

**Decision Session - Executive Leader
(incorporating Finance & Performance)**

15 May 2017

Report of the Deputy Chief Executive and Corporate Director Customer & Corporate Services

Staff Transfer from City of York Council to City of York Trading Limited

Summary

1. The Executive Leader is asked to agree to the transfer of eight employees of City of York (CYC) WorkwithYork Service to City of York Trading Ltd (CYT). The transfer will be in line with the requirements of TUPE (Transfer of Undertakings Protection of Employment) regulations. The transfer will support CYT to achieve their business objectives.
2. The Council has fulfilled its obligations under TUPE legislation and a pensions admissions agreement will be put in place to ensure that the transferring staff can continue to access the Local Government Pension Scheme.

Background

3. In October 2011 Cabinet agreed to the creation of a Local Authority Trading Company, a company which is wholly owned by the council and all profits made by the company come back to CYC. This subsequently became CYT. A Shareholder Committee was created to review the activities of CYT Ltd and monitor its performance.
4. The company commenced trading as a schools supply agency in June 2012 under the name WwY@CYT using the internal CYC casual staffing team, the brand was later changed to WorkwithYork (WwY).
5. In June 2013 Cabinet agreed that all requests for CYC temporary workers or casual work will be made through WwY. This decision was made to ensure value for money and was supported by a business case which demonstrated that there were several advantages of CYC using WwY to source temporary workers over external agencies. The

contractual relationship between CYC and CYT is set out in a management services agreement.

6. Neither of these reports proposed transferring the CYC staff who were administering these services to CYT. Since 2012 arrangements have been in place for any work undertaken for CYT by CYC employees to be recharged to the company on a full cost basis. The June 2013 report did reference that consideration had been given to transferring staff at that point.
7. Since the creation of WwY CYT has grown this area of its business and has appointed additional staff directly on terms and conditions determined by CYT.
8. There are currently eight CYC staff supporting the delivery of WwY services.
9. The issue of staff transferring to CYT was first raised on 20th May 2016 in a letter sent by the Chair of the Board of Directors of CYT to CYC. There were then a number of Governance and other changes to the CYT board and correspondence about the transfer recommenced on the 18th January 2017, following receipt of a business case for the proposal which was sent by the recently appointed Managing Director for CYT.
10. In this communication CYT set out their intention to growing its commercial business interests outside of the public sector and in order to achieve our business objectives it expressed their view that it was in the interests of the company (and therefore CYC as the sole shareholder) that all staff are directly employed by CYT. They also confirmed that the newly appointed Managing Director CYT had been tasked by the Board to lead on this matter and that they would take external legal and HR advice to ensure that they fulfilled their obligations.
11. Where one employer takes over activities from another (in this case known as in-sourcing) these types of transfer are called “service provision changes” and the following must exist immediately before the transfer for the TUPE regulations to apply:
 - there is a defined group of employees
 - the employees transferring should be assigned to the group
 - the client / service provider should remain the same
 - the activities should not become fragmented
 - the activities should remain fundamentally the same.

Legal advice has been taken and CYC are satisfied that these conditions have been met.

Consultation and Considerations

12. Formal consultation commenced with the staff and Trade Unions on the 17th February 2017 and since this point all of the relevant due diligence information required under TUPE has been provided and an application for an admissions agreement, which would allow the staff who would transfer to remain in the North Yorkshire Pension Scheme, has been made.
13. TUPE is designed to protect the terms and conditions of employment for those employees who are transferred to another employer. The TUPE Regulations provide for:
 - The transfer of all employees working in an undertaking to the new organisation with their contracts of employment. Continuity of employment and terms and conditions of employment are preserved and on the date of transfer the employee automatically becomes an employee of the new employer.
 - Protection against dismissal before or after the 'transfer' takes effect. Any dismissal for a reason connected with the transfer that is not an ETO reason (economic, technical or organisational reason) will automatically be 'unfair' in relation to employees with more than one year's service.
 - A limited opportunity for the transferee (new employer) or the transferor (former employer) to vary, with the agreement of the employees concerned, the terms and conditions of employment contracts where the sole or principal reason is not the transfer itself but is a reason connected with the transfer that is an ETO reason entailing a change in the workforce.
14. CYT have confirmed that they are not proposing to introduce any 'measures' as part of the transfer. A measure is a proposal to change to existing work practices such as pay rates, job descriptions, hours of work or recognition and collective bargaining as part of the transfer.
15. CYC, CYT and the North Yorkshire Pension Fund (NYPF) are proposing to sign an admissions agreement which will allow all staff transferring to

CYT to retain access to the NYPF with all pension benefits and rights under the scheme remaining.

16. The council will fulfil its obligation to ensure that all staff currently in the Local Government Pension Scheme who are transferring to a new provider will continue to have access to a broadly comparable pension scheme. As is normal when transfers such as this take place it is proposed that the council will act as guarantor for pension liabilities. This will be through a subsumption guarantee and will continue to fund the pension deficit in relation to the employees transferring that have arisen up to the point of transfer, this is consistent with other similar staff transfers. An Admission agreement will be drawn up setting out the details of the pension obligations of CYT. These will be signed by CYT, the council and NYPF prior to staff transferring.
17. Staff and the local trade unions have been fully consulted on these proposals and other than the need to clarify some questions relating to the transfer CYC have not received any specific feedback about the proposal.
18. Within TUPE there are no set timescales for the consultation, however both employers must consult for long enough before the transfer to ensure that the consultation is timely and meaningful.

Options

19. **Option 1** - To agree the proposed transfer of CYC staff to CYT with a proposed transfer date of 1st June 2017.
20. **Option 2** – To not agree to the transfer of CYC staff to CYT.

Analysis

21. **Option 1** – Consideration has been given to the proposal made by CYT and a period of consultation has been undertaken with staff and trade union representatives about the proposal.
22. There has been no feedback received by CYC which would suggest that we could not agree to the transfer. CYC have taken legal advice, ensured that we have fulfilled our statutory responsibilities which include the drafting of an admissions agreement to allow the transferring staff to retain access to the North Yorkshire Pension Fund.

23. **Option 2** – As all due process has been followed there is no reason for CYC to not agree to the transfer on this basis. CYC could take the view that the preference would be to continue with the current model of having some CYC staff delivering the WwY service, but this is not CYT's preference and as the sole shareholder CTY being a profitable and growing business is in the interests of the council.

Council Plan

24. The proposed recommendations made by this report support both 'a focus on frontline services' and 'a prosperous city for all' priorities in the 2015-19 Council Plan. The provision of temporary workers by CYT support the delivery of many essential front line services in the Council whilst also providing work opportunities for local residents.

Implications

25. **Financial** - There are no known additional costs to CYC. The CYC staff currently supporting the delivery of WwY services would transfer to CYT and the recharging of their salary costs from CYC to CYT would end.
26. **Human Resources (HR)** Staff and trade unions have been formally consulted on the proposed transfer. Should option 1 be approved, the council will ensure that we comply with its obligations under TUPE (Transfer of Undertakings Protection of Employment Regulations 2006).
27. Any changes will be carried out in accordance with the council's HR Change Management policy and procedure.
28. **Legal** - The main implications of a TUPE transfer have been covered in the body of this report. Legal services have advised on the proposed transfer to ensure that the transfer takes place under the requirements of the TUPE legislation.
29. **Information Technology (IT)** - There are no IT implications for CYC arising from this report.
30. **Property** - There are no property implications.
31. **Other** - There are no equalities or crime and disorder implications arising from this report.

Risk Management

32. As the sole shareholder it is in CYC's interest to support CYT to become a growing and profitable company. There are some potential financial liability risks associated with the admissions agreement; however the council also has obligations to ensure that all staff currently in the Local Government Pension Scheme who are transferring to a new provider can continue to have access to a broadly comparable pension scheme and the admissions agreement allows this.

Recommendations

33. The Executive Leader is asked to consider:

Option 1 - To agree the proposed transfer of CYC staff to CYT with a proposed transfer date of 1st June 2017 and to authorise the Director of Corporate and Customer Services to take all steps required including the entering of relevant agreements to achieve that transfer.

Reason: To support CYT to deliver their business objectives and grow the business.

Contact Details

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Wards Affected:			All ✓

For further information please contact the author of the report

Background Papers

Executive - Tuesday, 4th October, 2011
Establishment and Governance of the Local Authority Trading Company

Executive - Tuesday, 4th June, 2013
City of York Trading Ltd (CYT) Business Development

Annexes: None

Report Abbreviations:

CYC – City of York Council

CYT – City of York Trading Ltd

ETO – Economic, Technical or Organisational

NYPF – North Yorkshire Pension Fund

TUPE – Transfer of Undertakings Protection of Employment

WwY – WorkwithYork