Retained EU Employment Law

Consultation on Reforms to the Working Time Regulations, Holiday Pay, and the Transfer of Undertakings (Protection of Employment) Regulations

Unite Response to UK Government Consultation July 2023

About Unite the Union

This submission is made by Unite, the UK 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.

Retained EU Employment Law

Unite has followed the progress of the Retained EU Law (Revocation and Reform) Bill as it has made its way through Parliament, starting with the initial proposals in 2022. Unite was opposed to the Bill and expressed concern about the policy to revoke 40 years of EU law and regulations, associated with the destructive idea of a 31 December 2023 sunset clause. Although not forming part of the consultation, Unite is pleased that the Government agreed not to go forward with the approach of the original Bill. Unite also agrees with the decision through which the, Government has agreed to preserve the vast majority of legislation which has assisted in providing important employment rights for individual workers, and as regards collective issues, such as the law involving provision of information and consultation about business transfers and collective redundancies.

A review of the matters being preserved will confirm the extent of the important measures derived from EU law and principles, and Unite also expressed concern about the proposal to abandon 40 years of certainty for workers, trade unions, and employers as regards the interpretation of employment law legislation and associated rights. The Bill proposed that as well as repealing legislation, UK domestic courts would be directed to ignore existing EU jurisprudence, which has developed through the European Court of Justice (ECJ), and the valuable interaction between EU domestic courts and the ECJ. Unite is strongly of the view that any decision to abandon existing law on the meaning of EU directives and associated domestic legislation, would not only cause a severe impact upon the rights of individuals, but it would also cause difficulty for employers, as the parties to employment relationships understand the current position and apply it daily on a practical level. As with the original Bill, the proposal to abandon EU jurisprudence could only be seen as destructive, potentially requiring UK domestic courts to revisit long established principles, and causing unnecessary workplace disputes and legal cases, leading to all concerned incurring substantial costs, and causing periods of unnecessary uncertainty.

Unite is opposed to any decision which would cause a detriment to workers or their trade unions as regards holiday rights and consultation rights. It must be remembered that the Working Time Directive was introduced through EU procedures as a health and safety measure in the 1990s, recognising the importance of monitoring the amount of working time being undertaken, and ensuring that workers were provided with adequate daily and weekly rest, as well as properly funded holiday away from work. Any reduction in the current requirements is resisted by Unite, and also such proposals should be accompanied by a full risk assessment as regards the impact both physically and mentally upon individuals, their co-workers, and employers.

Reducing the administrative burden of the Working Time Regulations, recording working hours

Working hours are recorded for a number of reasons, and Unite does not agree that there should be any change to the current system. Remembering that the original Directive was a health and safety measure, Unite would question how any employer or worker could monitor hours of work correctly without some record being kept. A key issue in society is workplace stress and anxiety, and in complying with workplace health and safety duties, employers can monitor mental health and physical demands from work by knowing what hours are actually worked by their workforce. In addition, there are special rules involving workers being asked to work above an average of 48 hours each week, and if this is agreed by workers, employers should maintain records to determine whether any opt out from the 48 hour working week remains necessary or appropriate. This would be part of an ongoing risk assessment process.

Below in this response, Unite's view is set out as regards how holiday pay is calculated if an employer does not record hours and maintain records, and it would be difficult to see how they might ensure that a worker is receiving the correct rate of holiday pay. There should be no additional administrative burden in complying with this area, because it should already be done, and most employers now have access to IT systems and HR systems online, which should make this process easier by collation of data from all relevant sources. It must also be the case that when reviewing payment records, an employer should retain information should this be necessary for legal disputes (e.g. over levels of pay) and should an employer need to answer questions raised by HMRC or external organisations, such as pension providers. Record keeping will always be of importance, including as regards night workers, reference the specific obligations arising under the Regulations for those undertaking this work, reference the specific health risks.

1, Unite strongly disagrees with the proposal to legislate.

2, it is very important.

3, Unite is not an employer or worker, but has experience of representing the rights of workers, with an understanding that accurate internal records are important, so that a worker can ensure that their legal rights are being respected.

4 – 8, not applicable to Unite.

Proposal 1: create a single annual leave entitlement to 5.6 weeks.

Unite supported the introduction of the additional 1.6 weeks of annual leave so that the current overall entitlement is 5.6 weeks, 28 days for a standard 5 day working week worker. Unite has seen extensive litigation as to the distinction between EU derived holiday entitlement, and the additional 1.6 weeks which arose from domestic legislation. Over many years, there has been an extensive amount of legal attention given to the Working Time Regulations, and this has caused uncertainty for all sides which has to an extent been resolved through ECJ and UK higher court decisions, e.g. on the elements of pay taken into account when calculating holiday pay.

Unite is not opposed to the idea of a single entitlement of 5.6 weeks, as this should create greater certainty for workers and their employers. Many employers have agreed through negotiation and collective bargaining to ensure that workers receive their actual pay for all of their holiday entitlement, and contractually this will often exceed 5.6 weeks. There can be no justification to remove the real pay approach enshrined in EU law when moving to a single holiday entitlement. Remembering that the Directive was introduced as a health and safety measure, it is important to ensure that no part of the law deters workers from taking their annual leave in full. If a worker was obliged to take holiday and to receive only basic pay, it is inevitable that this may deter many workers from taking holiday. This would particularly be the case when account is taken of the pressures upon workers and their families and the current cost of living crisis. Therefore, matters such as commission, bonuses, regular overtime and the like should be taken into account for the full 5.6 weeks. The concept of normal remuneration should be assessed to ensure that when a worker is on holiday they are receiving, as far as possible, close to what they would have received had they been at work. Unite is unaware of any legal or practical issue which would impact upon this approach, bearing in mind that employers will already have systems in place to undertake the necessary calculations. Unite agrees that there is an administrative burden if employers are required to prepare two separate calculations.

Table 3 includes information about the matters which will need to be taken into account when looking at a single leave entitlement. Unite would agree with additional holiday entitlement being available for workers, bearing in mind the impact of stress across workplaces which has become a major health and safety issue over recent years. Unite agrees that arrangements should be in place to protect the interests of workers when considering carry over of holiday entitlement into the next leave year, and consideration should be given to circumstances when a worker is prevented from taking leave due to the demands of their job and conditions imposed by an employer. Unite is aware of the current arrangements, e.g. in relation to long term sick leave, and any final legislation must include certainty about when holiday can be carried over as a matter of right, with of course the parties entitled to reach their own agreement.

As regards question 9, Unite agrees that creating a single statutory leave entitlement would make it easier to calculate holiday pay and reduce administrative burden on businesses. It would also assist workers in being able to understand their annual leave entitlement and whether it is being paid at the correct rate. The introduction of a single entitlement should not be such as to reduce the level of entitlement to pay which must reflect average normal earnings. As far as possible, this should be identified with certainty and determined by reference to the real rate of pay and not a rate which may deter workers from taking holidays. New paragraph 10, not applicable.

11, Unite is not a worker, but Unite's members will receive holiday pay at different rates according to how their employer applies the current statute.

12, Unite considers that the 5.6 weeks of statutory annual leave should be paid at the rate of normal pay, being what the worker normally earns.

There can be issues as regards entitlement when workers undertake shifts by reference to annualised hours, and this can impact particularly during the first year of employment.

Regulations and guidance should ensure that during the first year of employment workers accrue leave according to time worked, and such that employers ensure that workers receive the correct pro rata entitlement before the first full year of annual leave entitlement commences.

13, Unite disagrees with this proposal, and entitlement should be based upon the principles set out above. The current system provides a more certain entitlement for workers during the first year, and it would be wrong for entitlement to be identified possibly after the end of the holiday year during which employment has commenced.

14, subject to any change in the position as regards Covid, the answer is no, providing that other guidance on carry forward of leave is set out with clarity.

Proposal 2: Introducing "Rolled-Up" Holiday Pay

Unite is aware of the previous system of using rolled up holiday pay, but over time this was subject to judicial criticism and could not be used over recent years by employers as it is unlawful. The advantage of a formal reference period is to ensure that holiday pay reflects real pay, including for those working irregular hours and for those undertaking overtime which may reflect seasonal obligations. Unite is aware of the position as regards those engaged in the gig economy, but employers already factor in a holiday entitlement which is paid in a manner which is lawful and reflects existing judicial authority. Unite is familiar with the other ongoing consultation exercise involving holiday pay and irregular hours derived from the Supreme Court decision in Harpur Trust. Rolled up holiday pay is unsatisfactory as a means of paying holiday pay for the vast majority of workers. It involves in effect paying holidays up front at a predetermined rate, which may fail to reflect the real value of the work. It is also unacceptable in that workers are expected to receive net pay which includes holiday pay, and to save part of the pay for when holiday is taken. It is unrealistic to expect workers to do this, particularly when workers and their families are subject to the pressures arising from the cost of living crisis. It is more likely than not that many workers would spend money received, e.g. at 12.07% prior to taking annual leave, meeting the ordinary challenges of daily living. It may also cause considerable administrative burden if employers had to adjust the amount of pay constantly to reflect additional work done, and as regards any holiday entitlement beyond the statutory provision.

15, Unite says no, rolled-up holiday pay should not be introduced.

It may be that in certain industries and workplaces there is a contrary view, but the best outcome would be for special cases to be subject to collective bargaining and negotiation between employers and recognised trade unions. This would ensure that no worker is disadvantaged when holiday is being taken.

16, Unite is not an employer or worker.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

Unite considers that TUPE is an important piece of legislation and as the title confirms, it was passed by the EU and adopted by the UK to protect the rights of workers. It is already the case that the law relating to information and consultation is limited for micro-employers, and it is already inadequate in that there is no specific obligation to consult for a particular period. Unite believes that there should be no reduction in the rights of workers associated with the provision of information and consultation when dealing with business transfers. The law in this area is already complex, and many workers struggle to obtain the necessary information about protection of rights, such as to comply with the obligations referred to on pages 27 and 28. It will remain preferable for transferors and transferees to consult with trade union representatives, or representatives of the workforce (if there is no recognised union), noting that those engaged should also be provided with training and relevant information so that they understand the task required of them.

17, no.

18, no, it would still be preferable for a formal consultation process to be undertaken.

19, see above, this is already an area with issues arising for workers, in terms of what they receive by way of information, and whether consultation is adequate to protect their rights. Starting to erode the statutory framework is not something which Unite can agree with.

20, the Unite experience of applying the TUPE Regulations has been that many workers are dissatisfied with the compliance on the part of transferors and transferees. The law is still complex in this area and whilst Unite would never support any reduction in rights associated with TUPE, should Government propose a broader consultation exercise, it would be a matter which Unite would engage with. This may provide an opportunity to review the text of the Regulations, the law as it has developed in this area, and the best way forward in terms of ensuring that workers' rights are fully protected, and that when they are not there are relevant remedies available.