

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

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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