

**Personnel Committee – 2<sup>nd</sup> December 2019**

**Changes to term time only pay calculations**

**1. Purpose of the report**

To provide an executive summary regarding changes to Term Time only employees National Joint Council Part 4 guidance, and seek agreement from Personnel Committee to implement the recommendations outlined in section 2 of the report. This report was considered and the recommendations endorsed by CMT 07 November 2019.

**2. Recommendations**

- 2.1 To use of the NJC advisory model for the calculation of term time only employees fraction replacing the existing model that has been in place since 2012.
- 2.2 That the revised model of calculation be back dated to an effective date of the 01 April 2019 in line with the NJC guidance being updated (published during March 2019).
- 2.3 That schools be encouraged to adopt the change as the majority still recognise the Green Book, however the decision to implement and associated risk of not implementing the advisory model would be that of the individual schools.
- 2.4 That any monies owing to a leaving employee be calculated at the point of leaving (using designated individual leave years) and paid accordingly.

**3. Aim**

- 3.1 To ensure a consistent and transparent approach for term time only employees employed by Walsall Council within corporate directorates and council schools.
- 3.2 To ensure these employees are treated no less favourably than employees on all year round contracts.
- 3.3 To ensure the council is applying the NJC Part 4 guidance in respect of term time only employees pay calculations, therefore reducing risks of any legal challenge.

**4. Know**

- 4.1 As part of the 2016-18 pay deal the National Joint Council (NJC) for Local Government Services agreed to conduct a review of term time working to deliver fair, consistent and transparent contracts for school support staff and term time only staff not employed in schools, as it was recognised that there was a range of methods used for calculating pay and no national formula.

- 4.2 Following the review revised guidance has been incorporated in to Part 4.12 of the NJC National Agreement, known as the 'Green Book', updated March 2019. The NJC new guidance covers the following areas;
- Advisory model calculation (pay and annual leave)
  - Calculation of redundancy pay
  - Designation of annual leave
  - Termination of employment/contract changes part way through a year
- 4.3 The NJC has recommended the employers review their term time only working practices, pay and leave calculations to ensure that they are consistent with the principles outline in the Part 4 guidance, so that term time only employees are not disadvantaged when compared to full year employees. The guidance states this model should not supersede local arrangements where these are more favourable.
- 4.4 Recently there was a Court of Appeal case (*The Harper Trust v Brazel*) which concerned the interpretation of Working Time Regulations and the pro-rating annual leave for a term time worker. The NJC acknowledged that the model is subject to current interpretation of the Working Time Regulations and that it may be subject to change dependent on case law. The current advice from the Local Government Association and West Midlands Employers is to ensure term time calculations are at least as favourable as that advised in the Green Book model.
- 4.5 In addition, Unison raised a tribunal claim against the Royal Borough of Greenwich Council concerning their method of pro-rating leave which used 52 weeks in the same manner as Walsall's current method. Although this was settled out of court in November 2018.

#### **Term time Calculation (pay and leave)**

- 4.6 The current term time calculation used by Walsall Council, which has been the method used since 1 April 2012, appears less favourable than the NJC advisory model in Part 4 of the National Agreement (Appendix 1).

For example based on a grade 2 Cleaner, with more than 5 years' service (i.e. 38 days FTE annual leave plus bank holidays), working term time (39 weeks)

- Current Walsall Council term time fraction calculation results in the employee being paid for 44.684 weeks (39 working weeks plus pro-rata leave entitlement 5.684 weeks).
  - The NJC advisory model term time fraction calculates the employee should be paid 45.654 weeks (39 working weeks plus pro-rata leave 6.654 weeks).
- 4.7 The difference relates to how the pro-rata leave entitlement is calculated. It would appear the current Walsall model has calculated pro-rata leave on the weeks worked, but does not factor in leave that is accrued whilst on leave, which on average equates to around one week less per year.
- 4.8 Therefore, the council's current model is less favourable than the NJC advisory model, giving fewer paid weeks and as a consequence a lower

annual salary. The advice from the National Joint Committee is to use the advisory model calculation where local arrangements are less favourable.

### **Calculation of redundancy pay**

- 4.9 The council's redundancy pay calculation uses the term time calculation which is currently less favourable than the NJC advisory model and therefore changing the term time calculation to bring it in line with the NJC advisory model will also impact on the level of redundancy payment.

### **Termination of employment or contractual change part way through the year / Designation of annual leave**

- 4.10 Part 4 of the Agreement also states that if an employee terminates their employment part way through a year it will be necessary to determine whether they have been over or underpaid. It is recommended that this calculation also takes place where there is contractual change (in either the rate of pay or leave entitlement) part way through a year.
- 4.11 Current custom and practice when someone terminates part way through a year or has contract changes no calculation is undertaken to determine if they are under/over paid. It is advised that this should be implemented regardless of the change to the term time fraction.
- 4.12 In order to make this calculation the annual leave year needs to be determined. This may be the anniversary of the employee's start date (like the rest of the organisation) or a fixed date for all e.g. 1 September.
- 4.13 Either way dependent on when employees start and leaves a calculation will need to be done at either the start of the employment to pro rata (if a fixed date is used unless they start on the selected fixed date) or on leaving (if an employee's start date is used) or both at start and on leaving (if a fixed date is used and the employee does not complete a full year). A consistent approach would be to designate the leave year in line with the employee's start date as is currently the approach taken with non-term time employment, this will mean that a calculation takes place by the manager at the point of the employee leaving (supported by HR advice and guidance if required) and payroll is instructed accordingly as part of the normal leavers process using the relevant forms.

### **Research**

- 4.14 A benchmarking exercise has been undertaken with other local authorities in the West Midlands region. From those who responded (who had term time only staff) the majority said that they believe they are already more favourable than the NJC advisory model.
- 4.15 The only element of concern with other authorities was with the recalculation each time someone's contract changes, as the calculation is manual and time consuming, and the volume of contract changes make

this prohibitive. However, the other authorities did comment they do recalculate when someone leaves part way through a year to see if they are owed any money.

## Council Corporate Plan Priorities

- 4.16 This proposal support the delivery of the council's corporate plan, specifically the priority; internal focus.

## Risk Management

- 4.17 N/A

## Financial Implications

- 4.18 The estimated additional cost (for 2019/20) corporately and to schools where Walsall Council is the employer is as follows (assuming implementation is agreed from 1 April 2019), however there will be ongoing additional costs per year when using the formula going forward;

	Basic Pay	Pension	National Insurance	Total
<b>Corporate</b>	£68,330	£8,586	£4,053	<b>£80,969</b>
<b>Schools (where WMBC is the employer)</b>	£571,979	£93,113	£68,221	<b>£733,312</b>

- 4.19 As at August 2019 there were 513 corporate term time only contracts, with the majority of these in Resources and Transformation in Facilities Management (cleaning / catering / caretaking services and school crossing patrol), working in a traded service where future costs could be passed to the customer dependent upon their contract, however any back pay may need to be funded corporately.

- 4.20 Corporate term time contracts (including those that are as a result of a flexible working request) broken down by directorate are;

Directorate	Headcount	FTE posts	Additional cost
<b>Adults</b>	Nil	Nil	£0
<b>Children's Service</b>	31	23.62	£14,522
<b>Economy &amp; Environment</b>	21	2.20	£1,599
<b>Resources &amp; Transformation</b>	461	142.01	£64,848

- 4.21 As at August 2019 there were 2,570 term time only contracts on NJC terms and Conditions in schools where Walsall Council is the employer (i.e. Community and Voluntary Controlled schools). Schools would be

expected to fund the additional costs from the schools' DSG budget, however they will not have budgeted for this in 2019/20, which could have financial implications for the schools.

### **Legal Implications**

- 4.22 In August 2019, the Court of Appeal handed down its judgment in Harpur Trust – v – Brazel. The case concerned holiday for a term time only school teacher. The court adjudged that workers are entitled to a minimum of 28 days annual leave to be paid at the rate of a weeks' pay or, where a worker works irregular hours, pay must be calculated on the basis of the preceding 12 weeks average of hours worked. Employees have the right to proportionate payment for annual leave entitlement under the Working Time Regulations 1998.
- 4.23 Failure on the part of the council to adopt an approach consistent with the judgment (and as set out in the NJC advisory model) could result in claims for unlawful deductions from wages as well as claims of less favourable treatment under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and the Equality Act 2010 given that the majority of people who work term time hours only are female.
- 4.24 If a case was made to an Employment Tribunal there is a possibility of back pay up to two years in relation to unlawful deduction of wages.

### **Procurement Implications / Social Value**

- 4.25 N/A

### **Property Implications**

- 4.26 N/A

### **Health & Wellbeing Implications**

- 4.27 N/A

### **Staffing Implications**

- 4.28 Implementing the advisory model would positively impact upon those employees who work term time only by increasing the payments they receive through the annual leave and redundancy calculation and ensuring they receive all monies owing on leaving for any outstanding leave.

### **Reducing Inequalities**

- 4.29 95% of term time workers are female. Implementation of the advisory model would positively support and address any perceived less favourable treatment of part time workers and protected characteristic covered by the Equality Act.

## **5. Decision**

- 5.1 A decision is required to determine the methodology for calculating the term time only fraction;

Option 1) Continue to calculate using current methodology – this option is not recommended due to the risks outlined in this report.

Option 2) Adopt the NJC advisory model – this option is recommended in order to reduce legal risk and ensure inequalities are being addressed.

- 5.2 If option 2 above is approved, a decision is required regarding the effective date;

Option 2a) implement (this would include back dating pay) from 1 April 2019, the rationale for this being that the advisory model was introduced in the revised Green Book published in March 2019 - this option is recommended.

Option 2b) implement from 1 September 2019, the rationale for this being the start of the academic year and following the Court of Appeal ruling on the Harper Trust v Brazel case in August 2019 – this option is not recommended as back pay claims might be sought particularly from the point the NJC guidance was updated.

- 5.3 If option 2 is approved, schools would be encouraged to adopt the change as the majority still recognise the Green Book, however the decision to implement and associated risk of not implementing the advisory model would be that of the individual schools.

- 5.4 Independent of the decision taken at 5.1 above, a decision is required to determine what should happen regarding any monies owing when an employee leaves part way through a year;

Option 3) any monies owing should be calculated and paid accordingly using a personalised leave year based on the employees start date – this option is recommended.

Option 4) any monies owing should be calculated and paid accordingly using a set leave year for all term time only employees (it would be assumed that this would be 1 September to fall in line with the academic year) – this option is not recommended.

Option 5) any monies owing are not calculated or paid – this option is not recommended.

## **6. Respond**

- 6.1 The adoption of the new NJC advisory model will be shared with trade union colleagues (via ERF) and those employees identified as term time only will be written to confirming their new term time fraction and annual pro-rata salary including effective date.

- 6.2 All relevant back pay will be calculated and paid and the new term time fraction will be used for all new contracts.

- 6.3 Council schools to be informed of the new term time calculation as this will impact on their budgets. The majority of non-council schools (Voluntary Aided, Foundation, Trust and Academies) that currently purchase a traded service from Walsall Council are on Green Book terms and conditions and use Walsall's current method of calculation. The council should advise the schools of the changes it intends to make to its model of calculation so that these schools can make a decision as the employer as to whether to move to the NJC advisory model. An advice note will be shared with schools and via the schools forum.
- 6.4 HR guidance and advice will be updated and communicated to ensure managers / HR / Payroll services are aware of their accountabilities in relation to calculating and instructing such payments to be made.

## **7. Review**

- 7.1 To review the National Agreement to ensure any further changes are considered. The NJC have said they are intending to update guidance on sickness and maternity, adoption, parental and shared parental leave and pay for term time only employees in due course.

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## Appendix 1 - Term Time Fraction Calculation Comparison

### Walsall Council calculation since April 2012

**Term time only calculation:**

Working weeks/52.143 weeks x FTE bank holidays/concessionary day = pro-rata Bank holiday entitlement

Working weeks/52.143 weeks x FTE days annual leave = pro –rata annual leave entitlement

Bank holiday proportion + Annual leave proportion + Working days = total paid days

Total paid days / 5 days = **total paid weeks**

**Example** (Grade 2 Cleaner, more than 5 years' service, working term time 39 weeks or 195 days)

39 weeks /52.143 weeks x 9 days = 6.731 days pro-rata Bank holiday entitlement

39 weeks/52.143 weeks x 29 days = 21.690 days pro-rata Annual leave entitlement

6.731 days + 21.690 days + 195 days = 223.421 total paid days

223.421 days / 5 days = 44.684 total paid weeks

### NJC Advisory Model

**Calculate annual leave accrued for each working day (FTE):**

365 days / 7 X 5 days = 260.71 maximum available days

260.71 – FTE days annual leave (inc bank holidays/concessionary day) = maximum working days

Annual Leave/maximum working days = days annual leave accrued each working day

**Term time only calculation:**

Working days x accrual per working day = days annual leave

Working days + days annual leave = total paid days

Total paid days / 5 days = **total paid weeks**

**Example** (Grade 2 Cleaner, more than 5 years' service, working term time 39 weeks or 195 days)

**Annual Leave Accrual (FTE):**

365 days / 7 x 5 days = 260.714 maximum available days

260.714 – 38 days leave = 222.714 maximum working days

38 days /222.714 days = 0.171 days annual leave accrued each working day

**Term time only calculation:**

195 x 0.171 = 33.271 days annual leave

195 days + 33.271 days = 228.271 total paid days

228.271 days / 5 days = 45.654 total paid weeks

**Salary calculation:**

(Contracted hours/37 hours) x (total paid weeks/52.143) x FTE salary = pro-rata salary