



SENIOR MANAGER PAY AND CONDITIONS – CLAIM FOR RESTITUTION

1 PURPOSE OF REPORT

- 1.1 This report follows on from the report of Council on 13 March 2024.
- 1.2 Following the resolution of the Council to seek further legal and other professional advice, Council now needs to determine the next steps in whether to pursue a legal claim for restitution as set out in this report.

2 LINKS TO COUNCIL'S PRIORITIES AND OBJECTIVES

- 2.1 This report relates to the Council's enabler objective – democracy and its decision processes.

3 RECOMMENDATION

- 3.1 It is proposed that Council **RESOLVES**
 - (1) To note unlawful decisions, and potentially unlawful payments made, and to write down these monies as not to be recovered or irrecoverable in accordance with the Council's Financial regulations.

AND/OR

- (2) To agree the exercise of the delegation of the Assistant Director, Legal & Democratic Services and Monitoring Officer (in consultation with the Section 151 Officer, the Chief Executive, the Leader of the Council, the Deputy Leader of the Council and the Cabinet Member for Resources) to issue and settle court proceedings.

AND

- (3) To note that there has been no withdrawal above £50,000 (as approved by Council on 13 March 2024).

AND IF RECOMMENDATION 2 IS AGREED:

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- (4) In pursuance of recommendation (2) that the Section 151 Officer is given delegated authority in consultation with either the Leader of the Council or the Cabinet Member for Resources to withdraw from the General Reserve sums above £50,000 to a maximum of £100,000 to meet the cost of the further legal and other professional advice and representation.

4 INTRODUCTION

- 4.1 In the report which was presented to Full Council on 13 March 2024, Council had three options to consider:
- Option 1: To ratify the remuneration decisions made by and in respect of the late chief executive and by and in respect of the former s151 officer.
 - Option 2: To note the view as to the unlawful decisions, and potentially unlawful payments made at that time, and to obtain further legal and other professional advice and analysis with a view to issuing a claim or claims for restitution.
 - Option 3: To note the view as to the unlawful decisions, and potentially unlawful payments made at that time, and to write down these monies as not to be recovered or irrecoverable.
- 4.2 The Council resolved to adopt Option 2, on the basis that because of the Council's fiduciary duty to its residents it should seek further advice and if possible, seek to claim back the monies. It was agreed that a further report would be presented to Council in the new municipal year with members then asked to make the decision as to whether a claim for the monies should be issued.
- 4.3 This is that report. The Council is, therefore, required to consider to what extent the Council has a reasonable and justifiable claim for restitution and unjust enrichment against individuals, which will more likely than not be upheld by the courts, and where agreement cannot be reached with the beneficiaries, to agree the exercise of the delegation of the Assistant Director for Legal & Democratic Services and Monitoring Officer authority to issue and settle court proceedings to recover certain of the payments.
- 4.4 Equally, it follows that where the Council does not have a reasonable and justifiable claim for restitution and unjust enrichment against individuals, that the Council is required to make the decision that those payments be written off in accordance with the Council's Financial Regulations which make it a requirement to "take prompt action to write off debts no longer deemed to be recoverable." The Council's Financial Regulations provide that action can be taken to write off debts if they are deemed no longer recoverable if:
- (a) The debtor is deceased, insolvent or absconded, or
 - (b) The debt is statute barred, or

- (c) It is uneconomical to pursue the debt, or
- (d) The debt is uncollectable after exhausting all options.

5 POTENTIAL CLAIMS FOR RESTITUTION

5.1 In law, the Council may be able to recover any unlawful payments by bringing a claim for restitution against the parties who have benefitted from those payments. To bring a claim for restitution the Council must establish that there has been an unjust enrichment to the party at the expense of the Council by proving on the balance of probabilities that:

- The party has been enriched or has received a benefit; and
- The enrichment is unjust; and
- The enrichment was at the expense of the Council.

5.2 A claim for restitution is a civil litigious claim. Litigation is a long process with no guarantee of success. Any claim for restitution must comply with the courts' Civil Procedure Rules. The following table provides an estimated timeframe and costs which would likely to apply to a claim for restitution:

Step	Estimated timeframe	Estimated costs
Pre-action stage	1-2 months	£5,000 - £15,000
Pleadings stage (including issuing proceedings, acknowledgement of service and defence/counterclaim)	2-3 months	£25,000 - £40,000
Case management stage (including allocation and conference)	2 months	£30,000 - £45,000
Evidence (including disclosure and exchanging witness statements)	8 months	£40,000-£65,000
Trial (including preparation for trial, pre-trial review, trial and judgment)	3-4 months.	£50,000 - £85,000

5.3 The above does not include Counsel's fees to represent the Council, pension actuary fees or the court fees to the Court. Additionally, a significant amount of senior officer time would likely be required. At this stage it is impossible to accurately estimate the additional cost of these items but a fair estimate would be in the region of £100,000.

5.4 The Council has a fiduciary duty to its residents and therefore, whilst there is a public interest for this claim, the Council must also balance this against the costs of proceedings and chances of a successful claim. Consequently, litigation should only be entered into following an examination of the merits/demerits of a case, including the likelihood of successful judgment and the likelihood of recovery of all the sums sought balanced against the cost (actual and operational) of bringing the claim in the first place. This cost/benefit analysis is necessary to justify the commencement and/or continuation of litigation. For example, a case may be begun in good faith, but if further information comes to light which changes the cost/benefit profile, then claims may be discontinued on economic grounds.

5.5 External legal advice was sought from Bevan Brittan LLP solicitors as to the merits and demerits of the Council issuing a claim for restitution to recover payments made unlawfully. That advice is set out in the Exempt Appendix to this report.

6 OPTIONS

6.1 The options now available to the Council are as follows:

6.2 Option 1: To note the unlawful decisions, and potentially unlawful payments made, and to write down some or all of these monies as not to be recovered or irrecoverable. Such a decision may be taken as a policy position if it is reasonably considered to be in the fiduciary interests of the Council and in reasonable fulfilment of its fiduciary duties to its taxpayers.

6.3 Option 2: To agree the exercise of delegated authority by the Assistant Director, Legal & Democratic Services and Monitoring Officer (in consultation with the s151 Officer, the Chief Executive, the Leader of the Council, the Deputy Leader of the Council and the Cabinet Member for Resources) to issue and settle court proceedings in respect of some or all of the unlawful payments.

6.4 These options are not mutually exclusive insofar as it remains open to the Council to decide which of the types of unlawful payment made should fall within either category.

7 RISK IMPLICATIONS

7.1 Embarking on any form of litigation is not without risks. Unpredictability of the process of litigation where key information and documents may only arise after the initiation of proceedings, the reliability of witnesses or evidence from a witness may no longer be available mean that it is vital to continuously keep under review those inherent risks of litigation which affect the public interest in commencement and/or continuation of litigation. Primarily this is linked to the cost of litigation balanced against the likelihood of successful judgment and the likelihood of recovery of the full sums claimed. In the event of an unsuccessful claim costs are often awarded against the claimant which would be in addition to the claimant's own costs. Also, it is not uncommon for

claimants to recover less than 100% of their own costs even if they are successful. This is particularly true for operational costs.

- 7.2 Before formal litigation is commenced there is a period of pre-action correspondence which carries less risk for the Council in that there may be an alternative resolution or negotiations in recovering the monies. This is, however, subject to the potential defendant(s) being receptive to corresponding and willing to discuss the matter. The costs of such action is significantly lower than commencement of litigation proceedings.
- 7.3 It is difficult to provide an opinion or view on the likelihood of success for court proceedings by the Council and notwithstanding the above risks, a litigation claim should be the last course of action taken. Embarking on formal court proceedings without engaging in pre-action correspondence may result in costs sanctions for the Council whether it be successful or unsuccessful in its claim.

8 FINANCIAL IMPLICATIONS

- 8.1 The financial implications will vary depending on the option taken. Option 1 would see no further costs incurred meaning the financial implications are limited to the value of costs incurred to date, including the value of the payments themselves.
- 8.2 All other options would incur additional costs and would need to be funded from the General Reserve. Therefore it is important to weigh up the costs and resource requirement (as well as public interest and the Council's fiduciary duty) of any action taken against the likelihood of a successful claim and the value of what that claim may be.
- 8.3 Engaging in pre-action correspondence is a lower cost option estimated at £5,000 to £15,000, although costs may rise if negotiations are entered into with the parties. Clearly the more parties, the greater the cost.
- 8.4 Bringing litigation is obviously the most costly way forward and carries greater risk than engaging in pre-action correspondence. The table in paragraph 5.2 shows expected costs of between £150,000 and £250,000. In addition, there would be other professional and legal costs incurred as well as a significant amount of senior officer time being required.

9 LEGAL IMPLICATIONS

- 9.1 The legal advice attached as the Exempt Appendix is confidential communication between the Council and its external lawyers. As such that information is protected under legal professional privilege at all times and cannot be disclosed unless there is a loss of such privilege. It is also an exemption from disclosure under section 42 of the Freedom of Information Act 2000.

10 EQUALITY AND DIVERSITY IMPLICATIONS

- 10.1 An Equality Impact Assessment has been completed and found there to be no impacts (either positive or negative) on protected groups as defined under the Equality Act 2010.

A handwritten signature in black ink, appearing to read 'Angela Law', written over a horizontal line.

Angela Law

Assistant Director, Legal & Democratic Services and Monitoring Officer

Background Papers:-

Report to Council 13 March 2024

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