

CHANGE AND THE LOCALISM AGENDA

Managing Major Change:

Employment and Corporate Governance

--

ROBIN ALLEN QC¹

--



www.cloisters.com

Introduction

1. National governments impose obligations on local government. Electors have needs and preferences to be met. Politicians have aspirations to achieve. None of this will happen without the worker – bees of local government - from chief executive to road sweeper – willingly putting their shoulder to the wheel or hand to the broom. So good human resource management is what makes things happen well.
2. Since we all know that the aim of the localism agenda is to *enable* major change to take place at the local level; we are going to need a very good deal of good human resource management in the next few years to make this happen. If it doesn't the agenda will have been a failure.
3. Major change inevitably means, a change of focus by authorities, changes in budget allocation, and therefore changes in the employment needs. None of this will work without good employment relations and a careful use of resources.

¹ Head of Cloisters Barristers' Chambers, 1 Pump Court, Temple, London EC4Y 7AA United Kingdom. Telephone: 020 7827 4000; Fax: 020 7827 4100; DX LDE 452; Email: ra@cloisters.com

4. Public accountability in relation to pay policies will be critical for buying in public acceptance. However public accountability will also increase internal accountability and so change the dynamics in job allocation and pay policies.
5. The key message of my paper is that following on the *horizontal comparisons* required by equal pay legislation the consequence of the new Bill is that authorities will now be faced with *vertical comparisons* between chief officers pay and that of the lowest paid. This is truly the beginning of a new era in public corporate governance.
6. The big accountability change we are now facing in the Localism Bill is in Chapter 8 simply entitled "Pay Accountability".

Pay Accountability

7. We all know that the pay levels achieved by senior public officials were a matter of public concern during the last election and soon after. The Times reported on the 30 December 2008, that Eric Pickles MP had unveiled plans to "purge town hall 'fat cats'". It said

"dozens of council chiefs who earn more than Cabinet ministers would lose their jobs as clusters of councils merged their frontline services and backroom operations to provide better value for money."

It was pointed out that there were officers who were paid more than the Prime Minister.

8. The story has not gone away. A headline² from the Eastern Daily Press on the 26 August 2011 gives a flavour of the debate³ as it simmered over this summer –

Chief executives of councils across Norfolk were collectively paid more than £1.2m in the past financial year, new figures have revealed. Norfolk County Council's chief executive David White was the biggest earner, with his basic salary of £205,400 increasing to £256,900 once a £12,300 performance bonus and contributions to his pension were added on.

² In citing this headline and the related passages I am not to be taken as endorsing their views of course but in explaining the context for this legislation.

³ See

http://www.edp24.co.uk/news/politics/the_1_2m_bill_for_norfolk_s_council_chief_executives_1_1005029

According to the council's statement of accounts, which have yet to be audited, that saw Mr White, who joined the county council in 2006, £6,800 worse off than the previous year - a 12-month period which has seen his authority agree £155m worth of cuts and the shedding of 750 full-time equivalent jobs.

9. Two posts on the EDP's website immediately following this catch the mood of the moment

The EDP itself today reports this quote from a letter to a national newspaper: "How long before a council announces that, after paying its officials' salaries and pensions, regrettably it has no money left to provide services".

...

This story over remunerations confers the true meaning of the word obscene. These performance bonuses are received for cutting services to the bone, as well as for abysmal failure to implement policy as it exist, These officers have failed and are remunerating themselves with monies that should be spent on services. David Whites well known previous history in Thurrock, makes this article an even more sickening experience. We should reject their already planned next cuts and make radical change at NCC a message for the next county elections. ...

10. So it is simply unsurprising that at a time when the government imposed a pay freeze on its civil servants⁴ it also considered it necessary to legislate to enhance public accountability of the pay of local government officers. As we shall see we need to recognise that there will be good deal more of this in the months to come.
11. Moreover although the focus was initially on chief officers' pay solely this now has to be seen in relation to the pay of lowest – paid officers.

The key parts of the strategy

12. There are three key elements to the Government's strategy in relation to pay accountability in Chapter 8 of the Localism Bill that have addressed this -

⁴ See http://www.hm-treasury.gov.uk/tax_pay_index.htm

- a. Authorities have to publish pay policy statements
- b. Authorities must comply with their pay policy statement
- c. Authorities cannot delegate functions in relation to pay policy statements

13. Following amendments⁵ in the Lords this is now likely to be a very demanding requirement on local authorities.

Pay Policy Statements

14. Clause 38(1) – (2) of the Bill⁶ sets out the basic requirement on a Public authority

<p>PAY ACCOUNTABILITY</p> <p>38 Pay policy statements</p> <p>(1) A relevant authority must prepare a pay policy statement for the financial year 2012-2013 and each subsequent financial year.</p> <p>(2) A pay policy statement for a financial year must set out the authority's policies for the financial year relating to—</p> <ul style="list-style-type: none"> (a) the remuneration of its chief officers, (b) the remuneration of its lowest-paid employees, and (c) the relationship between—(i) the remuneration of its chief officers, and (ii) the remuneration of its employees who are not chief officers.

15. The Lords amendments have introduced consideration not only of the rate of the highest paid but also the lowest paid and what the notes describe as pay dispersion – “that is, the relationship between the remuneration of their chief officers and all other employees”.

16. The statement must set out what definition is used for lowest paid employee and why it has been used: clause 38(3).

17. The pay policy statement must be approved before it comes into force and that must take place before 31st March 2012; it must be annually renewed before the beginning of each FY though it may be amended; and it must be published as soon as reasonably practicable: clause 39. There is a duty to

⁵ See <http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0244/en/12244en.pdf>

⁶ See http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0100/lbill_2010-20120100_en_5.htm

take into account any relevant guidance in making the statement: clause 40.

18. There 7 policies which the statement must set out and one which it may set out. The mandatory matters are

- (a) the level and elements of remuneration for each chief officer,
- (b) remuneration of chief officers on recruitment,
- (c) increases and additions to remuneration for each chief officer,
- (d) the use of performance related pay for chief officers,
- (e) the use of bonuses for chief officers,
- (f) the approach to the payment of chief officers on their ceasing to hold office under or to be employed by the authority, and .
- (g) the publication of and access to information relating to remuneration of chief officers.

19. There is discretion also to set out the policies for the financial year relating to the other terms and conditions applying to the authority's chief officers: clause 28(5).

The relevant authorities

20. The authorities to which this provision applies are the usual suspects: a county council, a county borough council, a district council, a London borough council, the Common Council of the City of London in its capacity as a local authority, the Council of the Isles of Scilly, the London Fire and Emergency Planning Authority, a metropolitan county fire and rescue authority, or a fire and rescue authority constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies: clause 43(1).

Who are the chief officers?

21. The Chief Officers are also the usual suspects: the head of paid service designated under section 4(1) of the Local Government and Housing Act 1989; its monitoring officer designated under section 5(1) of that Act; a statutory chief officer mentioned in section 2(6) of that Act; a non-statutory chief officer mentioned in section 2(7) of that Act; and a deputy chief officer mentioned in section 2(8) of that Act.

Using the pay policy statement

22. Two clauses set out constraints in relation to this process. Firstly, the responsibilities for the provisions of the chapter are not delegable. Thus clause 42 states

- (1) The functions conferred on a relevant authority by this Chapter are not to be the responsibility of an executive of the authority under executive arrangements. .
- (2) Section 101 of the Local Government Act 1972 (arrangements for discharge of functions by local authorities) does not apply to the function of passing a resolution under this Chapter.
- (3) The function of a fire and rescue authority within section 43(1)(i) of passing a resolution under this Chapter may not be delegated by the authority.

23. Secondly as it is presently the Bill imposes an obligation on authorities to comply with its pay policies in the statement in relation to chief officers in the following way –

- Determinations relating to remuneration etc .**
- (1) This section applies to a determination that—
- (a) is made by a relevant authority in a financial year beginning on or after 1st April 2012 and
- (b) relates to the remuneration of or other terms and conditions applying to a chief officer of the authority.
- (2) The relevant authority must comply with its pay policy statement for

the financial year in making the determination.

(3) Any power of a fire and rescue authority within section 43(1)(i) to appoint officers and employees is subject to the requirement in subsection (2).

(4) In section 112 of the Local Government Act 1972 (appointment of staff) after subsection (2) insert—

“(2A) A local authority’s power to appoint officers on such reasonable terms and conditions as the authority thinks fit is subject to section 41 of the Localism Act 2011 (requirement for determinations relating to terms and conditions of chief officers to comply with pay policy statement).”

24. In this way the political responsibility for the execution of the pay policies is firmly placed in the hands of the politicians.

What are the consequences of this?

25. The production of the pay policy statement will require a great deal of thought from a number of different angles. Firstly it will need to be very carefully written to accord with the facts. This may require very extensive consideration as to why a chief officer’s pay is what it is. It will require consideration of the outside market forces, the aims of any incentive plan, the relativities within the organisation, and value for money.

26. It is likely that there will be disputes between the chief officers and the reasons for the pay policies. The process seems destined to produce real examination of the process in which pay is set. How are those disputes to be resolved? The Act does not make it clear at all.

27. Litigation may occur; but is there room for mediation? The interests of the chief officers and the authorities in structuring the policies are to some extent different. Targets may not be well defined and that may suit the chief officer. Politicians in dispute with their officers may use these statements as a means to discipline or even sack them in the future.

28. Very few authorities if any (and none of which I am aware) have policies that relate in a meaningful way chief officers pay to that of the lowest

- paid. In many cases different job evaluation systems are used to set senior officers pay as compared with lower paid staff so there is not even that to fall back on.
29. It seems to me inevitable that the pay policy statement will also be used in trade unions negotiations when considering the relationship between highest and lowest paid employees. If a pay policy is used which applies to a chief officer then a trade union is likely to ask that something similar will be used for the next level and so on cascading down through the pay system.
30. In short one of the effects of this could be seen from one perspective as perverse - to keep down the pay levels of chief officers and to drive up the pay of more junior and obviously more numerous staff – thereby increasing the overall pay bill.
31. I am more than happy to discuss the implementation of this new regime and its consequences in questions and after this session since I cannot say that I have all the answers as to where it will lead.

Some conclusions

32. The change that the localism agenda will bring will inevitably lead to specific employment problems around *reorganisation, redundancy and reskilling*. It may mean that a council will lose functions and so no longer need the staff who have undertaken those functions or get new functions and therefore have to take over teams of staff from other authorities or start from scratch.
33. In that context pay policy will become critical. Questions about pay protection will be addressed in the context of overall pay policy. Affordability of staff will become once again a question of relative value.
34. As lawyers we need to understand the legal constraints on employment policy and to help our council managers and politicians to see what is legally sensible and what is not. We need to accept that the interface between human resource management and the law ought not to be confrontational. That is not to say that we can be flexible about absolute rights but we must be prepared to be flexible where the law allows us to be so.

35. Our constant role is to help the human resource managers by helping them to avoid legal pitfalls and to find a way out of problems when things go wrong and the unforeseen happens by always giving advice with integrity and honesty, and objectivity and impartiality.⁷
36. Throughout this good corporate governance in the widest sense will be necessary and that means ensuring legality, good decision making, a good use of resources, and good public accountability, that staff are empowered to work in accordance with best practice, and are effectively deployed and managed.
37. One way of doing this is through good risk management. In many situations the advice to be given about employment policy will be entirely clear. It is the difficult cases that will come to you and take up most of your time. Certainly that is the kind of problem that I get.
38. Having a good working method for cases where the law is not clear is vital. It is not enough for a local government lawyer to say I cannot tell you for certain how this issue would be resolved if it were litigated; we have a critical role in enabling where possible and stopping when necessary.
39. So our first task in the employment context is to state clearly when legal action is definitely unlawful . There is a direct parallel with our public law obligations. Public authorities must not act *ultra vires* and they certainly should not intentionally commit torts, break contracts or disregard statutory rights that employees have.
40. However there will be many cases when it is by no means clear that a proposed course of action will be unlawful in those senses and it is in this context that the lawyers get to be asked: "What can properly be done?" It is no good answering I don't know for sure. Good governance requires a risk assessment. What does that mean?
41. Because I almost only get difficult issues, when I am asked to advise public authorities as to a future policy or programme related to

⁷ Principles recently restated in the context of the Civil Service Commission: see section 7 of the Constitutional Reform and Governance Act 2010.

employment I always divide my final advice into three parts once the relevant law has been identified: *outcome risk*, *litigation risk* and *future risks*. Firstly I look to consider what the risk is of an adverse outcome if the council is sued and secondly what the risk is of litigation. Lastly I consider the identifiable future legal risks that may arise as a consequence if this course is taken.

42. It is obvious that careful management of the risk of litigation may mean that a higher risk of an adverse outcome is tolerable. On the other hand even where there is a lowish risk of an adverse outcome a higher litigation risk may be quite unacceptable. The final decision by the public authority will need to balance my advice in relation to both these matters where the law is not clear but it should also take into account where matter may proceed to if this course is taken. The best advice does not just look at the present problem but the risks that a course of action that seems to resolve the present issue will give rise to more issues in the future.

43. Chapter 8 of the Bill is going to require all of us to use these skills!

ROBIN ALLEN QC
Cloisters