NOTICE OF MOTION RELATING TO RETRIEVAL OF MONEY PAID AS A RESULT OF THE ‘PAY SUPPLEMENT’ SCHEME

At the Extraordinary Meeting of Council held on 1 May 2014, Council considered a report arising out of a Notice of Motion submitted by Councillors P N Miller, R M Stoddart, A W Wilcox, R G Bowen and Jacob Williams, the terms of such motion being:

That council approve action to investigate the recovery of any monies paid under the scheme for senior officers approved at the senior staff committee on 28th September 2011 under agenda item 6.

The report considered at that meeting is attached as an Appendix.

Council resolved as follows:

That Council approve action to investigate the recovery of any monies paid under the scheme for senior officers approved at the senior staff committee on 28th September 2011 under agenda item 6 and the Chief Executive and the other unnamed Officer are invited (in writing) to voluntarily return the unlawful pay supplements, net of tax and National Insurance, they received in lieu of employer pension contributions; and the Chief Executive’s and the other unnamed Officer’s response will be presented in full to the ordinary council meeting scheduled for July 2014 (or in the event that no response is received, a notification of this in its place) where members will consider the matter as an agenda item under the terms of Cllr Paul Miller’s originating motion.

In accordance with the instructions of Council, letters requesting the voluntary return of the payments made to them in lieu of employer pension contributions, have been sent to the Chief Executive and the other unnamed officer.

No response has been received from the other unnamed officer.

A letter marked ‘private and confidential’ has been received on behalf of the Chief Executive, from a Consultant acting for the Association of Local Authority Chief Executives. In view of the contents of that letter, it is my opinion that it can only be disclosed to Members of the Council and it is accordingly enclosed under separate cover as an item of exempt information. It is my opinion that the letter and this issue should be considered by the
Council as an item of exempt information, with the public and press being excluded from the meeting, as it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that exempt information would be disclosed. In this respect, my opinion is that Paragraph 12 (Information relating to a particular individual) and Paragraph 14 (Information relating to the financial or business affairs of any particular person (including the Authority holding that information) of Part 4 of Schedule 12A to the Local Government Act 1972 apply. It is also my view that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In this respect, whilst it is appreciated that some Members have strong feelings about this issue, it is the case, in my opinion, that all employees of the Council do have a legitimate and reasonable expectation, both in employment terms and in accordance with their human rights, that their relationship with their employer should be conducted in appropriate confidence.

The advice previously provided to Council, with respect to action to investigate the recovery of monies paid, and as set out in the report attached as an Appendix, is re-affirmed.

RECOMMENDATION:

That Council considers the matter in the context of the advice contained in this report and that which has already been provided in the previous report to Council.

Background Documents:

Minute of the Extraordinary Meeting of Council on 14 February 2014
NOTICE OF MOTION RELATING TO RETRIEVAL OF MONEY PAID AS A RESULT OF THE ‘PAY SUPPLEMENT’ SCHEME

The following Notice of Motion has been submitted by Councillors P Miller, RM Stoddart, AW Wilcox, RG Bowen and J Williams:

That council approve action to investigate the recovery of any monies paid under the scheme for senior officers approved at the senior staff committee on 28th September 2011 under agenda item 6.

The Appointed Auditor from the Wales Audit Office (WAO) has expressed his view, in a Public Interest Report dated 30th January 2014, that a decision made by the Council’s Senior Staff Committee at a meeting on 28th September 2011, to allow senior Officers to opt out of the Local Government Pension Scheme and to receive as remuneration the equivalent of the employer’s pension contribution, is unlawful and that payments made as a result of that decision result in an item of account that is ‘contrary to law’.

At an Extraordinary Meeting of Council on 14th February 2014, the recommendations contained in the Public Interest Report were accepted. The first of those recommendations was: “The Council should rescind the decision and withdraw the current option for senior staff, stopping any future payments.”

It is the case that two Senior Officers of the Council took advantage of the Senior Staff Committee decision, one of these being the Chief Executive. The Public Interest Report records at paragraph 7 of its Summary, that “In the 2012-13 financial year, the Council paid £22,269 to the Chief Executive under the ‘pay supplement’ scheme. A further £28,742 will be paid to both the Chief Executive and another Senior Officer under the scheme in the 2013-14 financial year (up until the end of March 2014).”

The first recommendation referred to above, was immediately implemented and the final payments to the two Officers were made in January 2014. The payments made to the two Officers in 2013-14, were accordingly not £28,742, but £23,337. However, it must be made clear that the figures given in the Public Interest Report are gross figures. The payments made, were taxed at 40% and were also subject to payment of National Insurance contributions.

The term “unlawful” used by the Appointed Auditor, is a determination in the context of the financial accounts. The view expressed by the Appointed Auditor is not a definitive statement of the position in law. A Court of Law has
not determined that the decision made by the Senior Staff Committee was unlawful. Members will also be aware that Mr Tim Kerr Q.C. did not consider that the decision of the Senior Staff Committee was intrinsically unlawful and that the Courts would not necessarily quash the decision because of procedural irregularities.

There was no suggestion in the Public Interest Report, that any misconduct had been committed by anyone. The Report also did not contain any allegation of activity of a criminal nature by any individual. The Report did not contain a recommendation, that the money paid to the two Officers should be recovered, or indeed that the Council should investigate whether action could be taken to recover the money.

Whilst the Appointed Auditor has considered the decision of the Senior Staff Committee to be unlawful in the context of the Council’s financial accounts, it does not automatically follow that the Council is able to recover the payments made to the two Officers.

If the Council decides that it wishes to investigate recovery of monies paid as a result of the Senior Staff Committee decision, it will be necessary to obtain specialist legal advice on the merits of pursuing recovery action.

It is the case however that specialist legal advice has already been provided to the Council in this respect, by Mr Kerr. As is recorded in the Minute of the Extraordinary Council meeting on 14 February 2014, when the Public Interest Report was considered, Mr Kerr advised the Council that it was not bound to seek the return of monies already paid to any senior Officer, as he was likely to have a defence of “change of position”, because he had left the Local Government Pension Scheme and had made other arrangements, had forgone payment of employer’s contributions while in receipt of the pay supplement and had paid income tax on it. At the meeting, Mr Kerr also quoted relevant case law to substantiate that advice.

In the unlikely event that the Council is now advised that recovery action could be taken, it would be necessary for legal proceedings to be commenced in the civil courts, for recovery of the money.

In any such legal proceedings, it would not be sufficient to simply recite the fact that the decision of the Senior Staff Committee had been found to be unlawful by the Appointed Auditor. In any recovery proceedings, it would need to be proved to the satisfaction of the Court itself, that the decision of the Senior Staff Committee was unlawful. All of the arguments on individual points, which arose with the Appointed Auditor, would need to be pleaded, argued, considered and determined. It is only if the Court made a determination that the decision was unlawful, that the question of recovery of money and any legal defences which might be available with respect to such recovery, would then be considered in detail.

There will inevitably be a cost to the Council, if it is decided to further investigate the recovery of the money paid, although it is impossible at present to quantify the cost of obtaining the advice of Counsel or Leading Counsel in that respect. If Mr Tim Kerr Q.C. was to be instructed to advise, it is clear that his view on the matter is already known.
Even if advice is now received, to the effect that recovery proceedings could be taken, it would be impossible for any certainty to be given as to the likelihood of success of such proceedings. It is likely that any such proceedings would be complex and lengthy.

RECOMMENDATION:

That Council considers the Notice of Motion in the context of the advice which has already been provided by Mr Tim Kerr Q.C. in relation to this matter.

Background Documents:

Minute of the Extraordinary Meeting of Council on 14 February 2014