

Adult Social Care Scrutiny Commission Report

Leicestershire County Care Limited

Lead Member: Cllr Sarah Russell

Lead Strategic Director: Martin Samuels

Date: 30 June 2020

Wards Affected: Thurnby Lodge, Eyres Monsell, Abbey, North Evington
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1. Purpose

1.1 To provide the Adult Social Care Scrutiny Commission with an update on the proposal made by Leicestershire County Care Limited (LCCL) to change the Terms and Conditions of staff that transferred from the Council's employment in 2015.

1.2 The Council sold 2 residential care homes to LCCL in February 2015 (Abbey & Cooper House) and a further 2 in October 2015 (Arbor House & Thurn Court).

2. Summary

2.1 In 2015 the City Council closed 4 of its elderly persons residential care homes and sold the vacant buildings on the open market. A further 4 homes were sold to LCCL as going concerns. The closure and sale of the homes was required to deliver budget savings.

2.2 LCCL had previously purchased 9 residential homes from Leicestershire County Council.

2.3 At the point of sale, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) ("TUPE") applied and Leicester City Council employees, who were engaged in the delivery of the service, to LCCL.

2.4 Under TUPE Regulations an employer cannot amend T&C's of employment, including harmonisation, post transfer, save for (1) a reason unconnected to the transfer or (2) an economic, technical, or organisational reason entailing changes to the workforce.

2.5 On the 24.4.2020 LCCL started a formal consultation with 97 former Council staff (53 Leicester City and 44 Leicestershire) and their union representatives seeking to remove enhancements (see paragraph 4.8). LCCL state these changes are needed due to economic reasons as a result of Covid19, including reduced occupancy levels, high agency costs, and additional Personal Protective Equipment (PPE).

2.6 As the TUPE Regulations provide legal protection to the transferring employee's terms and conditions, the sale agreement did not stipulate that staff transferring to LCCL would always remain on their Council T&C's.

2.7 Whilst the City Council cannot legally force LCCL to cease their proposal, representation has been made by the authority, requesting they defer any proposals for a 12 month period to allow for a review of their position at that point. To date a response has not been received. However, LCCL have extended the consultation period until 19.6.2020 and made concessions to the original proposals. They have stated that if staff refuse to accept the revised proposals,

then they will dismiss individual employees and then may reinstate them on LCCL's usual T&C's.

3. Recommendation

3.1 The Adult Social Care Scrutiny Commission is recommended to:

- a) note the content of the report and to provide comment/feedback.

4. Report

4.1 Following two open tendering processes, LCCL were selected as the preferred organisation to purchase and operate the Councils elderly persons homes on both occasions. The required due-diligence checks were completed and the sale of the first 2 homes took place in February 2015. The first homes to be sold were Abbey House (£225k) and Cooper House (£250k) and have been paid for.

4.2 The City Council then transferred Arbor House (£557.5k) and Thurn Court (£442.5k) in October 2015. It was agreed that the homes could be paid for within a 3-year period from the date of the sale, with the final payment of £265k to be paid at the end of a 5-year period from the date of the sale (20 October 2020).

The schedule of payments is detailed as follows:

	Thurn Court	Arbor	Comments	Payment Status
On 12/10/2015	£80,000	£80,000	Paid on completion of the sale	Paid
By 12/10/2016	£62,500	£62,500	Interest to be charged	Paid
By 12/10/2017	£62,500	£62,500	Interest to be charged	Paid
By 12/10/2018	£105,000	£220,000	Interest to be charged	Paid
By 12/10/2020	£132,500	£132,500	Interest free	Not yet due
Total	£442,500	£557,500		

The total interest charged and paid is £35,027.

4.3 All 4 homes were sold as going concern and freehold. A legal charge in favour of the City Council remains active on Thurn Court and will be discharged when the final payment of £265k is received. The agreement for Services and Transfer provided for existing employees of the homes (as at the time of sale) to be transferred to LCCL in accordance with TUPE regulations. However, there is no linkage to employees being retained pending payment of the money due to the Council.

4.4 At the time of the sale it was also agreed that existing residents could remain in homes and the Council would pay the standard banded rates for all new and existing

placements. This arrangement has continued.

4.5 LCCL have recently requested a revised payment schedule for the remaining debt to the City Council of £265k. The payment schedule is for regular payments between now and June 2021.

4.6 The Council spends in the region of £55m per annum on residential care for a range of vulnerable individuals, and for 2019/20 the City Council paid LCCL approximately £3.4m.

4.7 All 4 homes are currently rated as 'Good' by the Care Quality Commission (CQC) which is the regulatory body for residential/nursing care homes.

4.8 In April 2020, the City Council became aware that LCCL had commenced a formal consultation process with all ex local authority TUPE staff to remove their enhancements as a means of reducing costs to the organisation. This includes:

1. Sick pay to be paid on statutory sick pay rates
2. Additional hours to be paid at the standard rate
3. Disturbance allowance to be removed
4. Maternity/Paternity/Parental and Adoption leave to be paid at the standard rate
5. Night shift allowances to be paid at the basic hourly rate
6. Weekend shift enhancements to be removed and paid at the basic hourly rate
7. Bank Holiday and Public Holiday enhancements to be removed and paid at the basic hourly rate
8. Annual leave to be brought in line with the statutory holiday entitlement under the Working Time Regulation 1998

4.9 LCCL have extended the consultation period until 19.6.2020 and have made several concessions to the original proposal, which is currently being considered by the staff and their union representatives. However, LCCL have stated that if staff refuse to accept the revised proposals, then they will dismiss individual employees and then may reinstate them on LCCL's usual T&C's.

4.10 Contact was made with LCCL, who explained that due to reduced occupancy levels and additional costs, such as agency staff to cover employees who were sick or self-isolating, additional PPE costs etc, they were having to look at all expenditure, including reducing to staff enhancements.

4.11 The Government has made provision for grants to support the sector in response to Covid19 and the City Council has passed on the monies. It also announced the £600m Infection Control Fund (ICF) – funding specifically for care homes to be paid in 2 tranches (June/July). The first tranche has been paid to LCCL, but the local authority does not have any flexibility over the level or allocation of this funding, as it is automatically passported to all residential care homes.

4.12 However, the City Mayor and the Strategic Director for Social Care & Education have written to the Health & Social Care Minister, raising concerns about the payment of monies to organisations who are looking at changing T&C's for staff at time when these staff are needed to support the most vulnerable in our society.

Copies of the letters are attached at Appendix A, B and C.

4.13 To date the following monies has been paid to LCCL related to the coronavirus pandemic:

- We paid LCCL a total of £64,849 across the 7 homes (4 city and 3 county) based on the 10% fee enhancement on placements for a period of 11 weeks. The 10% fee uplifts were paid to all homes with whom the council has contracts.
- We have also made further payments totalling £12,943 in relation to estimated self-funder numbers (4 city homes) for the same 11 weeks.
- The first tranche payment of the Infection Prevention & Control funding totalled £98,949. A second tranche will be payable in July.
- The total additional funding paid to date is **£176,741**

In addition to this, LCCL would have also received some funding from the County for:

- County placements at the 4 city homes (8 county placements in total – as at May 2020).
- County would have also paid funding for their placements in County homes too and that would have been reasonably significant assuming County would have a number of placements in those homes they sold to LCCL.
- County would have also paid over their allocation of the Infection Control Grant to LCCL registered care homes in the County.

4.14 A financial check of LCCL's accounts has been completed, using an external business information service the authority subscribes to. Currently, the risk score for LCCL is graded as 'A – very low risk' of a company failing within the next 12 months.

4.15 LCCL have been asked to defer their proposals for a 12 month period, with a review of their position at this point. However, to date no response has been received, but it is assumed that they are awaiting the outcome of the consultations on the concessions.

5.1 Financial

LCCL have received the same proportion of additional funding from the council during the pandemic to cover additional costs. A number of providers with lower occupancy levels have asked for support to cover their reduced income during the pandemic. The Council has only been given funding including the infection control grant to cover additional costs and not to cover loss of income due to voids. This national issue has been raised with the DHSC. LCCL have not asked for additional funding to cover loss of income.

LCCL have asked for a revised payment schedule for the remaining debt to the council of £265k. The payment schedule is for regular payments between now and June 2021 and not a deferment of the entire debt until June 2021.

Given the companies financial position, previous history of meeting payment deadlines, nature of the revised payment schedule and the need not to damage further an already fragile provider market, from a financial viewpoint alone extending the payment terms seems reasonable.

Martin Judson, Head of Finance

5.2 Legal

As highlighted in the report, under the TUPE Regulations an employer cannot amend terms and conditions of employment save for in limited circumstances. These are (1) a reason unconnected to the transfer or (2) an economic, technical, or organisational reason entailing changes to the workforce.

In communication with the Council LCCL have indicated that they are proposing to remove access to the enhanced rights under Leicester City Council terms and conditions and replace them with statutory entitlements/ LCCL terms and conditions. It is likely that this will impact upon sick pay entitlement, holiday allowances and other more beneficial terms.

LCCL have indicated that the reason for the proposal is due to the economic pressure it finds itself in as a result of Covid19. This could potentially be a reason unconnected to the transfer, and therefore the changes might be permissible. Ultimately however this would be for an employment tribunal to determine should complaints be made to it.

There is no financial incentive under the Service and Transfer agreement for LCCL to retain Leicester City Council terms and conditions. Nor does it offer the transferred employees protection, other than the protection provided for under the TUPE legislation. There is however a requirement for pensions to be protected either by continued access to the LGPS or access to a broadly comparable pension scheme. Pensions are also protected should a subsequent transfer to another company/ organisation occur.

If the changes are permitted (as unconnected to the TUPE transfer), LCCL will still need to ensure that it complies with the applicable employment legislation to minimise risk of other claims, for example unfair dismissal.

Hayley McDade Employment Solicitor

5.3 Equalities

Under the Equality Act 2010, public authorities have a Public Sector Equality Duty (PSED) which means that, in carrying out their functions, they have a statutory duty to pay due regard to the need to eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act, to advance

equality of opportunity between people who share a protected characteristic and those who don't and to foster good relations between people who share a protected characteristic and those who don't.

Protected Characteristics under the Equality Act 2010 are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.

There are no direct equalities implications arising from the report recommendations as the report provides information and is for noting. However, if the proposal made by Leicestershire County Care Limited (LCCL) to change the Terms and Conditions of staff that transferred from the Council's employment in 2015 goes ahead, it would have an impact across a number of protected characteristics, with emphasis being on the protected characteristics of age and disability. LCCL also have their own responsibilities under the Equality Act in terms of both employment and service provision (as a provider of public services).

If the affected staff are dismissed this would lead to an adverse impact for residents of the homes as key skills/experience would be lost, and relationships between residents and staff be would also be disrupted, leading to anxiety for residents, who are already vulnerable and having to deal with the covid 19 outbreak. It should also be noted that the affected staff would be from across a range of protected characteristics and this would need to be considered by LCCL.

Sukhi Biring, Equalities Officer, 454 4175

5.4 Other

There are no significant climate change implications associated with this report.

Aidan Davis, Sustainability Officer, Ext 37 2284

6. Appendices

A – Letter from the City Mayor & Cllr Russell to LCCL

B – Letter to Rosmond Roughton – Director General for ASC

C – Letter to Helen Whately – Minister for Social Care

7. Background Papers

None

9. Is this a key decision Y/N No

