

# Report to Employment Panel

Agenda  
Item:

**A.1**

Meeting Date: 28 October 2019  
Portfolio: Finance, Governance and Resources  
Key Decision: No  
Within Policy and Budget Framework YES  
Public / Private Public

Title: WORKING TIME DIRECTIVE HOLIDAY PAY: OVERTIME AND OTHER ALLOWANCES  
Report of: Corporate Director of Finance and Resources  
Report Number: RD37/19

**Purpose / Summary:** This report provides details of legislation which the Council must comply with regarding holiday pay for overtime, non-contractual allowances and non-standard hours as set out in the Working Time Regulations.

## Recommendations:

The Employment Panel is asked to:

- (i) Note the content of the Working Time Regulations as set out in the report;
- (ii) Consider, and provide direction to officers in respect of, the options for the basis of the payment, as set out in paragraph 2.3;
- (iii) Approve the basis of the annual payment and backdated calculation as set out in paragraph 2.4.

## Tracking

Employment Panel:	<b>28 October 2019</b>
Executive:	<b>n/a</b>
Scrutiny:	<b>n/a</b>
Council:	<b>n/a</b>

## **1 BACKGROUND**

- 1.1 The Working Time Regulations (WTR) came into force on the 1st October 1998. It is a law made to implement a Directive made by the European Union and applies to employment law in the UK. The law applies to full-time, part-time, agency and casual workers from the day they begin work. The legislation has had recent case law regarding payments for holiday pay for overtime, non-contractual allowances and non-standard hours.
- 1.2 Carlisle City Council has a legal obligation to comply with this legislation which requires the Council to revisit its procedures for the payment of holiday pay as a result of overtime and other allowances paid to its employees.
- 1.3 Most workers are entitled to 5.6 weeks' (this is 28 days made up of 20 working days and 8 bank holidays and is known as statutory leave) paid holiday a year (pro-rata for part-time worker).
- 1.4 Reference to overtime relates to all overtime worked, whether voluntary or compulsory.
- 1.5 The Council currently pays contractual overtime for all annual leave (for example where an employee has a 39.5 hour per week contract, they will be paid 2 hours per week overtime which is also reflected in their annual leave payments).
- 1.6 The issue arises when people work more hours than contracted and whilst they are paid for these hours it is not reflected in annual leave pay – these additional hours include overtime, stand by and other premium payments.
- 1.7 For the Council to be compliant, holiday pay for all overtime and premium payments should be paid 'live' when annual leave is taken. However, our system is unable to accommodate this, therefore this report puts forward an alternative recommendation which is considered acceptable by North West Employers.

## **2 CONSIDERATIONS**

In order to implement the necessary changes, the following issues need to be considered and addressed:

### **2.1 Voluntary V Compulsory Overtime**

This was an area for discussion, but recent court decisions have indicated that **all** overtime worked should be included when calculating a worker's statutory holiday pay entitlement.

## **2.2 Regularity of overtime**

At present the regularity of overtime could be considered and assessed for all overtime worked on an individual basis; however, this would be costly and time consuming and advice from North West Employers is to pay based on all overtime.

In addition, the implementation of the Good Work Plan in April 2020 will mean a calculation period of 52 weeks.

The regularity of overtime worked will only be used to calculate for any back pay awarded.

## **2.3 Statutory versus Contractual annual leave**

Whilst court decisions apply to the four weeks of annual leave which are required under European law (20 days); all workers in the UK must receive an additional 1.6 weeks of leave by law (8 days), and some receive more as part of their terms and conditions of employment. This is the case in Carlisle City Council as we offer increasing annual leave entitlement with length of service.

Whilst the legal obligation is to pay on the statutory entitlement of 28 days (including bank holidays) many authorities and large private businesses are applying the increase to an employee's contractual holiday entitlement. This approach is supported by North West Employers.

## **2.4 Backpay**

The Deduction from Wages (Limitation) Regulations 2014 took effect from July 2015 to address concerns that recent holiday pay cases would lead to a flood of backdated claims for unpaid holiday pay and implemented a 2-year backstop for holiday pay claims, which limits the backdated claims that companies may have to pay.

It is suggested that the Council adopts the approach which is recommended by North West Employers and is as follows:

Backpay to be calculated on an individual basis of an average over a 12-week period prior to statutory leave being taken. If a break greater than 3 months occurs between each holiday, then backpay would cease prior to the 2-year backstop. This is currently being tested in the courts and therefore may change. Members should be aware that leavers would not automatically be entitled to any backpay.

It is therefore suggested that:

- Payment to be made annually in May payroll based on average across the previous leave year; the first payment being an average over 52 weeks (based on the Good Work Plan) for the financial year 01/04/2020 to 31/03/2021 and paid yearly in the May payroll moving forward.
- Backpay to be calculated and paid as a one-off payment and based on a 2-year period in line with current legislation – this will need to be on a case by case basis. It is suggested this payment is made in May 2020.

### 3 FINANCIAL IMPLICATIONS

- 3.1 The below costs have been calculated on an average of previous years and are indicative of the **maximum** costs (worst case scenario), if the scheme was active during these years.

#### Option 1 – Statutory Entitlement

Annual Leave	2017/18	2018/19
28 days 20 days + 8 bank hols	£23,261.38	£19,276.30

#### Option 2 – Contractual Entitlement

Annual Leave	2017/18	2018/19
41 days maximum entitlement of 33 days + 8 bank hols	£34,061.30	£28,226.00

- 3.2 These figures are assuming that **no** overtime has been made to any contractual, standby, callout or other premium payments. However, we are aware that some payments have been made but a detailed analysis would be required for exact figures.
- 3.3 Whilst the above costs will deal with the backpay issue, budgets moving forward will need to account for a certain amount of additional overtime pay.

## **4 RISKS**

Any risks (i.e. breach of Working Time Directive (2003/88/EC) for the Working Time Regulations 1998) of non-compliance with legislation will be mitigated by implementing the process set out in this report.

## **5 CONSULTATION**

- 5.1 SMT have agreed this approach, subject to Members confirmation and recommendations. The proposal would then be discussed with the Unions at CJC in December, with formal notification circulated to employees and the unions.
- 5.2 HR will continue to work with managers to lower the potential impact of costs by encouraging timely recruitment, supporting appropriate restructures, developing casual banks to offset agency costs and encouraging self-management of working hours through the flexi system.

## **6 CONCLUSION AND REASON FOR RECOMMENDATIONS**

- 6.1 To ensure compliance with the relevant legislation, it is recommended that lawful holiday payments for non-contractual overtime, non-contractual allowances and non-standard hours are implemented as set out in the report.
- 6.2 To ensure the Council is legally compliant, an agreed process must be implemented no later than 6<sup>th</sup> April 2020.

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**Note: in compliance with section 100d of the Local Government (Access to Information) Act 1985 the report has been prepared in part from the following papers:**

- **None**

## **CORPORATE IMPLICATIONS:**

**Legal –** If any cases were taken to an Employment Tribunal then they will look back to establish an average figure, which will include basic pay and any overtime, or other payments such as for being on call. Each case will be looked at individually, but unless an overtime payment is effectively a one-off payment then such payments will be taken into account. The purpose is to ensure that holiday pay effectively mirrors an employee's recent pay entitlement so that s/he isn't worse off in taking a holiday.

There is a long stop period of going back 2 years from the lodging of a claim at the EAT, but if there have been no unlawful deductions for a period of 3 months (whether due to a correct procedure now in place, or no holidays taken), then any previous claims for the balance of the 2 year period are extinguished.

The above should limit any liability significantly, however it appears that larger organisations and public bodies are taking a more pragmatic view under pressure from unions to deal with claims for a 2-year period. It would be prudent to approach any claims in a uniform way with other local authorities as suggested in this paper. Similarly, whilst the provision only applies to the first 20 days of holiday, being the Statutory minimum, many authorities are applying the increase to an individual's full holiday entitlement.

**Finance –** Depending upon which option is agreed, the actual backdated payments will need to be verified and calculated on a case by case basis to determine the true costs. The figures reflected in this report are the maximum sums for each option and range from £42,000 to £62,000. Any costs associated with the backdated payment and any on-going costs would need to be funded from within existing salary budgets.

**Equality:** The Public Sector Equality Duty and Equality Policy have been considered by the service manager in preparing this report.

**Information Governance –** It is important that the Council complies fully with the DBS Code of Practice regarding the correct handling, use, storage, retention and disposal of Certificates and Certificate information. The Council must also comply fully with its obligations under the General Data Protection Regulation (GDPR) and Data Protection Act 2018, and other relevant legislation pertaining to the safe handling, use, storage, retention and disposal of Certificate information and this policy fulfils that requirement.