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LEP Reorganisation – Employee Implications

Somerset Council

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1. Introduction and Background

- 1.1. Ashfords LLP has been asked by Somerset Council (the “**Council**”) to advise in relation to the employment implications of the ceasing of sponsorship and funding from the Government to Heart of the South West Local Enterprise Partnership (“**HSWLEP**”).
- 1.2. The Government has announced, by a letter dated 4th August 2023, that from April 2024, its sponsorship and funding of Local Enterprise Partnerships will cease (the “**Transition**”). The Government has set out that it will support upper tier local authorities (or combined authorities under a devolution deal) to take on the functions currently delivered by HSWLEP and has published some technical guidance on this point¹ (the “**Guidance**”).
- 1.3. The Council has asked Ashfords to advise on the following points:
 - 1.3.1. Does TUPE apply to any of the staff employed directly or indirectly (e.g. through SLAs or other contracts)?
 - 1.3.2. How does this work if the employer is a third party?
 - 1.3.3. Are there any potential liabilities that arise from this?
 - 1.3.4. What are the implications if TUPE does not apply?
 - 1.3.5. What are the timelines for the different scenarios if the aim is to close down the organisation by March 24?

For the purposes of this advice, we have assumed that we are looking at implications for the Council only, and not directly for HSWLEP or other Partners.

- 1.4. There are a number of complicating factors and unknowns here:
 - 1.4.1. Will all the functions of the HSWLEP transfer to the Council, or will some either be retained in the HSWLEP or transferred to other partners, such as Devon County Council or Plymouth City Council (the “**Partners**”)?
 - 1.4.2. What staffing arrangements currently exist for the provision of the functions currently carried out by HSWLEP?
- 1.5. As such, the advice provided in this note will be high level, exploring the potential scenarios and the implications under each scenario. Once we have more detail in respect of the above factors, we can provide more fact specific advice.

2. TUPE – the basic premise

- 2.1. TUPE may apply to transfer staff from one employer to another where there is a relevant transfer. A relevant transfer of a business, undertaking or part of a business or undertaking is where there is a transfer of an economic entity that retains its identity. An economic entity is "an organised grouping of resources that has the objective of pursuing an economic activity".
- 2.2. It is therefore likely that there will be a relevant transfer in this scenario if the functions currently carried out by HSWLEP (and assets) are transferred to another body, assuming that this would amount to an organised grouping of resources and that it essentially retains its identity after the transition.
- 2.3. If all functions, assets and reserves are transferred to the Council, it is highly likely that there will be a relevant transfer. The situation becomes more complicated if functions are being dispersed

in different directions. If these functions are discrete and there is still that economic entity that can be identified in each of its new locations, then there may well be a number of relevant transfers. However, it is possible that it could become so fragmented that it is not possible to identify an organised grouping of resources that has transferred from HSWLEP to each entity. In such a situation TUPE will not apply. We will address this later in the note.

3. Staffing Arrangements

3.1. We anticipate that there may be a number of different types of staff working on the functions, currently for HSWLEP:

- 3.1.1. Employees employed directly by HSWLEP;
- 3.1.2. Contractors or subcontractors of HSWLEP (and employees of such contractors);
- 3.1.3. Temporary staff, such as agency workers;
- 3.1.4. Secondees (for example, from the Council or Partners).

4. How would TUPE apply to each staffing type?

4.1. Employees employed directly by HSWLEP:

If there is a group of staff (whether all from this category or mixed with staff from other categories) which form an organised grouping of resources which is assigned to a function which is being transferred to the Council, then TUPE will apply to transfer these employees to the Council. The implications of this are as follows:

- 4.1.1. The Council and HSWLEP will need to comply with the informing and consulting obligations under TUPE;
- 4.1.2. On the date that the functions are transferred, the employees will become employed by the Council on their existing terms and conditions;
- 4.1.3. The Council will take on all liabilities and obligations in relation to these employees.

4.2. Contractors or subcontractors of HSWLEP (and employees of such contractors):

It might be that HSWLEP currently use contractors or subcontractors to carry out some functions. However, other than in exceptional circumstances, TUPE will not apply to self-employed individuals or to employees of other organisations and therefore they will not transfer.

4.3. Temporary staff, such as agency workers

It might be that HSWLEP currently use agency workers to carry out some functions. However, other than in exceptional circumstances, TUPE will not apply to employees of other organisations and therefore they will not transfer.

4.4. Secondees

We understand that a large number of staff working in HSWLEP are actually Council employed staff who are seconded to HSWLEP. These staff will remain employed by the Council and there will be no transfer. The implications of this are as follows:

- 4.4.1. If the employees are currently seconded to a function which is being transferred to the Council, it is likely that you will require them to carry on working on that function, albeit no longer in a seconded role;
- 4.4.2. If the employees are seconded to a function which is not being transferred to the Council because it is transferring to another Partner, they will not transfer to that Partner and will revert to their original post, unless a new secondment arrangement is entered into with the relevant Partner.

- 4.5. Conversely, there may be other employees working with HSWLEP who are currently seconded from other Partners. If they work on functions which are to be transferred to the Council, then they will not automatically transfer over to the Council, but will return to their role in their Partner employer. Should the Council need their continuing services, it will need to enter into a new secondment arrangement with the relevant Partner.

5. Are there other implications arising from this?

- 5.1. Yes, the main one will be in respect of resourcing moving forwards and will depend on the current staffing arrangements for the provision of the functions which will transfer to the Council.
- 5.2. If the majority of the staff in that function are either Council employed secondees or HSWLEP employees, then they should end up as Council employees, so are likely to be able to continue to provide the function.
- 5.3. However, if there is a reliance on contractors, sub-contractors, agency workers or secondees from other Partners, there is a risk that following the Transition, the Council will not have the workforce, skills and expertise to provide the functions. The Council therefore needs to assess this early on and consider how those functions will be fulfilled, including considering whether arrangements need to be entered into with agencies, contractors and other Partners.

6. What does this mean in terms of timescales?

- 6.1. The key point to take from this note is that the Council needs to be seeking information from HSWLEP at the earliest opportunity. It will need to understand, in terms of the functions that it will be taking over, what staff are currently working on these and who the employer of each staff is.
- 6.2. This will assist in assessing which staff fall under which of the above categories and the treatment of each of them.
- 6.3. For those to which TUPE applies, you should ask for early disclosure of Employee Liability Information. HSWLEP are not obliged to provide this under 28 days before the transfer, but will often be willing to provide anonymised information earlier than this so that they can comply with their own informing and consulting obligations.
- 6.4. Further advice can be provided once you have further clarity on the functions to be transferred to the Council and the current staffing arrangements.