

TRAFFORD COUNCIL

Report to: Employment Committee
Date: 2 July 2018
Report for: Information
Report of: Sara Saleh, Interim HR Director

Report Title

Holiday pay for additional remuneration

Recommendations

That the content of this report is noted.

Relationship to Policy Framework/Corporate Priorities	These proposals align with the council's Corporate Priorities in respect to 'Low Council Tax and Value for Money' and 'Reshaping Trafford Council'.
Financial	There is a financial impact which will be approximately £69k per annum and one off back pay in the year 2018/19 of up to £69k.
Legal Implications:	Case law is such that we now have to ensure that pay for annual leave reflects 'regular and normal pay' and so we must implement enhanced payment for annual leave where appropriate.
Equality/Diversity Implications	None
Sustainability Implications	None
Staffing/E-Government/Asset Management Implications	We need to ensure that we pay staff appropriately as not doing so could risk losing staff to organisations who do make these payments.
Risk Management Implications	See Legal Implications section.
Health & Wellbeing Implications	None
Health and Safety Implications	None

1. Executive Summary

- 1.1 Successive case law over recent years has concluded that holiday pay for the 20 statutory days of annual leave should reflect 'regular and normal pay'. This means that there is a requirement to enhance pay when leave is taken to reflect overtime, additional hours, sleep-ins and; standby/on-call undertaken.
- 1.2 A GM task and finish group was set up to explore the issues/implications surrounding payments to employees whilst on holiday; with a view to gaining some consistency of approach when tackling the issues within each Council. The group has explored several options and sought legal advice from NWEO and the LGA. They have agreed that the fairest and most practical solution is

to add a percentage enhancement to relevant payments. The Council proposes that we add a percentage based on taking 20 days statutory leave, divided into 261 available working days giving 7.66%.

- 1.3 It is estimated that the cost of these additional payments will be in the region of £69k per annum with a one-off back pay liability of up to £69k.
- 1.4 It is recommended that we implement the percentage payments in August 2018 with back-pay to follow, following negotiation and agreement with the unions.

2. Background

- 2.1 Currently staff receive annual leave entitlement which is dependent on their length of service and seniority. If they work additional hours or overtime they don't receive any extra leave for this additional work. Further to case law many years ago, staff who work on a casual basis, receive additional pay which is incorporated into their hourly rate, instead of being paid for specified dates on which they might take leave. This takes the form of 'rolled-up' holiday pay, i.e. their hourly rate is enhanced by 12.66%.
- 2.2 There have been a number of tribunal cases over recent years which have concluded that employees should not suffer a detriment in pay whilst on holiday, which might deter them from taking holidays, linked to the requirement for rest under the European Working Time Directive. The rulings mean that holiday pay (for the 20 statutory days' leave) should reflect 'regular and normal pay'. The cases include:
 - Lock v British Gas (commission)
 - Patterson v CBC (voluntary overtime)
 - Flowers and others v EEAT (non-guaranteed overtime)
 - Williams and others v BA (expenses)
 - Dudley MBC v Willetts and others (regular and settled voluntary overtime, call out allowances, out of hours payments, related expenses – remuneration normally paid)
- 2.3 The more recent case above of Dudley MBC v Willetts concluded that 'regular and settled' voluntary overtime is now to be calculated as part of holiday pay and will include call-out allowances, out of hours payments and other such related expenses as are considered a 'systemic component of remuneration that is usually or normally paid'. Because of this ruling we now need to take action and provide holiday pay for certain work.

3 GM position

- 3.1 A task and finish group was established in March 2018 (Oldham, Bury, Rochdale, Stockport, Salford, Bolton, Tameside, Wigan, Trafford and Blackpool). The group's remit was to explore the issues/implications surrounding payments to employees whilst on holiday; with a view to gaining

some consistency of approach when tackling the issues within each Council. The group reports in to the GMCA Heads of HR/OD.

- 3.2 Prior to the ruling that voluntary overtime and other payments should be factored into holiday pay, some Councils had applied holiday payments for contractual overtime. Since this ruling, the majority of GM authorities had started to explore the issues, however with no commitment around how they would implement, except for a couple who had progressed further.
- 3.3 One applied enhanced holiday pay in January 2018 and backdated payments to April 2017 (the beginning of the financial year within which the payments were implemented). Their system for payment is based on actually looking at when each employee takes the first 20 days of their leave (statutory entitlement) and taking the average pay over the 3 months prior to each period of leave being taken to enhance pay during the period of leave. The feasibility of this depends on the functionality of the HR/Payroll system and could be administratively burdensome. Making the back-payments could also involve a large manual task.
- 3.4 Another Council are near the end of their negotiations with trade unions with the plan of applying an enhancement of 7.66% to relevant payments with back-pay being considered.
- 3.5 The group have discussed different options for payment and based on the benefits and risks of these options, have agreed that the best approach is to add a percentage enhancement to relevant payments. There are different methodologies for calculating the percentage dependent on the number of available working days being used. Trafford Council is taking the approach that the calculation is based on taking 20 days statutory leave, divided into 261 available working days giving 7.66%, however other Councils may use a different percentage.
- 3.6 There are some risks around the approach of applying rolled up holiday pay, as technically it isn't compliant, as the payment should be made when the holiday is taken. However some of the other options which are also fairly easier to administer aren't compliant such as making a lump sum payment once or twice a year. However we have had rolled-up holiday pay for casuals in place for a long time, which technically isn't compliant and there hasn't been any issue or challenge raised to date and is a practice used by many organisations.
- 3.7 The payments in scope for the percentage enhancement are: overtime; additional hours; sleep-ins, and; standby/on-call. Although current case law states that payments must be sufficiently 'regular and settled' to require inclusion in holiday pay and so we will be paying to some employees who don't meet this threshold, case law may develop further to require that we pay an enhancement for any payments regardless of regularity. Therefore by taking this approach we are future-proofing. Also there is an argument that all staff who undertake these additional commitments should receive payments

which incorporate an element for annual leave, regardless of regularity if we want an equitable approach.

- 3.8 The group has also considered the issue of back-pay and have concluded that automatic back pay will apply from the start of the financial year in which the payments commence.

4. Local implementation

- 4.1 We plan to implement the option agreed by the AGMA task and finish group from August 2018 or as soon as possible after this date. This means adding an enhancement of 7.66% on all relevant elements (to include overtime, additional hours, sleep-ins and standby/on-call, however all other elements will be considered to ensure there are no others which should be in scope). This means that whenever staff receive payment for any of these extra commitments they will receive an additional amount to compensate them for the statutory annual leave entitlement.
- 4.2 We will commence discussions with the Trade Unions on the plan to implement including the proposal to back-pay to April 2018 and how we make these payments and to whom.
- 4.3 As we prepare for implementation a communications plan will be agreed for staff so they understand what the enhanced payment is for.

5. Cost

- 5.1 Approximate costings have been undertaken based on historical payments of the allowances which are currently identified as being in scope. The estimated cost per annum including on-costs breaks down as follows:

○ Additional hours and overtime	£56,500
○ Sleep-ins	£10,700
○ Standby/on-call	£2,000
○ Total	£69,200

- 5.2 The year on year cost is likely to be in the region of £69k, however there will also be back pay costs in 2018 which could be up to approximately £69k.

6. Conclusion

- 6.1 Case law has developed over the past few years around the requirement to give additional payment when an employee takes annual leave, when staff have variable earnings because of payments in addition to their basic salary.
- 6.2 The Council must respond to this, as not doing so would leave us open to tribunal claims and could also affect recruitment and retention if other authorities are making payments and we aren't.

6.3 Employment Committee is recommended to note the content of this report.