

NEWCASTLE-UNDER-LYME BOROUGH COUNCIL
EXECUTIVE MANAGEMENT TEAM'S REPORT TO THE
CABINET COMMITTEE

4th September 2019

1. **Report Title:** **Holiday Pay Entitlement**
- Submitted by:** **Interim Head of HR**
- Portfolio:** **Corporate and Service Improvements, People & Partnerships**
- Wards Affected:** **All**

Purpose of the Report

To seek Cabinet approval for a proposal to implement additional holiday pay for those employees who work regular and voluntary overtime.

Recommendations

That Cabinet approve the Additional Holiday Pay proposal as outlined in Section 4.

Reasons

To comply with employment legislation following an Employment Appeal Tribunal (EAT) – White & Others vs Dudley MBC. This ruling has significant implications for many organisations where they have employees who work regular voluntary overtime.

2. **Background**

- 2.1 Following on from the negotiation of a trade union recognition agreement earlier this year efforts have continued to resolve a number of longstanding industrial relations issues through constructive dialogue with the JNCC. One such issue is the calculation of holiday pay for those employees who work regular and voluntary overtime.
- 2.2 In August 2017, an employment appeals tribunal concluded that voluntary overtime, voluntary standby and voluntary call out payments should be considered as 'normal' pay if undertaken with 'sufficient regularity' and should therefore be used when calculating holiday pay and endorsed a 12-week reference period to calculate holidays.
- 2.3 At Newcastle Borough Council, only basic pay and regular fixed allowances currently count when calculating holiday pay entitlement. The premise underpinning the new ruling is that staff should receive a 'normal weeks' pay' when they take annual leave.
- 2.4 The key points from the ruling are:
- 2.4.1 Employees are entitled to a paid sum of money reflecting their 'normal non-guaranteed overtime which now forms part of their annual leave payments

- 2.4.2 The above (2.3.1.) only applied to the basic 20 days leave under the EU working directive and not the additional UK 8 days leave under regulations 13A of the Working Time Regulations or indeed the enhanced JNC Green Book entitlements
- 2.4.3 Subject to a reasonable practicability test, employees who claim for holiday pay arrears will be out of time if there is more than 3 month break between successive underpayments.

3. **Issues**

- 3.1 The Trade Unions raised the non-payment of regular overtime issue in July 2017 and then further in September 2018 via a formal grievance submitted by GMB.
- 3.2 Following a review by the Interim Head of HR Regional Trade Union Representatives were informed in December 2018 that the Council was not adhering to the additional holiday pay ruling and it was confirmed that a more detailed review would be undertaken with a view to bringing forward proposals that would ensure the Council was compliant.
- 3.3 On 6th June 2019, a meeting was held with the Joint Trade Unions to discuss the Council's scenarios, costings and options for calculating additional holiday pay including:
 - i. Backdated monies – a minimum of 2 years in line with the Bear Scotland vs Fulton case law decision
 - ii. Number of Paid Holidays i.e. EU law (20 days), UK law (28 days) NJC Green Book based on the minimum 34 days and NJC Green Book – variable. Casual employees are currently paid in line with NJC Green Book which provides for a minimum of 34 days.
 - iii. Review period – 12 weeks vs. rolling 12 month basis
 - iv. Definition of 'regular' overtime and how can this be quantified.

4. **Proposal**

- 4.1 At the meeting of 6th June 2019, the Council made the following proposal:
 - 4.1.1. Additional holiday pay would be paid from 1st April 2019 and backdated for 2 years in line with the ruling i.e. to 1st April 2017
 - 4.1.2 The holidays would be based on NJC Green Book which is based on the minimum of 34 days. This equates to 13.04% of pay.
 - 4.1.3 The review period would be 12 months to reflect seasonal work
 - 4.1.4 The majority of the Council's overtime would be deemed 'regular' and all overtime payments are included.
- 4.2 The cost of this proposal would be approximately £97,000.
- 4.3 On 11th June 2019, the Council's proposals were put officially in writing to the Trade Unions at their request.
- 4.4 On 19th June 2019, GMB and GMB APEX confirmed that they had consulted with their members and they wish to accept this proposal.
- 4.5. On 27th June 2019, UNISON agreed to the Council's proposals.
- 4.6 On 25th July 2019, the Joint Negotiating and Consultative Committee agreed to the Council's proposals.

5. **Reason for Proposed Solution**

- 5.1 That Cabinet approve the Additional Holiday Pay proposal as outlined in section 4 to comply with employment legislation following the Employment Appeal Tribunal (EAT) – White & Others vs Dudley MBC. This ruling has significant implications for many organisations where they have employees who work regular voluntary overtime

6. **Options Considered**

- 6.1 As the EAT case provides binding authority on the Council, it is necessary to reach agreement in relation to these issues.

7. **Legal and Statutory Implications**

- 7.1 The EAT case provides clarity and binding authority for the first time on holiday pay and entitlements, ruling that payments for voluntary overtime (as well as call-out, standby and mileage) were paid with sufficient regularity for them to fall within the definition of “normal remuneration”. Accordingly the EAT concluded that they should be included in holiday pay calculation for the 20 days of annual leave arising under the Working Time Directive.
- 7.2 By agreeing to the proposals in the report the Council will be complying with the ruling of the EAT.

8. **Equality Impact Assessment**

- 8.1 N/A

9. **Financial and Resource Implications**

- 9.1 Based on current estimates the Council can expect a payment of £97,000 during 2019/20 that has not been budgeted for. This consists of £32,000 additional holiday pay for the financial year 2019/20, and £65,000 for the two years backdated payment relating to the period between April 2017 and March 2019. An additional pressure on 2020/21’s budget of £32,000 is also forecast.

10. **Major Risks**

- 10.1 N/A

11. **Sustainability and Climate Change Implications**

- 11.1 N/A

12. **Key Decision Information**

- 12.1 Included on the Forward Plan

13. **Earlier Cabinet/Committee Resolutions**

- 13.1 N/A

14. **List of Appendices**

14.1 N/A

15. **Background Papers**

15.1 N/A