

Personnel Committee – 17 January 2022

Outstanding annual leave as a result of the COVID-19 pandemic

1. Purpose of the report

- 1.1 To seek authorisation to pay a proportion of outstanding annual leave where excessive annual leave exists due to it being difficult for employees to take during and as a result of the COVID-19 pandemic and which would continue to cause a business continuity issue moving forward.

2. Recommendations

- 2.1 PC are recommended to note the contents of the report, and to consider the proposed option detailed in section 5.1 following CMT's endorsement at its meeting of 13 January 2022.
- 2.2 PC are recommended to agree option 5.1.1 following CMT's endorsement at its meeting of 13 January 2022.

3. Aim

- 3.1 To give due consideration to the size and scope of the issue caused by council employees having excessive amounts of annual leave entitlement outstanding as a result of the COVID-19 pandemic which if taken in their current leave year would cause a business continuity issue.
- 3.2 To consider approval of a one off payment in lieu of such outstanding annual leave entitlement (as referred to in 3.1 above) in order to ensure employees are appropriately compensated for not taking all of their contractual leave and to mitigate risks / impact that taking such leave would have on service delivery and business continuity, including ongoing effects of compounded carryover of leave in future years.

4. Know

Context

- 4.1 Working Time Regulations (WTR) require all employees to have a minimum of 5.6 weeks annual leave, this equates to 28 days (pro-rata) (and includes bank holidays). The regulations require this leave to be taken and there is no facility within the regulations for employees to waive the right to take this statutory leave entitlement. The Working Time Directive states that leave should be taken as the need to rest is important and gives no provision to pay up the leave.
- 4.2 In line with the WTR the proposal detailed in this report therefore refers to paying up in lieu of outstanding contractual leave, which is over and above the statutory leave required to be taken by the regulations (i.e. 28 days

pro-rata including bank holidays) with the exception of and subject to the exceptional circumstance provision detailed in section 4.9 of this report.

- 4.3 Based on a recent Director survey approximately* 17 employees were identified as having an excessive** amount of annual leave remaining (collectively c.437 FTE days) that due to business need or service pressure would cause a business continuity issue if they were to take all of the remaining leave before the expiry of their personal leave year.

*It should be noted the Director survey returned a 93% response rate and did not include any excessive outstanding leave Executive Directors may have accrued (93% rate equates to 14 out of 15 Directors and therefore covers approximately 95% of the workforce (2,900 - employees). It should also be noted that whilst Directors were asked for information on excessive leave amounts that would cause a business continuity issue if taken – the potential for payment of such outstanding leave was not raised at the point of surveying. Due to this approximation it should be noted that the proposed financial implications detailed in the relevant section of this report are only an estimate and may fluctuate should the proposal be implemented.

**An excessive amount of annual leave is defined as outstanding leave that would total more than the council's permitted carryover leave amount in exceptional circumstances in line with the council's annual leave guidelines (which states up to a maximum of one third of an employee's leave entitlement can be carried over into their next leave year). Excessive leave due to other factors (non Covid-19 related i.e. periods of sickness absence / maternity leave) have been excluded.

Council Corporate Plan Priorities

- 4.4 This proposal supports the delivery of the Council's Corporate Plan, specifically the corporate priority of 'Internal Focus' to ensure that all Council services are efficient and effective, which includes the use and operation of annual leave to support the delivery of these services.

Risk Management

- 4.5 If option 5.1.1 is approved (to pay a proportion of outstanding leave), it is recommended that this should only apply in circumstances where employees would be demonstrably prevented from taking all of their contractual annual leave due to business continuity issues **and** where the leave that would be estimated to be outstanding at the end of the employees current leave year would be deemed excessive (i.e. in excess of the council's exceptional circumstance carryover limit of one third of their total leave entitlement). If at the expiry of the employees current leave year they are estimated to have one third or less of their leave remaining then they will not be eligible for payment and instead should either schedule the leave to be taken in the current leave year with management agreement or in line with the annual leave guidelines agree a carryover amount with management agreement.

- 4.6 If option 5.1.1 is approved (to pay a proportion of outstanding *excessive* leave), this will help to support the council as part of business continuity planning to mitigate potential risks caused by staff shortages due to annual leave impacting on service delivery and quality.
- 4.7 If option 5.1.1 is approved (to pay a proportion of outstanding *excessive* leave), it is recommended that as a general rule employees should take (and schedule appropriately with management agreement) as a minimum their *statutory entitlement* in order to prevent contravening the WTR (refer to section 4.1 of this report), with the exception of and subject to the exceptional circumstance provision detailed in 4.9 of this report.
- 4.8 If option 5.1.1 is approved (to pay a proportion of outstanding *excessive* leave *above statutory entitlement*), it is recommended that a business case be submitted to demonstrate/evidence that the employee is being prevented from taking the outstanding leave and that this clearly explains why the leave cannot be taken and what business continuity implications/issues would be caused by not paying up the outstanding leave in lieu.

It is proposed that the business case be submitted at the discretion of the line manager, with Head of Service support (following consultation and agreement with the employee) and that the Executive Director (Resources and Transformation) in consultation with the Director of HR/OD and ABS approve a decision to pay. Any decisions to pay should be recorded on the business case submission, passed to payroll for a one-off payment and recorded on the individuals personnel file, with a central record of all one-off payments authorised being retained by the Executive Director (Resources & Transformation).

- 4.9 Where in very exceptional circumstances the employee meets all of the qualifying criteria, are paid in lieu for contractual leave over and above statutory, and there remains a significant major business continuity concern due to the role of the individual (where the business prevents them from taking their statutory leave entitlement), then a business case in accordance with 4.8 above may be submitted to the Executive Director (Resources and Transformation) in consultation with the Director of HR/OD and ABS to consider approval of payment. Any payments made in lieu of statutory leave should be made following agreement with the employee and the employee will be required to provide written consent of their agreement.

Financial Implications

- 4.10 Based on the returns from Directors, where Directors have indicated that leave outstanding is going to be difficult for certain employees to take and is in excess of the one third carryover limit, the estimated cost of paying this outstanding leave is approximately £125,000 (this excludes Executive Directors and is based on approximately 17 employees and outstanding leave of c.437 FTE days).

- 4.11 It should be noted that the £125,000 approximate cost outlined in 4.10 is likely to be underestimated, based on not all directors sending in a return, nor did all Directors include themselves in the returns (it is unknown if this is because Directors do not consider themselves to have any excessive outstanding leave or whether they did not consider including themselves in the return).
- 4.12 It should also be noted that the £125,000 approximate costs outlined in 4.10 is likely to be overestimated, based on the costings not differentiating between statutory leave untaken and non-statutory leave untaken, as this would be unknown until directors / service managers review leave on an individual basis to ascertain leave and bank holidays taken to date.
- 4.13 HR have calculated the estimated costs within the report based on basic salary only and given the range of caveats in the report could potentially be significantly higher. However it is also worth noting that appropriate challenge will be provided against all business case claims through the approval route so that only those who meet the qualifying criteria remain eligible to receive payment.
- 4.14 It is proposed that any increased costs associated will be funded by individual service areas budgets.

Legal Implications

- 4.15 The Working Time (Coronavirus) (Amendment) Regulations 2020 amends the Working Time Regulations 1998 to create a further exemption relating specifically to COVID-19. Where it is not reasonably practicable for a worker to take some, or all, of the holiday to which they are entitled due to the coronavirus, they have a right to carry the 4 weeks under regulation 13 into the next 2 leave years.

Procurement Implications/Social Value

- 4.16 N/A

Property Implications

- 4.17 N/A

Health and Wellbeing implications

- 4.18 By ensuring that the minimum provisions in the WTR are met (i.e. all statutory leave is taken) the council can protect employees by providing at least the legal minimum amount of leave, ensuring a supportive approach to health and wellbeing through the provision of appropriate rest and leave from work (as a minimum) even if the outstanding amounts are agreed to be paid in lieu, subject to the exceptional circumstance provision in 4.9 (which requires employee agreement as an additional safeguard).

Staffing implications

- 4.19 Line managers should discuss any potential business request to pay leave with the employee affected in the first instance before submitted any requests for approval to pay through to the Executive Director (Resources & Transformation).

Reducing Inequalities

- 4.20 N/A

Consultation

- 4.21 N/A

5. Decide

- 5.1 The proposed and recommended option is as follows:

- 5.1.1 To pay (as a one off agreement) outstanding annual leave that meets the following criteria:

- The leave is expected to be outstanding at the expiry of the employee's personal leave year due to work pressures associated with the Covid-19 pandemic having prevented the employee from taking their leave entitlement, **and**;
- All statutory minimum leave in line with WTR (refer to section 4.1 of this report), will be taken and cannot be paid in lieu (with the exception and subject to the exceptional circumstance criteria detailed in section 4.9 of this report), **and**;
- The estimated leave amount outstanding is *excessive*, which means it totals more than one third of the employee's overall leave entitlement (which can be permitted as carryover allowance in exceptional circumstances in line with the annual leave guidelines), **and**;
- The leave proposed to be paid cannot be scheduled in within the expiry of the employees personal leave year due to a demonstrable business continuity implication / issue.

Where line managers believe the above criteria are met, with the support of their Head of Service, and having discussed payment in lieu with the employee concerned, the line manager at their discretion may submit a business case for outstanding payment to be made to the Executive Director (Resources & Transformation) who following consultation with the Director of HR/OD and ABS will authorise accordingly any payment to be made.

- 5.2 PC are recommended to agree option 5.1.1.

6. Respond

- 6.1 Subject to approval of 5.1.1. HR will develop a business case template for the purpose of justifying and approving any requests. In addition HR will provide guidance and advice as necessary to managers, Heads of Service, Directors, Executive Directors and the Chief Executive/Leader to enable them to identify relevant employees, calculate appropriate leave eligible (appendix 1) for payment and provide support with the business case / approval process.

7. Review

- 7.1 The payment of outstanding leave will be a onetime offer in response to COVID-19 work pressures and once implemented, employees and managers will be encouraged/required to manage and schedule leave appropriately throughout the year to prevent re-occurrence of excessive annual leave build-up. The annual leave policy and guidance should be reviewed in accordance with promoting good management of annual leave and this will be reviewed at the next scheduled review cycle, currently 2022/23.

Author

Nicola Rickhuss
HR Manager – Strategy & Planning
✉ nicola.rickhuss@walsall.gov.uk

Appendix 1

The following guidelines and formula should be used for calculating eligible leave for payment

Quick formula/process for checking eligible leave for payment:

1. Outstanding leave* = Contractual leave – leave taken/scheduled (approved)
*Outstanding leave must be more than one third of contractual leave to progress a claim for payment
2. Statutory minimum check** = leave taken/scheduled (approved) + Bank Holidays in their leave year (either 9 or 10*** pro rata)
**This must total a minimum of 28 days (if below 28, leave should be booked/facilitated up to 28 days minimum – this includes bank holidays)
***There are normally 9 Bank Holidays (including the concessionary day) however there is an additional Bank Holiday on the 3rd June 2022 due to the Queen's Jubilee which may be applicable dependent on the employees personal leave year

Once point 1 and 2 above have been satisfied – all outstanding leave that an employee has been or will be prevented from taking due to business continuity issues in their current leave year is then eligible for payment.

Example (1)

(Contractual leave) 33 days – 18 (taken/scheduled) = 15 days (outstanding)

*15 days is above one third of contractual entitlement and so all 15 days are potentially eligible for payment.

(Taken/scheduled) 18 days + 10 B.H. = 28 days - statutory minimum met, therefore no further days need to be scheduled out of the remaining 15 days outstanding leave and all 15 days leave entitlement is eligible for payment.

Example (2)

(Contractual leave) 33 days – 12 (taken/scheduled) = 21 days (outstanding)

*21 days is above one third of contractual entitlement and so all 21 days are potentially eligible for payment.

(Taken/scheduled) 12 days + 10 B.H. = 22 days - statutory minimum not met, therefore a further 6 days (to make a minimum of 28 days) need to be scheduled as leave and deducted from the outstanding leave (21 days – 6 days) = 15 days outstanding leave eligible for payment.

Example (3)

(Contractual leave) 33 days – 23 (taken/scheduled) = 10 days (outstanding)

*10 days is less than one third of contractual entitlement and so outstanding leave is not eligible for payment, instead this may be carried over into the next years leave entitlement and scheduled in agreement with line managers.