



## **1 Summary**

1.1 We have conducted an investigation on behalf of West Dunbartonshire Council in terms of the remit that is described in Section 2 of this report.

1.2 Our Conclusions and Recommendations are set out in Section 11 of the Report.

## **2 Introduction and Remit**

2.1 Brodies have been appointed to undertake an investigation that was required by a motion passed at the Requisitioned Meeting of West Dunbartonshire Council that took place on 19th January 2009. The wording of the motion defines the remit of the investigation. Accordingly we are required to prepare a report on:-

2.1.1 Why, despite repeated attempts by the Acting Chair of the Panel, it has taken over four months and this motion to get a Panel decision fully implemented.

2.1.2 Why the report requested with regards to actions taken by the Executive Director of Social work and Health has not been forthcoming?

2.2 The Panel decision referred to is the decision taken by the Council's Appeals Panel at the conclusion of the appeals hearing that took place on 14th August 2008. The report that is referred to is the report that was required of the Chief Executive by the Appeals Panel as part of their decision. (Note: the Appeals Panel is a Committee of the Council and is often referred to as the Appeals Committee).

2.3 Brodies have nominated Ms Jackie McGuire, Director of their Public Sector Services Group to undertake the investigation. Ms McGuire has over 20 years experience of working as a solicitor in local government. From April 1996 until December 2007 she was Head of Administration and Legal Services at Clackmannanshire Council where she was also the Council's Monitoring Officer. Of particular relevance to this investigation is Ms McGuire's former responsibility for Members' Services, and for Council and Committee Services. She has extensive experience in advising Appeals Panels on procedural and legal matters.

2.4 The remit for this investigation does not involve the interpretation of the Standing Orders of West Dunbartonshire Council, nor does it involve any commentary on the law in so far as it relates to local authority meetings or matters of employment law. However, Ms McGuire has familiarised herself with the Council's Standing Orders and with the procedures that are to be followed at hearings of the Council's Appeals Panel.

- 2.5 This report is not concerned with matters relating to the conduct of individual elected members, and although it does contain information regarding the actions of the Acting Chair of the Appeals Panel, the report does not comment on whether the actions of the member in question were appropriate. We understand that these matters are the subject of a referral to the Standards Commission.
- 2.6 The remit for this investigation does not include a review of the findings of the Appeals Panel that met on 14<sup>th</sup> August 2008. However, in order to respond in full to the Council's instructions we have found it necessary to revisit the manner in which the Panel appears to have arrived at its decision.
- 2.7 In the course of this investigation Jackie McGuire interviewed:-

Councillor R McColl  
 Councillor G Black (by telephone)  
 Councillor J Brown, (by telephone)  
 David McMillan, Chief Executive  
 Joyce White, Executive Director Corporate Resources  
 Andrew Fraser, Head of Legal and Regulatory Services  
 Mr Ettles, Principal Solicitor and Clerk to the Appeals Panel  
 Alan Douglas, Manager, Legal Services  
 Tricia O'Neill, Head of Human Resources  
 Mr Tom Morrison (Unison)

All interviewees were helpful and courteous.

### **3 General Background**

- 3.1 On 14<sup>th</sup> August 2008 the Appeals Panel met to consider a grievance that had been raised by a member of staff located in the Welfare Services Team for which the Director of Social Work and Health has overall responsibility. The Panel comprised Councillors:-

J Bollan  
 J Brown  
 J Finn  
 J McColl

and, in the absence of the standing chair Councillor G Black, was chaired by Councillor R Mc Coll. The Panel clerk and legal advisor was Mr Ettles. Mr Ettles has considerable experience in this role and (we have been advised by Councillors R McColl and G Black) has the trust of the standing chair and of Councillor R McColl.

- 3.2 The grievance had reached stage 3 in terms of the Council's Grievance Procedures (Appendix 1), and the Panel was therefore hearing an appeal against the failure on the part of management to resolve the staff grievance at stages 1 and 2.

- 3.3 At the hearing the appellant was represented by Mr Tom Morrison of Unison. The management representative was Mr Raymond Lynch, solicitor.
- 3.4 In accordance with the Council's Grievance Procedures (Appendix 1) the details of the grievance were recorded in a form PERGP/1/01 (Appendix 2). In order to ensure that the matters recorded on the form were an accurate record of the nature of the appellant's grievance the form was shown to the appellant and to Mr Morrison at the beginning of the hearing. Mr Morrison and the appellant confirmed the accuracy of the information on the form PERGP/1/01.
- 3.5 The form PERGP/101 contains a section headed  
"DETAILS OF GRIEVANCE/COMPLAINT/CONCERN" in which the appellant listed the nature of his grievance as :-  
  
"Since March 2004 I have not received the same consideration as other members of the Welfare Rights Team in the following areas and have therefore been discriminated against breaking my contract of employment.
1. I have not been given the same training opportunities as other Welfare Rights Staff
  2. I have been excluded from being part of the Welfare Rights collective framework.
  3. Management of the Welfare Rights Unit have failed to provide me with relevant materials and information given to other Welfare Rights Officers to do their job effectively. They have broken my contract of employment and have failed to treat me with dignity and respect.
- 3.6 Having heard evidence in accordance with the Council's Grievance Procedures the Panel reached a decision which was announced by Councillor R McColl in his capacity as Panel Chair, to the appellant, Mr. Morrison, and Mr Lynch.
- 3.7 Councillor McColl recalls that he announced that the Panel had upheld the appeal "in full and in all parts". Mr Ettles' hand written notes record that the Panel upheld the appeal "in its entirety". Although there is some difference between the wording in the notes and the precise phrase that is referred to by Councillor McColl, it is evident upon examination that the notes are not a verbatim account of the proceedings and we are of the opinion that Mr Ettles' notes are a shorthand account of what was actually said by Councillor McColl. Moreover, the effect of the statements is the same i.e. that the Panel upheld the appeal in all respects and did not dismiss any of the matters that had been complained of by the appellant.
- 3.8 In addition to upholding the grievance the Panel decided a number of other matters. These too were communicated to the parties at the conclusion of the hearing. These other matters were later recorded in the decision letter that was issued to the appellant on 15<sup>th</sup> August and were :-

“1. [The appellant] should have access to the same training and information as other Welfare Rights Officers, specifically:-

- a) He should remain on all relevant distribution lists
- b) He should have access to all relevant websites
- c) He should be able to communicate electronically with other Welfare Rights Officers
- d) He should have access to the same training opportunities as other Welfare Rights Officers

2.

- a) The Chief Executive should investigate this discrimination against [the appellant ] and the failure of the Executive Director of Social Work and Health to investigate fully accusations of bullying and harassment;
- b) The Chief Executive’s findings are to be distributed to Members of the Appeals Panel for information.”

#### **4 The Decision Letter**

- 4.1 The Council’s Grievance Procedures (Appendix 1) state at paragraph 5.15 that “the Appeals Panel will recall the department’s representative, the appellant and his/her representative and announce their findings and recommendations which will be confirmed in writing to both parties”. In the normal course of events this part of the process follows a private discussion by the Panel on the evidence that has been submitted by the appellant and by management. This is what happened at the Appeals Panel meeting of 14<sup>th</sup> August 2008.
- 4.2 The decision letter (Appendix 3) was drafted by Mr Ettles after the hearing and was issued on the day following the hearing. Mr Ettles did not show his letter to the Panel or to the Chair of the Panel before the letter was issued to the appellant. This was not unusual. It was in accordance with normal practice.
- 4.3 Andrew Fraser, Head of Legal and Regulatory Services sent a copy of the letter to the Chief Executive and to the Head of Human Resources on 15<sup>th</sup> August. Management did not take issue with any aspect of the decision letter.
- 4.4 Mr Morrison was not content with the decision letter. In his opinion the letter ought to have listed the precise nature of the grievance that had been upheld by the Appeals Panel and, in particular that the letter should have listed the points that were set out in the form PER/GP/01.
- 4.5 Mr Morrison telephoned Councillor McColl sometime during the last week in August in order to raise his concerns about the way in which the decision letter had been worded. At that time

Councillor McColl had not seen the letter. Councillor McColl agreed to raise Mr Morrison's concerns with Mr Ettles.

- 4.6 There is a lack of certainty as to when Councillor McColl first raised the matter with Mr Ettles, but this is understandable as not all business between officers and elected members is necessarily recorded in writing or marked up in diaries. However, both Councillor McColl and Mr Ettles recall that the matter was raised again just before a meeting of the Appeals Panel that was held on 9th October 2008. The matter appears to have been raised while elected members were arriving for the meeting. The matter was not on the agenda for the meeting of 9th October and was not dealt with as formal Panel business. What appears to have taken place was an informal discussion between Councillor McColl and one or more members of the Panel (the other members including Councillor Black and Councillor Brown who recall the discussion but not in any great detail). In any event, Councillor Black agreed with Councillor McColl that the decision letter might be amended so as to clarify exactly what had been decided by the Panel, in other words that it should be written in more specific terms and also that it should be checked with Councillor McColl before it was issued.
- 4.7 Mr Ettles explained to Councillor McColl that the letter issued on 15th August 2008 had been written in accordance with normal practice. This appears to have been accepted by Councillor McColl who has advised us that he regards Mr Ettles as an experienced and reliable officer and advisor to the Appeals Panel.
- 4.8 Mr Ettles subsequently drafted a further decision letter (Appendix 4), and on this occasion Councillor McColl did see a draft of the letter before it was issued. The draft was sent to Councillor McColl by email on 17th November. Councillor McColl telephoned Mr Ettles on 18th November 2008 to advise that he thought the email (i.e. the email that included the draft letter) "looked fine". Subsequently Mr Ettles issued a letter to the appellant on 18th November 2008. The letter spelled out in more detail (than the letter of 15th August 2008) the findings of the Appeals Panel. In particular the letter states:-
- "The Panel found that since March 2004 you had been treated less favourably than other members of the Welfare Rights Team in respect that:-
- 1) You were not given the same training opportunities as other Welfare Rights staff.
  - 2) You were excluded from being part of the Welfare Rights collective framework.
  - 3) Management of the Welfare rights Unit failed to provide you with relevant materials and information given to other Welfare Rights Officers to allow them to do their job effectively."
- 4.9 On 21st November Mr Morrison emailed Mr Ettles to indicate that "we believe the contents of [the appellant's] letter does not fully reflect the decision of the Appeals Panel in this case which we will pursue". Sometime thereafter (the dates are not clear, but in effect are not of any great significance) Mr Morrison delivered to Councillor Mc Coll a letter drafted in terms which he believed recorded the decision of the Appeals Panel with a greater degree of accuracy than either

of the two letters that had been issued by Mr Ettles. Councillor McColl referred this draft letter to Andrew Fraser. A copy of the letter is attached as Appendix 5.

- 4.10 The draft letter that was produced by Tom Morrison is written in substantially the same terms as the letter issued by Mr Ettles on 17th November when read together with Mr Ettles' earlier letter.. However, it is not wholly the same. Notably it contains an additional sentence to which Mr Morrison attaches considerable importance, that is:-

“ He [ that is the appellant ] was therefore discriminated against, breaking his contract of employment”

- 4.11 Councillor Mc Coll raised the matter of Mr Morrison's draft letter with Andrew Fraser who was, and continues to be of the view that it would not have been appropriate for a third letter to be issued. The Chief Executive shares this view.

- 4.12 Councillor McColl has advised us that at the time he reviewed Mr Ettles second letter (i.e. after it had been sent to him in draft on 17th November 2008) he did not have his meeting notes in front of him. He is, however, of the view that the wording in Mr Morrison's draft letter contains the more accurate record of the findings of the Appeals Panel. Despite Councillor McColl's view on the matter the letter issued on the 18th November is the last official communication issued to the appellant regarding the outcome of the hearing that took place on 14th August 2008.

- 4.13 In the present case we would add that we are of the view that, in the absence of a detailed account of the Panel's decision, the precise nature of the decision is provable by reference to the grounds of appeal that are listed in the appellant's grievance form. This is not a difficult or onerous process. The wording of Mr Ettles' original letter may not have met with the approval of Mr Morrison and it may not have been worded to the absolute satisfaction of the Chair of the Panel (who was not any more detailed in his verbal account of the decision than Mr Ettles' was in his written account of the decision) but it is, nonetheless, an accurate record of the Panel decision. We therefore find it impossible to support the view that Mr Ettles or any other officer of the Council has failed to implement the Panel decision.

## **5 SECTION 4 Procedural Matters**

- 5.1 This report is not concerned with the appropriateness of the manner in which Mr Morrison sought to have the wording of the decision letter amended or clarified. Nor is it concerned with the manner in which Councillor R McColl responded to the approaches made to him by Mr Morrison. However, it is clear that Mr Morrison was concerned that the letters issued by Mr Ettles were not sufficiently detailed.
- 5.2 The Chief Executive is of the view that Mr Morrison ought not to have approached Councillor McColl in the manner that he did, a view which is shared by Andrew Fraser. Both Mr McMillan and Mr Fraser are also of the view that Councillor McColl ought not to have directly approached Mr Ettles about the content of his first letter, but that all communication in connection with that matter ought to have been directed through Andrew Fraser in the first instance. Both officers have

expressed concerns about the manner in which Councillor McColl responded to Mr Morrison's representations regarding the content of the letter and have also expressed concerns about the consequences, for the Council, in the event of a decision letter in terms of the draft that was prepared by Mr Morrison being issued on behalf of the Appeals Panel. Our remit does not extend to an in-depth examination of these concerns, but it is evident that it is these concerns that have persuaded the officer concerned that a third letter should not be issued to the appellant.

- 5.3 Councillor McColl was frustrated by the fact that officers were not prepared to issue a further letter to the appellant along the lines of the draft that was prepared by Mr Morrison. Ultimately his frustration led to Councillor McColl and other elected members requisitioning a meeting of the Council. This was the meeting that took place on 13<sup>th</sup> January 2009.

## **6 Councillor McColl's Motion**

- 6.1 Councillor McColl's motion (prior to the addendum moved by Councillor Black) poses two questions:-

6.1.1 "Why despite repeated attempts by the Acting Chair of the Committee it has taken over four months and this motion to get a Committee decision fully implemented?" "And

6.1.2 "Why the report requested with regards to actions taken by the Executive Director of Social work and Health has not been forthcoming?"

- 6.2 The question posed by the second part of the motion is clear. We have dealt with this question in Section 11 below.

- 6.3 The question posed by the first part of the motion is not straightforward. It might be construed as a reference to the other instructions issued by the Appeals Panel. However, those matters had been attended to well before a Council meeting was requisitioned by Councillor McColl and others. Councillor McColl it quite clear about his interpretation of this part of the motion i.e. that it is concerned with the fact that, in his view, the letters that were issued by Mr Ettles do not fully reflect the decision arrived at by the Appeals Panel on 14<sup>th</sup> August and the fact that officers have not addressed this perceived shortcoming is, in the Councillor's opinion a failure on the part of those officers to fully implement the decision of the Panel.

- 6.4 In his report to the Requisitioned Meeting of the Council (which is attached as Appendix 5 ) the Chief Executive writes:-

"The Requisition motion is in two parts:-

1) To instruct officers to fully implement the decision of the Appeals Committee by issuing a new decision letter which differs from the original decision of the Committee. And

2) To Report to the February Committee on why despite repeated attempts by the Acting Chair of the Committee, the decision has not been fully implemented"

- 6.5 Whilst there is a clear difference of opinion between the Chief Executive and Councillor McColl as to whether the letter drafted by Mr Morrison is, or is not, an accurate record of the decision arrived at by the Appeals Panel, it is clear that the first part of the motion is wholly concerned with the question of why a third letter was not issued to the appellant. However, the Chief Executive does not accept that, in this respect, officers have failed to implement the decision of the Appeals Panel. The original letter issued by Mr Ettles was, in his view, an accurate account of the Panel decision, and further clarification, if any was needed, was provided in Mr Ettles' letter of 18<sup>th</sup> November 2008. In our investigation we have examined the detail of Mr Ettles' letter of 15<sup>th</sup> August, its relationship to the decision arrived at by the Appeals Panel of 14<sup>th</sup> August, the views of relevant parties including Mr Tom Morrison, The Chair of the Panel, Mr Ettles, the Chief Executive and The Head of Legal and Regulatory Services.
- 6.6 We have also looked into the matter of the alleged failure of senior officers to conduct the investigation required by the Appeals Panel and have reported thereon.
- 6.7 We note, however, that the Requisition Motion also requires that "officers fully implement the decision of the Appeals Committee in August 2008, including sending a letter stating:-
1. The grievance category
  2. All parts of the grievance listed in Appendix 1 on Page 6 of the Appeals Committee papers
  3. All contents of the letter sent to the Appellant dated 15<sup>th</sup> August 2008

We mention this solely for the sake of completeness as this matter falls outwith our remit and is not dealt within this report.

## **7 Appeals Panel Procedure – Announcing the Decision**

- 7.1 The procedure that was followed by the Appeals Panel is set out in a relatively concise document. The procedure does not prescribe the manner in which the decision of the Panel is to be stated at the conclusion of the hearing. It is wholly silent on that matter. In this respect the procedure that is to be followed for grievance hearings differs from the procedure that is to be followed for disciplinary hearings. In the latter case the approved Council procedure (Appendix 6) prescribes the manner in which the decision arrived at by the Panel is to be announced. In particular the disciplinary procedure provides for situations in which :-
- 1) "The grounds of appeal have been substantiated and the appeal is upheld"– in other words **all** of the grounds of appeal have been upheld

And situations in which



- 2) “The grounds of appeal have been substantiated in part and the appeal is upheld to the extent that they are specifically announced” – in other words **some but not all** of the grounds of appeal have been upheld.

7.2 The wording of the letter issued by Mr Ettles on 15<sup>th</sup> August suggests that **all** of the appellant’s grounds of appeal were upheld by the Appeals Panel i.e. without exception. In our view Mr Ettle’s letter provides an accurate account of what was decided by the Committee and of what was announced by Councillor McColl at the end of the meeting. It would, in our view, have been possible for Mr Ettle’s to provide more in the way of detail, but Mr Ettle’s has made it clear that this would not have been in accordance with normal practice at the Council. Of the two Council procedures (grievance procedure and disciplinary procedure) it is only the latter that provides any guidance on what is expected in terms of the record of the decision of the Panel. The wording of the disciplinary procedure, although not the same as the wording of the grievance procedure, does tend to suggest that detailed decisions are ordinarily only required in situations where the Panel reaches the conclusion that an appeal has only been partially upheld. This accords with Mr Ettles’ view that he was acting in accordance with custom and practice and we are satisfied that this was indeed the case.

## **8 Protocol- Challenging the Terms of a Decision letter**

8.1 It goes without saying that the decision that is recorded in the decision letter must reflect the outcome of the hearing. In so far as Mr Ettle’s letter of 15<sup>th</sup> August records that the Panel upheld the Appeal, it is an accurate record of the outcome of the Appeal. However, although the letter does not seek to qualify the findings of the Panel, there is a difference of opinion between senior officers of the Council and the Chair of the Panel (on the occasion in question, Councillor McColl) as to how the detail of the Panel decision ought to have been recorded in the decision letter.

8.2 It is not normal practice for a draft of a letter setting out the decision of an Appeals Panel to be shown to the Chair of the Panel before it is sent to the appellant. We do not believe that there is anything unusual about this, however, we suggest that if the clerk were to show a draft of the letter to the Chair of the Panel before it was sent out, the final document might benefit from having been checked by a second pair of eyes and concerns about accuracy picked up at an early stage.. However, that process in itself would not necessarily be foolproof. In the present case, Councillor McColl did see a draft of Mr Ettles’ second letter and although he confirmed he was happy with it, he changed his mind about that some time later. Councillor McColl believes that if he had had his papers available he would have been better placed to check the terms of the draft letter. Given the importance of the letter to both the appellant and to management it is unfortunate that Councillor McColl was not able to review the second letter with his notes to hand Mr Ettles had his letter checked by the Chair of the Panel and cannot therefore be criticised for having worded the letter in terms that the Chair subsequently took issue with. For the avoidance of doubt Councillor McColl has not been critical of Mr Ettles.

8.3 Whilst it may be unusual for a situation to arise in which the terms of the decision letter are questioned by either party to the appeal, on a rare occasion it is possible that one, or indeed both

parties may wish to take issue with a decision letter. The grievance procedure makes no provision for this sort of situation, but that should not mean that a party with genuine cause for concern must accept that he or she has no means of having the terms of the letter reviewed.

- 8.4 In some cases the matter may be capable of being sorted very quickly, for example where there is a straightforward clerical error. In our view matters such as this are capable of being remedied by the clerk. However, where the terms of the decision letter are challenged as appearing to be wholly or substantially incorrect it may be necessary to have the terms of the letter formally reviewed.
- 8.5 It is appropriate that the first point of contact should be the clerk. However, if the clerk is unable to amend the letter, because what is complained of is of some considerable importance, then in our view the matter should be referred back to the Panel in order that there can be absolute clarity as to the intended outcome of the hearing. The clerk may take soundings from the Panel Chair, but, where doubt persists, the matter has to be one for the Panel to decide. The matter cannot be left to the discretion of the Chair. We would suggest that it is for the clerk to take the lead in this situation, although we accept that this is a matter on which a clerk would want to take advice from a senior officer. For the avoidance of doubt any reconsideration of the terms of the letter would and should not involve a rehearing of evidence. There would, however, require to be a mechanism whereby both parties to the appeal might address the Panel on the terms of the decision letter and clearly the clerk would have a key role in assisting the Panel in ensuring that any proposed changes reflected the evidence that had been led as recorded at that time.
- 8.6 In the present case Mr Morrison approached the Chair of the Panel, not Mr Ettles, however, the matter might have been referred back to the Panel at any time after Councillor McColl raised the matter with Mr Ettles towards the end of August 2008. It is in our view unfortunate that this did not happen as it would have ensured that the terms of the letter were reviewed by the elected members who decided the appeal. As it is, the precise nature of the Panel decision has become the subject of much debate amongst officers and members who were not in fact present at the appeals hearing.
- 8.7 It is for the Council to decide whether it wishes to amend its procedures such that decision letters are either reviewed by the Chair or indeed by the Panel before they are issued. We do not recommend such a change because in our view it would be likely to undermine the relationship of trust that must exist between the clerk and the Panel and would also introduce an additional administrative burden. It would be more appropriate in our view for the Council to issue guidance as to how decisions ought to be recorded. We refer to this in more detail in section 10 of this report.

## **9 Response by Senior Officers to Request Made by (Acting) Chair of the Appeals Panel**

- 9.1 In his report to the Requisitioned Meeting of the Council, the Chief Executive sets out the reasons why senior officers of the Council, namely the Head of Legal and Regulatory Services and the Chief Executive, refused to issue third version of the decision letter. These reasons given were:-

- a) *Concerns that a party to the appeal should not be approaching the Chair to attempt to get a decision changed. This was a potential breach of the right to a fair hearing, and*
- b) *The Chair had no power to request that a decision be changes and indeed this was contrary to the council's member/Officer protocol approved as part of Standing Orders.*
- 9.2 A key consideration for the Council will be whether, in light of these concerns, officers were justified in refusing to issue a third version of the decision letter.
- 9.3 The Chair in question, Councillor R McColl is of the view that he was not seeking to have the decision of the Appeals Panel changed but that his concern was that the decision letter(s), as worded by Mr Ettles, were not an accurate reflection of the decision that was arrived at by the Panel. Councillor Mc Coll does, however, accept that he did not announce the decision of the panel in the way that Mr Morrison has attempted to persuade the Chair that the decision ought to be recorded.
- 9.4 The Chief Executive and the Head of Legal and Regulatory Services have expressed the view that by approaching Council officers, and in particular Mr Ettles, Councillor R McColl was seeking to have the decision of the Appeals Panel amended. We believe that this stems mainly from their concerns that the Panel could not have concluded that the appellant's contract of employment had been broken because no evidence had been led in support of that allegation, and as this was not a matter that fell within the competence of the Panel. We have dealt with this issue in more detail in section 10 of this report. We have not been asked to comment on matters of competency. However, it is clear from the statements given by both officers that they believed that what Councillor McColl was asking for amounted to a request that the decision of the Panel was amended. In our view the officers appear to have been acting in good faith and it seems appropriate, therefore that, as a precautionary measure, they decided not to issue a further letter.
- 9.5 Decision letters emanating from the Appeals Panel serve much the same purpose as the minutes of Panel meetings in that they record the outcome of such meetings. It is therefore understandable, why senior Council officers would be concerned that a decision letter might be subsequently altered to reflect the preferred wording of either side to an appeal. Doing business in this way, no matter how well intentioned, may well give rise to suggestions of partiality or unfair treatment. Whilst we are not suggesting partiality or unfair treatment in the present case, we share the concerns of the Chief Executive and the Head of Legal and Regulatory Services. In matters such as this is it is important not only that parties are treated fairly, but that they are seen to be treated fairly.
- 9.6 As with Council/Committee minutes, the appropriate forum in which to raise the accuracy of the decision letter appears to us to be the Appeals Panel. We appreciate that Councillor R McColl has strong views on the wording of the decision letter, but these views are not necessarily the views of the Appeals Panel. They are the views of a single member of that Panel, albeit on this occasion they are the views of the Panel Chair. In the circumstances it is, in our view, understandable why the Chief Executive and the Head of Legal and Regulatory Services did not issue a further version

of the decision letter. It is unclear, however, whether either side had given consideration as to how the impasse might be resolved.

## **10 The Appeals Panel Decision**

10.1 On the form PER/GP/01 completed by the appellant the grounds of appeal are listed in the section headed DETAILS OF GRIEVANCE/COMPLAINT /CONCERN. The third ground of appeal reads:-

“Management of the Welfare Rights Unit have failed to provide me with relevant materials and information given to other Welfare Rights Officer to do their job effectively. They have broken my contract of employment and failed to treat me with dignity and respect.”

10.2 This ground of appeal is comprised of three distinct matters. The first matter is the alleged failure of the part of management to provide the appellant with relevant materials. The second is that management have broken the appellant’s contract of employment. The third is that management failed to treat the appellant with dignity and respect.

10.3 The Panel decision as delivered orally by the Chair and later by Mr Ettles in his letter of 15th of August infers that all three parts of this ground of appeal were upheld by the Panel. We say this because neither the Chair in his oral delivery of the Panel decision, nor Mr Ettles in his letter of 15th August drew any distinction between the three parts of the third ground of appeal, and neither suggest other than that the appeal has been upheld in full. We note, however, that neither the appellant nor Mr Morrison as his representative, nor Mr Lynch who appeared on behalf of management, led any evidence in relation to the question of the appellant’s contract of employment having been broken. Not only was no evidence led in respect of this particular allegation, it would appear that at no time during the course of the hearing was any mention made of the matter by either party to the appeal, nor, it seems, by anyone who was present at the hearing. This was borne out by Mr Ettles during the course of his interview. Councillor McColl also commented to this effect. Furthermore Mr Ettles’ notes make no reference to this matter having been discussed. In the absence of any record of the Panel having considered this matter before having apparently issued a decision on it, there may be some doubt as to the validity of the Panel’s findings. It is not within our remit to provide detailed advice on this matter but it may have been appropriate for advice to have been sought at the time. We understand that as the matter of the breach of contract was not raised during the hearing, Mr Ettles did not think it necessary to intervene but that had the matter been raised he would have given advice to the Panel.

10.4 The Chief Executive, the Head of Human Resources and the Head of Legal and Regulatory Services have expressed concerns as to whether this particular question could in fact be decided by the Panel. We have not been asked to comment on whether it was competent for the Panel to have decided this matter, however, the Panel does appear to have decided the matter, competently or otherwise. This situation might have been avoided of matters of competency had been dealt with at the outset of the hearing, or indeed, before the grievance came before the Panel.

- 10.5 Finally, we would caution that a finding of breach of contract has specific legal consequences and as there would appear to have been a willingness on the part of elected members to make a finding on this matter without the issue having been raised in the course of the hearing, suggests that it might be wise to conduct a review of the training needs of Panel members. We appreciate that some members of the Panel will have considerable experience, however, the complex nature of the business that is conducted by the Panel and the potential consequences thereof require that experience is supplemented from time to time by appropriate training.

## **11 SECTION 9 Council Decision and Implication for Appeals Panel Procedures**

- 11.1 At the Requisitioned Meeting of West Dunbartonshire Council held on the 13<sup>th</sup> January 2009 the Council considered a report by the Chief Executive with the subject heading "Appeals Panel 14 August 2008 – Requisition Motion". In his report the Chief Executive referred to the motion that was set out in the Requisition Notice for the meeting which read:-

"This Council instructs Officers to fully implement the decision of the Appeals Panel in August 2008 including sending a letter stating

1. The grievance category
2. All parts of the details of the grievance listed in Appendix 1 on page 6 of the Appeals Panel paper
3. All contents of the letter sent to the appellant dated 15th August 2008

Furthermore, Council instructs Officers to submit an independent report to a full Council meeting no later than the February meeting on:

1. Why despite repeated attempts by the acting Chair of the Panel it has taken over four months and this motion to get a Panel decision fully implemented.
2. Why the report requested with regards to actions taken by the Executive Director of Social Work and Health has not been forthcoming."

During the course of the meeting the motion was moved by Councillor R McColl and was added to by Councillor G Black. Councillor Black's addendum stated

"This Council notes that the JCF, after considerable debate, agreed the following:-

- Appeals Panel Members will receive a copy of all decision letters sent out by the Council
- The Category of the Appeal will be clearly stated in the decision letter
- The terms of the Appeal and details of whether each has been upheld or otherwise will be clearly stated in the decision letter

- The further actions instructed by the Appeals Panel will be clearly stated in the decision letter

Council fully supports this decision and instructs officers to implement this decision”

- 11.2 Councillor R McColl agreed to accept the addendum and after the motion as amended had been seconded by Councillor Black it was approved unanimously. Consequently the procedures set out in the addendum moved by Councillor Black will be adopted at all future Appeals Panel meetings where the Panel is involved in the examination of an employee grievance. These procedures will supplement the Council’s existing Grievance Procedures attached as Appendix 1 to this report. Presumably the additional procedures will be added to the end of the existing procedures i.e. after paragraph 5.15. We believe that this will provide additional clarity for the Panel and for the Clerk and that it is to be welcomed.
- 11.3 The minute of the Council meeting records that Councillor Black’s addendum was accepted by Councillor McColl and that it was also approved by the Council. The Councillor Black has advised that it was his intention that the form of the letter approved by the Council would be applied in the present case as this would ensure that the decision of the Appeals Panel was recorded in detail. The minute of the Council meeting does not say that the form of letter approved by the Council should be applied retrospectively in the present case. This is unfortunate because it is not possible to ascertain from the minute alone what was expected of Council officers following the Council meeting. Because of this and because it is our understanding that the JCF is concerned with policy rather than individual cases and as JCF recommendations are not ordinarily applied retrospectively we find ourselves unable to recommend that the letter is redrafted in that format. However, we would suggest that for the reasons set out in this report there is no real prejudice to either the appellant or to management from the terms of the initial letter issued by Mr Ettles in August 2008.

## **12 The Investigation Required by the Council**

- 12.1 The second part of Councillor McColl’s motion to Council requires that we report on why the report (instructed by the Appeals Panel) “with regard to actions taken by the Executive Director of Social work has not been forthcoming”.
- 12.2 The other matters decided by the Panel were issued in the form of instructions and there would appear to have been no doubt in the mind of the Chief Executive, the Head of Legal and Regulatory Services, or the Head of Human Resources, that the matters decided by the Panel should be implemented.
- 12.3 There are no timescales for completion of the list of tasks that appear in the decision letter of 15<sup>th</sup> August 2008, however a number of them (namely items 1 (a) to (d)) seem reasonably straightforward and the Panel might reasonably have assumed that these might be completed in a reasonably short space of time. However, the investigation that is referred to in paragraph 2 (a) of the letter is a more complex matter, requiring careful consideration, planning, and the commitment

of resources at a senior management level. It would, however, have been reasonable for the Panel to assume that the Chief Executive would seek to complete this task within a reasonable period of time, although it would not have been reasonable to have expected the task to have been completed in a matter of weeks.

- 12.4 The Chief Executive and the Head of Human Resources did have an early discussion about the implications flowing from the decision of the Panel that an investigation should be undertaken by the Chief Executive. Both officers shared the view that it would not be appropriate for the Chief Executive himself to carry out the investigation as there was a possibility that he might have to consider taking action (whether or not including disciplinary action) depending upon the outcome of the investigation. In the circumstances The Head of Human Resources recommended that she contact ACAS in order to ascertain whether they would be prepared to undertake the investigation. The discussion between the Head of Human Resources took place before the Chief Executive was absent on sick leave i.e. before 3<sup>rd</sup> September, a date falling only a short period of time after the date of the Appeals Committee. It is our view that the initial response of senior officers was reasonably swift.
- 12.5 Although Ms O'Neill was unable to be precise about the date, she recollects first contacting ACAS sometime in September 2008. ACAS' initial response seems to have been that investigations of this sort were not something that they would ordinarily undertake. However, they did suggest that perhaps a there was a role for one of their officers in the present case. They undertook to revert to Ms O'Neill. In the end Ms O'Neill was required to make contact with ACAS which she did sometime in November. She explained that she might have contacted them sooner but for a number of pressing issues which demanded much of her time. These included reporting to Council on Single Status, the industrial action that took place in September of last year, and the absence of the Chief Executive on sick leave from the 3<sup>rd</sup> of September 2008.
- 12.6 Ms O'Neill did not lose sight of the need to finalise matters with ACAS, but although she attempted to set up a meeting with them this did not prove possible and by January of this year it had become apparent that ACAS did not wish conduct the investigation. In the circumstances we do not believe that it would be fair to criticise Ms O'Neil for the lack of progress towards the end of 2008 and in the early part of 2009.
- 12.7 Ms O'Neill has now managed to agree a way forward with a suitably qualified consultant. She has had detailed discussions with the consultant about the precise nature of the investigation and the matters that are to be investigated. Both Ms O'Neill and the Chief Executive advise that they expect that the investigation will be completed by March of this year.
- 12.8 The considerable work load that was being carried by Ms O'Neill in the latter part of 2008 does appear to hampered progress having been made sooner than it might have been. However, in the circumstances slippage appears to have been almost inevitable. In our view there was no attempt on the part of officers to delay the investigation, nor in the circumstances, are the delays that have been encountered unreasonable.

- 12.9 The Chief Executive clearly recognises the importance of this particular task and has stressed that it will now be completed as soon as reasonably practicable.

### **13 SECTION 11 CONCLUSIONS**

- 13.1 We have concluded that the letter written by Mr Ettles, that is the letter issued on 15<sup>th</sup> August 2008 gave an accurate account of the decision of the Appeal Panel as announced by the Chair of the Panel at the conclusion of the hearing held on 14<sup>th</sup> August. We are also satisfied that the letter written by Mr Ettles was written in accordance with custom and practice. Mr Morrison and the Chair of the Panel may have preferred that the letter was reworded, but in our view, the changes that were being proposed were more a matter of style than of substance.
- 13.2 We have concluded that the Chief Executive and the Head of Legal and Regulatory Services believed that what was being required by Councillor R McColl amounted to a significant change in the manner in which the decision of the Appeals panel was recorded, to such an extent that the changes that were being suggested were pertinent to the nature of the decision itself. We have also concluded that the officers acted in good faith and that it was not unreasonable for them to refuse to issue a further version of the decision letter. They rightly concluded that to do so might be regarded as being unfair treatment. We also concur with their view that the decision of the panel Chair on such matters does not have the authority of the panel itself.
- 13.3 There has been a delay in taking forward the investigation that was called for by the Appeals Panel. Whilst this is regrettable, not the least because the investigation is concerned with matters of some importance, that some delay would result as a consequence of the absence of the Chief Executive was inevitable. Additionally, Ms O'Neill had hoped to involve ACAS in the investigation and some time elapsed before this option was eventually discounted. The delay was not, however, significant and in the context of the significant issues that were being handled by Human Resources in the latter part of 2008 the delay was not unreasonable. The investigation is now in hand and ought to be completed by the end of March.
- 13.4 The differences between the Council's Grievance Procedures and Disciplinary Procedures highlighted in this report are unnecessary and unhelpful and it would assist officers and members alike if they were to be better aligned.

### **14 SECTION 12 Recommendations**

- 14.1 We recommend that:-
- 14.1.1 The Chief Executive should ensure that the investigation required by the Appeals Panel is completed as soon as possible and in any event before the end of March 2009.
- 14.1.2 The changes to the Grievance Procedures approved by the Council should be implemented immediately. The Procedures should be updated and reissued by the end of March.



- 14.1.3 The Council should adopt similar changes to its Disciplinary procedures.
- 14.1.4 The Council should require (not request) that all members who sit on the Appeals Panel undertake training on the processes and procedures with which the Panel must comply.
- 14.1.5 Officers likely to be involved in advising or appearing before the Appeals Panel should undertake refresher training. The training should also be extended to relevant officers in Human Resources. The training should cover the remit of the Panel, in particular the range of decisions that are within the competence of the Panel.
- 14.1.6 The Council should consider HR support to the Appeals Panel in addition to legal support. This may assist the panel achieve a better understanding of the practical (as opposed to legal) implications of their decisions.