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By email (john.bloxsom@derby.gov.uk) & by Post

Our ref: PPFH-D922-21001

Your ref:

11 March 2002

Dear John

Re: Staff Issues

Following on from our telephone conversation, I write to confirm our discussions. There remains outstanding, in our view, a question as to whether Derby Homes, as an Arms Length Housing Management Organisation (“ALMO”), will fall within the definition of one of the bodies listed in Schedule 1 to the Redundancy Payments (Continuity of Employment) Modification Order 1999 (“the Order”). You will recall that both the DTLR and the DTI have taken advice themselves from their lawyers, who drafted the legislation, and have confirmed their view that all ALMOs fall within the appropriate definitions. Following further requests, the DTI is yet to confirm whether they will amend the Order.

Derby Homes is therefore left with the option either to accept the DTI’s view or consider seconding staff to Derby Homes. I would like to examine these two options in more detail:-

1. Accept the DTI’s View

- 1.1. It is open to the Council and Derby Homes to accept the DTI’s lawyers’ advice that ALMOs fall within the Order. The result is that the Council staff who transfer to Derby Homes would have, without a doubt, all continuity of service recognised in relation to a move from the Council to Derby Homes and any compulsory or voluntary move back to the Council because they are associated employers.

- 1.2. The Council and Derby Homes could also advise staff of the DTI’s view and that both

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the Council and Derby Homes support this interpretation of the legislation. Derby Homes could, in the meantime, specifically apply for itself to become a specified body under the Order to cancel out any doubt. My personal view, however, is that it is extremely unlikely that Derby Homes would succeed in such an application if the DTI's view continues to be that all ALMOs are covered within the Order in any event.

- 1.3. Derby Homes could also support staff in any moves they make voluntarily to other local authorities by attempting to persuade those receiving authorities that continuity of service applies under the legislation. Based on the background of the DTI's view and Derby Homes' proposals, I would expect the vast majority of local authorities to accept the continuity of service point.
- 1.4. It is also worth mentioning that it would be open to individual employees who move to other local authorities to ensure that the continuity of service point is addressed within any offer of employment made to them; after all, it should be remembered that the staff would be moving voluntarily from Derby Homes and they would therefore be able to negotiate this term with the receiving authority.
- 1.5. We have seen a draft letter that is proposed to be sent to staff on this option and we have made some minor amendments which I will send under separate cover.

2. Secondment of Staff

- 2.1. You will remember that at various points in discussing Derby Homes, there was mentioned the possibility of seconding staff from the Council to Derby Homes to overcome the continuity of employment issue.
- 2.2. First of all, in my view it is clear that the DTLR would not accept a permanent secondment of staff from the Council to Derby Homes because it would not deliver the required separation between the Council and Derby Homes that is anticipated within the ALMO programme. The DTLR may not therefore give Section 27 consent, the proposals could not go ahead and the additional supplementary credit approvals could be lost.
- 2.3. It would technically be possible to consider a **temporary** secondment of staff from the Council to Derby Homes pending a clarification of the continuity of service issue under the Order. Staff would therefore clearly retain their continuity of service rights but there are a number of significant disadvantages with this approach as follows:-
 - 2.3.1. In order for the secondment to take place, each individual employee would need to sign to confirm that they consented to the secondment. With 350 staff, there are likely to be a few individuals who would refuse to sign the secondment letters or fail to do so. This could result in extremely difficult employer/employee relationship possibly leading to that employee's potential redundancy;
 - 2.3.2. The terms of the secondment would need to be decided and these would not be

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clear cut. For example, it would be unclear how long such secondment would take place for because it would be impossible for the Council and Derby Homes to identify when the continuity of service issue would be resolved. Therefore, there may need to be a significant amount of guesswork and decisions on issues involving whether (and, if so, when) the secondment arrangement may be determined by the employee, the Council or Derby Homes;

2.3.3. The whole security of employment of the Council's employees may be undermined because it is likely that Derby Homes would require a power within the secondment arrangements to terminate the secondment for individual members of staff based on certain conditions such as under performance by staff. Derby Homes may then start to recruit its own staff and terminate arrangements with existing seconded staff. This would undermine the whole aim of ensuring the Council staff continue to have security of employment;

2.3.4. Introducing secondment arrangements would not halt the transfer of business and assets to Derby Homes. Retaining the staff until some uncertain date and then making a separate decision to transfer staff would raise a legal query as to whether the transfer of staff was truly a transfer under TUPE. All parties have worked towards the transfer being covered by TUPE in order to ensure all staff are protected but this secondment process would potentially undermine this aim; and

2.3.5. It would also be extremely difficult to advise the Board of Derby Homes to agree to the secondment arrangement because it would be signing a services agreement with the Council at the same time which stated that it needed to deliver a range of services but without having the staff to do so. Derby Homes' Board would be left with the decision as to whether it was willing to take the risk of being required to deliver this range of services when it was not the employer of the staff. If there was ever a difference of instructions as to how an employee should act between Derby Homes and the Council then it would be understandable for the employee to act according to the Council's instructions because that would be the employee's employer. These types of situations could raise quite a few areas of conflict.

3. Conclusion

3.1. You will therefore see from the above that it is our view that **all** employees who would be asked to be seconded to Derby Homes would have their employment status undermined. It would also be extremely difficult for Derby Homes' Board to accept such a secondment arrangement.

3.2. The first option, however, of accepting the possible different interpretation of the Order as to whether staff would receive continuity of service when they move to another local authority would only potentially affect those employees who voluntarily move to another local authority. In these circumstances, Derby Homes could state that it would support the employee and the DTLR's interpretation of the Order so that continuity of

service would apply. It is extremely unlikely that a receiving local authority would take a contrary point of view and it would be open for the employee to ensure that this point was dealt with before they accepted any other job.

I hope that the above is clear. Should you have any queries, then please do not hesitate to contact me or Stephen Dalling.

As requested, Stephen Delling has kept his diary free for Thursday 21 March if you would like him to attend any meeting in Derby on that date. Please would you let me or Stephen know whether he is required.

Many thanks for your continued instructions.

Yours sincerely

Peter F Hubbard

Cme/jld

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