Dear Colleagues

**Important Information – calculation of leave and holiday pay – ‘Brazel’**

**Background**

You may be aware that there has been a recent judgment on a case at the Supreme Court that has an impact on workers across the UK. The case, Harpur Trust vs Brazel, concerns the calculation of statutory annual leave and holiday pay entitlement for workers who work for varying hours during only certain weeks of the year but have a contract throughout that year (“part–year workers”).

**How does this impact schools?**

Schools are particularly impacted as they employ part-year workers, in particular employees who work Term Time Only.

**What is the impact of the Case on Schools?**

The judgment requires employers to adjust the method by which term time holiday pay is calculated. This will mean an **increase in holiday entitlement and holiday pay** for those staff identified by this judgment going forward, as well as **back pay for a period of two years**.

A summary of the case is at Appendix 1.

**This will cause a significant budget pressure**

We recognise that this will have an impact on schools’ budgets at a time when they are already stretched, with a significant number of other budgetary pressures impacting the sector. Unfortunately, the judgment is binding on all employers who have to apply it in a reasonable timescale. It was made in July, at a point after budgets for both maintained schools and academies will have been set, so this is not something that schools could have anticipated in their budget setting process.

We have also confirmed that there is no further funding provided by government to fund this cost.

**I am a Maintained School (where BC is the employer) what does this mean for me?**

|  |  |  |
| --- | --- | --- |
| Maintained Schools | who use Buckinghamshire Council Payroll Service | The **actions here are mandatory** because Buckinghamshire Council is the employer. As the payroll function resides within the council, we will make the necessary changes to pay for affected staff. |
| Maintained Schools | who do not use Buckinghamshire Council Payroll Service | The **actions here are mandatory** because Buckinghamshire Council is the employer. As the payroll function resides outside the council, the school will need to implement our solution in line with our timescales with their own payroll provider.  |

**I am a School where Buckinghamshire Council is not the Employer – what does this mean for me?**

|  |  |  |
| --- | --- | --- |
| Schools where Buckinghamshire Council is not the employer:  | who do not use Buckinghamshire Council Payroll Service | The information here is **advisory** and demonstrates the approach that the council is taking. The school is under no obligation to take our approach but should ensure that a robust and compliant approach to the judgment is taken. It may be useful to work in line with the timescales listed here for Buckinghamshire so that staff feel parity across schools.  |
| Schools where Buckinghamshire Council is not the employer: academies, VA schools, foundation schools | who use Buckinghamshire Council Payroll Service | The information here is **advisory** and demonstrates the approach that the council is taking. Buckinghamshire Council will not implement a solution via payroll without explicit instruction from the school. The school is under no obligation to take our approach but should ensure that a robust and compliant approach to the judgment is taken. It may be useful to work in line with the timescales listed here for Buckinghamshire so that staff feel parity across schools.  |

**What is the impact for staff who are Buckinghamshire Council employees?**

Holiday pay will now be calculated for all part-year workers by applying the WTR statutory minimum 5.6 weeks’ leave and back payment will be paid for the two years prior.

**Have you spoken to the Trade Unions?**

The process and approach have been shared with both teaching and public service unions who, to date, have not identified any specific concerns.

**How will you implement this?**

A phased approach will be taken as set out in the timetable below:-

| **Phase** | **Action**  | **Time Scale** |
| --- | --- | --- |
| Phase 1 | To put the calculation right for regular hours TTO employees going forward |  By February  |
| Phase 2 | Implement the 2 years’ back pay | Anticipated April onwards |
| Phase 3 | Review the use of irregular hours/casual workers | Commence Review March  |

**How can I find out more?**

Further information will be provided at the following meetings, with an opportunity for you to ask questions:

|  |  |
| --- | --- |
| PEB | 30.11.22 |
| BASH | 02.12.22 |
| Special Schools Head Teachers’ Group | 08.12.22 |

We recognise that this news comes at a time of particular challenge and pressure for school leaders. However we can see that to leave this unresolved creates a larger legal and moral problem. We are committed to working with and supporting schools as much as is possible to address the issue.

Yours sincerely





John Macilwraith Sarah Murphy-Brookman

Corporate Director Children’s Services Corporate Director Resources

**Appendix 1**

**Summary of the case**

* Ms B was a visiting music teacher who worked a variable number of hours each week and was only paid for the hours that she teaches during term time.
* Ms B is entitled to take 5.6 weeks’ annual leave during school holidays (split into three tranches of 1.8 weeks)
* Harpur Trust paid Ms B 12.07 per cent of pay earned during the preceding term in respect of each period of annual leave taken
* Ms B challenged that this calculation method meant she had been underpaid holiday pay – her case went to the Supreme Court who agreed.

**Main impacts for employers**

* Statutory annual leave entitlement and the related holiday pay cannot be pro-rated for part-year workers
* The 12.07 per cent calculation is not lawful
* The reference period for calculating holiday pay is 52 weeks, discounting weeks not worked with no pay
* Where paid leave falls short of the statutory 5.6 weeks, there is a risk of claims from workers of unlawful deductions from wages for the shortfall – liability is up to a period of 2 years’ back pay

A link to the case transcript is below:

<https://www.bailii.org/uk/cases/UKSC/2022/21.pdf>

**Appendix 2**

**Details of Buckinghamshire Council’s Approach**

**Impact for Schools**

The ruling means that all permanent term time only workers must receive 5.6 weeks statutory paid holidays, as calculated in accordance with Working Time Regulations (WTR), the same as a 5 days’ a week full year worker. The decision does not affect those employed on short discrete Fixed Term contracts where there is no continuity of service.

The Council has followed the NJC green book method for calculating annual leave and the LGA has issued further guidance to employers to take account of this ruling (see attached LGA bulletin).

The guidance makes clear that the ruling only concerns statutory leave, so there remains the ability to pro rate contractual leave providing they still receive the same or more than their statutory 5.6 weeks’ leave entitlement and pay under the WTR.

The most significant impact will be for those support staff on ranges 1-3 whose annual leave entitlement is 22 days (with less than 5 years’ service), see example in the table below:-

|  |
| --- |
| Ranges 1-3 employee (working 5 days a week)Basic annual leave 22 days + public holidays 8 days = 30 days (total leave)Current pro-rated annual leave entitlement = 25.35 days 5.6 weeks’ leave entitlement under WTRs = 28 days Therefore, to comply with the Court of Appeal decision in the Brazel case, an additional **2.65** days will have to be added to the holiday calculation to give them the minimum requirement under the regulations. NB: This is the current interpretation of the regulations and may be subject to change. |

**Back Pay**

Another implication of this ruling is if a worker believes that they have not been given the correct amount of pay for the statutory 5.6 weeks’ leave, they have a right under the Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322) (2014 Regulations) to make a claim for unlawful deduction of wages. Any such claim is limited to two years’ back pay. The back pay for employees affected by Brazel will be a complex calculation, particularly for staff in schools who may have changed hours and/or school(s) over the 2 years.

**Casual**

Depending on the regularity and frequency of the work undertaken, a casual could be classified as a worker during periods when they are not carrying out any work. Therefore, we need to fully understand the implications of Brazel for casual staff by reviewing the use of casuals in schools. Further legal advice will be sought to understand how holiday pay is to be calculated for these staff if we are no longer able to apply a percentage to the hourly rate.