

Comments of Legal Services Haringey and Waltham Forest council's



Comments on Shared Services Report to Corporate Committee

Introduction

We can confirm that constructive and genuine consultation has occurred on this report and the contents of the protocols. This comment is in regard to such engagement with the Trade Unions representing Haringey staff, as our remit does not cross into our partner borough.

Committee will be aware that all Unions have concerns about the shared service agenda and we have previously addressed the committee on reports in this regard. Clearly our interests and those of our members will not always synchronise with those of the Council and its partner Council's (or other bodies). Our primary aim is to protect jobs, services, and conditions of service for our members as opposed to the Council's need to find significant savings potentially at the expense of one or more of our aims.

Further we wish to restate our position that shared services should not be used as a panacea for a level of cuts, which they cannot deliver. While it may be possible to achieve some "efficiencies" via this route it cannot deal with the level of financial pressure the Council finds itself under as a result of the draconian cuts from central government. We think it is important that the Council (both at an officer and political level are honest on this point)

Finally while we are not in principle opposed to new ways of working and engagement with other Councils or public bodies we feel obliged to make it clear this does not compromise our absolute opposition to privatisation in whatever form or title it may take. For the avoidance of doubt we include mutualisation and social enterprises as falling into this category.

Protocol

We are satisfied that the protocol will assist in ensuring that where shared services are being developed staff and Trade Unions are consulted adequately. You will note the comment at point 6 highlights our clear assertion that we should not only be consulted once the decision has been made but at the point a shared service model is being considered. There is clear evidence from a myriad of reports that staff engagement at an early point results in better outcomes for both staff and the client/customer. It is important to remember that effective change can be best managed with staff engagement not by a top down approach.

Our only concern on the agreement relates to the wording on 7.15 (below) and wish to make it clear we do not endorse it. The comment is as follows

7.15 Secondment agreements

At appendix C is a Secondment agreement for shared services partners.

The recommended length of time that the secondment should be in place is 12 months. At the end of 10 months a review should be conducted to determine if TUPE should apply or the arrangement should cease.

We believe this comment precludes a third option and would ask Councillors to amend the report accordingly. This is the option of renewing a secondment for a further fixed period. It would appear this very closed approach has been developed as a result of concerns regarding the CELTEC case Employeeside have highlighted at committee previously. Essentially this case sought to define when a secondment effectively becomes a TUPE (Transfer of Undertakings Protection of Employment) for the staff (individual or collective) involved.

1. Employeeside believes the arrangements seen under the shared services agenda should be flexible and allow for easy disengagement where change is required. Issues of TUPE transfer are complex and can lead to further complications such as Equal Pay claims where commonality of employer is established. For this reason it seems entirely pragmatic to allow renewal of secondment agreements at the ten-month point. This approach would also be consistent with that used widely in Adults services where we are engaged in joint working with the NHS in services such as Learning Difficulties and Mental Health. In both these cases secondments have been in place for many years without issue. This option appears in the secondment agreement (below) so Para 7.15 requires amendment.

COMMENCEMENT AND SECONDMENT PERIOD

The Agreement shall commence from the Commencement Date and shall continue for a period of [twelve (12) calendar months [unless:

- a. Terminated in accordance with clause; or
Extended by the written agreement of the Parties. Any extension shall be subject to the terms of conditions of this Agreement.

2. We are also seeking confirmation that Employeeside (from both boroughs) would be involved in deciding on future arrangements at the "10 month" point. It is our view that such a review would meet the definition of a restructure and should as such be subject of a formal consultation period. This would certainly apply if TUPE were being considered.
3. For administrative convenience and certainty for the employees it might be sensible to increase the initial length of the secondment where the shared service is expected to last for a defined period of time equivalent to the length of the initial partnership period.
4. If a shared service was to evolve into a service provider it is unclear to Employeeside whether another options appraisal would be carried out. It would be our view that this should be required, further that any decision should be the subject of full sign off by the appropriate Committee of elected members. There may also be issues in relation to the Council's procurement and financial standing orders?
5. In essence the Council would be choosing to contract a service from a neighbouring borough. How long would any such contracts be awarded for and how would the Council ensure it protected its interests (for example in respect of further sub-contracting) It is potentially the case for some large areas that OJEU notices could be required.

6. **The secondment Agreement**

We remain concerned at the content of the proposed agreement. The original draft Employeeside had worked on with Human Resources was simple and clear to read and understand but contained all relevant details. The agreement presented to committee is lengthy and complex, we are concerned that this agreement could potentially be issued to any member of staff from a Chief Executive to the lowest graded in the Council, it is not in an accessible format and would probably fail any plain English assessment! We are concerned that staff receiving it will inevitably feel the need to seek legal advice on the implications of signing it and further that in some cases a competent lawyer may require changes in it leading to inconsistencies.

7. We believe the agreement would be best in two discrete parts: part one dealing with the arrangement between the employer and host borough and part two dealing with the individual and the implications of the secondment.
8. We have a number of specific comments on the content as set out below. We will also be referring the document for advice to our respective Legal advisors for comment. However we would accept the need for Committee to approve the remainder of the report and would ask that the issue of amendments to the secondment agreements be delegated to Council Officers on the assurance that no such documents will be given to staff in the current shared services projects until these issues have been resolved.

Our specific concerns are

9. Para 2.2: This suggests the secondment is terminable by any party at 30 days notice. We do not believe this can be the case as where a shared service has been set up terminating an individual secondment would amount to a dismissal. Also it implies that the individual could terminate it and

10/11 that as such since there was no substantive post to revert to they would be entitled to receive a redundancy payment. This clause is simply not appropriate in a secondment agreement covering the sort of arrangements in the protocol and may well be unlawful.

Para 3.4: What will be the situation with regard to out of pocket expense incurred?

- 12.** Para 6.5- 6.8: We are of the opinion that this would be tantamount to dismissal and the host authority does not have such power. The only legitimate reason to remove an individual is a reason, which would apply even where there was no secondment: Examples being gross misconduct, relegation, or dismissal under some other Employer procedure.
- 13.** Para 12:1: As above re Para 2.2 this implies the host can terminate an individual secondment within a shared service. This would not be possible as it would be a dismissal, the employee can normally terminate a secondment to return to a substantive post but in these arrangements such a post would no longer exist.
- 14.** Para 12.3. c As above LBWF could only terminate where this was a result of LBH terminating the employment contract.

Seán Fox Employeeside Secretary

Shared Services report to Corporate Committee

Response of Legal Services of Haringey and Waltham Forest Council's to the Union comments - Comment numbering relates to numbers within the paragraphs above.

Comment 1

Para 7.15 is fine and in line with our advice. There are risks that should the agreement continue beyond 12 months (or 24 if the employment contract commenced after the extension of the qualifying period) that the secondee could claim employment act rights against the host authority. It may be true that secondments have lasted for longer than this but that does not mean the risk is not there. A safer course of action would be to break at month 11 and renew the arrangement after a break of, say, one month. Secondment agreements will not prevent equal pay claims and TUPE arguments if they are not properly managed and reviewed. It is always open to the court to declare them a sham arrangement.

Comment 2

If there was contemplation of TUPE there would be consultation arrangements with the unions before a decision to TUPE transfer staff to the host authority.

Comment 3

The point of the agreements is to test the water and it may be the case the agreements last for only six months.

Comment 4

Noted.

Comment 5

This relates to how the shared services are provided. It is not necessarily the case that there would be a service contract that needed to be advertised according to the Public contracts Regulations, for example, delegating functions between authorities. .

Comment 6

This is based on industry standard agreements and it is designed to protect all parties to the secondment arrangement, by clearly stating who is responsible for what. The secondment arrangements should not be amended.

Comment 7

This is not agreed. We are trying to keep this simple and straightforward. If it is in two parts it still needs all three parties to sign up to each part or it is unworkable. It means the host borough has no control over the employee and cannot expect the employee to be bound to deal with confidential matters for example.

Comment 8

The secondment arrangements have been proposed to protect all relevant parties.

Comment 9

As a matter of law termination of the secondment does not end the contract of employment because it is not an employment contract. There may be circumstances surrounding the termination, for example if the employee was guilty of gross misconduct, that could call into question the employment contract but that would have to be dealt with through the disciplinary process

Comment 10

An individual could terminate the secondment but that would not entitle them to a redundancy payment. Indeed it could be argued they had effectively resigned with out entitlement to compensation.

Comment 11

This is a standard clause and is not unlawful because it only gives rise to termination of the secondment, and not the contract of employment.

Comment 12

The conduct may amount to misconduct that warrants a dismissal but that is a matter for the employer and employees. This clause allows the termination of the secondment arrangements not the employment contract.

Comment 13

The host can terminate. It is not a dismissal as again this is not the employment contract. There would be no proposal to delete posts until the actual transfer of functions takes place in which case this would not be by use of the secondment agreement.

Comment 14

Actually that is not the case LBWF can terminate if LBH is in persistent or serious breach of the contract regardless of the conduct of the secondee.