



Waste Management – Industrial Action Update

Call In by the Co-ordinating O&S Committee

1 Request for “Call-In”

- 1.1 On 12 February 2019 Cabinet took a decision to:
- 2.1 Note the contents of this Report and the accompanying Private Report.
 - 2.2 Note the options available to the City Council for managing the current Industrial Action as set out in section 7 of this report.
 - 2.3 Note the advice of the Monitoring Officer and the Chief Finance Officer as set out in this report and in the private report.
 - 2.4 Note that Cabinet will be required to take into account any recommendations made by the District Auditor.
 - 2.5 Note, as set out this report, that Unite the Union have been offered binding arbitration and have declined. UNISON has not yet been offered this route and ACAS talks with UNISON continue. In such circumstances, the decision of Cabinet on 15th January 2019 was to commence the legal processes for a court application with a view to preventing the unlawful industrial action of both Unite the Union and UNISON from continuing.
 - 2.6 Note the updated Contingency Plan attached at Appendix 2
 - 2.7 Consider the benefits and risks associated with each option as set out in this report and the accompanying private report, and approve one of the following:
 - 2.7.1 Option 1 – do nothing and await the outcome of the employment tribunal litigation or any litigation issued by the Council as set out in [the public] report; or
 - 2.7.2 Option 2 - to offer a one-off payment (as set out in para 7.2 [the public] report) to the members of Unite the Union to settle the current employment litigation between the Council and Unite the Union; or
 - 2.7.3 Option 3 – to make a payment (as set out in para 7.3 of this report) to resolve the dispute; this option is not recommended due to significant legal and financial risks; or
 - 2.7.4 Option 4 – re-affirm the decision reached at Cabinet on 15th January 2019 and to issue forthwith injunction proceedings as set out in the Cabinet Report 15th January 2019 (Appendix 1).



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2.8 Delegate to the Head of Paid Service, Chief Finance Officer, the City Solicitor and the Acting Director Neighbourhoods, acting together, to implement the decision arising from consideration by Cabinet of options 2.7.1 – 2.7.4 above in accordance within the financial and legal terms set out in this report and in the private report in the shortest time possible, having regard to the relevant call in period.

1.2 At the meeting, a fifth option was agreed under 2.7:

2.7.5 i) To approve formal offers (as set out in the private report) to be presented to Unite the Union and UNISON via ACAS conciliation on Tuesday 12 February 2019 to settle the employment tribunal litigation issued against the Council by Unite the Union and the early conciliation claims issued by UNISON and, if those offers are not accepted by close of business on Tuesday 12 February 2019, to commence the legal process for a court application with a view to preventing further unlawful industrial action by both Unite the Union and UNISON.

ii) To note that the offer will be made subject to the Council's call in requirements and any injunction proceedings issued in the High Court by the Council will be subject to the Council's call-in period, however any pre action correspondence with solicitors acting for Unite the Union or UNISON regarding the proposed injunction proceedings will take place within this call-in period and does not negate a call-in.

1.3 Decisions on the private Cabinet report were to note the further information set out in that private report.

1.4 A request for call-in was made to the Co-ordinating Overview and Scrutiny (O&S) Committee by Councillors Phil Davis and Mary Locke on 14 February 2019.

1.5 The Co-ordinating O&S Committee considered the request for call-in at its scheduled meeting on 15th February 2019. At the meeting the Committee heard from Cllr Brett O'Reilly (Cabinet Member for Clean Streets, Waste and Recycling); Clive Heaphy (Chief Finance Officer) and Kate Charlton (City Solicitor). Dawn Hewins (Director of HR), Darren Share (Director for Waste Services) and Russell Johnston (HR Business Partner) were also present to answer questions.

2 Request for Call-In

2.1 Cllr Phil Davis set out the reasons for the request for Call-In, highlighting call-in criteria 6:

the decision has already generated particular controversy amongst those likely to be affected by it or, in the opinion of the Overview and Scrutiny Committee, it is likely so to do

2.2 He said that the Council was in a very serious position with regards to this dispute, with the impact being felt by residents with bins not being emptied. The Council must be seen to be taking all necessary steps to resolve this and the decision to take legal action is controversial. Therefore there should be opportunities for a wider group of members to look at that decision, and to understand the reasoning. It is unfortunate that we have ended up in a situation which only the courts can resolve, and so we need to hear what other alternatives were considered. This call-in is



a key part of the democratic process, allowing committee members chance to question the Cabinet Member about the decision taken.

- 2.3 In response the Cabinet Member outlined the reasons for the decision noting that with any litigation there is risk, but to avoid a drawn out dispute with significant costs it was agreed to put a final offer to Unite the Union, but time limited. Otherwise if Unite the Union chose to reject the offer, this industrial dispute could drag on until the Employment Tribunal proceedings and the Executive did not believe that would be in the interests of the citizens of Birmingham or the financial interests of the City Council. Therefore a final offer was made, which was rejected and so the Council must move to seek an injunction.
- 2.4 Members raised a number of issues to clarify the timescales and the processes involved. Within the course of that discussion, it was acknowledged that the very useful explanation given by Andrew Burns QC at Cabinet on 12th February should form part of the report as it outlined in detail the reasons for seeking to settle before applying for an injunction and what the courts would be looking for. A transcript is set out in Appendix 1.
- 2.5 Other issues discussed included:
- The basis for the injunction was that Leading Counsel was of the view that it was likely that the current industrial action was unlawful. As Andrew Burns QC stated at Cabinet on 12th February the “reason for the strike is effectively to promote discrimination between different unions and that is a reason which is excluded from protection under the strike and industrial action legislation”.
 - It was also clarified that injunction proceedings would happen more quickly than Employment Tribunal proceedings (where the earliest date was February 2020, though an application for an earlier hearing had been made);
 - Members asked about the risk of “contagion” (i.e. the decision precipitating further claims from elsewhere) and the precedent this might set as set against the commercial justification for offering payments. The details of the risk assessment – likelihood and impact – were discussed in the private part of the meeting as this information was set out in a private report. However in the public part of the meeting the Cabinet Member and the Chief Finance Officer emphasised that there were risks with all options which had to be balanced.
 - In response to a question on why the 15th January decision was exempt from call-in but the 12th February decision was not, the City Solicitor explained that in January the Council was in ACAS talks and it was hoped that parties would move to binding arbitration. Those talks continued post 15th January and on the 18th January the Council learned that the Employment Tribunal claims would not be heard until February 2020 which meant that the issue of the validity of claims would not be determined until then. Talks therefore progressed on ways to mitigate the financial impact if the industrial action continued until 2020 and Unite the Union put other options on the table that had not been put on the table before 15th January. Those options needed to be given careful consideration including legal and financial risk assessment



and then come back to Cabinet for another decision. The Council was therefore in a different place on 12th February in that there were firm options for Cabinet to consider that had arisen out of the ACAS talks including an option to re-affirming the injunction position. In addition, because options had changed it was important that there was full transparency as to what these were.

- The City Solicitor further clarified that legal proceedings had not been issued whilst the call-in period was on-going, but that, as agreed at Cabinet, pre-action correspondence had started;
- The Cabinet Member also confirmed that the door was still open for Unite the Union to come back to talk, however the final offer had been made.

3 The Committee Resolution

3.1 The Committee resolved to call-in the decision for reconsideration by Cabinet, on the grounds that:

5 – the Executive appears to have overlooked some relevant consideration in arriving at its decision – that the information given by the QC at Cabinet should be fully considered as part of the report;

6 – the decision has already generated particular controversy amongst those likely to be affected by it or, in the opinion of the Overview and Scrutiny Committee, it is likely so to do – that, due to the significant nature of the decision, Cabinet review its decision in light of all the information available;

8 – there is a substantial lack of clarity, material inaccuracy or insufficient information provided in the report to allow the Overview and Scrutiny Committee to hold the Executive to account and/or add value to the work of the Council – that the information given by the QC at Cabinet should be fully considered as part of the report.

3.2 I therefore formally ask the Cabinet to reconsider its decision as outlined above; in particular ensuring that full consideration is given to the explanation given by Andrew Burns QC at the Cabinet meeting on 12th February.

Councillor Mariam Khan

Deputy Chair, Co-ordinating Overview and Scrutiny Committee



Appendix 1: Transcript of remarks from Andrew Burns QC at Cabinet on 12th February 2019

c.38 minutes into meeting

In relation to temporary injunction, it's compulsory to apply for a temporary injunction in these circumstances before you apply for a permanent one. But, in an industrial action situation, the temporary injunction usually brings it into the whole matter because if a Court temporarily suspends a strike, or industrial action, usually before the Court process can get down the road a few weeks or months further to have a full trial, the industrial dispute, by that time, has either petered out or has been settled. So, generally, industrial disputes are solved after temporary injunctions are granted and it's a temporary injunction which is the proposal that is on the table.

Option 5 which has been put forward does seem to be a practical solution for the Council for this reason. Before you take any legal action against a party, Unite or anybody else, you need to give a proper opportunity to try and settle a case as part of the overriding objective that's built into the Court Rules and so, after the Cabinet took the decision on the last occasion to apply for an injunction, it quite properly responded to the union's indication that a settlement might be possible at ACAS and use the opportunity between then and now to try and reach a consensual settlement rather than one that's been fought in Court and the Courts are prepared, and, indeed, encourage, parties to try and settle matters outside of Court and only go to Court for an injunction if settlement cannot be reached.

Of course, where we are today is that the ACAS talks have, so far, been unsuccessful and; second, Unite have indicated that they will now be calling for an escalation to the action, going from industrial action to strikes and, therefore, the Council is facing a more acute situation and, therefore, it's quite reasonable to reassess whether now is the time that Court action is called for being that the Council is facing a more serious situation of strike.

The combination in option 5 looks to be a good legal approach because it must be reasonable to give Unite a last chance to settle for a proper amount, that's an option 2 amount, which is a proper and reasonable assessment of what the commercial value of their employment tribunal claims are, before pressing the button for Court action and so those two are, I think, rightly linked together. Just going for option 2 or just going for option 4 is a blunt instrument in terms of Court terms. One should be looking to have the option 2 reasonable settlement, if possible, one that is in the financial interests of the Council but it is important, in my view, to have option 4 as the next stage, the backstop, because without option 4 as something the Council is willing to go for over the next few days, there is little impetus for the other party to negotiate to settle. Having option 4 effectually gives you the opportunity to try and settle this matter which you haven't had up until now because you weren't just about to press the button for Court action.

So, it's been, in summary, a temporary injunction is what is on the cards. It's been reasonable to take ACAS as far as it can up until now and make the efforts to try and find a resolution which suits the Council's finances and is something that will reduce the ongoing costs of industrial action and, as of today, having tried ACAS and not having been successful, it looks like industrial action must be stopped by a Court action, if possible, but if it's possible before that happens for a settlement to be reached with Unite, this afternoon, then all the better.



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c. 50 minutes into the meeting

The decision in option 5 is about whether or not the Council should use its legal powers ... to prevent a strike action, industrial action, which is brought for an unlawful reason. The reason for the strike is effectively to promote discrimination between different unions and that is a reason which is excluded from protection under the strike and industrial action legislation.