

Employment Committee

Meeting to be held on Monday, 14 May 2018

Electoral Division affected: None;

Statutory Changes to the Council's Holiday Pay Calculation

Contact for further information:

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Executive Summary

The outcome of a number of legal cases that have progressed through the employment tribunal system, now require employers to include a number of previously excluded elements of pay in their statutory holiday pay calculations. The council is, therefore, required to amend the holiday pay calculation currently in place to include claimable allowances, e.g. overtime, standby and call-out payments.

Employment Committee has previously been advised of the holiday pay ruling and agreed that consultations would take place with the recognised trade unions on the most appropriate way to apply the council's statutory obligations in order to present a recommended proposal for Employment Committee to consider.

The council has concluded its consultations with the trade unions through the Joint Negotiating and Consultative Forum (JNCF) and agreed a method to comply with the statutory obligations for both the on-going payments and the requirement to consider arrears of pay (back pay).

The outcome of the consultations has resulted in the following:

- a proposal for applying the future holiday pay calculations
- arrears of pay (back pay) payments
- adjustments to the current plusage for part-time employees
- adjustments to the plusage for casual workers

The council had already included an estimated on-going and back pay provision within the Medium Term Financial Strategy.

Recommendation

Employment Committee is asked to approve, with effect from 1 June 2018:

- (i) The payment of a 7.67% plusage on top of relevant, qualifying elements of pay claimed by employees in order to meet the council's obligations in relation to the payment of holiday pay.
- (ii) Arrears of pay (back pay) payments of up to two years for eligible employees.

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| (iii) | The reduction of the current holiday plusage, paid to part-time employees who work additional hours up to 37 hours per week, from 10.74% to 7.67% in line with the proposal in respect of full time employees, see 1 above. |
| (iv) | An increase in the current holiday plusage paid to casual workers on all hours claimed, from 10.74% to 12.07% in line with advice from the Advisory, Conciliation and Arbitration Service (Acas). |

Background and Advice

In light of the legal outcomes of a number of key cases that have progressed through the employment tribunal system since 2014, employers are now required to change how they calculate holiday pay in certain circumstances. The judgements in respect of these cases determined that it is wrong for employers to only take into account basic pay when calculating how much an employee should be paid while they are on holiday. Holiday pay should be based on average earnings, which are higher when overtime, standby and other allowances that are intrinsically linked to the work an employee is required to do under their contract of employment, are taken into account.

When employees within the council take holidays, they are prevented from working overtime or claiming for enhancements during the period they are on leave. This results in them suffering a reduction in their salary, following the period of leave, and the employment tribunal rulings have ruled that employees should not suffer a detriment by taking holidays.

By law, all full time workers on a five-day week are entitled to 28 days a year paid holiday under UK regulations (four weeks – 20 days – minimum statutory annual leave under EU law plus an additional 1.6 weeks – 8 days – provided for within the UK), or the leave as set out within their contract of employment where this is more generous. Part-time workers are entitled to the same level of holiday on a pro rata basis.

Proposal for Amending the Council's Future Holiday Pay Calculation

Following research and consultations between Finance, Legal, BTLS Recruitment & Payroll Services and the trade unions, it is proposed to apply a 'percentage plusage' to all relevant additional hours and/or allowance claims in order to meet the council's legal obligations.

The proposal is that a percentage plusage of 7.67% will be applied to all qualifying, additional claimable payments that are not currently included as part of what the council currently recognises as 'normal' monthly pay. The plusage has been calculated as follows:

$4 \text{ weeks (20 minimum statutory holidays)} / 52.143 \text{ weeks (261 days)} \times 100 = 7.67\%$

The benefits of this approach are as follows:

- The plusage would be automatically applied to all qualifying payments. A list of qualifying payments is set out below.
- Other than submitting their claims for payment in the normal way, there would be no additional actions that employees would need to take in order to receive the holiday pay plusage.
- There would be no requirement for the Oracle HR & Payroll System to 'look back' over an agreed reference period to calculate average pay or to know when employees take their holidays in order to calculate and make the plusage payment, therefore resulting in less system development and costs. A similar arrangement is already in operation to pay casual workers holiday pay, and part time employees' holiday pay on any additional hours they work, which will need adapting due to the Acas guidance and explained later in the report.
- It is easier to explain how the plusage is calculated (a fixed percentage of all qualifying claimable payments) and for employees to check for themselves if they have received the correct payment (i.e. it would not be a varying amount calculated by averaging back over a relevant reference period).
- This approach would mean employees receiving the holiday pay 'top up' upfront on a monthly basis, i.e. at the time the submitted qualifying payment is made rather than waiting until the following month after taking holiday which would be variable over the year.

Qualifying Payments

The following list of qualifying payments would automatically attract the holiday pay percentage plusage:

- Weekend working
- Night working
- Standby duty
- Winter gritting
- Sleep in payments
- Overtime payments (contractual and non-contractual)
- Additional hours payments
- Call out payments
- Cleaning day payments
- Split duty payments

Arrears of Pay (Back Pay) Payments

The Deduction from Wages (Limitation) Regulations 2014 places a two-year limit on unlawful deduction from wages holiday pay claims presented on or after 1 July 2015. It is, therefore, proposed that two years' back pay be applied to employees who have had qualifying payments made in the two year period leading up to 31 May 2018,

except where employees have already submitted an 'unlawful deduction from wages' claim for the whole (or part) of the period that the council has settled.

The proposal would be to calculate back pay on the basis of the proposal to be applied going forward, i.e. the application of a 7.67% plusage on relevant payments. However, because the council is able to look back at claims already made, it is proposed that a test of 'regularity' is also applied. Again, this takes account of the legal ruling which enables employers to exclude payments made to employees who make additional claims on an irregular basis. 'Regularity', for this purpose, has been defined as submitting a qualifying claim in each quarter of each year (treating each year as a separate qualifying period).

Part Time Employees Working Additional Hours

The council currently pays a holiday pay plusage of 10.74% to part time employees who work additional hours, on any additional hours being claimed per week up to a maximum of 37 per week. The plusage is calculated on the following basis:

$$\boxed{5.6 \text{ weeks (28 statutory holidays)} / 52.143 \text{ weeks} \times 100 = 10.74\%}$$

It is proposed that, under the new arrangements, part time employees will be treated the same as full time employees and the 7.67% plusage be applied to any additional hours they claim up to 37 hours per week. The same plusage would also be applied to any other qualifying payments a part time worker makes and should they work any additional hours over and above 37 in a week the plusage would also be applied to the overtime claim they would make in the same way as a full time employee claiming overtime. This provides a fair and consistent approach for both full-time and part-time employees.

Casual Workers

The council currently pays a holiday pay plusage of 10.74% to casual workers on all hours worked that are claimed for payment. This is the same holiday pay plusage and calculation currently used for part time employees claiming additional hours.

Acas advice in relation to leave entitlements for casual workers identifies that the plusage should be increased to 12.07% as shown below.

$$\boxed{5.6 \text{ weeks (28 statutory holidays)} / 46.4 \text{ weeks} \times 100 = 12.07\%}$$

The reason for this is that using 52 weeks for the year is incorrect and the leave entitlement of 5.6 weeks should be removed as the casual worker would not be expected to work during these holiday weeks. Therefore, the 5.6 weeks' holiday are excluded from the calculation and 46.4 weeks is used instead of 52 weeks, which increases the percentage plusage to 12.07%.

Financial

The estimated recurring annual cost of adopting the percentage plusage approach, based on current salaries, is in the region of £1.5m. As part of the medium term

financial strategy budget provision has been made therefore there is no additional budget required. The cost of back pay is estimated to be c£0.5m per annum, with provision made within reserves to meet these costs.

Consultations

Consultations have been ongoing with the recognised trade unions through the JNCF and the trade unions are in broad agreement that applying a percentage plusage to future holiday pay calculations and the criteria for eligible back pay is the fairest and most efficient approach.

Implications:

This item has the following implications, as indicated:

Risk management

The council is required to amend the holiday calculation it uses to remain compliant with UK case law. The future direction of cases that progress through the employment tribunal system may require that further changes be made to the holiday pay calculation in future, dependent on the approach the council chooses to adopt. Legal Services has advised that the council's approach to meeting its statutory obligations is fair and consistent.

Local Government (Access to Information) Act 1985

List of Background Papers

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Reason for inclusion in Part II, if appropriate

N/A