Calculating holiday entitlement for part-year and irregular hours workers

Unite response to UK Government Consultation

March 2023

About Unite the Union

This submission is made by Unite, Britain and Ireland's largest trade union with over 1 million members across all sectors of the economy, including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, health, local government and the not for profit sector. Unite also organises in the community, enabling those who are not in employment to be part of our union.

Holiday Pay

Historically, entitlement to holiday pay arose from the terms of a contract of employment, whether this be an individual contract or an entitlement derived from a collective agreement. Negotiations undertaken by trade unions led to some of the earliest more general entitlement to holiday pay, and up until the late 1990s many workers had limited entitlement to paid holiday. The importance of public holidays is obvious, but entitlement to payment on a public holiday was not automatic. The EU decided that entitlement to paid leave was an important issue of health and safety for workers, and passed the Working Time Directive which made provision for 4 weeks of paid leave. This was enacted into UK law through the Working Time Regulations, and both measures addressed a number of other important issues such as entitlement to breaks, and a cap on the length of the working week.

The basic entitlement to 4 weeks of paid leave should always have been straightforward, but over the 25 years since 1998, there can be fewer areas of employment law which have led to so much action through domestic and EU courts, including the ECJ. It would take too long to identify all of the legal issues addressed, but it includes matters such as determining how holiday pay is calculated, and ensuring that pay received during a holiday is a fair reflection of what a worker would normally earn whilst in work. The general approach of courts has been to support the entitlement of workers and to prevent practices being adopted which would deter workers from taking their full entitlement. As a matter of UK domestic law, the 4 week period of entitlement was extended so that the basic obligation upon an employer is to honour a minimum of 5.6 weeks of paid holiday, which in effect incorporates the usual 8 days of public holidays.

The union considers that the above analysis assists as regards this consultation exercise, because what is at stake is ensuring that workers who undertake non-standard working patterns retain the same basic entitlement to holiday pay which reflects what they earn. If every worker was in work for 5 days each week and worked standard hours, it would be easy to assess holiday pay for a basic 28 days each year. That is not the position and the consultation exercises engages with non-standard working arrangements, for example those who work irregular hours, or those who work for only part of the year, whether or not the hours and days actually worked can be predicted in advance with certainty.

The Supreme Court Case Harpur Trust v Brazel

The above case was decided by the Supreme Court and the court has made it clear that every worker engaged on a permanent or continuous basis must receive at least 5.6 weeks paid holiday each year. Employers are unable to pro-rate statutory holiday to reflect the number of

weeks that a worker works each year, and holiday pay must be determined by reference to the calculation method set out in s224 of the Employment Rights Act 1996. The prior practice of adding 12.07% for holiday pay is unlawful, and holiday pay must reflect the real value of weeks actually worked, notwithstanding the apparent unfairness which might arise in some cases, with the perception being that some workers might receive a windfall of additional holiday pay.

As regards the consultation exercise, the union's view is that the final position must create certainty for workers and employers, and one of the errors arising from the WTR has been to have significant periods of time when there has been uncertainty as to rights and obligations. The final scenario should not be determined by the perception of big winners or losers, and false distinctions between different categories of worker should not lead to a contrived approach for what are likely to be minority work groups across work forces. The outcome should also discourage employers from creating avoidance mechanisms such as repeated separate contracts, or contractual terms designed to reduce entitlement, e.g. creating an obligation to provide a very limited amount of work in a working week simply to drive down the average.

Unite considers that it would be preferable to continue to adopt the approach from the Supreme Court case which honours the entitlement derived from the Regulations, and can be applied by employers and understood by workers on a basis which is clear and certain.

There are questions raised by the consultation exercise which are directed to employers and individual workers, and the intention of the union is to focus upon the more generic areas which will be of interest to all of those working under the conditions covered by the consultation and employing workers as employers.

The General Questions

17. Do you agree that including weeks without work in a holiday entitlement reference period will be the fairest way to calculate holiday entitlement for a worker with irregular hours and part-year workers?

Strongly disagree

The approach adopted by the WTR has been to focus entitlement to paid leave by reference to the average number of hours worked over an agreed reference period. This has been respected by the Supreme Court, and is a matter of common sense in that time when a person is not working should not determine entitlement under that particular contract, noting that a person who undertakes non-standard hours may have one or more other jobs which would create their own entitlement and obligations for those employers. The idea that a reference period can be isolated in this way ignores the reality of the world of work in our society.

A decision to include weeks without work rewards the imposition of zero hours contracts and can only be designed to reduce entitlement. A mechanism which creates certainty is to be preferred, and that has now been achieved through the decision of the Supreme Court. Further, bearing in mind the ratio of female to make workers in relevant occupations, it could

be seen that a departure from the decision of the UK's highest court is an attack upon female workers.

18. Would you agree that a fixed holiday entitlement reference period would make it easier to calculate holiday entitlement for workers with irregular hours?

Slightly disagree

Workers undertaking irregular hours already face uncertainty, with the hours to be worked only fixed close to the time when the work is to be done. In the same way, when such a worker decides to take paid leave, they should know that the work they have been undertaking will reflect in their time off, noting that the method of calculation should not deter workers from taking holiday. Historically there have been shorter reference periods to focus upon this connection, and if as Unite believes weeks without hours must be excluded, the longer reference periods may simply lead to greater uncertainty and complexity of calculation for all parties.

19. Do you agree that accruing holiday entitlement at the end of each month based on the hours worked during that month would be the fairest way to calculate holiday entitlement for workers on irregular hours in their first year of employment?

Slightly disagree

Accrual of holiday entitlement has always been an issue for new starters, and this can include when a person joins an employer part way through the holiday year. Basing entitlement only upon fixed calendar months works more easily for those undertaking regular hours, and for those working variable hours any fixed method of calculation would need to provide for some flexibility to ensure that the 5.6 weeks is paid at a rate reflecting the work done. This may be possible by assessing how each month of work is assessed, but the union's concern is that this could create additional complexity and uncertainty. Any approach concluded will need to ensure that the weeks accrued during the first year match the statutory entitlement, and are calculated in a fair and consistent manner.

20. Would you agree that using a flat average working day would make it easier to calculate how much holiday a worker with irregular hours uses when they take a day off?

Disagree

This approach appears to engage additional complexity which would be difficult to apply for workers who do not have fixed hours or shifts to be worked each week. If an assessment takes place over a reference period, up to 52 weeks, this allows entitlement and payment to reflect the statutory entitlement and the value of work done.

21. Would you agree that calculating agency workers' holiday entitlement as 12.07% of their hours worked at the end of each month whilst on assignment would make it easier to calculate their holiday entitlement and holiday pay?

Strongly disagree

The proposed method would again provide for weeks when no hours are worked to be included in the assessment, meaning that those working irregular hours would suffer a detriment. The union considers that any method of calculation which reduces entitlement should not be encouraged, and the approach suggested has been rejected by the UK's highest court through the decision referred to earlier.

Holiday pay should be available for workers to be taken at times agreed with their employer, and for payment to reflect the work done. Workers should not be deterred from taking holiday due to a concern that they will be receiving less pay than normal, and a fixed level of percentage can create this scenario. You may also end up with a dual workforce, with those working next to each other on a daily basis paid different rates for taking off the same day. This cannot be the intention of the decision of the Supreme Court, or of those responsible for passing the legislation, which it must be remembered is a health and safety measure to ensure that workers take a satisfactory level of fixed breaks away from employment.