



Report Reference Number: C/22/7

To: Council
Date: 13 December 2022
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Lead Executive Member: Councillor Mark Crane, Leader of the Council
Lead Officer: Glenn Sharpe, Solicitor and Deputy Monitoring Officer

Title: Proposed Redundancy Settlement Agreement: Council's Head of Paid Service and Chief Executive Officer ("HoPS")

Summary:

The purpose of the report is to seek approval to enter into a redundancy settlement agreement with Janet Waggott, the Council's Head of Paid Service and Chief Executive Officer ("HoPS") in the context of Selby District Council being abolished as a result of local government reorganisation and the post of HoPS ceasing to exist as at 1 April 2023.

A report was presented to the Council's Employment Committee on 24 November 2022 which resolved to accept the recommendation to enter into a redundancy settlement agreement in the terms described in this report and further resolved to recommend that Council endorse the said resolution.

Recommendations:

- 1. That Council resolves to endorse and approve the proposed settlement terms set out at paragraph 6.5. of the report.**
- 2. That the Council delegates authority to the Deputy Monitoring Officer to arrange for the Council to enter into a settlement agreement with HoPS and North Yorkshire County Council on the terms set out in paragraph 6.5.**

1. Introduction and background

- 1.1** The proposed settlement is recommended within the context of the Council being dissolved as a result of local government re-organisation and the post of the Council's HoPS ceasing to exist as of 1 April 2023.

1.2 The North Yorkshire (Structural Changes) Order 2022 (“SCO”) provides for the establishment, on 1 April 2023, of a single tier of local government in the county of North Yorkshire. The existing seven district areas within North Yorkshire are to be abolished as local government areas and replaced by a single district area coterminous with the county. All seven district councils in North Yorkshire (Craven, Hambleton, Harrogate, Richmondshire, Ryedale, Scarborough and Selby) are therefore to be wound up and dissolved. From 1 April 2023 North Yorkshire will be administered by a single unitary council, the North Yorkshire Council.

1.3 The reorganisation is being implemented by the SCO in accordance with the Local Government and Public Involvement in Health Act 2007 (the “2007 Act”) and the guidance and regulations made under the 2007 Act therefore apply including:

- The Local Government (Structural and Boundary Changes) (Staffing) Regulations 2008 (“Staffing Regulations”)
- Local Government Restructuring – Guidance on Staffing Issues dated June 2008 (“Staffing Guidance”)

1.4 Also relevant are:

- The Cabinet Office’s Staff Transfers in the Public Sector Statement of Practice January 2000
- The Secretary of States’ Direction for North Yorkshire made in accordance with section 24 of the 2007 Act
- The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”)
- The Employment Rights Act 1996 (“ERA”)
- The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 (Compensation Regulations)
- The Local Government Pension Scheme (benefits, Membership and Contributions) Regulations 2007 (Pension Scheme Regulations)
- The Localism Act 2011

2. Redundancy Situation

2.1 Redundancy arises in one of the three scenarios set out in the ERA. In summary these are:

- where there is a business closure;

- where there is a workplace closure (closure of one of several sites, or relocation to a new site); or
- where there is a diminished requirement of the business for employees to do work of a particular kind.

2.2 Whether a post is or should be declared redundant is a matter for the Council as the relevant employer to seek to agree or implement. Dismissals of the HoPS for redundancy are specifically a matter for full Council to determine.

2.3 As the Council remains the sovereign authority responsible for delivery of its existing statutory and discretionary services up until and including 31 March 2023, there is no diminished or ceasing requirement for the HoPS to perform her role. Indeed, the Staffing Guidance specifically acknowledges the importance that each authority subject to reorganisation continues to provide high quality services throughout the period pre and post reorganisation. It is therefore not envisaged that a redundancy situation will arise before 1 April 2023.

3. Application of TUPE and the implications thereof

3.1 TUPE contains the following provision that provides that it does not apply to an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities:

“An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer.” (Regulation 3(5))

3.2 However, the Staffing Regulations (Regulation 3) and accompanying Staffing Guidance expressly state that TUPE applies to the process of local government reorganisation. More specifically under the Staffing Regulations the county council in North Yorkshire is now a “preparing council” and will then become a “single tier council” as defined in Regulation 2. Regulation 3 provides that:

“Subject to regulation 4(1) and notwithstanding regulation 3(5) of the TUPE Regulations, the transfer of functions from a predecessor council to a single tier council in connection with one or both of a structural change and a boundary change shall be treated for all purposes as a relevant transfer within the meaning of the TUPE Regulations, whether or not, apart from this provision, those Regulations would otherwise apply.”

3.3 The intention behind the regulations being that staff who are subject to public sector transfers do so on terms that are no less favourable than those they enjoy immediately prior to the transfer. The HoPS of predecessor councils (which includes the Council) are therefore in principle subject to the application of TUPE and entitled to transfer on their existing terms and condition to the North Yorkshire Council.

3.4 Accordingly, unless the HoPS and Council as current employer agree or determine otherwise then the HoPS would be expected to transfer in accordance with the principles of TUPE as per with the Staffing Guidance on 1

April 2023. The North Yorkshire Council as the new employer would then be responsible for making and implementing any decisions as to redundancy.

- 3.5 If a redundancy takes place, ahead of 1 April 2023 the Council must be mindful that if such redundancies are by reason of the proposed transfer, it is likely to be automatically unfair in accordance with the principles of TUPE as there is no potential defence available (an Economic, Technical or Organisational reason entailing changes in the workforce (“ETO reason”)) to the Council pre-transfer. The ETO reason is for the North Yorkshire Council to establish. The North Yorkshire Council will have such a reason relating to the management or organisational structure adopted for the new authority and the fact that they have appointed the new HoPS, meaning that that office holding and employment role are not vacancies to which the transferring HoPS can transfer to (see immediately below).
- 3.6 Following a competitive process, on 17 August 2022 the North Yorkshire Council appointed the current NYCC Chief Executive (Richard Flinton) as the Chief Executive for the unitary Council. The North Yorkshire Council maintain that there will therefore be no suitable alternative post on transfer for the HoPS.

4. Options

- 4.1 Based on the fact that the new authority has appointed a new HoPS, the post of the current HoPS will be redundant and as such the following scenarios arise:
- the HoPS will transfer to the North Yorkshire Council on 1 April 2023 and as it is highly likely that the North Yorkshire Council will have no suitable alternative role (or will argue that no vacancies are suitable), the North Yorkshire Council as the employer will terminate her employment on the grounds of redundancy. The Council then have three options being:
 - (1) to employ her during the contractual period of notice (which will be difficult);
 - (2) put her on garden leave during all or part of her notice; or
 - (3) make a payment in lieu of contractual notice; or
 - if the HoPS wishes to leave local government service as a consequence of the reorganisation, the Council can agree that she may leave employment on 31 March 2023 on the grounds of redundancy and agree an exit package in exchange for waiving any claim for unfair dismissal.

5. Terms of Employment

- 5.1 For the purpose of the Redundancy Modification Payments Order 1993 her period of continual service is 26 years. The HoPS annual salary is £116,403.
- 5.2 The HoPS contract of employment provides for a 12 week notice period.
- 5.3 The HoPS is a member of the Local Government Pension Scheme who is over 55 years of age. As such, she has an entitlement to an unreduced pension. The shortfall in pension contributions prior to the statutory age of retirement, the

pension strain, will, it is proposed, be met by the Council as part of the proposed Settlement Agreement.

5.4 The Council has a policy and practice on the award of compensation which applies to all Council employees whose employment is terminated early, either on the grounds of redundancy or efficiency of the service. For the purposes of this policy, early termination occurs when an individual's employment ceases before the age of 65, the normal retiring age at which retirement benefits become payable. The policy provides that the Council will calculate redundancy pay using the statutory scheme but will use the employee's actual weekly pay (as opposed to the capped week's pay provided for in the calculation of statutory redundancy). It further provides that the Council will only pay a redundancy payment where the employee has two years' continuous service and that the Council will not pay any other amount in compensation. The calculation and entitlement to redundancy payment is a term and condition of all employee's contracts of employment.

5.5 In a redundancy situation the HoPS is therefore entitled to the following sums:

Redundancy Payment - £66971.59 (being calculated in accordance with the provisions of the ERA based upon weekly salary and capped at a maximum of 20 years' service)

Payment in lieu of notice - £26,788.68 (being 12 x weekly salary)

Pension Strain Costs - £116,169.1

6. Proposed way forward

6.1 To treat this as a genuine redundancy situation, which it is, which would enable the Council to consult with the HoPS as to redundancy and to serve notice on 31 March 2023 to terminate her employment by reason of redundancy.

6.2 Paragraph 6.3.7 of the Staffing Guidance states that:

“Any chief executive of a predecessor council for whom there was no suitable alternative post on transfer...is likely to be made redundant. There is, however, nothing to prevent a chief executive (or other senior officer) of a predecessor council from reaching agreement with their existing employers on terms of severance, if they wish to leave before the reorganisation date, though we would expect the agreement of the Implementation Executive or Shadow Council to be obtained, perhaps within the context of a local protocol on staffing issues.”

6.3 At paragraph 6.4.2 of the Staffing Guidance it states:

“The Government recognises that Implementation Executives and Shadow Councils may, in the interests of staff morale and in order to effect a smooth and efficient transition to single tier councils, wish to offer employees of affected councils the opportunity of taking VER [Voluntary Early Redundancy] in advance of the reorganisation date and including an appropriate financial package. The Government recommends that the Implementation Executive or Shadow Council should consider co-ordinating the offering of a VER scheme

with the existing employers (though the decision to actually make any redundancy ultimately rests with the existing employer). The Government expects any predecessor council to co-operate fully with the Implementation Executive or Shadow Council in arranging for a VER scheme to be offered to its employees.”

- 6.4 The guidance therefore confirms that the Council is entitled to offer Voluntary Early Redundancy to employees who wish to terminate their employment and receive a financial severance package resulting in the contract being terminated by mutual agreement. Indeed, the guidance suggests that North Yorkshire Council as the new authority may wish to promote such an arrangement to take effect before the Vesting Date “to effect a smooth and efficient transition” and coordinate with predecessor Councils whilst acknowledging that the decision rests with the Council as the relevant employer.
- 6.5 For this reason it is proposed that a tri-partite agreement be reached between the affected HoPS, the Council and North Yorkshire Council for the dismissal by reason of redundancy of the HoPS ahead of vesting day. The terms of that agreement being:
- The HoPS object to any TUPE transfer to the new authority therefore removing the risk of the employee transferring “as a matter of law” to North Yorkshire Council.
 - Notice to terminate by reason of redundancy be given on 31 March 2023.
 - The HoPS be paid £26,788.68 in respect of her contractual notice period of 12 weeks but that this payment be paid in lieu of notice, there being no role for her to serve her notice out after 31 March 2023.
 - The HoPS be paid her contractual redundancy payment of £66,971.59.
 - That the Council assume the pension strain costs for the remainder of the period until the HoPS statutory retirement age, such costs being £116,169.18.
 - The HoPS ensure that she has no accrued but untaken holiday.
 - Any payments received are therefore in full and final settlement of any employment related claim that as an employee she may have.

7. Implications

7.1 Legal Implications

The legal process and negotiations which have resulted in the recommendation comprised in this report has been undertaken with the benefit of advice from the Council’s specialist employment solicitors, Browne Jacobson.

The process and recommendation have also been the subject of review by one of the Council’s Independent Persons as required by the Constitution. The outcome of the review will be the subject of an update to Members.

7.2 Financial Implications

The financial implications of the recommendation have been the subject of discussion and consultation with both the Council's auditors, Mazars, and the Council's S151 Officer.

7.3 Other Required Assessments and Implications

In addition to the Legal and Financial implications of the recommendation, Policy and Risk, Resource Implications and Equalities have also been considered in the preparation of this report.

8. **Recommendations**

1. That Council resolves to endorse and approve the proposed settlement terms set out at paragraph 6.5. of the report.
2. That the Council delegates authority to the Deputy Monitoring Officer to arrange for the Council to enter into a settlement agreement with HoPS and North Yorkshire County Council on the terms set out in paragraph 6.5.

9. **Reasons for decisions**

9.1 The Local Government Restructuring – Guidance on Staffing Issues dated June 2008 (“Staffing Guidance”) explains that the Council is entitled to offer voluntary early redundancy to employees who wish to terminate their employment and receive a financial severance package resulting in the contract being terminated by mutual agreement. This has happened in a number of other areas subject to reorganisation.

9.2 More specifically the Staffing Guidance states:

“Any chief executive of a predecessor council for whom there was no suitable alternative post on transfer....is likely to be made redundant. There is, however, nothing to prevent a chief executive (or other senior officer) of a predecessor council from reaching agreement with their existing employers on terms of severance, if they wish to leave before the reorganisation date, though we would expect the agreement of the Implementation Executive or Shadow Council to be obtained, perhaps within the context of a local protocol on staffing issues.”

9.3 The proposed settlement is considered to represent value for money by ensuring that the HoPS remains in office and engaged to enable the Council to continue to delivery its services until 31 March 2023; that there is a smooth transition to the new authority; and that the potential for costly and disruptive legal proceedings will be avoided by recognising now what payments the HoPS is legally entitled as a result of his service and termination of employment.

9.4 Whilst the proposals do not encompass payments other than those to which the HoPS has a legal entitlement (i.e., contractual and statutory rights to such

payments), the HoPS has no contractual entitlement to be paid in lieu of notice. In the interests of good governance and transparency, the proposed payment has therefore been assessed against the considerations for making SSPs as contained in the government guidance.

- 9.5 Whilst section 24 approval may not be required of North Yorkshire County Council, officers are of the view that the County Council should be involved in the process not least in the interests of transparency, good governance and in recognition of the fact that ultimately all District and Borough Council assets and funds are publicly owned and will transfer to the County as the continuing authority.

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