

SENIOR OFFICER AND APPOINTMENTS STAFFING SUB-COMMITTEE**13 OCTOBER 2021**

REPORT TITLE:	EMPLOYMENT APPEALS
REPORT OF:	DIRECTOR OF RESOURCES

REPORT SUMMARY

This report sets out details of a request from one of the Council's recognised trade unions, UNISON, to make changes to the arrangements currently in place for employment appeals.

RECOMMENDATION/S

The Senior Officer and Appointments Staffing Sub-Committee is recommended to:

- (1) Note the request from UNISON to amend the procedure for concerning an employee's exercise of appeal against dismissal, attached as Appendix 1.
- (2) Consider whether the Council's procedures for an Appeals Panel considering an appeal against dismissal by an employee should:
 - (a) retain the existing procedure of a decision made by a Director or Assistant Director in consultation with two senior officers;
 - (b) adopt an alternative procedure of a decision made by a Director or Assistant Director in consultation with two elected Members of the Council (as requested by UNISON);
 - (c) adopt an alternative procedure of a decision made by a formal Sub-Committee of elected Members the Council; or
 - (d) adopt an alternative permitted form.
- (3) Authorise that the Assistant Director of Human Resources and Organisational Development to draw up amended disciplinary, capability and related procedures (including redundancy), which may include requesting this Sub-Committee to approve those changes if the Asst Director HR/OD considers it appropriate to do so, prior to the implementation of any change to Appeals Panels considered necessary (at (2) above).

SUPPORTING INFORMATION

1.0 REASON/S FOR RECOMMENDATION/S

- 1.1 UNISON have written to the Assistant Director of Human Resources and Organisational Development to requesting a change to employee Appeals against dismissal so that elected members are involved in the application on that sanction.
- 1.2 The Council's Constitution currently provides for alternative procedures to be adopted concerning an employee's right of appeal in respect of disciplinary action resulting in dismissal.

2.0 OTHER OPTIONS CONSIDERED

- 2.1 The Sub-Committee may choose to adopt ACAS compliant procedures for appeals against dismissal that provide for a hearing in person that:
 - (a) retain the existing procedure of a decision made by a Director or Assistant in consultation with two senior officers;
 - (b) adopt an alternative procedure of a decision made by a Director or Assistant in consultation with two elected Members of the Council (as requested);
 - (c) adopt an alternative procedure of a decision made by a formal Sub-Committee of elected Members the Council; or
 - (d) adopt an alternative permitted form

3.0 BACKGROUND INFORMATION

- 3.1 On 28 January 2013 Council resolved that delegated authority be granted to the Head of Paid Service to make appropriate arrangements for conducting appeals in connection with grading, grievances, disciplinary action against or dismissal of employees (including redundancy). This was objected to at the time by the unions.
- 3.2 The subsequent Appeals policy and procedure operated by the Council involves a process whereby all dismissals relating to conduct, sickness and capability are heard by a panel of three officers – usually chaired by a Director as decision maker and two other senior officers (Director, Asst Director or Head of Service), with officers from Legal Services and HR in attendance to offer advice and support.
- 3.3 Any appeals against dismissal on the grounds of redundancy are heard by a single Director or Assistant Director with HR and Legal advice and support.
- 3.4 UNISON have now written to the Assistant Director of Human Resources and Organisational Development to requesting a change to the procedure for exercising the right to appeal against dismissal. This is attached as Appendix 1.
- 3.5 The request by UNISON is that Appeals by employees against dismissal for reasons of conduct, capability (absence and performance) and some other substantial reason

(SOSR) will be considered by an Appeals Panel made up of an officer assisted by two elected Members.

- 3.6 The law as it applies to local authorities and the Council's Constitution allows for decisions of this kind to be heard by either a Committee or Sub-Committee of the Council or by an officer. In this requested form the hearing would not constitute a formal committee of the Council but be a panel chaired by a nominated Director as the decision maker together with two elected Members as formal consultees. The Panel would, as now, be attended by officers from Legal Services and HR to offer advice and support.
- 3.7 The UNISON request argues that involving elected members in the application on that sanction of dismissal would provide appellants with some reassurance and increase the appearance of fairness whilst the retention of a Director as Chair allows for someone with a good knowledge of Council procedures and practices to be responsible for ensuring the appeal is heard according to procedure.
- 3.8 The counter-argument is that the current arrangements for appeals work well. There is no evidence that the current appeals procedures is unfair or detrimental to employees. The range of outcomes from officer appeals has been similar to that of the previous appeal arrangements of an elected Members panel prior to 2013.
- 3.9 The UNISON request is explicit in that they are not suggesting hearings are not currently fair, but they believe their proposal would increase the appearance of fairness. The mixture of an officer as the decision maker and elected members as consultee 'wing members' would, however, have to be well understood by all present so as not to cause confusion or conflict.
- 3.10 The operation of a fair appeals processes is a requirement of employment law and a critical stage in managing the risks to the Council of potential claims to an Employment Tribunal. It is the final stage of the internal process which seeks to ensure that any decisions that have been taken in relation to an individual's employment are reasonable, procedurally fair and the processes of natural justice have been applied.
- 3.11 The Council appeal process is not simply a review of whether decision taken at the previous stage was reasonable based on the evidence available but can serve as a re-hearing of the case, including examination of witnesses and review of evidence. In doing so it can serve to rectify any procedural or other defects that may exist in the management of the case itself.
- 3.12 An employee has a right to make claims to an Employment Tribunal (providing certain qualifying criteria are met) if they believe that the Council has acted unfairly in dismissing them or if for example, they are alleging discrimination or breach of contract.
- 3.13 In the event of an Employment Tribunal, it would generally be the case that the Chair of the Appeals Panel is called, as may the other Panel members, to give evidence and explain their decision and actions as the employing Council. They can be called by either the Council or appellant and, on service of a witness order or as an instruction from their employer, may be legally obliged to attend.

- 3.14 Subject to the Committee's decision in relation to Member involvement in employment appeals, it would be proposed that there would be a cross party 'bank' of elected Members required to serve on the panels. There would be training on the Council's policies and procedures and some employment law training required for any Member involvement in panels. The extent of this would vary based on the model of panel adopted.
- 3.15 For these reasons, any decision by the Sub-Committee to request a change to the Council's procedures should provide for further consideration around the implications and details of an amended procedure, either as delegated authority or a request to be considered further by the Sub-Committee.
- 3.16 Appeals against dismissal are relatively infrequent averaging only two or three a year. However, they may involve a one or two-day hearing depending on the nature of the issues involved so there is a time commitment required.

4.0 FINANCIAL IMPLICATIONS

- 4.1 There are no direct cost implications.

5.0 LEGAL IMPLICATIONS

- 5.1 Mandatory standing orders as contained in the Officer Employment Procedure Rules at Part 4(7) of the Council's Constitution require that Members may only be involved in the appointment or dismissal of Chief Officers and Deputy Chief Officers, with the exception of appeals.

- 5.2 In relation to this request, the Employment Procedure Rules currently provide that:
"the Council's disciplinary, capability and related procedures, as adopted from time to time, may allow a right of appeal to Members in respect of disciplinary action resulting in dismissal only."

The changes requested, or some other form of procedural change, may therefore be adopted without any Constitutional change being approved by full Council.

- 5.3 Awards at Employment Tribunal may be made against an employer but in some circumstances may also be made against any individual decision maker who the Tribunal considers has offended employment law principles and caused harm, such as in cases of direct discrimination. Such an award against an officer or Member involved in the Council's decision may be made jointly and severally with the Council or against them individually. In that particular circumstance, any indemnity that may be claimed against the Council or its insurers by the officer or Member concerned will be invalid and they must bear those costs personally.
- 5.4 The Council has a responsibility to ensure that officers or Members involved in the appeals process have adequate and appropriate training in policies, procedures and relevant employment law as well as access to appropriate professional advice.

6.0 RESOURCE IMPLICATIONS: STAFFING, ICT AND ASSETS

6.1 Subject to any decision taken in relation to Member involvement in the appeals process, there will potentially be some additional workload for Democratic Services to organise and service appeal panels when required.

7.0 RELEVANT RISKS

7.1 It may be necessary for the chair of the Appeal Panel, or other Panel members if required, to be present and give evidence as to their decisions in respect of any future employment tribunal claims made against the Council.

8.0 ENGAGEMENT/CONSULTATION

8.1 The Trade Unions have initiated the request for a change to the employment appeals procedure and are aware that this matter would be considered by this Committee.

9.0 EQUALITY IMPLICATIONS

9.1 Wirral Council has a legal requirement to make sure its policies and the way it carries out its work, is not discriminatory. An Equality Impact Assessment is a tool to help council services identify steps they can take to ensure equality for anyone who might be affected by a particular policy, decision or activity.

9.2 An equality impact assessment is not required for this proposal.

10.0 ENVIRONMENT AND CLIMATE IMPLICATIONS

10.1 There are no environmental or climate implications arising from this report.

11.0 COMMUNITY WEALTH IMPLICATIONS

11.1 There are no community wealth implications arising from the report.

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APPENDICES

Appendix One Letter from UNISON dated 24 September 2021

BACKGROUND PAPERS

ACAS Codes of Practice

SUBJECT HISTORY (last 3 years)

Council Meeting	Date