

READING BOROUGH COUNCIL
REPORT BY CORPORATE DIRECTOR

TO:	PERSONNEL COMMITTEE		
DATE:	14 JULY 2016	AGENDA ITEM:	4
TITLE:	HOLIDAY PAY		
LEAD COUNCILLOR:	COUNCILLOR LOVELOCK	PORTFOLIO:	PERSONNEL
SERVICE:	ALL	WARDS:	ALL
LEAD OFFICER:	DENISE BURSTON	TEL:	0118 937 2486
JOB TITLE:	HR PARTNER	E-MAIL:	denise.burston@reading.gov.uk

1. PURPOSE AND EXECUTIVE SUMMARY OF REPORT

- 1.1 The purpose of this report is to outline the recent case law relating to Holiday Pay and the process that the Council went through in order to ensure that it did not find itself at risk of individual claims from employees.
- 1.2 An options paper was considered by Management and consultation with the Joint Trades Unions commenced in order to reach a collective agreement.

2. RECOMMENDED ACTIONS

- 2.1 That the Personnel Committee approve the option proposed in section 4.2 of the report.

3. POLICY CONTEXT

- 3.1 The Working Time Regulations 1998 (WTR) brought into effect the Working Time Directive (WTD) (enacted in 1993, subsequently amended in 2003), which give provision for paid annual leave (amongst other things).

It is established law that a worker is entitled to be paid for any period of leave "at a rate of a week's pay". Calculating a week's pay historically has been done by reference to the normal salary of the role. Non-contractual benefits such as bonuses, commission, and more relevantly to public authorities, overtime are not included.

So where for example a worker regularly works overtime, they would only get paid their normal salary (not including the overtime) when they are on annual leave. This has been the case in Reading.

3.2 Current case law

The case of Lock v British Gas Trading Ltd [2014] established that the above approach was wrong. To calculate pay for the purposes of annual leave, an employer would need to make some reference to payments that would have been earned had the worker not gone on annual leave, in this case by averaging commission over a representative period of 12 months.

This ruling was further strengthened by Bear Scotland v Fulton [2015], which concerned overtime payments which the employee was required to perform if it was offered. The Employment Appeal Tribunal ruled that pay whilst on annual leave similarly required a calculation of average remuneration over a reference period. In the case of non-guaranteed overtime, this was to be construed as part of "normal pay" and therefore should be taken into account when calculating holiday pay.

3.3 Current exposure

Given that we have not been calculating holiday pay in accordance with these cases, we have exposure to claims from employees and workers, particularly those who work non-contractual overtime.

There was the potential that our exposure could go back for at least 6 years. However, the Government passed legislation that with effect from 1 July 2015 limits such claims to just 2 years. All claims outside of this period are now out of time. To date Reading Borough Council does not have any claims lodged against it with the Employment Tribunal service.

3.4 Establishing the risk

Using annual data for expenses paid to staff carrying out overtime or standby it was separated into different elements as follows:

1. Contractual overtime - payable to those staff whose contract includes an element of overtime on a regular basis. This is calculated over 12 months and paid in equal amounts over the year.
2. Fixed Standby - the council operates numerous standby arrangements to ensure that its services are available out of hours. Where possible and implemented more widely post Pay & Grading, services operate a rota system set in advance, usually over a year, so that staff can plan their personal arrangements around the out of hours work. There may be for example 3 people on a rota, covering 17.33 weeks per year. The weeks will be set and staff have the ability to change around their weeks to allow for personal circumstances, holidays etc. The payment of the weekly standby rate is multiplied by the number of weeks, and times by 12 and then paid in equal amounts each month.
3. Call-out - the council has to respond as part of its standby arrangements and staff who are called out whilst on standby are paid at the appropriate

overtime rates. Because this is in response to the set rota, and staff have the ability to swop and change their weeks to meet personal circumstances amongst themselves, the overtime worked during the call out may fall outside of the available case law as they do not suffer a disadvantage whilst on leave, the set standby/callout overtime is still worked over the year.

4. Standby - some services have elected to provide a standby service which does not have a fixed rota or established pattern which means that payment cannot be spread across the year and we cannot evidence that staff have not missed out on standby or callout/overtime as a result.
5. Ad-hoc overtime - this group will contain a mixture of staff and services where there is an expectation that overtime is available, offered and accepted and those where it is on a casual basis and therefore truly voluntary.

Considering the case law, it would be reasonable to suggest that points 1 to 3 above would fall outside of the new legislation, as long as this could be evidenced through the use of rota systems and averaged payment through payroll.

Again looking at the case law Point 4 and 5 above are likely to fall within the scope of the legislation and a method of calculating average remuneration over a reference period will be required. In the case of non-guaranteed overtime, this was to be construed as part of "normal pay" and therefore should be taken into account when calculating holiday pay.

4. PROPOSALS

4.1 Current Position

The Council do not currently pay any enhancement to overtime to take account of the developing case law. Consideration needed to be given to the risks associated with the legal position and the ability for employees to make claims going back 2 years.

The Council sought legal advice on its approach and associated risks.

As well as considering its own position the Council contacted the other local authorities in Berkshire to find out how they were proposing to respond, except for West Berkshire who have implemented an enhancement of 8.33% to all overtime, no other local authority has a proposal at this time.

4.2 Option proposed

Calculating an enhancement

Calculating an enhancement for each employee within point 4 and 5 above would be an enormous administrative task. No weeks or months are the same and staff will drop in and out of the arrangements.

The following calculation could be applied to each piece of overtime irrespective of the job, grade or additional hours carried out:

4 weeks (statutory leave period) holiday divided by 48 weeks (being 52 weeks minus 4 weeks). The 4 weeks are excluded from the calculation as the worker would not be at work during those 4 weeks in order to accrue annual leave.

Payroll have calculated that for every pound of additional hours there is an entitlement to an extra 8.33% to take account of the requirements of the WTD.

The proposal is that the 8.33% enhancement is paid to those staff that fall within points 4 and 5 above whenever they carry out standby and overtime - calculated at approximately £26,800 per annum going forward.

The Council has consulted with the Joint Trade Unions on the legislation and the impact on Reading, giving consideration to the challenging budget position and agreement has been reached, subject to endorsement by this committee, that, the enhancement is paid with effect from 1 July 2016 to those areas covered in points 4 and 5 above in the established risks and that there will be no back payments.

4.3 Other options considered

The Council considered other options as follows:

1. That the 8.33% enhancement is paid to all staff within points 1 to 5 above whenever they carry out standby and overtime - calculated at approximately £130,522 per annum going forward.
2. That the Council consult/negotiate with the Joint Trade Unions on the legislation and its impact at Reading and try to reach one of the following options:
 - a. That for those staff who qualify for the enhancement, a back payment is made from 1 July 2015, back two years.
 - b. That a smaller monetary award is made recognising the legislation, but wrapped up in a collective agreement going forward to pay the enhanced rate - entering into settlement agreements with all parties.

5. **FINANCIAL IMPLICATIONS**

There are financial implications for the proposals. Each Directorate will need to take this into account within their existing budgets when approving any overtime. Additional payments are being monitored by CMT/DMTs and services are being asked to consider how alternative methods of service delivery could be introduced, to minimise the financial impact that the enhancement has as well as trying to reduce the amount of the overtime undertaken.

6. **LEGAL IMPLICATIONS**

These are contained within the report.

7. EQUALITY IMPACT ASSESSMENT

- 7.1 An EIA has been completed to accompany this report, see Appendix 1, but there will not be a need to introduce any mitigating measures. The decision to apply an enhancement will be determined by staff carrying out the overtime based on availability and suitability to perform the role, managers will ensure that overtime opportunities are offered across teams with budget availability and as such would not have a differential impact on: racial groups; gender; people with disabilities; people of a particular sexual orientation; people due to their age; people due to their religious belief.

8. BACKGROUND PAPERS

- 8.1 Appendices:
- Appendix 1 - Equality Impact Assessment



APPENDIX 1 Equality Impact Assessment
Holiday Pay Enhancement

Name of proposal/activity/policy to be assessed

Holiday pay enhancement

Directorate: Corporate Support Services

Service: Human Resources

Name and job title of person doing the assessment

Name: Denise Burston

Job Title: HR Partner

Date of assessment: 6 June 2016

Scope your proposal

What is the aim of your policy or new service/what changes are you proposing?

To introduce an enhancement to be added to ad-hoc overtime to recognise the case law surrounding holiday pay.

Who will benefit from this proposal and how?

All employees who carry out ad-hoc overtime that is not related to standby/call-out arrangements will have a 8.33% enhancement added to their overtime payments.

What outcomes does the change aim to achieve and for whom?

The addition of the enhancement recognises the case law surrounding holiday pay and fulfils the legal obligation in this area. The employees who undertake the additional work can receive the enhancement as part of their normal pay.

Who are the main stakeholders and what do they want?

The main stakeholders are the staff they carry out the additional work and they will want to ensure that they receive any enhancement they are due.

Assess whether an EqIA is Relevant

How does your proposal relate to eliminating discrimination; promoting equality of opportunity; promoting good community relations?

Do you have evidence or reason to believe that some (racial, disability, gender, sexuality, age and religious belief) groups may be affected differently than others? (Think about your monitoring information, research, national data/reports etc.)

No - services should ensure that opportunities to carry out additional work are offered to all the appropriate staff within the area.

Is there already public concern about potentially discriminatory practices/impact or could there be? Think about your complaints, consultation, and feedback.

No

If the answer is Yes to any of the above you need to do an Equality Impact Assessment.

If No you **MUST** complete this statement

An Equality Impact Assessment is not relevant because: The decision to apply an enhancement to ad-hoc overtime payments will be made across the Council and not as a result of one individual and as such would not have a differential impact on: racial groups; gender; people with disabilities; people of a particular sexual orientation; people due to their age; people due to their religious belief.

Signed Denise Burston

Date 6 June 2016

Signed (Warren King)

Date 6 October 2016

