

Backpay for leavers: Employers risk unlawful deduction from wages claims

05 January 2024  Sarah Linden

What is the issue?

The National Joint Council (NJC) reached an agreement on 1 November 2023 in respect of the 2023 pay award for local government services (Green Book) employees. It was previously unclear whether employers were legally required to provide retrospective backpay to those who left employment after 1 April 2023 but before 1 November 2023 and many trusts who adopt the Green Book considered that they had discretion as to whether to pay backdated increases to leavers.

Employment tribunal decision

In May 2023, an employment tribunal handed down its decision in *Rumford v City of York Council*. The case concerned several former employees of the City of York Council who were Green Book employees.

The employees left their employment with the council on 30 September 2022. On 1 November 2022, the NJC 2022/23 pay agreement was reached which had retrospective effect from 1 April 2022. The employees emailed the council on 16 November 2022 requesting their retrospective NJC pay increase for the period from 1 April to 30 September 2022.

The council refused these requests stating that, in a change to their historical position, they would no longer be providing backpay or pension adjustments for employees who had left the council prior to the pay award being agreed.

Recovering backpay

The employees brought employment tribunal claims to recover their backpay. The council attempted to defend the claims on the basis that payment of backpay to leavers under the NJC was discretionary and would not be paid under contracts of employment that had terminated prior to the pay agreement being reached.

This was rejected by the employment tribunal, who instead found that the employees were legally entitled under the retrospective NJC pay increase to receive backpay proportionate to their continued employment period from 1 April 2022 until termination.

NJC pay scales

The employment tribunal noted the requirement to pay employees in accordance with the NJC pay scales was expressly set out in the employees' contracts of employment. Their contracts also expressly stated that they incorporated the NJC collective agreement terms and conditions (Green Book).

Although the employees' contracts were silent on whether leavers were entitled to backpay for retrospective NJC pay increases, the employment tribunal concluded "*payment properly payable for work done prior to the termination of a contract of employment is payable as wages under that contract regardless of when they become payable.*"

In short, the backpay formed part of the employees' wages as their contracts of employment incorporated the NJC pay increase; it did not matter that the employees concerned had left prior to the NJC pay agreement being reached.

Express vs. implied contractual terms

The employment tribunal also set out that, even if the employees' contracts had not contained an express term incorporating the NJC pay increase, owing to the council's historical practice of automatically paying this increase to its employees, the employees were entitled to the same as an implied term.

Unless an employer has created an implied contractual term through custom and practice of automatically paying the agreed NJC pay increase to leavers without first requiring they request it in which case it is immediately payable, backpay to leavers falls due when a leaver requests it following the NJC pay agreement.

What does this mean for education employers?

The tribunal's decision in *Rumford v City of York Council* is a first instance decision. It does not create a binding legal precedent when considering the same issue but it is persuasive, meaning other courts are likely to follow it.

Where an employer who has adopted the Green Book fails to provide backpay to a leaver who has requested it under a retrospective NJC pay increase or where the employer has historically automatically paid it to leavers, employers risk unlawful deduction from wages claims being brought against them. Leavers would have three months to present those claims following the date of their request.

The Education and Skills Funding Agency (**ESFA**) has recently provided advice regarding academy trusts NJC backpay to leavers. This advice sets out that such payments by academy trusts to leavers constitute an "ex-gratia" payment under the ESFA Academy Trust Handbook (the **Handbook**) and therefore require ESFA's prior approval.

ESFA has directed trusts to obtain their approval using [this online form](#). This appears to be at odds with the decision in *Rumford v City of York Council*, where the tribunal concluded that, in the circumstances of that case, payment of retrospective NJC pay increases to leavers was a contractual entitlement. Contractual payments do not require ESFA approval under the Handbook.

What should academy trusts do now?

1. Check whether your contracts of employment expressly incorporate a contractual obligation to pay employees NJC pay increases.
2. If your contract is silent on the incorporation of NJC pay increases, check whether it is an implied contractual term by considering how the trust has historically handled retrospective NJC pay increases to leavers.
3. If your trust has either an express or an implied contractual obligation, you should consider whether to make this payment to avoid potential tribunal claims:
 - 3.1. given ESFA's guidance, you may wish to seek ESFA's approval for those payments.
 - 3.2. if you have not sought ESFA's approval, there is a risk that ESFA may treat this as a breach of the Handbook (although it's likely to be a minor breach).
4. If your trust has neither an express nor an implied contractual obligation, it is unlikely you would be under a legal obligation to do so. If you decide you wish to make this payment anyway, you should consider seeking ESFA approval as it will be an ex-gratia payment under paragraphs 5.17-5.18 of the Handbook.

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