

**Public Report - FINAL 4 February 2019**

**Birmingham City Council**

**Report to Cabinet**

12<sup>th</sup> February 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  
**Relevant O &S Chair(s):** Councillor John Cotton Chair of Co-ordinating Overview and Scrutiny  
**Report author:** Clive Heaphy, Chief Finance Officer  
Kate Charlton, City Solicitor and Monitoring Officer  
Rob James, Acting Director Neighbourhoods  
Dawn Hewins, Director Human Resources

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 Overview and Scrutiny Committee has agreed that the matter is urgent and cannot be reasonably deferred. [Paragraph 3.5 Council Constitution 11/9/18].

## 2 Recommendations

Cabinet are asked 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 in 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 15<sup>th</sup> 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 this report; or
  - 2.7.2 Option 2 - to offer a one-off payment (as set out in para 7.2 this 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 15<sup>th</sup> January 2019 and to issue forthwith injunction proceedings as set out in Cabinet Report 15<sup>th</sup> January 2019 (Appendix 1).
- 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.

### **3 Background**

- 3.1 On 15<sup>th</sup> January 2019, Cabinet considered public and private reports setting out options for mitigating the impact of the current industrial action in the waste service.
- 3.2 That meeting of Cabinet approved at paragraph 4.4.3 and 4.4.4 of the Public Report the following course of action: -
- a) A formal invitation to Unite the Union and UNISON to enter into binding arbitration; and
  - b) Subject to the outcome of an invitation to arbitration /arbitration meetings – commence the legal process for a court application with a view to preventing unlawful industrial action of both Unite the Union and UNISON continuing.
- 3.3 At the same time as the Cabinet decision was taken, the Council was still in active ACAS talks with the Unite the Union; during those talks an offer of binding arbitration was made and was not accepted by Unite the Union and so the ACAS talks continued.
- 3.4 On 31 January 2019, a formal written offer of binding arbitration was extended to the Unite the Union, via their solicitors, with a written response required by 1 February 2019 and no formal acceptance was received by the deadline given.
- 3.5 During those talks, Unite the Union notified the Council, of its intention to issue a 14 days' notice to escalate the current industrial action to full strike action if the Council commenced court action to prevent Unite the Union from continuing with its industrial action. On 4<sup>th</sup> February 2019, the Unite the Union gave notice of its intention to escalate industrial action as follows:
- To take part in discontinuous strike action consisting of a series of 24 hour stoppages commencing at 00:01 hours on: 19th February 2019, 22nd February 2019, 4th March 2019, and 8th March 2019
- And discontinuous strike action consisting of a series of 48 hour stoppages commencing at 00:01 hours on: 27th February 2019, 12th March 2019, and 21st March 2019.
- 3.6 This is in addition to the continuous action consisting of a ban on overtime, Unite the Union members adhering to job grades and descriptions, adhering to contractual start and finish times as follows:
- Unite the Union members on container or single operation vehicles (05:00 hours to 12:48 hours)
  - All other grades 2-4 Unite the Union members - all residual and recycling, including garden waste (06:00 hours to 13:48 hours) and Unite the Union members returning to work base yards for washing facilities for every 15 minute concessionary breaks and half hour lunch breaks in line with the Council's

Hygiene Regulations and Instructions which commenced on 29th December 2018.

#### **4 Latest Position**

- 4.1 Council has made, on a 'without prejudice' basis (via ACAS and subject to a decision of the Cabinet at a Cabinet meeting), a reasonable offer to Unite the Union to settle the ET Claim and to make a payment to each eligible litigant (as set out in the schedule to the ET) on a relevant date. The relevant date for the purposes of Option 2 is 6th June 2018 because that was the date of the last failure to consult payment to a GMB member.
- 4.2 Leading Counsel has been extensively consulted based on any litigation risk for the Council and the commercial reasons for settling these claims and advised that a reasonable well evaluated figure for members of Unite the Union would be in the region of £2,000 to £3,000.
- 4.3 The Council has made a reasonable offer which the Union has rejected on behalf of its members.
- 4.4 At the ACAS talks on Wednesday 30<sup>th</sup> January 2019, Unite the Union tabled additional demands which the Council cannot lawfully meet. Unite the Union have indicated that they see ACAS talks as being at an end although the Council continues to offer this route.
- 4.5 As a result of those ACAS discussions the options to mitigate the current industrial action are discussed at paragraph 7 of this report. In summary, these are:
- 1 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
  - 2 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
  - 3 To consider making a payment to resolve the dispute with the Unite the Union or
  - 4 For Cabinet to re-affirm its decision reached on 15<sup>th</sup> January 2019 to commence court action to seek to prevent the union from continuing with its industrial action.

#### **5. Analysis of Available Options to mitigate the risks and issues of the current industrial action by Unite the Union and UNISON**

As set out in this report and in the Private report.

These options are an update to those set out in the Public and Private Cabinet report dated 15<sup>th</sup> January 2019 including alternative options as a result of recent ACAS meetings and escalated challenges from Unite the Union.

## 5.1 Option 1

### Do Nothing

Allow the Industrial Action by Unite the Union to continue and await the outcome of the Employment Tribunal litigation issued by Unite the Union against the Council or injunction proceedings issued by the Council.

Unite the Union have also issued or notified of their intention to issue further litigation against the Council and this is set out in the Private report.

### Summary Issues - Option 1

1. Leading Counsel is of the view that it is likely that the current industrial action is unlawful.
2. Leading Counsel has also advised that in respect of the Employment Tribunal proceedings by Unite the Union members 'BCC is highly likely to successfully defend [these] claims'.
3. The hearing date for the Employment Tribunal is set to start on 3<sup>rd</sup> February 2020 and is likely to last for up to 10 working days.
4. A request has been sent to the Regional Employment Tribunal Judge at the Birmingham Employment Tribunal to request that the hearing date be expedited. If possible, a verbal update will be provided at the Cabinet meeting on 12<sup>th</sup> February 2019.
5. Litigation could result in further appeal hearings arising from the Employment Tribunal litigation.
6. The cost of industrial action is likely to continue at up to £350,000 per week. This cost is not in the current budgetary framework. The cost of providing a contingency service during the strike action is estimated to be in the range of £13.5m to £28.2m depending on whether the industrial action is discontinuous or continuous.
7. Waste accumulation is likely to increase whilst a resolution to the dispute is not reached resulting in increased resident complaints.
8. The Council will be unable to deliver a consistent waste service during this period due to industrial action.
9. This option does not align with Kerslake observations in relation to Political and Industrial Relations.
10. Trade Waste Collection and income will be adversely impacted.
11. Recycling rates will be compromised.

12. Absence rates in the refuse collection workforce are substantially increasing.
13. Significant Value for Money issues will arise for the District Auditor and will impact on resolving current section 24 Notice findings.
14. In spite of Council requests through recent ACAS negotiation meetings (January 2019 – to date), Unite the Union have not agreed to suspend the current Industrial Action during these talks.

## **5.2 Option 2**

Settle the Employment Tribunal claim B v Birmingham City Council (multiple 9438) issued by the Unite the Union ('ET Claim');

### Summary of Issues - Option 2

1. The Council has express and/ implied statutory powers under S111 Local Government Act 1972 to make payments to union members to settle litigation.
2. The express power conferred by S222 Local Government Act 1972 'Power to prosecute or defend in court in the interest of the public' enables the Council to also to seek to settle litigation claims.
3. Having the powers to transact does not necessarily make it the right thing to do as this course of action carries with it a number of risks. There is no certainty as to whether a challenge on the grounds of Ultra Vires (UV) would be successful, the view of the Monitoring Officer is that the risk cannot be nil. Option 2 and Option 3 each carry Ultra Vires risks however each is different in terms of likelihood of risk and impact of risk.
4. In spite of the likely unlawfulness of the industrial action, the fact that the earliest that a court can hear the cases is February 2020 means that the cost of the strike continuing is substantial and damaging to the City's finances and reputation.
5. The Council has made on a 'without prejudice basis' (via ACAS and subject to a decision of the Cabinet at a Cabinet meeting), a reasonable offer to Unite the Union to settle the ET Claim and to make a payment via ACAS COT3 agreements to each eligible litigant who was, on 6<sup>th</sup> June 2018
  - a. A Council employee (not an agency worker)';
  - b. A member of Unite the Union and on strike during 2017;
  - c. Listed on the schedule to the ET claim and is a valid claimant.
6. Settlement terms would include undertakings that the employment tribunal proceedings are withdrawn and that Unite the Union agree to cease all current industrial action against the Council relating to this dispute.
7. Leading Counsel has been extensively consulted based on any litigation risk for the Council and the commercial reasons for settling these claims and advised

that a reasonable, well evaluated figure for members of Unite the Union would be in the region of £2,000 to £3,000.

8. The Council has already made a reasonable offer which has been rejected by Unite the Union.
9. Factors in favour of making payments
  - a. Strong commercial reasons – In spite of the likely unlawfulness of the industrial action, the fact that the earliest that a court can hear the cases is February 2020 means that the cost of the strike continuing is substantial and damaging to the City's finances.
  - b. The significant impact the strike is having on the residents of Birmingham and the City's reputation.
  - c. The cost of providing a contingency service during the strike action is estimated to be in the range of £13.5m to £28.2m depending on whether the industrial action is discontinuous or continuous. This is based on a likely ET Claim hearing date of February 2020.
  - d. The outcome of the claim will be determined by the ET. Whilst the Council considers its case to be strong, there is never any complete certainty in litigation.
10. Factors against making payments
  - a. A settlement payment may carry litigation and other risks which are further discussed in the Private Report.
  - b. A settlement does not guarantee that there will no further collective disputes from Unite the Union in Waste Management or further industrial action across the Council or further trade union litigation.
  - c. A payment could set a precedent in the Council such that other service areas in the Council (and potentially Council managed Schools) who are subject to changes in terms of conditions and/redundancy would expect a similar payment, particularly if the affected group are a female dominated group. Industrial action might be taken in these areas and only be stopped if a payment was made.
  - d. 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, could lead to industrial unrest; the union members not paid could have a valid trade dispute entitling them to strike.

### 5.3 Option 3

To make a payment to resolve the dispute with Unite the Union.

### Summary of Issues - Option 3:

1. The Council has express and/ implied statutory powers under S111 and/or S222 to make payments to Unite the Union to settle a dispute.
2. Factors in Favour of making a payment
  - a. There are strong commercial reasons – the cost of the strike continuing and the significant impact on the residents of Birmingham.
3. Factors against making a payment to resolve the dispute
  - a. There is no legitimate reason to pay Unite the Union in order to resolve the dispute.
  - b. The Council's position is that the industrial action is unlawful and that the additional allegations of breach of the MOU 2017, use of agency workers during the industrial action, failure to approve holiday leave for Unite the Union members resulting in further blacklisting are denied and without merit.
  - c. A decision to make equivalent payments to those made to GMB members could be considered to be Ultra Vires (see Private report).
  - d. A payment could set a precedent in the Council such that other service areas in the Council (and potentially Council managed Schools) who are subject to changes in terms of conditions and/redundancy would expect a similar payment, particularly if the affected group are a female dominated group. Industrial action might be taken in these areas and only be stopped if a payment was made.
  - e. 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 could lead to industrial unrest; union members not paid could have a valid trade dispute entitling them to strike.

## **5.4 Option 4**

Issue injunction proceedings forthwith, with a view to preventing the unlawful Industrial action by the unions in waste management from continuing.

### Summary of Issues Option 4

1. The Council has the express power conferred by S222 Local Government Act 1972 'Power to prosecute or defend in court in the interest of the public.
2. The purpose of the injunction application is with a view to preventing the unlawful Industrial action by the unions in waste management from continuing.

3. The Council has explored and undertaken various mitigations since notification of the ballot and the industrial action by Unite the Union and since the Cabinet decision of 15<sup>th</sup> January 2019 the Council has used its best endeavours through ACAS mediation to mitigate the need to proceed with Court action all of which, to date, have not resulted in an agreed resolution to the dispute or the employment tribunal litigation.
4. Factors in favour of issuing injunction proceedings
  - a. Cabinet reached a decision on 15<sup>th</sup> January 2019 to commence the legal process for a court application with a view to preventing unlawful industrial action of both Unite the Union and UNISON continuing.
  - b. Such action would be setting a precedent not to accept unlawful industrial action.
  - c. Legal costs of injunction and costs of trial c£1.5m including potential appeal balanced against ongoing costs of industrial action of up to £350,000 per week.
  - d. Kerslake recommendations – mature relationship between members and officers with clarity of role and formally and transparently considering the advice of statutory officers in reaching cabinet decisions.
5. Factors against issuing injunction proceedings
  - a. Unite the Union have stated that they would carry on industrial action regardless of any injunction. Continuing on the same basis would risk contempt of Court by Unite the Union.
  - b. A risk that the injunction is not successful.
  - c. A risk that the Union ballot for another reason to issue strike action.

## **6. Operational Issues**

There are a range of operational issues as follows:

### **6.1 Option 1 Do Nothing:**

- Waste accumulation on streets and backlog increasing – up to 20 crews not going out each day.
- Impact of safety of residents in tower blocks becomes more significant
- Cabinet Mandate from 15<sup>th</sup> January provides a contingency – see update attached at Appendix 2
- Increased complaints from residents and elected members
- Risk of escalation to full strike (could be per hour rather than all out)
- Trade customers and income likely to be affected
- Media unrest and constant requests for information
- Recycling rates compromised

- Impact on the waste disposal arrangements i.e. mixed waste is collected which is higher in calorific value. Waste volumes are processed more slowly through the plant and therefore increases the amount of waste to landfill.
- General image of the city compromised
- Behaviour of workforce in applying industrial action i.e. returning to the depot for breaks, stand in arrangements etc. is left unchallenged.
- Absence is increasing with causation cited as stress and anxiety – leads to fewer rounds being sent out each day.

## **6.2 Options 2 & 3: Settle Employment Tribunal Proceedings / Settle Dispute**

- Industrial action would cease imminently.
- There would be a period of catch up required and we would continue to use existing contractor as two weeks' notice required to terminate these arrangements.
- Limited overtime over a maximum of 2 weekends could be offered to existing workforce to assist with the catch up. There is no question of regular overtime being re-introduced as this is not permitted in the MoU.
- Recycling rates would take additional effort to recover.
- Need to maintain good communication as to the reason for settling litigation when the strike itself is unlawful i.e. this cannot be tested until February 2020.
- Manager / Trade Union relations will need time to recover and a culture change is required
- Strong performance management of the service is essential going forward
- Resident engagement on recycling and support to the collections service will take time to recover

## **6.3 Option 4: Injunction**

As Option 1 but:

- Increased conflict
- Potential all out strike and increased contingency measures will be required

## **6.4 Contingency Plan**

An updated contingency plan is attached at Appendix 2

## **7.0 Consultation**

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

- 7.2 The Group Leader Conservative Group and the Group Leader Liberal Democratic Group Councillor have been advised of this report.
- 7.3 The 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.
- 7.4 The District Auditor has been briefed on the matters set out in this report.
- 7.5 The Birmingham Improvement Panel has been briefed on the matters set out in this report

## **8.0 Risk Management**

- a. 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
- b. Significant financial costs - contingency crews
- c. Significant operational issues – missed collections and impact on service delivery for residents.
- d. Significant reputational issue – missed collections, industrial action in Waste Service
- e. Mitigating these risks was discussed further in the Cabinet Report Public Report 15<sup>th</sup> January 2019 and further discussed in the Private Report.

## **9.0 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 and Monitoring Officer**

As set out in the Private Report and

- 10.1 The Council has express and/ implied statutory powers under S111 and/or S222 to make payments to Unite the Union and or UNISON members.
- 10.2 266 Unite the Union members have issued employment claims in the Birmingham ET alleging that the Council has subjected their members to detriment for whistleblowing, for trade union activities, and has blacklisted them. The Council is vigorously defending these claims.
- 10.3 The hearing date when this claim will be considered at the Birmingham ET is currently listed for February 2020.

- 10.4 The power conferred by S222 Local Government Act 1972 'Power to prosecute or defend in court in the interest of the public' enables the Council to also to seek to settle claims.
- 10.5 The cost of defending the ET is likely to be c£150,000.
- 10.6 A losing party to an Employment Tribunal decision can appeal to the Employment Appeal Tribunal and that process from application to the EAT and subsequent hearing could take up 12 months, i.e. 2021
- 10.7 It is not unreasonable for an employer to seek to settle litigation for commercial reasons. If the Council wins the Employment Tribunal, the Council would be able to claim the legal costs incurred in defending the litigation. If the Council won the injunction it would seek damages from Unite to include the cost of industrial action including the legal costs. It may not be possible to recover 100% of the costs incurred.
- 10.8 The process for instigating court proceedings could commence forthwith in accordance with the Cabinet decision reached on 15<sup>th</sup> January 2019, which would mitigate the risks/challenges of the options for resolving the dispute
- 10.9 The decision of the Employment Tribunal will be a legal ruling determining who is right and who is wrong about Unite's arguments that non-payment amounts to trade union detriment and trade union blacklisting and whistleblowing detriment.
- 10.10 A subsequent ruling about who is right and who is wrong could have the practical effect of determining the wider industrial dispute.

#### **11.0 City Solicitor (Monitoring Officer)**

- 11.1 A challenge to a decision to make the payments to members of the Unite Union or directly to the Unite Union if there is going to be a challenge it is likely to be made on the grounds that it is ultra vires. It is necessary to consider the factual circumstances, and apply the law on ultra vires to those circumstances to determine if a likely challenge would be successful or not. That risk assessment is set out in the Private report
- 11.2 In broad terms, an action will be ultra vires if the decision-maker has no power to make that decision, or even if it has a power to make it, it does not act in good faith, it takes into account irrelevant considerations, it does not take into account relevant considerations, or the decision is manifestly unreasonable in the sense that it is one which no reasonable decision-maker could make.
- 11.3 In reaching their decision on a preferred option as an alternative to that reached on 15<sup>th</sup> January 2019, as set out in paragraph 2 of this report, Cabinet are strongly advised to address their mind to all the relevant issues, act in good faith in reaching their decision, not base their decision on grounds of bias or pre-determination and not base their decision on irrelevant issues. In doing so Cabinet should ensure that they have read and considered the matters and

issues raised in this report and the Private report and also in the Public and Private Cabinet reports 15<sup>th</sup> January 2019.

- 11.4 There can be no guarantee that a challenge to a decision of Cabinet would seek to demonstrate that one or more considerations was legally irrelevant, or that a legally relevant consideration had been overlooked; however this report and the Private report and the Public and Private Cabinet reports 15<sup>th</sup> January 2019 contain a summary of a number of considerations that it is unlikely that a court would find to be irrelevant, or that omitted relevant considerations.
- 11.5 As the Council's Monitoring Officer, my statutory duty under section 5 and section 5A Local Government and Housing Act 1989 is summarised as being a duty to report to the Council in any case where I am of the opinion that any proposal, decision or omission of the Council, its committees or subcommittees or anyone employed by the Council is, or is likely to give rise to illegality or breach of statutory code or constitute maladministration.
- 11.6 Whilst I am of the view that there is no certainty as to whether a challenge on the grounds of Ultra Vires (UV) would be successful, I cannot say that the risk is nil. Option 2 and Option 3 carry UV risks however each is different in terms of likelihood of risk and impact of risk. They also carry other risks that the payment does not protect against future union action in waste, of future action in other areas of the Council, of claims from members of other TU's and of claims from the female dominated workforce.
- 11.7 The Injunction option enables the Council to either stop the current unlawful industrial action or then make a payment to Unite the Union, without the contagion and discrimination and TU issues arising. It also provides the option of claiming damages against Unite the Union in respect of the cost of the contingency arrangements.
- 12.0 Option 2
- 12.1 Settlement of the employment tribunal litigation under ACAS COT3 arrangements would be done under statutory powers as referred earlier in this report. That in itself does not present a risk. There is no appreciable risk that the council acted other than in good faith in order to bring the industrial action to an end for commercial reasons due to the significant financial and reputational risks. The Cabinet reports 15<sup>th</sup> January and these reports (public and private) set out relevant factors in favour and against making such a payment.
- 12.2 In terms of whether a decision to settle the ET Claim and for the Council to make a payment to Unite the Union members, relevant factors in favour of making that payment are that :
- a) the strike progressing until at least February 2020 is prohibitively costly, significant and
  - b) increased resident disquiet is probable with increased waste accumulating

- c) including significant reputational damage at a time when the Council is under public and government scrutiny is making significant improvement journeys in other service areas.
- 12.3 On the other hand, factors against making the payment are that other risks are created, such as contagion issues across the Council, allegations of trade union discrimination from other Unions and potential sex discrimination challenges from other service areas that are also in dispute with the Council. The likelihood of claims is low so unlikely but cannot be ruled out and the impact if claims were successful would be low to medium.
- 12.4 It is unlikely that I would need to consider reporting to Council if a decision is taken to implement option 2, to settle the employment tribunal litigation, provided the terms of settlement are in accordance with the legal advice given and for sound demonstrable commercial reasons.
- 12.5 Option 3
1. Making a payment to Unite the Union to resolve the dispute and for the union to make payments to its members which the Council cannot control or does not know about presents a more significant risk in terms of UV.
  2. A payment to Unite the Union would be done under statutory powers as referred earlier in this report. That in itself does not present a risk.
  3. A decision for the Council to make a payment to Unite would be likely to be found to be manifestly unreasonable in the sense that it is one which no reasonable decision-maker could make. The relevant factors are that the Council has received advice that there is good reason to conclude that Unite the Union's call for action is unlawful.
  4. There is a much higher risk of contagion elsewhere in the Council if payment is made to end the action, and unions in all areas will perceive that the Council will capitulate to their demands, and may become ever more ambitious in making them; the action has been called to pressurise the Council to make payments to Unite the Union members equivalent to the FTC payments to GMB members in circumstances where Unite the Union members have no valid FTC claims; the payments could therefore be viewed by a court as FTC payments to Unite the Union members.
  5. And so the chances that making a payment to Unite the Union to settle the dispute would be a manifestly unreasonable decision that no reasonable authority could choose to make, and hence ultra vires, are at least Low to Medium.
  6. In terms of sex discrimination and contagion risks, I describe the risk of claims as medium, however more importantly if such claims are subsequently successful for the claimants, then the impact across the Council is assessed as 'significant'.

7. A decision to approve option 3, is likely to require the Statutory officers to seriously consider further their statutory responsibilities, and particularly where the District Auditor is likely to raise issues of concern.

## 12.6 Option 4

1. The Council has received advice that there is good reason to conclude that Unite the Union's call for action is unlawful and that it would obtain an injunction to restrain Unite the Union from calling it and continuing with it. Those reasons were set out in detail in the Private Cabinet report 15<sup>th</sup> January 2019.
2. In response to the decision reached by Cabinet 15<sup>th</sup> January 2019, Unite the Union have widened the dispute with further challenges:
  - (a) use of agency workers during strike action,
  - (b) judicial review challenging Council's contingency arrangements; and
  - (c) threatened to issue further ET claims regarding holiday arrangements.
3. These challenges are not viewed as legitimate. The Union have widened the challenges in order to put pressure on the Council to approve option 3, all these challenges rest on their assumption that the Industrial Action is lawful.
4. The Union have threatened to apply for an injunction to restrain the Council from breaching the MOU (Nov 2017) – if they do this, it makes legal and practical sense for the Council, at the same time as defending that application, to apply for a cross injunction against the Union to restrain their unlawful action (it would also resolve the other Unite the Union challenges identified above).
5. The Injunction option presents an opportunity to the Council, a logical, speediest and most cost effective way, compared to option 1, and without the employment risks associated with option 2 and 3, of determining whether these challenges are correctly made or not.
6. Whether any judicial ruling goes in favour of the Council, which it is believed it would, it would be for the Council to apply as soon as possible for an injunction against Unite the Union.

## **13.0 Financial Implications and Chief Finance Officer**

- 13.1 The financial implications of each of the potential responses by the Council to industrial action are considered in the Private Report
- 13.2 The cost of current industrial action is around £350,000 per week and up to the date of the ET, is estimated to be in the region of £13.5m to £28.2m depending on whether the industrial action is discontinuous or continuous. 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.

### 13.3 **Chief Finance Officer**

- 13.4 The Council has a fiduciary duty to the taxpayers of Birmingham which extends both to probity and value for money – decisions should be taken having considered these factors. There are no straightforward options – each carries benefits and risks.
- 13.5 Extended industrial action, regardless of outcome, carries with it a high financial cost and operational and reputational damage. This is a strong commercial factor in considering available options to manage industrial action.
- 13.6 Whilst efforts are being made to secure an earlier hearing, and the Council's defence is considered strong, the cost of prolonged action and impacts on other service proposals would, if such a case were lost, the cost of the industrial action would be extremely damaging to the Council's financial stability. If the Council wins the Employment Tribunal, the Council would be able to claim the legal costs incurred in defending the litigation. If the Council won the injunction it would seek damages from Unite to include the entire cost of industrial action including the legal costs.
- 13.7 The making of a payment to Unite the Union members under ACAS COT3 arrangements to settle litigation would be done under existing powers and does not present a legal risk although the possibility of an Ultra Vires challenge remains a risk. As such, it is unlikely that I would consider a Section 114 notice as long as payments were within the parameters advised by Counsel or supported by an evidenced Commercial justification. However, the longer term impacts, including those related to future service transformation and indeed the risk of further industrial action could themselves lead to significant financial consequences and value for money issues.
- 13.8 The making of a payment directly to Unite the Union carries significant risks and indeed if not limited to litigant's only, poses many more questions which would require deeper review by myself as Section 151 officer. The making of payments to a politically affiliated body is not permitted and care would need to be taken not infringe contractual rights or anything which could give rise to challenge or contagion. The longer term impacts, including those related to future service transformation and indeed the risk of further industrial action could themselves lead to significant financial consequences and value for money issues.
- 13.9 Finally, the injunction route, like Option 1 has significant cost attached for it and no guarantee of an outcome. Should an injunction be successful it would cap the costs of the industrial action at a much lower level (circa £3m depending on timing) and clarify the lawfulness or otherwise of the dispute. The risk would still remain that both Unite the Union and UNISON would simply find other reasons to take industrial action.

- 13.10 No route provides a simple answer and there are considerable risks associated with each but it is important that Cabinet ensure that it understands the risks and is able to justify a decision based on the impartial advice of its statutory officers

#### **14.0 District Auditor**

- 14.1 It is a matter of practice that an auditor will seek a legal opinion where an issue comes before him/her which involves a council potentially taking a decision which might be deemed ultra vires.
- 14.2 The Auditors powers are set out in the Local Audit and Accountability Act 2014. The Act provides for an external auditor of a local authority to issue a Notice under schedule 8 of the Act. The issue of such a Notice requires a local authority to put a decision on hold and reconsider it if he/she considers the authority is about to make or has made a decision which involves or would involve the authority incurring unlawful expenditure or is about to take or has begun to take a course of action which, if followed to its conclusion, would be unlawful and likely to cause a loss or deficiency, or is about to enter an item of account, the entry of which is unlawful.

#### **15. Human Resources Implications**

- 15.1 Whilst Unite the Union have clearly stated its intention and requirements the Council remains committed to maintaining discussions with Unite the Union in a genuine effort to bring about resolution. Senior Management has been engaged in those discussions, having utilised the services of ACAS to assist, meetings that have been taking place throughout January 2019.
- 15.2 The Council remains committed to also having discussions with UNISON with a view to bringing about a resolution to their industrial dispute. ACAS led discussions between the Council and Unison are progressing.
- 15.3 At a more local level the Council remains committed to ensuring that lawful industrial action is able to progress unimpeded whilst maintaining employee relations with the joint Trade Unions. Regular union meetings in the Waste Service, led by officers in the service with the joint Trade Unions continue.
- 15.4 Following a ballot of its Refuse Collection members and appropriate notice to the Council Unite the Union have been engaged in continuous industrial action since 29 December 2018. Action has consisted of a ban on overtime; working to rule; adhering to contractual start and finish with times specified by Unite the Union; and returning to work base yards for washing facilities for every 15 minute concessionary breaks and half hour lunch breaks.
- 15.5 Following a ballot of its Refuse Collection members and appropriate notice to the Council Unison have been engaged in continuous action short of a strike commencing 25 January 2019. The action includes refusal to work stand-in and acting up; overtime ban; working to rule; returning to yard for breaks

15.6 Refuse Collection crews returning to the depot for breaks and lunch during the working day is reducing the time available to collect waste when compared to previous routines when such breaks were taken on the route. In addition, the workforce starting at the same time rather than previous staggered start times is creating queues waiting to tip loads at the end of the working day. This combination is having an adverse impact on performance

### **Director of HR**

15.7 Balancing the needs of the citizens whilst delicately performance managing its workforce during a period of lawful industrial action has placed greater demands on line management, as the environment has become more litigation charged demands on management time

15.8 The Council retains the right to not accept partial performance. Moving forward the following measures will assist depot management to ensure we make the best of available resources and deliver the best possible service to our citizens during these difficult times:

- Increased levels of HR support to each depot coupled with dedicated central specialists support to address employee related issues.
- Additional managerial support from across the wider Directorate to provide mentored support and increased capacity

### **16.0 Public Sector Equality Duty**

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

### **17.0 Appendices**

1. Cabinet Report (Public) 15th January 2019
2. Cabinet Report (Private) 15<sup>th</sup> January 2019
3. Waste Contingency Plan- updated (January 2019)