

Report To: Employment and Appeals Committee

Date: 22 December 2022

Subject: Update on performance management and reporting arrangements for exit arrangements for chief officers

Chief Officer: Stephen Taylor, Monitoring Officer

Contact Officer: Sarah Wilson, Principal Lawyer
Surjit Nagra, Associate Director HR

Ward(s): None

Exempt: Part – Appendix 1 is exempt as it contains personal information of individuals

Appendices: Appendix 1 – Details of exit arrangements for chief officers
Appendix 2 – Appraisal Process for the Chief Executive

1. Summary and Recommendations

1. As part of re-introducing a performance management framework for officers, it is important to consider the arrangements for performance management of the Council's most senior staff, including the Chief Executive. This will ensure that staff are properly supported to do their job and understand the link to corporate priorities, as well as providing an evidence base for poor performance to allow formal processes to be instigated.
2. For certain senior staff there is a statutory process to follow to take formal disciplinary action and dismiss. This is in place to protect staff whose role is to advise and constructively challenge elected members and who have statutory responsibilities to do so. Other chief officers have terms and conditions which set out the processes for taking formal disciplinary action.

Recommendations:

Committee is recommended to:

1. Review Appendix 1, including the learning identified, and note that a report will be brought back to Committee in 3 months with a progress update.
2. Review and approve the new Appraisal Process for the Chief Executive as set out in Appendix 2

Reason:

In May 2022 the Government issued guidance to local authorities on special severance payments due to concerns that paying additional sums on top of statutory and contractual entitlement does not usually provide good value for money or offer fairness to taxpayers.

In addition, there have been concerns raised that these arrangements are more common with senior staff and can be seen as rewarding failure. It is important that elected members are provided with information on performance management of its most senior staff (Chief executive and chief officers) and the processes for agreeing exit arrangements.

To pick up on a key piece of learning, the Appraisal Process for Chief Executive seeks to ensure that the Chief Executive's performance is formally reviewed on a regular basis. It complies with the principles set out in the Joint Negotiating Committee (NJC) for Local Authority Chief Executives (national salary framework & conditions of service) handbook. The purpose of the appraisal process is help maximise the chief executive's job performance, and share the objectives agreed to relevant stakeholders.

Commissioner Review

Commissioners comments on the CEx appraisal report are ' The proposals are supported as being in line with best practice'.

2. Report

- 2.1** In 2015 new regulations were introduced setting out the statutory process to follow to take disciplinary action against the three statutory governance officers – the Head of Paid Service, the Chief Finance Officer (s.151 officer) and the Monitoring Officer. This states that these officers cannot be dismissed without the report of a designated independent person's panel at a full council meeting.
- 2.2** Whilst proper procedures should be followed, whether by reason of statute or contract, it is also important to ensure the Council complies with its best value duty. The section 3 duty requires that local authorities must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness. This duty applies in relation to decisions the Council makes on agreeing severance payments over and above any contractual entitlement. Appendix 1 sets out the details of exit arrangements of three chief officers in the financial year 2021/22 and the learning identified from these processes, which is also set out below. The appendix is confidential as it contains personal information about individuals, and it is not in the public interest for this level of detail to be provided in a public report.
- 2.3** The Government has issued guidance to local authorities on special severance payments due to concerns that paying additional sums on top of statutory and contractual entitlement does not usually provide good value for money or offer fairness to the taxpayers who fund them and should only be considered in exceptional cases. Whilst this guidance was issued in May 2022, the legal framework that is referred to have not changed and therefore this appendix sets out the arrangements for the departure of key chief officers tested against this guidance.
- 2.4** The following type of payments are likely to constitute special severance payments:
 - Any payments reached under a settlement agreement between the employer and employee to discontinue legal proceedings without admission of fault;
 - The value of any employee benefits or allowances which are allowed to continue beyond the employee's agreed exit date;
 - Write offs of any outstanding loans;
 - Any honorarium payments;

- Any hardship payments;
- Any payments to employees for re-training related to their termination of employment.

2.5 In addition, the following payments may constitute special severance payments, dependent on the terms of the individual's contract, relevant statutory provisions, any non-statutory applicable schemes and other relevant terms and conditions:

- Pay or compensation in lieu of notice where the amount of payment is not greater than the salary due in the period of notice set out in the employee's contract;
- Pension strain payments arising from employer discretions to enhance standard pension benefits.

2.6 The following do not constitute Special Severance Payments:

- statutory redundancy payments
- contractual redundancy payments
- severance payments made in accordance with that local authority's policy adopted pursuant to Regulation 7 of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006
- a strain cost paid to the relevant LGPS administering authority under LGPS Regulation 68(2) which results from a LGPS member's retirement benefits becoming immediately payable without reduction under Regulation 30(7), or under Regulation 30(6) where the employer has waived the reduction under Regulation 30(8)
- payment for untaken annual leave
- payments ordered by a court or tribunal or agreed as part of a judicial or non-judicial mediation
- payments made as part of the ACAS Early Conciliation process
- payments made to compensate for injury or death of the worker
- payments made in consequence of the award of ill-health retirement benefits under Regulation 35 of the LGPS Regulations

2.7 When reaching settlement with any employee to allow them to leave their employment without proceeding through a statutory or contractual disciplinary process or through an employment tribunal, the Council should consider its best value duty in terms of economy, efficiency and effectiveness. The following section sets out due considerations.

Economy

2.8 The council should consider whether the individual can be "exited" at lower cost, how the payment will be perceived by the public, what alternative use could be made of that expenditure, the setting of precedent and evidence to demonstrate that the employee would not be willing to leave with their statutory and contractual benefits alone.

Efficiency and effectiveness

2.9 The Council should seek legal advice on the prospects of defending a claim in an employment tribunal or other court with jurisdiction, ensure that payments are not used to avoid management action, disciplinary processes, unwelcome publicity or avoidance of embarrassment, consider aligning with private sector practice, where payments are typically less generous and manage conflicts of interest to ensure

those who are subject to complaints play no part in deciding whether those complaints should be settled.

Exceptional circumstances in which it may be appropriate to consider making special severance payments

- 2.10** The guidance accepts there will be exceptional circumstances where it is necessary to pay special severance to facilitate an exit or to compensate for loss of employment or office. In relation to disputes, a special severance payment may be made to settle a dispute where it can be properly demonstrated that other routes have been thoroughly explored and excluded. This should be considered after receiving professional advice and where it is seen as a prudent use of public money. The decision should not just be made on cost alone, as it may be appropriate to defend a frivolous or vexatious claim even when the costs of defending will exceed the costs of settling. This is because of the need to discourage future such claims.
- 2.11** As part of their duties, the Council's s.151 officer and Monitoring Officer should take a close interest in and be able to justify any special severance payments that are made, particularly if they relate to a situation where the Head of Paid Service should not be involved due to a conflict of interest.

Reporting and disclosure

- 2.12** There should be clear and transparent reporting on exit payments. The Council already publishes the number of employees by remuneration in brackets, including further information on senior officers. The Council also has to publish its pay policy statement, which should include policies on termination payments. Finally, the Council has to include certain prescribed information in its annual accounts. Apart from where required by law, reporting must be anonymised to comply with data protection requirements.
- 2.13** In addition to this guidance, elected members should receive information on specific arrangements to satisfy itself that the Council is complying with its statutory obligations and guidance on achieving best value. Due to the possibility of identifying individuals and the sensitive nature of the exit arrangements, it is not appropriate to put this information in the public domain. For this reason, the information is being provided at a Part 2 exempt appendix. This ensures there is a formal record of reporting, whilst complying with data protection requirements to protect the rights of individual employees.

Learning from exit arrangements referred to in Appendix 1

- 2.14 Performance management of chief executive** – there is a need for independent support to assist the Leader with performance management of the Chief Executive. This could be extended to the other chief officers where the Chief Executive may need assess to specialist support to help assess the capability of statutory chief officers who perform specialist roles. To address this learning a new Appraisal Process for the Chief Executive has been developed which is based on the Joint Negotiating Committee (NJC) for Local Authority Chief Executives (national salary framework & conditions of service) handbook (Appendix 2). The new process recommends that independent support is sourced from an external recognised organisations such as SOLACE or the Local Government Association to facilitate the process. For the appraisal process for Chief Officers, it is proposed that members of the Cabinet with the relevant portfolio supports the Chief Executive in setting objectives for this group.

- 2.15 Consultation with elected members** on special severance over and above contractual entitlement but under £100,000. Whilst the guidance refers to consultation with the Leader, staffing matters are a non-executive function and therefore it would be prudent to consult the Chair of Employment and Appeals Committee on any special severance arrangements to identify whether the matter should be determined by elected members and if determined by an officer, how this should be reported to elected members.
- 2.16 Consultation with external auditors** – prior to agreeing any special severance there should be consultation with the external auditor. Whilst this would normally be undertaken by the s.151 officer, there should be a clear procedure maintained by HR to ensure this is done even if the post holder is the s.151 officer.
- 2.17 Local policy on flexible retirement** should be considered and in the absence of such, the Council must ensure it follows the national guidance. Consideration should be given to the approval processes for flexible retirement, and this should include the involvement of the s.151 officer and Monitoring Officer.
- 2.18** Ensuring that **allegations in disciplinary processes** are framed to allow focus on the main issues, whilst not being too narrow to limit the investigation or too wide to lead to a lengthy and complex investigation.
- 2.19 Acting up arrangements** (or even need for external interim support) when the HoPS or other statutory governance officers are away from work or suspended, bearing in mind even in a well-managed process this can take 6 months.
- 2.20** Ensuring that **learning from disciplinaries/performance management** is picked up. In this case, the Council had picked up learning from Croydon Borough Council on the need to have in place officer delegation to suspend statutory governance officers for up to 10 working days pending a member meeting being set up. Learning on procurement and contract management has also been picked up as well as the need to tighten up the working of delegations from Cabinet to officers and to review the significant officer decision-making rules.

3. Implications of the Recommendation

3.1 Financial implications

3.1.1 There are no specific financial implications. Implementing the recommendations will be managed within existing budgets and reviewing and amending the policies and procedures will ensure value for money when agreeing any exit arrangements.

3.2 Legal implications

3.2.1 Appointment and dismissal of chief officers and the statutory governance officers is governed by statute. The Council's Officer Employment Procedure Rules incorporate the statutory requirements. The recommendations are to ensure the elected members and the statutory governance officers are properly involved in exit arrangements and decisions around flexible retirement and redundancy to ensure that legal requirements are complied with and the Council can demonstrate value for money decision-making.

3.2.2 Under the statutory direction made by the Secretary of State for Levelling Up, Housing and Communities, appointed commissioners have been given the power to appoint, designate, set the terms and conditions of and dismiss statutory governance officers. In addition, the commissioners have powers in relation to recruitment of the senior officers, including other chief officers. These powers are held in reserve to be used when it is necessary and appropriate. When the commissioners have exercised these

powers, a report has been presented to the Council asking members to note the decision taken.

3.3 Risk management implications

3.3.1 Failure to comply with legal requirements will increase the likelihood of legal challenges which may necessitate settlement at financial cost to the Council. This can also lead to reputational and financial risks, which can impact on the Council's ability to recruit and retain staff.

3.4 Environmental implications

3.4.1 None

3.5 Equality implications

3.5.1 The Employment and Appeals Committee receives workforce data on its staff, including by grade. In addition, when recruiting new staff interview questions should include questions on equality and diversity. All candidates interviewed for chief officer roles by elected members have been asked about their approach to supporting diversity in the workforce and have been assessed based on this.

3.6 Workforce implications

3.7.1 Effective performance management is an essential part of managing a workforce and this should apply to the Council's most senior staff. If it is necessary for staff to leave due to capability or conduct reasons, staff are entitled to a fair and lawful process and decisions on exit arrangements should be made based on clear policies and advice and reported in a transparent way.

4. **Background Papers**

None