

Birmingham City Council

Report to Cabinet

23 June 2020



Subject: Birmingham City Council ICT staff delivering services to Schools currently seconded to the Capita contract.

Report of: Birmingham City Council – Director of Digital and Customer Services

Relevant Cabinet Member: Deputy Leader, Councillor Brigid Jones
Councillor Tristan Chatfield

Relevant O&S Chair(s): **Cllr Sir Albert Bore, Chair, Resources O&S Committee**

Report author: **Dr Peter Bishop**
Director, Digital & Customer Services
Tel: 0121 675 5762 Mobile: 07864 926819
Email: peter.bishop@birmingham.gov.uk

Are specific wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s): Birmingham City Wards		
Is this a key decision?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, add Forward Plan Reference: Revenue spend, potentially involve entering into new commitments in excess of £500,000, (gross value).		
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
If relevant, provide exempt information paragraph number or reason if confidential.		

Executive Summary

- 1.1 This report follows from a report and a decision made on the 16th April 2019. The recommendation was made at that time, that the Schools IT Support team (Link2ICT) should transfer to Capita's School business, Entrust Support Services Ltd (Entrust). This was agreed as part of the partial termination and negotiation of the IT Services outsourcing Contract with Capita that provided significant savings to BCC.
- 1.2 The intention of the report was that staff would transfer to Entrust with an Admitted Body Status (ABS) pension scheme, under the arrangements for the Local Government Pension Scheme (LGPS).
- 1.3 On the request of BCC an application was made by Entrust to the West Midlands Pension Fund (WMPF) for an ABS scheme.
- 1.4 The WMPF responded to accept the application up until the 31 March 2021 but would not commit to admission beyond then.
- 1.5 Entrust have since taken advice that asserts that the ABS pension arrangements cannot be established for the staff in this team. Trade Unions have raised considerable concerns regarding this.
- 1.6 Birmingham City Council's (BCC) external legal advice (from Gowling WLG (UK) LLP), has been that this is a very unusual circumstance and that the law is not precise. If there is a will from all parties (Entrust, Capita, BCC, the WMPF, the Trade Unions and the Staff) to make ABS work, there is precedent to suggest that this may be achievable in law. We have explored possible approaches together and Entrust and Capita are however no longer willing to consider any avenue for ABS.
- 1.7 Capita is proposing that the affected employees will TUPE to Entrust with all the agreed measures including the Capita Defined Contribution (DC) pension scheme. This DC pension scheme is comparable to many schemes available in the market for private sector employees and relatively generous in the employer contributions. The employees do not have a protected entitlement to the LGPS in regard to this TUPE transfer.
- 1.8 There is considerable disquiet amongst the Link2ICT staff regarding this. However, BCC is restricted by what the law requires and what the new employer (Entrust) is willing to apply for.

2 Recommendation

- 2.1 That Cabinet approves the transfer of staff to Entrust with the future employers DC pension scheme on the 1st April 2021.

3. Background

- 3.1 As part of the insourcing of the Capita IT&D service, there was a Plan to transfer the staff who deliver Schools services to Entrust Support Services Ltd (a joint operation between Capita and Staffordshire County Council) on 1 August 2019. This is because Entrust is best placed to compete in the Schools market; BCC would not have the skills, processes or investment to compete in this market and disruption to those services and schools would be minimised. This plan was agreed with Cabinet on 16th April 2019.
- 3.2 This team is known as “Link2ICT” and includes 19 affected members of staff, 17 of whom are now part of the pension considerations set out in this paper.
- 3.3 The Cabinet Paper of 16th April 2019 states in section 7.5.7 that “Subject to Cabinet approving Option 1 in this report, and subject to consultation, the 24 BCC staff [now 19] currently seconded to Capita as part of LINK2ICT will transfer from the Council to Capita. The proposed transfer date is yet to be agreed with Capita. Capita have admitted body status to the West Midlands Pension Fund.” This does imply that staff will be receiving an ABS pension after TUPE. Staff of Capita and Entrust and officers of BCC acted in good faith at that time on that assumption. Capita did have an admitted body arrangement for staff that originally TUPE transferred to Capita in 2006 at that time. For the avoidance of doubt the admission to the WMPF was on the basis of as a closed admission agreement which means that only those employees who were transferred to Capita would remain members of the WMPF. The Seconded Employees were able to remain members of the WMPF on the basis that BCC was a scheme employer for the purposes of the LGPS Regulations. Capita has never been an admission body in relation to the Seconded Employees. The original TUPE Agreement, which for the avoidance of doubt does not include the Seconded Employees, ended on 31st July 2019.
- 3.4 Trade Unions are prepared to accept the current measures document with a ‘pending’ status on the discussion of an acceptable pension offer (which is deemed comparable). They are of the view that this is a fair way for all parties

involved to try and resolve the pension issue. Although the exit negotiations included apparent promises that Entrust would offer an ABS scheme, following the TUPE transfer from Capita to BCC on 1 August 2019, Entrust advised that they would only offer a DC pensions scheme. External legal advisers were consulted at this stage and it became clear that there was no contractual obligation to force Entrust to gain ABS through the WMPF.

- 3.5 The Best Value Authorities Staff Transfers (Pensions) Direction 2007 applies to best value authorities in England, of which Birmingham City Council is one. The Direction refers to pension protection for an employee of the authority that transfers in respect of a contract or a subsequent contract for the provision of the service. Entrust maintain that as there is no TUPE in connection with the provision of outsourced services then the Best Value Direction does not apply. The employees do not have a protected entitlement to the LGPS in regard to this TUPE transfer. In any event the Best Value Direction is an obligation on Local Authorities and not Entrust. Legally, Entrust cannot be compelled to offer ABS.
- 3.6 Staff were not satisfied with the DC pension offer and the Trade Union raised a formal Trade Dispute and lodged a collective grievance which could have led to industrial unrest.
- 3.7 Following ongoing consultation and negotiation, and at BCC's request, Entrust made an ABS application to the WMPF on 18th December 2019. The response from the WMPF was received on 16 March 2020 and was clear.
- 3.8 WMPF advised that "the Admission Agreement will be drafted to cover the period from February 2020 to March 2021". However, the Fund could not commit to Entrust remaining an Admitted Body after 31 March 2021. Despite the assurances provided in a cover letter prepared by Entrust and BCC in support of the ABS application, the WMPF confirmed that it was not clear that Entrust would satisfy the requirements under the LGPS Regulations 2013 to be an Admitted Body after March 2021. The WMPF stated that it would agree to consider the position closer to the time and potentially extend the Admission Agreement beyond March 2021 if arrangements were in place at the time to support this.
- 3.9 However, even if admission to the WMPF was permissible, there would be logistical complications. There would be particular problems from 1 April 2021 (when the remaining contract with Capita finishes) for WMPF, Entrust and Capita to manage, if there was an ABS arrangement in place. Entrust has staff from

many contracts and from direct recruitment, to support a service delivered to schools across the country. If Entrust staff with a WMPF ABS pension could only be allocated to work on Birmingham Schools, the team would be divided and Entrust could not manage their business efficiently.

- 3.10 Entrust subsequently withdrew their application to the WMPF on 9th April 2020. Entrust further advised that they “will not be pursuing any further investigation into arranging an admission agreement to the WMPF in respect of the transferring employees as they are not eligible to remain active members of the LGPS post transfer.”
- 3.11 It is only following the response from the WMPF and then Entrust withdrawing the application on 9th April 2020, that it has become clear that admission to WMPF by Entrust submitting an ABS application to gain access to LGPS is no longer viable for the Link2ICT staff. This changes the recommendation previously brought to members which forms the requirement for this report.
- 3.12 The Trade Unions are disputing the assertion that ABS is not viable. However, there is no legal obligation on Entrust to provide a transfer on the LGPS or any other comparable pension scheme.

4 Options considered and Recommended Proposal

- 4.1 Throughout these negotiations, officers have been seeking to find alternative solutions to the pension problem. For an option to work it needs to be accepted by both Entrust, Link2ICT staff and BCC. The following options were reviewed:
- Option 1 - TUPE transfer to Capita with access to the WMPF (the previous agreed option as per the Cabinet decision in April 2019);
 - Option 2 - TUPE Transfer to Capita with access to the Capita DCS scheme;
 - Option 3 - Create a new secondment agreement;
 - Option 4 - Create a new BCC ICT service for schools; or
 - Option 5 - End the secondment agreement with Capita and all staff return to BCC.
- 4.2 The only viable option to the future employer (Entrust) and the current (BCC) is the TUPE transfer of staff against the agreed measures which includes the new Employers DC pension scheme (option 2 as per 4.1 above). If employees

object to the TUPE to Capita and cannot find a role within BCC, they will be deemed to have resigned and their contracts of employment terminated. If the transfer date is extended to 1 April 2021 all affected employees will have 40 weeks from 23 June 2020 to apply for any vacancies within BCC through BCC's recruitment and selection process.

5 Timing

- 5.1 Although it is legally feasible to make the TUPE transfer at any time between 1 August 2019 and 1 April 2021, the current proposed date for the transfer is 1st April 2021, subject to an amicable/workable resolution being reached in respect of any issues being raised.
- 5.2 Trade Unions would like to ensure that the transfer date remains as 1st April 2021, this gives maximum time to apply for jobs within BCC.
- 5.3 If the staff and Unions do not accept a transfer on the DC scheme, Entrust have indicated that they will not agree to deferring the transfer date from 1 August 2020 to 1 April 2021. Negotiations are currently on-going in this regard.

6 Consultation

External citizen consultation has not been required for this internal staffing matter. Staff consultation is discussed below under HR Implications.

7 Risk Management

- 7.1 The financial risks to transferring with the LGPS appear at 8.4 below.

8 Legal Implications

- 8.1 Officers of legal services, in conjunction with external lawyers at Gowlings, have been involved with discussions between IT&D, Capita and Entrust in respect of the application to the WMPF and the TUPE transfer. Pension law expertise from Gowlings was engaged as part of the negotiations.
- 8.2 The application to the WMPF for ABS could only have been made by Entrust as the candidate Admission Body employer. The decision that this application is not legally viable is made by Entrust.
- 8.3 The position from the WMPF regarding ABS eligibility is as follows; "the Fund will not commit to Entrust remaining an Admission Body after March 2021 at this

stage as, despite the assurances in the cover letter, it is not clear that Entrust will satisfy the requirements under the LGPS Regulations 2013 to be an Admission Body after March 2021. The Fund will agree to consider the position closer to the time and potentially extend the Admission Agreement beyond March 2021 if the arrangements are in place at the time support this”.

- 8.4 There is no legal obligation on Entrust to offer the affected staff a greater pension benefit (such as access to the LGPS or Defined Benefit Scheme), than the minimum required under the Transfer of Employment Pension Protection Regulations (Defined Contribution Scheme matching up to 6%). The pension protection that would normally apply to Local Government transfers under The Best Value Authorities Staff Transfers Direction 2007 does not apply to this transfer because there is no contract for the provision of outsourced services from BCC. Notwithstanding this, Entrust agreed to make an application for ABS upon the request of BCC but later withdrew the same. There is no legal obligation to compel Entrust to offer ABS.

9 Financial Implications

- 9.1 There are considerable financial implications for BCC to consider in relation to a transfer to Entrust on the ABS Scheme (option 1 as per 4.1 above). If this were to be pursued, there are considerable financial implications for BCC including a £1.7m pension strain risk and a £0.44m “onerous contract” cost. However, these are not material because despite BCCs best endeavours, Entrust have confirmed that they will not be pursuing any further investigation into arranging ABS to the WMPF in respect of the transferring employees.
- 9.2 The financial implications transferring affected employees to Entrust on the DC pension scheme are limited to the orderly transfer of the staff under TUPE. Following TUPE, all redundancy liabilities remain with Entrust. There would be no pension liabilities for BCC after 31 March 2021.

10 Procurement Implications

There are no procurement implications if the recommended transfer on DC pension scheme is selected.

11 Human Resources Implications

- 11.1 Formal consultation has been undertaken with the Trade Unions in line with the TUPE regulations, by BCC. Full consultation has taken place between BCC and the Trade Unions and BCC, Trade Unions and Capita/Entrust representatives. All contractual and non-contractual measures have been agreed except for those related to Pension.
- 11.2 BCC has ensured all affected employees have had the opportunity to understand their individual pension implications through presentations and one to ones by both the WMPF and Capita.
- 11.3 On 8th October 2019, Unison lodged a collective grievance and on the 10th October 2019 raised a formal Trade Dispute on being advised that an ABS offer would not be available.
- 11.4 The Trade Unions and affected employees were advised on 14th April 2020 that Entrust had withdrawn from the ABS scheme and a document setting out their reasons was provided. Full consultation has taken place with the Trade Unions, to discuss the various options following Capita and Entrusts withdraw of the ABS application. This was to provide updates, seek views and to progress matters by keeping all parties aware of the matters and being open and transparent through the consultation period. Affected employees have also been advised of the matter and their views taken into consideration. All have been afforded the opportunity to raise questions and have responses.
- 11.5 Capita and Entrust believe they have complied with all of their obligations in line with TUPE regulations. They believe there is no TUPE in connection with the provision of outsourced services, the Best Value Authorities Staff Transfers (Pensions) Direction 2007 ("the Direction") does not apply. Furthermore, they have stated the circumstances of this TUPE transfer does not give rise to Entrust satisfying the definition of any of the bodies listed in the LGPS regulations 2013, transferring employees under the LGPS regulation.
- 11.6 There is a strong preference amongst affected employees to transfer with the LGPS and for Entrust to have ABS. This preference, being unacceptable to Entrust as discussed above. As per the legal implications, there is no legal obligation on Entrust to offer the affected staff a greater pension benefit (such as access to the LGPS or Defined Benefit Scheme), than the minimum required

under the Transfer of Employment Pension Protection Regulations (Defined Contribution Scheme matching up to 6%).

12 Public Sector Equality Duty

12.1 An Equality Analysis has been undertaken with ref. no. EQUA504.

12.2 The Equality Impact Assessment declares that “The proposal is required by TUPE law and does not deviate with protected characteristics profiles” and that “There is no adverse impact on people with protected characteristics”.