



GOVERNANCE COMMITTEE

11 January 2017

Subject Heading:

Proposed Termination of the Salary Plusage Scheme

CMT Lead:

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Report Author and contact details:

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Policy context:

The Council has reward and retention payments for employees as required which are reviewed annually at Full Council in the Annual Pay Policy.

Financial summary:

The advice is that the Scheme is no longer permissible in law and should cease. Any 'exceptional hardship' payments will be decided by the Head of Paid Service.

The subject matter of this report deals with the following Council Objectives

Havering will be clean and its environment will be cared for	<input type="checkbox"/>
People will be safe, in their homes and in the community	<input type="checkbox"/>
Residents will be proud to live in Havering	<input checked="" type="checkbox"/>

SUMMARY

The Salary Plusage Scheme was introduced by the Council in 1965. It provides for additional salary payments to some Council employees and it would appear it may have been designed at that time as a staff retention tool and to reward long service. Members are advised that following a detailed review of these arrangements the Scheme is no longer reasonable or justified and accordingly is no longer permissible in law and that further payments under the Scheme should cease. This report sets out the steps that officers advice be taken by the Council.

RECOMMENDATIONS

That Members:

1. Agree that the Salary Plusage Scheme does not serve the purpose for which it was introduced and that continued payments under the Scheme are not legally permissible (save in the limited circumstances set out in this report).
2. Agree the steps set out in paragraphs 13 to 18 of this report to cease payments under the Scheme.
3. Delegate authority to the Head of Paid Service to take such actions and steps incidental to 1 and 2 above as are necessary to bring an end to the Scheme, including but not limited to exercising discretion to make some extra payments in exceptional circumstances/hardship cases.

REPORT DETAIL

Historical Context

1. The Salary Plusage Scheme has been in operation for over 50 years since September 1965. The explicit purpose of the Scheme is unclear but appears to have been to facilitate staff retention of experienced employees and to reward long service.
2. The Scheme provides that employees with more than 25 years of Local Government Service receive a salary plusage or enhancement for the final three years of that service at a rate of 0.3% of salary for each year of service with the Council and 0.2% for each year of service with other local authorities. The plusage is only paid to “officers”. It is not paid to former manual workers.
3. In 1997, a decision was made by the Council to phase out the Scheme and only employees employed as at 24 September 1997 remained entitled to qualify for the plusage. Any person employed after that date is not so entitled.
4. As at August 2016 there were 655 employee assignments (people held against jobs) across the corporate organisation and across Community/Voluntary Controlled schools where the employee had been continuously employed since 24 September 1997 and who were therefore potentially eligible to receive the Salary Plusage payment. Since an

employee may have more than one job, there may be slightly fewer employees affected than the employee assignment numbers suggest.

The Recent Review

5. The Council is reviewing employees' terms and conditions of employment and during the course of that review officers addressed the Salary Plusage Scheme as part of that process. By Summer 2016 it became apparent, after analysis of the payments made under the Scheme, that it may be legally problematic and the Council indicated in notifications to staff via the Council's intranet on 15th August 2016 and in the Terms and Conditions consultation booklet that, subject to legal advice being taken, it was proposing to terminate the Scheme except for those already in receipt of payment under the Scheme before 12 August 2016. New applications under the Scheme were frozen as from that date and that remains the case.
6. Recent analysis of the operation of the Scheme shows that:
 - a) As at August 2016 there were 655 employee assignments across the corporate organisation and across all Community/Voluntary Controlled schools where the employee had been continuously employed since 24 September 1997 and who were therefore potentially eligible to receive the Salary Plusage payment. Eligibility would be confirmed only after examination against the Scheme criteria on a case by case basis prior to the commencement of any payment.
 - b) Of these 655 employee assignments, 7 had already received Salary Plusage in full.
 - c) Of the remaining 648 employee assignments, 18 were then already receiving the Salary Plusage payment.
 - d) Of the remaining 630 employee assignments 200 had satisfied the 25 years Local Government Service criterion and were therefore eligible to apply for the Salary Plusage as at 11 August 2016 but had not done so.
 - e) Of the 18 employee assignments then receiving the Salary Plusage payment, the average monthly payment was £310 and the average total 3 year payment was £11,160. The payments also result in enhanced pension payments. The potential total cost to the Council in making all salary plusage payments in full is set out below under "Implications and Risks"
 - f) Of the 630 employee assignments, 366 were in the corporate organisation.
 - g) Of the 630 employee assignments, 264 were in Community/Voluntary Controlled schools.

Council Powers to pay Employees

7. The Council has the power to pay its employees reasonable remuneration. Payments beyond that which the Council has power to make are unlawful:
 - a. The Council may pay its staff reasonable remuneration: s.112, *Local Government Act 1972*;
 - b. Case law provides the parameters of reasonable remuneration:
 - i) the amounts paid must not substantially exceed normal market rates or be excessively or irrationally generous. Where the payment of wages is well in excess of the market rate it amounts to giving money away unnecessarily. The Council gets no value for the overpayment part of the wages
 - ii) The Council can increase pay or pay additional amounts provided that such increases or amounts are paid for a proper purpose and are not irrationally generous. Payment made at the end of employment simply to enhance retirement benefits or for some other purpose which does not benefit the Council may be considered *ultra vires*.
 - iii) An enhancement paid towards the end of employment might not be unlawful where it genuinely rewards long service and is paid in order dissuade existing staff from leaving (retention payment) so that the Council obtains a corresponding benefit from loyal and long service. However, it is more likely that such enhancements will be considered lawful if paid on merit rather than automatically.
 - iv) In deciding whether a retention payment is lawful it is necessary to consider how realistic it is that employees might leave the Council if the payment were not made, and whether the extra benefit was commercially worthwhile for the Council.

Analysis of the current use of Salary Plusage

8. Applying these legal parameters to the Scheme, Members are advised that the position, on analysis, is as follows:
 - a. When the Scheme was introduced in 1965, it seems the Council considered that the plusage could be an appropriate award for the purposes of long service and retention. This is not a case, therefore, of the Scheme being unlawful from the outset. Of course, the Council must keep such payments under review to ensure that they continue to serve the purposes for which they were introduced. The question is whether, in view of the recent analysis, continued payments under the Scheme still have any discernible effect on retention.

- b. There is no evidence that the Council's rates of pay are currently significantly below market rates or that its workforce is unstable due to pay dissatisfaction. The Council's turnover rate of corporate employees (i.e. excluding all Schools based staff) – that is the rate at which permanent employees leave the Council's employment – is relatively low as compared to other London Boroughs. In 2014-15, the turnover rate was 10.3% and in 2015-16 the rate was 13.21%. Both these rates place the Council well down the lower half of all London Boroughs for turnover.
- c. The question which then arises is whether the additional pay represented by the plusage serves any commercially worthwhile purpose so as to benefit the Council. If it does not then there would be a real danger that the payment would be considered by the Court to be unlawful by reason of being an irrationally generous top-up to enhance pension payments.
- d. The award is paid automatically to those who are eligible under the Scheme without any consideration of the merits of making the award in any individual case. The absence of any discretionary aspect to the making of the award weighs against the payments being lawful.
- e. The recent analysis undertaken strongly suggests that the award no longer has any discernible effect on retention;
 - i. We have no evidence to determine whether the retention rate amongst the pre and post-September 1997 cohorts are significantly different;
 - ii. The information as to leavers over the last two years (2015 & 2016) tends to suggest that the prospect of getting a plusage did not tempt all staff with close to 25 years' service to stay on in order to receive it. As at 10 November 2016, a total of 1031 employees (490 corporate employees and 541 Community/Voluntary Controlled schools employees) had left the Council's employment during the previous two years (2015 and 2016). 867 of these were recorded as resignations (398 corporate employees and 469 community/voluntary controlled employees) and 18 of these were employees that were eligible for salary plusage. A further 19 employees were within 5 years of being eligible but left voluntarily in any case.
 - iii. A snapshot of current vacancies within the Council (as at 1 November 2016) shows that for the majority of positions on offer (other than Social Worker posts), the ratio of applications to vacancies was quite high with particularly high levels of interest in Administrative, Clerical and Housing roles. This tends to support the conclusion that there is no difficulty in recruiting employees to these types of jobs and therefore any enhanced payments are not required.

- iv. The plusage amounts, on average, to about £11,000 over 3 years. This is not an insubstantial enhancement and would have quite a significant effect on pension levels. By comparison the majority of the market supplements (which are paid by the Council to address recruitment or retention issues in specific cases) prior to October 2016 were at the rate of around £2,000 per annum and since October when a review was undertaken these have increased to £4,000 per annum for Social Workers. This means that in many cases the Council has historically been paying significantly more by way of an automatic benefit than it does by way of market supplements to attract / retain specialist and hard to recruit to posts.
- v. There are at least 7 employees who, having received their plusage in full, remained with the Council and did not leave. It would appear that for those employees the cessation of the plusage did not cause them to leave to take up employment elsewhere. This would further undermine any suggestion that the Scheme had a significant retentive effect (although one cannot discount the possibility that alternative opportunities for those in their post-plusage years were so limited that remaining in post was the only realistic option).
- vi. It has been the Council's practice to pay plusage as an automatic lump sum to staff who are eligible for the Scheme and who are made redundant where at the point of redundancy the full value of the plusage had not yet been paid. A plusage payment made in those circumstances cannot be said with any certainty to have had any effect on retention.
- vii. As at August 2016 there were 200 employee assignments where employees were already entitled to apply for Salary Plusage but had not done so. There may be many reasons for this including that people may hope that payment would be higher at a later stage of employment. However, it is relevant to note that following the notice on intranet about the proposed ending of Salary Plusage, out of the 30 enquiries subsequently received, 10 were from employees who were eligible for the scheme but who were unaware that the Scheme existed or that they qualified. It is also apparent from recent discussions with the Unions that there was also a general lack of awareness of the Scheme amongst some of them. If there is a lack of general awareness that the Scheme even exists amongst those eligible, it is unlikely that the Scheme is having any effect on retention in relation to those individuals.

The table below shows that the vast majority of the pre-September 1997 employees (79%) live locally within the "RM" postcode which is where the Council offices are located. This suggests that

proximity to the workplace might be a significant retentive factor for this cohort, although this is not conclusive.

Postcode	Percentage of employees	
RM	79%	Romford and surrounding area
CM	11%	Chelmsford, Braintree, Billericay and surrounding area
SS	6%	Southend and surrounding area
IG	2%	Ilford and Barking
East London	1%	East London
Other	1%	Various
Grand Total	100%	

Consultation with the Unions

9. The Council has consulted the Trade Unions for their views in respect of the Scheme. Their view, in summary, is that the Scheme is a contractual benefit which should continue to be paid. It also says that as the Scheme is winding down in any event with final payments being made in September 2022, there is no need to cease payments now as they felt not many staff would be eligible. However, the Trade Unions do not provide any further statistical or other information or analysis that would assist in determining whether the Scheme still serves the purpose for which it was originally introduced.

The Trade Union view is incorrect when they say that final payments would be made in September 2022. The latest date where an employee would become eligible for payment under the scheme, due to commencing employment just prior to the cut-off date of 1997, is August 2029 and assuming that payment commenced immediately, the last payment under the scheme would be made in August 2032. It is considered that it would not be appropriate to let matters remain as they are just because there are only sixteen years of the Scheme left. This approach takes no account of the fact that Scheme payments are an unnecessary salary top-up being paid for no discernible benefit to the Council, and would not be in the public interest.

Conclusion on the lawfulness of any future Scheme payments

10. Taking all of the above matters into account and having regard to the limits on the Council's powers to remunerate its employees, Members are advised that, on balance, it is more likely than not that further plusage payments under the Scheme would be considered irrationally generous and therefore unlawful by the Court. This is principally because they are paid

automatically irrespective of merit in circumstances where the payments do not currently have any discernible effect on retention.

Steps proposed to be taken

11. It is likely to be the case that the Salary Plusage payments have, as a matter of custom and practice, become part of the contractual terms of employment of those employees who satisfy the criteria. However, if payments under the Scheme are no longer lawful, then the Council is not in a position to continue making them and they should cease. The Council is however, also entitled to take into account industrial relations considerations in the management of the cessation of these payments and accordingly the manner in which it is proposed the issues be dealt with. The Council would not be acting reasonably if it failed to give at least some notice of the cessation of the Scheme in the event of a decision that continued payment would be unlawful. It is therefore considered that one month's notice would be reasonable in the circumstances, for those currently in receipt of salary plusage. It is recognised that there may be cases where that period of notice would involve particular hardship and the Council will therefore consider whether exceptions should be made in cases where particular hardship is evidenced. There may also be some employees who can demonstrate they were about to access the Scheme and who are now exceptionally affected by termination. The Council might consider that some payment should be made in such cases.
12. The proposed steps to be taken are addressed by reference to the following categories of employees:
 - a. Those who have already received their plusage in full;
 - b. Those in receipt of an enhanced pension based on the plusage;
 - c. Those who are currently receiving their plusage where the three-year period is yet to expire; and
 - d. Those who expect to receive the plusage.

Those who have already received their plusage in full

13. As stated above, this is not a case where the Scheme has been unlawful from the outset. As such, plusage payments made whilst the Scheme was still considered to be lawful remain valid payments. Those who received the payments have done so in good faith and in the expectation that the payments received were lawful. Such employees can reasonably expect that the Council will not seek to recoup monies which were thought to have been lawfully paid. No action is therefore appropriate in these cases

Those in receipt of an enhanced pension based on the plusage.

14. This cohort is in the same position as those who have already received their plusage. Their pension entitlements are based on enhancements which were considered lawful at the time and which were received in good faith. No action is therefore appropriate in these cases

Those who are currently receiving their plusage where the three year period is yet to expire

15. The position is the same for this cohort in respect of payments already received. However, as for future and outstanding payments, where the Council determines that further payments would be irrationally generous, such payments should cease. It is proposed that one month's notice of termination be given, but that the Council will consider whether there are cases where particular hardship would be caused by cessation on one month's notice. In these exceptional circumstances, consideration will be given to whether some other payment is appropriate. These situations will be considered on a case by case basis by the Head of Paid Service. Where a case of hardship is accepted, the Head of Paid Service may approve some additional payment.

Those in the expectation of receiving the plusage

16. There are employees who satisfy the criteria for Salary Plusage but who have not applied, or have applied since the freeze date of 12th August 2016. As at the freeze date there were some 200 employees who were eligible to apply for the plusage but who had not done so. There are also persons who are not yet entitled to apply for Salary Plusage because they have not yet achieved 25 years service, but who may qualify and apply in the future.
17. The Council will consider applications made post 12th August 2016 by those who have the requisite service as at the date of this decision on a case-by-case basis: Those who can evidence that they were about to apply when the freeze date was imposed may receive some payment in line with the time frame for those who are already in payment under the Scheme. Again some discretion may also be exercised in cases of exceptional hardship. These situations will be considered on a case by case basis by the Head of Paid Service. Those who do not qualify for the scheme as yet, or who qualify but do not evidence that they would have applied in this period will not receive any payment.
18. A letter by way of notice and explanation will be sent to the Unions and all those who have or would have qualified for Salary Plusage setting out the position.

IMPLICATIONS AND RISKS

Financial implications and risks:

19. As outlined above there are 655 Corporate and Community/Voluntary Controlled schools employee assignments where the employee had been continuously employed since 24th September 1997, of which 7 have already received Salary Plusage in full, and 18 are currently in receipt of the Salary Plusage payment leaving 630 employee assignments potentially eligible for the Scheme. If it were legally permissible for the Scheme to continue (which members are advised it is not), and all those potentially eligible applied, based on current average 3 year payments totalling £11,160 per employee assignment, the overall remaining cost of the Scheme could be in the region of £7,030,800. The enhanced salary also has an impact on the pension fund.
20. If all 200 employee assignments who were currently eligible to apply to receive Salary Plusage at the cut-off August 2016 date did so and payments were made for the full 3 years, the cost of the Scheme would be £2,232,000.
21. There are in total 366 corporate employee assignments (including the 200 above) where the employee has been continuously employed since 24th September 1997 and are therefore potentially eligible to receive the Salary Plusage payment. If all 366 applied for plusage and were paid for the three years the total costs would be £4,084,560 which would be met corporately funded from reserves.
22. In the Community/Voluntary Controlled schools there are 264 employee assignments where the employee has been continuously employed since 24th September 1997 and are therefore potentially eligible to receive the Salary Plusage payment. If all 264 applied for plusage and were paid for the three years, the total cost to schools would be £2,946,240 which would be met by the relevant school's delegated budget.

Legal implications and risks:

23. The powers of and restrictions upon local authority payments to its employees are set out in the body of this report, and the operation of Salary Plusage is analysed with reference to the law. It is the advice of the council's Monitoring Officer, having regard to external advice obtained from Queen's Counsel, that it is more likely than not that continued payments under the Scheme would be regarded by the Court as irrationally generous and no longer justifiable for the reasons set out in this report.
24. Accordingly Members are advised that:
 - a. continued payments under the Scheme are not legally permissible and should cease;

- b. the steps set out in paragraphs 13-18 of this report should be taken to cease payments under the Scheme;
 - c. these steps are permissible in law in that the Council is entitled, as a reasonable authority and in the interests of maintaining industrial relations, to make reasonable payments by way of 'notice' even where the Scheme is declared unlawful. The extent and scope of those payments after the Scheme has ceased cannot be extensive, since to do so would be to continue to give effect to the Scheme. In reaching a decision about such payments the Council should also have regard to its fiduciary duty of which the legislation on irrationally generous payments is part.
 - d. The steps proposed for the termination of the Scheme take account of the employees' rights. It is appropriate in the circumstances for the Committee to delegate authority to the Head of Paid Service to take such action and steps incidental to Recommendations 1 and 2 above as are necessary to bring an end to the Scheme so that practical steps, including agreeing any payments can be decided expeditiously and without return to Committee for further decisions.
25. A decision relating to the terms and conditions of staff is a non-executive function under the *Local Authorities (Functions and Responsibilities) (England) Regulations 2000*. In accordance with the decision made by Full Council in March 2016 the decisions under Recommendations 1, 2 and 3 above are delegated to the Governance Committee and are reflected in the Council's Constitution within the Committee's terms of reference. Members are advised that the decisions within this report affect or potentially affect a high number of employees with a range of salary grades. While this matter has been addressed outside of the overall terms and conditions review it does nevertheless concern employees' terms and conditions and therefore falls within the delegation to the Governance Committee.

Human Resources implications and risks:

26. The implications for individual employees are set out in the body of this report. The decision has no human resource implications for the wider workforce nor for the Council as a whole.

Equalities implications and risks:

27. The Council has considered the equalities implications of terminating payments under the Scheme. The Council does not consider that termination would have any discernible differential impact in terms of equalities and protected characteristics. Insofar as it did have such impact, this would be justified by the fact that such payments would be likely to be regarded as unlawful as being irrationally generous. That justification is wholly neutral as far as any protected characteristic might be concerned.

Accordingly, the Council considers that there are no equalities implications arising from the proposed steps and/or that the risks of such are minimal.

BACKGROUND PAPERS

None