

FINAL

Birmingham City Council

PUBLIC Report to Cabinet

15th March 2019



Subject: Waste Management – Industrial Action Update

Report of: Chief Executive, Chief Finance Officer and City Solicitor

Relevant Cabinet Member: Councillor Ian Ward, Leader of the Council

Relevant O &S Chair(s): Councillor Penny Holbrook Chair of Housing and Neighbourhoods O&S Committee

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Are specific wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s):		
Is this a key decision?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, add Forward Plan Reference:		
Is the decision eligible for call-in?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

1 Executive Summary

- 1.1 This report is not on the Forward Plan. The subject matter is likely to be a 'key decision' and due to the matters set out in this report it is the opinion of the Chief Executive that it is impracticable to defer the decision. The Chair of Housing and Neighbourhoods Overview and Scrutiny Committee has agreed that the matter is urgent and cannot be reasonably deferred. [Paragraph 3.5 Council Constitution 11/9/18].

- 1.2 Further to Cabinet decision on 20th February 2019, and recent ACAS talks with Unite the Union (Unite) there is a need to urgently mitigate the impacts of the actual and proposed industrial action and also the litigation and threatened litigation issued by Unite against the Council. Further to the Cabinet Report 8th March 2019, this report is late and urgent due to ACAS talks reaching agreement on proposed Heads of Terms agreed by each party on 7th March 2019, subject to the decision of Cabinet and the need for Cabinet to consider fully the proposals to bring this litigation and industrial action to an end as soon as possible. Heads of Terms have also been sent to UNISON to resolve their dispute with the Council.

2 Recommendations

Cabinet are asked to: -

- 2.1 Note the contents of this Report and Note the contents of the Private Report.
- 2.2 Consider and agree the advice of Statutory Officers as set out in this Report and the Private Report.
- 2.3 Note that Cabinet must have due regard to the views expressed by the District Auditor set out in Appendix 5 including any recommendations.
- 2.4 Note and approve the 'Heads of Terms Unite' as set out in Appendix 2 and delegate to the Chief Finance Officer and City Solicitor to conclude these Heads of Terms with Unite in the shortest time possible having regard to the Council's Call In period.
- 2.5 Note and approve the 'Heads of Terms UNISON' as set out in Appendix 3 and delegate to the Chief Finance Officer and City Solicitor to conclude these Heads of Terms with UNISON in the shortest time possible having regard to the Council's Call In period.
- 2.6 Delegate to the Leader of the Council, the Cabinet Member, Clean Streets, Waste and Recycling and the Chief Executive or the Chief Finance Officer and City Solicitor (acting jointly as the delegate of the Chief Executive), to conclude respective Agreements with Unite UNISON and the Council.
- 2.7 Agree that those aspects of Head of Terms that impact upon the workforce in the Waste Service will be subject to consultation in accordance with the Councils Consultation Protocol with Recognised Trade Unions Policy

3 Latest Position – ACAS Talks

- 3.1 Set out at Appendix 1 is the Chronology of ACAS talks that have taken place with Unite since commencement of industrial action on 29th December 2018 and the key events up to this report, such as Cabinet meetings and High Court hearings.

- 3.2 The Council was unsuccessful in its application for a temporary injunction seeking to prevent the current industrial action of Unite and Unison from continuing. That hearing took place on 28th February 2019.
- 3.3 As the judgement did not grant Leave to Appeal, the Council could apply to the Court of Appeal for Leave to Appeal should it wish to do so and there are good prospects (around 60%) that the Court of Appeal would grant such permission. In terms of whether there are reasonably arguable points that the judge could have arrived at a different decision is at least 50% if not better.
- 3.4 An application has not been filed for Leave to Appeal as the prospects of a settlement with both Unions is positive. In addition, and more importantly, a decision of the Court of Appeal that the judge could have arrived at a different decision would not have stopped the new industrial action recently balloted for.
- 3.5 On 28th February 2019, on the day of the High Court hearing, the Council made proposals to Unite to settle all the industrial action and litigation and threatened litigation. That proposal had been discussed the previous day with Unite.
- 3.6 This proposal included a payment to settle the employment tribunal litigation *Bs v Birmingham City Council* (130513/2018). This offer was at £3,000 per valid Employment Tribunal (ET) claimant (in accordance with the Cabinet decision 12th February 2019 – option 2) and an additional £300 per claimant to settle all other litigation, disputes and actions which would be subject to additional Cabinet approval.
- 3.7 These proposals were rejected by Unite and further ACAS talks took place and a counter proposal from Unite was received on 4th March 2019.
- 3.8 The Council made a further alternative offer on 7th March 2019 broadly in the same terms as to the Head of Terms at Appendix 2. The settlement of *Bs v Birmingham City Council* (130513/2018) is in accordance with the Cabinet decision 12th February 2019. Further proposals to settle all the litigation propose further settlement payments as set out later in this report require the approval of Cabinet.

4 Analysis of Heads of Terms

(a) Legal

Detailed analysis of the Heads of Terms is set out in the Private Report. In the meantime, those terms which propose a payment to members of Unite or member of Unison who are employed in the Waste Service are discussed below:

4.1 Heads of Terms

4.2 Unite

- a) The Heads of Terms for Unite are at Appendix 2 to this report. Unite have confirmed that these terms are agreed subject to the approval of Cabinet.

- b) The payment terms to the members of Unite to settle the employment tribunal claims and in full and final settlement of the all the industrial action, litigation, and threatened litigation issued by Unite is set out as follows:
- c) Settle the Employment Tribunal Litigation issued by Unite Bs v. Birmingham City Council (Case Number 1305153/2018 & 271 others), and S v Birmingham City Council (1305981/2018) and Bw v Birmingham City Council (Case Number 1300839/2019 & 7 others) by way of a payment of £3,000 to each to valid claimant as set out in the Heads of Terms.
- d) BCC to make a payment in the sum of £500 to each Unite member who was a UNITE member and employed in the refuse collection service as at the date of the ballot of 14th December 2018 in full and final settlement of all the industrial action, litigation, and threatened litigation issued by Unite.

4.3 **Unison**

- a) The Heads of Terms for UNISON are at Appendix 3 to this report. UNISON has confirmed that these terms are agreed subject to the approval of Cabinet. In addition, they have confirmed that they will be taking a member vote on Monday 18th March to approve any final offer approved by BCC Cabinet.
- b) The payment terms to the members of UNISON to settle the employment tribunal claims and in full and final settlement of the all the industrial action, litigation, and threatened litigation issued by UNISON is set out as follows:
- c) BCC to pay each valid Claimant in the Tribunal Proceedings of D and Others v Birmingham City Council (Case Number 1300892/2019 & 18 Others) the sum of £3,000 to each to valid claimant as set out in the Heads of Terms.
- d) BCC to make a payment in the sum of £500 in full and final settlement to each UNISON member who was an employee of the Council working in the refuse service and was a UNISON member as at the date of the ballot 17th December 2018 in full and final settlement of all the industrial action, litigation, and threatened litigation issued by UNISON.

4.4 **ISSUES**

- 1) On 12th February 2019 Cabinet approved an offer to be made to members of the Unite Union to settle the current ET proceedings Bs v Birmingham City Council (Case Number 1305153/2018 & 271 Others). These are the employment tribunal claims that allege Unite members have been blacklisted and/or subjected to a detriment as a result of the settlement payments made to GMB members. The payment made to GMB members was made to settle

the legitimate claims that only GMB members had which arose out of an alleged failure to consult in 2017.

- 2) On 19 February 2019 Unite subsequently issued further employment tribunal claims *Bw v Birmingham City Council* (Case Number 1300839/2019 and 7 Others) also alleging that Unite members have been blacklisted and/or subjected to a detriment as a result of the settlement payments made to GMB members. The Council contends that these claims are out of time. The employment tribunal is likely to consolidate these claims with the claim already listed for hearing (*Bs v Birmingham City Council* (Case Number 1305153/2018) and so is not currently scheduled to be heard until February 2020. However, at a recent hearing on 8th March 2019, the Regional Employment Judge indicated that if settlement is not agreed by 26th March 2019, another pre hearing will take place with a view that the 10 day hearing will be expedited with a possible hearing in August/September/October 2019.
- 3) As set out in the Cabinet Report 12 February 2019:
 - a. The Council has express and/ implied statutory powers under S111 Local Government Act 1972 to make payments to union members to settle litigation.
 - b. The express power conferred by S222 Local Government Act 1972 'Power to prosecute or defend in court in the interest of the public' enables the Council to also to seek to settle litigation claims.
 - c. Having the powers to transact does not necessarily make it the right thing to do as this course of action carries with it a number of significant risks. There is no certainty as to whether a challenge on the grounds of Ultra Vires (UV) would be successful, the view of the Monitoring Officer is that the risk cannot be nil.
- 4) Payment 1a) and Payment 1b) for both Unite and UNISON as set out above (Clause 4.4.1 and 4.4.2) each carry a low risk of a successful Ultra Vires challenge. In respect of contagion and any likely claims for sex discrimination against the Council, each carries a different likelihood of risk and impact and these are discussed further in the Legal section of this report.
- 5) Through ACAS negotiations what became apparent is that settlement of the ET proceedings alone was not sufficient to bring an end to the industrial action or bring to an end further legal challenges and new industrial action.
- 6) Unite have stated that said that to end their industrial action 'parity' payments must also be made to Unison members on the same terms as payment to Unite members. This would effectively mean that any Unite settlement would be nullified and the payment made would not result in a back-to-work outcome.

- 7) The Council does not accept liability for the actions being brought by Unite against the Council. The volume and content of these claims however meritorious or otherwise, means that a settlement on a commercial basis in return for dropping these actions may represent the best value for money to our citizens and a way to end the current Industrial Action. It does not provide any guarantees about potential future action by the Trades Unions.
- 8) The Heads of Terms include undertakings that the employment tribunal proceedings are withdrawn and that Unite and UNISON agree to cease all current industrial action and withdraw all current and threatened litigation against the Council relating to this dispute.

5 Level of Payments

- 5.1 An offer was put to Unite on 28th February 2019 with two financial settlement proposals:
 - i) £3,000 for each valid Unite claim for settlement of the ET proceedings and
 - ii) £300 for each valid Unite claim in the Refuse Service for settlement of the industrial action and withdrawal of all the litigation against the Council. However, that offer was rejected.
- 5.2 Unite have insisted that to end their action and to stop the litigation and in particular their claim for an injunction to restrain a breach of the MOU 2017 in sending out mop up crews without a WRCO, the level of payment needed to be £500 per Unite member working in the Refuse Service.
- 5.3 Both Unite and UNISON have insisted that to end their industrial action and to stop the litigation against the Council, the level of payments needed to be the same for members of both trade unions. There are strong prospects that in the event of not settling a claim from Unison or proposing a lower settlement, that Unite members may choose not to cross a picket line thus effectively perpetuating industrial action.
- 5.4 The reasons for settling the ET claims of both Unite and Unison at these financial levels, resulting in the ending of the industrial action of both, are commercial rather than purely legal. This is not a figure upon which the Council's legal advisers can give an opinion although their views on the risks of such payment need to be weighed up by Cabinet bearing in mind members' personal fiduciary responsibilities and liabilities.
- 5.5 The commercial factors include the cost of the industrial action continuing, the likelihood that Unison would coincide their strike days with Unite, the increasing litigation and the threat of litigation from Unite and the significant impact of the continuing strike on the residents of Birmingham.

6 Factors in favour of making payments:

- a) There are strong commercial reasons, in favour of this level of settlement. The justification for any proposed settlement is wholly on commercial grounds based on the length of time it will take for cases to be heard before an employment tribunal and the increasing number of disputes, actions and litigations which Unite in particular are issuing against the Council. Whilst the base £3,000 payment will not change over time, the longer a settlement takes, the greater will be the secondary payment would need to be to close out these disputes and actions.
- b) At present, the fact that the earliest that an Employment Tribunal could hear the cases is February 2020 (though there is a good prospect that the hearing could be heard in the autumn 2019 if settlement is not reached by 26 March 2019). This means that the cost of the strike continuing is substantial and damaging to the City's finances.
- c) There is no certainty that the High Court would find in favour of the Council in the 'breach of MOU' proceedings to be heard during May 2019 and so bring the industrial action to an end.
- d) The significant impact of the industrial action is having on the citizens of Birmingham and the City's reputation.
- e) The cost of providing a contingency service during the industrial action is estimated to be in the range of £13.5m to £28.2m depending on whether the industrial action is discontinuous or continuous. This cost is based on a likely ET Claim hearing date of February 2020. The merits of defending the claims are good according to external legal advisors as set out in earlier reports. There is no certainty in litigation and a decision of the ET might be appealed by either party so continuing the industrial action. An expedited hearing in the autumn could reduce this financial exposure by up to 50% if the Council were to be successful at the Employment Tribunal however a losing party may seek to appeal and therefore extending the period of industrial action
- f) In February 2019, the Council successfully defended an application by Unite for an 'interim injunction preventing the Council from using mop up crews as part of its contingency arrangements. The full injunction hearing is due to be heard at the beginning of May. This litigation will be withdrawn by Unite should Cabinet approve the Heads of Terms and Unite sign the final Agreement. There is no absolute certainty that the High Court would find in favour of the Council in these proceedings.
- g) Unite have issued extensive and ever-growing litigation and disputes against the Council, as set out in the Legal Section (paragraph 9.9) of this report. Unite have also balloted for new Industrial Action based on the alleged breached of the MOU. The ballot closed on Friday 8th March and

the results were strongly in favour (more than 95%) of new Industrial Action including strike action.

- h) The Council does not admit liability in respect of any of the above proceedings. All proceedings will be withdrawn by Unite and Unison subject to Cabinet approval of the settlement terms and Unite and Unison signing a settlement Agreement.

7 Factors against making payments

- 7.1 A settlement payment may carry litigation and other risks which are further discussed in the Private Report.
- 7.2 A settlement does not guarantee that there will no further collective disputes from either Unite or Unison in Waste Management or further industrial action across the Council or further trade union litigation.
- 7.3 A payment could set a precedent in the Council such that other service areas in the Council (and potentially Council managed Schools) who are subject to changes in terms of conditions and/redundancy would expect a similar payment. Industrial action might be taken in these areas and only be stopped if a payment was made.
- 7.4 This could lead to an increase in industrial unrest, with union members choosing to strike in the hope of receiving a financial settlement and not because of specific issues leading to a trade dispute. Paying one union as against another union could lead to further industrial unrest; the union members not paid might argue that this amounted to a valid trade dispute entitling them to take industrial action.
- 7.5 The Council has received considerable specialist external legal advice from two QC's and a Senior Employment Barrister on the proposed terms and supported the City Solicitor with the drafting of the legal advice in this report. Regardless using legal means to resolve action, however strong a case appears to be, carries the risk of losing for unanticipated reasons.

8 Operational

- 8.1 Work to rule started on the 29th December 2018. The first full day of action took place on 19th February 2019.
- 8.2 On the 15th January 2019 Cabinet approved the contingency plan; this included the redirection of street cleansing operations and the use of external contractors.
- 8.3 To mitigate the impact of rising missed collections to residents, on the 18th February 2019 the Council temporarily moved to fortnightly domestic collections.

- 8.4 Enquiries to the contact centre has increased since the industrial action started rising from 214 calls per day to 1,030. With the contingency plan in full operation this has now fallen to around 600 calls per day.
- 8.5 Visitors to our Household Recycling Centres have continued to rise with a 135% increase compared to the same time last year. Tonnage presented to Household Recycling Centres has also increased by 80% compared to February 2018.
- 8.6 There are currently missed household waste collections throughout the city. The move to fortnightly waste collections has also seen an increased number of sacks presented alongside wheelie bins on the street.
- 8.7 If the recommendations are accepted, plans will be put in place to clear the streets of all uncollected rubbish. These plans will include;
- a) The use of one off overtime for both collection teams and street cleansing crews. This will take place over the weekends of 16th and 17th and 23rd and 24th March.
 - b) Weekly waste and fortnightly recycling collections will recommence 18th March 2019.
 - c) The external contractors will be stood down and the mop up crews which were collecting dropped work will cease on 29th March 2019.
 - d) The bulky waste collection service will reopen for bookings, week commencing 25th March 2019.
 - e) Street cleansing operations will return to their regular schedules.

9 Consultation

- 9.1 The Leader, Deputy Leader and Cabinet Members have been briefed on the Options set out in the Public report.
- 9.2 The Chair of Overview and Scrutiny Housing and Neighbourhoods has agreed that as this report is not on the Forward Plan and the subject matter is likely to be a 'key decision' and due to the matters set out in this report it is impracticable to defer the decision and has agreed that the matter is urgent and cannot be reasonably deferred to another meeting.
- 9.3 The District Auditor has been provided with a copy of this report and the draft Heads of Terms. The views of the auditor are an important consideration which should be given due weight in any Cabinet decision. The District Auditor's comment are shown at Appendix 5.
- 9.4 The Birmingham Independent Improvement Panel has been provided with a copy of the Public and Private report for the Cabinet meeting on 15th March 2019.

10 Risk Management

- 10.1 There are significant environmental, financial, operational and reputational risks associated with industrial action. The risks of not mitigating the industrial action would be as follows
- a) Significant financial costs - cost of contingency crews
 - b) Significant operational issues – missed collections and impact on service delivery for residents.
 - c) Significant reputational issue – missed collections and impact on service delivery for residents
 - d) Mitigating these operational risks was discussed in the Cabinet Report 15th January 2019.
- 10.2 Analysis of the legal risks against each of the items under the Heads of Terms is set out in Appendix A in the Private Cabinet Report 15th March 2019.

11 Compliance Issues:

- 11.1 These proposals support the City Council priority of being a great city to live in by keeping the streets free from unnecessary domestic waste and meeting its statutory responsibilities.

12 Legal implications

- 12.1 As set out above and as set out in the Private Report and:
- 12.2 The Council has express and/ implied statutory powers under S111 and/or S222 to make payments to Unite the Union and or UNISON members.
- 12.3 Unite members have issued employment claims in the Birmingham ET alleging that the Council has subjected their members to detriment for whistleblowing, for trade union activities, and has blacklisted them. The Council is vigorously defending these claims.
- 12.4 The hearing date when this claim will be considered at the Birmingham ET is currently listed for February 2020.
- 12.5 The power conferred by S222 Local Government Act 1972 'Power to prosecute or defend in court in the interest of the public' enables the Council to also to seek to settle claims. 12.6The Cabinet Report 12th February 2019 referred to employment tribunal proceedings issued by Unite 'Bs. v Birmingham City Council and Others (Claim Number 1305153/2018)'. The hearing date for this employment tribunal claim is currently listed to start on 3rd February 2020. On 31 January 2019, the City Solicitor asked the Regional Employment Judge to consider an expedited hearing date in view of the significant financial implications for the Council and the impact for residents of the industrial action.

- 12.6 A Pre-Hearing took place on 8th March 2019. At that hearing, the Regional Employment Judge indicated that if settlement is not agreed by 26th March 2019, another preliminary hearing will take place with a view that the 10 day hearing will be expedited with a possible hearing in August/September/October 2019.
- 12.7 Unison has also issued employment tribunal claims (Ds v Birmingham City Council and 18 others) alleging that the Council has subjected their members to detriment for whistleblowing, for trade union activities, and has blacklisted them. These claims have not yet been listed in the Employment Tribunal for hearing however it is the view of the City Solicitor and Counsel that the ET may direct that these claims should be heard with the Unite ET claims in February 2020, as they are based on similar facts.
- 12.8 Unite have issued or threatened extensive litigation against the Council, as set out below:
1. High Court, Queen's Bench Division (under claim number QB2019-00042) against BCC, alleging breach of the Order settling the proceedings in the High Court under Claim Number HQ17X03282 ("the MOU Proceedings"); these are the proceedings alleging that every mop-up crew requires a WRCO.
 2. Mr Bs and other Unite members in the Birmingham Employment Tribunal under Claim Number 1305153/2018 and others (Multiple No 9438) (the "Bs Proceedings").
 3. Mr Bw & Others v Birmingham City Council (Case Number 1300839/2019 & 7 others (the Bw Proceedings').
 4. Early Conciliation notification to ACAS of claims alleging Trade Union discrimination based on refusal of Annual Leave.
 5. Mr Bn & Others v Birmingham City Council Case Number 1300558/2019 (the Bn Proceedings') relating to Trade Union discrimination for Agency Workers and refusal of recruitment.
 6. An Action for Judicial Review based on use of Contingency crews.
 7. An alleged claim for defamation.
 8. An alleged claim for refusal of leave request outlined in Thompson Solicitors letter of 29 January 2019 and the subject to ACAS early claim conciliation for 355 people notified on 25 February 2019.
- 12.9 The cost of defending the litigation above is likely to be c£500,000 not including any costs awarded against the Council if the Council was unsuccessful in defending these claims. (although costs will not be awarded against the Council in the employment tribunal).

- 12.10 A losing party to the litigation might be able to appeal to a higher Court and that process from application to the higher court and subsequent hearing could take up 12 months, i.e. 2021.
- 12.11 It is not unreasonable for an employer to seek to settle litigation for commercial reasons.
- 12.12 A subsequent ruling in the High Court litigation or the Employment Tribunal about who is right and who is wrong might have the practical effect of determining the wider industrial dispute; however, that is not a certainty.
- 12.13 The Council will need to consult with the corporate trade unions where the non-payment proposals set out in the Heads of Terms of Unite and UNISON that has an impact on the workforce of waste management. The Consultation summary is at Appendix 4. If those employees are not represented by a union for the purposes of consultation, then the Council should ensure that it has made arrangements to consult with these individuals also. It should be noted that nontrade union employees have the right not to be subjected to a detriment that has the impact of pressurizing that employee to become a member of a trade union.
- 12.14 For the purposes of collective bargaining on any changes impacting on council wide terms and conditions, union and non-union members are represented by the collective corporate trade unions and consultation for council wide changes occurs at corporate trade union meetings. Where the proposals only impact on service or specific terms and conditions, then collective consultation occurs more locally.
- 12.15 However, it is important to remember that for the purposes of the payments outlined in this report to settle industrial action – claims and ACAS negotiations have occurred for Union specific issues, which are not council wide or representing a whole service. This is different to collective consultation as described above.

13 Financial implications.

This section looks at the settlement costs which is the principal topic of this report as well as the total cost to the Council of the current period of Industrial Action.

The justification for any proposed settlement is based almost wholly on commercial grounds based on the length of time it will take for cases to be heard before an employment tribunal and the increasing number of disputes, actions and litigations which Unite in particular are filing. Whilst the base £3,000 will not change over time, the longer a settlement takes, the greater will be the second payment needed to close out these disputes and actions.

13.1 Cost of Settlements with Unite and Unison

1. The cost of the proposed settlement with Unite and Unison is shown at table 1 below and is estimated at £1.783m.
2. The cost for each union is broken into 2 elements : a part payable to each valid claimant (a valid claimant is set out in the offer) in order to settle litigation and a part to settle all other disputes, litigation, industrial action and claims.
3. The cost of settling Unite claims is £1.673m. This will involve settling around 280 valid litigation claims (the final number may be marginally lower) and the cost of settling all other action for around 355 members (which includes the 280 litigants)
4. For Unison, with only 19 members, the cost of £110,000 is clearly much lower but again, divides into the two elements
5. Unlike GMB claims which were punitive payments free of tax and national insurance, in order to pay a net amount to individuals in Unison and Unite, BCC will need to 'gross up' payments and meet the cost of employers' national insurance.

Table 1 Cost of the proposed settlement with Unite and Unison

Cost of Proposed Refuse Collection dispute settlement	UNITE		UNISON	
	Cost per person £	Cost per person £	Cost per person £	Cost per person £
Gross Payment to the individual	£4,411.76	£735.29	£4,411.76	£735.29
Basic Rate Tax 20.0%	-£882.35	-£147.06	-£882.35	-£147.06
Employees National Insurance 12.0%	-£529.41	-£88.24	-£529.41	-£88.24
Net Payment to the individual*	£3,000.00	£500.00	£3,000.00	£500.00
Add Employers National Insurance 11.8%	£520.59	£86.76	£520.59	£86.76
Cost to BCC (Payment not pensionable)	£4,932.35	£822.06	£4,932.35	£822.06
Claimants	280	355	19	19
	£1,381,100	£291,900	£93,800	£15,700
	Total Unite	£1,673,000	Total Unison	£109,500
	Total Cost	£1,782,500		

6. The cost to BCC in respect of circa 299 valid Unite and Unison litigants receiving a net £3,000 is £4,932.35 assuming that the individual is a basic rate taxpayer with no complex tax circumstances. Similarly, the cost to BCC of 374 valid Unite and Unison members receiving a net £500 is £822.06 using similar assumptions. All efforts will be made to structure the

arrangement in a manner which meets HMRC rules for a tax treatment similar to those made to GMB although this cannot be guaranteed.

7. The payment is assumed not to be pensionable. However, should an individual wish to make this payment pensionable, they could choose to do so through a 16.8% reduction in the gross payment to meet the Employer's Pension liability at no net cost to the Council. The employee would, in such circumstances, meet their own Employee pension deductions.
8. It is not planned to make payments to non-Union members as this payment settles litigation and disputes and is not a compensation payment of any sort.
9. Settlement is not without its risks. Ultra Vires, Contagion and the potential for Sex Discrimination claims all represent risks which, if they materialise, could have significant financial implications. These risks have been discussed at length with Cabinet members including QC briefings
10. There is no budgetary provision for these settlement costs and financial provision will need to be met from underspends or ultimately, if this is insufficient, from reserves at the year end.

13.2 Total cost to the Council

11. The total cost to the Council of current Industrial Action and strikes by Unison is made up of 3 main elements; the cost of contingency place during periods of action, the cost of settlements and legal costs
12. Cost exclude the considerable amount of senior officer time (other than Legal Services) expended over the last 9 months in mediation, negotiation, litigation and briefing member, report production etc.
13. These costs are estimated to be in the region of £5.845m and exclude areas of financial risk highlight in this section of the report. Costs are summarised as follow

Cost of Contingency Arrangements to cover periods of Industrial Action and Strike Action	£2.612m
Cost of Settlement proposals (Detailed in section A above)	£1.783m
Legal costs	£1.450m
Total	£5,845m

These 3 elements are itemised below.

13.3 Cost of Industrial and strike action.

14. Direct costs for the industrial and strike action from 29th December 2018 to 15th March 2019 will amount to £2.612m covering the cost of waste collection.
15. Indirect costs due to the industrial action include lost income from Paper recycling amounting to £0.174m. These is a strong risk that these will escalate as set out below.
16. The cost of industrial action does not include a number of areas which currently cannot be quantified until the final waste collection service reverts back to the normal collections. These costs include, increased tonnage sent to Landfill as part of the waste disposal process, loss in confidence in waste collection services for Bulky Waste, Trade waste and Green waste
17. The table below sets out the chronology of event and associated costs during this period.

Date	Status	Collection approach	Additional Resource	Impact
29 th December 2018	Action short of industrial Action	Maintained weekly residual collections fortnightly recycling cover reported dropped roads	Existing Mop up 4 x crews 10 Crews (7 days per week)	Missed collection were rising
18 th February 2019	Partial Strike (2 days per week)	Fortnightly collections on all waste streams	Existing Mop up 4 x crews 20 crews (7 days per week)	Missed collections reducing. Current outstanding roads are 50
14 th January 2019	n/a	Bulky Waste service suspended (due to re-start)	Existing 3 Bulky Waste Crews diverted to sack collections	Minimise missed collections

18. The Incremental costs for the Industrial action short of strike amounted to £0.134m per week.
19. For a partial (2 days per week) strike action, there was a requirement to increase the level of support on collections from 24th February 2019 the costs increased to £0.266m per week (approx. £350,000 direct cost less 2 days wages saved).
20. Should this escalate to full 5 day action with similar numbers of strikers, the direct costs would rise to circa £0.665m per week (£0.875m direct costs less £0.210m wages saved).

21. The direct costs quoted above cover the contractor costs based on number of crews and days per week they are commissioned, as well as the access to car parking for the additional waste collection vehicles.
22. Additional cost implications are to be calculated as a direct consequence of the industrial action for increased tonnage for land fill disposal. The loss of income on paper recycling is estimated as minimum, £0.174m.
23. Due to a lack in confidence in the waste collection service and the suspension of some services the following areas have been impacted with identified financial risk £0.745m.
 - a. Bulky Waste Income – The suspension of the service from January 2019 sales income has reduced from this time last year by £0.111m.
 - b. Garden waste subscriptions have reduced from 60,000 to 46,400 year on year resulting in £0.544m variance, efforts to improve take up of this service will continue over the next 6 months.
 - c. Trade contracts lost and those that have given notice amount to £0.090m

13.4 Costs of the settlement

24. These costs are set out in section A above and amount to £1.783m

13.5 Legal costs

25. Over the course of the Industrial Action, the Council has incurred significant internal and external legal cost in advising on, defending and prosecuting legal actions.
26. The internal resources of the in house team has been supplemented by specialist external Counsel advising on Industrial Relations law and other aspects.
27. Anticipated costs are as follows

Outsource Partners (est)	£162,300
Legal costs (costs awarded against BCC)	£368,000
Counsel fees	£604,900
Costs in favour of BCC	£-30,000
Disbursements (third party costs)	£311,300
Provision for unbilled costs	£33,500

Total	£1,450,000
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28. This represents the total cost to date for dealing with both the industrial action in August 2017 and resulting litigation and the current industrial action and litigation (which includes some anticipated costs depending on the outcome of this industrial action)

29. There is no budgetary provision for these settlement costs and financial provision will need to be met from underspends or ultimately, if this is insufficient, from reserves at the year end.

30. settlement is being made in the full knowledge by Cabinet of the risks that it brings for significantly greater costs should any party challenge successfully on grounds such as Ultra Vires, Contagion or Sex Discrimination.

31. Members are reminded of their personal Fiduciary duty to the residents and taxpayers of Birmingham and the need to balance the pragmatism of a short term solution and the immediate avoidance of the Impacts of Industrial Action against the longer term much greater cost risks that could potentially arise from para 33 above.

32. The Chief Finance Officer, Monitoring Officer and Chief Executive supported by specialist QCs have spent an extensive amount of time with Cabinet setting out these risks.

33. In recommending this settlement, members do so from a well informed position.

14 Human Resources Implications

- 14.1 The Council has demonstrated its commitment to bringing the industrial action to resolution on behalf of the citizens of Birmingham, utilising the services of ACAS to assist.
- 14.2 The Council remains committed to ensuring that lawful industrial action is able to progress unimpeded and also to maintaining employee relations.
- 14.3 Trade union meetings will continue, led by officers in the waste management service with the local joint trade unions on local matters, and with the council wide trade unions, led by the HR Director on a council wide basis.
- 14.4 The Joint Service Improvement Board (JSIB) will reconvene to discuss and monitor progress and the implementation of any proposed changes. The JSIB increases the level of employee engagement to help minimise any future risk of dispute.

- 14.5 During industrial action the Council will continue to manage the performance of the refuse collection workforce in accordance with current protocols.
- 14.6 Efforts to improve performance and deliver change, however minor, in the refuse collection service of the future could be thwarted by further industrial action, which may become an impediment to delivering a value for money service. The expectation being a payment reward and reversed managerial decision in return for clean streets for our citizens.
- 15 Director of HR**
15. BCC will need to consult with the collective trade unions on any council wide proposed amendments to current council policy or protocols, to ensure that there has been meaningful consultation with each trade union representing employees across the Council.
- 15.2 Trade Union consultation is taking place on a local level for the waste management service, and on a corporate level for any council wide proposals. TU meetings with both local and council wide trade unions will continue to discuss matters as outlined in this report.
- 15 .2 Such proposed payments (as laid out in this report), could make future service transformation more difficult and may lead to future industrial action, which could also impact on delivery of efficiency savings across the Council.

Statutory Officers

16 Chief Finance Officer

- 16.1 The Council has a fiduciary duty to the taxpayers of Birmingham which extends both to probity and value for money – decisions should be taken having considered these factors. There are no straightforward options – each carries benefits and risks.
- 16.2 Extended industrial action, regardless of outcome, carries with it a high financial cost and operational and reputational damage. This is a strong commercial factor in considering available options to manage industrial action.
- 16.3 Whilst efforts are being made to secure an earlier hearing, and the Council's defence is considered strong, the cost of prolonged action and impacts on other service proposals would, if such a case were lost, the cost of the industrial action would be extremely damaging to the Council's financial stability. If the Council wins the Employment Tribunal, the Council would be able to claim the legal costs incurred in defending the litigation.
- 16.4 The making of a payment to Unite members under ACAS COT3 arrangements to settle litigation would be done under existing powers and does not present a legal risk although the possibility of an Ultra Vires challenge remains a risk. As such, it is unlikely that I would consider a Section 114 notice as long as

payments were within the recommendations in this report or supported by an evidenced commercial justification. However, the longer term impacts, including those related to future service transformation and indeed the risk of further industrial action could themselves lead to significant financial consequences and value for money issues

- 16.5 No route provides a simple answer and there are considerable risks associated with each but it is important that Cabinet ensure that it understands the risks and is able to justify a decision based on the impartial advice of its statutory officers.
- 16.6 Taking all of the risks into account alongside the ongoing costs of prolonged strike action, the making of a settlement payment at the quoted values is proportionate and lawful but not without risks.

17 Monitoring Officer

- 17.1 A challenge to a decision to make the payments to members of the Unite the Union and to members of UNISON if there is going to be a challenge it is likely to be made on the grounds that it is ultra vires. It is necessary to consider the factual circumstances and apply the law on ultra vires to those circumstances to determine if a likely challenge would be successful or not. That risk assessment is set out in the Private report.
- 17.2 In broad terms, an action will be ultra vires if the decision-maker has no power to make that decision, or even if it has a power to make it, it does not act in good faith, it takes into account irrelevant considerations, it does not take into account relevant considerations, or the decision is manifestly unreasonable in the sense that it is one which no reasonable decision-maker could make.
- 17.3 In reaching their decision on a preferred option as an alternative to that reached on 15th January 2019 and 12th February 2019, Cabinet are strongly advised to address their mind to all the relevant issues, act in good faith in reaching their decision, not base their decision on grounds of bias or pre-determination and not base their decision on irrelevant issues. In doing so Cabinet should ensure that they have read and considered the matters and issues raised in this report and the Private report and also the Public and Private Cabinet reports 15th January 2019 and 12 February 2019.
- 17.4 As the Council's Monitoring Officer: the statutory duty under section 5 and section 5A Local Government and Housing Act 1989 is summarised as being a duty to report to the Council in any case where I am of the opinion that any proposal, decision or omission of the Council, its committees or subcommittees or anyone employed by the Council is, or is likely to give rise to illegality or breach of statutory code or constitute maladministration.

- 17.5 Whilst I am of the view that there is no certainty as to whether a challenge on the grounds of Ultra Vires (UV) would be successful, I cannot say that the risk is Nil. The payment proposals in the Head of Terms for either union, each carry UV risks, however, each is different in terms of likelihood of risk and impact of risk. They also carry other risks that the payment does not protect against future union action in waste, across the Council or claims from members of other unions and of claims from the female dominated workforce in the Council.
- 17.6 There can be no guarantee that a challenge to a decision of Cabinet would seek to demonstrate that one or more considerations was legally irrelevant, or that a legally relevant consideration had been overlooked; however this report and the Private report and the Public and Private Cabinet reports 15th January 2019 and 12th February 2019 contain a summary of a number of considerations that it is unlikely that a court would find to be irrelevant, or that omitted relevant considerations.
- 17.7 Whilst I am of the view that there is no certainty as to whether a challenge on the grounds of Ultra Vires (UV) would be successful, I cannot say that the risk is Nil. The payment proposals in the Head of Terms for either union, each carry UV risks, however, each is different in terms of likelihood of risk and impact of risk. They also carry other risks that the payment does not protect against future industrial action in waste, future industrial action across the Council or claims from members of other unions and of claims from the female dominated workforce in the Council.

Settlement of ET Claims - UNITE

- 17.8 Settlement of the employment tribunal litigation under ACAS COT3 arrangements would be done under statutory powers as referred earlier in this report. That in itself does not present a risk.
- 17.9 There is no appreciable risk that the council acted other than in good faith in order to bring the industrial action to an end for commercial reasons due to the significant financial and reputational risks. The Cabinet reports 12th February and these reports (public and private) set out relevant factors in regarding making such a payment.
- 17.10 In terms of whether a decision to settle the ET Claim and for the Council to make a payment to Unite and UNISON members, relevant factors in favour of making that payment are that :
- a) the strike progressing until at least February 2020 is prohibitively costly, significant and
 - b) increased resident disquiet is probable with increased waste accumulating

- c) including significant reputational damage at a time when the Council is under public and government scrutiny is making significant improvement journeys in all service areas.

17.11 On the other hand, factors against making the payment are that other risks are created, such as contagion issues across the Council, allegations of trade union discrimination from other Unions and potential sex discrimination challenges from other service areas that are also in dispute with the Council. As set out in the Cabinet report 12th February 2019, the likelihood of such claims is low so unlikely, but cannot be ruled out and the impact if claims were successful, would be low to medium.

Settlement of ET Claims UNISON other litigation and withdrawal of industrial action – Unite and Unison

17.12 The Council's proposal to each the members of Unite/UNISON is to make a payment in the sum of £500 to each Unite/UNISON member who was a Unite/UNISON member and employed in the refuse collection service as at a defined date , in full and final settlement all the industrial action, litigation, and threatened litigation issued by Unite.

17.13 Making a payment to members of Unite and members of UNISON to withdraw other litigation and cease current Industrial action presents a risk in terms of UV.

17.14 The risk of an Ultra Vires Claim is low. It will be difficult to argue that making payment to settle the ET claims and all the industrial unrest would be a manifestly unreasonable decision that no reasonable authority could make. Although the risk is low it cannot be said to be nil. This risk increases if the payment is not limited in accordance with the current Heads of Terms

17.15 Such payments would be done under statutory powers as referred to earlier in this report. That in itself does not present a risk.

17.16 In terms of sex discrimination and contagion risks, I describe the risk of claims as medium, and if such claims are subsequently successful for the claimants, then the impact across the Council is assessed as ' low to medium 30 - 50%.In analysing all the risks proposed under the Heads of Terms, this is discussed further in the Private Report.

17.17 It is unlikely that I would need to consider reporting to Council if a decision is taken to approve the payments to Unite and UNISON provided the payments were within the recommendations in this report and evidenced by a strong robust commercial justification

18. District Auditor

18.1 It is a matter of practice that an auditor will see a legal opinion where an issue comes before him/her which involves a council potentially take a decision which might be deemed Ultra Vires.

- 18.2 The Auditors powers are set out in the Local Audit and Accountability Act 2014. The Act provides for an external auditor of a local authority to issue a Notice under schedule 8 of the Act. The issue of such a Notice requires a local authority to put a decision on hold and reconsider it if he/she considers the authority is about to make or has made a decision which involves or would involve the authority incurring unlawful expenditure or is about to take or has begun to take a course of action which, if followed to its conclusion, would be unlawful and likely to cause a loss or deficiency, or is about to enter an item of account, the entry of which is unlawful.
- 18.3 The District Auditor has reviewed the proposed settlement and taken independent QC advice. This is attached at Appendix 5
- 18.4 Nothing in the District Auditor's advice invalidates the recommendations in this report but it does re-confirm the risks and issues brought out in this report by the Council's Statutory Officers. Members are strongly advised to take careful note of this advice in arriving at a decision.

19. Public Sector Equality Duty

- 19.1 The requirements Council's Equality Policy and the Equality Act 2010 policy will be specifically included as part of any implementation of any decision.

20 Appendices

- 20.1 Appendix 1 - Chronology of ACAS talks - Unite Industrial Action
- 20.2 Appendix 2 – Heads of Terms UNITE
- 20.3 Appendix 3 – Heads of Terms UNISON
- 20.4 Appendix 4 - Consultation Summary
- 20.5 Appendix 5 – District Auditor Independent QC Advice

21 Background Documents

1. Cabinet Report (Public) 15th January 2019
2. Cabinet Report (Private) 15th January 2019
3. Waste Contingency Plan- updated (January 2019)
4. Cabinet Report (Public) 12 February 2019
5. Cabinet Report (Private) 12 February 2019
6. Waste Management- Industrial Call In by the Co-ordinating O&S Committee
7. Cabinet Report (Public) 8th March 2019
8. Cabinet Report (Private) 8th March 2019

Appendix 1

Chronology of ACAS Talk and Key events – UNITE Industrial Action - as at 6th March 2019

Date	Event
9 November 2018	Unite issue 272 claims for blacklisting in the Birmingham Employment Tribunal (<i>B and others</i>)
23 November 2018	Unite issue notice of intention to ballot for Industrial Action over “secret payments”
30 November 2018	Unite ballot opens
10 December 2018	UNISON issue notice of intention to ballot for IA over “secret payments”
14 December 2018	Unite ballot closes – confirm IA short of strike from 29 December 2018
17 December 2018	Unite issue 2 further employment tribunal claims for blacklisting in ET (<i>S and others</i>)

20 December 2018	ACAS talks
29 December 2018	Unite begin IA short of strike
8 January 2019	ACAS talks
8 January 2019	UNISON ballot closes – confirm IA short of strike from 25 January 2019
15 January 2019	Cabinet approve proposal to seek injunction for unlawful IA
16 January 2019	ACAS talks
18 January 2019	B & Others preliminary hearing, final hearing listed for 3 – 14 February 2020
21 January 2019	ACAS talks
23 January 2019	ACAS talks
24 January 2019	ACAS talks
28 January 2019	Unite issue 355 claims with ACAS for refusal of leave (<i>S and others</i>)
30 January 2019	ACAS talks
4 February 2019	Unite confirm series of one day strikes from 19 February 2019
6 February 2019	High Court injunction application issued by Unite for “breach of MOU”
12 February 2019	Cabinet re-approve proposal for injunction for unlawful IA
13 February 2019	High Court hearing for “breach of MOU”
14 February 2019	High Court judgment – injunction not granted
15 February 2019	Unite issue 20 claims for blacklisting agency workers (<i>Broughton and others</i>)
15 February	Unite issue notice of intention to ballot for new IA for “breach of

2019		MOU"
19 February 2019		Unite begin series of one day strikes
19 February 2019		Unite issue 8 further employment tribunal claims for blacklisting in ET (<i>Benbow and others</i>)
20 February 2019		Special Cabinet re-approve proposal for injunction following request for call in
20 February 2019		BCC issue High Court injunction application for unlawful IA
21 February 2019		ACAS talks
22 February 2019		Unite ballot opens
25 February 2019		ACAS talks
26 February 2019		ACAS talks
26 February 2019		UNISON issue 19 claims for blacklisting in ET (<i>Danks and others</i>)
27 February 2019		ACAS talks Council sends to Unite formal offer to settle .
28 February 2019		High Court hearing for "unlawful IA"
1 March 2019		High Court judgment – injunction not granted
4 March 2019		ACAS talks Unite send to Council formal offer to settle