

Director of Legal Services:
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BRIEFING

Local Authority Secondments

Definition

1. A secondment is where one employer ("**Secondor**") makes available one of its employees to another employer ("**Secondee**") who manages that employee as part of its business or undertaking.

Birmingham City Council Practice

2. There are a number of recent secondments in which the Council has been involved. These include:-

- The secondment by the Council of the Chief Executive designate of the Millennium Point Trust Company on an initial three year secondment to facilitate the development at Millennium Point.
- The secondment of museum staff to the Discovery Centre company to facilitate the transfer of part of the Council's loan collection from the Museum of Science & Industry.
- Secondment of trainee solicitors from a private firm of solicitors to the Legal Services Office and secondment of a legal assistant from the Legal Services Office to a private firm of solicitors.

3. It is relevant to note that these were all examples of short-term secondments which had a clear objective in terms of either the establishment of a new venture or

the training and development of staff.

4. The DETR consultation paper 'Working with others to achieve Best Value - Section 16 of the Local Government Act 1999 March 2001' gives examples of the use of secondments to meet best value. The following figure is taken from that consultation paper:

Figure 8: Examples of the use of secondments to meet Best Value

- To support voluntary and community groups or partnerships as an alternative or a complementary measure to other support mechanisms;
- To bring into the authority new skills and competencies;
- To achieve joint working with partners;
- To contribute to a Human Resources training and development strategy;
- As an alternative to TUPE transfers; and
- To deploy, temporarily, surplus staff capacity.

Council Powers

5. Section 113 of the Local Government Act 1972 provides that the Council may enter into an agreement with another local authority for the placing at the

disposal of the latter for the purposes of their functions on such terms as may be provided by the agreement, of the services of officers employed by the former but shall not enter into any such agreement with respect to any officer without consulting him.

6. Section 113(1A) of the 1972 Act provides in addition that the Council may enter into an agreement with a Health Authority, Special Health Authority or NHS Trust for the placement at the disposal of the Health Authority, Special Health Authority or NHS Trust for the purposes of their functions on such terms as may be provided by the agreement, of the services of officers employed by the Council. It also provides for the placing at the disposal of the Council for the purposes of its functions on such terms as may be provided by the agreement, of the services of officers employed by the Health Authority, Special Health Authority or NHS Trust. Again the Council shall not enter into an agreement where it seconds staff without consulting the employee to be seconded.
7. The Council may use its promotion of economic, social and environmental well-being powers under Section 2 Local Government Act 2000 to provide staff for any person. That is subject to any restriction or limitation on the Council's powers in any other enactment. Further the Council cannot charge for such a secondment.
8. Finally it has been held that the Council's powers under Section 111 of the Local Government Act 1972, which enable it to do anything which is calculated to facilitate or is conducive or incidental to the discharge of any of their functions, provides for the

secondment of an officer to a joint committee.

TUPE/Consultancy Contracts

9. A secondment is not the same as a consultancy agreement. Under a consultancy agreement the employer will provide services to another organisation and manage the staff that are providing the services.
10. In establishing a secondment agreement it is important to check that the arrangement does not in fact constitute a transfer under TUPE particularly if assets are made available to the Seconded.

Key Issues

11. Where the Council is seconding staff it will still remain the employer of such staff. It will therefore pay the employees and the employees will remain in the West Midlands Pension Scheme if they are members of it at the time of the secondment.
12. The Council will still retain rights to suspend or dismiss the seconded employee and therefore the Council will have a key role in any disciplinary/ grievance process. It follows from this that where a seconded employee is guilty of misconduct or incapable of performing work satisfactorily for the Seconded that they are likely to be returned to the Council to deal with such problems, which may result in difficulties if the Seconded doesn't wish to cooperate with the Council.
13. There is a raft of health and safety legislation which imposes duties on employers where it makes no difference that the employee is not under their control or working at another undertaking. In particular Section 2 of the Health & Safety at Work etc. Act 1974 places a duty

on employers to ensure so far as is reasonably practicable the health, safety and welfare of all their employees. Regulations which impose similar obligations on employers which still apply to employees notwithstanding a secondment are set out in the Appendix to this paper. This list is not intended to be exhaustive.

14. Careful consideration needs to be given as to how the seconded staff are to be developed during the period of the secondment and to impose relevant training and development requirements on the Seconded.
15. At the end of the secondment the seconded employee's post may not necessarily be available. It is good practice and important to consult the seconded employee if his/her post is unlikely to be available to him/her at the end of the secondment. An "out of sight out of mind" syndrome should be avoided as the seconded employee remains an employee of the Council and as such has all the rights of employment offered to the employees of the Council. If their posts are not available then they will be the subject of the Council's Redeployment & Redundancy Agreement.
16. As the Council is developing more partnership based relationships with providers, a secondment does not sit comfortably into long-term agreements as partnering assumes that organisations are clearly defined as distinct entities.

Longer Term Secondments

17. Critical issues arise in secondments which are for longer than a relatively short term;
 - Consideration needs to be given as to the benefit to the Council in any such arrangement and in particular whether

it is more economical, efficient or effective than any other contracting solution.

- Longer term projects have to ensure that outcomes are secured and to achieve this there will be a risk transfer. If providers rely on seconded staff they will have a ready defence in certain areas of non-performance. This will be particularly relevant in the context of PFI transactions where the risk transfer test in Regulation 40 of the Leisure Authorities (Capital Finance) Regulations SI 1997 No 319 (as amended) may not be achieved.

Documentation

18. It follows that any secondment agreement needs to deal fully and adequately in a way that is legally appropriate with all the relevant issues and risks. There needs to be adequate consultation with the staff who are proposed for secondment and this will include a secondment letter issued to them prior to the secondment.
19. It is strongly suggested therefore that officers consult the Legal Services Office prior to agreeing to or formalising any secondment.

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APPENDIX TO SECONDMENTS
BRIEFING NOTE

1. Health & Safety Information for Employees Regulations 1989 SI 1989 No 682.
2. Notices at Works Regulations 1989 SI 1989 No 1790.
3. Manual Handling Operations Regulations 1992 SI 1992 No 2793.
4. Personal Protective Equipment at Works Regulations 1992 SI 1992 No 2966.
5. Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 SI 1995 No 3163.
6. Health and Safety (Consultation with Employees) Regulations 1996 SI 1996 No 1513.
7. Control of Lead at Work Regulations 1998 SI 1998 No 543.
8. Working Time Regulations 1998 SI 1998 No 1833.
9. Provision and Use of Work Equipment Regulations 1998 SI 1998 No 2306/
10. Lifting Operations and Lifting Equipment Regulations 1998 SI 1998 No 2307.
11. Control of Substances Hazardous to Health Regulations SI 1999 No 437.

