

Public Report
Birmingham City Council
Report to Cabinet
8th 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
Councillor Brett O'Reilly, Cabinet Member, Clean Streets, Waste and Recycling

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

Report author: Clive Heaphy, Chief Finance Officer
Kate Charlton, City Solicitor and Monitoring Officer
Rob James, Acting Director Neighbourhoods

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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 both Unite and Unison against the Council. This report is late and urgent due to the need to update Cabinet on the outcome of recent ACAS talks and ensure full transparency for Cabinet/members.

- 1.3 It was hoped that the ACAS talks would have concluded during this week so that a full decision report could be considered by Cabinet at the meeting on 8th March 2019. However positive ACAS talks concluded late on 7th March 2019 and it was not possible for officers to present detailed legal and financial advice and for members to demonstrate that they have fully considered relevant information before making an executive decision.
- 1.4 Members need to demonstrate that they have addressed their mind to all relevant issues, acted in good faith in reaching their decision, not based their decision on grounds of bias or predetermination and not based their decision on irrelevant issues. In the Cabinet report 12th February 2018, the City Solicitor advised Members at para 11.3 that they should ensure that they have read and considered the matters and issues raised in the reports. Members will not have had sufficient time before Cabinet on 8th March, to fully consider the relevant information with assurance that they have before them relevant information and that they have not considered irrelevant information. Therefore a Cabinet meeting has been arranged for 15th March for Cabinet to consider the proposals.
- 1.5 In view of the continued desire for transparency and openness, it is considered important that an update report is presented to Cabinet at the soonest possible opportunity.
- 1.6 Unite and Unison have each agreed to suspend their current industrial action for 8th March 2019.

2 Recommendations

Cabinet are asked the following: -

- 2.1 To note the contents of this report and the Private report.
- 2.2 To note the outcome of the Councils Injunction application.
- 2.3 To note that as a result of recent ACAS talks and pending a Cabinet decision on the outcome of those talks both Unite and Unison have suspended industrial action for Friday 8th March.
- 2.4 To note the proposed Heads of Terms with Unite in the Private Report.
- 2.5 To agree to a further special Cabinet meeting on 15th March 2019.
- 2.6 To agree to delegate to the Chief Finance Officer and City Solicitor to consult with the District Auditor on the Heads of Terms prior to approval by Cabinet decision.

- 2.7 To agree that the corporate trade unions will be consulted on the matters set out in the proposed Heads of Terms that impact on their members.
- 2.8 To agree to establish an independent review on future options for delivering the waste service and that draft terms of reference be brought to Cabinet for approval on 26 March 2019.

3 Background

12th February 2019 to 27th February 2019

- 3.1 The options to mitigate the current industrial action were presented to Cabinet on 12th February 2019 and discussed at paragraph 7 of that report. In summary, these were:
- (i) To allow the industrial action to continue through to the date of the trial to hear the tribunal claims (currently set for February 2020) or
 - (ii) To consider a one-off financial settlement of the current employment litigation with members of Unite the Union based on legal and commercial factors or
 - (iii) To consider making a payment to resolve the dispute with the Unite the Union or
 - (iv) For Cabinet to re-affirm its decision reached on 15th January 2019 to commence court action to seek to prevent the union from continuing with its industrial action.
- 3.2 On 12 February 2019, Cabinet:-
- (i) Noted the contents of that Report and the accompanying Private Report;
 - (ii) Noted the options available to the City Council for managing the current Industrial Action as set out in section 7 of that report;
 - (iii) Noted the advice of the Monitoring Officer and the Chief Finance Officer as set out in this report and in the private report;
 - (iv) Noted that Cabinet will be required to take into account any recommendations made by the District Auditor;
 - (v) Noted 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 as set out this report;
 - (vi) Noted the updated Contingency Plan attached at Appendix 2 of the report;
 - (vii) Considered the benefits and risks associated with each option and the accompanying private report; and
 - (viii) Approved Option 5 as set out below:
 - 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.

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.

Call in 14th February 2019

- 3.3 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.
- 3.4 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.
- 3.5 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.
- 3.6 Within the course of that discussion, it was acknowledged that the very useful explanation given by Andrew Burns QC at Cabinet on 12th February 2019 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.
- 3.7 On 20th February 2019 Cabinet re-affirmed the decision reached at Cabinet on 15th February 2019 and to issue forthwith injunction proceedings as set out in the Cabinet report 15th January 2019.

4 Latest Position – Council’s Injunction Hearing 27th February 2019

4.1 The Council was not successful in its application for an injunction preventing the current industrial action of Unite and Unison from continuing.

4.2 Andrew Burns QC provided an immediate consideration of the main points of the decision, see below.

4.3 “The Judge (Mr Justice Freedman) ruled at the interim hearing today that Unite and Unison’s demand for payments for their members the same as GMB claimants received in 2018 in settlement of their failure to consult claim was not believed by Unite and Unison to be discrimination.”

He held that s.222 (1) (b) TULRCA 1992 required the Court to look at the unions’ genuine reasons even if they were held unreasonably. He held that the unions believed the call for industrial action was to seek parity payments for their members or workers generally. It did not matter therefore that the Council knew that it was not a parity payment and that GMB members had received a settlement. What the Judge held matters was the belief of the unions, whether that was reasonable or unreasonable.

The Judge said that the unions did not believe this was ‘action to enforce trade union membership’ or pressure on the Council to adopt some form of closed shop arrangement. That was the problem which s.222 sought to address and so the industrial action of Unite and Unison was protected and lawful under s.219 TULRCA. The Judge decided therefore that he did not need to rule on the issue of delay.”

4.4 On Friday 1st March 2019, a copy of this initial summary was provided to all Council members along with a copy of the judgement.

4.5 The Council would need to apply to the Court of Appeal for leave to Appeal as the judgement did not grant leave to appeal. There are good prospects (around 60%) that the Court of Appeal would grant 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.

4.6 An application has not been filed for permission to appeal as settlement prospects were 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 industrial action. Unite issued notice on 22nd February to ballot members for a new reason to strike ‘a breach of the Memorandum of Understanding 2017.

4.7 This ballot closes on 8th March 2018. So any successful appeal decision would not have impacted on or resolved the current dispute between the Council.

4.8 If the Council was not successful at the Court of Appeal, it would have incurred significant legal costs of both the Council and the Union.

5 Latest Position – ACAS Talks

- 5.1 Set out at Appendix 1 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.
- 5.2 Following the outcome of the High Court judgement, a number of ACAS talks continued and on 7th March resulted in a proposed settlement based on the attached draft Heads of Terms set out in the Private report. These proposals, if approved, will settle all litigation and all industrial disputes including ceasing all current industrial action.
- 5.3 Those proposals are subject to the approval of Cabinet and the District Auditor and will be presented to Cabinet for approval on 15th March with a detailed legal risk and financial assessment.

6 Proposed Settlement

- 6.1 The Council and Unite Union have agreed on a without prejudice basis a draft Terms of Settlement subject to the approval of Cabinet, the Statutory Officers and the District Auditor. The draft terms of settlement for UNISON are intended to be agreed by 15th March.
- 6.2 Each set of proposals will be presented to Cabinet for an executive decision on Friday 15th March.
- 6.3 A copy of the proposed terms of settlement for Unite are attached at Appendix 1 in the Private Report and by way of summary:
 - 1) BCC will make a payment to Unite members as follows;
 - a. all the valid individual claimants in the proceedings B v Birmingham City Council in the sum of £3,000;
 - b. BCC will make a payment of £500 to UNITE members who were UNITE members as at the date of the current ballot (14 December 2018).
 - 2) In consideration of the payments to their members, each Union will agree to withdraw all litigation and industrial action and any other action against the Council as at the date of signing an agreement between and the Council and UNITE.
 - 3) All industrial action will be suspended on signing an agreed Heads of Terms and on final agreement the existing ballot notices will be withdrawn.
 - 4) The parties agree to establishment of an independent review on the future options for delivering the waste service, commissioned by the Council.
 - 5) On signing a final agreement - an agreed joint statement.

6) All parties will use best endeavours to seek to resolve any disputes over the implementation of the MOU through mediation within a period of up to 8 weeks overseen by the Joint Services Improvement Board.

6.4 It is intended that similar terms will be agreed with UNISON and in time for the Cabinet meeting on 15th March 2019. In the meantime it has been agreed that subject to Cabinet approval the following term:

BCC will make a payment to Unison members as follows:

- a) 3,000 for all valid Claimants in full and final settlement of the Tribunal claim (D and Others); and
- b) £500 to those employees of Birmingham City Council who were UNISON members as at the date of the current ballot (17 December 2018)

6.5 Prior to any final offer being signed, meaningful consultation, in accordance with the Council's Consultation Protocol with Recognised Joint Trade Unions will also need to take place with the other corporate Trades Unions, where the proposals in the Heads of Terms with Unite and Unison impact on the members of the corporate trade unions.

7 Consultation

7.1 The Leader, Deputy Leader and Cabinet Members have been briefed on the Options set out in this report.

7.2 The Chair of Overview and Scrutiny Neighbourhood and Homes Councillor Penny Holbrook 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 any decision and has agreed that the matter is urgent and cannot be reasonably deferred to another meeting. In view of the continued desire for transparency and openness, it is considered important that an update report is presented to Cabinet at the soonest possible opportunity.

8 Risk Management

To be fully considered and assessed in a Cabinet Report 15th March 2019

9 Compliance Issues:

How are the recommended decisions consistent with the City Council's priorities, plans and strategies?

9.1 These proposals support the City Council priority of being a great city to live in by keeping the streets free from unnecessary domestic waste.

10 Legal Implications

10.1 To be discussed in Cabinet Report 15th March 2019

11 Financial Implications and Chief Finance Officer

11.1 To be discussed in Cabinet Report 15th March 2019

12.0 District Auditor

12.1 The District Auditor will be consulted on the proposed Heads of Terms prior to presentation to Cabinet 15th March 2019.

13. Human Resources Implications

13.1 To be discussed in Cabinet Report 15th March 2019

14.0 Public Sector Equality Duty

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

15 Appendices

15.1 Appendix 1 - Chronology of ACAS talks - Unite Industrial Action

16 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

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 Industrial Action 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 Employment Tribunal (<i>S and others</i>) |
| 20 December 2018 | ACAS talks |
| 29 December 2018 | Unite begin Industrial Action short of strike |
| 8 January 2019 | ACAS talks |
| 8 January 2019 | UNISON ballot closes – confirm Industrial Action short of strike from 25 January 2019 |
| 15 January 2019 | Cabinet approve proposal to seek injunction for unlawful Industrial Action |
| 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 | Unite issue 355 claims with ACAS for refusal of leave (<i>S and others</i>) |

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| 2019 | | |
| 30 2019 | January | ACAS talks |
| 4 2019 | February | Unite confirm series of one day strikes from 19 February 2019 |
| 6 2019 | February | High Court injunction application issued by Unite for “breach of MOU” |
| 12 2019 | February | Cabinet re-approve proposal for injunction for unlawful Industrial Action |
| 13 2019 | February | High Court hearing for “breach of MOU” |
| 14 2019 | February | High Court judgment – injunction not granted |
| 15 2019 | February | Unite issue 20 claims for blacklisting agency workers (<i>Bn and others</i>) |
| 15 2019 | February | Unite issue notice of intention to ballot for new Industrial Action for “breach of MOU” |
| 19 2019 | February | Unite begin series of one day strikes |
| 19 2019 | February | Unite issue 8 further employment tribunal claims for blacklisting in Employment Tribunal (<i>Bw and others</i>) |
| 20 2019 | February | Special Cabinet re-approve proposal for injunction following request for call in |
| 20 2019 | February | BCC issue High Court injunction application for unlawful Industrial Action |
| 21 2019 | February | ACAS talks |
| 22 2019 | February | Unite ballot opens |
| 25 2019 | February | ACAS talks |
| 26 2019 | February | ACAS talks |
| 26 2019 | February | UNISON issue 19 claims for blacklisting in Employment Tribunal (<i>D and others</i>) |
| 27 2019 | February | ACAS talks |

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|------------------|--|
| 2019 | Council sends to Unite formal offer to settle. |
| 28 February 2019 | High Court hearing for “unlawful Industrial Action” |
| 1 March 2019 | High Court judgment – injunction not granted |
| 4 March 2019 | ACAS talks Unite send to Council formal offer to settle |