



City of York Council 2019/20

**Public Interest Report  
19 April 2021**

**Early Termination of the Chief  
Executive's Employment Contract**

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## Introduction

Mazars LLP is the appointed local auditor of the City of York Council (the Council).

We are required to carry out our work in accordance with the Local Audit and Accountability Act 2014 (the 2014 Act) and the Code of Audit Practice which is approved every 5 years by both Houses of Parliament. The Code of Audit Practice relating to the 2019/20 audit was approved by Parliament and published by the National Audit Office in March 2015 (the 2015 Code).

The 2015 Code prescribes the way that local auditors should discharge their functions under the 2014 Act and summarises their responsibilities and powers.

Under the 2014 Act and the 2015 Code we are required to consider:

- whether the accounts comply with all applicable statutory requirements and that proper practices have been followed in their preparation – this results in our audit opinion on the Council's financial statements; and
- whether proper arrangements have been made for securing economy, efficiency and effectiveness in the use of resources – this results in our value for money (VFM) conclusion.

Section 24 and Schedule 7 of the 2014 Act provide that a local auditor should consider whether, in the public interest, they should report on any matter that comes to their notice during the course of the audit, so that it may be formally considered by the body concerned or brought to the public's attention. This report is made in accordance with that statutory requirement.

This report has been issued following audit work we carried out because of our concerns about the regularity and propriety of severance payments made in connection with the termination of the Chief Executive's employment contract and the disclosures made in the unaudited statement of accounts for 2019/20 which was published by the Council on 30 June 2020. The sensitive nature of the payments, the sums involved, the public interest in the issue and the requests made by elected Members for clarity on the nature of the payments have led us to the view that we should bring our independent audit findings into the public domain by issuing this public interest report.

Schedule 7 of the 2014 Act specifies requirements about how the Council should respond to a public interest report, including the time within which it must consider the findings, the arrangements for publicising the meeting at which the Council will consider the report, and for publicising the Council's response to the report.

## Background

Following the local election in May 2019 and the subsequent appointment of a new Leader of the Council, the then Chief Executive began a period of absence and did not return to work. The Council introduced interim arrangements to cover the absence which involved the Council's Deputy Chief Executive and Director of Corporate and Customer Services acting as Interim Head of Paid Service.

On 24 February 2020, the local press reported that the former Chief Executive had taken early retirement "after a secret meeting to decide her future". The meeting referred to was the 17 February 2020 meeting of the Council's Staff Matters and Urgency Committee which was convened in accordance with the Local Government Act 1972 and during which the request for retirement had

been approved. The meeting was chaired by the Council Leader, Councillor Keith Aspden, and approval followed consideration of a business case which included the costs of termination and the value of a settlement agreement.

The Committee was informed that the settlement agreement had been negotiated following the issuing by the Chief Executive of a claim in the Employment Tribunal which named the Council and Councillor Aspden as Respondents. The claim was recorded as received by the Tribunal office on 10 December 2019.

The claim before the Employment Tribunal referred to a series of events preceding the Chief Executive's departure and involved allegations of bullying and victimisation especially by Councillor Aspden. The Council and Councillor Aspden deny the allegations. The alleged detrimental treatment followed an investigation that was commissioned by the Chief Executive in response to complaints she had received in March 2017 which included allegations about a series of breaches of the Council's Code of Conduct by Councillor Aspden in connection with a recruitment matter for another person. The investigation was completed in August 2017 and the independent investigator concluded that Councillor Aspden:

- used his position as a Councillor improperly to obtain an advantage for an applicant contrary to paragraph 3(8) of the Code of Conduct by reason of his involvement in the process whilst having a personal interest;
- disclosed confidential information (the paper applications for the administrative role) contrary to paragraph 3(5) of the Code of Conduct; and
- by failing to follow paragraphs 3(5) and 3(8) of the Code of Conduct in relation to the appointment of the administrative role, acted in a manner which could reasonably be regarded as bringing the Council or his position as a Councillor into disrepute contrary to paragraph 3(7) of the Code of Conduct.

On 3 January 2019, the Council's Standards Sub-Committee considered the findings of the independent investigator and did not agree that Councillor Aspden had a close association with the successful candidate or that he shared confidential documents but agreed that information about candidates was improperly shared. No sanctions were imposed.

Councillor Aspden was appointed Leader of the Council on 22 May 2019. On 29 May 2019 the Chief Executive started a period of absence from work. The Chief Executive wrote to the Council in July 2019 and claimed that she had made protected disclosures in September 2017 and suffered detriments as a consequence. A protected disclosure is a qualifying communication by an employee which the employee believes shows serious wrongdoing in the workplace and if it fulfils the requirements of the Public Interest Disclosure Act 1998. The law protects employees who have made a protected disclosure from being treated badly or dismissed for raising genuine concerns (even if incorrect).

During the meeting of the Staff Matters and Urgency Committee on 17 February 2020, Members were asked to agree the Chief Executive's request for early retirement. The meeting was chaired by Councillor Aspden who did not declare any interests in the agenda items despite being a named Respondent in the Employment Tribunal proceedings.

The amounts in the business case reported to the Committee when the retirement request was approved are as follows:

**Table 1: Approved amounts**

Statutory and contractual payments	£55,308
Equivalent redundancy cost	£24,844
Settlement agreement	£71,970
Pension Fund	£252,532
<b>Total</b>	<b>£404,654</b>

The business case proposed an early retirement date of 29 February 2020 on the grounds of efficiency of the service which is normally understood to cover reorganisations and amendment to officer structures. The case explained that early retirement costs should be offset against estimated savings from efficiencies and the legal costs and damages associated with defending a potential legal case the Chief Executive could bring against the Council. The Director of Governance and Monitoring Officer estimated potential legal costs at up to £250,000 in the assessment.

The settlement agreement included a non-disclosure agreement and was signed by the Chief Executive on 16 March 2020, and Councillor Aspden and the Director of Governance and Monitoring Officer on 18 March 2020. The reason recorded in the agreement is business efficiency retirement.

The meeting of the Audit and Governance Committee on 15 July 2020 included the Council's draft accounts for 2019/20. The accounts include disclosure of the severance costs and Members questioned officers about the nature of the payments. The amounts disclosed as an exit package at page 78 of the draft accounts are as follows:

**Table 2: Amounts reported in the financial statements**

Payment in lieu of notice	£35,985
Redundancy	£24,884
Ex gratia	£65,779
Pension Fund	£250,467
<b>Total</b>	<b>£377,115</b>

The difference between the "statutory and contractual payment" value and the amount disclosed as payment in lieu of notice is the Council's calculation of holiday pay compensation. The other differences reflect adjustments made by officers to reflect the actual termination date.

Two complaints (one on 26 June and one on 14 July 2020) were made to the Council's Standards Committee. The complainants' views were that Councillor Aspden should have declared he had a personal interest in the matters considered at the Staff Matters and Urgency Committee meeting in February 2020.

As has been reported in the press, these complaints have not been upheld. Officers in the Council's legal department, after consulting an Independent Person, concluded that no investigation was necessary in respect of either complaint. We are informed that one complaint was dismissed because other options to challenge the decision were available and the other was dismissed because the decision did not have a particular effect on the complainant.

On 11 August 2020 we received notice from a local government elector recording an objection to entries made in the Council's accounts. On 20 August we accepted for consideration the part of the notice challenging the entries for the Chief Executive's exit package as a statutory objection under section 27 of the 2014 Act.

## The Council and its statutory powers

### **Legality**

#### **Local government law and the employment of officers**

Local authorities, when employing officers, must act in accordance with both public and private law principles. The Local Government Act 1972 sets out the general power to employ staff, but authorities must also comply with general employment law and contractual principles. In making decisions to terminate contracts of employment, they must act reasonably and in accordance with the relevant legislation and reasons must be supported by appropriate evidence to justify termination.

#### **Local government law and severance of employment contracts**

A local authority's power to make payments on severance is limited to those conferred by legislation. As a consequence, and in certain circumstances, payments made in excess of those permitted by the relevant legislation will be ultra vires (as in *Allsop-v-North Tyneside Metropolitan Council (1992)*). An employee's entitlements on termination of employment depend on various factors, including the reason for the termination and whether any claims are being settled.

In the case of Hinckley and Bosworth Borough Council-v-Shaw (1998), the High Court confirmed payments to employees could be unlawful if they are paid without good reason.

Some of our audit findings relate to complex areas of employment law and we have relied on legal advice from employment specialists in preparing this report.

### **Payments on severance**

#### **Business case**

At the meeting of the Staff Matters and Urgency Committee on 17 February 2020, officers presented a business case to Members using the Council's standard template which outlined a settlement proposal based on 'retirement on grounds of business efficiency'.

In general business cases should:

- present realistic options (including do nothing), outlining the risks and benefits of each;
- clearly present all financial information that underpins the business case, including how the preferred option is affordable and funded;

- outline the strategic dimension to explain how any potential change will benefit the long-term objectives of the Council and explain how the business case demonstrates best value;
- demonstrate how the business case can be successfully delivered;
- confirm consideration of applicable laws and regulations applicable to the decision;
- confirm what external and internal advice has been considered in developing the business case;
- clearly identify any conflicts of interest relating to the proposed business case and document any mitigations; and
- document all enquires or follow up questions made about the business case and responses.

Guidance published by HM Treasury in July 2013 includes a template for business cases supporting decisions such as the severance of senior officers. While the template is for decisions involving Treasury approval, we consider the guidance to be relevant to this report as it states that business cases for severance payments should include the following items:

- case history including a situation summary and terms of employment;
- explanation of procedures followed;
- proposal details including:
  - (a) contractual entitlement;
  - (b) reasons for special payment;
  - (c) summary of legal assessment;
  - (d) other options considered;
- value for money considerations including:
  - (a) breakdown of costs;
  - (b) rationale for payment level proposed;
  - (c) cost of other options;
  - (d) explanation of why the proposal is the best solution;
- for non-disclosure agreements, confirmation that the transaction is open to public scrutiny;
- explanation of wider impact and whether the case might set a precedent; and
- lessons learned with an explanation of how systems will be improved to prevent recurrence.

In our view the business case presented did not include sufficient facts in each of these areas to provide Members with the information needed to make an informed decision. In particular, the business case presented:

- included a misleading statement about contractual requirements and elements subject to discretion (see tables 1 and 2 below);
- included reference to an annual saving of £50,000 without explaining in detail how the savings and costs were calculated;
- did not set out the assumptions underpinning the estimate of £250,000 for potential legal costs and damages; and
- did not provide context to support the reason for the costs associated with the settlement agreement.

## **Recommendation 1:**

**The Council should adopt and apply appropriate standards for business case preparation in relation to exit and pension discretions to improve information supporting decisions.**

## Payments

The following tables set out the amounts paid as remuneration and as termination payments together with our own calculations of the actual obligations based on the employment contract:

**Table 3: Remuneration paid to the Chief Executive**

Payment	Amount paid	Statutory/Contractual obligation
Salary	£138,135	£110,970 - half pay from December 2019
Holiday pay	£19,323	£19,323
<b>Total</b>	<b>£157,458</b>	<b>£130,293</b>

**Table 4: Exit package paid to the Chief Executive**

Payment	Amount paid	Statutory/Contractual obligation
Payment in lieu of notice	£35,985	£35,985
Redundancy	£24,884	£0
Ex gratia payment	£65,779	£0
Pension strain	£250,467	£250,467 as advised by the Pension fund
<b>Total</b>	<b>£377,115</b>	<b>£286,452</b>

## Salary

The payments made to the Chief Executive were more than the Council's contractual obligations and were approved under delegated arrangements. The contractual annual salary in 2019/20 was £143,940 and, under the terms of the contract which included the nationally agreed conditions in respect of sickness absence, sick pay was payable at six months at full pay, six months at half pay and zero entitlement thereafter. Under national employment arrangements, local authorities have discretion to extend sick pay periods and a failure to exercise discretion may have been seen as a further detrimental act.

The Chief Executive's sickness absence commenced 29 May 2019. Under the terms of the contract salary would have been paid:

- in full to end of November 2019; and
- at 50% from December 2019 up to end of May 2020 with no entitlement thereafter.

The £138,135 actually paid equates to 11 months and 16 days at full salary. We are informed that the Head of Human Resources (HR) and the Monitoring Officer approved the continuation of full pay from 25 November up to the severance date, but we have not seen a decision note that supports an approval process. We have, however, seen correspondence that confirms the Head of HR consulted legal advisers.

As part of their explanation, officers have informed us that the situation was a consequence of delays on the part of the Council's occupational health provision. We have seen evidence that supports that response and note that the Head of HR initiated the referral to the Council's occupational health provider in May 2019 in accordance with the normal arrangement. The occupational health process, however, did not proceed as expected and, despite the Council's attempts to resolve the issues, the Head of HR has informed us that service provider's welfare visit did not take place until 7 January 2020.

We have enquired why a decision was made, in the absence of the requested occupational health assessment, to maintain the Chief Executive's remuneration at full pay beyond the contractual entitlement. The responses we have received do not confirm one consistent explanation but officers have confirmed that the Leader, as line manager, was made aware of the payment arrangement and of the delays that led to an occupational health report being received on 11 February 2020 and after the settlement agreement had been negotiated.

Until the underpinning causes of the delays in delivering occupational health assessments are addressed, they present an ongoing threat to the Council's ability to safeguard the welfare and resilience of its workforce and to ensure payroll costs accurately reflect entitlements. We asked the Head of HR if there were any other cases which were experiencing long delays and have been informed there are none. Recognising the risks involved, the Head of HR has informed us that additional monitoring is being carried out by her team in order to mitigate the impact of the current occupational health contract. Reviews carried by HR have concluded that there were no cases ongoing that presented such risks in December 2019 when the delays were apparent, or in February 2021.

We have been informed that the timeliness of the occupational health report was a material factor in the Head of HR's decision that it would not be fair to invoke the contractual reduction in pay. Another explanation for the full pay arrangement continuing is that the Chief Executive indicated that she intended to return to work after 6 months. Evidence we have seen makes it clear that this was not the outcome that the Council wanted and, in our view, the outcome of the deliberations was that the Chief Executive was paid sums in excess of her contractual entitlement and this was discretionary and within the limits of the Council's policy.

## **Recommendation 2:**

**Decision notes should be maintained that document the factors that explain the case for the use of public funds under the scheme of delegation such as where payments exceed contractual entitlements.**

## Holiday pay

The Chief Executive's contractual leave allowance was 30 days per annum. The Joint Negotiations Committee for Local Authority Chief Executives Conditions of Service explain that in exceptional circumstances untaken annual leave may be carried forward from the previous year. The holiday pay in table 1 includes 16 days holiday pay from 2018/19 (totalling £8,617.89) and 16 days for 2019/20 (totalling £10,438).

The amount paid is based on the accrual of leave up to the contract termination date because long-term sickness absence meant leave could not be taken.

## Payment in lieu of notice

The Council's legal advisers informed officers that payment in lieu of notice would be applicable in the circumstances. Employees have a right to give or receive contractual notice and the amount was paid in settlement because the notice period could not be served. Notice pay is based on remuneration at the time of termination of contract so the amount paid was a consequence of the Head of HR's decision to continue paying salary at the full rate.

## Redundancy

The business case for termination presented to the Staff Matters and Urgency Committee included references to the Chief Executive's legal entitlement to the amounts calculated for equivalent redundancy cost, statutory payments and pension costs. The Director of Governance and Monitoring Officer and the Head of HR informed us during a call on 23 February 2020 that the Council was negotiating a severance arrangement with the Chief Executive on the basis of her statutory and contractual entitlements and that external advice was being taken in respect of a potential settlement agreement. We have not seen any evidence to suggest that the redundancy element was a statutory or contractual obligation, or that the post was deleted when the severance agreement was approved.

While the description of the termination of the employment contract has been inconsistent, the facts we have collected through our audit procedures confirm the contract was terminated by mutual agreement. As a consequence, there is no entitlement to redundancy. The settlement reached is recorded in the "Agreement in respect of an Actual or Potential Claim to the Employment Tribunal" form and the reason recorded is business efficiency retirement. The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 allow for additional payments to employees (including employees who are retired on grounds of service efficiency). Enhancement for redundancy is discretionary and is compensatory in nature. It is not an automatic contractual entitlement as recorded in the business case and Members should have been made aware this element was discretionary and therefore required their specific approval.

Notwithstanding the point that no case for redundancy was made, Members should have considered the merits of the case within the Council's policy framework. It would not be considered reasonable to compensate all officers facing termination of contract as local authorities must consider each case on its merits and decision makers must be given information as to relevant factors and then make a decision based on circumstances of each case. We have seen no evidence that these considerations were adequately explained to Members.

The amount paid has not been properly approved and is arguably an unlawful payment. The facts suggest to us that this was not a genuine efficiency of business situation but involved the settlement of threatened claims.

### **Settlement agreement**

On the general matters of ex gratia payments, the case in *Re Hurle-Hobbs* (1944) confirmed that such payments, where in accordance with legislation, may be made if they are in the interests of taxpayers. Where a convincing case is made, local authorities may not be gratuitously generous at the expense of taxpayers and must genuinely consider payments to be in the public interest. In taking decisions elected members must make all proper enquiries and consider all available material that can help in coming to a decision.

We are aware of other circumstances where local authorities, having decided to terminate the employment of an employee, consider it prudent to negotiate settlements because there are potential claims employees could make. Settlements are accompanied by an understanding that the employee will not pursue a claim for compensation, such as for unfair dismissal.

In the matter of the settlement agreement reached with the Council's Chief Executive, we have not seen clear evidence that the Council considered the arrangement and the ex gratia payment to be in the interests of taxpayers.

A local authority should not enter a settlement agreement simply to avoid embarrassment to the authority or individual elected members, or the cost of defending proceedings. It is only where there is a risk that a claim has a reasonable chance of success that it may be compromised.

The business case refers to potential legal costs of contesting the Employment Tribunal claim but we have seen no clear evidence that demonstrates Members challenged the limited information provided, or asked about the source of the estimate, or considered other options. In particular, we note the reference in the minutes of the meeting to the possibility that officers could provide "further clarity". To us this implies that the information considered by Members may not have been complete or there were at least doubts about completeness or accuracy. We are aware that not all of the key officers were present at the meeting so it is understandable that there may have been unanswered questions. Members, however, proceeded to approve the business case. With this in mind, it is not clear that the Council acted within its powers and it can demonstrate it acted reasonably in approving the early retirement business case and the settlement agreement. It is, therefore, unsurprising that the public and the local media have followed up the issue.

## **The Council's exercise of its statutory powers**

### **Lawful exercise of discretion**

#### **Standards in decision-making**

When making decisions within their legal powers local authorities need to exercise discretions lawfully. Councils must follow proper procedures, designed to ensure objectivity and accountability. Elected members must act in a manner which upholds public confidence in their authority and the Model Code of Conduct published by the Local Government Association gives guidance on the need to demonstrate impartiality and the absence of personal and prejudicial interests.

The Localism Act 2011 requires local authorities to promote and maintain high standards and to adopt a local Member Code of Conduct. The Council's Code includes the following requirements for disclosure of interests:

6.
  - (1) *You have a personal interest in any business of your authority where it relates to or is likely to affect you, a body named in the second schedule or any person with whom you have a close association.*
  - (2) *If you are present at a meeting and you have a personal interest in any matter to be considered or being considered at the meeting:*
    - (a) *If the interest is not registered, you must disclose the interest to the meeting.*
    - (b) *If the interest is not registered and is not the subject of a pending notification, you must notify the Monitoring Officer of the interest within 28 days.*
  - (3) *If you have a personal interest and a member of the public with knowledge of the relevant facts would reasonably regard it as so significant that it would be likely to prejudice your judgement of the public interest then you have a prejudicial interest. This is subject to the exceptions set out in paragraph 6.4.*
  - (4) *You do not have a prejudicial interest in any business of the authority where that business:*
    - (a) *does not affect your financial position or the financial position of a person or body named in the second schedule;*  
...
  - (5) *A member with a prejudicial interest must leave the room during the debate and voting on the matter in question.*

Without safeguards and arrangements for managing conflicts of interest, discretion may not be properly exercised and a decision by a council may be rendered unlawful if any member with a prejudicial interest participates in the decision. The importance of ethical standards of decision-making underpins the Nolan Principles which were published by the Committee on Standards in Public Life in 1995 and which apply to anyone who works as a public office-holder and is therefore a steward of public resources.

In the termination of the Council's Chief Executive's employment contract, ambiguity in the nature of the severance was accompanied by a lack of transparency and objectivity in approving the discretionary elements of the agreement. We are not satisfied that the following Nolan principles were fully demonstrated:

- **Objectivity**, defined as 'holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias';
- **Accountability**, defined as 'holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this'; and
- **Openness**, defined as 'holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.'

**Conflict of interest**

The meeting of the Staff Matters and Urgency Committee which approved the severance arrangement was chaired by Councillor Aspden, the Leader of the Council, the Chief Executive's line manager, and a named respondent in the Employment Tribunal claim. We are aware that the Leader had been told that there was no pecuniary interest because he would be indemnified for financial loss in connection with the claim.

The Leader has explained to us that the Council's Code of Conduct was interpreted by him to mean he had no prejudicial interest because the exception at paragraph 6.4 of the Council's Code applied. By considering just the indemnification matter, which assured him that he would not be liable for legal costs and damages, the Leader argues he has complied fully with the wording of the Council's Code.

Based on the records we have seen and the interviews we have conducted, it is clear to us that attention was given to just one aspect of the potential prejudicial interest threat and that was the fact that the Leader was a named Respondent in the Employment Tribunal claim. We are aware that the Leader had been informed that he was indemnified in respect of that matter and we have not challenged that advice. In our view, however, the claim, the management role, and the earlier investigation into the Leader's conduct in the recruitment matter presented a clear personal interest that would prejudice the judgement of the public interest and the Leader should have left the room when the matter was considered. It should have been apparent that the matter considered, and the compensation involved, presented a clear ethical threat. The Leader has informed us that he was aware this was a contentious matter but that he would be criticised by other political groups if he avoided the issue. This suggests to us that the Leader prioritised political interests over the need for objectivity in decision-making, and propriety in the use of the public funds.

We have seen a record of the advice the Director of Governance and Monitoring Officer provided to the Leader on the matter. The advice was that he had no direct pecuniary interest (as insurance arrangements were in place) but that he considers his position (in respect of the meeting). The advice is suggestive rather than directive but we can understand how a newly appointed officer who was dealing with the Council's most senior Member, would reasonably expect the ethical threat to be so clear and significant that it would be seen as prejudicial.

We understand that at least some other Committee Members may not have been informed that Councillor Aspden was named as a Respondent in the Employment Tribunal claim and were, therefore, unaware of that aspect of the conflict of interest. We can reasonably expect, however, that they would have been aware of the earlier investigation arranged by the Chief Executive and might, therefore, have been sceptical about the propriety of the decision to approve an incomplete business case during a meeting he chaired. There is no suggestion in the minutes of the meeting that such doubts were raised.

The failure to manage the conflict of interest arguably means that the discretion involved in approving the severance has not been properly exercised.

We have sought views from Members and officers on the recurring themes of conflicts of interest and standards of Member behaviour that have led to audit action or media coverage in recent years. We have suggested to the Leader and officers that the reported failures to manage conflicts of interest demonstrate a pattern or evidence of systemic weakness. The responses we have received include indicators of denial but also an awareness of how the issues reported could undermine trust and confidence in the Council. While we are concerned about the ongoing apparent lack of understanding

of how perceived conflicts can arise, we are aware that a review of the Constitution is underway and in our view the Council should use that as an opportunity to clarify standards and rules so that self-interest risks are better managed.

**Recommendation 3:**

The Council should review the design of its governance policies and procedures to manage conflicts of interest (including self-interest threats). This should include updating the Council's constitution and scheme of delegation.

**Recommendation 4:**

The Council should ensure all Members fully understand the requirements of the Code of Conduct in relation to declaration of interests.

**Recommendation 5:**

The Council should review its policies and procedures to reflect Government guidance in the use of non-disclosure agreements.

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