

## **EMPLOYMENT MATTERS COMMITTEE**

**27 APRIL 2022**

### **TERM TIME ONLY PAY DISPUTE**

Report from: Samantha Beck-Farley, Chief Organisational Culture Officer  
Author: Nicola Smith, Deputy Head of HR (Strategic)

#### **Summary**

This paper outlines a current pay dispute relating to Term Time Only employees' holiday pay and the roll out of individual offers to compensate staff affected.

#### **1. Budget and policy framework**

- 1.1. This matter falls within council officer delegations regarding budgetary implications. Once the budget has been set at Full Council, service managers have responsibility for the day-to-day running of the service concerned and must do so in accordance with the constitution, paying particular regard to Chapter 4, Part 3, Budget and Policy Framework Rules.

#### **2. Background**

- 2.1 Medway Council introduced a new holiday pay calculation for TTO employees from 1<sup>st</sup> April 2020 in order to bring the local calculation in line with new national best practice as set out in National Joint Council (NJC) terms and conditions (known as the Green Book).
- 2.2 Following the introduction of the new calculation, two trade unions, Unison and GMB, lodged grievances against the council claiming that the pay calculations used for staff working TTO prior to April 2020 disadvantaged them when compared to all year-round staff.
- 2.3 Medway Council sought ACAS involvement and commenced negotiations with trade unions in May 2021 to try to resolve the dispute. A series of meetings were held and in September 2021 Medway Council presented a final employer offer to settle the claim.
- 2.4 Medway Council has offered the following in final settlement:
- Compensation equivalent to up to two weeks gross pay, for those eligible, dependant on length of service;

- The compensatory sum will be calculated using current rates of pay at time of payment;
- The compensatory sum will be based on working hours immediately prior to the new calculation being adopted on 1 April 2020;
- The compensatory sum will be subject to deductions for tax and National Insurance (NI) and will be pensionable for individuals currently participating in the pension scheme;

2.5 Beneficiaries must be in current employment with an appropriate employer such as the council, a Medway school or an academy trust and have been in employment in a TTO role at the point of cut off i.e. when the new rate was implemented, (on 1 April 2020.)

2.6 Various legislative frameworks would normally specify a limitation period for bringing claims for underpaid holiday of three months following any underpayment or change in calculation. However, in Medway ex-employees who were in post on 1 April 2020 may be entitled to claim compensation but they must have expressed an interest in doing so in writing by 31 March 2022. The cut off date was originally set as 31<sup>st</sup> December 2020 but was extended at the request of the trade unions in order to align with their consultations and ballots.

2.7 Medway Council employees will receive their offers of compensation in Summer 2022.

### 3. Advice and analysis

3.1 Medway Council currently has 22 centrally employed staff who are affected, the majority of whom are on Medpay terms and conditions. There are 17 community and voluntary controlled schools with an estimated 500 workers on Medway NJC terms and conditions who are affected. There is also one foundation (special) school that has around 80 workers who would be affected but it is not known how many workers in academies are affected as the council does not hold this data, however there are 73 academy schools in the Medway area and 10 voluntary aided schools.

3.2 In determining the final employer offer, Medway Council met with educational leaders across the sector and presented the various options. The view from the sector has been to fully support the Medway offer on the grounds of affordability and sustainability.

3.3 A Diversity Impact Assessment (DIA) is at Appendix A.

## 4. Risk management

Risk	Description	Action to avoid or mitigate risk	Risk rating
Industrial dispute	Potential industrial action if offer is not accepted	Individuals will be presented with details of their offer and given independent advice from ACAS so that they can make an informed choice	D3

## 5. Consultation

- 5.1 Many employees in schools and academies across Medway are affected by this dispute, and the council has worked with educational leaders from the outset to establish a collective approach.
- 5.2 Medway Council's offer has had the backing of employers across the Medway area who have agreed to mirror the council offer and roll it out to their workers. This approach reduces the administrative burden for both employers and trade unions and negates the need for individual trade union consultations with each employer. This approach has the support of ACAS, the trade unions and local employers.
- 5.3 The two trade unions have presented the employer final offer to their members. Unison consulted in the form of a written ballot whilst GMB held face to face meetings across schools and academies. GMB advised that 99% of the respondents met during the consultation wished to reject the employer offer whilst Unison's ballot response was 78% in favour of accepting the employer offer.
- 5.4 As employers are due to commence rolling out the Medway offer to individuals, GMB propose holding a further face to face consultative survey to identify whether there would be any interest in taking industrial action. If there is interest in pursuing industrial action then the GMB would have to undertake a formal written ballot in accordance with the relevant Code of Practice and legislation.

## 6. Financial implications

- 6.1 Compensation for Term Time Only (TTO) employees working directly for Medway Council will be met from current revenue budgets.
- 6.2 In accordance with current financial policy and conditions of the Designated Schools Grant, schools and academies will meet the compensatory costs for all eligible employees. This principle applies to all schools whether community, voluntary controlled, voluntary aided, foundation or academy trusts.

## 7. Legal implications

- 7.1 Many schools and academies across Medway have received Employment Tribunal claims (ET1's), including some community and voluntary controlled

schools. The Council would only be a co-respondent to community and voluntary controlled schools, should these claims proceed to an employment tribunal.

- 7.2 Should an individual wish to accept the compensatory offer they would be required to attend a webinar ran by ACAS and sign a COT3 agreement in full and final settlement. Individuals who are cited on a an ET1 claim will be required to have a 1:1 meeting with an ACAS conciliator/mediator before signing a COT3 agreement and if they wish to accept the compensatory amount any outstanding ET claim would need to be withdrawn.
- 7.3 It is not clear whether all ET claims will be eligible to be heard as many were out of time and the correct legislative requirements do not appear to have been followed in either the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 or in relation to procedures for claiming unpaid holiday back pay. However trade unions have cited other legislative frameworks that they consider may be relevant. Any claim that proceeds to an ET is likely to be a test case for this specific issue.

## 8. Recommendations

- 8.1 Members are asked to note the report.

### Lead officer contact

Nicola Smith, Deputy Head of HR (Strategic), Gun Wharf, Dock Road, Chatham, ME4 4TR. Tel: 01634 334095 E-mail: nicola.smith@medway.gov.uk.

### Appendices

Appendix A: Diversity Impact Assessment

### Background papers

None