

BIRMINGHAM CITY COUNCIL

JOINT CABINET MEMBER AND CHIEF OFFICER

THURSDAY, 18 APRIL 2019 AT 00:00 HOURS
IN CABINET MEMBERS OFFICE, COUNCIL HOUSE, VICTORIA
SQUARE, BIRMINGHAM, B1 1BB

A G E N D A

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1 WASTE MANAGEMENT – INDUSTRIAL ACTION UPDATE- UNITE

Report of the Chief Finance Officer, City Solicitor and Acting Director
Neighbourhoods

FINAL

Birmingham City Council

PUBLIC Report to Leader, Cabinet Member Clean Streets, Waste and Recycling and Chief Executive



12 April 2019

Subject: Waste Management – Industrial Action Update

Report of: Chief Finance Officer and City Solicitor and Acting Director Neighbourhoods

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

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 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 On 15th March 2019 Cabinet approved proposals to bring the litigation and industrial action in the refuse service issued by both Unite the Union and UNISON against the Council to an end as soon as possible.
- 1.2 Cabinet also delegated to the Leader, 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.

- 1.3 The agreement to settle needs to be concluded as soon as possible in order to mitigate any resumption of industrial action and/or litigation against the Council.
- 1.4 This report deals with the delegation approved by Cabinet to conclude agreements to settle between Unite the Union and the Council.
- 1.5 At the date of writing this report, UNISON have not agreed a settlement position with the Council and so a further report will follow if and when this position changes.

2 Recommendations

The Leader, the Cabinet Member and the Chief Executive are asked to: -

- 2.1 Note the contents of this Report.
- 2.2 Note and approve the Agreement between Unite the Union and the Council at Appendix 1 of this report.
- 2.3 Delegate to the Chief Executive, acting as Head of Paid Service or her nominated deputy (as authorised by the Cabinet Report 15th March 2019 clause 2.6) authority to conclude by way of signature the agreement at Appendix 1 of this report between the Council and Unite the Union.

3 Background

- 3.1 On 15th March 2019 Cabinet approved the Heads of Terms agreed at ACAS between both Unite the Union (Appendix 2) and UNISON.
- 3.2 Since 15th March 2019 'without prejudice' discussions between the respective legal teams and the Unions has taken place with a view to finalising an agreement acceptable for each party. Those discussions have resulted in recommended agreements between the Council and each Union. At the time of writing this report only the Council and Unite the Union have agreed a final form agreement.
- 3.3 The recommended agreement between the Council and Unite the Union is attached at Appendix 1.

Summary of Settlement Terms

- 3.4 The settlement terms are in accordance with the respective Heads of Terms and are summarised as follows:
 - a) In full and final settlement of all the known and threatened litigation and industrial action against the Council.
 - b) Unite the Union will ensure all industrial action will cease with immediate effect on signing the agreement.

- c) Each union member (as identified by the respective union) will be required to enter into a COT agreement with the Council in order to receive a payment as set out in the respective union settlement agreement.
- d) Only eligible claimants will be entitled to receive a payment which will depend on their union membership at specified dates and provided they were employed in the refuse service and provided that they have not already received a payment as a GMB member made by BCC pursuant to a COT3 agreed with the GMB and dated 24 May 2018 or as a Unite/UNISON member pursuant to the settlement agreement entered into with Unite/UNISON.
- e) The Council will not make more than one offer of say £500 to any eligible employee; for example an individual who is a Unite and also a UNISON member and who is offered £500 by virtue of UNISON membership.
- f) The Council will make payments to eligible Unite members in the April payroll.
- g) The number of eligible claimants has not been determined as at the date of this Report and so it has been agreed, by way of side letter that issues of eligibility will be dealt with on a case by case basis.
- h) Unite have asked that the Council settle with Unite members who have been missed from the litigation schedules and anticipate these to amount to a 'handful' of claimants. By way of a side letter, it has been agreed that parties deal with claimant's entitlement on a case by case basis and a payment may be made subject to meeting the necessary eligibility criteria.
- i) The Council does not have governance approval for making payments to non eligible claimants.

4 Consultation

- 4.1 The Leader, Councillor Ian Ward and Councillor O'Reilly Cabinet Member Clean Streets Waste and Recycling have been briefed on the matters set out in this report.

5 Risk Management

- 5.1 There are significant environmental, financial, operational and reputational risks associated with industrial action and the litigation issued against the Council. The risks of not mitigating the industrial action and the issued litigation against the Council have been discussed in detail in previous Cabinet reports as detailed in the background documentation (paragraph 13).
- 5.2 There are contagion risks, and other litigation risks associated with settlement of the litigation and industrial action with each union. These have been

discussed in detail in previous Cabinet reports as detailed in the background documentation (paragraph 13).

6 Compliance Issues:

- 6.1 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.

7 Legal implications

- 7.1 It should be noted that there are no confidentiality provisions in the agreement to settle with Unite the Union or the individual COT3 agreements with eligible employees (as defined in the settlement agreements). This does mean that both the union and the union member can share the details of the settlement agreement/payment with third parties. However the Council will need to be aware of obligations arising under the Data Protection Act 1998 which would preclude the Council from publishing details of individual names and individual payments made to union employees who are also employees of the Council.
- 7.2 There is a risk that certain eligible employees (as defined in the settlement agreements) may decide not to enter into a COT3 agreement with the Council and instead proceed with the tribunal litigation issued against the Council by Unite the Union. In this event, these employees could not be supported by their union as the settlement agreement between the Council and the union requires the union to withdraw all support and funding from such individual.

8.0 Financial implications.

The settlement costs were set out in detail in the Public Cabinet Report 15th March 2019 and by way of reminder are set out below.

8.1 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.

9.0 Human Resources Implications

- 9.1 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.

- 9.2 The Council remains committed to ensuring that lawful industrial action is able to progress unimpeded and also to maintaining employee relations.
- 9.3 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.
- 9.4 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.
- 9.5 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.

10 Director of HR

- 10.1. 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.
- 10.2 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.
- 10.3 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.

11. Public Sector Equality Duty

- 11.1 The requirements of the Council's Equality Policy and the Equality Act 2010 policy will be specifically considered as part of the implementation of this decision.

12 Appendices

- 12.1 Appendix 1 - Settlement Agreement - BCC and Unite the Union
- 12.2 Appendix 2 - Heads of Terms UNITE

13. 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 20th February 2019
7. Cabinet Report (Public) 8th March 2019
8. Cabinet Report (Private) 8th March 2019
9. Cabinet Report (Public) 15th March 2019
10. Cabinet Report (Private) 15th March 2019

PROPOSED TERMS OF SETTLEMENT OF THE REFUSE COLLECTION DISPUTE BETWEEN BCC AND UNITE

WITHOUT PREJUDICE AND SUBJECT TO CONTRACT

	BCC/Unite Agreed position
1	<p>Subject to withdrawal of all litigation and all industrial action and any other proceedings or actions against BCC as set out at item 7 BCC Proposal below:</p> <p>a) BCC to pay each valid Claimant in the Tribunal Proceedings of</p> <p>i. Mr Bs & Others v Birmingham City Council (Case Number 1305153/2018 & 271 Others) and</p> <p>ii. Mr C Bw & Others v Birmingham City Council (Case Number 1300839/2019 & 7 others</p> <p>the sum of £3,000 each in full and final settlement provided that each individual has signed an ACAS COT3 Agreement with the Council. A valid claimant is a Unite member who was an employee of the Council working in the refuse service as at 6th June 2018.</p> <p>b) BCC to make a payment in the sum of £500 in full and final settlement to each UNITE member who was a UNITE member who was an employee of the Council working in the refuse service as at the date of the current ballot (14th December 2018) provided that the individual has signed an ACAS COT3 Agreement with the Council.</p>
2	<p>BCC have already started arranging recruitment fairs – which enable Agency workers to apply for roles assisted by their Trade Union and HR.</p> <p>BCC are seeking to increase the proportion of full time staff to agency workers which is likely to result in more opportunities.</p> <p>In these circumstances, a payment is not appropriate.</p>
3	<p>BCC will pay the figures in paragraphs 1a and 1b “net” of any applicable tax or national insurance contributions (i.e. payment will be grossed up should tax and NI be deemed payable),</p> <p>This is not a pensionable benefit. However, should any employee wish to convert this into a pensionable payment, BCC will agree subject to the deduction of Employers’ pension contributions (at a rate of 16.8%) from the gross sum payable. This is at the discretion of the employee.</p>
4	<p>BCC management is proposing that Darren Peach’s grievance will be dealt with through a mediation process and that he will continue to be deployed on his existing round until this grievance is heard.</p> <p>Decisions on individuals are a matter for BCC.</p>

5	Unite will meet all legal costs incurred in all proceedings save for sections 8,9 and 15 below.
6	<p>In consideration of payments above, Unite will immediately withdraw the following: -</p> <ul style="list-style-type: none"> (A) High Court, Queen's Bench Division (under claim number QB2019-00042) against BCC and appended to an Order settling the proceedings in the High Court under Claim Number HQ17X03282 ("the MOU Proceedings"). (B) Mr Bs and other Unite members in the Birmingham Employment Tribunal under Claim Number 1305153/2018 and others (Multiple No 9438) (the "Bs Proceedings"). (C) Mr C Bw & Others v Birmingham City Council (Case Number 1300839/2019 & 7 others (the Bw Proceedings')). (D) Early Conciliation proceedings (ACAS EC Certificates Group MU000407/19/03 and R111412/19/78) (the ACAS EC Annual Leave Proceedings'). (E) Mr A Bn & Others v Birmingham City Council Case Number 1300558/2019 (the Bn Proceedings'). (F) Withdrawal of various other claims outlined in correspondence by Unite including all of the below: <ul style="list-style-type: none"> i) an Action for Judicial Review outlined in Thompson Solicitors letter of 28 January 2019 and subsequent correspondence; ii) an alleged claim for defamation outlined in Thompson Solicitors letter of 18 February 2019; iii) 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. iv) a new ballot for Industrial Action based on the alleged breached of the MOU. (G) Withdrawal of any other litigation or pre litigation action against the Council as at the date of signing the agreement by Unite. (H) All industrial action will be suspended on signing an agreed Heads of Terms and on final agreement the ballot notice served on 15 February 2019 will be withdrawn.
7	Unite shall discontinue its claim under QB2019-00042 with each party to bear its own costs in those proceedings and BCC agrees to not pursue the Legal Costs Award in favour of BCC determined by the High Court on 14 February 2019 other than the amount already paid .
8	BCC to discontinue its claim under QB2019-006592 with each party to bear its own costs in those proceedings and BCC agrees to pay the Legal Costs Award in favour of Unite determined by the High Court on 1 March 2019.

PROPOSED TERMS OF SETTLEMENT BETWEEN BCC AND UNITE – UNITE PROPOSALS

9	<p>BCC have already started to arrange recruitment fairs – which enable Agency workers to apply for roles assisted by their Trade Union and HR.</p> <p>BCC is seeking to increase the proportion of full time staff to agency workers which is likely to result in more opportunities.</p> <p>For this event only all trade unions will be invited to act as observers in the interviews where their members are impacted.</p>
10	<p>Mop-up crews are not referenced in the MoU.</p> <p>BCC's aim is to complete all collections each day within the rounds of its normal crews.</p> <p>BCC will only use two-person mop-up crews for a further two weeks from the settlement date with each depot being entitled to use one-mop-up crew doing one round per day for the next two weeks.</p> <p>Following the expiry of the two week period, BCC will retain the right to use mop-up crews where it is necessary to clear waste not collected but it will put a WRCO with the mop-up crew. These may be sourced from an agency.</p> <p>All staff, whether BCC or Agency, will be fully trained in health and safety requirements.</p>
11	<p>The commencement date of the MoU is agreed as 24th September 2018.</p> <p>The end date of the MoU therefore is 23rd September 2019. The end date will be extended by the duration of the current industrial action (which began on 29th December 2018). The duration of the Industrial Action is 11 weeks and therefore the end date of the MOU is now agreed as 9th December 2019.</p>
12	<p>This refers to the 'stand-in' and NOT 'acting-up'.</p> <p>A stand-in protocol has already begun the consultation process with the main unions.</p> <p>The Acting director of Neighbourhoods and Cllr Ian Ward will meet local representatives regarding their concerns over WRCO recruitment.</p>
13	<p>In accordance with Clause 12 of the MOU 2017, a Joint Service Improvement Board (JSIB) will be established and membership will include all joint trade unions, GMB, UNISON and UNITE (incorporating UCATT) and the meetings will be chaired by the Cabinet Member BCC.</p> <p>Terms of reference will be agreed by the Board.</p>

	During the period the JSIB is considering future working arrangements and the review of the MOU.
14	<p>Unite agree not to pursue its defamation action but meet their own costs in bringing the action.</p> <p>The following statement be issued by the Council, Unite. It shall be specifically agreed that the parties will not materially defer from the material facts in this statement when making public commentary about the dispute: -</p> <p><i>“BCC, Unite and Unison are pleased to confirm that all industrial action and litigation between the parties (the dispute) have been concluded by way of mutually acceptable settlement terms.</i></p> <p><i>BCC confirms that at no stage in 2017 did either Unite or Unison attempt to prevent the Council from discussing any intended role changes with the GMB. Whilst the Council maintains that any payment made to [GMB] refuse workers, arising from the dispute in 2017, was made in good faith and following internal and external legal advice, the Council accepts that such payments had unintended consequences and is committed to working with all of the unions to ensure that a cohesive and positive working environment exists going forward.</i></p> <p><i>BCC further retracts commentary that was made in a recent Cabinet report wherein it was incorrectly said that Unite had declared a willingness to take industrial action even if a Court declared the action to be unlawful. BCC apologises for this commentary.</i></p> <p><i>All parties are committed to working together to provide a waste service that the people of Birmingham can be proud of and to this end are pleased to announce that the settlement terms have seen the creation of a working group (the Joint Services Improvement Board), to include council officers, trade union representatives and councillors, to ensure future disagreements can be resolved transparently and by discussion.”</i></p>
15	<p>These terms were not defined in the MoU and are added for clarification and the avoidance of doubt.</p> <p>The terms used in paragraph 11 above have the following meaning, for the purpose of this agreement.</p> <p>a. “Waste and Recycling Lorry” means any Open Back or Split Back vehicle currently being used to collect Domestic Waste.</p> <p>b. “Domestic Waste” means both</p> <ul style="list-style-type: none"> (i) waste products designated for recycling, which are collected from or from outside of domestic residences in respect of which the Council has a statutory waste collection function; and (ii) other (residual) waste products placed into black bin bags and/or wheelie bins, which are collected from or from outside of domestic residences in respect of which the Council has a statutory waste collection function. It does not include any of the following (as these terms are commonly used and understood within the Council’s Waste Service): fly-tipped waste, commercial waste, trade waste, or ‘dropped waste’.

	c. A “WRCO” is a grade 3 officer but may include a grade 2 Loader or other employee who, (having had the necessary training) is acting up or standing in to that role on a temporary basis
16	<p>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 JSIB.</p> <p>Nothing in this provision shall be interpreted as amending any provisions of existing collective agreements</p>
17	<p>The Heads of Terms/and Agreement will require the prior approval of the Cabinet based on the advice of its Statutory Officers.</p> <p>Prior to any final offer being made, 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, <u>where the proposals impact on their members</u>.</p> <p>The views of the District Auditor will also be fully considered as part of the approvals process.</p>
18	<p>Parties agree to the establishment of an independent review on future options for delivering the waste service, commissioned by the Council.</p> <p>The independent review will report to the Council but the Joint Services Improvement Board (JSIB) will be consulted on its terms of reference and will continue to be consulted throughout the Review period.</p>
19	Parties agree that these terms are in full and final settlement of all and any claims including those set out in section 6 above and nothing in these Heads of Terms shall be represented or construed as an admission of liability.

