



CABINET – 15TH MARCH 2017

SUBJECT: ANNUAL LEAVE PAYMENTS

REPORT BY: ACTING DIRECTOR OF CORPORATE SERVICES & SECTION 151 OFFICER

1. PURPOSE OF REPORT

1.1 The purpose of the report is to seek approval from Cabinet with regards to payments for annual leave for employees that receive payments in addition to their basic salary. Recent changes in legislation have resulted in the need to review this as part of pay.

2. SUMMARY

- 2.1 Since 2010, various cases have been considered by the European Court of Justice (ECJ) where employees have argued that their holiday pay should include all elements of their pay and not just their basic salary.
- 2.2 These cases all relate to the principle that when an employee is on leave, they should be paid the same as when they are in work.
- 2.3 This report provides recommendations to ensure that the Council is compliant with case law whilst having regard to the Council's Single Status Agreement 2009.

3. LINKS TO STRATEGY

3.1 The recommendations set out in this report contribute to the following Well-being goals within the Well-being of Future Generations Act (Wales) 2015 in that the proposals will ensure that staff are fairly remunerated, which in turn enables the Council to retain employees:

- *A prosperous Wales*
- *A more equal Wales*

4. THE REPORT

- 4.1 The case law referred to in section 2 has determined that holiday pay should not be limited to basic salary but must correspond to "normal remuneration".
- 4.2 The earlier case decisions related to pilots and commission payments which did not affect the Council. However in November 2014, the decision in Bear Scotland Ltd v Fulton was announced and widely publicised. This case related to overtime payments and certain travel related payments and does affect the Council, as these types of payments are regularly made to some groups of employees.

- 4.3 Although the Council sought to remove some additional payments from 1 April 2009 under the Single Status Agreement e.g. bonus and incentive payments, some payments were retained, including additional hours, overtime, acting up, lettings, recalls to work, standby and call out, night work and sleeping in duties. The Council paid £4,519,427.48 on all of these additional payments for the period September 2014 to August 2015.
- 4.4 Based on the recent case law, there is a potential that any regular payments made in addition to salary should be incorporated into holiday payments. This is based on the principle that employees have to be paid for “normal remuneration” intrinsically linked to the performance of tasks in accordance with their contract of employment. Where there is a settled pattern of work, it should be easy to identify normal remuneration. However, where there is no settled pattern, it is appropriate to use an average taken over a reference period determined by national legislation. Due to the requirements to deliver services across the Council, patterns of work are not always clearly defined.
- 4.5 The cases referred to relate to statutory holiday pay and there is currently no case law in relation to contractual holiday pay. Cabinet will be aware that the Council’s contractual entitlement to annual leave is more generous than the statutory entitlement.
- 4.6 These additional payments do not stem from the national terms and conditions and so there is no suggestion that terms and conditions be amended on a national basis.
- 4.7 A number of claims in respect of backdated holiday pay have been made to date by one of the recognised Trade Union. The other three recognised Trade unions wished to work with the Council to resolve this matter without applying to the Employment Tribunal.
- 4.8 The Council therefore has two options to avoid further claims:-
- i) amend working practices to stop paying additional payments (as detailed in 4.3).
 - ii) include additional elements in payments for holiday pay.

Neither of these options offers the Council a simple solution.

4.9 Option One

This option would require the Council to revisit its Single Status Pay and Grading Structure. On the introduction of Single Status, the Council reinvested all of the savings relating to the removal of additional elements against its budgetary figure for the 2009 Pay Structure. At that time, the Council invested in increasing the grade pay lines to arrive at a new pay scheme. This was a significant investment that was specifically targeted in the areas where large groups of our employees were affected. The additional elements of pay that exist under the Single Status Agreement apply to all Council Staff on NJC terms and conditions of employment. Whilst there are specific groups of staff affected by these claims, any negotiation relating to the removal of these allowances will be relevant to all staff. In 2009, the monies invested into creating the new pay structure received the support of the majority of staff under a ballot. If agreement cannot be reached with Council staff to vary their terms and conditions of their employment, the Council might need to consider the position of dismissal and re-engagement on new terms. This would not be without risk to the Council.

4.10 Option Two

This option would be to include certain elements when calculating payments for annual leave. The payments suggested are those which employees receive regularly and include:

Additional hours (up to 37 per week)
Overtime
Nights

Stand by
Sleep in

N.B. Call outs are covered by the elements of additional hours or overtime.

- 4.11 It has not been suggested to include payment for acting up as work has been undertaken with service areas to review the practice of acting up to ensure that it is in accordance with the Council's Single Status Agreement. This should remove the regular acting up payments currently being received.
- 4.12 The second option is recommended to Cabinet. Cabinet are also asked to consider whether this would apply to the statutory or contractual entitlement to annual leave. The statutory entitlement is 20 days in accordance with the Working Time Directive. The Council's contractual entitlement is 24 days for employees with less than 5 years service and 28 days for employees with more than 5 years service. It is recommended that Cabinet agree that any payment reflects employees' contractual annual leave entitlement.
- 4.13 In accordance with the contractual entitlement, Cabinet is asked to agree the following payments:
- 9.23 % of the difference between salary held and total gross earnings for employees with less than 5 years' service
- and
- 10.77% of the difference between salary held and total gross earnings for employees with 5 or more years' service
- 4.14 If Cabinet agree the entitlement to payments, it recommended that this payment is calculated and made every 13 weeks as the practice has already been agreed and is in place with regard to calculation of annual leave for casual workers.
- 4.15 The recognised Trade Unions (non Teaching) are fully supportive of the proposal to include the elements detailed in 4.10 within payments for annual leave and also of the calculation (as detailed in 4.13) and the frequency of payments (as detailed in 4.14).
- 4.16 The proposal to the recognised Trade Unions recommended that payments were backdated to 1 April 2016. They have requested that the date for backdated payments is 1 January 2016.
- 4.17 One recognised Trade Union (prior to merging with another Trade Union) requested that the calculations regarding normal earning was extended to all holidays, including bank holidays, but this was not supported by the other recognised Trade Unions and is not recommended to Cabinet.

5. WELL-BEING OF FUTURE GENERATIONS

- 5.1 Having considered the five ways of working, the recommendations of this report illustrates the Council's commitment to the prevention of poverty.
- 5.2 Long term, this should also support the Council's ability to retain employees.

6. EQUALITIES IMPLICATIONS

- 6.1 No Equality Impact Assessment has been undertaken as case law that affects employment issues, such as those covered by this report, must be incorporated into the local authority's HR policies and practices, and relevant equalities issues would have been considered as part of the original case law decision.

7. FINANCIAL IMPLICATIONS

- 7.1 To ensure that the Council is compliant with recent case law, the 2017/18 Budget Proposals approved by Council at its meeting on 22 February 2017 included a sum of £425k to meet the annual revenue cost of these potential additional payments for annual leave. Assuming that the proposals in this report are agreed by Cabinet, this funding will be released to service budgets.
- 7.2 The report to Council also referred to the requirement to set aside funding from the General Fund to meet the cost of one-off back-dated payments to staff. Cabinet is reminded that current estimates indicate that up to £500k should be sufficient and this will enable Officers to make the appropriate arrangements to settle this matter.

8. PERSONNEL IMPLICATIONS

- 8.1 The personnel implications are included in this report.

9. CONSULTATIONS

- 9.1 There are no consultations that have not been included in the report.

10. RECOMMENDATIONS

- 10.1 Cabinet is requested to approve:
- 10.1.1 option two to avoid further claims and to settle backdated claims.
 - 10.1.2 the calculation of payments detailed in paragraph 4.13.
 - 10.1.3 the frequency of payments as detailed in paragraph 4.14.
 - 10.1.4 a date for backdated payment of 1 January 2016.
- 10.2 Cabinet is also asked to delegate authority to the Acting Director of Corporate Services & S151 Officer to agree back-dated payments / claims within the approved funding envelope of up to £500k.

11. REASONS FOR THE RECOMMENDATIONS

- 11.1 The recommendations are made to ensure that the Council is compliant with recent case law relating to annual leave whilst having regard to the Council's Single Status Agreement 2009.

12. STATUTORY POWER

- 12.1 Local Government Acts 1972 and 2000.

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Recognised Trade Unions (non Teaching)