

## Approval for Special Severance Payments

<b>1.</b>	<b>Introduction</b>
1.1	This document sets out the business case for seeking approval for Harrogate Borough Council (the “Council”) reaching a redundancy settlement agreement with Wallace Sampson, the Council’s Head of Paid Service and Chief Executive Officer (“HoPS”).
1.2	The proposed settlement is in 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.
1.3	In the interests of good governance and transparency the proposed payment has been assessed against the government’s May 2022 published statutory guidance on the making and disclosure of Special Severance Payments (“SSP”) by local authorities in England. That guidance states that pay or compensation in lieu of notice, even where the amount of the payment is not greater than the salary due in the period of notice set out in the employee’s contract may constitute a SSP, depending on the terms of the individual’s contract.
1.4	This business case has also been prepared with the benefit of external legal advice from Browne Jacobson LLP and has been agreed with the Council’s s151 officer and Monitoring Officer. The Council’s external auditors have received a copy of this business case in advance of a Council decision on this matter. North Yorkshire County Council as the continuing authority have also received a copy in advance.
<b>2</b>	<b>Background</b>
2.1	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 county council, the North Yorkshire Council.
2.2	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: <ul style="list-style-type: none"> <li>• The Local Government (Structural and Boundary Changes) (Staffing) Regulations 2008 (“Staffing Regulations”)</li> <li>• Local Government Restructuring – Guidance on Staffing Issues dated June 2008 (“Staffing Guidance”)</li> </ul>
2.3	Also relevant are: <ul style="list-style-type: none"> <li>• The Cabinet Office’s Staff Transfers in the Public Sector Statement of Practice January 2000</li> <li>• The Secretary of States’ Direction for North Yorkshire made in accordance with section 24 of the 2007 Act</li> <li>• The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”)</li> </ul>

	<ul style="list-style-type: none"> <li>• The Employment Rights Act 1996 (“ERA”)</li> <li>• The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 (Compensation Regulations)</li> <li>• The Local Government Pension Scheme (benefits, Membership and Contributions) Regulations 2007 (Pension Scheme Regulations)</li> <li>• The Localism Act 2011</li> </ul>
<b>3</b>	<b>Redundancy Situation</b>
3.1	<p>Redundancy arises in one of the three scenarios set out in the ERA. In summary these are:</p> <ul style="list-style-type: none"> <li>• where there is a business closure;</li> <li>• where there is a workplace closure (closure of one of several sites, or relocation to a new site); or</li> <li>• where there is a diminished requirement of the business for employees to do work of a particular kind.</li> </ul>
3.2	<p>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.</p>
3.3	<p>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 his 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.</p>
<b>4.</b>	<b>Application of TUPE and the implications thereof</b>
4.1	<p>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</p> <p><i>“An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer”.</i> (Regulation 3(5))</p>
4.2	<p>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:</p> <p><i>“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.”</i></p>
4.3	<p>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.</p>

4.4	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.
4.5	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).
4.6	Following a competitive process, on 17 August 2022 the North Yorkshire Council appointed Richard Flinton as the Chief Executive for the unitary council. The North Yorkshire Council maintain that there will be no suitable alternative post on transfer for the HoPS (though they also argue that TUPE does not apply and the HoPS has no right to transfer.) The Council’s legal advisors disagree with the position taken by North Yorkshire Council i.e. the Council’s legal advisors believe that there are cogent legal grounds to maintain that the HoPS has the right to transfer their employment (Chief Executive role) to the new authority, and that there may be suitable alternative posts (such as suggested recently by ALACE, who represent some of the affected HoPS, that “their skills and experience” could be brought to bear in “other senior roles such as the Corporate Director of Community Development ... or the Assistant Chief Executive, Local Engagement”.
<b>5.</b>	<b>Options</b>
5.1	<p>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:</p> <ul style="list-style-type: none"> <li>• The North Yorkshire Council will continue to claim that HoPS will not transfer to them on 1 April 2023 and will refuse to recognise them as an employee. That will inevitably lead to an automatically unfair dismissal claim in the employment tribunals causing unnecessary conflict and a waste of public funds.</li> </ul> <p style="text-align: center;">Or</p> <ul style="list-style-type: none"> <li>• 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 his employment on the grounds of redundancy. The Council then have three options being: (1) to employ him during the contractual period of notice (which will be difficult); (2) put him on garden leave during all or part of his notice; or (3) make a payment in lieu of contractual notice.</li> </ul> <p style="text-align: center;">Or</p> <ul style="list-style-type: none"> <li>• If the HoPS wishes to leave local government service as a consequence of the reorganisation, the Council can agree that he 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.</li> </ul>

<b>6</b>	<b>Terms of employment</b>
6.1	The HoPS commenced employment with the Council on 28 July 2008. For the purpose of the Redundancy Modification Payments Order 1993 his date of continual service is 1983. The HoPS annual salary is £126,263.00 which would increase an increment on 1 April 2023 to £128,800.
6.2	The HoPS contract of employment provides for a 12 week notice period. There is no contractual provision covering payment in lieu of notice.
6.3	There is no pension strain.
6.4	The Council has a policy and practice on the award of compensation which applies to <u>all</u> Council employees whose employment is terminated early, either on the grounds of redundancy or efficiency of the service. 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.
6.5	In a redundancy situation the HoPS is therefore entitled to the following sums: <ul style="list-style-type: none"> <li>• £71,633.77 redundancy payment; and</li> <li>• £29,641.56 Pay in Lieu of Notice – incremental progression from 1 April 2023</li> </ul>
<b>7.</b>	<b>Proposed Way Forward</b>
7.1	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 his employment by reason of redundancy.
7.2	Paragraph 6.3.7 of the Staffing Guidance states that, <i>“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.”</i>
7.3	At paragraph 6.4.2 of the Staffing Guidance it states, <i>“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.”</i>

7.4	<p>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.</p>
7.5	<p>For this reason it is proposed that agreement be reached between the affected HoPS and the Council for the dismissal by reason of redundancy of the HoPS ahead of vesting day. The terms of that agreement being:</p> <ul style="list-style-type: none"> <li>• 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</li> <li>• Notice to terminate by reason of redundancy be given on 31 March 2023</li> <li>• The HoPS be paid £29,641.56 in respect of his contractual notice period of 12 weeks but that this payment be paid in lieu of notice, there being no role for him to serve his notice out after 31 March 2023</li> <li>• The HoPS be paid his contractual redundancy payment of £71,633.77</li> <li>• The HoPS take all reasonable steps to ensure that he has no accrued but untaken holiday</li> <li>• Any payments received are therefore in full and final settlement of any employment related claim that as an employee he may have.</li> </ul>
8	<p><b>Application of Considerations in Government Guidance on SSPs</b></p>
8.1	<p>As a local authority the Council must comply with the duty of best value. In considering whether it is appropriate to make a payment, the government makes it plain in its guidance that local authorities should consider whether such a payment would be a proper use of public money. The Council therefore needs to be able to demonstrate the economic rationale behind any proposed payment including the considerations set out in the SSP Guidance. 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 and the response to each one is set out below.</p>
<p><b>SSP Guidance Consideration</b></p>	<p><b>Response</b></p>
<p>Is there any feasible possibility of exiting the individual at a lower cost?</p>	<p>The role of the HoPS is necessary whilst the Council is the sovereign authority delivering statutory and discretionary services – as such there is no diminished or ceasing requirement for the HoPS to perform his role during this period.</p> <p>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.</p> <p>Retaining key staff is important to ensure an orderly transfer of services to the new authority on 1 April 2023.</p>

	<p>The HoPS is represented by ALACE, a registered Trade Union and has been advised by ALACE that he is entitled to TUPE transfer to the new unitary authority and therefore the earliest that notice of redundancy could be served lawfully by the new authority is after 1 April 2023.</p>
<p>How will the exit payment be perceived by the public and is it in line with the duty to manage taxpayers' money appropriately?</p>	<p>The payment reflects the HoPS's legal entitlement and does <b>not</b> contain any ex gratia element. The only proposed payment to be made that is not contractual is a right to a payment in lieu of notice. Whilst there is no contractual right to a payment in lieu of notice (as opposed to the right to a paid notice period), there is no role for him to work his notice.</p> <p>The payment accords with practice elsewhere in local government re-organisation.</p>
<p>What alternative use could be made of that expenditure?</p>	<p>The Council has a legal obligation to meet its employment law liabilities.</p>
<p>Will it set any potential precedent (e.g. where a payment is made to certain employees and not others)?</p>	<p>The HoPS is a unique position as are the circumstances of local government reorganisation. No other employee faces the argument put forward by North Yorkshire Council that they have no right to transfer under TUPE. It is therefore unlikely to set any precedent</p> <p>In any event the HoPS is only receiving such sums as he is legally entitled to and in this respect all employees will be treated equally with their employment law rights protected and observed.</p>
<p>What is the legal advice on the prospects of successfully defending an Employment Tribunal claim (or claim to any other court or tribunal with jurisdiction), if an employee were to take a legal route to appeal any grounds of their employment being terminated? The chance of success and the costs likely to be incurred should be noted and weighed up against the costs of making a payment</p>	<p>Browne Jacobson provided independent legal advice and their view is that TUPE applies (to the employment role i.e. Chief Executive role – not the office holding of Head of Paid Service) and therefore should the HoPS bring legal proceedings in respect of any dismissal pre-vesting day the HoPS would succeed in establishing automatic unfair dismissal entitling the HoPS to compensation for loss of employment. However, the the maximum statutory compensation for an unfair dismissal, is currently capped at £93,878. Given the unusual facts there will be extensive legal arguments on the application of TUPE and then of course whether the HoPS lost the opportunity to be redeployed with North Yorkshire Council as a result of his dismissal by the council pre-vesting day. In addition to compensation, the Council would incur extensive legal costs and incur senior management time on a matter that should be resolved amicably.</p> <p>In all the unique circumstances of this case it is proportionate, efficient and in the interests of the council to seek to settle</p>
<p>Are payments being used to avoid management action, disciplinary processes, unwelcome publicity or avoidance of embarrassment?</p>	<p>There is no disciplinary or management issue. The payment will require approval by full Council and be disclosed in a publicly available report.</p>

<p>Manage conflicts of interest to ensure that individuals who are the subject of complaints play absolutely no role in deciding whether those complaints should be settled by making an award to the complainant from public funds.</p>	<p>The HoPS is represented by ALACE who have made representations on his behalf as to the application of TUPE.</p> <p>These proposals are based on external and independent legal advice but happen to align with the advice ALACE has provided to their member.</p> <p>The proposal is therefore in line with independent legal advice and a copy has been sent to the Council's Independent Person who has been invited to provide any observations to the Chief Officer Employment Committee.</p>
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