

**TITLE OF REPORT: Term Time Only Non-Teaching Staff**

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**Purpose of the Report**

The purpose of this report is to inform Schools Forums of the implications of implementing the February 2019 amendment to Part 4 of the Green Book introducing guidance on the employment of term time only employees.

**Background**

Currently, holiday entitlement is calculated on a pro rata basis based on the number of hours and weeks an employee is required to work per year. As term-time only employees work 39 weeks per year, they only accrue holiday for these weeks. Therefore, they do not receive the statutory minimum of 5.6 weeks holiday per year that a full year employee accrues.

Recent caselaw (The Harper Trust v. Brazel) refers to a term-time only employee claiming that she must receive the statutory minimum holidays in accordance with the Working Time Regulations and the pro rata of holiday entitlement to 39 weeks is incorrect. The Court of Appeal agreed with the employee and stated that the Working Time Regulations do not provide for pro-rating of holiday for any employee who works part year.

This decision may be subject to a Supreme Court appeal, however to assess the potential implications of applying the case law to the Council's term-time only employees, the current position regarding term time only workers has been examined. Applying the case law would result in positively adjusting the pay for the majority of term-time only employees to account for the increase in holidays to the statutory minimum. Appendix 1 details estimated term-time only statistics.

Whilst technically the case law is applicable only to statutory holidays, to avoid creating an equal pay risk, the case law should be applied to contractual holiday entitlement, not just the statutory minimum. The impact will be a greater positive adjustment than that detailed in 6 above and will apply to all term-time only employees.

Currently, term-time only employees are paid for 39 weeks work plus a pro rata of their holiday entitlement, which is then equated over 12 months. This means they receive a reduced pay each month in order to receive pay over the 13 weeks of school closures. At present this is not adjusted when term-time only employees leave, join or have contractual changes that affect their annual leave entitlement during the year.

The Green Book Part 4 Guidance, which was revised in February 2019 provides a suggested calculation to be applied when term-time only employees leave or join during the year to ensure that they receive all monies (pay and holiday) owed to

them. In addition, it recommends that councils consider the impact of contractual changes affecting their annual leave accrual rate during the year.

HR Advice and Payroll have considered the guidance and the suggested calculation for leavers and joiners during the year in detail and have determined that this provides term-time only employees with an accurate payment for the work done and holidays accrued. Therefore, it is expected that the majority of term-time only employees leaving during the year will receive a payment on the ending of their contract for any underpayment of salary. In addition, it will allow the Council to recover any monies overpaid to a term-time only employee.

HR Advice and Payroll have applied the suggested Part 4 calculation to contractual changes during the year and have determined that this will continue to pay term-time only employees incorrectly. Therefore, it is recommended that when a term-time only employee has a contractual change affecting their annual leave accrual rate two calculations are undertaken at the date of change to ensure their pay is correct and there is no unlawful deduction of salary.

## **Proposal**

It is currently unclear if the case will progress to the Supreme Court, but the Council intends to make a provision in their 2019/20 Final Accounts for the potential cost of implanting the suggested Part 4 of the Green Book and the cost of backdating the changes to August 2017. The estimated cost to maintained schools is approximately £600K and HR Payroll are currently working on what the cost would be to Gateshead Academies funded from Gateshead Dedicated Schools Grant (DSG).

It is proposed that if the case does progress to the Supreme Court that the cost of the increase holiday pay and the effect of mid-year leaver and starters be funded from DSG reserves to reduce the impact on all schools and especially those schools that employ higher numbers of non-teaching term time only employee's which includes all Gateshead Special Schools. When the situation is crystalized, we will work closely with Gateshead Academies to ensure that DSG reserves are available to both maintained schools and academies to cover these costs.

## **Recommendations**

It is recommended that Schools Forum notes the contents of the report and that further reports will be brought to Schools Forum when it is known if the case goes to the Supreme Court.

## **For the following reasons:**

To inform Schools Forum of the current situation re term time only non-teaching staff, and to make Schools Forum aware of the possible call on DSG reserves.

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