

Executive

30 July 2015

Report of Executive Leader for Finance & Performance

Holiday Pay and Overtime

Summary

- 1 This report presents Members with the pay and process implications relating to the calculation of holiday pay for non contractual overtime and additional hours earned. Members are asked to agree the rate and mechanism relating to Holiday Pay to be applied from 1st August 2015.

Background

Impact of Employment Tribunal decisions

- 2 Recent case law has confirmed:
 - When overtime, additional hours, other pay allowances are worked on a “regular and systematic” basis then holiday pay should include these elements of pay. There is no definition for “regular and systematic”. The direction of travel is to ensure holiday pay reflects the normal pay that a worker receives. All pay elements should be included in the calculation of holiday pay and not basic pay;
 - In order for workers not to be deterred from taking annual leave, they must not suffer any financial “detriment”, disadvantage for taking leave; and restated the principle that holiday pay must correspond to normal remuneration;
 - The legal decision applied to leave under the Working Time Directive (WTD) 20 days/4 weeks and not the additional leave which stems from the Working Time Regulations (WTR) additional 8 days/1.6 weeks or contractual leave;
 - Non-guaranteed overtime (overtime which the employer does not have to offer, but the employee must work if requested) is part of

normal remuneration and must be included in holiday pay, as must any other payments;

- Contractual overtime should be included in holiday pay in respect of the full 5.6 weeks' leave.

Current arrangements at City of York Council (CYC)

- 3 At CYC **overtime** is defined as “authorised hours that are worked above the standard 37 hour week. An employee will be paid their normal basic hourly rate for the job plus a fixed cash amount per hour”. ‘**Additional Hours**’ are hours worked in excess of contractual hours up to the standard 37 hour week and which are paid at single time rate.
- 4 Where staff are **contractually** required to work overtime and also attract specific contractual allowances in connection with their role, these contractual pay elements are already taken in to account when calculating a day’s holiday pay, so no further action is required.
- 5 The recent Bear v Scotland ruling specifically concerned **non guaranteed** overtime; overtime which the employer is not contractually obliged to provide but employees are obliged to work if offered.
- 6 The majority of overtime worked within the council is **voluntary**, whereby the council is not contractually obliged to offer overtime and the employee is not obligated to work it, if offered. Voluntary overtime is not currently taken into account when calculating a day’s holiday pay.
- 7 The management and administration of annual leave is undertaken within each service area. There is no link or capture of information between the recording of when holidays are taken and monetary payments for holidays in the HR system.

Response by other councils

- 8 Only one other upper tier authority in the region has reached a local decision so far on the calculation of holiday, the calculation agreed is on the basis of 7.6923% in line with the CYC proposal (see paragraph 10 below). At least one other local authority does not have non contractual overtime and others are still considering their position.

Options for holiday pay payments

Approach to date

- 9 The approach taken by the council in relation to back-dated claims made to date so far, has been to calculate the additional holiday pay entitlement as a percentage of non contractual earnings.
- 10 The calculation has been based on minimum statutory requirements which is based on 20 statutory annual leave days, 260 working days in the year, and calculated as 7.6923% of additional non contractual earnings.
- 11 Elements to be included in the Holiday Pay calculation:
 - Contractual salary
 - Overtime allowances (contractual¹ & claiming²)
 - Standby allowance (contractual & claiming)
 - Call out Hours (claiming)
 - Residential Sleep-in allowance (claiming)
 - Shift allowance (contractual)
 - Tool allowance (contractual)
 - Night Work allowance (contractual & claiming)
 - Weekend allowance (contractual & claiming)
 - Living Wage supplement (contractual)
 - Market supplement (contractual)
 - Pay protection (contractual)
 - Temporary Additional Responsibility Allowance (TARA) (contractual)
 - Additional hours (claiming)
 - First Aid (contractual)
 - Cycle Allowance (contractual & claiming)

Looking forward

- 12 The council is expected to have in place mechanisms for the correct calculation of holiday pay going forward. Until these arrangements are in place the council continues to leave itself open to grievances and/or employment tribunal claims for back-pay.

¹ Note: "Contractual" denotes pay element automatically included in the calculation of holiday pay, where applicable.

² "Claiming" denotes a claimed pay element currently not included in the calculation of holiday pay.

- 13 Subject to Executive approval the proposed calculation of holiday pay would be effective from 1st August 2015. There will, however, be a requirement to put in place a revised automated payroll process which may take a number of months to implement.

Recommended rate of payment

- 14 Based on experience and evidence to date it is proposed the payments would be based on the recommended 7.6923% which would be subject to statutory national insurance and tax deductions for the employee/employer. Any other option to pay higher rates as referred to by the Trade Unions (see paragraph 20 to 21) would result in proportionately higher costs. There is no evidence base at the current time to pay any other rate.

Mechanism for payment

- 15 In terms of the mechanism there are only two options open to the council:
- apply the calculation for holiday pay across all CYC employees; or
 - limit the calculation of holiday pay to those groups of staff who claim voluntary overtime, additional hours, etc, on a 'regular and systematic' basis.
- 16 The practicalities of the latter option is that the transactions would be too numerous and resource intensive to administer, and potentially open to challenge given the lack of a clear definition of 'regular and systematic'.
- 17 The former mechanism is the most pragmatic option for services and payroll to implement. It is a simple process which would enable an automated calculation of holiday pay to be implemented and maintained going forward within the payroll system.
- 18 This mechanism also reflects the legal 'direction of travel' whereby employees must not suffer any financial detriment for taking leave and holiday pay reflects the normal pay that a worker receives.

Impact on schools

- 19 Any changes to the calculation of holiday pay will only apply to employees on non-teaching contracts. Staff on teachers' terms and conditions are unaffected by the case law as their terms and conditions of employment excludes overtime. Headteachers have received a briefing paper on the recent legal judgements and potential implications for schools and there is

planned consultation with schools Trade Union representatives in September.

Consultation

20 The following matters have been discussed with Unison, GMB, UCATT and Unite Trade Unions:

- a. Proposed calculation of holiday pay based on 20 statutory annual leave days, 260 working days in the year and calculated as 7.6923% of additional earnings. (see paragraph 14)
- b. Elements to be included in the calculation of holiday pay (see paragraph 11)
- c. How the calculation of holiday pay will be applied (see paragraphs 15-18).

21 The Trade Unions have given joint responses which are summarised as follows:

- They fully support the mechanism being applicable to all employees.
- They agree to points b. and c. above which cover the elements to be included in the holiday calculation and the mechanism for application.
- Whilst there was agreement on the use of 260 working days in point a, they did not agree to the number of leave days to be used and they would expect to see, as an employer of choice, the council use contractual holidays; and if the council was not willing to look at that then at least to use the base of 28 days, rather than the 20 days.
- They have strongly stated that they believe this is a matter relating to pay and terms and conditions then it should be negotiated through the collective bargaining machinery in place. They have requested that negotiations are commenced on this basis so that staff can be engaged in the decision-making. Their view is that negotiation on this matter would be consistent with previous regional discussions and agreements.

Options

22. There is no option not to set a rate as case law has established that holiday pay on non contractual overtime/additional hours must be paid based on the terms set out in the report.

23. The options on a pay rate are as follows:

- To pay the rate based on CYC previous claims experience and a rate set by another local authority as outlined in paragraphs 8 and 14).
- To pay a higher rate, but there is no evidence base on which to base a decision on a higher rate. Any higher rate would have a greater impact on the council's financial position and on funding for front line services.

24. In light of paragraph 22 and 23 above the council is not in a position to negotiate these matters. With reference to Trade Union comments on regional discussions, these have been held in relation to agreeing back pay arrangements, which is not the subject of this report.

25. The options on a pay mechanism are outlined in paragraphs 15 and as outlined there is no alternative but apply the rate to all non contractual overtime and additional hours earned, given the lack of definition of 'regular and systematic'.

Analysis

26 All analysis is contained in the body of the report.

Council Plan

27 Outcomes achieved by the activities covered in this report help to deliver priorities in the draft Council Plan 2015-19 in support of 'Our purpose is to be a more responsive and flexible council that puts residents first and meets its statutory obligations'.

Implications

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a) Financial

All pay related costs will be borne by the budget area commissioning the overtime. The additional amount to fund, based on current practice is estimated around £270k based on the recommended calculation of 7.6923%, approximately £36k of which will be borne by the Housing Revenue Account. The areas of greatest impact are Adult Social Care, Communities & Neighbourhoods and Schools. Stringent monitoring and controls over the use of such overtime has already commenced and will help to control future costs.

b) Human Resources (HR)

Most implications are covered in the report but there will be an ongoing priority for service areas to identify where working practices can change in order to reduce or remove overtime and the associated costs.

c) Equalities

The Community Impact Assessment for this decision is attached at the Annex to this report.

The proposed holiday pay calculation will have a positive impact on all Community of Identity groups – if an employee receives their normal remuneration whilst on annual leave they will be in position to maintain standards of living and are more likely to take all their leave aiding general health and wellbeing.

31% of the workforce claim overtime or related allowances proposed to in the holiday pay calculation, of which 67% are females and 33% male. This indicates women will be more positively impacted by the changes, These gender percentages are representative of the general workforce

70% of the employees who claim pay allowances are employed in grades 4-6 of our 12 Grade Pay Structure. The proposals will therefore positively impact on some of our lowest paid employees.

d) Legal

Legal Implications are covered in the body of the report.

These proposals are based on the currently known minimum requirements however there is the potential for future legal challenge in UK/European case law which may require the council to give further consideration to the holiday calculation. It is recommended that any further changes to the rate that are statutorily imposed as opposed to a local decision, will be implemented by the Director of Customer & Business Support Services.

e) Crime and Disorder

No known implications.

f) Information Technology (IT)

These changes as proposed will be achievable through the existing payroll/HR system and any costs will be managed within existing service budgets.

g) Property

No known implications.

h) Other

No known implications.

Risk Management

29 The key risk is that inadequate and wrongful payment arrangements for staff incurring non contractual overtime or additional hours result in grievances and possibly new and repeated employment tribunal claims.

Recommendations

30 Members are asked to approve:

- a. the proposed calculation of holiday pay to be applied to all non contractual overtime and additional hours worked at a rate of 7.6923% of additional non contractual earnings effective from 1st August 2015.
- b. Any future statutorily imposed rate change for the deduction of holiday pay in relation to non-contractual overtime/additional hours will be implemented by the Director of Customer & Business Support Services.

Reason: to ensure Members are aware of the implications of changes to holiday pay for non contractual overtime and additional hours worked.

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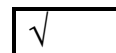
Report Approved**Date** 14.7.15**Specialist Implications Officer(s)** *List information for all*

Financial: Ian Floyd

Director of Customer & Business Support Services

Legal: Andrew Docherty

AD for Governance and ICT

Wards Affected: *List wards or tick box to indicate all***Background Papers:****Annexes**

Annex Community Impact Assessment