for members'. There are two issues in relation to the advice of the Monitoring Officer. The first is that, in my opinion, the advice is incorrect. The second is that notwithstanding this, the full advice of the Monitoring Officer was not followed.
- 33** The Council's constitution is clear that a decision, made pursuant to delegated powers must be published if the decision is to be lawful. To fail to do so is to deny the members the chance to call in a decision. The decision was therefore unauthorised and accordingly unlawful.
- 34** In addition there is no evidence to suggest that the chairmen of all overview and scrutiny committees were sent copies of the records in accordance with the Council's constitution. A failure to comply with this element of the constitution will also result in a decision which is unauthorised and therefore unlawful.
- 35** Furthermore, the Monitoring Officer advised that the Leader and his Deputies should be consulted prior to proceeding with the decision. There is no evidence that any such consultation took place. Officers did not, therefore, follow the Monitoring Officer's advice.
- 36** Accordingly, in my view, the decision in relation to officers other than the Chief Executive was also unauthorised and therefore unlawful. Any payments made pursuant to this unlawful decision will be contrary to law.

There are weaknesses in the governance procedures at the Council

- 37** The concerns I have outlined above are significant from a governance perspective as well as a legal perspective and arise from failures in governance procedures by the Council. In particular I have concerns in relation to:
- a** The lack of documentation recording the formal decision made to proceed with making an offer to Chief Officers in respect of ECUA and ALA.
 - b** The consequent lack of clarity as to how the decision was made and by whom.
 - c** The informal process by which advice was obtained from the Monitoring Officer and the accuracy of the advice given.
 - d** The failure to follow the advice given by the Monitoring Officer in any event (notwithstanding the inaccuracies in the advice).
 - e** The failure to publish the decision on the Council's decision list.
 - f** The failure to consider and deal appropriately with the conflicts of interest of those who participated in the decision-making process.
- 38** As well as the weaknesses noted above, there are other areas in which I have concerns from a governance perspective. These concerns relate to other elements of the decision-making process.

The report from the Head of Human Resources was not adequate for the purposes of decision making

- 39** Whilst the report from the Head of Human Resources to the informal CMT on 19 January 2012 contained recommendations, it did not follow the standard reporting format for the Council. In particular, it did not:
- a** Identify the author, the name of the body considering the report nor the date on which it was considered; and
 - b** Comment on any consultations with statutory and other officers that had or should have taken place. Both the S151 Officer and the Monitoring Officer have confirmed that they were not consulted on the report.
- 40** The report from the Head of Human Resources gave three options in relation to the removal of ECUA from Chief Officers. One option that was not included or considered was that of removing the allowance from Chief Officers without compensation. This option should have been considered in order for a balanced decision to have been made.

The purpose of the buyouts was undermined by the offer of retaining the allowance for annual leave

- 41 The purpose of the buyouts was to harmonise terms and conditions of service in order to reduce the risk of future equal pay claims. However, the proposals were amended very late in the process to include an option for Chief Officers to retain their existing terms and conditions in respect of ALA. The impact of this is to negate the purpose of the proposals. Again it is unclear how the decision to include this further option was made, with conflicting views of events and no clear record of the decision.

Next steps

- 42** The Council is now required by Section 25 of the 2004 Act to consider this report at a full meeting of the Council within one month of the date of this report. At the meeting, the Council must decide:
- a** whether the report requires it to take any action;
 - b** whether the recommendations in the report are to be accepted; and
 - c** what action (if any) to take in response to the report and recommendations.

Acknowledgements

- 43** I wish to express my appreciation to officers and members of the Council for their co-operation during the audit.



Anthony Barrett

Appointed Auditor
19 December 2013