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**Report of Corporate Management Team**

**Joint Report of Don McLure, Corporate Director Resources and  
Rachael Shimmin, Corporate Director Children and Adults Services  
Councillor Jane Brown, Cabinet Portfolio Holder for Corporate  
Services**

**Councillor Ossie Johnson, Cabinet Portfolio Holder for Children  
and Adult Services**

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**Purpose of the Report**

- 1 To invite Council to agree to the proposed arrangements to implement the changes to Teaching Assistants terms and conditions in order to reduce the risk of equal pay challenges to the Council.

**Background**

- 2 In 2004 Durham County Council (DCC) extended a national Collective Agreement applicable specifically to Nursery Nurses' roles at that time, to incorporate a much wider group of school based employees, classed as Teaching Assistants. This put in place arrangements whereby this group of workers are paid for 37 hours per week but are only required to work 32.5 hours. They are also paid as if working 52 weeks per year (whole time) when they actually work school term times only.
- 3 Although the Council undertook a job evaluation/single status exercise that was implemented with effect from 1 October 2012, the working hours for Teaching Assistants were not reviewed as part of the negotiated single status changes at that time. This was because it was the jobs' size and jobs' content that were being evaluated as part of the job evaluation/single status exercise and not the hours worked element of the contract.
- 4 Since the implementation of single status in October 2012, some working practice changes were made to the way some Teaching Assistants were deployed within some schools. During the implementation process, it was also identified that within the group of Teaching Assistants, some were being deployed to work 37 hours per week, and alongside this had variations around their whole time / term time status. This created a risk of equal pay challenge from within the teaching assistant group, where jobs had been evaluated the same but that working hours and annual leave arrangements were different on a localised level in some schools.

- 5 Taking a risk based approach to the above, the Council proposed as part of a follow-up phase of change to single status, to develop proposals for change to bring all of the Teaching Assistants' working practices in line with how other school support staff were employed and to pay them only for the hours that they actually work and on a term time only basis.

### **Proposed Changes to Terms and Conditions – Consultation to Date**

- 6 Consultation with Trade Unions, Head Teachers and Teaching Assistants proposing to vary the working practices as outline above, commenced in October 2015, with the view of reaching a collective agreement to implement the changes outlined in paragraph five. The payment of a compensatory lump sum (equivalent to one year's loss of pay by moving to a term-time contract) was included in this proposal. Additionally, Head Teachers were asked to offer Teaching Assistants 37 hours per week contracts to minimise the reduction in salary of those Teaching Assistants working 32.5 hours a week. The majority of Head Teachers have confirmed that they can provide 37 hours per week contracts.
- 7 As no agreement was reached, the proposal was then varied in a second round of consultation that began in February 2016. The revised proposal was to implement the change over a three year period and phase-in the one year's loss of pay compensation payment accordingly.
- 8 Through the consultation period, independent legal advice was also taken. This advice was very clear and confirmed that the Council does have an equal pay risk with regard to the existing terms and conditions of Teaching Assistants. The Council were also advised that the fairest and most defensible legal position would be to apply a pro rata arrangement to Teaching Assistants i.e. salary based on 37 hours per week / term time only from as soon as possible.
- 9 It was also confirmed that the risk of equal pay claims lies not solely with the Teaching Assistants core group, but also across wider schools based employees as well as other Council employees.
- 10 In line with feedback from the consultation process, consideration was also given to phasing in any proposed changes by only applying them to new recruits and waiting for natural turnover to resolve the discriminatory practice. However, the legal advice was very clear that in doing so, the risk would continue to apply for a very significant number of years, and therefore very strongly advised against this. Additionally, it was confirmed that the longer the period of time taken to fully implement the changes using protection arrangements, would make any equal pay claims more difficult to defend and the risk would continue until the time when full implementation was achieved.
- 11 There are approximately 2,700 Teaching Assistants affected by the proposed changes to terms and conditions.

## Current Position

- 12 The annual cost of the current terms and conditions, which are met from schools' delegated budgets, is around £8 million. This includes the cost of paying Teaching Assistants for 37 hours when they are only working 32.5 hours plus the cost of paying them for whole time when they are only working term time. In the first year of the proposed change to term-time salaries, the cost of compensation would broadly equal the reduction in salary. Thereafter, there would be an annual saving to school budgets estimated to be in the region of £3 million. There will be no financial implications for the Council's General Fund Revenue Budget.
- 13 The financial risk of losing equal pay claims is difficult to quantify but would be substantial if the current arrangement remain and would be a risk to both schools and the Council.
- 14 Trade Unions have highlighted during the process that they are receiving enquiries from other school based employees as well as wider Council employees indicating that they will submit equal pay claims if Teaching Assistants continue to receive their current enhanced terms and conditions.
- 15 Despite every effort being made to reach a collective agreement to implement the changes, this has not yet been achieved, nor would it appear likely to be achieved based on the strength of feeling from the consultation process. Therefore, in order to make the necessary changes, the last resort option of dismissal and re-engagement must unfortunately be considered by the Council.
- 16 The process for dismissal and re-engagement would include;
  - Issuing a Section 188 notice and entering into formal redundancy consultation (45 days minimum) with Teaching Assistants and Trade Unions;
  - Serving notice to terminate existing contracts (maximum 12 weeks) and offering re-engagement on the new terms;
  - Offering employees a right of appeal against their dismissal.
- 17 A dismissal and re-engagement process is not without risk. There may be some Teaching Assistants who refuse the offer of re-engagement on new terms and conditions. If so, and they subsequently make claims to an employment tribunal on the grounds of constructive or unfair dismissal, these will be judged upon in terms of the reasonableness of the decision in business terms and the process followed with regard to the dismissal.
- 18 The Head of Paid Service, the Section 151 Officer and the Monitoring Officer for the Council advise that the risks of not making the changes to the Terms and Conditions of Teaching Assistants will highly likely result in challenge with regard to the Council acting unlawfully and without financial probity. Should any challenge result in a judicial review, court costs would be significant.

- 19 Additionally, the Council's Constitution makes it clear that all decisions of the Council will be made in accordance with due regard to equalities legislation. In terms of equalities, the Council has received clear, independent advice with regard to the risk of equal pay claims. Again such claims would be of significant cost to the Council.

### **Proposed Next Steps**

- 20 It is proposed that the Council agrees to undertake a dismissal and re-engagement process. This would involve commencing a formal statutory consultation exercise with Trade Unions and Teaching Assistants, at the end of which, notice would be issued to terminate existing contracts and new contracts would be offered on the proposed revised terms and conditions.
- 21 The dismissal and re-engagement process should commence on 23 May 2016. This would mean the changes to terms and conditions could be implemented in January 2017. Additionally, it is proposed that one year's compensatory payment should continue to apply.
- 22 Trade Unions have been clear that should the Council move to the dismiss and re-engage process, they would undertake a formal ballot of their members within the Teaching Assistant group to determine whether industrial action, including strike action should be taken.
- 23 Appeals against any dismissals would form part of the process. Given the anticipated high volume of appeals expected and the need for a central process to take place, a dedicated officer would be engaged to lead on the work involved in the appeals process.
- 24 Should Council agree to move forward with the process outlined in this report, this would be developed in consultation with Trade Unions.

### **Recommendations**

- 25 That the Council agrees to the termination and re-engagement of Teaching Assistants on the revised terms and conditions as outlined in this report.
- 26 That authority be delegated to a dedicated panel of officers to hear all appeals associated with this process.

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## **Appendix 1: Implications**

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**Finance** – The savings from moving staff to term time salaries and the cost of compensation payments will come from school budgets. In the first year the cost of compensation would broadly equal the reduction in salary. Thereafter, there would be an annual saving to school budgets estimated to be in the region of £3 million.

There will be no financial implications for the Council's General Fund Revenue Budget.

**Staffing** – Proposed changes to terms and conditions of employment for a large group of staff and the associated risks as highlighted in the report.

**Risk** – As outlined in the report.

**Equality and Diversity / Public Sector Equality Duty** – Equal pay risk as outlined in the report.

**Accommodation** - None

**Crime and Disorder** - None

**Human Rights** - None

**Consultation** – Formal consultation would be required with trade unions and employees with regard to a dismissal and re-engagement process.

**Procurement** - None

**Disability Issues** - None

**Legal Implications** – The Council has equal pay obligations and the current arrangements expose the council to the risk of equal pay claims that would have no realistic defence. Continuing such arrangements in this knowledge knowingly exposes the council to expensive claims that it will ultimately lose and would be an inappropriate approach to the council's fiduciary obligation to protect the public purse.