

**Collective Agreed Framework in relation to annual leave payments
("Framework Agreement")**

Introduction and context

- A. This Framework Agreement is agreed in the context of ongoing litigation regarding the calculation of the payment which a worker receives during a period of annual leave. The case of *Flowers v East of England Ambulance Service NHS Trust* concerns the interpretation of the Working Time Directive, Working Time Regulations 1998 and section 13.9 of the NHS Terms and Conditions of Service Handbook (Agenda for Change – "AfC"), and the treatment of overtime payments and, in particular, payments for voluntary overtime in the calculation of holiday pay. The EAT and Court of Appeal held that payments for regular voluntary overtime were to be included in the calculation of holiday pay. The Trust obtained permission to appeal against the above to the Supreme Court and that appeal is scheduled to be heard on 22nd June 2021.
- B. Section 13.9 of the AfC Terms and Conditions states that "*Pay is calculated on the basis of what the individual would have received had he/she been at work*". However, the evidence suggests that implementation across NHS organisations in England is inconsistent and that overtime has not, in a number of cases, been included in holiday pay calculations.
- C. It is the aim of the parties that existing and ongoing claims in either the Employment Tribunal or the County or High Court relating to the issues of holiday pay dealt with by this Framework shall be resolved at a local level between claimants and the relevant NHS Employers (as defined in paragraph G below), with the Trade Unions facilitating such resolution.
- D. The parties support this Framework Agreement in respect of corrective payments (as defined further in sections 1, 2 and 3 below) which are to be made to eligible employees in connection with any allegedly accrued rights and/or liabilities under paragraph 13.9 of AfC and/or the Working Time Directive and/or the Working Time Regulations 1998 up to and including 31 March 2021 ("Corrective Payments"). For the avoidance of doubt all claims for underpaid holiday pay relating to Overtime payments up to 31 March 2021 are intended to be resolved and corrected by the terms of this Framework Agreement and not pursued. This Framework Agreement applies only to NHS employees employed under AfC by an NHS Employer (as defined in paragraph G below).
- E. NHS Staff Council will have a role in providing guidance and information to support the process of making the Corrective Payments.
- F. This Framework Agreement and the Corrective Payments made pursuant to it are in respect of all "Overtime" (i.e. regularly-worked voluntary overtime, non-contractual overtime and excess hours). For the purposes of this Framework

Agreement, such Overtime comprises hours which are worked regularly by employees in excess of their standard hours pursuant to their contract of employment. Accordingly, it also covers additional regular “overtime” (including voluntary/non-contractual hours) worked by part-time employees over and above their contracted hours.

- G. This Framework Agreement only covers NHS employers in England, as set out in Annex 1 to AfC (“an NHS Employer”).
- H. This Framework Agreement has been developed in full awareness of the Public Sector Equality Duty (“PSED”) and the duty to comply with it.
- I. Whilst individual employees and NHS employers who fall within the scope of this Framework Agreement are not parties to it, the intention is that those employees and employers should respect the terms agreed and should not seek to litigate the issues which are agreed and considered resolved by the Framework Agreement.
- J. The parties are very mindful of the importance of equalities in regard to the matters dealt with in this Framework Agreement and Guidance will be issued by Department of Health and Social Care on the implementation of this Framework Agreement taking into account equality issues under the Equality Act 2010 including the fulfilment of the Public Sector Equality Duty.

CORRECTIVE PAYMENTS

1. Corrective Payment period

- 1.1 The Corrective Payment period to which this Framework Agreement and any corresponding Corrective Payments apply is the financial years 2019/2020 and 2020/2021 only, namely 1 April 2019 to 31 March 2020 and 1 April 2020 to 31 March 2021 (“the Corrective Payment Period”).
- 1.2 Subject to the eligibility criteria set out in paragraph 2.4, an employee may be eligible for a Corrective Payment in respect of either or both the financial years of the Corrective Payment Period.
- 1.3 For the avoidance of doubt, this Framework Agreement is premised on the commitment of the parties and on relevant employees and NHS employers respecting its terms and not making any claims in any Court or Tribunal for payments in connection with allegedly unpaid holiday pay at any time prior to 31st March 2021, which claims are of the nature of the claims resolved by the terms of this Framework Agreement. For the avoidance of doubt, nothing in this Framework Agreement is intended to limit or prevent a Trade Union from providing support and assistance to members in respect of securing a Corrective Payment.

2. Eligibility criteria

- 2.1 An employee must satisfy the agreed eligibility criteria set out in paragraph 2.4 in the financial year(s) in question in order to receive a Corrective Payment for that financial year.

2.2 For the avoidance of doubt the eligibility criteria set out at paragraph 2.4 below in connection with the regularity of payments of overtime have been agreed specifically for the purposes of this Framework Agreement and are not to be understood to be providing any more general definition of regularity in connection with matters outside of this specific Framework Agreement.

2.3 Employees may be eligible for a Corrective Payment where they commenced employment with an NHS Employer during the Corrective Payment Period provided they satisfy the criteria set out at paragraph 2.4.

2.4 Employees must satisfy the following criteria to be eligible for a Corrective Payment:

- a) they must be employed by an NHS Employer on 31 March 2021; and
- b) they must have received payments in respect of "Overtime" (as defined in paragraph F) in a minimum of four months out of any of the twelve months in the financial year 2019/2020 (1 April 2019 to 31 March 2020) and/or 2020/2021 (1 April 2020 to 31 March 2021);
- c) Paragraph 2.4(b) immediately above is subject to the Guidance referred to in paragraph J in the Introduction and context section of this Framework Agreement which Guidance will include examination of the need to refine the terms of clause 2.4(b) in the light of the impact of protected characteristics in terms of the application of clause 2.4(b).

2.5 Employees are only entitled to a Corrective Payment to the extent that Overtime payments have not been already taken into account for holiday pay and will not be entitled to a payment under this Framework Agreement to the extent their employer has already either included all Overtime payments for the purposes of calculating holiday pay entitlements or otherwise paid any such corresponding amount at any time prior to 31 March 2021.

3. Calculation and payment of Corrective Payments

3.1 It is agreed for the purposes of this Framework Agreement only, and not by way of any more general principle, that the Corrective Payment for an eligible employee will be calculated based on an agreed percentage multiplier of 16% applied to the total amount of "Overtime" pay received by the employee in any applicable financial year in the Corrective Payment Period.

3.2 The Corrective Payment is a non-consolidated and non-pensionable compensatory payment and will be subject to deductions for income tax and national insurance contributions and other usual deductions.

3.3 Each NHS Employer will use all reasonable endeavours to ensure that the Corrective Payments are completed and paid to relevant employees by 30 September 2021.

4. Existing claims and future claims (as future claims are dealt with at paragraph 4.4 below) in respect of "Overtime"




4.1 Employers and Trade Unions agree to work collectively with the joint aspiration (both nationally and locally as needed) to resolve outstanding litigation on the issue concerning Overtime payments. Trade unions will not support existing claims (in either the Employment Tribunal or the County or High Court in connection with the issue of the

inclusion of Overtime payments in the calculation of paid annual leave under section 13.9 of Agenda for Change and/or the Working Time Directive and/or Working Time Regulations 1998 covering the period up to and including 31 March 2021) in the event of individual settlements being offered and unreasonably rejected.

- 4.2 The Trade Unions confirm that the Corrective Payments are the best resolution achievable through a collective Framework Agreement.
- 4.3 The Trade Unions confirm that they will recommend the Corrective Payments to members as a preferable alternative to taking further legal claims and/or pursuing existing claims relating to Overtime payments in respect of any time in the period up to and including 31 March 2021. The Trade Unions note that, once the Corrective Payments are implemented, any further legal claims based on annual leave payments not taking into account Overtime payments in respect of any time in the period up to and including 31 March 2021 which are made despite the terms of the Framework Agreement are likely to be deemed without merit.
- 4.4 The Trade Unions agree that they will not provide any support for individuals who pursue future legal claims, against employers listed in Annex 1 of the NHS Terms and Conditions of Service in either the Employment Tribunal or the County or High Court in connection with taking "Overtime" into account for the calculation of paid annual leave, under section 13.9 of Agenda for Change and/or the Working Time Directive and/or Working Time Regulations 1998 up to and including 31 March 2021, which claims are of the nature of the claims resolved and corrected by the terms of this Framework Agreement. For the avoidance of doubt, nothing in this Framework Agreement is intended to limit or prevent a Trade Union from providing support and assistance to members in respect of securing a Corrective Payment.
- 4.5 It is agreed that it is the aim of the parties that existing and ongoing claims in either the Employment Tribunal or the County or High Court shall be resolved at a local level between claimants and NHS organisations, with the Trade Unions facilitating such resolution.


12 March 2021

Signed by:

Jon Lenney	Employer Side Chair of the NHS Staff Council and Director of Workforce & OD, Manchester and Trafford Local Care Organisation 
Sara Gorton	Head of Health, UNISON and Staff Side Chair of the NHS Staff Council 
Rachel Harrison	National Officer, GMB 

Colenzo
Jarrett-Thorpe

National Officer, Unite

A handwritten signature in black ink, appearing to read "Jarrett-Thorpe", written in a cursive style.