



URGENT BUSINESS

THURSDAY, 16 NOVEMBER 2006

Please find enclosed Urgent Business Notices in connection with the following:

1. Removal of Exempt Status Imposed on Reports to Council (Pages 1 - 20)

The Chief Executive (in consultation with the Leaders of each political party and the Mayor) has been asked and has agreed to make a decision in accordance with the City Council's Urgent Business Procedure.

Details of the above decision and the reasons for urgency are set out in the attached Notice.

Queries regarding these documents

Please contact Sharon Marsh, Democratic Services - telephone (01524) 582096 or email smarsh@lancaster.gov.uk.

Gillian Noall
Head of Democratic Services
Town Hall,
Lancaster LA1 1 PJ

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The Mayor

Group Leaders

13th November 2006

Dear Councillor

URGENT BUSINESS – REMOVAL OF EXEMPT STATUS IMPOSED ON REPORTS TO COUNCIL

I have been asked to consider agreeing to the removal of exempt status on the following reports which it was formerly resolved should be treated as exempt and therefore not made publicly available in accordance with Access to Information legislation:

- Report to Council on 17th December 2003 – Pension of Former Town Clerk, Mr William Pearson (also submitted to the Town Clerk Pensions Committee)
- Exempt Minute 6 of the Town Clerk Pensions Committee – 25th February 2004.

A request has been received for a copy of these documents (amongst other related material) under Freedom of Information legislation.

At the time the reports and minute were treated as exempt by virtue of the fact that they contained some financial and personal information and included legal advice which if made publicly available may have affected the Council's position. However on examining the content of the documents there is now no good reason for the reports to continue to be treated as exempt from publication, indeed they do not meet the criteria for being treated as exempt under the Freedom of Information Act, provided that the small amount of personal data is removed to comply with Data Protection legislation. A copy of the reports and minute are attached for information.

Where a report has been declared exempt from publication the lifting of this exemption can only be done by the body that passed the original resolution (or if necessary its parent body). In this case full Council is required to make this decision.

However in order to comply with the time limits set by the Freedom of Information Act it is impracticable to defer this decision to the next meeting of full Council and I am therefore writing to you in accordance with Access to Information Procedure Rule 15 to inform you that I intend to take this decision.

I would be grateful if you could complete the attached slip, signifying whether you are in agreement with the recommendation or not, and return it to the Town Hall as soon as possible. In the meantime, could you please telephone Sharon Marsh on 582096, or e-mail SMarsh@lancaster.gov.uk, with your decision.

Yours sincerely,

CHIEF EXECUTIVE
Enc.

URGENT BUSINESS – REMOVAL OF EXEMPT STATUS IMPOSED ON REPORTS TO COUNCIL

Councillor Consultation

*I am/~~am not~~ (***please delete as appropriate**) in agreement with the recommendation:

That the exempt status of the following reports and minute be lifted to enable the documents to be made available to the public:

- Report to Council on 17th December 2003 – Pension of Former Town Clerk, Mr William Pearson (also submitted to the Town Clerk Pensions Committee)
- Exempt Minute 6 of the Town Clerk Pensions Committee – 25th February 2004.

Signed: Ian Barker
Roger Mace
Stuart Langhorn
Chris Coates
Janie Kirkman
Evelyn Archer

Name: Councillors Ian Barker, Roger Mace, Stuart Langhorn, Chris Coates, Janie Kirkman and Evelyn Archer. -----

Position Held: Leaders of Political Parties and The Mayor -----

Dated: 16.11.2006 -----

Chief Executive Decision

*I agree/~~do not agree~~ (***please delete as appropriate**) to exercise my delegated authority and give approval:

That the exempt status of the following reports and minute be lifted to enable the documents to be made available to the public:

- Report to Council on 17th December 2003 – Pension of Former Town Clerk, Mr William Pearson (also submitted to the Town Clerk Pensions Committee)
- Exempt Minute 6 of the Town Clerk Pensions Committee – 25th February 2004.

Signed: Mark Cullinan-----
Chief Executive

Dated: 16.11.2006 -----

Please return to: Sharon Marsh,
Democratic Services,
Town Hall,
Dalton Square,
LANCASTER. LA1 1PJ

Ref: UB41

Agenda Item:

4

COPY REPORT

Meeting of: COUNCIL

Date: 17TH DECEMBER 2003

Report of: CHIEF EXECUTIVE

Reference: ST

Title: PENSION OF FORMER TOWN CLERK, MR. WILLIAM PEARSON

PUBLIC/EXEMPT ITEM

This report is not for consideration in the public part of the meeting because it contains information about a former employee of the Council and the financial affairs of that employee, (paragraphs 1 and 7 of Schedule 12A to the Local Government Act 1972). In addition, at the meeting, further legal advice may be given orally, which would be exempt information under paragraph 12 of Schedule 12A.

It should be noted that, on Counsel's advice, a copy of the report has been sent to the solicitors representing ALACE (Association of Local Authority Chief Executives), who act on Mr. Pearson's behalf, and to the District Auditor.

PURPOSE OF THE REPORT

To enable Council, in the light of a submission on behalf of Mr. Pearson, and other relevant documentation, to consider afresh, and with an open mind, whether the decision of the Finance and Resources Policy Committee of the 6th April 1995 in respect of Mr. Pearson's early retirement was lawful, and, if it is of the view that it was not lawful, to consider whether the Council should exercise its discretion to credit Mr. Pearson with added years. The report also asks Members to consider a request that the Council pay the costs incurred by ALACE in dealing with this matter.

RECOMMENDATIONS

1. Council is asked to consider in the light of all the information before it, whether it considers that the decision of the Finance and Resources Policy Committee of the 6th April 1995 and subsequent enhanced payments of pension to Mr. Pearson were lawful or unlawful, and to consider future payments of pension in the light of that consideration.
2. If Council finds that the decision of the 6th April 1995 was unlawful, it is recommended that Council defer consideration of whether to exercise a fresh discretion to grant added years until the outcome of a forthcoming Court of Appeal case is known. Council may also wish to consider delegating this aspect to the Personnel Committee.
3. Council is asked to consider the request that it pay the costs incurred by ALACE in dealing with the matter of Mr. Pearson's pension.

REPORT

Introduction

On the 6th April 1995, the Council's Finance and Resources Policy Committee considered a report from the four then Group Leaders. That report records that the Group Leaders were recommending that the Committee agree to the then Town Clerk's request to take early retirement on the 30th September 1995 or on such earlier date as might be convenient to the Council, and that the Council exercise its discretion to give the Town Clerk maximum added years both in respect of his local government service and his service as Returning Officer since being appointed Town Clerk. Mr. Pearson says that the initiative or request for him to retire came from the Council.

The Committee accepted the recommendations set out in the report and resolved accordingly. Both the report and minute are attached as Appendix 1 to this report.

Subsequently, the District Auditor's Public Interest Report, published on the 31st January 2003, expressed the District Auditor's opinion that the decision of April 1995 to grant early retirement to the former Town Clerk, Mr. Pearson, with immediate payment of an enhanced pension, was unlawful.

It should be noted that, prior to the publication of the Public Interest Report, the District Auditor had in March 2002 issued his provisional views, and these were considered in detail by the Unique Response Committee, a Committee of Council. That Committee looked in detail at the provisional views and all the existing relevant documentation, and, on the information then available, accepted the District Auditor's provisional view on the payment of the enhanced pension. The District Auditor's views on the pension payments did not change between publication of the provisional views and the final Statement of Reasons.

On receipt of the Public Interest Report, the Head of Financial Services, as Section 151 Officer, notified Mr. Pearson and the Lancashire County Council, as Pensions Authority, that the Council would no longer reimburse payment of the ongoing pension enhancement until such time as the Council had concluded its consideration of the matter. This was to ensure that the Council did not incur any further expenditure that would be viewed as unlawful by the District Auditor.

The Council considered the Public Interest Report on the 20th February 2003, and accepted the opinion of the District Auditor in respect of Mr. Pearson's retirement, and further resolved to make no further pension enhancement payments on a permanent basis.

Following the Council meeting of the 20th February 2003, officers met with Mr. Pearson's representative Mr. Bounds of the Association of Local Authority Chief Executives (ALACE), and there was further correspondence with him. Subsequently, ALACE instructed Messrs. Pinsents, solicitors, and a written submission was received on Mr. Pearson's behalf. This is enclosed with this report at Appendix 2. It includes inter alia the correspondence with Mr. Bounds, and the report and minutes of Council of the 20th February 2003.

Counsel's advice was taken on the submission, and this advice was that Council should consider afresh, and with an open mind, the question of whether or not the decision of the 6th April 1995, was lawful or unlawful, having regard to all the information now available.

In that regard, there is in particular the submission from ALACE on behalf of Mr. Pearson (Appendix 2). In addition, the Head of Legal Services has interviewed all sixteen of the surviving members who are recorded as having attended the meeting of the Committee on the 6th April 1995, and also Councillor G. K. Wilson who was listed as one of the co-authors of the report, but who was not present at the meeting. Their statements are also before the Council at Appendices 3 and 4, together with the transcripts of the interviews of Councillor Gilbert and Councillor Wilson

with the District Auditor, at Appendix 5. The transcript of the interviews of Mr. Henig with the District Auditor are included in Appendix 2.

A draft report for this meeting was prepared, and in the light of that draft report, Messrs. Pinsents have sent further written submissions which, together with correspondence from Messrs. Pinsents, are at Appendix 6.

The relevant information that the Council is requested to consider is therefore as follows:

- (1) the directly contemporaneous documents, which are the report to the Finance and Resources Policy Committee of the 6th April 1995 and Minute (Appendix 1)
- (2) the statements taken by an officer of the Council from the 16 surviving members of the FRPC as at the 6th April 1995; namely:

Councillors Archer, Blamire, Bryning, Gilbert, Horner and Taylor, and former Councillors Broad, Carr, Fearnley, Heath, Henig, Lodge, Morris, Rainford, Shuttleworth and Towers.
(Appendix 3)
- (3) a statement taken by an officer of the Council from Councillor Wilson, one of the 4 persons whose name appears on the report of the 6th April 1995 (Councillor Wilson did not attend the meeting of the 6th April 1995) (Appendix 4);
- (4) copies of the transcripts of the interviews of Mr Henig, Councillor Gilbert and Councillor Wilson with the District Auditor. The transcripts of Councillors Gilbert and Wilson are at Appendix 5. Those of Mr. Henig are included in the ALACE submission on behalf of Mr. Pearson at Appendix 2 at documents 11 and 13 of Annex 2 thereof.
- (5) the Submission on behalf of Mr. Pearson of May 2003, and the documents enclosed therewith (Appendix 2)
- (6) the letters from Messrs. Pinsents of the 5th November and 2nd December 2003, the Further Submission of the 2nd December 2003, and the document headed "Text for Inclusion in the Body of the Report to Council" also of the 2nd December 2003. Messrs. Pinsents requested that the latter document be included in the main body of the report. However, it was felt better to exhibit it as an additional document, and Members should of course have regard to it.

It should be noted that Mr. Pearson was employed both as Town Clerk and as Returning Officer, and the Council should consider each of the possible grounds of unlawfulness set out below in respect of each of those employments.

First Issue - The Lawfulness of the decision of the 6th April 1995

The first issue for consideration by Council is the lawfulness of the decision of the 6th April 1995. Within this issue, there are a number of principles to be taken into account, and this report reflects Counsel's advice to the Council.

The Law

The relevant Regulations in force in April 1995 were the Local Government (Compensation for Premature Retirement) Regulations 1982 ("the 1982 Regulations"). In summary, the 1982 Regulations conferred a discretion on local authorities to credit an eligible person with certain

additional years of service which would be treated as reckonable service for the purposes of calculating pensions.

In Mr. Pearson's case in 1995, the relevant provisions were Regulations 4 and 5 of the 1982 Regulations. Regulation 5 provides that an authority:

"may credit an eligible person with a period of service not exceeding the shortest of the following periods-

- (a) a period which, when added to his reckonable service and any period in respect of which he has become entitled to an occupational pension, does not in aggregate exceed 40 years...
- (d) a period of 10 years"

Regulation 4 of the 1982 Regulations provides that the Regulations apply to a person who:

"ceases to hold his employment with an employing authority by reason of redundancy or in the interests of the efficient exercise of that authority's functions."

First Possible Ground of Unlawfulness – "Efficiency"

The discretion could only be exercised if the employee ceased to hold employment by reason of redundancy (which was clearly not relevant in Mr. Pearson's case) or "in the interests of the efficient exercise of that authority's functions". In other words, the Council would have needed to be satisfied that a factual situation existed whereby it was in the interests of the efficient exercise of the Council's functions that Mr. Pearson did cease to be employed. Counsel's advice is that if the Finance and Resources Policy Committee did not address the question of whether or not it was in the interests of the efficient exercise of the Council's functions for Mr. Pearson to retire, its decision of the 6th April 1995 would have been unlawful, as Members would have failed to address their mind to the correct test in deciding whether to exercise their discretion.

In relation to this first ground, the Council will wish to have regard to:

- (a) the report to the Committee and the minutes of the meeting of the 6th April 1995, neither of which refers to the interests of efficiency nor explains how Mr. Pearson's retirement would be in the interests of the efficient discharge of the Council's functions;
- (b) the recollections of Councillor Gilbert and former Councillor Henig, who are the two persons still alive who were joint authors of the report to the Committee and who attended the Committee meeting. Members will note that Mr. Henig states that the decision was taken in the interests of the efficient discharge of the Council's functions as Mr. Pearson had reached the point where he did not have much more to give to the Council and the Council wanted a different sort of Chief Executive. Councillor Gilbert's recollection is that efficiency was not a consideration that he had in mind;
- (c) the recollection of the other persons who attended the Committee meeting in April 1995 and the extent to which they say that the question of efficiency and how Mr. Pearson's retirement would be in the interests of efficiency was, or was not, drawn to their attention and to what extent, if at all, it influenced their decision;
- (d) the letters of the 12th May 1995, 25th May 1995 and 25th June 1995 (documents 4, 5 and 6 in Annex 2 of Mr. Pearson's submission at Appendix 2); the first letter refers to the "interests of the service" and the second and third letters refer to the "interests of the efficiency of the service". The submission on behalf of Mr. Pearson submits that these letters support the view that the Council considered that it had made the decision in the interests of the efficient exercise of the Council's functions. The submissions on behalf of Mr. Pearson also draw

attention, amongst other matters, to the evidence of Mr. Henig, and invite the Council to infer that the position of the late Mrs. Kirkby would have been the same, and they draw attention also to the assumption that decisions would have been properly taken. The Council must consider all those matters, and all other points made on behalf of Mr. Pearson, and must weigh them against the directly contemporaneous documents of the 6th April 1995, and the recollections of the persons involved. Relevant questions for Members now to consider are whether they accept the submissions on behalf of Mr. Pearson and consider that the letters referred to above, and all the other matters referred to by Mr. Pearson, outweigh any contrary evidence, or whether any contrary evidence (such as the report, the minutes and the recollections of the councillors present at the meeting on the 6th April 1995) is to be given greater weight. In addition, the Council will wish to consider what weight, if any, it should give to the fact that the letters were written after the date of the decision, and, in two cases, by persons not involved in the decision;

- (e) all the submissions made on behalf of Mr. Pearson; and
- (f) the statement of Councillor Wilson. However, the Council will need to bear in mind that Councillor Wilson is not in a position to give evidence of what actually happened at the Committee meeting and what caused the councillors to decide to exercise their discretion, as he did not attend the meeting.

If the Council considers that the Committee did not consider whether or not Mr. Pearson's retirement was in the interests of the efficient discharge of the Council's functions, the decision of the 6th April 1995 would be unlawful. If Council does consider that the members of the Committee did address their mind to that question, the decision of the 6th April 1995 would not be unlawful for that reason, but the Council would need to go on to consider whether it was unlawful for one of the following other possible reasons.

Second Possible Ground of Unlawfulness – "Reward"

Counsel advises that if the Finance and Resources Policy Committee proceeded on the basis that Mr. Pearson was retiring and that he should be given a reward for long service (and was not concerned about whether or not his retirement was in the interests of efficiency), the decision of the 6th April 1995 would be unlawful.

In relation to this possible ground of unlawfulness, the Council will need to consider, as with the first ground:

- (a) the report to the Committee and the minutes of the 6th April 1995 meeting;
- (b) the statements of the two councillors who were party to the report of 6 April 1995 and attended the meeting of the Committee;
- (c) the statements of the other councillors who attended the meeting on the 6th April 1995;
- (d) the letters of the 12th May 1995, the 25th May 1995 and the 25th June 1995;
- (e) the submissions on behalf of Mr Pearson; and
- (f) it may wish to consider the statement made by Councillor Wilson, but it will need to bear in mind that Councillor Wilson is not in a position to give evidence of what actually happened at the Committee meeting and what caused the councillors to decide to exercise their discretion, as he did not attend the meeting.

The Council will need to determine whether or not it is satisfied that the reason for the decision to exercise the discretion and the decision to add the maximum number of years was simply that the Committee wished to reward Mr Pearson for long service. If so, the decision of 6 April 1995 is unlawful

Third Possible Ground of Unlawfulness – “Cost of Added Years”

The Finance and Resources Policy Committee would have had to consider whether to exercise its discretion to award added years and, if so, it would have had to determine how many years to add. The Committee would have had regard to all relevant considerations in deciding that matter, one of which would have been the likely cost of the proposed arrangements. Furthermore, the Committee should have considered that cost before it took the decision to pay compensation in the form of added years. Counsel advises that if the Committee did not have regard to that consideration before it took its decision on the 6th April 1995, then again the decision of the Committee would be unlawful.

In this regard, the Council will wish to consider:

- (a) the report to the Committee and the minutes of the 6th April 1995, neither of which sets out the likely cost to the Council of agreeing to pay compensation in the form of added years. Indeed, the minutes expressly state that the cost of such enhancement is to be determined after the meeting, that is after the decision;
- (b) the recollections of the two councillors who prepared the report of the 6th April 1995 and who attended the meeting of the 6th April 1995, together with the recollections of the other councillors who attended the meeting;
- (c) the submissions made on behalf of Mr Pearson.

If the Council considers that the Committee did not consider the likely cost of agreeing to pay compensation before it took its decision, or in deciding how many added years of service to award, then the decision of the 6th April 1995 is unlawful (whether or not any other ground of illegality is established).

Council will also need to bear in mind that an award of added years is compensatory and must not exceed the loss the employee would suffer by reason of loss of office. Counsel advises that this should be compensation for the opportunity to build up additional years of reckonable service. If the number of added years exceeded this principle, that would be a separate reason for deciding that the decision was unlawful. Mr. Pearson was granted “added years” ~~three years and two months and six days~~ in respect of his employment as Town Clerk, which gave a total service of forty years. In respect of the office of Returning Officer, ~~eight years and two months and sixty five days~~ of added service were granted, which would have taken him to his sixty fifth birthday ~~giving total service of twenty four years and six months and thirty five days~~

Fourth Possible Ground of Unlawfulness – “Application of Policy”

Finally, the Committee would have had to consider all the relevant considerations in deciding whether to grant any added years, and if so, how many. If the Committee simply awarded the maximum number of years as a matter of course, because it had a fixed policy of granting maximum payments to retiring employees, without considering whether or not it was appropriate to apply the policy in Mr Pearson's case, the decision of the 6th April 1995 would be unlawful. The Council could, in principle, have a policy of paying the maximum possible to an employee who was to be dismissed in the interests of efficiency. It would, however, have to consider whether or not to depart from that policy in a particular case. The issue in the case of the 6th April 1995 decision is really whether the Committee simply applied the policy automatically to Mr Pearson without

considering whether there was any reason for not applying the policy or not giving the maximum amount.

This final possible ground of unlawfulness involves the Council considering whether it believes that the Committee approached matters simply on the approach that there was a policy of granting the maximum number of added years to retiring employees and simply applied that policy without considering whether or not it was appropriate to depart from the policy on the facts of Mr Pearson's individual case. The Council will need to consider the report of the 6th April 1995, the recollections of the councillors who attended the meeting, and the submissions made on behalf of Mr Pearson, to see if it is of the view that the Committee simply applied such a policy. If the Council is satisfied that the Committee did apply such a policy without considering whether to depart from it, the decision of the 6th April 1995 is unlawful for that reason. If the Council is satisfied that the Committee did not simply apply a policy, the decision of the 6th April 1995 would not be unlawful for that reason (although it may still be unlawful for any one or all of the previous three reasons set out above).

General Approach to the Question of Unlawfulness

Council is advised to consider each of the above grounds separately, and to make a finding on each as to whether it considers that the decision was lawful or unlawful. However, even a finding of unlawfulness on one of the grounds would mean a finding that the decision of the 6th April 1995 was unlawful.

As indicated earlier in the report, this report was drafted on the basis of advice received from Counsel. In the light of the documents of the 2nd December 2003 from Messrs. Pinsents, the report has been amended slightly so that the Council fully understands the points being made on behalf of Mr. Pearson. Counsel is satisfied that the report reflects the current law and that it is not flawed.

Human Rights Considerations

The Council, as a public authority, has to act compatibly with Convention rights. In particular the submission made on behalf of Mr Pearson refers to rights under Article 8 of the European Convention on Human Rights and Article 1 of the First Protocol.

The decision that the Council is taking is whether or not the decision of the 6th April 1995 to exercise its discretion to pay compensation by the grant of added years was lawful or unlawful, and, if it decides that it was not lawful, not to make any further periodical payments of the enhanced sum represented by those added years. The issue is whether that decision would breach a Convention right.

Counsel's advice is that a decision that the Finance and Resources Policy Committee acted unlawfully would not constitute an interference within the meaning of Article 8(1) which guarantees respect for private and family life, home and correspondence. Even if there were an interference within the meaning of Article 8(1), such an interference would be justified under Article 8(2) ECHR as being in accordance with law and necessary, for the achievement of one of the legitimate aims in Article 8(2), for the protection of the rights and freedoms of others or the economic well-being of the country. The decision would be based on the common law rule, reflecting the public interest, that public money should not be paid out without lawful authority.

Article 1 of the First Protocol guarantees the right to peaceful enjoyment of possessions. Counsel recognises that there is an argument that a decision not to pay an enhanced pension may involve a deprivation of property, or a control of use, or otherwise an interference with possessions within the meaning of Article 1 of the First Protocol. If, however, the Council decides that the 6th April 1995 decision was unlawful, any interference would, in Counsel's opinion, be justified. The purpose

of the rule that statutory authorities may not pay out money unlawfully is to safeguard the public interest. The decision relates only to the enhanced part of the pension; consequently, the extent to which the pension rights would be affected would be directly related to the extent of the illegality. The remainder of Mr Pearson's pension would be unaffected. Further, the Council is only deciding at present whether to stop further payments in future of the enhanced part of the pension. For all those reasons, Counsel takes the view that a court would consider that any decision that the 6th April 1995 decision was unlawful so that there be no further payment of the enhanced part of the pension would be done in the public interest and would be reasonable and proportionate.

So far as Article 6 is concerned, that involves ensuring a fair and public hearing of disputes relating to civil rights by an independent tribunal. Again, Counsel recognises that there is an argument that a decision by the Council that the 6th April 1995 decision was unlawful and that no further payments of the enhanced part of Mr Pearson's should be made, involves a determination of civil rights within the meaning of Article 6. The Council may not be an independent tribunal for these purposes as it is, arguably, one of the parties to the dispute. However, in considering whether or not there is any breach of Article 6, the courts have to consider whether the combination of the procedures available and any subsequent court procedures, were sufficient to meet the requirements of Article 6. The decision of the Council would be subject to judicial review or, alternatively, the claimant could bring an action for breach of contract, relying on the 6th April 1995 decision, and the Council would raise as a defence, the claim that the 6th April 1995 decision was unlawful. Those mechanisms would ensure that there was a fair hearing before an independent tribunal. At present, therefore, Counsel's advice is that there is no basis for the Council declining to consider Mr Pearson's request that it reconsider afresh whether or not it considers that the 6th April 1995 decision was unlawful on the ground that it is unable to ensure compliance with Article 6. Taking the procedures before the Council and any subsequent court action as a whole, Mr Pearson can be given a hearing which meets the requirements of Article 6 ECHR.

Second Issue – Whether the Council can now consider whether to grant added years compensation to Mr. Pearson, and, if so, how that discretion should be exercised

This part of the report will be relevant only if the Council finds that the decision of the 6th April 1995 was unlawful.

If the Council decides that the 6th April 1995 decision was unlawful for any or all of the four reasons set out above, it needs to address the question whether it can now consider whether to grant added years compensation to Mr Pearson. The submission made on behalf of Mr Pearson does not appear, in itself, to be requesting the Council to exercise a fresh discretion and appears to be limited to asking the Council to reconsider the question of whether the 6th April 1995 decision was lawful. However, consideration of the exercise of any discretion to grant added years would not depend on Mr Pearson first asking for the discretion to be exercised.

The Law

The relevant Regulations now are the Local Government (Early Termination of Employment) (Discretionary Compensation) England and Wales) Regulations 2000 ("the 2000 Regulations"). Regulation 4 of the 2000 Regulations provides, so far as material that:

“(1) These Regulations apply in relation to..... a person –

(a) whose employment is terminated –

(i)...

(ii) in the interests of the efficient exercise of the authority's functions....”

Regulation 8 of the 2000 Regulations provides, so far as material, that :

- "(1) An employing authority may award a credited period to an eligible person.
- (2) A credited period must not exceed whichever is the shortest of
 - (a) the difference between his total membership and 40 years.....
 - (d) 10 years.
- (3) An award may not be made later than six months after the termination date."

Power to Exercise the Discretion in 2003

Regulation 8(3) of the 2000 Regulations appears to provide that any award must be made within 6 months after the termination date. Mr Pearson's employment, of course, terminated in 1995, more than 6 months ago.

However, in the case of *Eastbourne Borough Council v Foster*, in a judgment given on the 15th February 2002, Mackay J held that the provisions of Regulation 8(3) of the 2000 Regulations were not mandatory and it was not a precondition that the discretion be exercised within 6 months of the termination of the employment. Mackay J. held that a local authority could exercise its discretion even after the expiry of the 6 month period. The decision of Mackay J. represents the current law. There was no appeal against this part of his decision.

There is, however, an appeal in a second case involving Eastbourne and Mr. Foster (a decision of Moses J. whose judgment was given on the 8th April 2003). That appeal is due to be heard by the Court of Appeal on the 16th and 17th December 2003. It is understood that, at present, the grounds of appeal do not include any issue as to the power of a local authority to grant added years more than 6 months after the termination of the employment. It is understood, however, that the District Auditor, who is an interested party in the appeal, has put in a Respondent's Notice seeking to raise this issue in the appeal.

In the present circumstances, the law at present is as stated by Mackay J. in *Eastbourne Borough Council v Foster*. The Council has power now to consider whether or not it may award added years to Mr Pearson by way of compensation to Mr Pearson. However, it is recommended that the Council should defer consideration of this matter until after the decision of the Court of Appeal in the second *Foster v Eastbourne Borough Council* case is given, to see if the Court of Appeal does indeed deal with the matter. If the Council were to deal with the matter before the Court of Appeal decision is known, it would be prudent to record that any decision was subject to subsequent court decision on the interpretation of Regulation 8 of the 2000 Regulations, and would need to be reconsidered if the courts, in particular the Court of Appeal, held that the discretion could not be exercised if 6 months had elapsed since the termination of the employment.

Appropriate Body to Consider the Grant of Added Years

Whilst it would be open to full Council itself to consider whether or not to exercise its discretion under the 2000 Regulations to grant added years, Members may feel that, as the matter of early retirements is generally dealt with by the Personnel Committee, it would be more appropriate to delegate the matter to that Committee.

The Personnel Committee next meets on the 13th January 2004, but there can be no certainty that the Court of Appeal decision would be given by that date, or that there would be sufficient time to consider the implications of the Court of Appeal decision before that date.

If the Council (or the Personnel Committee) does exercise its power, there is an issue as to whether any payment is only to be made prospectively, or whether the Council could backdate the payment to an earlier period. Counsel's advice is that, on balance, the Council could decide to award added years from any date from the date of termination and not merely from the date at which it exercises its discretion.

The Approach to the Exercise of the Discretion

If and when the exercise of the discretion is considered, whether by full Council or by the Personnel Committee, a further report will be submitted setting out detailed advice from Counsel as to the proper approach to be followed in considering whether to exercise the power in Regulation 8 of the 2000 Regulations, and the relevant factual information

Third Issue - Costs Incurred by ALACE

The third issue is the request that the Council pay the costs incurred by ALACE on behalf of Mr. Pearson in dealing with this matter.

If the Council decides that the 6th April 1995 decision was unlawful, then there appears to be no basis upon which the Council could rationally decide to pay ALACE any money.

If the Council decides that the 6th April 1995 decision was lawful, the question arises as to whether the Council has power to pay ALACE's costs and if so, whether it wishes to exercise that discretion. On balance, Counsel considers that the Council would in principle have power to make a contribution to ALACE. Counsel recognises, however, that the matter is not straightforward and there are arguments that no power to pay such costs exist.

The Council at most has a discretion to pay all or part of the costs; it is not under any obligation to pay all or part of the costs. The mere fact that the Council were to take a decision now which is different from that which it took in February 2003 does not, in Counsel's opinion, oblige the Council to meet the costs. The question is whether, having regard to all relevant considerations, including its fiduciary duty to the council tax payer, the Council wishes to exercise its discretion to pay all or part of ALACE's costs. The Council would need to consider all relevant considerations, including the fact that the response of the Council on 20 February 2003 was a reasonable response to the District's Auditor's report, that no challenge to the lawfulness of that decision was taken, that Mr Pearson is not seeking to recover any financial costs that he incurred personally, but rather is seeking to recover the costs of ALACE, and the amount of such costs.

To enable the Council to consider their request, Pinsents were asked to provide details of their costs. In a letter of the 5th November 2003, (at Appendix 6), Pinsents indicated that their costs were currently £44,352.55. They were asked to supply a detailed breakdown of that figure, but this has not been provided at this stage. The letter of the 2nd December 2003 at Appendix 6 refers.

The District Auditor was sent a copy of the draft report, and was asked for his views as to whether there is any power to pay such costs and as to the reasonableness of so doing. His response was that he does not accept that the Council has power to indemnify ALACE against legal costs it has incurred, or that it would be reasonable for the Council to do so.

FINANCIAL IMPLICATIONS

The Council continues to incur costs associated with the Public Interest Report and matters arising from it. A provision of £50,000 has been built into the Revised budget for this year to meet the Council's own legal costs and audit fees. The actual costs incurred will depend on how the issues progress and any resulting further legal action. No provision has been made as yet in next year, but this will be reviewed during the budget process.

Furthermore, no budget provision has been made to meet any of ALACE's costs. This would be an additional call on the Council's finances and Council should bear this in mind when considering the ALACE's request, in addition to the comments mentioned above regarding fiduciary duty to council tax payers, power to pay such costs, etc. If Council is minded to bear all or part of ALACE's costs, then Members must be clear about the justification for it in terms of the power to incur such expenditure and the benefits arising; in such an event further legal advice would be sought.

Should Council decide that the decision of Finance & Resources Policy Committee in April 1995 was lawful, then enhanced pension payments to Mr Pearson would resume (backdated to February of this year - when they were stopped).

Should Council decide that the decision of the Policy Committee was unlawful and the granting of added years compensation to Mr Pearson should be reconsidered, further financial information will be produced at the time of that reconsideration.

LEGAL IMPLICATIONS

The legal advice is incorporated in the report, which has been prepared by the Head of Legal Services in conjunction with Counsel.

COMMUNITY SAFETY IMPLICATIONS

None

HUMAN RIGHTS ACT IMPLICATIONS

Counsel's advice on the human rights implications is included in the main body of the report.

RACIAL EQUALITY AND EQUAL OPPORTUNITIES IMPLICATIONS

None

SUSTAINABILITY IMPLICATIONS

None

MONITORING OFFICER'S COMMENTS

The Monitoring Officer has been consulted and has nothing further to add.

SECTION 151 OFFICER'S COMMENTS

The Section 151 Officer has been consulted and has no further comments to add.

BACKGROUND PAPERS

The background papers are exempt.

TOWN CLERK PENSION COMMITTEE

9.00AM

25TH FEBRUARY 2004

PRESENT:- Councillors J. Ravetz (Chairman), J. Dent, E. Heath, A. G. Johnson, G. Millar, P. M. Quinton and J. Ravetz

Officers in Attendance:

Chief Executive
Head of Legal Services
Head of Administration Services

6. PENSION OF FORMER TOWN CLERK MR WILLIAM PEARSON

In accordance with Minute No. 5 (2), a draft of the Committee's decision had been circulated to enable Members to agree the precise wording.

A number of suggestions for clarifying the wording were discussed in detail and a small number of amendments were agreed.

Members felt that the final wording, which would form an exempt minute, reflected their previous discussions and explained the reasoning behind the decision that they had reached.

On being put to the vote, the Committee unanimously agreed the following resolution.

Resolved:

The Committee has considered all the available information, including all the representations made on behalf of Mr. Pearson, in respect of the decision taken by the Council's Finance and Resources Policy Committee on 6th April 1995 relating to the early retirement of the then Town Clerk, Mr. William Pearson, and, by reference to the possible grounds of unlawfulness as set out in the report to Council of the 17th December 2003, resolves as follows:

1. "Efficiency".

The Committee has noted that, the reason of redundancy not being relevant in this case, the discretion in Regulation 5 of the Local Government (Compensation for Premature Retirement) Regulations 1982 could only be applied where employment ceased "in the interests of the efficient exercise of the authority's functions". On the limited evidence available and on the balance of probability, the Committee resolves that the Policy Committee did not consider the matter of efficiency, and that the decision was unlawful on this ground. The Committee has noted in particular that the matter of efficiency was not mentioned in the report and there is no record of it being discussed at the meeting. The Committee has noted that some Members knew that the criteria under Regulation 5 had to be met. However, the Committee is satisfied on the evidence available that not all Members were aware of this, and that it was not taken into account when the Policy Committee took its decision on the 6th April 1995.

2. "Reward"

The Committee has found that there is insufficient evidence to show that the decision in April 1995 was made on the basis of reward and therefore resolves that the decision was not unlawful on this ground.

3. "Cost of Added Years"

The Committee is satisfied that financial information was not given to Members either in the report or orally at the meeting on 6th April 1995, since it was specifically stated in the minutes of the meeting that the City Treasurer would determine the cost of the enhancement after the meeting. The Policy Committee did not consider the likely cost, and this was not lawful. The Committee therefore resolves that the decision was unlawful on this ground.

4. "Application of Policy"

The Committee is satisfied that the Policy Committee simply applied automatically to Mr. Pearson the then Council practice of granting maximum added years as a matter of course, and did not consider whether there was any reason to depart from this practice. The Committee considers that Members of the Policy Committee in 1995 knew that they could make a decision not to apply maximum years' enhancement, but that without any information on the number of years of Mr. Pearson's service to show what that enhancement would mean, they were unable to give the matter proper consideration. Furthermore, whilst the Committee believes that the Policy Committee would have been aware of Mr. Pearson's length of local government service, there is no indication that there was any knowledge of or separate consideration of the length of his service as Returning Officer. Had the Policy Committee known his length of service as a Returning Officer, this would have enabled it to give meaningful consideration to the number of added years which could or should be granted, rather than applying the practice of simply granting maximum added years. The Committee therefore resolves that the decision was unlawful on this ground.

Overall, the Committee therefore has resolved that the decision of the Council's Finance and Resources Policy Committee on 6th April 1995 relating to the early retirement of the then Town Clerk, Mr. William Pearson was unlawful on each of the grounds given at 1, 3 and 4 above. The Committee considers that the decision would be invalid if any one ground had been established, but is satisfied that three of the four grounds are established.

.....
Chairman

(The meeting finished at 10.00 a.m.)

**Any queries regarding these Minutes, please contact
Gillian Noall, Head of Administration Services
on Lancaster 582060 or e-mail Gnoall@lancaster.gov.uk**

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TOWN CLERK PENSION COMMITTEE

9.00AM

25TH FEBRUARY 2004

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.....
Chairman

(The meeting finished at 10.00 a.m.)

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