Public Report - FINAL 14/01/19

Birmingham City Council

Report to Cabinet

15th January 2019

Subject:	Waste Management – Industrial Action Update
Report of:	Chief Executive, Corporate Director Finance & Governance and City Solicitor
Relevant Cabinet Member:	Councillor Ian Ward, Leader of the Council Councillor Majid Mahmood, Cabinet Member Clean Streets Waste and Recycling
Relevant O &S Chair(s):	Councillor John Cotton Chair of Co-ordinating Overview and Scrutiny Committee on behalf of Councillor Penny Holbrook
Report author:	Clive Heaphy, Corporate Director Finance and Governance Kate Charlton, City Solicitor and Monitoring Officer Rob James, Acting Corporate Director Place

Are specific wards affected? If yes, name(s) of ward(s):	☐ Yes	☒ No – All wards affected
Is this a key decision? If relevant, add Forward Plan Reference:	☒ Yes	☐ No
Is the decision eligible for call-in?	☒ Yes	☐ No
Does the report contain confidential or exempt information?	☒ Yes	☐ No
If relevant, provide exempt information paragraph number or reason if confidential : 1) Paragraph 4 and 5 S12A Local Government Act 1972		

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 Overview and Scrutiny Committee, Councillor John Cotton, has agreed that the

matter is urgent and cannot be reasonably deferred. [Paragraph 3.5 Council Constitution 11/9/18]

1.2 As a result of the outcome of the strike action in the Waste Management service by Unite Union announced on 14th December 2018 and the ballot result of UNISON Union announced on 11th January 2019, there is a need to urgently mitigate the impacts of the actual and proposed industrial action. This report is late and urgent due to the need to consider fully all the options open to the Council to manage these impacts. The agreement of the Chair of Overview and Scrutiny is required for this report to progress as late and urgent. [Paragraph 3.5 Part B Council Constitution 11/9/18].

1.3 The interests of the Council are likely to be jeopardised unless further mitigation options are instituted immediately and the Chief Executive in consultation with the Leader (or Deputy Leader in his/her absence) has determined that such executive decision is so urgent that its implementation cannot wait until the expiry of the call-in period. [Paragraph 3.7 Part B Council Constitution 11/9/18]. The Chief Executive and the Leader of the Council have agreed that the matters in this report require immediate implementation.

2 Recommendations

2.1 Cabinet to note the contents of this Report and note the contents of the Private Report.

Comment [KC1]: Kate Charlton asked Leader (Chair of Cabinet) to add this to the recommendations during the Cabinet Meeting – which he announced before the decision was taken on the recommendations.

2.2 Cabinet to note the Options for the management of the Industrial Action as set out in paragraph 4 of this report and Cabinet to approve the recommended strategy as set out in paragraph 4.4.3 and 4.4.4 of this report.

2.3 Cabinet to agree the Waste Contingency plan as set out in paragraph 5 of this report.

2.4 Cabinet to agree for the purposes of managing the contingency plan for the industrial action in the Waste Service including any residual impact following any resolution or court order, to agree to extend the officer delegation to the Acting Corporate Director of Place from £200,000 up to £350,000 per week for an initial 3 months and to delegate to the Leader, the Cabinet Member Clean Streets Waste and Recycling, the Chief Finance Officer and the Acting Corporate Director Place acting together to agree the procurements arrangements relating to the Waste Contingency Plan.

3 Background

3.1 In June 2017, BCC proposed a reorganisation of the Waste Management Service. Details are set out in the private report to Cabinet dated 27 June 2017. Amongst these changes, BCC proposed deleting the post of Gr3 Leading Hand (LH) and changing refuse collection from a compressed 4-day working week with overtime on the 5th Day to a 5-day week with no overtime.

3.2 Extensive consultations were held at the time with the recognised trades unions which resulted in the Unite Union taking industrial action from July 2017.

3.3 The then Leader of the Council, Councillor John Clancy and Howard Beckett of the Unite Union reached agreement in August 2017 that the Gr3 LH post would not be deleted.

3.4 Notwithstanding this BCC issued Leading Hands with notices of redundancy following which Unite resumed industrial action, bringing proceedings against BCC seeking to uphold the August 2017 agreement and restraining the dismissals. In September 2017, the High Court granted an interim injunction to that effect.

3.5 Some GMB members in the Waste Service did not cross the picket line during the industrial action in 2017.

3.6 The Council sought to negotiate jointly with the recognised unions with a view to resolving the Waste dispute but throughout October and November 2017, the Council agreed to Unite's demands that GMB be excluded from any joint negotiations. Although Unite had made their position abundantly clear (i.e. that Unite would not participate in negotiations if the Council continued to include GMB in joint negotiations), the Council has since admitted that it was wrong at that time to exclude GMB. Unite did not seek the exclusion of UNISON, nor did the Council exclude them.

3.7 On 24 November 2017 BCC entered into a written agreement with Unite, and also separately agreed with UNISON by which, amongst other things:

- a new role of Waste Reduction and Collection Officer (WRCO) was to be created, with duties over and above those of the Gr3 LH role, the latter to be phased out and LHs to "transition" into the WRCO role with training and support, and
- a 5-day week would replace the compressed 4-day week. The 5 day week would impact on all employees working in the Waste Service.

3.8 The GMB Union played no part in these talks. UNISON had balloted for Industrial Action but did not receive the mandate for lawful action. Unlike GMB UNISON were included in those talks involving UNITE.

3.9 The agreement reached with Unite on 24 November 2017 effectively created the new post of WRCO and confirmed that Leading Hands would transition into these roles. That agreement was expressed to be legally binding and incorporated into individual members contracts of employment in spite of the fact that GMB were not expressly consulted on the role of the WRCO nor during this period were they consulted about the impacts of a 5 day working week, which prior to agreement with Unite and UNISON had not been implemented, and which now resulted in the withdrawal of overtime from all of its members.

3.10 At the point of exclusion in October 2017, the GMB union raised a trade dispute with the Council. On 26 January 2018 the GMB commenced Early Conciliation

with ACAS in relation to prospective s.188 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") claims – the mandatory step prior to bringing Employment Tribunal ("ET") proceedings – and GMB and the Council then entered into talks at ACAS about potential settlement.

3.11 As a result of these ACAS talks and based on external legal advice, the Council considered that GMB had a potentially valid claim on behalf of its members and in May 2018 the Council agreed to pay GMB Members in Waste Management in respect of s.188 claims. The total amount paid to the GMB members was £68,465 which was within the Officer delegation of £200,000.

3.12 On 23 November 2018, Unite informed the Council that they intended to ballot their members in the Waste Service. Unite subsequently balloted their members for industrial action within the Waste Management Service based on the payment of sums to GMB Union members which were not made to Unite members ("the settlement payments"). Unite's position is that such claims by the GMB were unmeritorious, that the payments were in effect a s146 TULRCA detriment to Unite members and that the "payments ... have gone to those who did not strike and are therefore, in the view of Unite, payments that blacklist its members."

3.13 The Council does not in any way agree with Unite's position; both Unite and UNISON were fully included in negotiations during October and November 2017 whilst GMB was excluded from those negotiations by the Council at Unite's insistence. There can be no basis for such a payment to Unite.

3.14 On Friday 14 December 2018, Unite the Union gave the Council formal notice of its intention to take part in "continuous industrial action, commencing at 00:01 hours on 29 December 2018, consisting of a ban on overtime, Unite members adhering to job grades and descriptions and adhering to contractual start and finish times. In addition, Unite members will be returning to work base yards for washing facilities for every 15 minute concessionary and half hour lunch breaks in line with the Council's Hygiene Regulations and Instructions." The action will affect refuse collection crews in each of the four depots with Unite warning that the Council "may be warned of further industrial action, if necessary".

3.15 On 11th January 2019, UNISON the Union gave the Council formal notice of its intention to take part in continuous industrial action commencing 25th January 2019 consisting of a ban on overtime and adhering to contractual start and finish times. In addition, Unison members returning to work base yards for washing facilities for each concessionary 15 minute break and half hour lunch breaks in line with the Council's Hygiene Regulations and Instructions.

4 Implications of the Strike - options to mitigate risks and recommended option

4.1 There are several possible options to consider in determining how to respond to the Unite and UNISON Industrial action; which include whether to issue court

proceedings to seek to prevent these Unions from continuing with (Unite) and commencing (UNISON) unlawful industrial action.

4.2 These options, including the operational and legal risks and mitigations are discussed in this report and in the Private report.

4.3 The recommended strategy for dealing with the Industrial Action in Waste Management is to proceed with :

a) A formal invitation to Unite the Union and UNISON Union to Binding Arbitration (Unite have been informally invited to Arbitration and have declined), and at the same time

b) Commence the legal process for a court application with a view to preventing unlawful industrial action of both Unite the Union and UNISON union continuing.

4.4 Analysis of Available Options to mitigate the risks and issues of the current industrial action by Unite and UNISON

4.4.1 Option 1

Do Nothing

Allow the Industrial Action by Unite Union to continue and now UNISON to commence.

Summary Issues - Option 1

1. Waste accumulation and increased resident complaints
2. Council unable to deliver a consistent waste service due to industrial action.
3. Not taking account of Kerslake observations – Political and Industrial Relations
4. Significant financial costs not accounted for within budgetary framework
5. Value for Money issue for District Auditor and section 24 Notice implications.
6. Through recent ACAS negotiation meetings the Unite Union have not agreed to suspend the Industrial Action pending these talks or suspend the action because the industrial action is considered as unlawful.

This option is not recommended due to the significant issues for the citizens of Birmingham including the impact on service delivery to residents and reputational and financial implications for the Council as a result of the unlawful industrial action.

4.4.2 Option 2

Meet the demand of the Unite Union and UNISON to make a payment to its members employed in the refuse collection service of similar amounts paid to GMB members.

Summary of Issues - Option 2:

1. The Council has express and/ implied statutory powers under S111 and/or S222 to make payments to Unite and or UNISON members of amounts similar to those paid to GMB members.
2. However, there is no legitimate reason to pay both Unite and UNISON members in Waste Management for failure to consult as they would not have valid claims.
3. To make equivalent payments to them could be Ultra Vires.
4. A payment could set a trend in the Council. So that each and every other service area in the Council and potentially Council managed Schools, subject to change in terms of conditions and/redundancy would expect a similar payment, particularly if the affected group are a female dominated group. A strike might only be stopped if a payment was therefore made.
5. This could lead to an increase in industrial unrest, with union members choosing to strike because they would then be likely to expect to receive a financial settlement and not because of specific issues leading to a trade dispute. Paying one union as against another union, would lead to industrial unrest; the union members not paid would likely have a valid trade dispute entitling them to strike.

This Option 2 is NOT recommended due to the service delivery impact for residents, and the significant legal, HR, financial and reputational risks.

4.4.3 Option 3

A formal invitation to both the Unite Union and UNISON to binding arbitration with a view to bringing the industrial action to a resolution.

Summary of Issues - Option 3

1. Unite have indicated (informally) that they would not be to attend this meeting, particularly as the recent ACAS meetings (January 2019) have not resulted in a cessation of the strike action.
2. It will not be possible to offer through Arbitration a financial payment to Unite or UNISON in view of the risks set out in Option 2.
3. If the Unions do not accept the invitation to attend or the Arbitration does not result in a mutually agreed solution then Option 4 should be implemented.
4. Any offer of Arbitration including arranging the meeting must be progressed without delay so as to determine if a likely agreed outcome is possible.

4.4.4 Option 4

Obtain a Court Order to prevent the Industrial action from continuing.

Summary of Issues Option 4

1. The Council setting clear leadership by taking an objective view and legitimately assessing all of its options.
2. Setting precedent not to accept unlawful industrial action.
3. Likely citizen support.
4. Legal costs of injunction and costs of trial c£1.5m balanced against ongoing costs of strike at a likely cost of £350,000 per week.
5. Kerslake recommendations – mature relationship between members and officers with clarity of role. Formally and transparently considering the advice of statutory officers in reaching cabinet decisions.
6. Unite have stated that they would carry on industrial action regardless of any injunction – this is unlikely to have any public support.
7. The Council has explored and undertaken various mitigations since notification of the ballot and the industrial action by Unite Union all of which, to date, have not resulted in an agreed resolution to the dispute.

5. **Implications of the Strike - Operational**

5.1 The implication of the industrial action has had the impact of increased missed collections due to teams returning to the depot and therefore leaving the pitch, which has increased fuel costs and decreased productivity. The 24th November 2017 legally binding agreements between Birmingham City Council and the Unite and UNISON, required each refuse collection crew to have a Waste Reduction and Collection Officer on board, meaning a round cannot go out without a WRCO. There are currently 176 WRCO's for 176 rounds. This figure does not include cover for Annual leave or sickness. To mitigate the impact of this Current Grade 2's have been trained and are asked to 'Act up' or 'Stand In' on a short term basis to reduce reliance on use of agency staff. This industrial action has stated that Unite members must adhere to current grades, removing the possibility of asking Grade 2's to stand in or act up. This action has seen, on average, 20 rounds dropped per day.

5.2 Traffic to the call centre reporting missed collections has increased since the industrial action started rising from 214 calls per day to 1030. It is also noted during previous industrial action the amount of refuse put out by residents almost doubles.

5.3 Currently, the impact of this industrial action has seen a 40% reduction in the efficiency of collections and the objective of the contingency plan is to mitigate the reputational, financial and environmental impact on the city and its residents.

5.4 The contingency plan has been implemented since the start of the industrial action by Unite Union. It was not possible to determine the extent of the impact at the start of the industrial action and so 10 crews were engaged so as to assess the impact of the industrial action and therefore the points made in these paragraphs are refining the plan, including a proposal to move to fortnightly collections for all residual waste. This will keep costs down.

5.5 Domestic Collections (Wheelie Bin): It is proposed that current weekly residual collection be moved to fortnightly to correspond with residents' current recycling day and a twin stream (i.e. separate collection for residual and recycling) will be maintained where possible. However, where contractors are collecting missed roads/bins the waste is likely to be mixed and this will impact on recycling rates . Current residual collections are 90 crews per week. Moving to fortnightly for the period of industrial action will free up 45 of these crews, however, these crews will be operating the work to rule as laid out by the action and therefore will only reach 60% efficiency. In order to provide fortnightly refuse and recycling collections the Council will use external contractors to bolster current crews. Please see table below.

5.6 High Rise Flats: We have seen a dramatic drop in the collection of high rise blocks during this industrial action and the safety of our residents is of paramount importance. The suspension of the current container collection round is proposed as well as the procurement of contractors to collect from 213 High Rise blocks, ensuring current collection rates are maintained.

5.7 Trade Waste: In order to minimise the impact on our trade accounts it is proposed that current containers crews focus all their collection availability on the collection of trade waste to current schedules and contracts.

5.8 Sacks: There are currently 22,000 properties which are still using sacks as opposed to Wheelie Bins. The non collection of this waste will become an environmental concern. To address this, Waste Management will suspend Ward based Street Cleansing and allocate these crews (who are not in industrial action) to the 22,000 properties who still have sack collections.

5.9 To underpin this work, there will be a suspension of current enforcement activities undertaken by regulatory services and allocate those resources to commercial and arterial roads on an agreed schedule working with the Ward based cleansing teams to ensure the cleanliness of the wards.

5.10 Flytipping: The last round of Industrial Action saw a dramatic rise in flytipping across the city. In order to counter this, the establishment of a task force for escalated concerns such as flytipping and environmental health hazards, 8 crews operating from 6 am to 8pm, 7 days a week will be considered.

5.11 Use of Household Recycling Centres: Since the publication of the Christmas Collection schedule we have seen a marked increase in the use of the HRC's by residents. On 2nd January 2018 there were 4629 visits equating to 146 tonnes. On 2nd January 2019, there were 6151 visits equating to 185 tonnes. This shows that residents are increasingly eager to use the HRC's and therefore it is proposed that the opening times for the HRC's are extended to minimise queuing and extend the availability to residents.

5.12 Contingency plan and costs:

Issues	Action	Dependencies	Cost	Impact
Domestic Collection (Wheelie Bin)	Reduce residual collection to fortnightly to correspond with residents Recycling collection days and reinforce with the use of 20 contractor crews, collecting 7 days a week. Keeping, where possible, the twin stream collection but focussing on recycling collections where residents have, historically, minimal contamination	Procurement Corporate Communications Contact Centre Waste Management	As set out in the Private Report	Financial
High Rise Flats	Suspend current container collection round and procure contractors to collect from 213 High Rise, maintaining their current collection rates	Procurement Housing	As set out in the Private report.	Financial
Sack Collection	Suspend Ward based Street Cleansing teams and allocate this resource to the collection of domestic sacks for those 22,000 properties who still have sack collections. Suspend current enforcement activities and allocate to commercial and arterial roads to assist with the clearance of residual waste in sacks on an agreed schedule underpinned by the ward based cleansing teams.	Waste Management Regulatory Services	No cost	Reputational
Flytipping	Establish a task force for escalated concerns such as flytipping and environmental health hazards. 8 crews operating from 6 am to 8pm, 7	Waste Management	As set out in the Private report.	Financial

	days a week.			
Trade Waste	All current container rounds to be allocated to trade.	Waste Management	No Cost	Reputational

5.13 Communication: In order for an effective contingency plan to be successful it is imperative that communication to the public continues to be clear and helpful.

5.14 When the initial contingency plan was confirmed on 21 December 2018 a number of activities took place – including the publication of a press release to local media (print, online and broadcast), ongoing social media (including paid-for activity to boost the 'reach' of messages), messaging on the Council's website, email updates through channels such as 'Birmingham Bulletin' and briefings to contact centre staff (including the creation of dedicated IVR messaging). Information has also been shared with staff and members through the intranet and internal social media (Yammer) and email.

5.15 Information about the plan has reached a significant number of people from across the city. For instance from 3 – 6 December 2018 there were three views of the 'check your collection' webpage and in the week commencing 24 December 2018 there were 68,115 views of the same webpage.

5.16 With a shift to fortnightly collections, prevention messages as well as collection information will need to be available, building on the content and activity already in place. The role of elected members in supporting this is crucial as they play a pivotal role in the link between the council and residents. Therefore, regular updates (email and face to face briefings) will be made available to all elected members for the duration of the contingency arrangements.

6. Options considered and Recommended Proposal

6.1 There are possible options to consider in determining how the Council might respond to the industrial action in respect of Unite and UNISON members in the Waste Service. This is discussed in this report and also in the Private Report.

7. Consultation

7.1 The Leader Councillor Ian Ward and the Deputy Leader Councillor Brigid Jones and Cabinet Members have been briefed on the Options set out in the Public report.

7.2 The Group Leader Conservative Group, Councillor Robert Alden and the Group Leader Liberal Democratic Group Councillor Jon Hunt have been advised of this report.

7.3 John Cotton, Chair of Co-ordinating Overview and Scrutiny 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.

8. Risk Management

8.1 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

8.2 Significant financial costs - contingency crews

8.3 Significant operational issues – missed collections and impact on service delivery for residents.

8.4 Significant reputational issue – missed collections, another industrial action in Waste Service

8.5 Mitigating these risks is discussed in paragraph 4 of this Report and also in the Private Report.

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.

10.0 Legal Implications.

As set out in the Private Report and

10.1 There is no overarching right to strike under UK legislation. Instead, statutory protection for trade unions is afforded in the form of immunities from liability in civil proceedings. In addition, individuals who take part in lawful industrial action have limited statutory protection against unfair dismissal for taking part in strike action.

10.2 The relevant statutory provisions are principally set out in TULRCA

10.3 In summary, not only have Unite balloted their members for industrial action, and called industrial action, they have also issued an employment claim in the Birmingham ET for not making similar payments to their members, alleging that the Council has subjected their members to a detriment for whistleblowing, for trade union activities, and has blacklisted them. The Council is vigorously defending these claims and they are currently proceeding through the ET.

11.0 Financial Implications

11.1 The financial implications of each of the potential responses by the Council to industrial action are considered in the Private Report

11.2 However, the cost of industrial action could be up to £350,000 per week and it is clear that the financial impact of prolonged action could place a significant financial burden on the Council. All efforts need to be made to seek a resolution which limits the financial impacts

12.0 Procurement Implications (if required)

12.1 Due to the urgent and unforeseen nature of the industrial action and the need for contingency arrangements and therefore procurement requirements, the Negotiation Procedure without a Call for Competition as defined in Regulations 32 (2)(c) of the Public Contracts Regulations 2015 will be used.

12.2 Details of the costs will be included within the SCN award report following conclusion of negotiations.

12.3 The contracts will be managed by The Assistant Director, Waste Management.

12.4 Following satisfactory conclusion of the single contractor negotiations a further report will be presented requesting approval to award the contracts.

13.0 Human Resources Implications (if required)

13.1 Whist Unite the Union have clearly stated its intention and requirements the Council remains committed to maintaining discussions with Unite in a genuine effort to bring about resolution. Senior Management have been engaged in those discussions, having utilised the services of ACAS to assist, meetings taking place on 8 January 2019.

13.2 The Council remains committed to also having discussions with UNISON with a view to bringing about a resolution to their industrial dispute. And if necessary will also utilise the services of ACAS to assist.

13.3 At a more local level the Council remains committed to ensuring that lawful industrial action is able to progress unimpeded and also maintaining employee relations. Regular union meetings in the Waste Service, led by officers in service with the joint Trade Unions continue on 25 January 2019.

13.4 During the industrial action the Council will continue to manage the performance of the Refuse Collection workforce in accordance with current protocols.

14.0 Public Sector Equality Duty

14.1 The requirements of Standing Order 9 in respect of the Council's Equality Policy and the Equality Act 2010 will be specifically included in the contract documentation.

15.0 Background Documents

15.1Cabinet Report (Private) 24th November 2018

15.2Waste Contingency Plan (January 2019)

16.0 Appendix

1. Risks and Mitigations Options Analysis