



Please ask for Charlotte Kearsey
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The Chair and Members of Joint
Cabinet and Employment & General
Committee

3 September 2018

Dear Councillor,

Please attend a meeting of the JOINT CABINET AND EMPLOYMENT & GENERAL COMMITTEE to be held on TUESDAY, 11 SEPTEMBER 2018 at 10.00 am in Committee Room 1, Town Hall, the agenda for which is set out below.

AGENDA

Part 1(Public Information)

1. Declaration of Members' and Officers' Interests relating to items on the Agenda
2. Apologies for Absence
3. Minutes (Pages 3 - 4)
4. Correct payment of holiday pay (Pages 5 - 24)

Yours sincerely,

A handwritten signature in black ink, appearing to be "K. Kearsey".

Local Government and Regulatory Law Manager and Monitoring Officer

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JOINT CABINET AND EMPLOYMENT & GENERAL COMMITTEE

Tuesday, 17th July, 2018

Present:-

Councillor P Gilby (Chair)

Councillors Blank
Brunt
Burrows
Davenport
A Diouf
T Gilby

Councillors Huckle
J Innes
Ludlow
Serjeant
Simmons
Wall

Non-Voting Members Dickinson
Catt

*Matters dealt with under the Delegation Scheme

7 DECLARATION OF MEMBERS' AND OFFICERS' INTERESTS RELATING TO ITEMS ON THE AGENDA

No declarations of interest were received.

8 APOLOGIES FOR ABSENCE

Apologies for absence were received from Councillor Bagley.

9 MINUTES

RESOLVED –

That the Minutes of the meeting of the Joint Cabinet and Employment and General Committee of 15 May, 2018 be approved as a correct record and signed by the Chair.

10 EXCLUSION OF PUBLIC

RESOLVED –

That under Section 100(A)(4) of the Local Government Act 1972 the public be excluded from the meeting for the following items of business on the grounds that they involved the likely disclosure of exempt information as defined in Paragraph 3 of Part 1 of Schedule 12A of the Act.

11 INFORMATION AND COMMUNICATIONS TECHNOLOGY

The Assistant Director – Customers, Commissioning and Change submitted a report seeking approval to establish and recruit to additional posts in the ICT service to support delivery of the Council ICT Improvement Programme.

Delivery of the ICT Improvement Programme would provide Chesterfield Borough Council with greater ICT resilience and reliability. The Improvement Programme would also lay the foundations to enable future digital transformation of Council services.

When funding for the ICT Improvement Programme was approved by Cabinet on 24 April, 2018 and Council on 25 April, 2018, the need to strengthen the competence, capability and capacity of the service was highlighted as an issue that would need to be addressed through a fundamental review of the current staff establishment. The report sought to address the need.

***RESOLVED –**

1. That the identified additional ICT posts be approved and added to the Council's establishment.
2. That the Executive Director and Assistant Director - Customers, Commissioning and Change be granted delegated authority, in consultation with the Cabinet Member for Business Transformation, to recruit to the new posts, within the constraints of the ICT Improvement Programme approved budgets.

REASON FOR DECISIONS

To ensure the Council has the correct competence, capability and capacity to deliver the approved ICT Improvement Programme.

For publication

Approval of Correct Payment of Additional Holiday Pay Policy

1.0 Purpose of report

Meeting: Joint Cabinet & Employment and General

Date: *11th September 2018*

Cabinet portfolio: Business Transformation

Report by: Human Resources Manager

- 1.1 To seek approval of a corporate policy on the correct payment of additional holiday pay for the Council.

2.0 Recommendations

- 2.1 That the corporate policy on the correct payment of additional holiday pay is approved.
- 2.2 That the council adopt the policy as outlined at Annex B which supersedes the agreement in place from 2016 (Annex A) and meets current legislative requirements.
- 2.3 That the council endorses the compromise agreed with unions that the calculation of additional holiday pay includes **all** relevant earnings from the previous tax year (to avoid judgements having to be made regarding the regular and settled nature of the working pattern and reduce the administrative burden on the council) but is based on 28 days

statutory minimum annual leave as opposed to the full contractual leave.

- 2.4 That these changes take effect from April 1st 2018 and that the HR Manager work with service areas to implement the new policy and identify where arrears are due under the previous system to ensure consistency of approach.

3.0 **Background**

- 3.1 All employees are entitled to receive a minimum 28 days statutory paid annual leave per year (pro rata for part time staff) by virtue of regulation 13 of the Working Time Regulations 1998. It is a matter for employers whether they increase this with contractual annual leave.
- 3.2 In general, all workers should receive the same amount of pay when they are on annual leave as they do when in work to ensure workers are not penalised for taking annual leave. It is now accepted that **all** allowances received by employees make up a weeks pay for the purposes of calculating holiday pay.
- 3.3 It is important to distinguish between **payment** for annual leave (holiday pay) and annual leave **entitlement**. This paper and the decisions required are relating to holiday pay not entitlement.
- 3.4 The legal position, until the Lock v. British Gas case came into force in 2016, was that a 'week's pay' was considered to be basic wages received **exclusive** of allowances and overtime received. Changes to case law since then (see 4.1 below) state that all types of overtime, including voluntary, must be included when calculating a worker's statutory holiday pay entitlement, apart from overtime that is only worked on a **genuinely occasional and infrequent basis**. The working group came to an agreement that to reduce the administrative burden on the

council that **all** relevant earnings in the previous tax year would be included in the calculation but that this would only be paid for 28 days as the statutory legal minimum rather than on full annual leave entitlements.

- 3.5 In 2016 Employment and General committee considered and approved a revised approach to the method of calculation of normal holiday pay following the decision in a Court of Appeal hearing (Lock v. British Gas) in which it was decided that certain allowances and regular **contractual** overtime should form part of the 'normal weeks pay' when calculating holiday pay. (See Annex A)
- 3.6 At that time the council took the decision not to include additional hours (up to 37 per week) worked by part time staff and voluntary overtime in the calculations for holiday pay due to increased costs for the organisation.
- 3.7 In recognition of the patience and goodwill of employees whilst the matter was resolved, the council agreed to base holiday payments on **all** contractual annual leave entitlement rather than the 28 day statutory minimum as required by the EU directive.
- 3.8 The calculation method adopted by the council to pay holiday pay on the allowances set out at Annex A is that set out in the Employment Rights Act 1996 which stipulates where there is no set basic pay then an average over a 12 week reference period should be used in the absence of any other relevant reference period. This revised policy supersedes that agreement.

4.0 Issue

- 4.1 As anticipated, there has been further legal challenge since the Lock vs British Gas decision and further case law decisions handed down. The recent EAT decision in Dudley Metropolitan Borough Council v. Willetts & Ors (Working Time Regulations)

[2017] relating to payment of correct holiday pay for voluntary overtime and additional hours worked by part-time employees found in favour of employees, and therefore reopens the debate for the council.

- 4.2 The latest case established that where a pattern of 'regular and settled' voluntary overtime or additional hours are being worked, these should also form part of the 'normal week's pay' when calculating holiday pay. This presents a challenge for management and an administrative burden if it were necessary to continually review whether overtime being worked was 'regular and settled', hence the compromise proposed in method of calculation.
- 4.3 This legislative change requires the council to once again review the policy in relation to payments for holiday pay and to consider including all overtime (whether voluntary or contractual), additional hours and other relevant allowances when calculating holiday pay.
- 4.4 The policy attached at Annex B includes the methodology for calculating payment of additional holiday pay following the changes to legal position as identified above and this has been through consultation with management and unions.
- 4.4 Responsibility for reviewing this Policy will be that of the Human Resources Manager in consultation with the responsible Cabinet Member(s) and Chief Financial Officer.

5.0 Financial considerations

- 5.1 A detailed analysis of payments to employees during 2016/17 has been undertaken and this shows that the council paid out just short of £700,000 to employees for additional hours (up to 37 per week) and overtime during that year.

- 5.2 Of that sum, over £300,000 was paid in additional hours (up to 37 per week); just over £200,000 was paid as overtime @ 1.5; £65,000 paid as overtime @ 2 and approx. £119,000 was coded to overtime override.
- 5.3 It must be noted that figures quoted above do not reflect the true position in relation to overtime as the override code was used for any changes to basic pay e.g. sports coaches, 'step up' allowances and any other variations not included in the normal pay elements. Since January 2018 the Payroll team have been working with service areas to implement revised codes which better reflect the true nature of the costings.
- 5.4 It is not possible to state the exact financial impact of making these changes due to the existing arrangements for holiday pay established in 2016 and the ambiguity of payroll coding. However, if the calculation proposed above was performed on the amount of additional hours, overtime @1.5 and @ 2, and assuming all individuals were 1FTE then the maximum amount of additional cost would be in the region of £60,000 per year.

6.0 Alternatives considered

- 6.1 In presenting these recommendations several alternatives have been considered and discounted. These are:
- a. Continue calculating additional holiday pay under the arrangements agreed in 2016. (This has not been considered due to the increased risk of exposure to claims (see risks below))
 - b. Make payments for additional holiday pay using the statutory formula laid out on the Employment Rights Act 1996. This provides for receipt of holiday pay based on all relevant earnings in the 12 week period worked immediately prior to the first 20 days annual leave taken in the year. (This was discussed with the working group

and agreement was reached with unions that as this would be an administrative burden annual payment was agreed. Therefore employees will not have the option of payment other than on an annual basis)

- c. Calculate additional holiday pay due for employees working additional hours (up to 37 per week) on an annual basis rather than quarterly. (This is not a preferred option as this issue has already been raised by unions where we have part time staff regularly working additional hours and currently not receiving additional holiday pay for these hours. Additionally the calculation is different to the proposed calculation for overtime payments and therefore it is sensible to address this in the same time frame as variable hours employees as effectively the treatment is the same).

7.0 Risks

- 7.1 There are significant risks in not adopting this approach. The council would be open to legal challenge and potential tribunal cases (especially as the tribunal fees have now been removed). The council would also not be complying with legislation.

Description of the Risk	Impact	Likelihood	Mitigating Action	Impact	Likelihood
Increase in employment tribunal claims as a result of not changing method of calculating holiday pay	High	High	The Policy provides a revised methodology for calculating holiday pay in line with legislation	Low	Low
Increased numbers of leavers due to staff dissatisfaction with rates of pay	Medium	Medium	The policy aims to equalise holiday pay for all.	Low	Low
Inequality of pay	High	High	The current	Low	Low

for part time staff and women			approach to the payment of holiday pay precludes those part time staff working additional hours and puts them at a disadvantage. This group is also more likely to be lower paid and female. The policy will provide equality for all staff.		
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8.0 Equalities Impact Assessment (EIA)

- 8.1 An Equalities Impact Assessment has been produced and is attached at Annex C.

9.0 Consultation

- 9.1 A working group was established consisting of administrative officers, managers from service areas and all unions. The working group met on three occasions to develop and consult on the proposals. The proposals were discussed by SLT and approved.
- 9.2 The proposal was considered by Employer/Trade Union meeting and approved on July 4th 2018.

10.0 Recommendations

- 10.1 That the corporate policy on the correct payment of additional holiday pay is approved as follows:-

- a) That the council adopt the process as outlined at Annex B which supersedes the agreement in place from 2016 (Annex A) and meets current legislative requirements.
- b) That the council endorses the compromise agreed with unions that the calculation of additional holiday pay includes **all** relevant earnings from the previous tax year (to avoid judgements having to be made regarding the regular and settled nature of the working pattern and reduce the administrative burden on the council) but is based on 28 days statutory minimum annual leave as opposed to the full contractual leave.
- c) That these changes take effect from April 1st 2018 and that the HR Manager work with service areas to implement the new policy and identify where arrears are due under the previous system to ensure consistency of approach.

11.0 Reasons for recommendations

- 11.1 To ensure a consistent approach to concessions within discretionary services while retaining the flexibility needed to achieve the Council's social and legal obligations, as well as its commercial needs.

Decision information

Key decision number	
Wards affected	ALL

Document information

Report author	Contact number/email
Kate Harley –HR Manager	kate.harley@chesterfield.gov.uk

Appendices to the report	
Annex A	Correct payment of holiday pay - 2016
Annex B	Correct payment of holiday pay framework - 2018
Annex C	Equality impact assessment

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Calculation of Holiday Pay – 2016

Annex A

Allowances currently being included in the calculation of holiday pay

<i>Payment</i>	<i>Payroll Pay Element</i>	<i>Type</i>
Unsocial Ad hoc	2407	Monetary amount
Call out	3000	Monetary amount
Standby	3005	Monetary amount
Get Out (Venues only)	3014	Monetary amount
Tool Allowance	3017	Monetary amount
Clothing Allowance	3018	Monetary amount
Battery Allowance	4015	Monetary amount

Calculation Process:-

It has been agreed the calculation of average holiday pay will be based on the previous 13 week average of payment made prior to the actual holiday being taken. Once you have calculated the average monetary sum of the entire above pay element this will be claimed as one single amount under a separate pay element for Average Holiday Pay for payment via Payroll. Average holiday pay is only due for paid holiday(not accrued flexi); if period of holiday is unpaid then no average holiday payment is due.

The following examples are aimed to help you calculate this new average holiday pay statutory requirement:-

Example1 – Employee takes one weeks holiday (single post holder); you must calculate 13 weeks past average holiday pay payments as follows:-

Week	1	2	3	4	5	6	7	8	9	10	11	12	13	Total	Average / 13 wks
Callout	27.18	0	11.54	0	16.79	0	0	23.08	0	27.18	0	11.54	0	117.31	9.02
Standby	94.45	0	85.86	0	12.88	0	0	12.88	0	12.88	0	12.88	0	231.83	17.83
TOTAL															£26.85

As one weeks holiday taken to be taken, you must claim £26.85 average holiday pay in addition to paid holiday hours.

Example 2 – Employee takes one days holiday; you must calculate 13 weeks past average holiday pay payments as follows:-

Week	1	2	3	4	5	6	7	8	9	10	11	12	13	Total	Average / 13 wks
Callout	27.18	0	11.54	0	16.79	0	0	23.08	0	27.18	0	11.54	0	117.31	9.02
Standby	94.45	0	85.86	0	12.88	0	0	12.88	0	12.88	0	12.88	0	231.83	17.83
TOTAL															£26.85

In this example employee's contract is 37 hours per week, working 5 days per week. You must calculate one days average holiday pay depending if you record holiday in DAYS or HOURS as follows:-

- a. DAYS – average holiday pay $\text{£}26.85 / 5 \text{ days per week} \times 1 \text{ days holiday} = \text{£}5.37 \text{ daily average holiday pay}$
- b. HOURS – average holiday pay $\text{£}26.85 / 37 \text{ hours contract per week} \times 8 \text{ hours holiday} = \text{£}5.81 \text{ average holiday pay}$

This framework sets out how holiday pay of various categories will be paid and takes into account existing and new arrangements.

Existing arrangements

1. The existing annual leave arrangements in respect of payment of **normal contractual** hours remain unchanged as do payments for tool, battery and first aid allowances which are covered in normal contractual payments.
2. The existing arrangements for calculating **variable hours** holiday payments remain unchanged.
3. The existing arrangements for holiday payments made to operatives at OSD remain unchanged.

New arrangements

4. This framework allows for all elements of regular pay over and above basic pay to be taken into account in calculating additional holiday pay. This includes the following:
 - All overtime (including guaranteed, contractual and voluntary)
 - All enhancements received on relation to unsocial hours (where not currently paid in fixed pay on a monthly basis)
 - Standby, call out and get out allowances (where not already covered by existing arrangements e.g. OSD)
5. This framework applies to statutory annual leave entitlement which equates to 28 days for fulltime employees. This comprises 20 days annual leave (derived from regulation 12 of the Working Time Regulations) plus 8 bank holidays. This allowance is prorated for those who do not work fulltime. **Please note that contractual annual leave entitlements remain unchanged.**
6. The additional annual leave value of those elements of regular pay over and above the basic pay detailed (overtime, standby, unsocial hours etc.) will be calculated for the current year on the basis of actual earnings for the previous year. **The calculation is set out below followed by two worked examples :**

Step 1

Total eligible gross pay received in 2017/18 x (Contractual hours/Normal FTE Hours) = Pro rata eligible gross pay in 2017/18

Step 2

28 days (Statutory annual leave and bank holiday entitlement) / 261 (Number of available working days in a year) = 10.7%

Step 3

Pro rata eligible pay in 2017/18 x 10.7% = Total Additional Normal Holiday Pay Due

Example 1

Fulltime employee who earned £8,060 in overtime in 2016/17:

Step 1

Total eligible gross pay received in 2017/18 (£8,060) x 1(contractured hours (37)/normal FTE) = pro-rata eligible gross pay on 2017/18 = £8,060

Step 2

28 days (statutory annual leave and bank holiday entitlement)/261 (number of available working days in a year) =10.7%

Step 3

Pro rata eligible pay in 2017/18 (£8,060) x 10.7% = total additional normal holiday pay due = £859.21.

Example 2

Part time employee who earned £102.88 in unsocial hours payments during 2017/18:

Step 1

Total eligible gross pay received in 2017/18 (£102.88) x 0.43 (contracted hours (16)/normal FTE) = pro-rata eligible gross pay on 2016/17 = £44.48

Step 2

28 days (statutory annual leave and bank holiday entitlement)/261 (number of available working days in a year) =10.7%

Step 3

Pro rata eligible pay in 2017/18 (£44.48) x 10.7% = total additional normal holiday pay due = £4.76

7. This framework also covers details of calculation of payments for **additional hours** worked by contracted part time staff up to 37hours per week which are not currently captured and which will be calculated using the accrued hours method currently used for variable hours staff.

Timing of payments

8. The additional normal holiday pay (paragraph 4 above) will be calculated annually in June/July and payments made as a one off lump sum.
9. Payments for starters during the year will be calculated on the basis of the gross earnings during the part-year and factored up to represent a full years entitlement. The retrospective payment will be prorated to the part year actually worked.
10. Payment for additional hours worked by part time staff up to 37 hours per week (paragraph 7) will be calculated on a 13 week average based on variable hours calculation

Holiday pay calculations by type		
Type of hours worked	Calculation method	Payment due
Contracted annual leave	Yearly entitlement given based on hours worked and taken under normal annual leave rules.	As and when annual leave taken and reflected in normal pay
Variable staff	Existing calculations dependent on length of service e.g. <5 years service – number of hours worked x 0.123 > 5 years service – number of hours worked x 0.1419	Quarterly
Contracted staff undertaking additional hours up to 37 per week	Use variable hours calculations on difference between contracted hours and 37 hours per week to give an additional holiday pay as follows: <5 years service – number of additional hours worked up to 37 x 0.123 > 5 years service – number of additional hours worked up to 37 x 0.1419	Quarterly
Overtime (x 1.5; x 2); Unsocial hours ad-hoc; call-out; standby; get-out (venues);step up (leisure)	New calculation (10.7%) based on total eligible gross pay in previous tax year using statutory minimum annual leave (28 days including bank holidays) to give additional holiday pay (see paragraph 6)	Annually

Chesterfield Borough Council Equality Impact Assessment - Full Assessment Form

<i>Title of the policy, project, service, function or strategy:</i>		Correct payment of holiday pay
<i>Service Area:</i>	HR	
<i>Section:</i>		
<i>Lead Officer:</i>	Kate Harley	
<i>Date of assessment:</i>	08/18	
<i>Is the policy, project, service, function or strategy:</i>		
<i>Existing</i>	<input type="checkbox"/>	
<i>Changed</i>	<input checked="" type="checkbox"/>	
<i>New / Proposed</i>	<input type="checkbox"/>	

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Section 1 – Clear aims and objectives

1. What is the aim of the policy, project, service, function or strategy?

The framework is a revision of guidance issued in 2016 regarding correct payment of holiday pay following changes in legislation. The revised framework encompasses all methodologies for calculating holiday pay and gives managers and staff guidance on appropriate calculations in line with legislation.

2. Who is intended to benefit from the policy and how?

The revised policy should benefit all staff especially part time staff as it sets in place new procedures for payment of holiday pay for additional hours worked over contracted hours.

3. What outcomes do you want to achieve?

The policy is intended to ensure that rules regarding correct payment of holiday pay are transparent and accessible and implemented consistently across the council. The policy will ensure the council meets legal obligations.

Section 2 – What is the impact?

4. Summary of anticipated impacts. <i>Please tick at least one option per protected characteristic. Think about barriers people may experience in accessing services, how the policy is likely to affect the promotion of equality, knowledge of customer experiences to date. You may need to think about sub-groups within categories eg. older people, younger people, people with hearing impairment etc.</i>			
	Potentially positive impact	Potentially negative impact	No disproportionate impact
Age	<input type="checkbox"/>	<input type="checkbox"/>	X
Disability and long term conditions	<input type="checkbox"/>	<input type="checkbox"/>	X
Gender and gender reassignment	X	<input type="checkbox"/>	<input type="checkbox"/>
Marriage and civil partnership	<input type="checkbox"/>	<input type="checkbox"/>	X
Pregnant women and people on parental leave	<input type="checkbox"/>	<input type="checkbox"/>	X
Sexual orientation	<input type="checkbox"/>	<input type="checkbox"/>	X
Ethnicity	<input type="checkbox"/>	<input type="checkbox"/>	X
Religion and belief	<input type="checkbox"/>	<input type="checkbox"/>	X

Section 3 – Recommendations and monitoring

If you have answered that the policy, project, service, function or strategy could potentially have a negative impact on any of the above characteristics then a full EIA will be required.

5. Should a full EIA be completed for this policy, project, service, function or strategy?		
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	
The changes to the policy will provide positive benefits to all staff especially part time staff who may be more likely to be female therefore this positively affects that group of people.		

Section 6 – Knowledge management and publication

Please note the draft EIA should be reviewed by the appropriate Service Manager and the Policy Service **before** WBR, Lead Member, Cabinet, Council reports are produced.

Reviewed by Head of Service/Service Manager	Name:	Kate Harley
	Date:	23/08/2018
Reviewed by Policy Service	Name:	Allison Potter
	Date:	23/08/2018
Final version of the EIA sent to Policy Service	<input type="checkbox"/>	
Decision information sent to Policy Service	<input type="checkbox"/>	

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