

DERBYSHIRE COUNTY COUNCIL

CABINET

22nd November 2016

Report of the Strategic Director of Corporate Resources

CHANGES TO THE CALCULATION OF NORMAL HOLIDAY PAY

1 Purpose of the Report

To approve introduction of a new framework agreement for the calculation and payment of “normal holiday” pay for employees subject to Derbyshire Package terms and conditions including schools support staff.

2 Information and Analysis

Over the past few years there has been a large amount of litigation in respect of the appropriate way to calculate holiday pay and which elements of pay should be included in the calculations. A number of recent judgments have provided some clarification in respect of the elements of pay which should be included such as overtime and unsocial hours enhancements but have left other questions such as the appropriate reference period unanswered.

A recent Court of Appeal decision in the field of holiday pay (*Lock and Another v British Gas trading*) did not provide the clarification many commentators had envisaged and is now itself the subject of an appeal to the Supreme Court and consequently the legal landscape in this area remains somewhat unsettled.

The delays in resolving the litigation in this area mean that it is no longer appropriate to delay tackling the Council's calculation of holiday pay and ensure that its payment calculations and related criteria are revised to reflect the additional pay components and improved entitlements.

Following joint discussions undertaken through the Council's CJC consultation machinery with all constituent trade unions a revised framework agreement which better reflects the revised legal requirements are set out at **Appendix 1**.

In developing the framework consideration has been given to the business administration impacts of the provisions adopted as well as the need to satisfy the statutory requirements stipulated under the Employment Rights Act (ERA) 1996 and associated regulations. In particular the framework contains a process whereby individuals can 'opt out' of the framework (option 2) if they consider that its provisions result in them receiving less than their statutory entitlement.

Those employees who are of the opinion that the provisions applied under the annual average arrangements outlined under Option 1 in the framework, are less favourable than their entitlement would have been if their pay calculation had been carried out in accordance with the formula in the ERA, can opt out and elect for a payment based on the statutory formula, for employees with no normal working hours this would be based upon relevant earnings in the 12 week period worked immediately prior to the leave being taken.

The Deduction from Wages (Limitation) Regulations 2014 apply to any claims presented after 1 July 2015, these regulations amend the provisions of the Employment Rights Act and the Working Time Regulations to limit the period of time over which an Employment Tribunal may consider any deduction from wages claim based upon a failure to pay appropriate levels of holiday pay. Following joint consultations with the recognised trade unions it is proposed that those individuals affected on initial introduction of the agreement will receive twice the annual value based on the 2015 / 16 earnings, which in effect represents 12 months retrospection. It is proposed that this will be paid in one sum at the same time as the initial payment.

It is acknowledged that the case law surrounding normal holiday pay entitlements and also the United Kingdom's decision to leave the European Union may lead to further clarification of legal requirements in due course. It is therefore proposed that the framework agreement is subject to annual joint review to ensure that the terms of the agreement reflect current regulations and minimum statutory provisions.

3 Financial Considerations

Based on the current workforce and value of earnings during the 2015-16 financial year the annual costs of normal holiday pay as detailed

under the above framework have been calculated at £465,000 and are distributed across departments as shown in the table below:

| Department | Employee Numbers | Number of full time equivalents | Additional Normal Annual Holiday Pay Value £ | Average per Employee £ |
|--|-------------------------|--|---|-------------------------------|
| Adult Care | 2,395 | 1,186.56 | £125,414.72 | £52.37 |
| Chief Executives Office | 41 | 39.16 | £3,120.25 | £76.10 |
| Childrens Services | 856 | 552.45 | £81,809.23 | £95.57 |
| Corporate Resources | 820 | 629.09 | £143,089.08 | £174.50 |
| Economy Transport & Communities | 391 | 331.84 | £111,812.08 | £285.96 |
| Grand Total | 4,503 | 2,739.10 | £465,245.37 | £103.32 |

It is acknowledged that the value of normal holiday pay will vary year on year to reflect fluctuations in service need and will be influenced to a considerable extent by the severity of the winter.

A proportion of the costs of holiday pay will relate to staff whose costs are covered by external income and therefore the ongoing cost to council budgets will be lower than the figure calculated above. However, all of the one off cost of £465,000 for 12 months back pay will be met from an earmarked reserve held specifically for the purposes of meeting these costs. Ongoing annual costs, including the 2016/17 payments, will be met from departmental revenue budgets.

4 Legal Considerations

Specialist Counsel has been consulted who has confirmed that the revised framework agreement adequately reflects the current legal position.

5 Equality of Opportunity Considerations

An equality assessment has been undertaken of the impact of the payment of normal holiday pay including additional hours worked by part-time staff up to full time equivalent and those elements of pay specifically specified in the framework at Appendix 1.

The additional hours worked by part-time staff up to the full time equivalent (fte) 37 hours per week do fall under the terms of the normal holiday pay criteria but are currently paid separately and given that these are arrangements with which staff are currently familiar it is proposed to continue paying under existing arrangements. An analysis of the distribution of costs by department, gender, ethnicity, disability is shown at **Appendix 2**.

Based on the 4503 employees who currently benefit from the framework the analysis indicates that, including the £688K currently paid to part-time staff for additional hours worked over contract up to full time equivalent (37 hours), the proportionate gender split of the workforce is 69.5% female / 30.5% male with a respective split in total payment values of £787K (68.1%) female and £368K male (31.9%). This indicates a very high degree of correlation between the proportionate split in the total value of payments between the numbers of female and male workers.

The analysis would therefore suggest that there is no disproportionate impact in the value of payments across those employee groups that have protected characteristics.

6 Social Values

The adoption of these arrangements will provide for holiday pay based on normal actual earnings which reflect additional hours, overtime and other enhancements as stipulated in **Appendix 1**. Given the group affected comprise a large proportion of low paid and part-time (predominantly female) groups, the new scheme will enhance earnings within the local community and contribute to a stronger economy with less reliance on welfare and benefits.

7 Other Considerations

In preparing this report the relevance of the following factors has been considered: prevention of crime and disorder, environmental, health, property and transport.

8 Key Decision

Yes

9 Call-In

Is it required that call-in be waived in respect of the decisions proposed in the report?

No

10 Background Papers

The file is held in the HR Division, County Hall, Matlock.

11 Officer's Recommendations

That Cabinet approve:

1. the normal holiday pay framework as set out in **Appendix 1** and the related report, on the basis that joint collective agreement is achieved with the recognised trade unions;
2. 12 months retrospective payment for those individuals affected on initial introduction of the framework agreement;
3. a joint review of the framework agreement should be undertaken periodically, initially annually, to reflect any changes in case law and / or statutory requirements / regulations.

Judith Greenhalgh
Strategic Director of Corporate Resources

**FRAMEWORK AGREEMENT FOR THE CALCULATION OF NORMAL
HOLIDAY PAY**

1. Normal holiday pay will be calculated in respect of a total of 20 days annual leave (as stipulated under the European Directive relating to minimum annual leave entitlement) and 8 statutory bank holidays and will reflect the following components of pay in addition to normal basic pay:
 - All additional earnings received in respect of:
 - All overtime (including guaranteed, contractual and voluntary);
 - All enhancements received in relation to unsocial evening, weekend and bank holiday working;
 - Standby and sleep in duty allowances;
 - Minimum recall to work allowances and letting payments;
 - All travel time (not expenses) paid from home to first duty and from last duty home.
 - The basic pay rate applicable including pay protection, acting up or temporary promotion payments applicable over the annual reference period.
 - The additional earnings for each separate occupation where multiple employments are held by one individual.
2. Employees will have an option of a calculation based on actual earnings over the previous year expressed as an annual value (Option 1) or a calculation based on the previous 12 week period worked immediately prior to the leave period (Option 2) as detailed below:

**Option 1
Annual Calculation**

The current year normal holiday pay value will be:

- Calculated annually after May pay day each year, which allows for late entry of additional hours, allowances etc. and the related payment in arrears to be processed.

- Calculated to include all additional overtime hours worked, allowances and enhancements earned over the previous financial year.
- Adjusted to deduct any allowances already paid (on account of the fact they have been hard wired into SAP) in respect of annual leave previously taken during 2015 /16 and any subsequent leave year and thus avoid double payment.
- Expressed as an annual value which will be converted into average daily normal holiday pay earnings in accordance with the standard payment days formula applied to normal earnings.
- Pro-rata'd to reflect payment days (including variations for term time only contracts dependent upon the number of weeks actually worked) and part-time hours (proportion of 37) in accordance with the existing formula's applied to basic pay.
- Paid in monthly payments (2.33 days per month) as from the June payslip up to the following March each year, where the total annual value of the payment is more than £25. The first June payment to include payment for April and May also, thus equating to a value of three monthly payments. The current analysis based on the 2015 / 16 financial year suggests there are 2300 employees with a value in excess of £25.
- Paid as a one off annual payment in the June payslip where the total annual value is £25 or less. The current analysis based on the 2015 / 16 financial year suggests there are 2200 employees with a value of £25 or less.

Option 2 **Statutory calculation**

Those employees who are of the opinion that the provisions applied under the annual average arrangements outlined under Option 1 above, are less favourable than their entitlement would have been if their pay calculation had been carried out in accordance with the formula in the Employment Rights Act, can opt out and elect for a payment based on their statutory entitlement. For employees with no normal working hours

this would be based upon the 12 week period worked immediately prior to leave being taken, as set out below.

- A calculation based on relevant earnings (as set out in paragraph 1. above) over the previous 12 week period worked immediately prior to the leave being taken, for the first 20 days leave in the leave year (pro-rata for part-time staff).

The option chosen whether annual average or previous 12 week calculation, will apply for the duration of that leave year. Individuals will not be able to opt back into the annual framework or the 12 week average until the annual re-calculation / notification process, when those affected will be asked to indicate their preference for the coming year.

3. The existing annual leave arrangements in respect of payment of normal contract hours, any accrued hours payments for additional working up to full-time equivalent (37 hours per week), together with any “overall / tool” and first aid allowance payments made whilst on leave will continue in accordance with existing arrangements and are therefore excluded from the terms and provisions detailed above. The normal holiday pay provisions set out in this framework do therefore relate to an additional value that reflects other regular earnings received that are not included in the existing annual leave and accrued leave payment provisions.
4. Relief employees will also continue to receive payment of leave provisions (including annual leave and bank holidays) in accordance with existing arrangements, recognising that relief contract arrangements are currently the subject of a separate joint review. It is anticipated this will result in the introduction of an average guaranteed contract hours offer for those individuals who currently have no contractual hours guarantee. At the point a minimum contractual hour’s guarantee is accepted the individual concerned will be transferred to these arrangements and the framework provisions outlined in this document will be applied.
5. The agreement will be effective from 1 April 2016, and will apply to those employees actually in post at the date agreement is reached, with the first additional leave payment being based on the value of earnings received in the 2015 /16 financial year. The timing of the first payment will be dependent upon the date agreement is reached, resolution of the payment and associated communication processes and will include all

previous months in the current financial year. For example, payment in November 2016 would include a value of 8 months (April to November 2016 inclusive).

Any employees who opt for the 12 week calculation will receive a payment based on the first 20 days leave taken in the current leave year and in the 2015 / 16 leave year.

6. New starters will be paid their additional normal annual holiday pay payment in their first June pay following their appointment and their payment will include the part year entitlement in addition to their first full year entitlement. Both payments will be based on their additional earnings accrued under the above criteria for the first part year period and will be pro-rata'd to a full year for the first full year payment.

Any new employees who opt for the 12 week calculation will receive a payment based on the first 20 days leave (or proportion thereof) taken in the leave year in which they commence.

7. Employees who leave during the year will be entitled to receipt of normal annual holiday payment for the period up to the date of leaving and the fact that payments are made monthly will mean that no overpayments should occur, provided that the leaver notification is actioned timely by the manager. No recovery will be made in respect of payments that do not exceed an annual value of £25.

Any new employees who opt for the 12 week calculation will receive a payment based on the first 20 days leave (or proportion thereof) taken in the leave year in which they leave their employment.

Holiday Pay by Department & Gender for 2015/16

CONTROLLED

Appendix 2

| | Count of Personnel number | | | Sum of wte | | | Sum of holiday pay calculation £ | | | Average Per Employee | | |
|--------------------------------|---------------------------|------|--------|------------|---------|---------|----------------------------------|-------------|-------------|----------------------|---------|--------|
| Row Labels | ALL | Male | Female | ALL | Male | Female | ALL | Male | Female | ALL | Male | Female |
| Adult Care | 2395 | 208 | 2187 | 1186.56 | 106.63 | 1079.94 | £125,414.72 | £17,811.89 | £107,602.83 | £52.37 | £85.63 | £49.20 |
| Chief Executives Office | 41 | 17 | 24 | 39.16 | 16.47 | 22.68 | £3,120.25 | £1,571.82 | £1,548.43 | £76.10 | £92.46 | £64.52 |
| Childrens Services | 856 | 253 | 603 | 552.45 | 165.02 | 387.43 | £81,809.23 | £33,336.88 | £48,472.35 | £95.57 | £131.77 | £80.39 |
| Corporate Resources | 820 | 597 | 223 | 629.09 | 501.23 | 127.86 | £143,089.08 | £134,007.97 | £9,081.11 | £174.50 | £224.47 | £40.72 |
| Economy Transport &Communities | 391 | 294 | 97 | 331.84 | 272.85 | 58.99 | £111,812.08 | £107,868.12 | £3,943.96 | £285.96 | £366.90 | £40.66 |
| Grand Total | 4503 | 1369 | 3134 | 2739.10 | 1062.20 | 1676.90 | £465,245.37 | £294,596.68 | £170,648.69 | £103.32 | £215.19 | £54.45 |

NOTES:
"Count of Personnel number" and "Sum of wte" figures only relate to staff in receipt of holiday pay

Holiday Pay by Department & Disability for 2015/16

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| | Count of Personnel number | | | | Sum of wte | | | | Sum of holiday pay calculation £ | | | | Average Per Employee | | | |
|--------------------------------|---------------------------|------------|---------------|-----------|------------|------------|---------------|-----------|----------------------------------|------------|---------------|-----------|----------------------|------------|---------------|-----------|
| Row Labels | ALL | Disability | No Disability | Not Known | ALL | Disability | No Disability | Not Known | ALL | Disability | No Disability | Not Known | ALL | Disability | No Disability | Not Known |
| Adult Care | 2395 | 53 | 2341 | 1 | 1186.56 | 25.33 | 1160.23 | 1.00 | £125,414.72 | £2,324.70 | £123,090.02 | £0.00 | £52.37 | £43.86 | £52.58 | £0.00 |
| Chief Executives Office | 41 | 3 | 38 | | 39.16 | 2.60 | 36.56 | | £3,120.25 | £202.45 | £2,917.80 | | £76.10 | £67.48 | £76.78 | |
| Childrens Services | 856 | 13 | 843 | | 552.45 | 7.50 | 544.95 | | £81,809.23 | £460.16 | £81,349.07 | | £95.57 | £35.40 | £96.50 | |
| Corporate Resources | 820 | 19 | 801 | | 629.09 | 18.24 | 610.84 | | £143,089.08 | £3,421.17 | £139,667.91 | | £174.50 | £180.06 | £174.37 | |
| Economy Transport &Communities | 391 | 9 | 382 | | 331.84 | 7.38 | 324.46 | | £111,812.08 | £2,702.06 | £109,110.02 | | £285.96 | £300.23 | £285.63 | |
| Grand Total | 4503 | 97 | 4405 | 1 | 2739.10 | 61.05 | 2677.05 | 1.00 | £465,245.37 | £9,110.55 | £456,134.81 | £0.00 | £103.32 | £93.92 | £103.55 | £0.00 |

NOTES:

Holiday Pay by Department & Ethnicity for 2015/16

CONTROLLED

| | Count of Personnel number | | | | Sum of wte | | | | Sum of holiday pay calculation £ | | | | Average Per Employee | | | |
|--------------------------------|---------------------------|--------------------|-----------------------|-----------------------------|------------|--------------------|-----------------------|-----------------------------|----------------------------------|--------------------|-----------------------|-----------------------------|----------------------|--------------------|-----------------------|-----------------------------|
| Row Labels | ALL | White British ONLY | All Other Ethnicities | Prefer Not To Say/Not Known | ALL | White British ONLY | All Other Ethnicities | Prefer Not To Say/Not Known | ALL | White British ONLY | All Other Ethnicities | Prefer Not To Say/Not Known | ALL | White British ONLY | All Other Ethnicities | Prefer Not To Say/Not Known |
| Adult Care | 2395 | 2257 | 119 | 19 | 1186.56 | 1124.97 | 51.75 | 9.85 | £125,414.72 | £115,686.81 | £8,748.57 | £979.35 | £52.37 | £51.26 | £73.52 | £51.54 |
| Chief Executives Office | 41 | 39 | 2 | | 39.16 | 37.68 | 1.47 | | £3,120.25 | £3,100.89 | £19.36 | | £76.10 | £79.51 | £9.68 | |
| Childrens Services | 856 | 782 | 47 | 27 | 552.45 | 511.30 | 26.42 | 14.73 | £81,809.23 | £73,952.95 | £4,812.96 | £3,043.32 | £95.57 | £94.57 | £102.40 | £112.72 |
| Corporate Resources | 820 | 794 | 13 | 13 | 629.09 | 610.08 | 11.22 | 7.78 | £143,089.08 | £141,103.45 | £1,223.45 | £762.17 | £174.50 | £177.71 | £94.11 | £58.63 |
| Economy Transport &Communities | 391 | 381 | 6 | 4 | 331.84 | 326.96 | 4.88 | 0.00 | £111,812.08 | £111,578.69 | £198.84 | £34.56 | £285.96 | £292.86 | £33.14 | £8.64 |
| Grand Total | 4503 | 4253 | 187 | 63 | 2739.10 | 2611.00 | 95.75 | 32.36 | £465,245.37 | £445,422.79 | £15,003.17 | £4,819.41 | £103.32 | £104.73 | £80.23 | £76.50 |

NOTES:
"Count of Personnel number" and "Sum of wte" figures only relate to staff in receipt of holiday pay

Accrued Leave Pay by Department & Gender for 2015/16

CONTROLLED

| | Count of Personnel number | | | Sum of wte | | | Sum of Accrued Leave pay calculation £ | | | Average Per Employee | | |
|--------------------------------|---------------------------|------|--------|------------|--------|---------|--|------------|-------------|----------------------|---------|---------|
| Row Labels | ALL | Male | Female | ALL | Male | Female | ALL | Male | Female | ALL | Male | Female |
| Adult Care | 2057 | 139 | 1918 | 1061.48 | 74.15 | 987.33 | £463,165.16 | £29,007.95 | £434,157.21 | £225.17 | £208.69 | £226.36 |
| Chief Executives Office | 12 | 1 | 11 | 6.66 | 0.47 | 6.18 | £1,400.93 | £52.59 | £1,348.34 | £116.74 | £52.59 | £122.58 |
| Childrens Services | 1920 | 142 | 1778 | 809.41 | 33.60 | 775.81 | £154,853.49 | £18,063.25 | £136,790.24 | £80.65 | £127.21 | £76.93 |
| Corporate Resources | 597 | 207 | 390 | 219.42 | 90.18 | 129.24 | £38,709.98 | £20,242.96 | £18,467.02 | £64.84 | £97.79 | £47.35 |
| Economy Transport &Communities | 412 | 71 | 341 | 103.02 | 16.65 | 86.37 | £30,444.47 | £5,339.43 | £25,105.04 | £73.89 | £75.20 | £73.62 |
| Grand Total | 4998 | 560 | 4438 | 2199.99 | 215.05 | 1984.94 | £688,574.03 | £72,706.18 | £615,867.85 | £137.77 | £129.83 | £138.77 |

NOTES:
"Count of Personnel number" and "Sum of wte" figures only relate to staff in receipt of Accrued Leave pay