



Mayor and Cabinet

Report title: Settlement of claims relating to holiday pay for schools and Council employees employed on a part year basis

Date: 19 May 2021

Key decision: Yes

Class: Part 1.

Ward(s) affected: All

Contributors:

Pinaki Ghoshal, Executive Director for Children and Young People

Kathy Freeman, Executive Director for Corporate Resources

Outline and recommendations

This report sets out the proposed terms and financial implications of a collective agreement with the trade unions in respect of compensation payments to employees in schools and the Council. These stem from changes to the formula used to calculate pro rata entitlement to annual leave for employees working part year.

Mayor and Cabinet are recommended to:

- Agree the terms of the collective agreement as set out in summary in this report.
- Delegate authority to the Head of Human Resources, in consultation with the Executive Director for Children and Young People and the Director of Law, Governance and HR, to implement the collective agreement and to settle any further matters arising including from claims made.
- Delegate authority to the Executive Director for Corporate Resources, in consultation with the Executive Director for Children and Young People to agree the basis of shared funding arrangements between the Council and schools, via the Schools' Forum.
- Delegate authority to the Executive Director of Corporate Resources and the Monitoring officer to enter into any loan agreements to support those schools requiring financial or cash flow support as a direct result of backdated Term Time only claim costs.

Timeline of engagement and decision-making

There have been no previous formal decisions relating to this matter.

Schools have been consulted on the proposed approach through the Schools Forum at their meetings in January and May 2021.

Summary

- 1.1 The Council has received claims for compensation because of changes in the calculation of holiday pay from Trade Unions representing employees who work on a part year basis, normally referred to as “term time only”. This affects approximately 3,000 support staff in schools, in addition to 207 Council current employees. The claims also extend to former schools and Council employees.

Recommendations

- 2.1 Mayor and Cabinet are recommended to:
- Agree the terms of the collective agreement as set out in summary in this report.
 - Delegate authority to the Head of Human Resources, in consultation with the Executive Director for Children and Young People and the Director of Law, Governance and HR, to implement the collective agreement and to settle any further matters arising including from claims made.
 - Delegate authority to the Executive Director for Corporate Resources in consultation with the Executive Director for Children and Young People to agree the basis of shared funding arrangements between the Council and schools, via the Schools’ Forum.
 - Delegate authority to the Executive Director of Corporate Resources to enter into any loan agreements to support those schools requiring financial or cash flow support as a direct result of backdated Term Time only claim costs.

Policy Context

- 3.1 The proposed approach is in accordance with National Joint Council Guidance on pay and conditions of term time only employees.

Background

- 4.1 The Council has received claims for holiday pay from Trade Unions representing employees who work on a part year basis, normally referred to as “term time only”. The majority of these employees are approximately 3,000 support staff in schools, in addition to 207 Council employees. The claims also extend to former schools and Council employees. The roles in scope of the claims are typically those at the lower end of the pay structure and the employees are mainly female.

Is this report easy to understand?

Please give us feedback so we can improve.

Go to <https://lewisham.gov.uk/contact-us/send-us-feedback-on-our-reports>

- 4.2 These employees have a pro rata entitlement to annual leave that is reflected in their pay. Historically there have been a range of different formulae applied by different organisations in order to calculate that pro rata entitlement. The formula that has been applied by the Council was created by the Inner London Education Authority. It was already in place for monthly paid staff when Education transferred to Local Authorities in 1990.
- 4.3 In January 2019 the National Joint Council (NJC) published joint guidance on the pay and conditions of term time only (TTO) employees with the aim of ensuring that TTO employees are treated no less favourably than those on all year round contracts. The Trade Unions have been pursuing claims at a local level across the country for the national guidance to be applied. As part of those claims they have also been seeking compensation for their members, both in terms of back pay and to reflect the impact on pension entitlement over a number of years. In addition, they have asked for the terms of the collective agreement to enable former employees to claim compensation. These claims also follow a change in the legal position as to the apportionment of holiday pay arising from case law.
- 4.4 In Lewisham, the GMB union has lodged a small number of Employment Tribunal claims and Unison have submitted a collective grievance. This report sets out the position reached with the Trade Unions in response to their claims for back pay and compensation for loss of pension entitlement.

5 Revised pay calculation

- 5.1 The Council has up until now calculated TTO holiday entitlement as:
- the number of weeks worked, divided by 52.143 (which represents full year full time weeks worked plus annual leave and bank holidays), multiplied by a full year annual leave entitlement
 - Bank holidays are not included in this calculation and are added to the pro rata entitlement
- 5.2 The national guidance sets out a different approach which takes as its starting point the number of weeks that a full-time employee is required to work to accrue their leave entitlement. It is based on:
- The number of weeks worked, divided by the number of weeks actually worked by a full-time employee with the same leave entitlement, multiplied by a full year annual leave entitlement
- 5.3 The Council has implemented the revised approach to the calculation of annual leave for term time only staff with effect from 1 April 2021, as set out in the national guidance.

6 Proposed Collective Agreement

- 6.1 Following detailed discussions with the Trade Unions, agreement in principle has been reached without prejudice on the following aspects of a potential Collective Agreement:
- a) Back pay to 1 January 2015. This to be calculated on pay and contractual hours as of 31 March 2021. Exceptionally, where an individual's salary has been reduced as a consequence of a restructure in the previous 2 years, they will be able to request a recalculation of the payment based on actual pay history for the full back pay period and use whichever calculation is the most beneficial to the employee.

Is this report easy to understand?

Please give us feedback so we can improve.

Go to <https://lewisham.gov.uk/contact-us/send-us-feedback-on-our-reports>

- b) A lump sum payment of £50 for each full year of Local Government Pension Scheme (LGPS) membership prior to March 2014 when the LGPS changed from a final salary scheme to a career average scheme.
- c) Former employees employed March 2018- March 2021 may, on request claim a compensatory payment in respect of their employment during that period. In addition, any staff who were made redundant after 1 January 2015 may also claim for the period of their employment from 1 January 2015 until the date their employment terminated on grounds of redundancy. Such payments will be calculated on the basis of the pay and contractual hours of the individual on the date of termination of their appointment.

There will be a need to have a process under which employees will be consulted with by unions to inform them of the deal. Individual employees will then need to sign ACAS agreements to accept the deal. This process is likely to take 3-6 months.

- 6.2 The Trade Unions have pursued similar claims against other Councils, including Greenwich, Brighton and Lambeth and the elements of the proposed collective agreement are similar to those already agreed by those Councils.
- 6.3 The claims rely on the Part Time Workers Regulations 2000 which state that a part-time worker has the right not to be treated less favourably than the employer treats a comparable full-time worker. A small number of claims have been lodged with the Employment Tribunal. If the dispute is not settled further cases would be lodged and progressed which would be both time and resource intensive. If those claims were successful, there is the potential for higher sums to be awarded. Settlement also avoids the risk of significant legal costs. The terms of the proposed settlement recognises the avoidance of legal costs for both sides and avoids the risks of costly litigation. Litigation would also bring with it employee relations issues in schools as well as reputational issues for both schools and the Council.

7 Financial Implications

- 7.1 To establish some financial context an exercise was carried out to establish the potential cost implication. This exercise was on data available for 2019/20 and where data was not available e.g schools that do not use Lewisham as a payroll provider, an estimate of a similar size school was made.
- 7.2 The exercise noted an annual liability of circa £715k (including employer's costs). The proposed collective agreement will require a recalculation of the estimated costs, which is likely to increase the annual cost position due to pay awards applied (circa 5%), moving the average cost position to potentially to circa £750k. The proposal is based on back pay of 6 years and 3 months (potential period of compensation) resulting in a total of circa £4.7m, of this around £4.4m is expected to relate to schools, based on the figures used in 2019/20 to calculate the liability.
- 7.3 There is likely to be further costs to this figure including:
 - Implementation costs are currently estimated to cost the Council approximately £200k. The process, including leading up to and finalising individual settlements with staff - is expected to be highly labour intensive and will require some additional
 - staffing resource to undertake the detailed work, which is likely to take 3-6 months.
 - The report also refers to pension costs, depending on the numbers of staff within the pension scheme this is estimated to be circa £600k
 - Contingency –recognising that there may be some staff who have left Lewisham

Is this report easy to understand?

Please give us feedback so we can improve.

Go to <https://lewisham.gov.uk/contact-us/send-us-feedback-on-our-reports>

but will be eligible for a claim plus those who may request a historical calculation due to previous reductions in their contractual hours, it would be appropriate to allow a small contingency of approximately £250k-£500k.

7.7 Overall the total cost of the Term Time Only could potentially be in the region of circa £5m to £6m. The estimated costs are based on the best information available to us at the time of writing this report and the final cost will be determined when the individual claims are processed. The funding assumptions consider 50% to be funded from the Council's central budgets and 50% from Schools.

7.8 With regards Schools, various discussions have taken place, including an extraordinary Forum meeting on the 6th May 2021. Schools forum supported the following decisions in principle

a) Nursery Schools – 100% of cost to be met from with resources available with no expectation on the Nursery Schools

b) Special Schools and PRU – Recognition that due to the operational nature of these schools which requires a higher reliance on staffing that is likely to be in scope, that 80% should be supported with schools meeting 20% of their individual liability.

Re-prioritisation of resources – Schools forum agreed to the reprioritisation of resources of circa £1m towards reducing the burden on individual schools. The reallocation of the £1m Growth Fund decreases the direct contribution from schools to an average of 27% towards the back pay costs.

7.9 The table below shows an illustration of the liability including the application of potential resources (incorporating the feedback from Schools forum). As stated previously, the actual position is likely to change as that is based on March 2021 and also for any staff that have left but could potentially be entitled to compensation. The table is for indicative purposes and refers only to the pay element of the settlement. Final costs will include the pension element of circa £600K. However, the table provides direction for agreeing principles in respect of Liability.

Table to Illustrate Potential Split of Liability of Back Pay (excluding Pension Liability and contingency)

Phase	Total Potential Liability	Central Funds		£1m re priorities of growth and falling rolls funds		Schools	
		£	%	£	%	£	%
Primary	£2,896,123	£1,259,254	43%	£791,278	27%	£845,591	29%
Secondary	£583,191	£253,575	43%	£159,339	27%	£170,276	29%
All-through	£180,743	£78,588	43%	£49,383	27%	£52,772	29%
PRU	£58,271	£46,617	80%	0	0	£11,654	20%
Special	£607,896	£486,317	80%	0	0	£121,579	20%
Nursery	£77,522	£77,522	100%	0	0	£0	0%
Total potential Liability for School Based Staff	£4,403,747	£2,201,874	50%	£1,000,000	23%	£1,201,874	27%
LA Direct							
Plus Central Staff	£243,856	£243,856					
Plus administration	£200,000	£200,000					
Total Potential Liability	£4,847,603	£2,645,729	55%	£1,000,000	21%	£1,201,874	25%

7.10 It was also agreed with Schools forum, that officers will undertake a programme of

Is this report easy to understand?

Please give us feedback so we can improve.

Go to <https://lewisham.gov.uk/contact-us/send-us-feedback-on-our-reports>

engagement with Headteachers and Bursars to ensure that schools are effectively communicated and aware of the likely liability levels so that the liability can be considered as part of their imminent budget setting process.

- 7.11 The impact on schools will vary depending on their overall financial position. Discussions with the Executive Director of Corporate Resources has noted that support in the form of loan agreements can be offered to schools where necessary to support those schools experiencing cash flow difficulties or are currently in financial deficit position.

8 Legal implications

- 8.1 Under the Council's Scheme of Delegation in the Constitution, matters are reserved to members which in the opinion of the relevant Executive Director, the Chief Executive or the Director of Law, Governance and HR should be more appropriately dealt with by them. This is because of the scale of the decision, its potential impact, the sensitivity of the decision, or for any other reason. Accordingly, the decisions referred to in this report are sought from Mayor and Cabinet.
- 8.2 The proposal in this report for the proposed collective agreement will entail expenditure estimated in total at circa £4.7 million as set out in section 7 of the report. However settlements reached with staff individually will be much less than that and will fall within officers' delegated limits as set out in the Constitution Scheme of Delegation and the Directorate Scheme of delegation for Children and Young Peoples. The relevant delegated limits are: The Schools HR business manager has authority to settle individual claims up to £5,000; and the Director of Corporate Resources has delegated authority under the Scheme of Delegation to settle claims over £ 5000 on advice from Legal Services and HR.
- 8.3 Decisions which result in the Council expenditure of over £500,000 are key decisions. The proposal in the report is therefore a key decision and should go in the Forward Plan.
- 8.4 The rationale for the proposed collective agreement is set out in the body of the report at paragraphs 6.2 and 6.3.
- 8.5 In terms of the proposed settlements with individual staff, referenced at paragraph 6.1 of the report: these will need to be agreed individually, with ACAS Form COT3 agreements being completed in order for them to be legally binding.
- 8.6 The Equality Act 2010 (the Act) introduced a new public sector equality duty (the equality duty or the duty). It covers the following nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. In summary, the Council must, in the exercise of its functions, have due regard to the need to:
- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act
 - advance equality of opportunity between people who share a protected characteristic and those who do not
 - foster good relations between people who share a protected characteristic and those who do not.
- 8.7 The duty continues to be a "have regard duty", and the weight to be attached to it is a matter for the Mayor, bearing in mind the issues of relevance and proportionality. It is

Is this report easy to understand?

Please give us feedback so we can improve.

Go to <https://lewisham.gov.uk/contact-us/send-us-feedback-on-our-reports>

not an absolute requirement to eliminate unlawful discrimination, advance equality of opportunity or foster good relations.

8.8 The Equality and Human Rights Commission has issued Technical Guidance on the Public Sector Equality Duty and statutory guidance entitled “Equality Act 2010 Services, Public Functions & Associations Statutory Code of Practice”. The Council must have regard to the statutory code in so far as it relates to the duty and attention is drawn to Chapter 11 which deals particularly with the equality duty. The Technical Guidance also covers what public authorities should do to meet the duty. This includes steps that are legally required, as well as recommended actions. The guidance does not have statutory force but nonetheless regard should be had to it, as failure to do so without compelling reason would be of evidential value. The statutory code and the technical guidance can be found at: <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice-and-technical-guidance/>.

8.9 The Equality and Human Rights Commission (EHRC) has previously issued five guides for public authorities in England giving advice on the equality duty:

1. The essential guide to the public sector equality duty
2. Meeting the equality duty in policy and decision-making
3. Engagement and the equality duty
4. Equality objectives and the equality duty
5. Equality information and the equality duty.

8.10 The essential guide provides an overview of the equality duty requirements including the general equality duty, the specific duties and who they apply to. It covers what public authorities should do to meet the duty including steps that are legally required, as well as recommended actions. The other four documents provide more detailed guidance on key areas and advice on good practice. Further information and resources are available at: <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-the-equality-duty/>

9 Equalities implications

9.1 This report addresses a cohort of staff who share protected characteristics covered by the Equality Act 2010 and the Working Time Regulations 1998 as the majority of employees on part year contracts are female. Implementation of the recommendations would positively support the Council’s position and address any perceived less favourable treatment of this cohort, compared to the general employee group.

10 Climate change and environmental implications

Not relevant.

11 Crime and disorder implications

Not relevant

12 Health and wellbeing implications

Not relevant

Is this report easy to understand?

Please give us feedback so we can improve.

Go to <https://lewisham.gov.uk/contact-us/send-us-feedback-on-our-reports>

13 Background papers

None

14 Glossary

Not relevant

15 Report author and contact

Author

Pinaki Ghosal, Executive Director for Children and Young People E-mail:

Pinaki.Ghosal@lewisham.gov.uk

Kathy Freeman, Executive Director for Corporate Resources E-mail:

Kathy.Freeman@lewisham.gov.uk

Financial Implications

Mala Dadlani, Interim Group Finance Manager, CYP Financial Services E-mail:

Malasona.Dadlani@lewisham.gov.uk

Legal Implications

Stephanie Fleck, Principal Lawyer (Ref JW) E-mail : stephanie.fleck@lewisham.gov.uk

Is this report easy to understand?

Please give us feedback so we can improve.

Go to <https://lewisham.gov.uk/contact-us/send-us-feedback-on-our-reports>