

Decision Note

Agenda Item 7: Response to Query from External Auditor relating to Former Chief Executive Settlement Agreement

Following consideration of the Monitoring Officers report at the Committee on 13 October 2022 and the continuation of the meeting held on 9 November 2022 the following was agreed.

Resolved:

1. To approve the draft response to the External Auditor's query and attached as Appendix 3. Note that the response is based on the Monitoring Officer's findings following the due diligence enquiries.
2. For the avoidance of any doubt, and for the reasons set out in the Monitoring Officer's findings, the Committee does not endorse the decision of the August 2020 Appointments Committee that the settlement payments made to the former Chief Executive were value for money.
3. The Committee requests the Corporate Director of Resources and the Monitoring Officer to meet with the External Auditor and convey this decision. Also, that the External Auditor is requested to reflect upon the Committee's decision in the value for money judgement for the 2020/21 financial year in the External Auditor's letter.
4. The draft response be published and submitted to the next meeting of Full Council for noting.

Appendix 3

The Council's Response

Query from External Auditor relating to former Chief Executive Settlement Agreement

1. On 27th August 2020, the Council's Appointments Committee, following advice from officers, resolved to terminate the employment of the former Chief Executive and approve a settlement agreement at a total cost to the Council of £437,973.
2. About 2 months later, on 23rd October 2020, the Council's External Auditor issued a Report in the Public Interest. This concerned the Council's financial position and related governance arrangements and identified the Council's deteriorating financial resilience, low level reserves, poor governance practice and significant overspending over its approved budgets.
3. The Council's External Auditor received a query from an elector relating to the entry on the Statement of Accounts 2020/21 about the settlement payment made to the former Chief Executive. Consequently, in January 2022, the External Auditor raised queries about the governance arrangement relating to the payments, whether it was value for money for Croydon taxpayers and the officer advice to members before reaching a decision on the payment.
4. The Council's Monitoring Officers (in April 2022 and September 2022) made enquiries on the issues raised by the External Auditor. The Monitoring Officer made the following findings.
5. There were significant failings in the officer report to the August 2020 Appointment Committee meeting relating to the approval of the former Chief Executive's settlement agreement and consequently the decision making.
6. The report fails to set out the facts that gave rise to the breakdown in trust and confidence between the former Leader and former Chief Executive, any wrongdoing by the Council, the reporting of this by the former Chief Executive and any attempts at conciliation or dispute resolution. Allied to this, was the absence of legal advice on the merits and chances of success of any potential Employment Tribunal (ET) claims by the former Chief Executive which should have informed the decision on the settlement. Generally, the report should have given members of the Appointment Committee all the relevant information to enable them to make an informed and reasoned decision.
7. There was no officer advice that explains the cost differential of £7,718.00 in the capped maximum settlement payment at ET tribunal for unfair / constructive dismissal of £88,519 and the actual payment for compensation for loss of employment of £96,237.00 made to the former chief executive. Also, there was no officer advice on the £48,118.50 gross payment in lieu of notice and the basis for the compensatory payments.

8. There was a very optimistic analysis offered by officers of the former Chief Executive's position in the event of an ET claim (for example a cost award against the Council) in the absence of established facts or any information on any failings or wrongdoing by the Council and no legal advice provided on the merits and chances of success.
9. There was no mention of the efforts, if any, made by officers to negotiate or secure a lower quantum of financial settlement. Also, whether the option of seeking to negotiate or put forward a reduced settlement package had been explored. In effect, no information was provided to members as to whether the former Chief Executive's exit could have been secured at a lower cost.
10. The process for convening the meeting (i.e., notice and dispatch of agenda and report) of the Appointment Committee did not meet the requirements of the Constitution and was potentially unlawful. The Council's Protocol for decision making provides that: *"The Leader, Cabinet, a Cabinet Committee, a Non-Executive Committee or Sub-Committee shall not take any "relevant decision", as defined in article 1.8 below, until the following requirements have been complied with: 1.5 At least 5 clear working days before the proposed date and time for taking the final decision, the Council Solicitor shall send a copy of the report, or arrange for a copy of the report to be sent to all Members of the decision making body. 1.8 Relevant Decisions - A decision shall comprise a relevant decision if either: ..(f) is of such significance to the locality, the Authority or the services which it provides that the Executive Director is of the opinion that it should be treated as a relevant decision.*
11. The purpose of an agenda is to provide Councillors with advance notification of, and the detail of the business to be transacted at a particular meeting. The agenda item was titled 'Governance Matters'. This appears misleading and a more appropriate title would have been 'Employee Settlement Agreement' or 'Settlement Agreement relating to an Employee'.
12. The former Leader of the Council chaired the Appointments Committee. The circumstances that gave rise to the settlement agreement (i.e., breakdown in relationship) was between the former Leader and the former Chief Executive. There should be serious consideration given to how the Council manage any likely conflicts of interest by ensuring individuals who are the subject of the complaints "play absolutely no role in deciding whether those complaints should be settled by making an award to the complainant from public funds"¹
- 12A. The settlement terms were the subject of extensive legal advice by external Solicitors. The report adequately reflected the legal advice provided. The external Solicitors view (post settlement) is that, considering all the circumstances, 6 months' pay for settlement of potential claims for a senior post holder and officer was objectively justifiable.

¹ Paragraph 3.4 statutory guidance on special severance payment.

13. The Appointments Committee had the requisite decision-making powers to approve the settlement agreement with the former Chief Executive. The Committee was acting within its constitutional authority. Based on the information and advice in the officer report at the time, the Committee's decision was not irrational. It is within scope of the decision that a reasonable local authority could have made at that time and with the information provided. The decision made to approve the terms of the settlement at the time (albeit tainted by poor and inadequate advice in the officer report) was lawful. However, for the avoidance of any doubt, for the reasons set out above and considering the Reports in the Public Interest in 2020 and 2021, the Council should not have agreed to settlement payments.
14. The best value duty requires the Council to secure value for money in its decisions. From the report, there was regard to the fact that pursuing other options was likely to be a long-drawn-out process, time consuming, adversely affect the conduct of the Council's business and could be difficult to manage, and costly. At the time, the assessment was that a settlement payment was the most prudent and commercial use of public money. This was balanced against the cost of investigating the breakdown in relationship, any disciplinary action, potential ET claims, and ongoing salary cost of the former Chief Executive remaining in post. On balance and based on recent case experience and the comparative analysis in the Monitoring Officer April 2022 report, it is acknowledged that at the time the settlement payment to secure the exit of the former Chief Executive was cost effective and value for money. However, for the avoidance of any doubt, for the reasons set out above and considering the Reports in the Public Interest in 2020 and 2021, the Council should not have agreed to settlement payments.
15. The Council must clearly demonstrate that lessons have been learnt and that it has now embedded best practice in the form of the recent statutory guidance on severance payments available here <https://www.gov.uk/government/publications/special-severance-payments/statutory-guidance-on-the-making-and-disclosure-of-special-severance-payments-by-local-authorities-in-england>². The exit of the former Head of Paid Service has significant local and wider public interest. There should have been proper records kept of the conversations between the Leader, Monitoring Officer, former Chief Executive, Section 151 Officer, and Director of HR relating to the exit. There should have been some initial enquiries to establish the facts and to inform any future decision making. Legal advice (Counsel's opinion) should have been sought on merits, chances of success

² The Guidance sets out the issues that the Council must consider in making exit payment including the economic rationale, seeking legal advice on the prospect of successfully defending potential ET claims arising, the chances of success and the likely cost which should be weighed against the cost of the exit payment. Also, the need to manage conflicts of interest by ensuring individuals who are the subject of the complaints "play absolutely no role in deciding whether those complaints should be settled by making an award to the complainant from public funds". The guidance also requires accountability for such payments depending on the value, by Full Council, Head of Paid Service, Leader and with input from the Section 151 Officer and Monitoring Officer.

and quantum of damages of any potential ET claim. This should have informed the decision on settlement. The ethos of the Openness and Accountability in Local Pay Guidance, as the title clearly suggest, is that there should be more transparency and scrutiny of senior officer's exit payment. It appears that concerns about potential leaks were given priority over adhering to constitutional and statutory requirements for notice and agenda papers to be sent to members in advance of the meeting. Democratic Services must attend the closed session of meetings to make sure proper minutes are taken of the deliberations that informed the decision made. There must be consideration given to managing any conflicts of interest arising. The Council must now assure itself of the following.

- a) The requirements of the statutory guidance on special severance payments are embedded into its policies, practice, and procedures.
- b) That proper records are kept of any conversations, discussions, or meetings of any potential settlement agreements with an employee.
- c) That reasonable enquiries are made to establish all the facts, events, and circumstances that give rise to any proposed settlement agreement, including any wrongdoing by the parties involved.
- d) That legal advice is sought on merits and chances of success of any potential claim against the Council and quantum of damages awarded. This should inform the decision on any potential settlement payment.
- e) There is compliance with the governance arrangements relating to the decision-making on settlement payments.
- f) That officers and members that are the subject of the dispute are not involved in the decision-making relating to the proposed settlement agreement.
- g) That Democratic Services attend the both the open and exempt part of any committee meeting for approval of settlement payments. That proper minutes of the meeting are taken so that there is an understanding of the reasons for the decision and the deliberation by the committee.

End