



Briefing14-06

February 2014

The Living Wage and public procurement considerations

To: All Chief Executives, Main Contacts and APSE Contacts

Key Issues

- The introduction of a Living Wage policy by councils is a growing issue and can give rise to very positive local outcomes
- However authorities need to be mindful of their procurement and other obligations when looking to expand the concept of a living wage to its suppliers and contractors
- There are different approaches to the introduction of a Living Wage emerging from different councils throughout the UK
- This briefing considers a number of legal and practical considerations

What is the statutory minimum wage?

In the UK the National Minimum Wage rate per hour depends on age and whether or not a worker is an apprentice.

The current rates, which are subject to review, are:-

- 21 and over £6.31
- 18 to 20 £5.03
- Under 18 £3.72 and
- The recently introduced 'apprentice rate' of £2.68 provided that the worker is under the age of 19 or is in the first year of an apprenticeship.

In local government the current NJC pay rate at the bottom of the pay spine at SCP 5 is currently at £6.45 or just 14 pence about the adult minimum wage rate.

As a result of the gap significantly closing between the basic minimum (adult) wage and the lower end of the local government pay spine, as well as local economic and social considerations, a number of councils have already sought to adopt a Living Wage policy introducing a higher basic wage for its lowest paid staff.

What is a 'Living Wage'?

The Living Wage is paid on a voluntary basis as opposed to the statutory basis of the National Minimum Wage. Whilst there are many organisations and trade unions that have campaigned historically for a Living Wage, the most commonly accepted definition of a Living Wage has been developed by the Living Wage Foundation. It has developed a calculation both in terms of a London Living Wage and an out of London Living Wage, according to the basic cost of living in the UK. The calculation is based on what is considered to be the minimum income standard for the United Kingdom, informed by research from the Centre for Research in Social Policy at Loughborough University and supported by the Joseph Rowntree Foundation. This calculation is based on what households need in order to have a minimum acceptable standard of living, for example taking into account rent, childcare costs and food costs. Decisions about what to include in this standard are made by groups comprising members of the public and looks at what people need to 'make ends meet'.

The current Living Wage outside London rose from £7.45 to £7.65 on 4 November 2013 and the London Living Wage is at £8.80. However outside of these parameters set by the Living Wage Foundation many employers have introduced their own 'Living Wage', in local government, using local determinants about the cost of living and what they subsequently pay to their workforce. This has been done on a voluntary basis and appears to enjoy cross party support. Where employers choose to pay their employees the Living Wage set by the Living Wage Foundation they can become accredited as a 'Living Wage Employer'.

The Living Wage and (traded) frontline services

Although a number of APSE member authorities have supported and indeed introduced a Living Wage, whether by following the recommendations of the Living Wage Foundation, or by introducing their own local Living Wage increase, for lower paid staff, there are some concerns amongst managers in areas where services are 'traded' to external organisations.

The issue of a Living Wage in traded service areas is explained as follows. Where traded services, such as education catering services to schools (School Meals) are in direct competition the labour costs have a clear impact on the competitiveness of the service. The service will in most situations be competing with other providers for school business. Those other providers may not be paying a Living Wage and may in fact be paying labour costs close the National Minimum Wage.

Although there does not appear to be hard data to support these assumptions, in the absence of a more detailed study into private sector pay rates in these types of services, the market rate issue would appear to be a justifiable fear, for service managers within certain local authority service sectors. Ironically it is in the very sectors where the Living Wage might have the most positive impact for individuals that are also the subject of trading arrangements.

However many traded services areas have successfully implemented corporate decisions to introduce a Living Wage policy. In some cases payments have been made by way of an employee supplement rather than added to the labour costs of the service. In other cases pending full implementation of a Living Wage Policy, a temporary non-contractual payment has been introduced to allow for full implementation discussions to take place with trade unions. In many cases the approach has been to fund the introduction of the Living Wage centrally rather than the cost to fall on services directly which would clearly have a disproportionate impact on those services employing the lowest paid staff.

One further matter of concern raised by APSE members is that the introduction of a Living Wage can have unintended consequences on the pay to points relationship on local pay spines, introduced as a result of job evaluation schemes. Being mindful of this as a potential issue has helped authorities at the introductory stages of Living Wage policies, to ensure that the Living Wage is consistent with equal pay considerations.

The origins of the Living Wage campaign and subsequent implementation is to ensure that suppliers to businesses and other contractors are also paying a Living Wage - to raise the wage rates across the local economy and maximise the social impact of a Living Wage approach to delivering goods and services. In the scenario of local education catering services for example there would be an expectations that schools procure catering suppliers on the basis of those suppliers - whoever they are - paying a Living Wage to their workforce. However, the public sector when adopting a Living Wage needs to be mindful of its public procurement responsibilities and take a proportionate approach as to what it may demand of its suppliers and contractors.

The Living Wage and Public Procurement Considerations

A critical question for local authorities introducing a Living Wage will be whether, during a procurement process, any requirement for contractors or suppliers to pay a UK Living Wage to their staff if successful in winning the contract, would infringe European Procurement rules.

Including a requirement on contractors or suppliers to pay a 'Living Wage' would be clearly considered to be a social consideration in EU procurement terms. This could be

problematic, more especially if this requirement is linked to the award criteria - rather than being related to how a contract is performed.

Social considerations can be considered where a contract is awarded using an assessment based on the MEAT criteria - the ' Most Economically Advantageous Tender', however such criteria needs to be:-

- Relevant (i.e. linked to the subject matter of the contract)
- Proportionate (based on the needs of the contracting authority (the council) and not discriminatory;
- Reasonably Specific and expressly mentioned in the OJEU notice and tender documents;
- Effective enough to enable identification of the most economically advantageous tender
- Not confer an unrestricted freedom of choice.

Therefore whilst EU rules do not prevent inclusion of contractors it is critical that local authorities consider how they seek to consider Living Wage issues during a procurement process.

One APSE member who responded to the APSE network query on this matter usefully indicated that they use a statement as follows in procurement notices:

'From the 1st April 2013 xxxxxx Council is ensuring that every Council employee earns at least the Living Wage.

The Living Wage is a concept introduced in 2001 that sets an hourly rate based on the basic cost of living in the UK.

In practical terms this means that nobody working for the Council will earn less than £7.45 an hour.

Initially this scheme will be implemented across the Councils employees however the Councils vision is much wider and we are therefore pro-actively encouraging contractors and sub-contractors of the Council to adopt the Living Wage so that together we can really make a difference to people's lives."

This stops short of requiring contractors but sends a clear message about the council's ambitions for a Living Wage.

Social considerations incorporated as contract conditions must be:

- Non-discriminatory;
- Indicated in the OJEU notice or tender documents;
- Be true 'contract conditions' (not for example disguised as selection or award criteria and
- The tenderer's ability to comply with the conditions should not be assessed as part of the selection or award but tenderers must undertake to comply with the conditions if they are successful in being appointed.

Alongside what would appear to be strong cross party support for a Living Wage to be introduced in public services the Coalition Government introduced 'The Public Services (Social Value) Act 2012'. It is an important consideration for local authorities exploring the introduction of a Living Wage.

The Public Services Social Value Act 2012

The Act applies to:

- All service contracts and frameworks to which the Public Contracts Regulations 2006 (the "Regulations") apply.
- As part of pre-procurement planning
- Contracting authorities are under a duty to consider how what is being procured might improve the economic, social and environmental wellbeing of an authority's area as part of the pre-procurement planning stage.
- The contracting authority must consider how, using its procurement process, it can secure that improvement (of economic, social and environmental well-being) whilst remembering that it needs to act proportionately and ensure any action is relevant.

APSE has long supported the better use of procurement to secure better economic, social and environmental outcomes and indeed in 2009 produced a toolkit for local authorities looking to better use their procurement processes to secure such improvements. The development of 'The Public Services (Social Value) Act' is therefore a welcome addition to the tools which local authorities may consider at their disposal, in certain circumstances to provide leverage on contractors and other suppliers also paying a Living Wage.

However whilst the Act may prove to be useful local authorities should not be using the Act to impose any blanket requirements on all contractors. They must still regard the tests as to whether they are acting proportionately and whether it is a relevant consideration. There will be a different degree of proportionality dependent upon the contract type. For example a person supplying pens, manufactured abroad and really acting as a go-between for delivery of the pens compared to say a building maintenance contract where there is a clear interest in retaining competent well-trained staff to do the required work within the local economy.

The EU Parliament, in response to a parliamentary question about Living Wage contract conditions, provided the following point of clarification:-

'Living wage conditions may be included in the contract performance clauses of a public procurement contract provided they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. In addition, they must be related to the execution of the contract. In order to comply with this last condition, contract performance clauses including living wage conditions must concern only the employees involved in the execution of the relevant contract, and may not be extended to the other employees of the contractor'.

APSE commentary

The payment of a Living Wage is a matter for determination by individual local authorities. There are some emerging concerns amongst some councils' that given the conditions attached to the Living Wage Foundations approach - such as annual uprating - the level of the Living Wage needs to be controlled through more localised negotiations to ensure that it remains affordable.

However APSE would also refer to research by APSE and CLES (The Centre for Local Economic Strategies) which found that there is significant local spend in local economies from council staff. Therefore there is a degree of correlation between the money used to pay a Living Wage being used to bolster local economies. In the APSE / CLES research this found for every £1 spent in local services there was a £1.64 return to the local economy with the largest proportion of this return being attributable to wage spend in the local economy.

Boris Johnson the Mayor of London stated that

'Paying the London Living Wage is not only morally right, but makes good business sense too.'

The findings of the APSE/CLES research supports the economic arguments put forward by the Mayor of London.

It is important however for local authorities when considering the introduction of a Living Wage policy to be mindful of

- The impact on its traded services and how it can structure support for its introduction, without having a negative and unintended impact on jobs and service sustainability
- The impact and legal considerations of its procurement obligations
- Not distorting localised 'pay to points' relationships on local pay spines and give rise to any unintended equality issues

It should also be noted that there has recently been a new EU Public Procurement Directive which will shortly be adopted into UK. Local authorities will need to be mindful of those new regulations when considering Living Wage issues.

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