

WEST DUNBARTONSHIRE COUNCIL

Report by the Executive Director of Corporate Services

Council : 29 June 2011

Subject: Joint Consultative Forum Minute – Decisions on Competency of Grievances

1. Purpose

- 1.1 On 25 May 2011 Council considered the Minute of the Joint Consultative Forum of 24 March 2011 Item 'Minutes of previous meeting' together with a report providing further information and background to the recommendations of the JCF. A copy of the relevant section of the JCF Minute is attached at Appendix 1 and a copy of the report to Council on 25 May 2011 is attached at Appendix 2.

At the meeting on 25 May 2011 Council agreed to continue consideration of the report to the next meeting of Council in order to obtain further information and clarification in respect of the recommendations within the report. The purpose of this report is to provide further information and clarification as requested.

2. Background

- 2.1 The background is set out in Appendix 2.

3. Main Issues

- 3.1 In addition to the amendment which formed the Council resolution on 24 May there was a motion and another amendment. Neither in the unsuccessful motion or amendment, nor in debate were issues raised regarding the recommendations contained in 8.3 i, iii and iv of Appendix 2. Accordingly this report deals with the remaining issue which relates to whether decisions on whether a grievance is within the remit of the Appeals Committee should be taken by the Monitoring Officer in consultation with the Legal Clerk to the Appeal Committee, or should be taken by the Appeals Committee itself.
- 3.2 Clarification was sought on the stage at which grievances would be rejected and the procedure for this. How would the Monitoring Officer get to know about grievances if they had already been rejected by Management at Stage 1 or 2? There are two alternative means by which the Monitoring Officer would become aware of such grievances:-

- i In all such cases to date Human Resources and Organisational Development or Management has sought legal advice on the competence of a grievance prior to Stage 1. Notwithstanding that this has been the practice to date, Management could now be instructed that if they have any queries regarding the competence of a grievance, these must be referred to the Monitoring Officer for advice prior to Stage 1. The Grievance Procedure could also be changed to reject this.
- ii There is also a safety net in case this step is missed. If a grievance is rejected at Stage 1 the Appellant can still appeal the rejection to Stage 2. If Management have still not consulted the Monitoring Officer and reject a grievance at Stage 2, the Appellant can simply appeal it to Stage 3. At that stage the Monitoring Officer would become involved as the appeal papers would be passed to Legal and Administrative Services to arrange the Appeals Committee Hearing.

Clearly it is important that a decision is made as soon as possible on the competence of a grievance as that enables the Appellant to amend their grievance to make it competent.

It should also be made clear that when making a decision on the competence of a grievance, the sole issue for the Monitoring Officer is to establish whether the grievance is within the remit of the Appeals Committee. He acts in an independent capacity and does not act as part of Management.

- 3.3.1** During debate on 24 May it was also clear that a concern of some Members was that if Officers ruled that a grievance was not within the remit of the Appeals Committee, the Appellant could be left without a remedy and would be unable to place the matter before Elected Members. It is extremely unlikely that this would ever be the case. The third recommendation in paragraph 8.3 is intended to deal with this remote possibility and states:-

“Management meet with the Trade Unions to clarify, in terms of Standing Orders and Committee Remits, the processes available to the Unions to enable them to voice their concerns. This matter has already been discussed with the Employee Liaison Group and the Trade Unions are supportive of identifying processes and mechanisms to enable early resolution of workplace disputes which may not be fully covered by the Grievance Policy.”

- 3.3.2** Without going into the details of the grievance which has given rise to the referral from the JCF in this report it is fair to state that this could conceivably come before Members in the following ways:-

- It would be straight forward to amend the grievance to bring it within the remit of the Appeals Committee. To do this it merely needs to state the individual problem which the grievance is about and the employee or employees on whose behalf it is raised. As long as it does not then seek to overturn a decision of Council or seek a policy decision it will be competent to go to the Appeals Committee.

- The grievance as presently raised is relevant to the terms of the Council's Organisational Change Policy. Officers and Union Representatives could meet to attempt to resolve the issues raised in the grievance. Thereafter these could if necessary be referred to the JCF or Corporate and Efficient Governance Committee.
- The Unions who raised the grievance could raise the grievance at the JCF since the resolution sought is an issue of policy within the JCF's remit.
- The Unions could raise the same request at Council under the Open Forum.
- The Unions could ask that a Councillor raises the same issue as a Motion.

3.3.3 As such, there are a number of ways in which this particular grievance could be resolved.

3.4 The present issue has been presented to the Appeals Committee and the JCF as being an issue of principle of who determines the competence of grievances. However, the key point is that employees and Unions should have adequate opportunities to raise their concerns and have these addressed whether they are individual concerns or relating to policy. The Council's Standing Orders provide that such concerns can be raised in a number of ways. Individual cases can go to the Appeals Committee at Stage 3 while issues of policy go to the JCF, Corporate and Efficient Governance Committee or in exceptional cases (e.g. single status) to Council itself. Moreover Council can deal with such matters under the Open Forum and Motions sections of its agenda. To decide where an issue goes is simply a matter of looking at the remit of the particular committee and the issue raised. The fact that a policy matter has been raised on a grievance form does not automatically mean that it can go onto the agenda of the Appeals Committee if it is not within that committee's remit. To allow the Appeals Committee to consider the competence of matters clearly outwith their remit allows them to extend their remit. Taken to its logical extension it would allow them to deal with policy matters and to overrule decisions of Council or Committee.

4. People Implications

4.1 The people implications are detailed in paragraph 4.1 of Appendix 2.

5. Financial Implications

5.1 There are no financial implications for this report.

6. Risk Analysis

- 6.1** The main risks are set out at paragraph 6 of Appendix 2. A further risk is that to allow the Appeals Committee to determine the competence of grievances would allow them to extend their remit and result in confusion as to committee remits. It might also encourage further grievances seeking to overturn decisions of Council or other committees.

7. Equalities, Health and Human Rights Impact Assessment (EIA)

- 7.1** The issues covered in this report do not raise any equalities issues which should require an Equalities Impact Assessment.

8. Conclusions and Recommendations

- 8.1** The recommendations remain those detailed at paragraph 8.3 of Appendix 2, namely:-

- i) Note that Officers cannot arbitrarily decide on what is a grievance. The Grievance Procedures will provide that management should obtain the advice of the Monitoring Officers before considering the competency of grievances at either Stage 1 or 2.
- ii) Decisions on whether a grievance is within the remit of the Appeals Committee should only be taken by the Monitoring Officer in consultation with the Legal Clerk to the Appeals Committee. It should only be in exceptional circumstances where a grievance is clearly outwith the remit of the committee that the Stage 3 grievance should not go to the Appeals Committee. In these cases advice should be given to the Appellant as to the issues which render their grievance incompetent, enabling them to re-draft as a competent grievance.
- iii) That management meet with the Trade Unions to clarify, in terms of Standing Orders and committee remits, the processes available to the unions to enable them to voice their concerns. This matter has already been discussed within the Employee Liaison Group and the Trade Unions are supportive of identifying processes and mechanisms to enable early resolution of workplace disputes which may not be fully covered by the grievance policy.
- iv) That the facility for external mediation is offered to the relevant Trade Union in relation to any outstanding matters relating to the particular grievance which has given rise to the issues addressed in this report.

Joyce White
Executive Director of Corporate Services

Person to Contact: Andrew A Fraser, Head of Legal, Administrative and Regulatory Services, Council Offices, Garshake Road, Dumbarton, G82 3PU. Telephone 01389 737800
e-mail: andrew.fraser@west-dunbarton.gov.uk

Appendices: Appendix 1 - relevant section of the JCF Minute of 24 March 2011, Appendix 2 - Joint Consultative Forum Minute Decisions on Competency of Grievances, Council on 25 May 2011

Background Papers: None

Wards Affected: All

MINUTES OF PREVIOUS MEETING

The Minutes of Meeting of the Joint Consultative Forum (JCF) held on 17 December 2010 were submitted and approved as a correct record subject to an amendment under the heading 'Minutes of Previous Meeting' (page xx refers), concerning the supply of drinking water at Clydebank High School. It was noted that the site visit had been arranged for St. Peter the Apostle High School and not Clydebank High School as stated in the minutes.

With reference to the item under the heading, 'Minutes of Previous Meeting' (page xx refers), the Forum then heard from Councillor Black in relation to the Trades Unions Issue 'Welfare Rights Grievance'. Having heard Councillor Black, it was noted (i) that Councillor Black had declared an interest as a member of the Appeals Committee at the meeting; (ii) that following discussion at the meeting of the JCF, Councillor Black had raised the procedural matters arising from the welfare rights grievance at a meeting of the Appeals Committee who were of the unanimous view that the grievance should be allowed to proceed through the Grievance Procedure, and that ultimately, it was a matter for the Appeals Committee to decide on the competency of a grievance; (iii) that the Appeals Committee had discussed the principle way in which a grievance was raised and had no details of the specific Welfare Rights grievance; and (iv) that a direct response on the view of the Appeals Committee detailed at item (ii) above was awaited from the Head of Legal, Administrative and Regulatory Services.

Having heard the Manager of Legal Services in legal clarification, the Forum noted that (i) it was open to the JCF to consider the general principles of a particular complaint and thereafter make a recommendation to Council to determine resolution of the complaint; and (ii) that it was the role of the Head of Legal, Administrative and Regulatory Services as Monitoring Officer to determine the competency of any motion/report to Council or Committee.

Following discussion, the Forum agreed that in order to move this matter forward, the undernoted motion be submitted to Council:-

"This JCF refers the principle point of view that officers cannot arbitrarily decide on what is a grievance to Council".

The Forum then heard from the Head of Human Resources and Organisational Development on matters arising from the Minutes of Previous Meeting. It was noted that an email had been circulated to relevant Elected Members and Trades Unions representatives providing information on the issues highlighted following the visit to St. Peter the Apostle High School. It was also noted that further information had yet to be provided on a question concerning the risk of legionnaires disease in the drinking water, which is sourced from rising mains and not from a tank. The Head of Human Resources and Organisational Development provided an update on progress of the Restructuring and Redeployment Protocol and advised that some matters concerning the Protocol remained outstanding, in particular

clarification of the Council decision on what required to be referred to Council in a potential redundancy situation. This would be discussed further at the next meeting of the Employee Liaison Group.

In relation to a point raised by Mr Morrison under the heading 'Minutes of Previous Meeting' (page xx refers) concerning the Trades Unions Recognition and Facilities Agreement, and the recording and retention of trades unions facility time being an attack on the trade union movement, the Head of Human Resources and Organisational Development advised that ACAS Guidance would be applied in respect of the retention period for such information and that it was not intended to report this information for any other purpose.

Having heard the Head of Human Resources and Organisational Development and Mr Morrison in relation to an update provided on the item 'Job Evaluation Process' under the heading 'Minutes of Previous Meeting – Trades Unions Issues (Page 3107 refers), the Forum agreed:-

- (1) to note that management had followed up on commitments following the Trades Unions request for a list of the categories of posts that were successful in the appeals process; and
- (2) that the Trades Unions would provide clarity and/or names of Senior Social Workers who did not receive back payment following the evaluation of Senior Social Worker Posts.

With reference to the item on the heading 'Minutes of Previous Meeting' (page xx refers), the Forum heard from Ms McLafferty concerning the scheduling of a meeting to discuss preventing grievances arising following the outcome of unsuccessful appeals. Having heard the Section Head – Employee Relations and Employment Policy in response, it was noted that the meeting would be organised in due course.

The Forum then heard from Ms McLafferty in relation to an item raised under the heading 'Minutes of Departmental Joint Consultative Committees, Departmental Health and Safety Meetings and Employee Liaison Group Meetings' (page xx refers), concerning the lack of knowledge amongst some managers of the Council's collective bargaining arrangements with the Trades Unions to support organisational change.

The Forum agreed:-

- (1) to note that Management and the Trades Unions had held early discussions on the issue but the consultation process remained a concern for the Trades Unions side;
- (2) that the issue of collective bargaining should remain on the agenda for future meetings of the JCF; and
- (3) that dates for Management Briefing Sessions to support organisational change had been issued to Managers and would go some way to address the issue.

WEST DUNBARTONSHIRE COUNCIL

Report by the Executive Director of Corporate Services

Council : 25 May 2011

Subject: Joint Consultative Forum Minute Decisions on Competency of Grievances

1. Purpose

- 1.1** On 24 March 2011 the Joint Consultative Forum agreed the following motion be submitted to Council:-

“This JCF refers the principle point of view that Officers cannot arbitrarily decide on what is a grievance to Council”.

This report provides further information and background to the recommendation and the issues involved in it.

2. Background

- 2.1** By way of background it is important to briefly outline the remits of the Appeals Committee and the Joint Consultative Forum (JCF).

- 2.2** The remit of the Appeals Committee is as follows:-

To consider and decide upon appeals submitted under the Council’s Disciplinary and Grievance Procedures for Local Government Employees and Craft Operatives and Appeals against Dismissals, submitted outwith those procedures. The Appeals Committee has full delegated powers to implement its functions. The Appeals Committee is a formal committee of the Council and is bound by its Standing Orders.

- 2.3** The remit of the Joint Consultative Forum (JCF) is set out in its constitution and includes the following:-

To afford facilities for regular consultation between the Council and the Trades Unions representing employees of the Council on general policy matters which are not specifically determined by the Scottish Council or its committees.

The JCF is not a formal committee and cannot make binding decisions.

- 2.4** The Council has in place an agreed Disciplinary and Grievance Policy and Procedure which is based on the ACAS Code of Practice. The Policy is quite clear on the management of individual grievances but is less clear in relation to collective grievances and disputes. The grievance procedure is a 3 stage process culminating in an appeal to the Council Appeals Committee. In the past there have been isolated cases where matters raised as a grievance have not been placed before the Appeals Committee. These have fallen into two categories. The first category relates to grievances seeking a policy decision which was contrary to the Council's decision on terms and conditions in relation to single status. The second was where Council had provided for an alternative procedure, such as the Job Evaluation Appeal Process. In a small number of cases where management were of the view that grievances were not competent the decision of the Legal Clerk to the Appeals Committee, usually in consultation with the Head of Human Resources and Organisational Development and Head of Legal Administrative and Regulatory Services was that these grievances were competent and therefore should be considered at Appeal..
- 2.5** Currently a situation has arisen whereby Trade Union representatives have contacted the Chair of the Appeals Committee complaining that Officers were determining the competency of a grievance. It was argued that the Appeals Committee, not Officers, should consider the competency of a grievance. The Legal Clerk advised the Chair that the particular grievance was not competent as (a) it sought a policy decision (b) appeared to question a decision of Council and (c) it was a group grievance on behalf of individuals who were not named in it. The Appeals Committee consider individual cases, not issues of general policy. It would however be competent for the JCF to consider this matter.
- 2.6** Thereafter on 17 December 2010 the JCF considered this matter. The minute of the JCF agreed:-
- i) To note the opinion of the Trades Unions that the grievance should be heard through the Grievance Procedure;
 - ii) To note that the meeting had previously agreed to consider issues of communication and consultation in relation to organisational change, and such discussions would consider the point at issue in this case;
 - iii) That management and the Trade Unions would meet to discuss the scenario where Standing Orders and committee responsibilities may not allow for the resolution of certain issues through the grievance procedure.
- 2.7** Thereafter a Trade Union representative contacted the Chair of the Appeals Committee in this regard and the Appeals Committee discussed the issue at their meetings on 18 January, 17 February, 10 March and 17 March 2011. Advice was given from the Legal Clerk, and an email from Head of Legal Administrative and Regulatory Services setting out his views was circulated amongst the members of the Appeals Committee. The advice detailed in this

email is covered in the main issues section of this report. As noted in the minute of the JCF of 24 March 2011, the Appeals Committee were of the unanimous view that the particular grievance should be allowed to proceed through the Grievance Procedure and that ultimately it was a matter for the Appeals Committee to decide on the competency of a grievance.

2.8 Subsequently when the JCF of 24 March 2011 considered the accuracy of the minute of the meeting of 17 December 2010 there was further discussion of the issue. The recommendation of the JCF, as detailed in the minute contained within these papers was to:

- i) To note the unanimous view of the Appeals Committee that it is a matter for the Appeals Committee to decide on the competency of a grievance.
- ii) That a direct response on this view of the Appeals Committee was awaited from the Head of Legal Administrative and Regulatory Services.
- iii) To note that it was the role of the Monitoring Officer to determine the competency of any motion/report to Council.
- iv) To note that it was open to the JCF to consider the general principles of a particular complaint and thereafter make a recommendation to the Council to determine resolution of the complaint.
- v) To submit the following motion to Council – “this JCF refers the principal point of view that officers cannot arbitrarily decide on what is a grievance to Council.

3. Main Issues

3.1 The Council’s procedures for dealing with grievances comply with the ACAS Code of Conduct and ensure that there is a fair internal procedure which allows grievances to be fully addressed prior to going to an Employment Tribunal. While this is more of an issue for dismissals, there is the possibility that unresolved grievances could give rise to other claims such as constructive dismissal. For these reasons it should only be in exceptional circumstances that grievances would be considered as “not competent” without having the opportunity to proceed, where appropriate to the Appeals Committee. Officers should never arbitrarily decide on what is a grievance. Thus the motion from the JCF that “Officers cannot arbitrarily decided on what is a grievance” is correct.

3.2 The Appeals Committee view is that it is a matter for the Appeals Committee to decide on the competency of a grievance with advice from Legal Services. Given this view two different scenarios require to be distinguished. The first is where the Legal Clerk has taken the view that the grievance and management submission are within the committee’s remit, these are before

the committee and an objection is taken to the competency of the grievance or the management submission. In those circumstances it is perfectly appropriate for the Appeals Committee to decide on the competency of the grievance or the management submission. The second scenario however is where the Legal Clerk is of the view that the grievance is clearly not within the remit of the committee and where the matter would not normally be placed before the committee. This is a much more contentious situation and the issues are:-

- The Appeals Committee is a full committee of the Council, is bound by the Council's Standing Orders and can only consider matters delegated to it by Council, in other words, it can only consider matter within its remit. To this extent it is no different from other committees of the Council. In common with other committees, officers would not put a matter to that committee if it was not within its remit. It is a fundamental principle of the relationship between Members and Officers that the decision on whether a report should go to committee, or its subject matter or conclusions is for officers to make. The Councillor's Code of Conduct in Appendix C states that :-

"Employees will always be fully responsible for the contents of any reports submitted in their name, to have the right to submit a report to Members in their areas of professional competence. While employees will wish to listen to the views of Convenors, they must retain the final responsibility for the contents of reports".

The Council's own Member/Officer Protocol, approved by Council in 2007 stated:-

"The Executive Director will always be fully responsible for the contents of any report submitted in his/her name".

The Appeals Committee's view requires that issues regarding the competency of grievances should be placed on the agenda of that committee in circumstances where Officers would not normally do so. It breaches the fundamental rule that Officers determine which matters go to committee. Taken to its ultimate extreme, were Council to decide that the Appeals Committee should consider the competency of grievances clearly outwith their remit and were Members to put pressure on Officers to bring forward report on matters where they would normally not do so, this would probably result in a reference to the Standards Commission.

- Secondly, to allow the Appeals Committee to determine whether all grievances are competent, gives the committee the power to widen its remit without the authority of the Council. For example, were the Appeals Committee to allow the particular grievance at the centre of this debate, it would allow them to make a policy decision binding Council to future action. It would also allow the Appeals Committee to encroach on the remit of other committees, and potentially undermine their decisions. For example, it would be perfectly competent to deal with the subject matter of

the present grievance either at the JCF, Corporate and Efficient Governance Committee or Council itself.

- The Appeals Committee cannot overturn decisions of other committees or Council. The remit of the Appeals Committee is to deal with individual cases, not make policy and the Appeals Committee simply has no power to over-rule policy decisions taken by Council or committee. A purported grievance which really sought to overturn a Council decision would not be competent for the Appeals Committee to consider.

3.3 One of the concerns put forward by the Trade Union Representative to the Appeals Committee was that management were deciding on the competence of grievances. This is not the case. At Stages 1 and 2 of an Appeal, management may decide that an Appeal is not competent. However at Stage 3 the decision on whether the matter goes forward to the Appeals Committee is not for management. In theory it is a decision of the Chief Executive as to whether any report goes to committee. In practice the decision on whether a grievance is within the remit of the committee is taken by the independent Legal Clerk to the committee, usually in consultation with the Monitoring Officer and the Head of Human Resources and Organisational Development. As previously mentioned there have been a number of cases where management have sought to argue that an Appeal was not competent but the Legal Clerk advised to the contrary and the matter came to the Appeals Committee.

4. People Implications

4.1 As detailed in the minute of the JCF of 24 March 2011 it is important that Officers do not arbitrarily reject grievances. This should only be done in exceptional circumstances and should only be done where the Legal Clerk and Monitoring Officer are clearly of the view that the grievance is outwith the remit of the Appeals Committee. It is also important that where a grievance is identified as not being competent, that help is given to appellants to enable them to make the grievance competent. For genuine individual grievances this will normally avoid such grievances becoming incompetent. In the present case, this was not possible as the grievance was raised by Trade Union representatives with the express purpose of seeking a policy decision binding Council in future. The minute of the JCF of 17 December 2010 and the Employee Liaison Group also agreed that management and Trade Unions meet to discuss the scenario where the grievance procedure may not allow for a solution of certain issues, this would still be appropriate, notwithstanding that the JCF have changed their minute.

5. Financial Implications

5.1 There are no financial implications of this report.

6. Risk Analysis

6.1 The main risks are:

6.1.1 If the pressure is put on Council Officers to bring reports to a committee where there is no clear jurisdiction to do so, this could be detrimental to Member/Officer relations and could result in reference to the Standards Commission.

6.1.2 There is a risk that direct approaches by one side of a grievance to the Chair of the Appeals Committee would be seen to undermine the impartiality and fairness of a subsequent hearing.

7. Equalities, Health and Human Rights Impact Assessment (EIA)

7.1 The issues covered in this report do not raise any equalities issues which would require an Equalities Impact Assessment.

8. Conclusions and Recommendations

8.1 There are no concerns regarding the JCF's proposed motion that "Officers cannot arbitrarily decided on what is a grievance" since officers should never arbitrarily decide this. Only in exceptional circumstances where a grievance is clearly outwith the remit of the Appeals Committee should a grievance not be placed on the agenda of the committee. In these circumstances it would be expected that the matter had been fully considered by the Legal Clerk to the committee in consultation with the Monitoring Officer and Human Resources.

8.2 There are however a number of problems should Council decide that the Appeals Committee has the final say on what grievances are within its remit. This runs contrary to the fundamental principle that officers determine which reports go to committee. It could also allow the Appeals Committee to extend its remit, to overrule decisions of Council or other committees and to determine issues of policy rather than individual cases.

8.3 It is recommended that Council:-

- i) Note that Officers cannot arbitrarily decide on what is a grievance.
- ii) Decisions on whether a grievance is within the remit of the Appeals Committee should only be taken by the Monitoring Officer in consultation with the Legal Clerk to the Appeals Committee. It should only be in exceptional circumstances where a grievance is clearly outwith the remit of the committee that the Stage 3 grievance should not go to the Appeals Committee. In these cases advice should be given to the Appellant as to the issues which render their grievance incompetent, enabling them to re-draft as a competent grievance.

- iii) That management meet with the Trade Unions to clarify, in terms of Standing Orders and committee remits, the processes available to the unions to enable them to voice their concerns. This matter has already been discussed within the Employee Liaison Group and the Trade Unions are supportive of identifying processes and mechanisms to enable early resolution of workplace disputes which may not be fully covered by the grievance policy.
- iv) That the facility for external mediation is offered to the relevant Trade Union in relation to any outstanding matters relating to the particular grievance which has given rise to the issues addressed in this report.

Joyce White
Executive Director of Corporate Services

Person to Contact: Andrew A Fraser, Head of Legal, Administrative and Regulatory Services, Council Offices, Garshake Road, Dumbarton, G82 3PU. Telephone 01389 737800
e-mail: andrew.fraser@west-dunbarton.gov.uk

Appendices: None

Background Papers: None

Wards Affected: All