

ABERDEEN CITY COUNCIL

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COMMITTEE	Finance Policy and Resources
DATE	4 <sup>th</sup> December 2014
DIRECTOR	Director of Corporate Governance
TITLE OF REPORT	Holiday Pay - Legal Issue
REPORT NUMBER	CG/14/154
CHECKLIST COMPLETED	Yes

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1. PURPOSE OF REPORT

To advise the Committee of developments in case law regarding the calculation of holiday payments.

2. RECOMMENDATION(S)

It is recommended that the Committee delegate authority to the Chief Executive and the Convener and Vice Convener of Finance Policy and Resources to approve required amendments to the method of calculating holiday pay, including approval of the additional costs associated with that change and any required retrospective payments.

3. FINANCIAL IMPLICATIONS

The full implications of the recent Employment Appeal Tribunal judgement are still to be established. It is currently projected that paying additional holiday pay in accordance with that judgement will add up to £440,000 to the Council's annual pay bill. These costs will be covered from reserves in 2013/14 and built into base budgets for future years

In addition there are potential costs associated with making payments in settlement of any associated historical claim. However, with the legal judgement being open to interpretation it is not possible to determine the duration of the backdating of this award and as such cannot give an indication of costs.

#### 4. OTHER IMPLICATIONS

None

#### 5. BACKGROUND/MAIN ISSUES

##### Calculation of Holiday Pay

The Employment Appeal Tribunal on 4<sup>th</sup> November 2014 handed down a judgement on three appeals cases involving Bear Scotland Ltd., Hertel (UK) Ltd. and Amec Group Ltd. That appeal related to a European Court of Justice ruling in the case of Lock v British Gas Trading.

The earlier Lock case looked at whether commission payments should be taken into account when calculating holiday pay and concluded that a worker should receive their **normal week's pay** when on holiday.

The Court stated that it was for the UK Employment Tribunal to assess whether or not, on the basis of an average over a representative reference period under UK law, the UK's methods of calculating holiday pay for a worker such as Mr Lock achieve the objectives of the Working Time Directive. It was hoped that the outcomes in the appeal cases mentioned above would then clarify that issue.

The Employment Appeals Tribunal judgement has confirmed that, for the 4 weeks of holiday derived from the Working Time Directive, holiday pay should be equivalent to the pay which a worker would normally receive when they are at work. That judgement may now be subject to further appeal, in which case a final judgement may not be available until 2017. There may indeed be new legislation introduced, to clarify the position.

Importantly, it is a requirement that the pay is "normally" received by a worker. Payments must therefore be made over a sufficient period of time to justify the label "normal".

The EAT detailed which additional pay elements must be included in the calculation of holiday pay. Those were:

- (1) Pay for "non-guaranteed overtime" (i.e. work which a worker if requested is obliged to perform). This must be distinguished from "voluntary overtime" (i.e. which the employer asks the worker to do but where the worker is not contractually obliged to take it)
- (2) Payments for travel time which exceed expenses incurred and amount to taxable remuneration.

In addition to the above two types of payments considered by the EAT, there are many other payments received by workers for tasks which they are required to perform under their contract which will also require

to be included in the calculation of holiday pay. In our own case, payments for standby duty or call-out charges may meet the criteria.

In general overtime working in Aberdeen City Council is voluntary. Contracts do not require employees to work overtime when it is offered. Nevertheless, it will be necessary to review and amend the calculation of holiday pay in light of the Employment Appeal Tribunal judgement.

This issue will apply to both public and private sector employers, and has had, and is likely to have, a huge implication for all employers

### Historic Liability

Prior to the Employment Appeal Tribunal judgement it was feared that liability for historic claims for additional holiday pay may extend as far back as 1998 i.e. the date the Working Time Regulation came in to operation in the UK. The Employment Appeal Tribunal however has concluded that a series of backdated payments will be broken should there be a period of three months between payments. Accordingly, if there is a period of three months between holiday payments then this will break the backdated pay that a claimant is entitled to.

### Legal Advice

The currently available legal advice recommends:

- Offering to pay those claimants who have a genuine prospect of success a settlement in line with the recent judgement as full and final settlement of any claim.
- Paying the correct amount of holiday pay going forward.

### Conclusion

There is still some dubiety about which pay elements need to be included in the calculation and about how to decide what a “normal” week’s pay is. As a result further detailed discussions with Trades Union representatives will be required to clarify those points, with a view to settlement, to provide a definitive value for expenditure

## 6. IMPACT

This issue arises as a result of UK and European legislation. The costs arising will place an additional strain on budgets and are therefore likely impact negatively on both Corporate and Service plans.

This report is unlikely to be of particular interest to the public. There is potentially a significant positive impact on any employees who work

compulsory, guaranteed overtime or earn any other additional amounts which will be included in holiday pay calculation going forwards.

7. MANAGEMENT OF RISK

Failure to adjust the method of calculating holiday pay will expose this Council to a risk of Illegal Deduction of Wages claims raised through Employment Tribunal. A number of claims have already been lodged by Trades Unions on behalf of certain groups of Council employees, and such claims are sisted meantime pending the outcome of the appeals mentioned above. When the decisions currently being appealed are considered by higher courts, there is a risk that there may be decisions adverse to the employers, adding factors in addition to those already identified. It would seem in the interest of both sides that an early settlement, bringing some degree of certainty to the situation, should be reached.

8. BACKGROUND PAPERS

None

9. REPORT AUTHOR DETAILS

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