

# Deficiencies in Pembrokeshire County Council's Governance and Decision Making Relating to the Departure of its former Chief Executive with a Termination Payment

Audit year: 2020-21

Date issued: January 2022

Document reference: 2746A2021-22

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As the Auditor General for Wales, I have issued this report under section 22 of the Public Audit (Wales) Act 2004, to draw the public's attention to deficiencies in Pembrokeshire County Council's governance and decision-making relating to the departure in 2020 of its former Chief Executive with a termination payment. The Council must consider the report and the recommendations made, in accordance with section 25 of the Public Audit (Wales) Act 2004.

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# Summary report

## Introduction

- 1 On 2 September 2020, Pembrokeshire County Council (the Council) announced that its Chief Executive would be leaving the Council's employment by mutual consent. Later that month, the Council made a termination payment of £95,000 to the then Chief Executive under the terms of a Settlement Agreement signed by the Council's Leader and its Chief Executive on 27 August 2020. On 30 November 2020, the Chief Executive's employment ended.
- 2 The Council is required to individually report termination payments made to chief officers within its annual accounts. The payment to the then Chief Executive is therefore required to be disclosed within the Council's 2020-21 financial statements. My audit of the Council's accounts includes examining all termination payments made to chief officers to confirm that they have been properly disclosed and that they have been made in accordance with legislative requirements and the Council's Constitution.
- 3 Shortly after the Chief Executive's departure was announced, my auditors became aware that he was to receive a termination payment. My auditors raised concerns with me regarding this payment because they were unclear of the basis on which the then Chief Executive was leaving his employment; the reason why he was to receive a payment of £95,000; and how decisions in respect of these matters had been made by the Council.
- 4 In normal circumstances my auditors would not examine a termination payment made to a Council chief officer until that payment has been disclosed in the Council's draft financial statements. However, in view of the concerns expressed by my auditors, I asked them to commence an immediate audit to determine:
  - the basis on which the Council entered into the Settlement Agreement with its then Chief Executive resulting in the termination of his employment and to him receiving a payment of £95,000.
  - whether the Council followed a proper and transparent process when deciding to make a termination payment to the then Chief Executive.
  - whether the Council complied with legislation and its own Constitution and pay policy in the way it dealt with this matter.
- 5 This report sets out the findings and conclusions arising from my audit.

## My audit work and its scope

- 6 During the course of the audit, my auditors interviewed a number of individuals who had some involvement in the events that led to the Council's former Chief Executive leaving his employment with a termination payment of £95,000. My auditors also considered a large number of contemporaneous documents. The audit work undertaken by my auditors gave rise to concerns regarding the lawfulness of the decision-making process followed by the Council and the legality of the payment itself. I sought external legal advice on these matters, and the findings and conclusions set out in this report are consistent with the legal advice I received.
- 7 The audit has been complex, made more difficult by the failure of the Council to contemporaneously document the basis on which decisions were made. Furthermore, those interviewed sometimes held very different recollections of the same events.
- 8 There are some matters set out in this report on which I have been unable to reach a definitive conclusion. These relate primarily to the circumstances that led to the Council's then Chief Executive being offered a termination payment if he decided to leave the Council's employment. My auditors heard the views of a number of individuals regarding this matter.
- 9 There was consensus that one of the factors that led to the Chief Executive's departure was that relationships between him and some members of the Council's Cabinet were, at the very least, strained. Some officers and the former Chief Executive told my auditors that his relationships with some Cabinet members had irrevocably broken down. However, those interviewed expressed differing views as to the reason for the relationship problems. Some, including the former Chief Executive, told my auditors that the difficulties were caused by poor member behaviour towards him over a sustained period, amounting to bullying and intimidation. Others, including the Council Leader, maintain that whilst Cabinet members were robust in challenging and scrutinising the way in which the then Chief Executive was performing his role, he was not subjected to bullying. I note that the then Chief Executive raised concerns with the Council Leader regarding his treatment in 2019.
- 10 However, the former Chief Executive did not raise his concerns under the Council's HR policies or by making a complaint that members had breached the Council's Member Code of Conduct. The former Chief Executive's concerns were therefore never investigated. As a consequence, it was not determined whether or not his concerns had substance.
- 11 My role as the statutory auditor of the Council does not extend to investigating employment matters. However, given the significance of this matter, I consider that the Council should review whether its framework for managing relationships between

members and senior officers is robust and is being complied with. This review should include ensuring that there is clarity on the respective roles of members and officers and clarifying how concerns regarding member and officer relationships should be reported and addressed.

## Overall conclusion

- 12 This report sets out the events and circumstances relating to the departure of the Council's Chief Executive with a termination payment of £95,000. My overall conclusion is that the process followed by the Council resulting in the payment is an example of a serious breakdown in governance. The report highlights a failure to address and resolve relationship difficulties between members and officers, lack of clarity on respective roles and responsibilities, examples of officers failing to properly discharge their professional duties, disregard of external legal advice, failure to follow internal policies and procedures, poor and untransparent decision-making, failure to document and report the reasons for decisions, members of the Council not being given the opportunity to review and scrutinise the proposal, and failure to comply with legislative requirements.
- 13 In my view, the Council has much work to do to satisfy itself that it has robust governance arrangements in place and that these arrangements are being complied with. My audit also identified cultural and behavioural concerns relating to the way in which the former Chief Executive's departure was handled. The Council needs to satisfy itself that these concerns are not symptomatic of a wider problem.
- 14 I have been encouraged that senior officers of the Council have acknowledged the serious nature of the findings set out in this report. I also recognise that since a Local Government Association led Corporate Review Challenge reported to the Council in 2020, which identified both positive aspects of the Council and a range of key considerations and concerns, the Council has taken action to improve its governance and decision-making. The Council has established a wide-ranging and ongoing improvement programme, and this gives me confidence that the Council will act to address the recommendations set out below.

## Detailed conclusions

- The Council's Leader and its then Chief Executive reached agreement that the Chief Executive would leave his employment with a payment of £95,000, but the basis on which he was departing and the reason he was to receive a termination payment was not properly recorded.
- The Council's Head of Human Resources instructed external legal advisors to draft a Settlement Agreement in respect of the Chief Executive's negotiated departure with a termination payment, but the instructions were not based on established facts.

- The Council's external legal advisors advised the Council's Head of Human Resources to clarify and document the basis on which the then Chief Executive was leaving his employment and the reason why he was to receive a termination payment of £95,000, but the Head of Human Resources did not act on this advice.
- The Council's external legal advisors prepared a draft Settlement Agreement based upon the oral instructions of the Head of Human Resources, but the wording was subsequently amended on the Leader's instructions resulting in the Council being exposed to a potential tax liability.
- There was a general lack of clarity regarding who was advising who in the legal negotiations around the Settlement Agreement, and this was compounded because the Head of Human Resources shared the Council's external legal advice relating to the departure of the Council's then Chief Executive with him.
- The decision to make a termination payment of £95,000 to the Council's former Chief Executive was incorrectly taken as an executive decision and, in my view, the payment was contrary to law.
- The Council's Head of Legal and Democratic Services raised a concern with the Council's Monitoring Officer that the proposed payment to the Council's Chief Executive might not be compliant with the Council's statutory pay policy statement. But this concern was not addressed and the Council appears to have deviated from its pay policy statement without being able to demonstrate good reason for doing so.
- The Council's decision-making process in respect of the departure of its Chief Executive with a termination payment was fundamentally flawed and did not comply with legislative requirements.
- The former Chief Executive received a termination payment of £95,000 in advance of the agreed date of payment set out in the Settlement Agreement.
- Non-executive members of the Council were not given the opportunity to review and decide whether the Chief Executive should receive a termination payment.



# Recommendations

## Recommendations

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### Roles and responsibilities

R1 The Council should ensure that:

- the respective roles and responsibilities of members and officers have been clearly defined.
  - members and officers are able to demonstrate a clear understanding of their respective roles and responsibilities.
  - relationships between members and officers are constructive and respectful.
- 

### Member/Officer relationships

R2 The Council should review whether its current arrangements for dealing with member/officer complaints and disputes are fit for purpose. This should include:

- ensuring that it has effective informal mechanisms in place to seek early resolution to disputes and avoid unnecessary escalation through formal processes.
  - strengthening the section of the Council's constitution that covers member/officer relationships to include a clear informal mechanism that officers can use to seek resolution of relationship difficulties with members.
- 

### Decision-Making

R3 The Council should:

- ensure that its decision-making procedures are clearly set out, understood and adhered to by members and officers alike.
- ensure that when making decisions that relate to the use of significant amounts of public money (as defined by the Council), value-for-money considerations are properly considered and documented.
- ensure that its delegated decision-making arrangements are fit for purpose, and members and officers adhere to their levels of delegated authority.
- remind members and officers that significant and/or controversial decisions should not be taken by officers using delegated powers.
- ensure clear accountability and consistency in securing the provision of governance advice.

## Recommendations

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### Termination Payments

- R4 The Council should ensure that all future terminations payments made to Chief Officers are:
- supported by proper business cases.
  - determined in accordance with legislative, constitutional requirements and the Council's approved pay policy statement.
  - reported in a transparent way.
- 

### Pay Policy Statement

- R5 The Council should review and update its pay policy statement to ensure that it is comprehensive and provides sufficient flexibility in relation to exit payments on termination of Chief Officer employment.
- 

### Procurement and use of external advisors

- R6 The Council should review and implement a programme of officer awareness and training to ensure robust procedures for procuring and using external advisors are properly embedded and cover:
- considerations being taken into account in deciding whether to appoint external advisors.
  - provision of written instructions to external advisors.
- 

### The Council Constitution

- R7 The Council should review and rewrite its Constitution to ensure that it reflects legislative requirements, its content is consistent throughout and consistent with any significant Council policies and procedures, is easy to navigate and it follows good practice.
- 

### Adherence to the Nolan Principles of public life<sup>1</sup>

- R8 The Council should:
- ensure officers and members understand their fundamental obligations as public servants to adhere to the Nolan principles of public life

<sup>1</sup> In 2015, the Committee on Standards in Public Life set out seven Principles of Public Life (also known as the Nolan Principles) which apply to anyone who works as a public officeholder. This includes all those who are elected or appointed to public office

## Recommendations

(selflessness, integrity, objectivity, accountability, openness, honesty and leadership).

- ensure staff are aware of how they can raise concerns when they encounter conduct contrary to the Nolan principles and in respect of the Member Code of Conduct.

## Next steps

- 15 In accordance with section 25 of the Public Audit (Wales) Act 2004 the Council must now consider this report at a full meeting of the Council by **14 February 2022**, ie within one month of the date of this report.
- 16 At least seven days before the meeting, the Council must publish a notice in a newspaper circulating in the community stating:
  - the time and place of the meeting;
  - that the meeting is being held to consider a report in the public interest; and
  - a description of the subject matter of the report.
- 17 At the meeting, the Council will need to decide:
  - whether the report requires it to take any action;
  - whether the recommendations in the report are to be accepted; and
  - what action (if any) to take in response to the report and recommendations.
- 18 The Council will then need to prepare a written response and agree the wording of that response with me before publishing its response in a newspaper circulating in the local authority area.

# Detailed report

## Introduction

- 19 On 30 November 2020, the former Chief Executive and Head of Paid Service<sup>2</sup> of Pembrokeshire County Council (the Council), left his Council employment under the terms of a Settlement Agreement signed on 27 August 2020<sup>3</sup>. The former Chief Executive signed the Settlement Agreement as the party to whom the Agreement related, and the Council Leader<sup>4</sup> signed the Agreement on behalf of the Council.
- 20 Under the terms of the Settlement Agreement, the former Chief Executive received a payment of £95,000. The first £30,000 was paid tax free.
- 21 On 2 September 2020, the Council published a 'decision notice' dated 1 September 2020 on its website. The notice set out that the Council's Director of Resources<sup>5</sup> had made the following decision "that a sum of £95k be approved in accordance with the settlement agreement" and refers to "a settlement agreement as agreed between the Council and a chief officer". The notice states that the reason for the decision was "to achieve fair and equitable remuneration to support a Settlement Agreement". The notice does not identify that the chief officer referred to was the Council's then Chief Executive, but this was the case.
- 22 On the same day, the Council issued a short media statement that: "the Chief Executive of Pembrokeshire County Council ... has today announced his intention to leave the post by mutual consent, subject to a Settlement Agreement, following consultation between the Leader and Cabinet. A decision in relation to the Settlement Agreement has been published on the Council's website."

<sup>2</sup> Where this report refers to 'the former Chief Executive or 'the then Chief Executive' of the Council, those references relate to Mr Ian Westley who left the Council's employment on 30 November 2020.

<sup>3</sup> A settlement agreement is a legally binding contract entered into voluntarily between an employee and their employer. When the employee signs the agreement, the employee relinquishes their right to take to an employment tribunal any employment claims that they might have had against their employer.

<sup>4</sup> References to the Council Leader in this report relate to Councillor David Simpson who was the Council Leader throughout 2020, and remains in that position.

<sup>5</sup> References to the Council's Director of Resources and Section 151 in this report relate to Mr Jon Haswell who held this post throughout 2020 and remains in post. The role of S151 Officer is a statutory role. Under Section 151 of the Local Government Act 1992 every local authority must make arrangements for the proper administration of their financial affairs and must secure that one of their officers has responsibility for the proper administration of those affairs

- 23 Where a local authority chief officer leaves their employment and receives a termination payment, that payment is required to be reported within the remuneration disclosure note which forms part of the Council's annual accounts. The payment to the former Chief Executive, therefore, has to be disclosed within the Council's 2020-21 financial statements. My auditors examine all payments disclosed within the remuneration note to confirm their accuracy and that they have been made in accordance with legislative requirements and the Council's Constitution.
- 24 In normal circumstances my auditors would not examine a termination payment made to a chief officer of the Council until that payment has been disclosed in the Council's draft financial statements. However, in this instance, my auditors considered it necessary to carry out an early audit of this matter for the following reasons:
- the Council did not give my auditors advance warning that negotiations were taking place with the then Chief Executive regarding his possible departure. I would have expected the Council to have kept my auditors sighted of this matter.
  - there appeared to be a lack of clarity over the basis on which the then Chief Executive was leaving his post, why he was to receive a termination payment, and how that payment had been calculated.
  - my auditors were unsighted on how decisions relating to this matter had been taken. Where a local authority chief officer leaves his post with a termination payment, I would expect members of the Council, meeting as either full Council or in committee, to have been involved in the decision-making process. In this instance, it did not appear that the decisions were taken in a meeting of the full Council or by a Council committee.
  - Council decisions are required to be recorded and published when those decisions are made, either within the minutes of the meeting in which the decision was taken, or as a decision report when the decision is taken by an individual Cabinet member or by an officer of the Council under delegated powers. Whilst the Council published a decision report in the name of its Director of Resources approving the funds, which had already been agreed under the Settlement Agreement of £95,000 (see **paragraph 21**), the decision to enter into the Settlement Agreement and the reasons for doing so were not recorded.
- 25 In view of the concerns set out above, I requested that my auditors undertake an audit to determine:
- the basis on which the Council entered into the Settlement Agreement with its then Chief Executive resulting in the termination of his employment and to him receiving a payment of £95,000;
  - whether the Council followed proper and transparent process when deciding to make a termination payment to its then Chief Executive; and

- whether the Council complied with legislation and its own Constitution and pay policy in the way it dealt with this matter.

26 This report sets out the findings and conclusions arising from my audit.

**The Council's Leader and its then Chief Executive reached agreement that the Chief Executive would leave his employment with a payment of £95,000, but the basis on which he was departing and the reason he was to receive a termination payment was not properly recorded**

**Against a backdrop of an ongoing review of the Council's senior management structure and a deterioration in the working relationship between the then Chief Executive and some Cabinet members, in July 2020 the Council Leader asked officers of the Local Government Association to discuss with the then Chief Executive or his representative a possible voluntary exit agreement**

27 During 2019, the Council began to consider streamlining its senior management structure which, it was anticipated, would generate efficiency savings. An internal review had been undertaken by the Council's Corporate Management Team which identified some restructuring options. However, members of the Cabinet were unable to agree a way forward.

28 The former Chief Executive told us that during 2019 he had several conversations regarding "issues impacting my employment", and he informed the Leader in late 2019 that he had held discussions with his Trade Union representative regarding these matters. In January 2020, the Council's then Chief Executive asked the Leader of the Council to meet his Trade Union representative to discuss matters relating to his Council employment. He also requested that the Council's then

Monitoring Officer<sup>6</sup> and Head of Human Resources<sup>7</sup> be present at this meeting. On receipt of this request, the Leader contacted the Local Government Association's<sup>8</sup> (LGA) Specialist Employment Team to seek its support in respect of the proposed meeting.

- 29 An email to the Leader from a member of the LGA Team dated 28 January 2020 indicates that the Leader and the LGA anticipated that the purpose of the requested meeting was to discuss the possibility of a mutually acceptable severance arrangement: "you [the Leader] said that the Chf Exec and his representative have requested a meeting with you and Heads of HR and Legal; this on the face of it sounds promising insofar as the Chf Exec may be wishing to reach mutually agreeable terms for his departure. This discussion is known as a 'protected conversation'. "The LGA Officer asked the Leader to provide him with a copy of the Council's severance policy. He also emphasised the importance of the Council's then Monitoring Officer and Head of Human Resources being involved in any discussions. The Council's former Monitoring Officer told my auditors that she was present at a Telecon meeting involving the Leader and the LGA in or around February 2020 to discuss potential negotiations with the then Chief Executive. She maintains that she advised the Leader at this meeting that he would need to involve the Council's then Head of Legal and Democratic Services<sup>9</sup> and its Director of Resources and Section 151 Officer if negotiations were to proceed.
- 30 The former Chief Executive told my auditors that he requested a meeting with the Leader because he considered that relationships between him and some members of the Cabinet had broken down. He maintains that he had been subjected to bullying and intimidating behaviour and he raised his concerns in a letter to the

<sup>6</sup> References to the Council's Monitoring Officer in this report relate to Ms Claire Jones who held this post throughout 2020 and until the end of September 2021 when she left the Council's employment. The post of Monitoring Officer is a statutory post. All principal local authorities in England and Wales are required under Section 5 of the Local Government and Housing Act 1989 to designate one of their officers (to be known as "the monitoring officer") as the officer responsible for specific duties which include reporting on matters he/she believes are, or are likely to be, illegal or amount to maladministration. Pembrokeshire County Council has also designated that its Monitoring Officer has responsibility for determining the interpretation and application of the Council's Constitution and for keeping the Constitution up to date.

<sup>7</sup> References to the Council's Head of Human Resources in this report relate to Mr Ceri Davies who held this post throughout 2020 and remains in post.

<sup>8</sup> The Local Government Association (LGA) is the national membership body for local authorities which seeks, on behalf of member councils, to support, promote and improve local government.

<sup>9</sup> References to the Council's Head of Legal and Democratic Services in this report relate to Ms Claire Inledon who held this post throughout 2020 and left the Council's employment in December 2021. The Head of Democratic Services post is a statutory post. Under Section 8(1) of the Local Government (Wales) Measure 2011 (the Measure) local authorities must designate one of its officers to discharge the democratic services functions in Section 9 of the Measure.

Leader dated 5 November 2019. The letter states: "as per our initial discussion, I have no choice but to give my most serious consideration to the available options for discussion with you and will authorise my Trade Union representative to enter into 'without prejudice' discussions with the Head of HR and the Monitoring Officer in order to inform this debate." The former Chief Executive said that the concerns he had raised with the Leader were not addressed, and he reluctantly came to the conclusion that his position as the Council's Chief Executive had become untenable.

- 31 The Leader's perspective on this matter is different. He told my auditors that whilst relationships between the then Chief Executive and some members were difficult, and that members could sometimes be robust when challenging officers, he did not consider the level of challenge to be unreasonable, nor did he consider relationships had irrevocably broken down. The Leader acknowledged that the former Chief Executive informed him that he held files documenting examples of poor member behaviour but did not share the content of these files with him. The Leader told my auditors that in his view the then Chief Executive did not have grounds on which to bring an employment claim against the Council.
- 32 My statutory audit remit does not extend to concluding on whether the former Chief Executive had grounds to bring an employment claim against the Council. However, in order to consider what process the Council should have followed when deciding to make the termination payment, I have had to form a view on whether the Council's payment of £95,000 to its then Chief Executive was to settle a potential employment claim he could have brought against the Council.
- 33 As set out in **paragraph 30**, the former Chief Executive wrote to the Leader on 5 November 2019 setting out his concerns regarding the conduct of one Cabinet member. However, the Council has no record that the then Chief Executive formally raised his concerns under the Council's HR policies, including grievance and bullying policies. He did not refer potential breaches of the Member Code of Conduct to the Standards Committee or Public Services Ombudsman for Wales. Furthermore, he did not give notice to the Council of his intention to bring an employment claim against the Council. The former Chief Executive told my auditors that he did not take such action because he did not wish to damage the reputation of the Council.
- 34 I have not discounted the possibility that the former Chief Executive may have had grounds to bring a claim against the Council. I note that an external Corporate Peer Review of the Council<sup>10</sup> which reported in February 2020 raised concerns regarding cultural, behavioural and relationship issues within the Council. It made a recommendation that the Council should recognise that "the behaviour of some elected members is completely inappropriate and demonstrate at the senior leadership the necessary collective resolve to address the matter." Furthermore, a

<sup>10</sup> LGA Corporate Peer Challenge Pembrokeshire County Council, Feedback Report, February 2020



review of the Council's senior management structure conducted by the Welsh Local Government Association<sup>11</sup> (WLGA), which reported in June 2020, found that there was a broad consensus amongst members of the Cabinet that "working relationships between the Cabinet and the Corporate Management Team collectively require further development". However, the Council did not consider whether there was evidence available to support a potential employment claim in respect of the treatment of its then Chief Executive, or to determine that £95,000 was appropriate compensation for any such claim.

- 35 I therefore consider it unlikely that the purpose of the payment made to the former Chief Executive in September 2020 was to settle a potential claim. If I am incorrect on this point, the Council failed to follow its own internal human resources' policies and procedures for handling potential and actual employment claims.
- 36 The Leader agreed to meet the then Chief Executive's Trade Union representative on 4 March 2020 in the London offices of the Local Government Association (LGA). Two officers from the LGA's Specialist Employment Team supported the Leader at this meeting, and the Council's then Monitoring Officer and Head of Human Resources were also present. The then Chief Executive was not in attendance.
- 37 The Council Leader told my auditors that at the meeting the then Chief Executive's representative explained that the Chief Executive wished to leave the Council's employment either on the basis of early retirement or by way of voluntary severance under the terms of the Council's severance policies. The Leader told my auditors that having been advised of the cost to the Council of a departure on these terms, he was unwilling to agree to these requests. He maintains that he explained to the former Chief Executive's representative that whilst an agreement was not possible at that time, the senior management restructuring exercise might in due course provide opportunities for the then Chief Executive to exit the Council with an agreed termination package.
- 38 The Council's Head of Human Resources told my auditors that "the Leader had confirmed at the LGA meeting on 4th March that relations had broken down" and that he "wished to pursue a mutually acceptable exit arrangement in order to avoid any potential claim or bad publicity and reiterated that fact when he asked [him] to instruct external legal advisors re: a settlement agreement." The Head of Human Resources provided my auditors with what he maintains were his contemporaneous notes of the meeting of 4 March 2020. I have reason to doubt that these notes were in fact contemporaneous.

<sup>11</sup> The Welsh Local Government Association (WLGA) is a membership organisation that represents all 22 local authorities in Wales. It seeks to represent the interests of local government and to promote local democracy in Wales. Its primary purposes are to promote better local government, to promote its reputation and to support authorities in the development of policies and priorities which will improve public services and democracy.

- 39 Notwithstanding my concern regarding the notes provided by the Head of Human Resources, these notes are not wholly consistent with the response the Head of Human Resources sent to my auditors when he was asked to comment on the factual accuracy of this report. On 13 July 2021, he wrote to my auditors stating, “the Leader had confirmed at the LGA meeting on 4th March that relations had broken down”. However, the Head of Human Resources’ notes of the meeting of 4 March 2020 record that the Leader stated at that meeting that there were “no problems between members/ officers.” and “neither were there any specific issues between [the then Chief Executive] and Cabinet members/Leader. [The Leader] also saying he’s happy for [the Chief Executive] to continue in his role as are members.”
- 40 The Leader told my auditors that whilst relationships were difficult, he did not consider relationships had irrevocably broken down at the time of the meeting of 4 March 2020. This is consistent with notes kept of the 4 March meeting by the former Chief Executive’s representative (see **paragraph 42**). The Leader also maintains that his position remained unchanged after the 4 March meeting, and that he had conversations with the then Chief Executive in which he made it clear that he and his Cabinet colleagues were willing to work through any relationship issues that existed.
- 41 The Leader also told my auditors that he did not agree to pursue a “mutually acceptable exit” at the meeting of 4 March 2020, but did state that the senior management restructuring exercise might provide opportunities for the then Chief Executive to exit the Council with an agreed severance package. He did not consider that the Chief Executive had grounds to bring a claim against the Council and he did not ask the Head of Human Resources to instruct external legal advisors to prepare a settlement agreement. I note that it was not until 12 August 2020 that the Head of Human Resources instructed external legal advisors to prepare a settlement agreement on the request of the Leader (see **paragraphs 82 to 86**).
- 42 The former Chief Executive’s representative provided my auditors with notes he took of the meeting. These notes record that he raised concerns regarding the way some members of the Council had treated the then Chief Executive, but that the Leader had responded that he did not believe there was a major problem, and that he and other leading members were happy to continue to work with him. The notes also record that:
- the then Chief Executive’s representative pointed out that the Chief Executive could apply for voluntary severance under the Council’s voluntary severance scheme, but the Leader did not “like this suggestion” because it would be very difficult to politically deliver, would need to be approved by a meeting of full Council and the Council would still need a Chief Executive.
  - the then Chief Executive’s representative pointed out that the senior management restructuring could lead to the deletion of the post of Chief Executive with one of the remaining Corporate Directors being appointed as

Head of Paid Service in addition to their substantive role, or one of the Directors could be restyled as 'Managing Director'. This would provide the opportunity for the then Chief Executive to leave as "a casualty of the restructuring" and "with appropriate compensation and with no need for member approval".

- the Leader agreed the way forward, as set out in bullet point 2 above, on the basis that this could be politically acceptable, but the senior management restructuring review would need to be undertaken by an external body "to avoid the accusation that any Council officer had come up with a proposal from which they would benefit financially". The notes record that the then Chief Executive's representative suggested that the LGA undertake the senior management restructuring review.

43 If the Leader had agreed that the senior management restructuring review should be used as a vehicle to ensure that the Chief Executive received a substantial termination payment without the need to seek the approval of full Council, as could be inferred from the notes of the former Chief Executive's representative, that would be a very serious matter and would reflect very badly on all those present at that meeting. However, in the process of checking extracts of this report for factual accuracy, the former Chief Executive's representative told my auditors that the scenario referred to in **paragraph 42**; bullet point 2 was not put forward or discussed in such terms. He stated that the scenario was put forward as one "option acceptable to me and endorsed by the LGA advisers, to allow the Chief Executive to leave the organisation at a reasonable cost to the Council as there would be a consequential reduction in the staff numbers on the [Corporate Management Team]".

44 I also note that what is described in the former Chief Executive's representative's notes of the meeting on the 4 March 2020 is not what occurred. As set out in **paragraphs 46 to 49**, whilst the former Chief Executive's departure from the Council was connected to the senior management restructuring process, he left in advance of the review being completed. His departure had no bearing on the future senior management structure, and the payment he received in September 2020 was not determined under the Council's redundancy or voluntary severance schemes, but on the basis of individual negotiation. Nevertheless, in two key respects there are similarities between the proposal outlined in the notes of the former Chief Executive's representative and what occurred:

- the WLGA, with some input from the LGA, was asked to undertake an external, independent review of the Council's senior management structure; and
- members of the Council were not asked to approve the termination payment of £95,000 made to its then Chief Executive in September 2020.

45 The Council's former Monitoring Officer maintains that, following the meeting of 4 March 2020, she again advised the Leader that he would need to involve the Council's then Head of Legal and Democratic Services and its Director of Finance

and Section 151 Officer if negotiations with the then Chief Executive were to proceed. However, she maintains that the Leader indicated that he only wanted to receive external HR and legal advice in relation to any on-going negotiations.

## Following a recommendation made by the Welsh Local Government Association, the Leader agreed that negotiations take place on the then Chief Executive's possible departure from the Council with a termination payment

- 46 At some point in early April 2020, the WLGA, with input from the LGA was commissioned by the Council's Leader and the Cabinet member for Finance to "complete [a Senior Management Review exercise recently undertaken by the Council's Corporate Management Team] in order to provide an objective proposal for Cabinet's consideration. The outcome of this exercise will need to be a proposal that is a sustainable senior management model for the future in order to guarantee effective service delivery." The arrangements for the WLGA review were made by the Council's Head of Human Resources.
- 47 On 20 May 2020, the WLGA's Strategic HR Director (the WLGA Officer) leading the project emailed the Council's Leader setting out details of discussions he had held with the Leader regarding restructuring options. The email set out the following:
- "[the Chief Executive] might be willing to leave on a voluntary severance basis - if supported by Cabinet, confidential discussion required with [the Chief Executive]
  - if [Chief Executive] leaves – resultant vacancy can be advertised nationally and an appointment made; internal candidates can, of course, apply – no savings will arise
  - if this option is favoured, consider delaying [the Senior Management] review until new [Chief Executive] is in post".
- 48 On 24 June 2020, the WLGA Officer sent a copy of his draft report 'Pembrokeshire County Council Review of Senior Management Structure' to the Council's Head of Human Resources. The report included a recommendation that the Council's Cabinet discuss with the then Chief Executive whether he wanted to use the Review as an opportunity "to develop the strategic capacity of his senior management team in a way which enables him to continue to lead the delivery of the Council's agreed priorities" or whether he wanted to explore other options including voluntary severance. The full text supporting the recommendation is set out in **Exhibit 1**.

## Exhibit 1: review of senior management structure report produced by the Welsh Local Government Association

Extract recommending a 'without prejudice' discussion with the then Chief Executive regarding a voluntary severance arrangement.

- 10.16 As far as the current Chief Executive is concerned, having regard to -
- (a) the role played by him in stabilising the operation of the Council over the last five years or so, and
  - (b) the different and more transformational landscape which is clearly emerging in relation to the coming period, ... an opportunity exists to discuss with the current post holder - on a without prejudice basis - if he wishes to continue to lead the Council and its transformational agenda or whether he wishes to explore other options. This is a matter of great personal significance to the Chief Executive, who may be entirely happy to continue in his current role, but not to have such a conversation with him at this stage as part of this review might prove to be an opportunity lost to both parties.
- 10.17 Should Cabinet consider this to be an opportune moment to explore options regarding the Chief Executive's position, it is RECOMMENDED that a confidential discussion takes place with the Chief Executive to ascertain whether he considers this review to be an opportunity to develop the strategic capacity of his senior management team in a way which enables him to continue to lead the delivery of the Council's agreed priorities, within the context described in this report, or whether he wishes to explore other options, possibly linked to a voluntary exit arrangement.

Exhibit source: Council records

- 49 On 17 July 2020, the WLGA Officer emailed the Leader of the Council stating that a member of the LGA's Specialist Employment Team would, at the Leader's request, have a confidential discussion with the then Chief Executive and/or his Trade Union representative about the matters referred to in paragraph 10.17 of the senior management restructuring report (see **Exhibit 1**). The email further set out that a member of the LGA's specialist Employment Team (the LGA Officer) would contact the Council's Leader to obtain the Leader's instructions.

## **The Leader and the then Chief Executive reached an agreement in principle that the Chief Executive would depart his employment and would receive a termination payment of £95,000, but the reasons for his departure and the basis on which a termination payment was to be paid to him were not properly documented**

- 50 On 12 August 2020, a meeting took place at the request of the Leader between the then Chief Executive's Trade Union representative and the LGA Officer. No Council officers or members were present at the meeting.
- 51 As set out in **paragraphs 46 to 49**, the stated purpose of the meeting was to determine whether the then Chief Executive would be interested in a voluntary exit from the Council with a termination payment and, if so, to negotiate a mutually acceptable agreement (see **Exhibit 1**). The Leader told my auditors that he had come to the view that such an arrangement could be in the Council's best interests in view of the fact that the Chief Executive had made it clear he would like to leave his employment, and the relationships between him and some members were strained. However, he maintained that if an agreement had not proved to be possible, he was prepared to work constructively with the then Chief Executive on an ongoing basis.
- 52 The Leader told my auditors that he was not prepared to support a payment in excess of £95,000 because this was the proposed legislative cap on public sector exit payments. He was therefore not prepared to support a proposal for the then Chief Executive to receive voluntary early retirement or voluntary severance under the Council's severance policies. Under those policies, the cost to the Council would have been significantly higher than £95,000, and he considered he could not justify such costs, particularly as the Council would still require a Head of Paid Service and the functions being performed by the then Chief Executive would still need to be performed. The negotiations with the then Chief Executive were therefore not based on the terms of the Council's agreed severance policies but were bespoke negotiations on an individual basis.
- 53 The Head of Human Resources told my auditors that the Leader made it clear to him that "he would not support a higher payment than £95k as he did not want to place a proposal before Full Council". The Leader disputes that he made such a statement. He maintains that he was not prepared to support any proposal to the Council to make a payment that he himself considered excessive and that, until receiving advice from the then Monitoring Officer, his assumption was that any proposal to make a termination payment to the Chief Executive, regardless of the amount, would need to go to Council "to approve in some way shape or form". As set out in **paragraphs 142 to 148**, the Council's then Monitoring Officer subsequently advised that the Leader was able to approve a termination payment to the then Chief Executive on the basis that the payment was less than £100,000.

- 54 The LGA Officer told my auditors that the Leader did not instruct him to discuss or negotiate the settlement of potential employment claims with the former Chief Executive's representative, and in his meeting with the Chief Executive's representative on 12 August 2020, no claim(s) was presented or discussed. He told my auditors that his understanding was that the Chief Executive was eager to leave the Council, and that some members of the Cabinet did not have full confidence in him. He was therefore seeking, on the instructions of the Leader, to negotiate a voluntary exit "in the interests of the efficiency of the service".
- 55 The LGA Officer also told my auditors that his understanding was that there were potentially two reasons why this agreement was in the interests of the Council:
- "the Council did not feel the Chief Executive had the right skills and competencies to take the Council forward on its improvement journey", and
  - the then Chief Executive's representative maintained "that the Chief Executive had been the victim of bullying by a number of senior elected members and was prepared to pursue a grievance in this context". The LGA Officer told my auditors that it was therefore deemed that the departure of the Chief Executive was "in the interests of the efficiency of the service".
- 56 The LGA Officer also told my auditors that, whilst the negotiations were aimed at agreeing mutually acceptable terms for the then Chief Executive's departure, "an important outcome for the Council was to agree a settlement agreement whereby the Chief Executive waived his right to bring any future claims against the Council arising from his employment".
- 57 The former Chief Executive has told my auditors that the payment of £95,000 was to settle an employment claim he could have brought against the Council. As set out in **paragraphs 27 to 35**, I am unable to determine whether the former Chief Executive had grounds to bring a claim against the Council. However, I am satisfied that the Council had not considered whether there was evidence available to support a potential employment claim in respect of the then Chief Executive or to determine that £95,000 was appropriate compensation for any such claim. It therefore appears unlikely to me that the payment made to the then Chief Executive related to a potential employment claim. I also note that:
- the meeting of 12 August 2020 was held in response to a recommendation in the external review of the Council's senior management restructure (**Exhibit 1**). The recommendation related to the restructuring process and made no reference to a potential employment claim.
  - as set out in **paragraph 54**, the LGA officer conducting the negotiations on behalf of the Council maintains that the Leader did not instruct him to discuss or negotiate the settlement of potential employment claims with the former Chief Executive's representative, and in his meeting with the Chief Executive's representative, no such claims were presented or discussed.
  - the payment of £95,000 was not connected to the value of a potential claim but was based on the proposed legislative cap on public sector exit payments.

58 On 12 August 2020, after his meeting with the Chief Executive's representative, the LGA Officer emailed the Council Leader setting out that he had "put the offer to [the Chief Executive's Trade Union representative] as the best that can be achieved". Later the same day, the WLGA Officer who had conducted the senior management structure review wrote to the Council's Head of Human Resources with a number of minor queries relating to the then Chief Executive's terms and conditions of employment that needed to be clarified to finalise the offer. In addition, the email asked the Head of Human Resources:

- "to let me have documentary details of the Council's policy which authorises [the Council Leader] to approve the proposed £95,000 compensatory payment to the Chief Executive; [the Leader] understandably requires assurance that he is permitted to authorise this planned payment.
- further to the foregoing request, and also in a wider sense, please will you seek legal advice about what formal report - if any - will need to be submitted to Members in relation to the compensatory payment, or any other matter relating to the Chief Executive's potential departure from the Council.
- please will you speak to the relevant Legal Officer to start drafting a Settlement Agreement asap, based on the information currently available. A Reference and a Press Release will need to be agreed between the parties, so this needs to be referenced in the Settlement Agreement please."

59 The Head of Human Resources has told my auditors that he also received a telephone call from the Leader on 12 August 2020 asking him to instruct legal advisors to prepare a settlement agreement, (and he instructed legal advisors that afternoon). The Head of Human Resources maintains that in the telephone conversation:

- he asked the Leader whether he wished the Settlement Agreement to be drafted within the Council or externally, and that the Leader confirmed that he wanted external legal advisors to prepare it.
- the Leader told him that "relations were broken and that we need to do something about it".
- he asked the Leader how the £95,000 payment had been arrived at, and the Leader told him "that it was equivalent to the proposed £95k public sector cap and it would not be a requirement for him to put the proposal before full Council as he was not prepared to do that".

60 The Leader disputes the account of the Head of Human Resources. He maintains that neither he nor his Cabinet colleagues considered that relationships had broken down, and they were prepared to work through any issues that the then Chief Executive had, but that it had become clear to him that the Chief Executive no longer wished to remain in the Council's employment.

61 The Head of Human Resources also maintains that in the telephone conversation of 12 August 2020 the Leader told him that "it would not be a requirement for him to put the proposal before full Council." As set out in **paragraph 58**, on 12 August



2020, the WLGA Officer emailed the Council's Head of Human Resources seeking confirmation on whether the Leader had the requisite authority to authorise a payment of £95,000 to its then Chief Executive. The WLGA Officer made this request for advice because the Leader "understandably requires assurance that he is permitted to authorise this planned payment." The Head of Human Resources forwarded the request to the Monitoring Officer the same day. The Monitoring Officer did not send her advice on this matter to the Head of Human Resources until 23:02 on 12 August 2020 . It therefore appears unlikely that the Leader would have informed the Head of Human Resources earlier that day that the proposal would not need to be put before the full Council, given that the Monitoring Officer's advice on how the payment should be approved was pending.

- 62 The Head of Human Resources provided my auditors with what he maintains were contemporaneous notes he took of the telephone conversation which support his account of the telephone conversation of 12 August 2020. I have reason to doubt that these notes were in fact contemporaneous.
- 63 The same afternoon, 12 August 2020, the Council's Head of Human Resources orally instructed external legal advisors to draft a settlement agreement. I refer to these instructions in **paragraphs 81 to 91**.
- 64 At 15:32 on 12 August 2020, the Head of Human Resources emailed the Council's then Monitoring Officer asking for advice on the first two bullet points in **paragraph 58**. The Monitoring Officer replied to the Head of Human Resources the same day providing caveated advice that the Leader was able to authorise a payment of £95,000 and, if making that decision, the Leader would need to record it as an Individual Cabinet Member decision using an Individual Cabinet Member Decision Report (ICM Report). The advice provided by the former Monitoring Officer is considered in **paragraphs 142 to 162**.
- 65 On 13 August 2020, the WLGA Officer emailed the Leader, copying in the then Chief Executive and the Head of Human Resources, setting out the offer that had been discussed by the LGA Officer with the Chief Executive's Trade Union representative the previous day. The details of this offer are set out in **Exhibit 2**.

#### **Exhibit 2: summary of offer put to the former Chief Executive by LGA Officer**

- "The Council's Monitoring officer has confirmed in writing that you have the authority - as Council Leader - to agree a £95,000 compensatory payment
- There will need to be a standard ICM (Individual Cabinet Member) report, which the Head of HR will prepare on your behalf
- The Chief Executive has indicated that he will submit his (provisional) notice to you imminently, subject to a Settlement Agreement subsequently being agreed and signed
- [A firm of] solicitors have been commissioned to independently prepare a Settlement Agreement; this will be available early next week

- The Chief Executive's annual leave entitlement for the 2020 calendar year is 32 days; carry forward from last year is 5 days
- The last day of employment for the Chief Executive will be 3 months from the date that notice is submitted, ie around end November 2020; the Chief Executive will remain in work until a date to be agreed (around end September), with outstanding leave to be taken during the remainder of the notice period
- All of these details will be incorporated into the planned Settlement Agreement."

Exhibit source: Email dated 13 August 2020 from the WLGA Officer to the Council Leader

- 66 **Exhibit 2** sets out that the former Chief Executive was agreeable to giving provisional notice of his resignation, subject to the terms of the offer being set out in an agreed and signed Settlement Agreement. I note that the Chief Executive's resignation was conditional, ie he would only resign if the negotiated offer, which included a payment to him of £95,000, was included in a legally binding agreement. The email also indicates that both the Leader and the then Chief Executive were informed of the Monitoring Officer's advice that the Leader had authority to agree the payment to the then Chief Executive, and the Leader's decision would have to be recorded in an ICM Report. The email does not set out caveats included by the then Monitoring Officer in her emailed advice of 12 August 2020 (**paragraph 145**).
- 67 Later that day, 13 August 2020, the Council Leader met with the then Chief Executive to clarify a small number of points of detail about the proposed agreement. Following this meeting the Chief Executive sent a note of the meeting setting out what had been agreed to the Leader, the Head of Human Resources and the WLGA Officer who had conducted the senior management restructuring review. The Leader responded confirming his agreement to the content. The email confirmed that an agreement had been reached subject to a Settlement Agreement being signed.
- 68 I have concerns regarding the process that resulted in the Leader and the then Chief Executive reaching an agreement in principle that the Chief Executive would leave his Council's employment with a termination payment.
- 69 I accept that the Leader was entitled to act on the recommendation that a without prejudice discussion take place with the then Chief Executive over his future with the Council. This recommendation was contained in the senior management restructuring report prepared by WLGA, received by the Leader on 24 June 2020 (see **Exhibit 1**). The Leader told my auditors that he discussed the recommendation with his Cabinet colleagues who agreed to explore whether the then Chief Executive wished to continue in his role, or would prefer to leave his employment with an exit payment.
- 70 I also accept that there were advantages in using an independent third-party organisation such as the LGA to support the Council in these discussions due to

the sensitivity of the discussion, and because the outcome of the discussions had potential implications for the forthcoming senior management restructuring.

- 71 However, in my view, the Council Leader made an error of judgement when he decided not to involve Council officers with relevant professional expertise in the negotiations that took place. Whilst I have no reason to question the expertise of the LGA officer who conducted the negotiations, he could not advise on the Council's internal decision-making processes, nor was he responsible for ensuring the Council had properly documented the following:
- the circumstances that had led to the negotiations with the then Chief Executive;
  - the case for allowing the then Chief Executive to leave the Council's employment with a termination payment;
  - what the proposed payment was for and how it had been calculated; and
  - how the proposed payment represented value for public money.
- 72 Providing a documented audit trail of a proposed severance arrangement would, under usual circumstances, have been a function undertaken by Council officers to inform the internal decision-making processes and to ensure that it was clear what considerations had been taken into account in reaching a decision to grant a severance package to a chief officer.
- 73 The absence of Council officers from the negotiations meant that, by the time an agreement in principle had been reached, the documentation necessary to inform the internal decision-making process and the legal instructions to prepare a Settlement Agreement had not been put in place.
- 74 The failure to document these matters was a serious oversight leading to uncertainty regarding:
- the basis of the former Chief Executive's departure and payment. The former Chief Executive maintains that the payment was to settle a potential employment claim. However, the Leader maintains that this was not the purpose of the payment. Internal emails between officers involved in advising on the internal decision-making process indicate that they were still unsighted on the reason for the payment after the Settlement Agreement had been signed.
  - the appropriate internal decision-making process. The nature of the payment should have determined the approval process that the Council followed. The Council has separate processes for settling potential employment claims and deciding on severance packages in respect of chief officers. In the event, the Council did not follow either process properly.
- 75 I consider that Council officers should have been involved in the negotiations from the outset to ensure that there was a full understanding of the basis on which the former Chief Executive was leaving his employment, the reason why he was to receive a termination payment, and how that payment had been calculated. These matters should have been properly documented. The failure to document the

matters set out in **paragraph 74** could have been remedied after an agreement in principle had been reached, because the formal internal decision-making process had not commenced at that stage and the Council was not committed to making a termination payment to its then Chief Executive. However, it was not remedied.

- 76 As set out in **paragraph 58**, the WLGA officer wrote to the Council's Head of Human Resources seeking advice on the internal decision-making process that would need to be followed, and requested that a Settlement Agreement be drafted. The signed Settlement Agreement would form a legal contract between the Council and its then Chief Executive. The Council's Head of Human Resources instructed external legal advisors to draft a Settlement Agreement and asked the Council's then Monitoring Officer to advise on the internal decision-making process.
- 77 I consider that, before acting on these requests, the Head of Human Resources and the then Monitoring Officer should have sought further information to establish the basis on which the Chief Executive was to leave his Council's employment, the reason for the payment, and the business case to support the proposal. This information was essential to enable an informed decision to be reached on whether the proposal should be approved.
- 78 In my view, neither the former Monitoring Officer nor the Head of Human Resources made sufficient effort to clarify these matters. If they had, it would have become apparent that these matters had not been documented. I am also unclear how, in the absence of this information, the former Monitoring Officer was able to ensure that her advice on the appropriate decision-making process was accurate, and the Head of Human Resources was able to give accurate instructions to the legal advisors tasked with drafting the Settlement Agreement.
- 79 I note that on 12 August 2020 the Council's external legal advisors advised the Head of Human Resources of the need to document the reason for the termination and the basis on which the termination payment had been calculated (see **paragraphs 118 to 137**). This advice was not acted on.
- 80 The Council's Head of Human Resources told my auditors that he considered that it was not the role of Council officers, but rather the LGA and WLGA officers to document "all the necessary information and to be clear on the rationale for reaching a settlement of £95k". I disagree with the Head of Human Resources. The Council has appointed officers who have responsibility for ensuring that the requirements of the Council's internal decision-making processes have been followed, and that there is sufficient documentary evidence available to enable the Council to reach informed decisions.

## The Council's Head of Human Resources instructed external legal advisors to draft a Settlement Agreement in respect of the Chief Executive's negotiated departure with a termination payment, but the instructions were not based on established facts

- 81 As set out in **paragraph 58**, on 12 August 2020, the Council's Head of Human Resources received a request via the WLGA Officer that a legally binding Settlement Agreement be drafted to formalise the negotiated agreement that the then Chief Executive would leave the Council's employment with a termination payment of £95,000.
- 82 Later the same day the Head of Human Resources orally instructed external legal advisors to draw up a Settlement Agreement. That afternoon, the Council's external legal advisors emailed the Head of Human Resources setting out the instructions they had received from him: "[the Chief Executive] is considering leaving and taking his pension, albeit on a slightly reduced basis. This is as a consequence of discussions ongoing for some time, given difficulties he has been facing from some members of the Council, including Cabinet members. Indeed, you explained that in some cases, the treatment that [the then Chief Executive] has suffered could be considered as bullying".
- 83 It appears from this email that the Head of Human Resources orally instructed the Council's external legal advisors that the reason the Chief Executive was leaving his employment was because of an employment dispute and that he may have been subjected to bullying behaviour. A further email to the Head of Human Resources from the Council's external legal advisors on 19 August 2020 records that the Head of Human Resources had told them that the termination payment was "a genuine compensation payment given that [the then Chief Executive] could, for example, bring constructive dismissal proceedings in light of discussions which have taken place".
- 84 The Council's external legal advisors told my auditors that they drafted the Settlement Agreement based on the oral instructions provided by the Head of Human Resources and understood from those instructions that the purpose of the Settlement Agreement was to settle an employment dispute. They told my auditors that the Head of Human Resources did not instruct them to advise on whether the then Chief Executive had a potential claim, nor were they provided with any evidence that he had grounds to bring a claim against the Council.
- 85 I acknowledge that the purpose of a settlement agreement is to settle all claims, potential or actual, that an employee could bring against his/her employer, and therefore the then Chief Executive was waiving his right to bring future claims against the Council. However, the Council's Head of Human Resources appears to

have orally instructed the Council's external legal advisors that the purpose of the Settlement Agreement was to settle a specific employment dispute on the basis of which the then Chief Executive could "bring constructive dismissal proceedings in light of discussions which have taken place" (see **paragraph 83**).

- 86 The Council's Head of Human Resources told my auditors that the oral instructions he gave to the Council's legal advisors in respect of the Settlement Agreement were given to him by the Leader in a telephone conversation on 12 August 2020 (**paragraphs 59 to 62**). The Head of Human Resources provided my auditors with what he has stated are his contemporaneous notes of the telephone conversation. These notes record that the Leader told the Head of Human Resources that: "relations broken- so bad, can't continue like this, have got to do something." However, they do not record that the Leader told the Head of Human Resources that the proposed payment was to settle a potential claim that the then Chief Executive might bring against the Council.
- 87 The Leader and the LGA Officer who conducted the negotiations on behalf of the Council told my auditors that the purpose of the negotiations was to determine whether a mutually agreeable voluntary severance arrangement could be reached, and this followed from a recommendation made in the WLGA's report on the senior management structure (**paragraphs 50 to 56**).
- 88 The LGA Officer also told my auditors that he was aware that the former Chief Executive's representative considered that he had been bullied. It was therefore an important outcome for the Council that in agreeing the then Chief Executive's departure with a termination payment, he would need to waive his right to bring claims against the Council by signing a settlement agreement. However, the LGA Officer maintains that during the negotiations no potential employment claims were discussed, and the payment was not intended to be in settlement of a specific potential claim.
- 89 In my view, even if the then Chief Executive had grounds to bring an employment claim against the Council, the Council did not have sufficient information to settle a claim, given it had not seen the supporting evidence and had not evaluated the financial value of such a claim or the likelihood of it succeeding. If the payment was to settle a specific employment claim, then the Council's own HR procedures were not adhered to, which required potential claims to be properly evaluated before any settlement could be reached.
- 90 My auditors asked the Council's Head of Human Resources why he orally instructed the Council's external legal advisors that the then Chief Executive could potentially bring a constructive dismissal claim against the Council. He told my auditors that he assumed that the payment was for settling a claim but acknowledged that he had seen no evidence to support his assumption.
- 91 In my view, the Head of Human Resources should have put his legal instructions in writing to ensure that there was absolute clarity regarding the basis on which the Chief Executive was leaving his employment, the reason for the payment, and how it had been calculated. If he had done so, it would have enabled those carrying out

the negotiations on behalf of the Council to confirm that the instructions were factually accurate in advance of them being sent to the Council's external legal advisors. The Head of Human Resources did not put his instructions in writing, and I consider that the oral instructions given by the Head of Human Resources to the Council's external legal advisors were not based on established facts.

## Failure to clarify and document the reason for the Chief Executive leaving his employment, and why he was to receive a termination payment exposed the Council to a potential tax liability

### **The Council's external legal advisors prepared a draft Settlement Agreement, which gave a reason why the Chief Executive was leaving his employment, but due to disagreement this reason was removed from the agreement resulting in the Council having no documented reason for the Chief Executive's departure**

- 92 On 12 August 2020, the Council's external legal advisors wrote to the Council's Head of Human Resources. They set out that the Head of Human Resources had spoken to them earlier that day and requested that they draft a settlement agreement relating to the then Chief Executive's potential departure later that year. The email sets out that the Head of Human Resources had explained in their discussion that the Chief Executive "was considering leaving and taking his pension, albeit on a slightly reduced basis. This is as a consequence of discussions ongoing for some time, given difficulties he has been facing from some members of the Council, including Cabinet members. Indeed, you explained that in some cases, the treatment that [the Chief Executive] has suffered could be considered as bullying." The email from the external legal advisors suggests that the Head of Human Resources instructions had not been entirely clear, in that whilst the Head of Human Resources had indicated that the Chief Executive's departure was connected to an employment dispute, he had also set out that the Chief Executive was considering taking early retirement.
- 93 In their email of 12 August 2020, The Council's legal advisors advised the Head of Human Resources of the importance of obtaining clarity regarding the basis of the Chief Executive's departure. They explained that this was important because the reason for the departure of the Chief Executive was directly relevant to the question of whether the first £30,000 of the proposed termination payment could be paid to the Chief Executive tax-free. The email set out that if the Chief Executive was "considering retirement ... there is a risk that any sum paid to him on termination is potentially taxable under sections 393 and 394 of [the Income Tax

(Earnings and Pensions) Act 2003] and, therefore, would not benefit from the £30,000 exemption which is often available on termination", but if the Chief Executive was "leaving in circumstances which could amount to constructive dismissal, then even if he could be said to retire or takes his pension immediately after leaving, there would be a strong argument that any severance payment is made by reason of the potential constructive dismissal and would therefore be exempt from taxation under section 394 [the Income Tax (Earnings and Pensions) Act 2003] thus qualifying for taxation under section 401 (exempt from tax in respect of the first £30,000)."

- 94 The Council's external legal advisors also advised that in order to ensure that the Council secured the correct taxation treatment of the payment, it was "important to be clear about why a particular payment is made, for example, by demonstrating that the payment reflects the likely compensation in the event of successful employment claims." They advised the Head of Human Resources of the need "to have a clear rationale of the reason for termination, and an explanation of how the payment had been calculated, and that rationale must be documented. You can expect HMRC to request copies of all relevant documentation (including correspondence with the employee), so it is important to ensure that all documentation correctly describes the situation, rather than 'early retirement', if this is correct [my emphasis]."
- 95 The Council's external legal advisors told my auditors that the Head of Human Resources orally instructed that the reason why the then Chief Executive was leaving with a payment of £95,000 was in settlement of a potential constructive dismissal claim. In an email of 19 August 2020 to the Head of Human Resources, the Council's external legal advisors stated, "you explained that your view was that this was a genuine compensation payment given that [the then Chief Executive] could, for example, bring constructive dismissal proceedings in light of discussions which have taken place."
- 96 I am unclear how the Head of Human Resources came to the view that the payment to the then Chief Executive was to settle a potential employment dispute /constructive dismissal claim given that he told my auditors that he had not seen evidence to support a potential claim. He therefore had no direct knowledge:
- of whether the former Chief Executive had legitimate grounds to bring a claim.
  - what potential financial liability the Council would face if the former Chief Executive had legitimate grounds to bring a claim, and a claim was brought. In fact, the proposed payment of £95,000 was not related in any way to the value of a potential claim the Chief Executive could have brought against the Council. As set out in **paragraph 52**, the amount was set by the Council Leader at the level of the proposed legislative cap on public sector exit payments of £95,000. It was not related to the value of any potential claim. The Head of Human Resources told my auditors that the Leader informed him in a telephone conversation on 12 August 2020 that the payment had



been set at the level of the proposed legislative cap. The Head of Human Resources was therefore aware that the amount of the payment was not connected to the likely compensation in the event of successful employment claims (see **paragraph 94**).

- 97 On 18 August 2020, the Council's external legal advisors sent a first draft of the Settlement Agreement to the Head of Human Resources for his consideration.
- 98 **Exhibit 3** provides an extract from the draft Settlement Agreement setting out the basis on which the proposed termination payment was to be paid.

**Exhibit 3: extract from draft Settlement Agreement sent to the Head of Human Resources on 18 August 2020**

- 3.1 A dispute has arisen between the parties in light of concerns raised by you regarding your working relationship with members of the Employer's Cabinet, to the effect that some of these relationships have broken down. The parties recognise that the need for a strong working relationship between the Employer's Chief Executive and its Leader/Cabinet is integral to and essential for any effectively run council.
- 3.2 On this basis, the parties have entered into this Agreement to record and implement the terms on which they have agreed to settle all outstanding claims which you have or may have against the Employer or its respective officers, members or employees arising out of or in connection with or as a consequence of the issues you have raised referred to above at 3.1, your employment generally and/or its termination and your office as Chief Executive and/or its cessation. The terms set out in this Agreement constitute the entire Agreement between the parties and are without admission of liability on the part of the Employer.

Exhibit source: Council records

- 99 The draft Settlement Agreement referred to the £95,000 payment to be paid to the then Chief Executive as a 'termination payment' which would be paid on an 'ex gratia basis'.
- 100 The draft Settlement Agreement also set out that the payment of £95,000 was "to settle all outstanding claims which [the Chief Executive had] or may have against the Employer or its respective officers, members or employees arising out of or in connection with or as a consequence of [the dispute]." As the payment was stated to relate to the settlement of claims relating to a specific dispute, the first £30,000 of the payment was deemed eligible to be paid tax-free under the provisions of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003). However. It included a clause whereby the Chief Executive was to provide an indemnity against any future tax liability arising from the Settlement Agreement, ie if HMRC should deem

that the first £30,000 of the payment should not have been paid free of tax, the Chief Executive would meet any resultant tax liability.

- 101 On receipt of the draft document, the Head of Human Resources responded to the Council's legal advisors stating, "I think we need to use the term 'compensation payment' rather than termination payment in the [Settlement Agreement]". The Council's external legal advisors responded, "we can refer to compensation payment rather than termination payment so I'll change that. They effectively amount to the same in law." In the event the description of the payment was not amended.
- 102 Later the same day, 18 August 2020, the Head of Human Resources sent the draft Settlement Agreement to the Council Leader and the then Chief Executive asking them to confirm that they were happy with the contents. The Leader then sent the draft document on to the WLGA Officer who had carried out the senior management restructuring review, asking him to forward it to the LGA Officer who had negotiated the departure of the then Chief Executive with a termination payment. The Leader stated in his email that he was unhappy with paragraph 3.1 of the Settlement Agreement (see **Exhibit 3**) and asked the LGA and WLGA officers for their opinions on the draft text.
- 103 The Council Leader told my auditors that the draft wording did not correctly set out the basis on which the Chief Executive was leaving his employment and the reason for him receiving a termination payment. He considered that the purpose of the negotiations was not the settlement of an employment dispute, but about reaching a mutually acceptable voluntary exit arrangement "in the interests of the efficiency of the service". Furthermore, the agreement that the then Chief Executive would leave with a termination payment was reached in response to a specific recommendation set out in the senior management restructuring report produced by the WLGA (see **Exhibit 1**). He therefore did not consider the wording in paragraphs 3.1 and 3.2 of the draft Settlement Agreement to be an accurate statement of the basis on which the then Chief Executive was to receive a termination payment.
- 104 The LGA Officer responded to the Leader's email stating: "I have read clause 3.1 and am a bit puzzled as to its inclusion. It's not a standard clause so I presume has been drafted by your lawyers specifically to cover this agreement. I don't think it needs to be in the agreement so would ask for a very clear explanation for its inclusion. Usually we just refer to a termination/early retirement by mutual agreement in the interests of efficiency of the service. We don't normally go into the circumstances that have brought the parties to this point ... Ultimately it is down to your lawyers to advise but I think you are right to ask the question and challenge the wording/inclusion of these two paragraphs". Later the same day, the WLGA Officer wrote to the LGA Officer stating "If the wording is removed altogether, it will place at risk the £30k tax relief for [the then Chief Executive]. If that happens, I understand that [the Chief Executive] will not sign the Agreement. So, [the Council's external legal advisor] has been requested to revise the wording to try to

meet the needs of both parties. I'll get back in touch as soon as I have further news so that this matter can be resolved today."

- 105 Late in the evening of 18 August 2020, the Council's then Head of Legal and Democratic Services wrote to the Head of Human Resource stating, "I understand that the Leader is anxious that the reasons behind the [then Chief Executive] taking early retirement are not publicised whether through debate or any other means, and that the [Chief Executive] wishes to benefit from a degree of confidentiality in regards to the terms of the [Settlement Agreement]". This email which refers to the Chief Executive taking early retirement indicates the continuing confusion and uncertainty regarding the basis on which the Chief Executive was leaving his employment.
- 106 The Head of Human Resources forwarded the then Head of Legal and Democratic Services' email to the Council's external legal advisors, who responded the following day expressing concern over its content: "this comes back to previous advice given regarding the tax status of the payment. If the arrangement is one of 'early retirement' then the whole of the payment is likely to be taxable - only if the payment is genuinely a payment to compensate for loss of employment for some reason rather than an employee's voluntary departure will this fall within section 401 of [the Income Tax (Earnings and Pensions) Act 2003] (and benefit from the £30k tax exemption). HMRC may well wish to see all documentation relating to the negotiations on this matter so it is important to ensure that your audit trail on this, as well as your position generally is clear".
- 107 On 19 August 2020, the Head of Human Resources wrote to the Council's external legal advisors stating that "since we last spoke, I have received a message ... confirming that the Leader wishes to delete para 3.1 from the agreement and is not prepared to negotiate further on that point." The Council's legal advisors responded to the Head of Human Resources expressing concerns regarding the Leader's decision to remove the text in the Settlement Agreement Settlement that referred to the reason why the Chief Executive was departing and the reason the Council was paying him a termination payment. They were particularly concerned about the impact this could have on the proposed taxable treatment of the payment. The email sets out that:
- the Head of Human Resources had previously told them that his view that the proposed payment to the then Chief Executive "was a genuine compensation payment given that the [the Chief Executive] could, for example, bring constructive dismissal proceedings in light of discussions which have taken place."
  - they had previously advised him that: "it would be sensible to have a clear rationale set out in the settlement agreement documenting the reason for termination, and an explanation of how the payment was calculated, given that HMRC have the ability to request copies of all relevant documentation (including correspondence with the employee). On this basis, it is important

to ensure that all documentation correctly describes the situation, rather than 'early retirement', if this is correct".

- "If the Council wishes to remove this provision, then clearly it is able to do so. However, the risk of HMRC deeming the payment to be taxable as a payment in connection with retirement in my view increases. Having said this, if there are other documents in existence pointing to this being an 'early retirement' package, then this could undermine the content of this clause in any event, and makes it more likely the whole payment will be taxed."
- "As a Council, you will no doubt want to ensure that you are treating all payments made to individuals properly for tax purposes, since HMRC have the right to recover any underpayments of tax from you; even if you have an indemnity included within the agreement (i.e. from the individual concerned) HMRC will still look to you to make the payment, leaving you in a position where you will potentially have to take action to enforce the indemnity against an ex-employee if this is not forthcoming. The cautious approach if you are not satisfied the exemption under s.401 applies would be to tax the whole sum under the agreement on this basis, which I appreciate may result in [the then Chief Executive] not accepting the amount offered."

108 Following receipt of this advice, the Head of Human Resources responded stating, "I've just been informed that the Leader wants 3.1 deleted. Could you amend the report and also change the first bit of the current 3.2 para as you suggested earlier today". On 19 August 2020, the Council's external legal advisors sent the Head of Human Resources an updated version of the Settlement Agreement. The previous paragraphs 3.1 and 3.2 of the Settlement Agreement (see **Exhibit 3**) had been replaced with the text in **Exhibit 4**.

109 On 21 August 2020, the Council's then Head of Legal and Democratic Services wrote to the then Chief Executive and the Head of Human Resources stating, "If not in the [Settlement Agreement], somewhere we need a form of wording to ensure that the payment is correctly treated as compensation and not a sum designed to support voluntary departure. As when we last spoke, in my view to effect this you will need to have a 'clear rationale for the reason for termination, and an explanation of how the payment was calculated'. The only other way is for the Authority to accept that it will not seek to take any action against [the then Chief Executive] if HMRC challenge the payment and accept that the Authority pays any and all tax liability on the £95k. This however does not deal with the 'reasons' for termination and looking forward it is difficult to understand what message the Leader intends to rely on to advise Members and the public why [the Chief Executive] has left his post."

110 The then Head of Legal and Democratic Services' reference in her email of 21 August 2020 of the need for a 'clear rationale for the reason for termination, and an explanation of how the payment was calculated' was a quotation taken from external legal advice provided to the Head of Human Resources on 12 August 2020 (see **paragraph 94**). Although the then Head of Legal and Democratic

Services acknowledged the importance of this advice, no action was taken to address it.

- 111 On 27 August 2020, the Leader and the then Chief Executive signed a final version of the Settlement Agreement which had been amended to delete the original paragraph 3.1 and the first part of paragraph 3.2 which had referred to an employment dispute and the settlement of all outstanding claims the then Chief Executive had or may have had in respect of this dispute. The amended Settlement Agreement was therefore silent on the reason for the Chief Executive's departure and the reason why he was to receive a payment of £95,000. The amended wording is set out in **Exhibit 4**.

#### **Exhibit 4: extract from final Settlement Agreement**

- 3.1 "The parties have entered into this Agreement to record and implement the terms on which they have agreed to settle all outstanding claims which you have or may have against the Employer or its respective officers, members or employees arising out of or in connection with your employment generally and/or its termination and your office as Chief Executive and/or its cessation. The terms set out in this Agreement constitute the entire Agreement between the parties and are without admission of liability on the part of the Employer".

Exhibit source: Council records

- 112 Even after the Settlement Agreement was signed there remained a lack of clarity regarding the basis of the Chief Executive's departure and the reason he was to receive a termination payment of £95,000. On 3 September 2020, the Council's then Head of Legal and Democratic Services in response to an email from the Council Leader seeking support on the wording of a draft press release stated "I was not involved in negotiations on the Settlement Agreement, nor on the press release, and perhaps those who assisted can advise further? You will need further support to find wording around why [the Chief Executive] has exited and the reason for the £95k. It appears that Members may well request that this is scrutinised through Corporate [Overview and Scrutiny Committee]."
- 113 I consider it concerning that the Council reached the position of entering into a legal agreement whereby its Chief Executive would leave his employment with a termination payment without having any agreed rationale setting out the reason for his departure, why it was making a payment of £95,000 to him, and why the first £30,000 of the payment could be made tax free.
- 114 As set out above, the Council's external legal advisors advised on more than one occasion of the need to have a 'clear rationale for the reason for termination, and an explanation of how the payment was calculated' and that this rationale and explanation should be put in writing. This was important in order to support the proposed tax treatment of the payment, but more importantly being able to clearly

evidence the basis on which decisions have been taken is a fundamental component of good governance. The decision of the Leader to ask for the draft Settlement Agreement to be amended to remove text which referred to an employment dispute which he maintains was factually inaccurate was not in my view unreasonable. However, at that point steps should have been taken to confirm and document the basis on which the Chief Executive was leaving his employment and the reason for the payment either within the Settlement Agreement or elsewhere. In my view, the Settlement Agreement should not have been signed until that written rationale had been agreed.

- 115 My auditors asked the Council's Head of Human Resources why he did not act on the external legal advice he received. He told my auditors that he did not consider that it was his responsibility to act on these matters and that he viewed his role in respect of the then Chief Executive's departure with a termination payment was to "facilitate the final wording of the agreement itself" and to act as the 'go between' for both parties in that respect. That is where my role ended."
- 116 In my view, when the Council receives external legal advice it should be able to demonstrate how it has addressed that advice. If it decides not to follow that advice it should be able to demonstrate that it had good reason for disregarding the advice. In this instance, the advice to document the basis of the Chief Executive's departure and the reason for making a termination payment to him was not contentious. The Council was being advised to comply with a governance principle applicable to every public body, ie to document the basis on which decisions have been made. I can see no good reason why the Council chose to disregard this advice.
- 117 The failure to follow the legal advice set out above has resulted in the Council being unable to demonstrate that the Chief Executive was entitled to receive the first £30,000 of the termination payment tax-free as set out in **paragraphs 118 to 141**.

### **The failure of the Council to have a clear written rationale of the basis on which the Chief Executive's was departed and the reason for him receiving a termination payment has exposed the Council to a potential tax liability**

- 118 The Council paid the first £30,000 of the £95,000 termination payment made to its then Chief Executive tax-free.
- 119 When organisations make payments to employees on the termination of their employment, it is important to ensure that the tax treatment of the payment conforms to relevant tax regulations, in this instance the Income Tax (Earnings and Pensions) Act 2003, (ITEPA 2003). In specific circumstances, ITEPA 2003 allows employers to pay the first £30,000 of a termination payment tax-free. Whether a

tax-free payment can be made is dependent on the nature of the termination and the reason for the payment. It is therefore crucial that before making tax-free payments, employers consider on a case-by-case basis whether ITEPA 2003 allows such a payment. They should also document their considerations because if a tax-free payment is made, HMRC may wish to examine the organisation's documented rationale to support the tax treatment.

- 120 It was therefore essential that in order to determine whether the proposed termination payment to its Chief Executive could be paid tax-free under ITEPA 2003 that the Council determined:
- the reason why the then Chief Executive was leaving the Council's employment;
  - what the payment was being made for;
  - how the payment had been calculated; and
  - having considered those matters documented them.
- 121 As set out in **paragraphs 92 to 117**, the Council's external legal advisors advised on more than one occasion of the need for clarity on these matters.
- 122 Paragraph 3.1 of the draft Settlement Agreement drawn up by the Council's external legal advisors on the oral instructions of the Head of Human Resources provided an explanation of why the Chief Executive was leaving his employment, ie due to a "dispute [that had] arisen between the parties in light of concerns raised by you [the Chief Executive] regarding your working relationship with members of the Employer's Cabinet, to the effect that some of these relationships have broken down." Paragraph 3.2 of the Settlement Agreement set out that the payment was to settle all outstanding claims which [the Chief Executive had] or may have against the Employer or its respective officers, members or employees arising out of or in connection with or as a consequence of [the dispute]."
- 123 However, as set out in **paragraphs 107 to 108**, the Council Leader insisted that the draft Settlement Agreement be amended because he did not agree that paragraphs 3.1 and 3.2 of the Settlement Agreement were factually accurate.
- 124 On 19 August 2020, the Council's external legal advisors, having been informed that the Leader wished to delete the stated reason for the Chief Executive's departure and payment wrote to the Council's Head of Human Resources stating: "if the Council wishes to remove this provision, then clearly it is able to do so. However, the risk of HMRC deeming the payment to be taxable as a payment in connection with retirement in my view increases. Having said this, if there are other documents in existence pointing to a this being an 'early retirement' package, then this could undermine the content of this clause in any event, and makes it more likely the whole payment will be taxed. As a Council, you will no doubt want to ensure that you are treating all payments made to individuals properly for tax purposes ... The cautious approach if you are not satisfied the exemption under s.401 applies would be to tax the whole sum under the agreement on this basis."

- 125 In the light of this advice, and the Leader's insistence that paragraph 3.1 should not be included in the Settlement Agreement, I would have expected Council officers to have sought confirmation from the Council Leader and the LGA Officer who had conducted the negotiations regarding the basis of the Chief Executive's departure, what the termination payment was for, and how it had been calculated. This information was fundamental in determining whether the first £30,000 of the payment was eligible to be treated as tax exempt tax under ITEPA 2003. My auditors have seen no evidence that Council officers requested this information, and the Council holds no documentation which sets out the Council's position on why the Chief Executive departed his employment and the reason he received a termination payment.
- 126 On 19 August 2020, the WLGA Officer wrote to the Leader and the LGA Officer stating that "if the wording [paragraph 3.1 of the draft Settlement Agreement] is removed altogether, it will place at risk the £30k tax relief for [the Chief Executive]. If that happens, I understand that [the Chief Executive] will not sign the Agreement".
- 127 On 19 August 2020, the Head of Human Resources forwarded the email correspondence set out above related to the wording of the Settlement Agreement and the tax treatment for the proposed payment to the Council's then Chief Executive. This correspondence included the confidential external legal advice the Council had received and the Leader's decision to remove paragraph 3.1 of the Settlement Agreement which referred to an employment dispute.
- 128 The Chief Executive responded to the Head of Human Resources thanking him for sharing the information. The Chief Executive set out that:
- he was not taking early retirement.
  - he was contemplating leaving his employment "solely as a consequence of deteriorating relations arising from inappropriate Member behaviours which have not been addressed".
  - if paragraph 3.1 of the of the Settlement Agreement was removed (the paragraph setting out the proposed basis on which the Chief Executive was departing his employment), he "could not contemplate anything that presents a risk to me in terms of the tax free element of the £95k payment. The agreement will therefore need to be abundantly clear to anyone including the HMRC that the payment is a compensatory payment (for the reasons captured in clause 3.1 currently)."
  - "I have no interest in indemnifying the Authority against this risk, rather the agreement is required to remove the risk to me and provide evidence in the event of an HMRC challenge."
- 129 On 20 August 2020, the Council's external legal advisor advised that, in view of the disagreement between the Leader and then Chief Executive regarding the wording of the Settlement Agreement, there were three potential options:
- clause 3.1 remained as currently drafted.



- a revised Clause 3.1 is included – for example: "The parties have encountered difficulties in their working relationship, to the effect that some of these relationships have been significantly damaged. The parties recognise the need for a strong working relationship between the Employer's Chief Executive and its Cabinet is integral to and essential for any effectively run Council, and on that basis have agreed to enter into this agreement."
- clause 3.1 is removed – in recognition of the risk posed, clause 10.3 is also removed so that [the Chief Executive] does not give the Council an indemnity (see **paragraph 100**).

- 130 The Head of Human Resources forwarded the external legal advice of 20 August 2020 to the then Chief Executive, copying the email to the Council's then Head of Legal and Democratic Services, suggesting that the third option might be a way forward and asking, "What are your thoughts on that as an option?". The Chief Executive responded stating that the first option was his preferred option, the second option was acceptable but with amendment to the suggested wording, and that the third option would be acceptable to him subject to his own legal advice and to him receiving confirmation that, "the Council is satisfied that the £95k is a compensation payment, the first £30k of which will therefore be paid tax free."
- 131 Later the same day, 20 August 2020, the then Chief Executive wrote to the Head of Human Resources and the then Head of Legal and Democratic Services suggesting that the Council obtain legal advice on whether it was possible to change the description of the payment from an "ex gratia payment" to "a compensatory payment made for loss of office in the interests of efficiency of the service". The Head of Human Resources forwarded the Chief Executive's email to the Council's external legal advisors to enquire whether this change in wording was possible. It appears to me that this change of wording was proposed due to a misapprehension that, if the payment was referred to as a "compensation payment" within the Settlement Agreement, the first £30,000 could automatically be paid tax free.
- 132 The Council's external legal advisor responded: "I have double checked the position with our internal tax specialist lawyers this afternoon in order to ensure my understanding of the tax treatment is correct - they have confirmed that my advice is accurate. [The Chief Executive] appears to be unaware of the retirement tax provisions which also apply. We can call the payment whatever you want under the agreement (ex gratia/compensation etc), but the retirement tax issue remains given that [the Chief Executive] has indicated that he is retiring, albeit earlier than he had planned. He is not correct in stating that the £30k is 'definitely free of tax and NI' in these circumstances<sup>12</sup>. This is the whole reason why we included this wording in the first place, so that we could 'head off' the issue in the event that HMRC asked

<sup>12</sup> the statement that £30k of the payment is 'definitely free of tax and NI' if the payment was for "loss of office in the interests of efficiency of the service" was in fact made by the LGA officer and not the former Chief Executive.

to see copies of all your Settlement Agreements if undertaking a PAYE audit. The ability to make efficiency payments/redundancy under the LGPS do not override general taxation rules in respect of termination payments. Your auditors should be able to confirm this is you feel you need another view".

- 133 The Council did not consult my auditors on the proposed tax treatment of the payment. I also note that the Head of Human Resources did not share the legal advice with the Council's Director of Resources and Section 151 Officer (s151 Officer) to enable him to reach an informed view on whether the first £30,000 of the payment was eligible to be paid to the then Chief Executive under ITEPA 2003.
- 134 The Chief Executive responded to the then Head of Legal and Democratic Services' email, copying in the Head of Human Resources, stating: "removal of the indemnity clause would comfort me in terms of the cost of any challenge from the HMRC then being met by [the Council]. Having reflected a little more on [the Council's external legal advisor's] earlier email, I'm at a loss as to why [they are] focussing on my alleged intention to retire - where has this come from, [they haven't] spoken with me and as we know from yesterday, [are] prevented from doing so. My position is that I will potentially leave my employment with [the Council] because of an irrevocable breakdown in relations with some Members which are not conducive to effective and efficient management of the Council. I will be compensated for that and I will access my pension out of necessity. Does this constitute retirement? I would argue not".
- 135 The then Head of Legal and Democratic Services responded to the email stating, "I agree ... Being on the side-lines I am not sure where the mixed messages are coming from, but I would hazard a guess that if there is confusion as to who is advising who messages will also get confused".
- 136 The Council's external legal advisor was instructed to delete the paragraph in the Settlement Agreement in which the then Chief Executive had provided the Council with an indemnity against any future tax liability arising from his departure and payment. I am not clear who made the decision to instruct the Council's legal advisors to delete the indemnity clause.
- 137 The decision to remove paragraph 3.1 and the first half of paragraph 3.2 from the Settlement Agreement, in conjunction with the failure to document the basis of the Chief Executive's departure or the reason for the payment outside the Settlement Agreement, put at risk the eligibility of the first £30,000 of the payment to be paid tax-free. However, the inclusion of an indemnity clause in the Settlement Agreement whereby the then Chief Executive indemnified the Council against any future tax liability arising from his departure provided some protection in the event that HMRC deemed the whole sum to be taxable. The decision to delete the indemnity clause from the Settlement Agreement further exposed the Council to the risk of incurring a tax liability.

There was a general lack of clarity regarding who was advising who in the legal negotiations around the Settlement Agreement and this was compounded because the Head of Human Resources shared the Council's external legal advice relating to the departure of the Council's then Chief Executive with him

138 The Council appointed external legal advisors to represent its own interests in negotiations over the terms of the then Chief Executive's departure with a termination payment. As the Council's external legal advisors were advising the Council, they could not advise the then Chief Executive whose interests conflicted with those of the Council. The Council therefore paid for the Chief Executive to have his own independent legal advisor. In my view, all communication regarding the Settlement Agreement terms should have been taken place through the Council's legal advisor and this would have ensured that there was clarity on who was representing who in the negotiations. However, this distinction was blurred because other parties became directly involved in the negotiation process making it unclear who was representing whose interests in the negotiations. This is illustrated by the following:

- whilst the LGA and WLGA officers had been engaged to enter into negotiations in respect of the Chief Executive's departure and to conduct a senior management restructuring exercise respectively, emails show that they were also advising on matters relating to the wording of the draft Settlement Agreement, despite the fact that the Council's external legal advisors were advising on the Settlement Agreement. The advice received was not wholly consistent.
- an email exchange between the Head of Human Resources, the Council's then Head of Legal and Democratic Services and the then Chief Executive regarding the wording of the Settlement Agreement, records that the Head of Human Resources told the then Chief Executive, "we'll wait to see what [your legal advisor] advises and take it from there. Looks as though we can't do any more until then. I'll be on the mobile if we need to speak before next Tues". In my view, Council officers should not have been directly involved in discussions with the Chief Executive regarding the terms of settlement. These were matters which should have been communicated through their respective legal representatives.
- an email from the Head of Human Resources to the Leader dated 20 August 2020, in which the Head of Human Resources refers to the LGA Officer as the Leader's (not the Council's) advisor. In addition, it is evident that the LGA Officer was advising the Leader on possible amendments to the draft

Settlement Agreement and the taxable treatment of the termination payment. These were matters that the Council's external legal advisor was already advising on.

- an email exchange between the then Chief Executive and the Head of Human Resources on 20 August 2020. The Chief Executive set out concerns regarding the wording of the draft Settlement Agreement and, in particular, the decision of the Leader to delete paragraph 3.1 of that Agreement. The Head of Human Resources responded that the Leader's decision was "regrettable" and suggested that the then Chief Executive phone the Council's external legal advisor to discuss "that point further ... and if there is a need to make any further change then it can be done today before the Agreement is signed". The Council's external legal advisor considered it necessary to email the Head of Human Resources reminding him, "since [the Chief Executive] is not my client and indeed is on the other side of the agreement - ethically this would be breaching the solicitors conduct rules. Could you let [the Chief Executive] know please. I am looking at the points below and will be back in touch", to which the Head of Human Resources responded "understood ... I should have realised".

139 I also note that the Head of Human Resources shared the Council's privileged external legal advice with the then Chief Executive, as well as internal emails which included internal legal advice regarding the decision-making process for approving the Chief Executive's termination payment.

140 The Council was, in theory, entitled to waive privilege over its external legal advice in relation to the Settlement Agreement, and it does appear to have waived this privilege by the Head of Human Resources providing copies of the advice to the then Chief Executive. However, it is difficult to see how this could be in the Council's best interests as there was a clear conflict of interest between the Chief Executive and the Council. For example, it was in the Chief Executive's interest to obtain the largest severance payment possible, including negotiating the settlement to ensure that as much as possible was tax free but, on the other hand, the Council had a duty to taxpayers to ensure that the settlement was for an appropriate amount.

141 The Head of Human Resources told my auditors that he was given authority to disclose this information by the Council's external legal advisor, but my auditors have seen no evidence to support this. The legal advice was of a confidential nature, provided for the benefit of the Council. The disclosure of this information had the potential to cause detriment to the Council (by giving the then Chief Executive an advantage in the negotiations, as he had the benefit of knowing what the Council's legal advice was on certain points, whereas the opposite was not true).

The decision to make a termination payment of £95,000 to the Council's former Chief Executive was incorrectly taken as an executive decision and in my view the payment was contrary to law

**The Council's former Monitoring Officer provided caveated advice to the Head of Human Resources that the Council Leader had the necessary legal authority to approve a termination payment of £95,000 to its then Chief Executive, but in my view this advice was incorrect**

- 142 As set out in **paragraphs 50 to 58**, following a meeting held on 12 August 2020 between an LGA Officer and the then Chief Executive's Trade Union representative, an agreement in principle was reached whereby the Chief Executive would leave his employment and would receive a payment of £95,000. The WLGA Officer wrote to the Council's Head of Human Resources the same day and asked him to provide the "documentary details of the Council's policy which authorises [the Council Leader] to approve the proposed £95,000 compensatory payment to the Chief Executive; [the Leader] understandably requires assurance that he is permitted to authorise this planned payment". The Head of Human Resources passed this request to the Council's then Monitoring Officer to advise on the matter.
- 143 The Monitoring Officer responded to the Head of Human Resources the same day setting out the following:
- section 38 of the Localism Act 2011 (the 2011 Act) requires local authorities to publish annual Pay Policy Statements setting out their policies on the remuneration of their chief officers. Remuneration is defined in the 2011 Act as including payments to chief officers on their ceasing to hold office under or to be employed by the authority.
  - the content of an annual Pay Policy Statement must have regard to statutory guidance issued in May 2017 under s40 of the 2011 Act by the Welsh Government's then Minister for Finance, Local Government and Public Services under the title 'Pay Accountability in Local Government in Wales'. This guidance relates to the content and the principles underpinning an annual Pay Policy Statement.
  - Pay Accountability in Local Government in Wales states that: "the Welsh Government recommend Authorities should offer full Council...the opportunity to vote before large severance packages beyond a particular threshold are approved for chief officers leaving the organisation. As with

salaries on appointment, the Welsh Ministers consider £100,000 is the right level for that threshold".

- the Council's Pay Policy Statement, adopted on 27th February 2020, sets out that "The Authority will comply with the Welsh Government's guidance that full Council should be given the opportunity to vote before; "large severance packages (defined as those valued at £100,000 or more) are approved for staff leaving the organisation...."
- "As the proposed compensatory payment of £95,000 is below the WG recommended threshold, the logical conclusion is that WG has interpreted the legislation to mean that payment of a compensatory sum below £100,000 is an executive function by virtue of the default provisions in Section 13(2) of the Local Government Act 2000".
- in accordance with Section 15(2) of the Local Government Act 2000 which deals with the executive arrangements made by the Leader, "as the Leader has not specifically allocated this function [approving severance packages in respect of Chief Officers of under £95,000] ... the executive leader may discharge any of those functions [not allocated]...."

144 The then Monitoring Officer concluded that: "My advice is therefore that any decision to make a £95,000 compensatory payment to the Chief Executive is one which the Leader may himself make" and that the Leader's decision, as taken by an individual Cabinet member, would need to be recorded in an ICM Report "drafted by a HR Officer and the usual considerations would need to be given as to whether all or part of the Report would be exempt. The usual Director of Resources and Legal input would be required in relation to that Report."

145 The Monitoring Officer included caveats in her advice. She set out that the advice was being given to the Leader on the understanding that:

- "[the advice] has been produced within a very limited time-frame and is necessarily brief and based on rapid research, as it is required as a matter of urgency for a meeting which will be taking place tomorrow morning."
- "it has been produced in the absence of the [then] Head of Legal and Democratic Services who is currently on leave and who would normally advise the Leader on legal matters of this significance and sensitivity."
- she was "one of the three Officers identified for potential redundancy in the Senior Management Re-Structure Review, and although the above amounts to procedural advice only, the [then] Head of Legal and Democratic Services would need to sign-off any final advice with regard to governance."

146 The following morning, 13 August 2020, the Head of Human Resources forwarded the Monitoring Officer's advice to the WLGA Officer with the covering message: "please find below the Monitoring Officer's advice as requested confirming that the Leader is able to authorise the payment referred to. I have not discussed this matter with the then Head of Legal Services as she is away on leave and so with

that discretion ... [the] Monitoring Officer, has provided the advice in order that you are able to deal with matters today.”

- 147 On the afternoon of 13 August 2020, the WLGA Officer wrote to the Leader of the Council, copying in the then Chief Executive and the Head of Human Resources stating:
- “The Council's Monitoring officer has confirmed in writing that you have the authority – as Council Leader – to agree a £95,000 compensatory payment.”
  - “There will need to be a standard ICM (Individual Cabinet Member) report, which the Head of HR will prepare on your behalf.”
- 148 The WLGA Officer did not share the full text of the Monitoring Officer’s advice with the Leader, and it does not therefore appear that the Leader was made aware that the Monitoring Officer’s advice was heavily caveated, and that advice had explicitly stated that “the then Head of Legal and Democratic Services would need to sign-off any final advice with regard to governance.” In my view, the fact that the Monitoring Officer’s advice was qualified should have been made clear to the Leader, but I also note that the Head of Human Resources had sight of the full text of the advice.
- 149 I have considered the former Monitoring Officer's advice and sought my own external legal advice on whether the Leader had the lawful authority to agree to make a termination payment to the Council's then Chief Executive. I have concluded that the Leader did not have the necessary authority to approve the termination payment and that the former Monitoring Officer's advice was incorrect.
- 150 Section 42 of the Localism Act 2011 sets out that functions conferred on an authority under Chapter 8 of Part I Localism Act 2011 "are not to be the responsibility of an executive of the authority under executive arrangements".
- 151 Section 41 of Chapter 8 of the Localism Act 2011 provides that an authority must comply with its pay policy statement for the financial year in making a determination which relates to the remuneration of, or other terms and conditions applying to, a chief officer of the authority. As correctly set out by the then Monitoring Officer, remuneration is defined to include "any amounts payable by the authority to the chief officer on the chief officer ceasing to hold office under or be employed by the authority, other than amounts that may be payable by virtue of any enactment".
- 152 Therefore, in my view, the functions in Chapter 8 of the Localism Act 2011 which must not be the responsibility of the executive, include making a determination as to a chief officer's remuneration, part of which can constitute the amounts payable to that person on ceasing to hold office or be employed.
- 153 I recognise that it could be argued that the relevant "function" in section 41 is the duty to comply with pay policy, rather than the power to make determinations about remuneration. However, I do not consider this argument to be persuasive because in order to comply with the pay policy statement under section 41, the authority must make a determination, which therefore follows that determination is also a

relevant function. It is difficult to see how the duty to comply with the pay policy statement could be the responsibility of the authority (and specifically not the duty of the executive) but the determination on remuneration could be the responsibility of the executive. The authority could not fulfil its duty in a manner consistent with the duty not being the responsibility of the executive if it allowed the determination to be made by the executive.

- 154 Notwithstanding the interpretation of the relevant provisions within the Localism Act 2011, I consider that the Council's Constitution supports the position that the determination of a severance payment to a Chief Officer could not be a decision of the executive. The Constitution sets out that, "The Council must determine the level, and any change in the level, of the remuneration to be paid to a Chief Officer as defined in the Local Authorities (Standing Orders) (Wales) Regulations 2006."<sup>13</sup> Therefore, determination of the level, and any change in the level, of the remuneration to be paid to a Chief Officer, is under the provisions of the Council's Constitution a Council function. I also note that the Constitution specifies that functions relating to gratuities are Council functions not executive functions. This further supports the position that decisions on severance payments were a Council not an executive function.
- 155 In her advice, the then Monitoring Officer referred to the Welsh Government's guidance on Pay Accountability in Local Government in Wales, issued under section 40 of the Localism Act 2011 (and to which the Council must have regard). She noted that the guidance recommends that authorities should offer full council the opportunity to vote before large severance packages (those over £100,000) are approved for chief officers leaving the organisation. She set out that the "logical conclusion" to this was that severance packages below the relevant threshold could be executive decisions. I do not agree with the former Monitoring Officer's view. The legislative provisions outlined above designate decisions on chief officer remuneration (including amounts payable on ceasing to hold office or employment) as a Council rather than executive decision. In addition, the provisions of the Council's Constitution also set out that decisions regarding chief officer remuneration were not executive functions.
- 156 The former Monitoring Officer told my auditors that she had no involvement in discussions or negotiations regarding the then Chief Executive's departure after 4 March 2020, and I accept that this was the case. She maintains that when she was instructed, on 12 August 2020 at 15.32, to provide urgent advice on whether the Leader could approve the payment to the Chief Executive the instruction arrived without any advance warning. She maintains that, at the time of receiving the instructions, her workload was particularly demanding, and she was due to take annual leave from 14 August 2020. She was asked to provide advice for a meeting on 13 August 2020 and she provided caveated advice at 23:02 on 12 August 2020.

<sup>13</sup> Remuneration is defined in these Regulations in the same way as in the Localism Act 2011. It therefore includes amounts payable to a person on ceasing to hold office or be employed.



She maintains that "at this stage, there was no indication that the parties were looking to conclude this matter within a fortnight and before my return from annual leave". I have no reason to doubt the Monitoring Officer's account of the circumstances in which she gave her advice.

- 157 I accept that the former Monitoring Officer was instructed to provide advice without notice and within a very short timeframe. As such, I consider that the request may have been unreasonable. I also acknowledge that the Monitoring Officer's advice was caveated as set out in **paragraph 145**. However, the Council's former Monitoring Officer had a statutory duty to report to the Council on matters she believed to be, or were likely to be, illegal or amount to maladministration. I would therefore have expected the former Monitoring Officer to have ensured that her advice on whether the Leader had authority to approve the payment to the then Chief Executive was sound. If she considered that she was unable to provide sound advice within the requested timeframe, I would have expected her to make this clear.
- 158 I also note that whilst the former Monitoring Officer was asked by the Head of Human Resources to advise within a very short timeframe, on 8 December 2020 my auditors wrote to the then Monitoring Officer asking her to set out in writing the basis on which she considered that the payment to the then Chief Executive could lawfully be made as an Executive decision. The Monitoring Officer responded on 23 December 2020 maintaining that having re-considered her advice of 12 August 2020, she remained of the view that the decision to make a termination payment of £95,000 to the then Chief Executive was a decision that could be taken as an Executive decision. I therefore consider that if the then Monitoring Officer had been given a longer timeframe to respond, her overall conclusion is unlikely to have been different.
- 159 On 14 August 2020, the Council's then Monitoring Officer sent her advice of 12 August 2020 to the Council's then Head of Legal and Democratic Services. As set out in **paragraph 145**, in her email of 12 August 2020 the then Monitoring Officer stated that the then Head of Legal and Democratic Services, "would need to sign-off any final advice with regard to governance."
- 160 The then Head of Legal and Democratic Services was on leave in the first half of August 2020 until 17 August 2020, but she responded to the then Monitoring Officer on Sunday 16 August 2020, the day before her return. In her response, the then Head of Legal and Democratic Services set out that she concurred with the Monitoring Officer's "interpretation of the position under the Localism Act". The Monitoring Officer had advised on 12 August 2020, with reference to the Localism Act 2011, that, "any decision to make a £95,000 compensatory payment to the Chief Executive is one which the Leader may himself make".
- 161 I consider that for the reasons set out in **paragraphs 149 to 155** that the former Monitoring Officer's advice was incorrect, and the then Head of Legal and Democratic Services was also in error when she expressed her agreement with the advice. It was on the basis of the advice provided by the then Monitoring Officer

that the Leader and those involved in the negotiations were satisfied that the decision to make a termination payment to the then Chief Executive was one that could be taken by the Leader, when in my view the Leader did not have the lawful authority to make the decision. The Leader, acting on this advice decided to make a termination payment of £95,000 to the Chief Executive. In my view, the payment is unlawful because the Leader did not have the authority to authorise it.

- 162 I recognise that only a court can definitively determine whether the payment made to the former Chief Executive was unlawful but, in my view, payment was unlawful.

## The Council's Head of Legal and Democratic Services raised a concern with the Council's Monitoring Officer that the proposed payment to the Council's Chief Executive might not be compliant with the Council's statutory pay policy statement, but this concern was not addressed and the Council appears to have deviated from its pay policy statement without being able to demonstrate good reason for doing so

- 163 As set out in **paragraph 160**, on 16 August 2020 the Council's then Head of Legal and Democratic Services responded to the then Monitoring Officer's advice of 12 August 2020 in which the Monitoring Officer stated, "My advice is therefore that any decision to make a £95,000 compensatory payment to the Chief Executive is one which the Leader may himself make". In her response, the then Head of Legal and Democratic Services expressed her agreement with the Monitoring Officer's advice but questioned whether the proposed payment to the then Chief Executive was in accordance with the Council's Pay Policy Statement. The Council is required under the provisions of the Localism Act 2011 to comply with its own pay policy statement when making a determination on any amounts payable to a chief officer upon that chief officer ceasing to be employed by the authority. She highlighted that the proposed payment to the then Chief Executive did not appear to be covered within the Council pay policy statement for 2020-21 and that, "my concern is two fold (i) what parameters are those who are advising on the settlement working in and are they fair and (ii) what the message to Member [sic] is in relation to how the figure was achieved in the absence of clear policy."
- 164 I note that the Council's pay policy statement for 2020-21 sets out that, "the Council's approach to statutory and discretionary payments on termination of employment of chief officers (and all other employees) by reason of redundancy or in the interests of the service, is set out in its policy under the Local Government

(Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006. Please refer to Appendix D".

- 165 The failure of the Council to document the reason why it made a termination payment to its then Chief Executive means that I have been unable to reach a definitive conclusion as to the nature of the payment. However, in the absence of clear evidence that the payment was to settle a specific employment dispute, I consider it more likely than not that the payment was a discretionary payment made to a Chief Officer on the voluntary termination of his employment. I therefore consider that, in order to comply with its pay policy statement, the Council should have calculated the payment to the then Chief Executive in accordance with its policy for making discretionary compensations payments under Regulation 6 of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 (the Regulations)<sup>14</sup>.
- 166 The amount of the payment made to the former Chief Executive was not determined in accordance with the Regulations, and I therefore consider that the Council may have been in breach of section 41 of the Localism Act 2011 which requires the Council to comply with its pay policy statement.
- 167 The Head of Democratic Services told my auditors that the then Monitoring Officer did not respond to her email of 16 August 2020. The Monitoring Officer was on annual leave from 14 August 2020 for a period of two weeks, although she told my auditors that she attempted to respond to a limited number of emergency items during her leave period. I have seen no evidence to suggest that the concern raised with the then Monitoring Officer by the then Head of Legal and Democratic Services was addressed.

<sup>14</sup> The Council's stated policy under Regulation 6, was to "exercise this discretion by reference to the statutory age/length of service criteria multiplied by a factor of 2.5 (ie, maximum payment equivalent to 75 weeks' pay)".

## The Council's decision-making process in respect of the departure of its Chief Executive with a termination payment was fundamentally flawed and did not comply with legislative requirements

### The Council's former Monitoring Officer correctly advised that where an individual Cabinet Member made an executive decision the decision needed to be reported in an individual cabinet member decision report

- 168 As set out in **paragraphs 142 to 162**, in my view the decision to make a termination payment to the Council's former Chief Executive was a decision that, under both legislation and the Council's Constitution, could not be exercised by the Council's Leader as an executive function.
- 169 In the then Monitoring Officer's emailed advice of 12 August 2020 she advised, incorrectly in my view, that the Leader could take this decision, but that the decision would need to be recorded in the form of an Individual Cabinet Member report (ICM): "there is a standard Report format for ICMs with which all Members are now familiar. I would envisage that the Report would be drafted by a HR Officer and the usual considerations would need to be given as to whether all or part of the Report would be exempt. The usual Director of Resources and Legal input would be required in relation to that Report".<sup>15</sup> The Monitoring Officer was referring to the written statements required under Regulation 7 of the Decisions Regulations as Individual Cabinet Member (ICM) reports.
- 170 The Council's Constitution, which reflects regulation 7 of the Decisions Regulations, requires an ICM report in respect of a decision made by the Leader or Deputy Leader to be reported to the next Cabinet Meeting. The Constitution also states that:
- a relevant officer requested to produce an ICM report for consideration by an Individual Cabinet Member is required to send a copy of that report to the

<sup>15</sup> The then Monitoring Officer was referring in her email to the requirements of Regulation 7 of the Local Authorities (Executive Arrangements) (Decisions, Documents and Meetings) (Wales) Regulations 2001 (the Decisions Regulations) which requires a written statement to be produced as soon as reasonably practicable after an executive decision by an individual member of the executive. The Decisions Regulations set out the information required under those statements, including the date, reasons, and any interests declared. Individual executive decisions should not be implemented until the written statement has been produced, except in urgent cases where agreement as to the urgency of the decision from the chair of the relevant overview and scrutiny committee is obtained.

Individual Cabinet Member, the Leader, the Committee Services Manager and the relevant Overview and Scrutiny Committee Chairman.

- an Individual Cabinet Member proposing to make an Executive decision must wait 3 days after receiving an ICM report from a relevant officer to make the decision.
- the Individual Cabinet Member must consider the ICM report before making any decision and return the signed ICM report to the Committee Services Manager with a copy to the relevant Officer who prepared the report.
- the Committee Services Manager must supply a copy of the signed decision form to the Chairperson of the Overview and Scrutiny Committee and the decision must be published on the Council's website and sent to all Members of the Council.
- the decision cannot be implemented until three working days have expired since the decision was published and, during that period, the Chairman of the relevant Overview and Scrutiny Committee, any four members of the relevant Overview and Scrutiny Committee, or any six members of the Council can request the decision be 'called in' for consideration by the relevant Overview and Scrutiny Committee. The Committee may require that a decision taken but not yet implemented be re-considered.

171 Section 5, paragraph 6 of the Council's Constitution sets out that an ICM report in respect of decision made by the Leader should be produced by the then Head of Legal and Democratic Services, "as soon as is reasonably practicable after the Leader or Deputy Leader has made any executive decision, he/she shall instruct the Head of Legal and Democratic Services to produce a written statement of that executive decision".

172 Whilst I disagree with the former Monitoring Officer's advice that the Leader had the necessary authority to decide on a severance package for the then Chief Executive, I agree that if the Leader had the authority to make the decision it would have been necessary to report and publish his decision using an ICM report in order to satisfy the requirements of the Decisions Regulations and the Council's own Constitution.

173 However, as set out in **paragraphs 183 to 186**, the Council's Head of Legal and Democratic Services subsequently advised the Leader that the decision could be taken as an officer delegated decision. In my view this advice was incorrect.

174 On 17 August 2020, the Council's then Head of Legal and Democratic Services emailed the Council's Head of Human Resources stating: "I have thought through our earlier conversation and despite my enthusiasm based on previous approaches to [Settlement Agreements] I am reminded that someone somewhere needs to make a decision ... and as a purely financial transaction I would suggest that the [Individual Cabinet Member] report be authored by [the Director of Resources] and determined by the Leader. I will draft an outline report for you to fill in gaps and share with [the Director of Resources]". As set out in **paragraph 171**, the Council's Constitution sets out that, where the Leader makes any executive

decision, he/she shall instruct the Head of Legal and Democratic Services to produce a written statement of that executive decision.

- 175 The Head of Human Resources responded to the then Head of Legal and Democratic Services, "I understood from our earlier conversation that there was not the need for an [Individual Cabinet Member] report - is that correct? If so, we don't need to trouble ourselves further on this point (and we could simply ask the Leader to inform [the Director of Resources] on e-mail that there will be a financial element to this [Settlement Agreement] and that he has agreed it). Will wait to hear".
- 176 The then Head of Legal and Democratic Services responded, "earlier I was exploring with you whether there were any options around not reporting formally in light of previous decisions, mindful of the potential for issues to arise due to the [Individual Cabinet Member report] being published. Having further considered the position however, I have concluded that there is no way around this decision being appropriately and formally recorded. The email also states, "I am aware that [the Chief Executive] is particularly anxious about the reporting mechanism and implications".
- 177 The content of these emails suggest to me that the then Head of Legal and Democratic Services and Head of Human Resources considered and discussed options to avoid the formal reporting process. The then Head of Legal and Democratic Services and the Head of Human Resources told my auditors that this was not the case and they were not seeking to avoid formally reporting the decision. The then Head of Legal and Democratic Services told my auditors that her email comments set out in **paragraph 176** related to an earlier conversation she had with the Head of Human Resources in which he had informed her, "that there had been a number of recent [Settlement Agreements] with chief officers that had been signed off and not recorded", and that if what the Head of Human Resources had told her was correct, "decisions could be rolled through without formal decision making, and clearly that wouldn't be acceptable!". However, the only reported decision relating to the Chief Executive's departure with a termination payment was an officer delegated decision notice which made no direct reference to the Chief Executive (referring only to a Chief Officer) which provided no reason for the Chief Executive's departure or what the termination payment was for. In any event, as set out in **paragraphs 142 to 162**, in my view the decision to make a termination payment to the Chief Executive was not in my view made following a proper, lawful decision-making process.
- 178 On 18 August 2020, the then Head of Legal and Democratic Services wrote to the Head of Human Resources, copying in the then Monitoring Officer stating that, "I have drafted an ICM for your consideration. The bracketed bits and question marks require further instruction. As the Leader may wish you to explore with [the Director of Resources] the option of a delegated decision I will now draft a delegated record of decision and forward that in due course for comment."
- 179 It is not clear from the draft ICM report whether the relevant decision was to:

- agree to enter into a Settlement Agreement (or agree a sum further to a proposed Settlement Agreement); or
  - to approve the use of funds further to the Settlement Agreement.
- 180 This ambiguity continues in internal correspondence and was picked up by the Council's external legal advisors in an email on 18 August 2020 to the Head of Human Resources. This noted that the prospect of the "decision" being taken by the Leader was presumably being discussed, "on the basis that the decision is about the financial approval for the settlement, rather than a decision regarding an employment matter, which cannot be an executive decision."
- 181 The Council's external legal advisors did not express a view in relation to the prior decision to the financial approval decision (ie whether to enter into a Settlement Agreement and on what terms) in their email. When the then Head of Legal and Democratic Services saw the advice, she made it clear to the Head of Human Resources that external legal advice on the decision-making process was not required: "I asked specifically for the advice from [our legal advisors] to be in relation to the effect if any on the [Settlement Agreement] if through the decision-making process the Settlement Agreement is challenged. By this I was not looking for any view on the decision-making process itself, you have that advice ,, from myself and [the then Monitoring Officer]. I am not going to provide any view in response to the legal advice provided by [our external legal advisors] on the decision-making process at all."
- 182 Later the same day, 18 August 2020, the then Head of Legal and Democratic Services sent a further email to the Head of Human Resources copying in the then Monitoring Officer stating: "attached is a suggested approach for a delegated decision report to record the decision if the Leader and [the Director of Resources] are agreeable to this approach. This option is feasible as a stand-alone Director decision further to para 5.2 of section 5, part 3 of the Constitution. Attached to the email was a draft officer delegated decision notice for approval in the name of the Director of Resources, with the decision stated as being, "that [a sum no more than £100k][a sum of £95k][a settlement sum] is approved further to the Settlement Agreement".
- 183 On 1 September 2020, the then Head of Legal and Democratic Services wrote to the Leader, copying in the Director of Resources attaching the draft ICM report and officer delegated decision report she had prepared. The email set out the following:
- the decision was not a matter that was required to be reported to Council as the sum involved was below the £100,000 threshold requiring full Council approval, and "whilst the settlement agreement itself is now signed and can be relied upon, without a formal decision the Council has no record of the allocation of the sum of money to effect the agreement".
  - draft ICM and officer delegated decision reports had been prepared to provide two options to record the allocation of the sum of money set out in the Settlement Agreement.

- the Settlement Agreement had been signed with the, "unanimous acceptance by Cabinet of the resignation, and an understanding that the terms around the loss of employment be set out in the Settlement Agreement including a compensatory payment".
- the Leader had two available reporting options:
  - to record the decision through an ICM: "this would follow standard process, and will be published and available to any member/the public to view. There may then be questions as to what the decision entails and you may wish to consider issuing a mutual press statement at the time of publication. If the matter is not called-in [by the Corporate Overview and Scrutiny Committee], the decision is effective on the third day following publication."
  - "for the Director of Resources to sign off a delegated decision. As the matter is dealing primarily with the allocation of financial resources the Director of Resources may be agreeable to sign a delegated decision and that would obviate the need to go through the ICM process. Whilst the decision is effective once signed, the report will be published and again it would be advisable to issue a press release at this time."

184 The email sent to the Leader by the then Head of Legal and Democratic Services setting out the options for recording the decision was sent on 1 September 2020. However, the Settlement Agreement had already been signed by the Leader and the then Chief Executive on 27 August 2020, so the Leader had already made the decision to enter into an agreement to pay the Chief Executive £95,000 on the termination of his employment.

185 The then Head of Legal and Democratic Services did not send the reporting options and a draft ICM to the Leader until after the Leader's decision had been taken. This meant that it was not possible for the requirements of the Council's Constitution relating to ICMs to be complied with (see **paragraph 170**). These requirements included that "an Individual Cabinet Member proposing to make an Executive decision must wait 3 days after receiving an ICM report from a proper officer to make the decision".

186 I have not seen a response from the Leader to the then Head of Legal and Democratic Services' email of 1 September 2020 (see **paragraph 183**). However, on 2 September 2020 a delegated officer decision notice dated 1 September 2020 in the name of the Director of Resources was published on the Council's website. No ICM report was published. The Director of Resources told my auditors that he met with the Leader and the Head of Democratic Services on 1 September 2020, and he understood the then Head of Legal and Democratic Services favoured the option of recording the decision as an officer delegated decision, "for the approval of the allocation of resources for the payment of the £95,000".

187 The Council's then Head of Legal and Democratic Services told my auditors that she considered there was no requirement for an ICM Report to be published



because the reportable decision in this instance was the decision of the Director of Resources to authorise the payment to the then Chief Executive.

- 188 I do not agree with the view of the Council's then Head of Legal and Democratic Services. I consider that the reportable decision was the Leader's decision to enter into the settlement. In signing the Settlement Agreement, a legal obligation was created to make a payment of £95,000 to the Council's then Chief Executive on the termination of his employment. The notice of decision made by the Director of Resources dated 1 September 2020 was that "a sum of £95k be approved in accordance with the Settlement Agreement", the reasons given being to, "achieve fair and equitable remuneration to support a Settlement Agreement." The decision notice refers to "a Settlement Agreement as agreed [emphasis added] between the Council and a chief officer."
- 189 It seems fairly clear that this decision notice was recording the release of the funds required under the Settlement Agreement, the terms of which had already been agreed. There is no conditionality about it, for example, "if settlement is reached", or suggestion that the decision was to enter into a Settlement Agreement and on what terms. The fact that the decision notice of 1 September 2020 was simply recording the approval of the funds, which had already been agreed under the Settlement Agreement, is supported by the fact that, as set out in **paragraph 19**, the Settlement Agreement was signed by the Leader and the then Chief Executive on 27 August 2020.
- 190 This is acknowledged in an email sent by the then Head of Legal and Democratic Services to the Leader (copied to the Director of Resources) on 1 September 2020, in which she noted that the Leader had signed the Settlement Agreement, the Cabinet had accepted the former Chief Executive's resignation, and that the agreement could be relied upon.
- 191 The Council's Director of Resources told my auditors that he had no involvement in the decision to enter into the Settlement Agreement and he understood that the Settlement Agreement represented a binding obligation. It appears to me that the intended purpose of the Director of Resources' decision was to authorise the release of the funds for the payment of sums which had already been agreed in the Settlement Agreement, and to record the allocation of those sums. As such, it does not appear that the decision to enter into the Settlement Agreement was delegated to the Director of Resources.
- 192 Even if I am incorrect on this matter, I do not consider that a decision to approve making a termination payment to a chief officer of the Council was one which could in any case have been taken as an officer delegated decision (see **paragraphs 194 to 199**).
- 193 In my view, the Council failed to produce a written statement of the Leader's decision to enter into the Settlement Agreement. I therefore consider that the Council would have been in breach of the Decisions Regulations had the relevant decision been capable of being taken as an Individual Cabinet Member executive

decision. However, as set out in **paragraphs 149 to 162**, I consider that the decision was not one which was able to be taken as an executive decision.

### **The only reported decision relating to the former Chief Executive's departure with a termination payment was an officer delegated decision notice in the name of the Director of Resources, however the Council's Constitution did not allow for officers to determine severance packages in respect of chief officers**

- 194 As set out in **paragraph 21**, on 2 September 2020 the Council published an officer delegated decision notice in the name of the Director of Resources which related to the departure of the former Chief Executive with a termination payment. The notice refers to, "a Settlement Agreement as agreed between the Council and a chief officer" and records the decision as, "that a sum of £95k be approved in accordance with the Settlement Agreement". This is the only recorded decision in respect of the former Chief Executive's departure with a termination payment.
- 195 For the reasons set out in **paragraphs 187 to 192**, I consider that the decision recorded in this decision notice was not a decision to approve a termination payment to the former Chief Executive. It was simply recording the approval of the funds which had already been agreed under the Settlement Agreement.
- 196 Notwithstanding, I do not consider that the determination of a severance package for a chief officer of the Council was one which could in any event have been delegated to an officer of the Council.
- 197 As set out in **paragraph 154**, the Council's Constitution states that: "the Council must determine the level, and any change in the level, of the remuneration to be paid to a Chief Officer as defined in the Local Authorities (Standing Orders) (Wales) Regulations 2006." Remuneration is defined in the Standing Orders Regulations to have the same meaning as in the Localism Act 2011, meaning that it includes "any amounts payable by the authority to the chief officer on the chief officer ceasing to hold office under or be employed by the authority."
- 198 Where a council has incorporated those standing orders (ie to determine the level or change in level of Chief Officer remuneration), as the Council has done, the Standing Order Regulations are clear that such decisions are for the authority to make. As such, the decision regarding the severance package could not lawfully have been delegated to an officer of the Council.
- 199 Furthermore, the Council's Constitution does not allow for a decision on a severance package in respect of a chief officer to be delegated to the Director of Resources (as opposed to a decision to release funds for the payment of such a package, further to a decision taken by the Leader).

## **The Council's Director of Resources and s151 Officer did not take adequate steps to satisfy himself that a proper decision-making process had been followed before signing an officer delegated decision approving that a termination payment be made to the former Chief Executive**

- 200 On 18 August 2020, the Council's then Head of Legal and Democratic Services emailed the Council's then Monitoring Officer and the Head of Human Resources with a draft of an email she was intending to send to the Council Leader. The draft email set out that she was writing to advise the Leader, "of the process in formally resolving the negotiations concerning the early retirement of the Chief Executive and consequent settlement." The email sets out that a decision, "to agree the sum [to be paid to the Chief Executive] under a settlement agreement" could be reported in the form of an ICM Report, and that, "the only other option is for a Director to sign off a delegated decision. As the matter is dealing primarily with the allocation of financial resources if the Director of Resources was agreeable to sign a delegated decision this would obviate the need to go through the ICM process."
- 201 I consider that the advice on reporting options proposed by the then Head of Legal and Democratic Services was incorrect because:
- the matter concerned was not, as stated by the then Head of Legal and Democratic Services, a matter "dealing primarily with the allocation of financial resources". The matter related to the employment of the Council's then Chief Executive.
  - the decision to approve a termination payment to the former Chief Executive was required to be taken in accordance with legislation and the Council's Constitution. The function of approving termination payments for chief officers is a matter reserved to Council and therefore, in my view, that function cannot lawfully be exercised by the Council's Executive. The options proposed by the then Head of Legal and Democratic Services did not set out how the payment had been or was to be approved.
  - the options proposed by the then Head of Legal and Democratic Services in her email of 18 August 2020 were stated to relate to the need, "to agree the sum [to be paid to the Chief Executive] under a settlement agreement". The then Head of Legal and Democratic Services appears to have overlooked the fact that the sum to be paid to the former Chief Executive was determined by a prior decision, the decision to enter into the Settlement Agreement. The Settlement Agreement set out that the Chief Executive would receive a termination payment of £95,000. The Council has no recorded decision of who made the decision to enter into the Settlement Agreement and the reasons for making that decision. In my view neither the Leader nor the Director of Resources had the lawful authority to enter into the Settlement Agreement.

- the Council's Constitution did not allow for officers to determine severance packages in respect of chief officers.
- 202 Notwithstanding that officers of the Council did not have the necessary authority to approve a severance package for a chief officer, I consider it surprising that it was considered that the Council's Director of Resources was the appropriate officer to sign an officer delegated decision notice in this instance. The Director of Resources had not been involved in the negotiations regarding the former Chief Executive's departure and was not fully aware of the circumstances that had led to a severance offer being made. Whilst the then Head of Legal and Democratic Services stated in her email that, "the matter is dealing primarily with the allocation of financial resources", in my view this was not accurate. The departure of the former Chief Executive with a severance package involved employment matters.
- 203 On 27 August 2020, the Settlement Agreement was signed by the Leader and the then Chief Executive. At this point in time, neither an ICM nor an officer delegated decision report was published, and the Head of Democratic Services had not sent her proposed reporting options to the Leader. The Council's Director of Resources was on leave when the Settlement Agreement was signed and was therefore not in a position to sign an officer delegated decision report. He did not return from leave until 1 September 2020.
- 204 On 1 September 2020, the then Head of Legal and Democratic Services wrote to the Leader, copying in the Director Resources setting out that the Leader could either sign an ICM Report or the Director of Resources could sign an officer delegated decision report. Attached to the email was a draft ICM report and a draft officer delegated decision report. I have not seen a response from the Leader setting out his preferred option. However, later the same day the then Head of Legal and Democratic Services wrote to the Director of Resources asking for an update regarding the officer delegated decision report and suggesting minor amendments to the draft. The Director of Resources responded that he had already signed the document but would speak to the Leader and the then Chief Executive the following day to see whether the document could be updated.
- 205 The Director of Resources told my auditors that on 1 September, the day he returned from leave, he had several meetings regarding the departure of the then Chief Executive with a termination payment. These meetings were with:
- the Chief Executive on his own;
  - the Council Leader on his own;
  - the Chief Executive and the Leader together;
  - the Council leader and the then Head of Legal & Democratic Services together; and
  - possibly the Chief Executive, Leader and the then Head of Legal & Democratic Services together.
- 206 The Director of Resources told my auditors that in these meetings he sought and obtained assurances in order to satisfy himself that the Council had made proper

arrangements for the administration of its financial affairs, that the Head of Human Resources had been involved in the process, and that he could sign the officer delegated decision notice prepared by the Council's then Head of Legal and Democratic Services.

- 207 The Director of Resources told my auditors that he questioned the decision-making process with the Council Leader and the then Head of Legal and Democratic Services because he had assumed that some form of formal member approval would have been required prior to the Settlement Agreement of £95,000 being signed. He maintains the Leader of the Council told him that the Cabinet had approved the payment of £95,000, albeit not in a formal Cabinet meeting. He also recalls that the then Head of Legal and Democratic Services informed him that both she and the then Monitoring Officer had advised that the agreed payment did not require a Council decision because it was below the threshold of £100,000 requiring approval by the full Council, but "a decision was required in respect of the financial aspects of the settlement agreement, namely the approval of the allocation of resources for the payment of £95,000". He told my auditors that, following his meeting with the then Head of Legal and Democratic Services, he recalls, "undertaking a quick review of relevant elements of the Constitution, but [found] nothing that clearly contradicted the advice provided by the then Head of Legal and Democratic Services".
- 208 The Director of Resources also told my auditors that while he recalls making brief notes of the meetings held on 1 September 2020, he has not been able to find them. He accepts that, "he should have clearly documented and articulated [his] thought process, considerations and actions and this is something [he] will take forward for the future".
- 209 In the absence of any written records of the meetings which took place on 1 September 2020, I am unable to reach a firm conclusion on what was discussed and what assurances the Director of Resources received in those meetings. I do not dispute that assurances were sought and I accept that the Director of Resources was entitled to place some reliance on oral assurances given to him by the Council Leader and the then Head of Legal and Democratic Services.
- 210 However, given that the officer decision notice was to be in his name, I would have expected the Director of Resources to do more than seeking oral assurances from the Leader, the then Chief Executive and the then Head of Legal and Democratic Services.
- 211 When the Director of Resources was asked to sign the officer delegated decision notice, (which was only recorded decision relating to the former Chief Executive's departure with a termination payment), he should in my view before signing the decision notice have:
- sought written confirmation that the payment did not require members acting in full Council or committee to approve the payment.
  - insisted on having sight of the Settlement Agreement and reviewed the content. The Director of Resources maintains that he asked the then Chief

Executive for a copy of the Settlement Agreement, but the Chief Executive declined his request on the basis that the Settlement Agreement contained a confidentiality clause, "which allowed for only [the Chief Executive] and the Leader of the Council to have a copy and both would have to agree for any disclosure." And that "the Leader of the Council had confirmed that what the Chief Executive had advised me was also his understanding".

- requested and reviewed any external and internal legal advice the Council had obtained regarding this matter.
- requested written confirmation setting out his constitutional and/or legislative authority to sign an officer delegated decision notice regarding the matter. This was particularly important as the officer delegated decision notice was to be the Council's only recorded decision in respect of the Chief Executive's departure with a termination payment.
- requested a copy of the business case supporting the proposal.
- sought written confirmation of the basis on which the then Chief Executive was leaving his employment and the reason for him receiving a termination payment.

212 In my view, if the Director of Resources had taken the steps set out above, rather than relying on oral assurances, it may have become apparent that proper process had not been followed and the termination payment had not been properly approved. However, I accept that the Director of Resources did not have any involvement in the process that led to the Settlement Agreement being signed on 27 August 2020 and that when he signed the officer delegated decision notice on 1 September 2020 the legal agreement to make a payment of £95,000 to then Chief Executive was already in place. Therefore, even if the Director of Resources had identified that proper process had not been followed, failure to make the agreed payment could have led to the Council facing legal action.

## The former Chief Executive received a termination payment of £95,000 in advance of the agreed date of payment set out in the Settlement Agreement

213 On 27 August 2020 the Settlement Agreement, which sets out that the then Chief Executive would leave his Council employment with a termination payment of £95,000, was signed by the Leader and the then Chief Executive.

214 The Settlement Agreement sets out that the payment of £95,000 would be made to the then Chief Executive, "within 28 days of the later of this Agreement becoming binding and the Termination Date". The Chief Executive's termination date was set as 30 November 2020, and the Settlement Agreement became binding on 27 August 2020. This meant that the payment to the Chief Executive should have

been made on the date his employment terminated; 30 November 2020. However, the payment was made in the week commencing 21 September 2020 whilst the Chief Executive was still employed.

- 215 The Council's Director of Resources told my auditors that he was informed by the former Chief Executive in a meeting on 4 September 2020, at which the Council Leader was present, that the payment had to be made within 28 days of the date of the Settlement Agreement. The Director of Resources also told us that he was unable to confirm the payment date by reference to the Settlement Agreement because he did not have a copy of the Settlement Agreement. The Leader also maintains that the former Chief Executive told the Director of Resources at the meeting of 4 September 2020 that the payment had to be paid within 28 days. The former Chief Executive told my auditors that he did not inform the Director of Resources that the payment had to be made within 28 days, and that it was the Director of Resources who informed him that this was the case.
- 216 Following the meeting of 4 September 2020, the Director of Resources emailed the Head of Human Resources stating: "we will need to ensure that the payment of £95k to [the Chief Executive] is made before the next pay run to ensure compliance with the terms of the Settlement Agreement, which I understand is 28 days from the date of signing. Can you please arrange the payment."
- 217 On 7 September 2020, the Head of Human Resources emailed a member of the Council's payroll team regarding the completion of a 'Change of Circumstances' (COC) form in respect of the former Chief Executive's departure from the Council. The covering email states: "if you could put his details in for me that would be great- leaving date 30/11/20 and a compensation payment of 95k to be made by 25th Sept at latest (in order to comply with the terms of the agreement)." This statement was incorrect because the Settlement Agreement did not require any payment to be made until 30 November 2020.
- 218 Later the same day, the Head of Human Resources wrote again to a member of the Council's payroll team stating, "I've just checked the settlement agreement again and I need the 95k payment (first 30k tax free) to be made on the 24th Sept in order to comply with the agreement that has been made". I find it surprising that having checked the wording of the Settlement Agreement, the Head of Human Resources nevertheless instructed that the payment had to be made on 24 September 2020, when the Settlement Agreement did not require this.

## Non-executive members of the Council were not given the opportunity to review and decide whether the Chief Executive should receive a termination payment

### Members of the Council were not given the opportunity to decide whether to make a termination payment to its former Chief Executive

- 219 On 12 August 2020 the Council's then Monitoring Officer advised that, "any decision to make a £95,000 compensatory payment to the Council's then Chief Executive is one which the Leader may himself make". I disagree with this advice for the reasons set out in **paragraph 149 to 162** and I consider that, in accordance with legislation and the Council's own Constitution, the decision could not be an executive decision. In my view, the decision should have been taken by a meeting of the full Council, or arguably by the Council's Senior Staff Committee which comprised seven members of the Council and whose remit included determining terms and conditions of service for chief officers. However, it is unlikely that the Senior Staff Committee's delegation of determining terms and conditions of service for chief officers could be deemed as extending to agreeing termination payments to chief officers.
- 220 Even if the former Monitoring Officer had been correct in her advice and the Leader could take the decision to make a termination payment to the Council's then Chief Executive, it does not mean that this was an appropriate or transparent way to make such an important decision.
- 221 As set out in **paragraph 160**, on 16 August 2020 the Council's then Head of Legal and Democratic Services wrote to the Council's then Monitoring Officer confirming that she agreed with the Monitoring Officer's interpretation of the legal position. However, in that email she questioned, "if this is indeed a matter that can appropriately be taken by the Leader as the exiting of a [Chief Executive] surely is a matter in the public interest and one that has significant effect on the Authority as a whole" and "I am also mindful that scrutiny does have a role to play here and may well wish to review the severance package or may well call in the decision".
- 222 I agree with the views expressed by the then Head of Legal and Democratic Services. Regardless of whether the Leader had the power to make such a determination, there was a question about whether it was appropriate in the circumstances for the decision to be taken by the Leader. In my view, it was inappropriate for a decision relating to the departure of the former Chief Executive with a termination payment, a decision which would have significant implications for the Council as a whole, to be taken as an individual cabinet member decision.



## Non-Executive members of the Council were not given the opportunity to scrutinise any proposals to make a termination payment to its former Chief Executive

- 223 As set out in **paragraph 221**, the Council's then Head of Legal and Democratic Services' email to the Council's then Monitoring Officer of 16 August 2020 set out that: "I am also mindful that scrutiny does have a role to play here and may well wish to review the severance package or may well call in the decision". I agree with the view expressed by the then Head of Legal and Democratic Services on this point. The Welsh Government's guidance on Pay Accountability in Local Government in Wales, issued under section 40 of the Localism Act 2011 recommends that, "authorities' scrutiny arrangements allow the appropriate overview and scrutiny committee or any other member-led pay or remuneration panel (or equivalent) to review the pay policy statements and any individual salary or severance packages for their chief officers." The Council is required by the Localism Act 2011 to have regard to this guidance.
- 224 The Settlement Agreement was signed by the Leader and the then Chief Executive on the 27 August 2020. The Council's Corporate Overview and Scrutiny Committee was not afforded the opportunity to review the proposed decision.
- 225 As set out in **paragraph 183**, following the signing of the Settlement Agreement on 1 September 2020, the then Head of Legal and Democratic Services advised the Leader that the decision could be recorded either by an ICM report or by a delegated officer decision notice. The decision was made to issue an officer delegated decision notice. The Council's Constitution does not include any mechanism to enable the Council's overview and scrutiny committees to call-in officer delegated decisions. In consequence, the Council's Corporate Overview and Scrutiny Committee was denied the opportunity to call-in the decision before its implementation. Whilst I accept that the Council's Corporate Overview and Scrutiny Committee could have decided to review the decision after the decision had been made, the Settlement Agreement signed on 27 August 2020 had formed a contract between the Council and the then Chief Executive. Any attempt to prevent a payment under the terms of this contract would have exposed the Council to the risk of legal challenge.
- 226 I note that on 18 August 2020, the Head of Human Resources wrote to the Council's external legal advisors asking for confirmation that: "once signed, the [Settlement Agreement] is legally binding, and that the decision recording process, including any scrutiny matters, will not affect the signed [Settlement Agreement], could you also advise on the issue of members wishing to have sight of the [Settlement Agreement] specifically, will that render the [Settlement Agreement] null and void".
- 227 The advice the Head of Human Resources received from the Council's external legal advisors was that:

- if the decision was called in by a Council Overview and Scrutiny Committee, "the matter could at that point potentially be referred to Cabinet or Full Council who could order that the decision be re-taken, whether or not the agreement has been entered into by that point or not". However, as the only recorded decision was an officer delegated decision to release funds for the payment of such a package, further to a decision taken by the Leader, and officer delegated decisions could not be called-in by the Council's overview and scrutiny committees, the possibility of the Cabinet or Full Council ordering the decision be re-taken was avoided.
- "The safest route is generally to agree the Settlement Agreement in principle". In other words, the external legal advisor was advising that the Council's interests would be better protected if the Council's correct democratic processes were concluded before entering into a legal agreement. This advice was disregarded.
- if taking the decision to full Council was not considered appropriate, other approval options could be considered, for example referring the matter to the Council's senior staffing committee or urgency committee: "this would at least mean that any decision of the committee would not be an executive decision, and therefore would not be subject to the same level of call in by scrutiny".
- if members were to make the decision, in the view of the Council's external legal advisors, those members, "would be able to have sight of the agreement if this was considered necessary to a determination of the issue".

228 It is not clear to me why officers of the Council advised a process that avoided any possibility of the decision to make a termination payment to the then Chief Executive being called in by the Council's Overview and Scrutiny Committee or being reviewed and scrutinised by members of the Council, other than Cabinet members.

229 Internal emails suggest to me that officer advice may have been influenced by a number of factors:

- there appears to have been a genuine fear that sharing information with members could have led to a breach of a confidentiality clause contained within the Settlement Agreement. Notwithstanding that concern I note that, when raising this question with the Council's external legal advisors, the Head of Human Resources was advised that where members needed sight of the Settlement Agreement in order to make a determination, then they should be given it.
- officers were concerned that once the Settlement Agreement was signed, if members were to overturn the decision it might place the Council in an untenable position of having entered a legal agreement but unable to implement it, leading to a possible breach of contract claim. However, the Council's external legal advisors had advised that the safest route in these circumstances was to agree the Settlement Agreement in principle and wait

for the appropriate democratic processes to be completed before finalising the agreement. However, this advice was not heeded.

- internal officer emails between the then Head of Legal and Democratic Services and the Head of Human Resources suggest that both the Leader and the then Chief Executive wanted to avoid details of the agreement being publicised. On 17 August 2020 the then Head of Legal and Democratic Services wrote to the Head of Human Resources, copying in the then Monitoring Officer stating, "I am aware that [the then Chief Executive] is particularly anxious about the reporting mechanism and implications". On 18 August 2020, the then Head of Legal and Democratic Services wrote to the Head of Human Resources stating, "I understand that the Leader is anxious that the reasons behind [the Chief Executive] taking early retirement are not publicised whether through debate or any other means, and that [the Chief Executive] wishes to benefit from a degree of confidentiality in regards to the terms of the [Settlement Agreement]". Whilst I acknowledge that parties to a Settlement Agreement will always wish to retain a degree of confidentiality regarding the circumstances that have led to that agreement, it cannot be at the cost of transparency and the proper conduct of public business.

230 As set out in **paragraph 221**, the then Head of Legal and Democratic Services had acknowledged that, "scrutiny does have a role to play here and may well wish to review the severance package or may well call in the decision". However, the decision-making process that was advised and followed resulted in no non-executive member scrutiny or involvement. In my view this was unacceptable.

231 The failure to allow the appropriate overview and scrutiny committee or any other member-led pay or remuneration panel (or equivalent) to review the proposal to make a termination payment to the Council's then Chief Executive before the decision had been taken, the Council did not adhere to the Welsh Government's guidance on Pay Accountability in Local Government in Wales, issued under section 40 of the Localism Act 2011 (see **paragraph 223**). Local authorities may only depart from the guidance if they give clear (in the sense of objective, proper, and legitimate) reasons for doing so. I have seen no clear reason why the Council would have departed from the Welsh Government guidance, and I therefore consider that the Council may have been in breach of the provisions of the Localism Act 2011.



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