

# SCHOOLS' FUNDING FORUM

<b>SUBJECT:</b>	Term Time – Back Pay
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<b>DATE:</b>	4 <sup>th</sup> December 2020
<b>FOR:</b>	Decision

## 1. Introduction

- 1.1 Kent County Council has spoken to the Forum on a number of occasions over the last year regarding changing the annual leave calculation for term time only staff and its implications. The Council provided a written update in July (as the Forum meeting was cancelled) and attended the last meeting of the Forum on the 17<sup>th</sup> September and provided a verbal update.
- 1.2 This paper provides full details of the background to the issue, along with details of the back-pay offer that has been made by the Council to the unions. This offer has been agreed in principle, but the unions want to understand how the costs associated with this offer will be funded before considering their full agreement.

## 2. Background

- 2.1 After a number of years reviewing the issue of term time only staff the National Joint Council (NJC) issued guidance in 2019 to assist local authorities in revising some perceived issues with the annual leave calculation for term time only staff. Having reviewed this guidance, the Council adjusted its calculation to mirror that in the NJC guidance and implemented it from 1 April 2020.
- 2.2 In light of the guidance and changes made by councils across the country, trades unions have made claims to a number of local authorities, who aren't part of the NJC bargaining group, claiming back pay for their members. The most notable of these authorities has been the London Borough of Greenwich who settled with the unions on 5 years and 3 months back pay, based on the amounts due between the differences in the two calculations.
- 2.3 The Council has been contacted by its recognised trades unions about coming to an agreement on back pay. The Authority has had a number of meetings with the unions on this matter, but no formal agreement has been reached to date. Negotiations are continuing. The Council also understands that the unions have contacted some academies, Foundation and Voluntary Aided schools regarding engaging on settling cases for the employees in those

schools. The next meeting with the unions is on the 8 December 2020 where it is intended to discuss the latest offer pertaining to back pay with a view, if possible, to agreeing a settlement. However, the success of this is potentially dependent on the decision of the Forum in relation to this paper.

- 2.4 In parallel with these negotiations the unions have canvassed members in schools encouraging them to contact the union about making a claim. ACAS have advised the Council that a significant number of claims have been lodged with the Employment Tribunal Service. During the negotiations the parties to the claims embarked on the early conciliation process, which is undertaken with a view to avoiding any claims being continued. No settlement was found during the set conciliation process but, as mentioned above, talks have continued.
- 2.5 If negotiations aren't successful the outcome will be that each claim will have to be heard and resolved on its merits. We are conscious of the financial risks associated with any success for claimants, in that they may secure up to six years back pay, which is why we continue to talk to the unions regarding the potential for managing the impact.
- 2.6 In terms of funding this issue we set out to the Forum various options that could be considered. The choices as we see them are:
- 1) individual schools fund from their bank accounts, or
  - 2) the local authority funds from the DSG reserve, or
  - 3) we look to top slice any potential headroom available within future year's schools' block allocations after fully meeting the mandatory requirements of the national funding formula.
- 2.7 The Council's preferred option is the use of the DSG reserve, even though it is well documented that this reserve is in deficit arising from the significant High Needs budget overspend over the last few years. However, the Council has undertaken an exercise to separate out the historical entries between High Needs and non-High Needs, which equates to approximately £9m surplus balance. This surplus could be used to fund the backpay costs rather than helping to fund the historic high needs deficit or other priorities. The attraction of this option is that it does not affect existing school budgets.
- 2.8 Utilising the non-High Needs surplus for this purpose would result in a more transparent overspend specific to High Needs which will be important when the Council develops its DSG deficit recovery plan. The Council remains of the view that a significant part of the solution to this accumulated deficit is through increases to the High Needs Block within the totality of the overall government published increases to the national Schools Budget.
- 2.8 The Forum supported the council's view that the DSG reserve should be used, and the option to top slice future DSG headroom should also be explored further. The Forum were not keen on funding these costs from individual school and academy bank accounts.
- 2.10 The Council has further considered option 3 to top slice any potential headroom available within future year's schools' block allocations and has come to the view that this is an unviable option for the following reasons:

- 1) The Council is already seeking to transfer 1% of the Schools' Block into the High Needs Block as set out in the school budget consultation which is due to end on 23 November. This transfer would need to increase to over 2% in order to fully cover the liability arising from this claim.
- 2) Any transfer over 0.5% is subject to Secretary of State approval, and our feedback from this years process suggest a transfer of over 2% is very unlikely to be approved.

### 3. The Offer

3.1 The back-pay offer that we have agreed in principle with the unions is as follows:

- **Employees with five years' service or more** – 4 years' worth of the difference between the leave calculation implemented on the 1 April 2020 and the calculation in place immediately before
- **Employees with fewer than five years' but more than two years' service**- 2 years' worth of the difference between the leave calculation implemented on the 1 April 2020 and the calculation in place immediately before
- **Employees with fewer than two years' service** – the difference between the leave calculation implemented on the 1 April 2020 and the calculation in place immediately before multiplied by their length of service in the qualifying role

3.2 The calculation will be based on the employee's actual salary at time of settlement and will be subject to employee national insurance and tax deductions, as applicable. Full employer on costs will be paid on the amount, which includes any employer pension contributions.

(Note: the cut off point for calculation of years' service is the 31 March 2020)

3.3 We can also confirm that the above offer applies to those people who formally lodged a qualifying claim but have subsequently left employment from the role that would have entitled them to a payment.

3.4 Any employee who accepts the offer will be doing so in the knowledge that it is in full and final settlement of any claims they may have made or intend to make and will be expected to sign an agreement to that effect.

3.5 Kent County Council has engaged ACAS to help manage the process, in relation to the Council's staff, voluntary schools and community schools, of ensuring that the payment and associated agreement with each employee are legally secure. The Authority has also secured the services of ACAS to work with those Academies, Voluntary Aided and Foundation who wish to use them to help manage the same process. As ACAS offer this as a free service it is the most cost efficient way of progressing these matters.

3.6 The Forum must also be advised that whilst we expect most employees to accept the offer, if agreed, it cannot be guaranteed that every employee will be happy with it and may pursue the back pay through the tribunal system. Kent County Council will manage this situation for those employees and schools where it is either the primary or co-respondent to the claim. Other employers will be in the position that they will need to manage the claim as they see fit

#### **4. Estimated Total Cost**

4.1 We estimate the total cost of this offer to be in the region of £12m based on the data we have available to us. It should be stressed that we do not have a complete set of data for all term time only staff in Kent schools and academies, and have therefore used the data we can access and extrapolate for missing schools and academies making a series of assumptions.

#### **5. Recommendation**

- 5.1 Members of the Forum are asked to approve the use of the DSG reserve for:
- a) reimbursing all maintained schools and academies for the total salary costs (pay and associated employer on-costs) associated with this back-pay settlement of all eligible staff. If schools and academies have already settled term time only back pay claims for their staff, the reimbursement would be capped at the offer in 3.1 above.
  - b) any additional administration costs incurred by the local authority in administering a) above. The Local Authority intends to keep this to an absolute minimum and redeploy existing resources wherever possible.