

Executive

21 June 2018

Report of the Corporate Director of Health, Housing and Adult Social Care
Portfolio of the Executive Member for Adult Social Care and Health

Transfer of Be Independent into the direct management of the City of York Council

Summary

1. Following discussions between Officers and the board of Be Independent, an agreement has been reached in principle to return the Service to the management of the Council on a proposal that is acceptable to both parties which secures future service delivery.
2. Officers have held lengthy discussions with Be Independent and as a result, it is proposed the Service comes back into the management of Health, Housing & Adult Social Care which will ensure continuity of service for customers and the staff currently providing the service. The services provided are an integral part of the Directorate's prevention approach enabling people to remain independent in their own homes.
3. This report highlights the implications of the Council taking on the management of the Service(s) and seeks the agreement of the Executive to progress and finalise the transfer back to the City of York Council.
4. If the Executive were to agree the recommendations within this report it is proposed to transfer the service back into the management of the Council by the 1st August 2018 or sooner if feasible.
5. Officers will be working with the Board of Be Independent to develop a joint implementation plan for the transfer and will be consulting with all interested parties including the trades unions as the plan is developed.

Recommendations

6. The Executive is asked to:
 - a) Agree the transfer of Be Independent into the direct management of the City of York Council.
 - b) Agree the transfer of all assets and liabilities from Be Independent to the City of York Council and agree the staff transfer under TUPE as detailed within this report.
 - c) Note that following the transfer, a review of the service will take place to ensure that the service is sustainable.

Reason:

Taking this approach will ensure continuity of service for customers and staff providing the service and will mitigate any risks to customers who currently receive services from Be Independent.

Background

7. The Council has entered into the final year of a five year contract with Be Independent (BI) as the provider of the Council's community alarm and equipment service. Previously provided in-house, the service was externalised and the Council supported the establishment of a social enterprise in the form of a Community Interest Company (CIC) to deliver the service. A CIC was chosen as it had the flexibility to offer staff ownership in the form of membership of the enterprise, and provided regulation which meant the assets associated with running the business could not be sold but would be "locked" to the provision of that service.
8. The organisation is an independent company and is not solely reliant on the Council for its income, the service provides for both subsidised customers through its Council contract, but also people on a private basis. As their primary contract and main customer is the City of York Council it would be difficult to operate a service solely for one of the groups.
9. The original service spun out with approx 2,878 customers split between 1,422 paying and 1,456 subsidised customers. The last quarterly monitoring from Be Independent in 2017/18 reported that 2,448 customers were using the service: 1,296 paying customers and 1,152

subsidised. The original business plan was based on private customer numbers increasing annually between 2015/16 and 2018/19 by 5%, 6%, 7% and 8% respectively.

10. The rationale for setting up a Be Independent as a Community Interest Company was supported by a business plan with an expectation that the numbers of people using the service would increase and as a result generate significant income to offset the cost of operation. However, the original business plan has not been delivered in line with expectations. Despite a range of marketing efforts, Be Independent have not been able to increase the take up with more customers and generate additional income, in fact the opposite as the overall numbers using the service have slightly reduced. They have also tried but have been unsuccessful in winning new contracts which has had a negative impact on their financial viability. On this basis, and as already stated, it has been agreed that it would therefore make sense for the service to transfer back in-house as the council are able to use its economies of scale and integrate the service with other council services to deliver greater efficiency and ensure the future stability of service provision.
11. During this period Be Independent lost the contract with the NHS to provide equipment services in the Vale of York which contributed to a significant loss of income.
12. Be Independent delivers approximately 4,500 items of equipment every quarter. Be Independent also provides an alarm response service in the Council's Independent Living Schemes (operated by Housing colleagues) and also signpost calls to the out of hours Housing repairs service.
13. Health, Housing & Adult Social Care were finalising a review of the service model for telecare, community alarms and equipment which was due to report to Members in May 2018. It was the intention to go out to procurement in July/August but Be Independent approached the Council stating the company faced difficulties; as a result the proposed procurement will not be proceeding. Following these discussions, officers have undertaken a form of due diligence on Be Independent to understand the implications of bringing the service back in house and to ensure that any risks are identified and managed as part of any proposed transfer to the Council.
14. Be Independent has advised the loss in contracts and reduced numbers has led to their income being less than current operating costs. In the

short term they are using their surplus / reserves, but obviously this isn't financial sustainable in the longer term, hence the agreed plan to transfer the service back to the Council. This will enable the service to benefit from economies of scale and CYC infrastructure to reduce their operational costs.

15. The contract Be Independent has with Adult Social Care has been extensively monitored during the four years of its operation. The difficulties in delivering the growth within the original business plan have been acknowledged during this period. Unfortunately Be Independent has been unable to sustain any significant business growth and this has led to the operational deficits.
16. No undue concerns have been identified by officers through the due-diligence that has been undertaken and a summary of the findings are detailed below

Finance

17. Be Independent provided the Council with a variety of information early in the new year demonstrating that the company was projecting future financial difficulties. Finance staff from both organisations and the Chief Executive of Be Independent jointly produced an agreed financial statement that showed the company forecast a loss of £167k in 2017/18 with £64k in reserves to cover deficit. There will be an issue as to how this loss is dealt should the business be returned to the Council as the organisation's main creditor is CYC in relation to the payroll support we provide.
18. They also provided a cash flow forecast which showed them operating continuously in overdraft from approx May 2018 onwards. Several options were proposed to ease this cash flow situation but were rejected in March as unrealistic. There were a few options put forward which appeared feasible to turn their underlying financial position from loss to profit but none of these has since materialised.
19. Finance staff met again in late April 2018 to understand what financial risk CYC would need to mitigate if the Service came back in house.
20. We estimate that should Be Independent return to the Council's management it would be running at a loss of £95k per annum. This assumes that the existing staffing cohort will transfer back in its entirety and provides for those due increments. It also includes assumptions

around possible future access to pay awards and makes provision for any vacancies currently held by Be Independent.

21. Be Independent also has budgets set aside for legal and professional fees and depreciation. Assuming the service returns to the council some of these provisions will no longer be required, and the budget for legal and professional fees has been reduced by £40k with the expectation that CYC's in house services will provide this support as part of our existing departmental agreements and the depreciation budget of £21k has been removed as it would not be needed.
22. The business would need to be stabilised so some short term funding may need to be found in 2018/19 prior to an in-depth review of the service once it is in house to establish future direction e.g. there is a break clause in the rental lease of their current premises in March 2019 which may afford an opportunity to consider a move to alternative premises.
23. The Directorate's assessment is that the current loss can be turned around by integrating certain aspects of the current Be Independent business with Council's services.

Human Resources

24. Be Independent has confirmed that whilst the company undertake work for five other small organisations, the primary contract and main customer is with City of York Council. As a result the staff group (with a headcount of 49 (WTE 41)) is organised in such a way that the majority of their activities link to City of York Council's contract and SLA. As it is envisaged that the activities would remain fundamentally the same, should a decision be taken to bring the service back in house, then this is likely to be considered a relevant transfer.
25. This means that the Transfer of undertakings Protection of Employment regulations 2006 TUPE as amended by the collective redundancies and transfer of undertakings (Protection of Employment), (Amendment) Regulations 2016 would apply and provides those employees assigned to the entity with certain employment protections. The employment rights and liabilities that would transfer from Be Independent to City of York Council are:
 - Contracts of employment (with the exception of pensions)
 - Collective agreements in force at the time of the transfer;

- Continuity of employment;
- Accrued entitlements
- Liabilities for the outgoing employers acts and omissions;
- The right not to be dismissed for reasons of the transfers;
- Union recognition.

26. The majority of Be Independent's employees remain on the same terms and conditions of employment as per council staff with 69% of their staff already in the North Yorkshire Pension Fund through admitted body status.
27. Based on the information we have been provided with by Be Independent, providing TUPE is applied correctly, any risk from an HR perspective should be minimal.

Consultation

28. Should a decision be taken to bring the service back in house both Be Independent and the Council have a duty to inform and consult representatives of staff affected by the transfer (which includes CYC employees). This duty includes confirming any measures that the council envisages in relation to those employees arising from the transfer.
29. The Council and Be Independent have agreed that all communication should be joint. Be Independent has contacted users of their services to re-assure them that a return to the management of the Council would not impact on the services they receive.
30. UNISON has held meetings with staff from Be Independent to discuss the proposals and listen to any concerns that have been expressed.

Options

31. Several options have been considered but none afford the same security to maintain existing service provision and ensure stability for customers and support staff. This must be seen alongside the pressing timeline for any decisions due to the financial viability of the organisation. A return to the management of the Council is the only available option that can be delivered within the timescale that is available.
32. A brief summary of the options that were considered is included below;

- Re-procurement of Council Contracts – this was due to take place later this year but it would take approximately 6 months to undertake and would only relate to Council contracts and not the overall Be Independent service.
- Increased financial support – the Council would need to provide this pending a re-procurement taking place in order for the existing organisation to remain viable.
- Administration – If the option proposed within this report is not accepted, Be Independent would enter administration and customers currently in receipt of vital services would be placed at risk of no provision. The Council would also have to ensure continuity of service. Providing equipment and responding to customers falling is a critical component of the preventative approach adopted by CYC and is key to limiting demand for formal ongoing social care. In an insolvency situation the Be Independent employees would also face redundancy and whilst this is a complicated area of law, the likelihood, given the terms of the contract it is likely that the Council would have to pay any redundancy costs.
- Terminate contract and cease service provision – services provided are an integral part of the Council's preventative approach and such a decision would place approx 2,500 customers at risk of no service.

Analysis

33. Given the presenting factors, it is felt that the only realistic option available to the Council is to recommend that the service returns to the Council and the direct management of Health, Housing & Adult Social Care.
34. Officers view the services provided as an integral part of the Directorate's contribution to both a wider commitment to a prevention approach, and enabling more people to remain independent in their own homes. As such the services provided play a key role in supporting better outcomes for individuals and managing demand across the wider system.
35. It is felt that an agreement between City of York Council and Be independent to transfer the service would be the best way forward in

maintaining the service for current customers, vulnerable local people and promoting continued stability for the staff.

Council Plan

36. The proposals to be considered within this report are in line with the three key corporate priorities as set out in the Council's Plan 2015-19, a prosperous City for all, a focus on Frontline Services and a Council that listens to residents.

Implications

Financial

37. Financial implications are detailed within paragraphs 17-22 of this report, below is a breakdown of the estimated business income and expenditure likely to transfer:

Income:	£000
CYC contract – equipment and response	1,136
CYC contract – Landlord response	86
Private customer response	568
Equipment Sales	401
Other income	27
Total Income	2,218
Expenditure:	
Direct purchases	519
Direct wages	880
Director's remuneration	273
Pension costs	202
Overheads	215
IT and telecommunications	159
Rent	75
Total expenditure	2,313
Deficit	95

38. There will need to be a review undertaken of the current business model on its return to the Council including fees, premises, vehicles and structure and consideration will need to be given as to how the deficit on transfer will be managed.
39. The outstanding debt owed to Be Independent by private customers will be transferred to the Council. They currently have £21k of debt over 1

year old and some of this may need to be written off if it cannot be recovered.

40. It is estimated that should Be Independent return to the Council's management it would be running at a loss of £95k per annum.

Legal

41. A variety of corporate and commercial considerations should be considered if the Be Independent service is transferred back in-house. Many of these considerations relate to corporate matters, the expertise and capacity which the Council currently lacks. The Council will need to understand any company law requirements to which it must adhere to bring a CIC back in-house over and above Be Independent's own responsibilities. In particular the legal requirements with regards a potentially insolvent CIC where assets to be brought back in-house may be undervalued. Although the currently favoured scenario anticipates taking the entire business, a legal opinion from a corporate specialist would be helpful in relation to whether that is the best option i.e. does the Council simply take the commercial contracts back in-house and TUPE the staff across, or does it take the entire business of Be Independent including branding/assets/leases etc.
42. Legal advisors will need to look at the transfer of the business that Be Independent currently carries out for non-Council clients and whether the terms of the contracts allow an automatic transfer of the contracts to the Council, or whether negotiations need to take place with the current customers.
43. There are numerous employment/TUPE/pension considerations, which have been considered internally by the Council's HR and legal services team to date, due to the staffing issues set out above. Further work will be required to ensure that the service transfers back in-house smoothly.
44. If the entire organisation of Be Independent comes back in-house there will be lease considerations in relation to its premises in terms of whether the lease is terminated or novated.
45. Due to the complexity of the legal work required and the limited capacity within legal services at present, it was decided by legal services that this work needed to be sent out to external solicitors. Legal services have appointed an appropriate provider from the legal framework that the Council is a member of and has instructed external solicitors.

Equalities

46. If Members were to agree the recommendations within this report, customers should not experience any changes to their service over the transfer period so it is not felt there will be any equalities issues although this will be kept under review. If we do not secure the future provision, clearly vulnerable, and largely Older People will be disadvantaged and left at risk, and potentially some may then seek more institutional care.

Human Resources (HR)

47. Human Resources implications are detailed within paragraphs 24-27 of this report.

Crime and Disorder

48. There are no crime and disorder implications

Information Technology (IT)

49. There are no Information Technology implications

Property

50. There are no Property implications

Other

51. There are no other known implications at this stage.

Risk Management

52. Any risks identified will be kept under review and will be pro-actively managed. If the option proposed within this report is not accepted, the organisation would enter administration and customers currently in receipt of vital services would be placed at risk. The Council would also have to ensure continuity of service.

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Report
Approved

6/6/18

Specialist Implications Officer(s) List information for all

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Wards Affected: List wards or tick box to indicate all

All

For further information please contact the author of the report

Annexes

None

Background Papers:

None