

Cheshire East Council

Objection to the 2016/17 accounts – sleep-in payments

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Background

- 1 We have recently concluded our work relating to an objection made by a local elector to Cheshire East Council's (the Council) audit of its 2016/17 financial statements.
- 2 The objection criticised the Council for allegedly failing to react to the need to treat sleep-in payments to carers as counting towards the National Minimum Wage and claimed that large back-payments were due to the staff impacted.
- 3 Overall, we did not uphold the objection but did agree with officers that the case demonstrated that the Council could have handled aspects of it better.
- 4 This report is a summary of the objection and our findings and conclusions. It is presented for consideration by the Council's Audit and Governance Committee to clearly document our position and, importantly, the actions that officers have agreed to take in response to our findings.

What is an objection?

- 5 One of the key differentiators between local public audit and commercial audit is the fact that electors and other interested parties have public rights to inspect and challenge the accounts of local authorities. This reflects the fact that public bodies are responsible for the stewardship of public funds and are accountable to the public for these monies and the arrangements that support their proper governance and financial management. Any objection is one such form of challenge, where the objector can ask a local public auditor to either refer a matter to the courts to be declared unlawful, can ask the auditor to issue a Report in the Public Interest, or both.
- 6 The auditor has a duty to respond to valid objections and can either uphold the objection or not. If the auditor does not uphold the objection, they are required to explain their decision. Objections are often made regarding complex and contentious aspects of a council's business and the cost of investigation falls upon the audited body. Auditors therefore need to take a proportionate approach to investigation to ensure that the relevant matters raised are properly investigated in an independent manner but that the costs of such investigations are reasonable, given the matters raised.

The objection

- 7 The objection was in respect of sleep-in payments made to employees providing social care within Cheshire East. The objector was concerned that the Council knew it was paying below National Minimum Wage levels for these individuals, which was unlawful and that the Council had been aware of its failure to pay the national minimum wage to staff undertaking sleep-in duties since "early 2014". As a consequence of the Council's failure to respond to this knowledge, the objector alleged that back pay was owed to the impacted individuals from 1 April 2009.
- 8 The objector requested that I apply to the Court, under section 28 of the Local Audit and Accountability Act 2014 (the Act) for a declaration that the salary payments in the areas mentioned were unlawful.
- 9 In addition, the objector requested that I also issue a Report in the Public Interest under section 27 of the Act, because a whistle-blower originally brought these unlawful salary payments to the Council's attention and was subsequently dismissed. The objector also considered that this Report in the Public Interest should address the view that the Council had been aware that it was not lawfully paying its sleep-in workers and was potentially behaving dishonestly and misleading members and, as such, had not exhibited the appropriate high standards in Public Office.
- 10 The objector had concern that the Council's Chief Operating Officer had potentially misled members of the Council's Audit and Governance Committee of 16 March 2017 and ourselves, as the Council's external auditor, by his failure to declare this matter when responding to Grant Thornton's question regarding compliance with law and regulation, within our report, "Informing the audit risk assessment for Cheshire East Council for the year ended 31 March 2017".

Work carried out

- 11 In responding to the objection, we have taken into account the Council's own work since the matter was raised with us in August 2017, as the Council's Internal Audit service has also been investigating the timeline of events regarding this matter since March 2014, in order to gain its own understanding of the issues and identify any lessons to be learned for the future.
- 12 To avoid duplication and minimise the cost of investigation for the Council, we have considered carefully Internal Audit's work as it has progressed and have raised various queries of our own with officers, as well as conducting our own review of the documentary evidence relating to the issues you have raised.

The national issue

- 13 In November 2013, the Local Government Association (LGA) advised local authorities that an Employment Appeal Tribunal had determined that carers, who slept-in on call in case care was needed during the night, were entitled to have the whole of the time reckoned for calculation of the National Minimum Wage.
- 14 In recent years, the key legal developments in this area have related to the Royal Mencap Society, who operate their sleep-in care arrangements in common with most social care providers and pay a mostly flat rate sleep-in payment. The Society has been unsuccessful in arguing that the hours during sleep-in shifts were not to be taken into account in calculating the National Minimum Wage. The matter, which is commonly described as 'the Mencap case', has been considered at Employment Tribunal and an Employment Appeal Tribunal and is currently under appeal by the Society to the Court of Appeal.

Impact at Cheshire East

- 15 In terms of the specific matters the objector raised, I had the following conclusions:
 - i **The Council knew it was paying below National Minimum Wage rates for certain employees, undertaking sleep-in duties since early 2014.** I have established that the Council was aware that it was at risk of failing to comply over this period and could have done more to establish with clarity the position against this risk, but ambiguity with the national legal position and the Council's initial financial evaluation, had led it to believe that it was compliant in this area and that a continued "watching brief" approach was appropriate.
 - ii **The Council owed back pay to the impacted individuals from 1 April 2009.** Once the Council had acknowledged its earlier errors, it has devoted significant resources to ensure an appropriate methodology and that the final calculations were accurate and complete. In addition, the Council engaged with independent legal counsel who advised on various matters. I have reviewed the various counsel opinions obtained and find them to be comprehensive. Following counsel advice, the Council determined that initial backdating over two years from September 2015 was appropriate and backdated payments amounting to £167,863 were made to 108 current and former employees in October 2017. The Council was the first nationally to acknowledge that back payments should be made and has, in my opinion, made full and appropriate effort to regularise the situation once its actual non-compliance was identified. I did not agree with the scale of backpayments suggested by the objector or the number of years to be backdated.
 - iii **The Council had "personally defrauded" these employees by its actions and was at risk of being "named and shamed" by HMRC and, potentially being penalised up to 200% of the money owed.** I considered that the Council's earlier actions relating to this matter were based on an ambiguous legal position and financial analysis that had misled the Council to believe it was compliant with the National Minimum Wage regulations. There is, therefore, no evidence of dishonesty or intent to defraud, in my opinion. As Cheshire East Council has already made back payments based on detailed calculations and independent counsel opinion, based on these national developments, I did not consider the Council to be at risk of being named and shamed and fined by HMRC.

- iv **A whistleblower had originally brought the unlawful salary payments to the Council's attention and was subsequently dismissed.** On 28 November 2016, the officer wrote to Care4CE's Service Manager saying that she was "being finished" at the Council. This letter drew attention to the Council being "*seriously at risk*" of paying some individuals below the minimum wage. The letter appears to me to be consistent with the employee's previous communications on the subject and, whilst it correctly highlights a risk to the Council, it is part of the general management of this issue that has taken place over a number of years. In terms of the officer's exit from the Council, I understand that the matter is now subject to an employment tribunal, so I have not pursued the matter further at this stage, as the tribunal process represents the proper process for dealing with the matter.
- v **Officers had misled members generally regarding this matter and, specifically, the Council's Chief Operating Officer had misled members of the Council's Audit and Governance Committee of 16 March 2017, as well as Grant Thornton, by not disclosing the matter when responding to Grant Thornton's questions regarding compliance with law and regulation, within our report, "informing the audit risk assessment for Cheshire East Council for the year ended 31 March 2017".** I have not seen any evidence of dishonest behavior from officers to members in their general interactions regarding this matter. In terms of disclosures made to the Audit and Governance Committee of 16 March 2017, the sequence of events set out above identifies that the potential risks of non-compliance were being considered over a number of years and the position was clarifying during late 2016. It is debatable whether officers were sufficiently clear on the risk of non-compliance with the National Minimum Wage Regulations to include the matter in the management comments to the Audit and Governance Committee in March 2017. However, as the purpose of the communications are to promote transparency over the communication of such matters, I consider that a more open approach should have been adopted towards drawing our attention to this matter. I note, however, that the level of disclosure in this year's "Informing the audit risk assessment" report has considerably increased and encourage the Council to continue with this practice in future.

Conclusions

- 16 If an item of account appears to me to be contrary to law, it is within my discretion as to whether I apply to the Court for a declaration to that effect. Relevant factors which we take into account in deciding whether to exercise our discretion to apply to the Court for a declaration include:
 - the significance of the issue concerned;
 - the amount of the item account involved;
 - the expense of an application;
 - the practical consequence of my declaration;
 - whether or not the Council agrees with our view on the unlawfulness of the item in question.
- 17 While the underpayments and/or the failure to accrue for the back pay at 31 March 2017 could well be deemed to be unlawful by the Court, the Council has already remedied the situation by making back payments. Under such circumstances, it seems unlikely that the Court would actually make a declaration, or if one were made it would be of little consequence. There is therefore little point in incurring further public expense in seeking an application from the Court. Therefore, whether or not there are unlawful items of account, I did not consider it appropriate to exercise my discretion in applying to the Court for a declaration in this matter.
- 18 Whether or not to issue a Report in the Public Interest is also a matter for us in the exercise of discretion.
- 19 In this particular case, I considered that, through more effective risk management arrangements, the Council could have allocated more senior leadership to the matter (particularly in its early stages) and clarified the respective roles and responsibilities of its social care service and finance legal and HR support teams. I also considered that greater care should have been taken to check and approve the early (now accepted as erroneous) financial calculations that had led officers to believe

that the Council was complying with the National Minimum Wage Regulations. The Council has accepted improvements are required in these areas and is taking action as a consequence.

- 20 Whilst a lack of firm risk management has contributed to a tendency for matters to drift, over a number of years, I note that, since the Council has identified its non-compliance (which also followed further clarification of the national legal position), it has moved quickly and decisively to regularise matters. It is particularly important to note that Cheshire East Council was amongst the first nationally to make back payments in remedy of previous non-compliance. The Council has also taken the measure of obtaining independent counsel advice in this matter, to balance its responsibilities to the underpaid carers with its wider duties of stewardship for public money.
- 21 Importantly, I have found no evidence of dishonesty or willfully delaying dealing with the matter beyond the reasonable approach of monitoring the clarification of the national legal position.
- 22 The matter of compliance with the National Minimum Wage has been a matter of considerable interest in the national press but I do not consider there are any aspects of Cheshire East Council's handling of the matter that warrant specific reporting to the public.
- 23 Overall then I also did not believe that the public interest would be served by making a Public Interest Report on this matter.

Recommendations

24 I recommend that:

- the Council now takes action to implement improvements arising from the Internal Audit review into the matter;
- the Council formally concludes on whether further back payments are necessary, following the outcome of the Mencap appeal;
- also following the outcome of the Mencap appeal, the Council continues to ensure that its current and forward arrangements comply with the Government's National Social Care Compliance scheme;
- officers continue with the increased levels of disclosure regarding potential areas of non-compliance with law and regulation established this year in future communications with the auditor.

Appendix – Action Plan

Recommendations	High/Med/Low	Management comments
R1 The Council should take action to implement improvements arising from the Internal Audit review into the matter	M	<p>The Internal Audit review identified that had there been more formal ownership and robust risk management of the issue in 2014, this would have ensured that the issue of Sleep In allowances and the National Minimum Wage was subject to regular review and formal decision making with regards to retaining a watching brief.</p> <p>Operational risk registers are now integrated into annual Team Plans and as such are signed off by the appropriate Head of Service. Team Plans are subject to quarterly challenge sessions to ensure that they are up to date and being delivered successfully and a review of the risk register is included within this process. This improvement in the control environment and embedding of risk management into wider team planning and performance regime should ensure that the risk of a similar issue arising is mitigated.</p>
R2 The Council should formally conclude on whether further back payments are necessary, following the outcome of the Mencap appeal	H	Agreed.
R3 Also following the outcome of the Mencap appeal, the Council should continue to ensure that its current and forward arrangements comply with the Government's National Social Care Compliance scheme	H	Agreed.
R4 Officers should continue with the increased levels of disclosure regarding potential areas of non-compliance with law and regulation established this year in future communications with the auditor.	H	<p>The completion of the 'Informing the Risk Assessment for Cheshire East Council' document will continue to be a comprehensive exercise ensuring that the External Auditor is aware of all areas of non compliance with law and regulations.</p> <p>The document is completed by managers within Internal Audit and Finance and approved by the Interim Executive Director of Corporate Services (Section 151 Officer).</p> <p>It is also subject to comment by Corporate Leadership Team and Audit and Governance Committee.</p>



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