Official Response to the Government Consultation

Calculating holiday entitlement for part-year and irregular hours workers

March 2023

Introduction

As part of the ambition for the UK to be the best place in the world to do business, the Government is removing barriers to growth by providing clarity on complex employment legislation so that it is simpler for employers to comply.

Over time, holiday pay and entitlement legislation has become complex and, in some cases, can be challenging for employers to follow due to changes in case law. There is a risk that in certain circumstances this legislation may not be fully achieving its original intention. The main pieces of legislation that govern holiday entitlement and pay for workers are the Working Time Regulations 1998 and the Employment Rights Act 1996. There is also a significant body of domestic and retained EU case law.

In July 2022, the Supreme Court handed down its judgment on Harpur Trust v Brazel.[1] This case concerned the calculation of holiday pay and entitlement of a permanent part-year worker on a zero-hours contract. The judgment held that the correct interpretation of the Working Time Regulations 1998 is that holiday entitlement for part-year workers should not be pro-rated so that it is proportionate to the amount of work that they actually perform each year. Part-year workers are entitled to 5.6 weeks of statutory annual leave calculated using a holiday entitlement reference period to determine their average weekly pay, ignoring any weeks in which they did not work. As a result of this judgment, part-year workers are now entitled to a larger holiday entitlement than part-time workers who work the same total number of hours across the year.

The Government is keen to address this disparity to ensure that holiday pay and entitlement received by workers is proportionate to the time they spend working. The consultation seeks to understand the implications of the judgment on different sectors including agency workers who have complex contractual arrangements. The Government wants to ensure that any changes we consider do not have any adverse impacts on other parts of the legislation.

[1] https://www.supremecourt.uk/cases/uksc-2019-0209.html

About Community Union

Community Union is a general union formed in 2004 by the merger of the ISTC and KFAT unions. These two traditional unions had deep roots in communities across the UK, and today our union maintains that connection.

Since then we have welcomed members across diverse sectors such as Education Professionals, Prison Services workers, Health and Social Care, Logistics and Finance to be a true community of workers.

We are a voice for those communities. Standing together we can achieve a better working world for everyone.

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This is the official response submitted on behalf of members of Community Union.

This response will be published on our website following the close of the consultation.

We give permission for this response to be published and included in any response as necessary.

This response was submitted via email to: holidayentitlementconsultation@beis.gov.uk

Background to Holiday Pay and Entitlement

Holiday Entitlement

Almost all workers are entitled to 5.6 weeks of paid annual leave each year; this includes agency workers, workers with irregular hours and workers on zero-hours contracts. This leave entitlement is broadly granted under the Working Time Regulations 1998 (WTR), although workers in some sectors are covered by other regulations; for example, workers in civil aviation are covered by the Civil Aviation (Working Time) Regulations 2004.

Holiday entitlement in the WTR is split into two allocations:

- 4 weeks under regulation 13, which implemented the leave required by the EU's Working Time Directive; and
- 1.6 weeks under regulation 13A, which is additional leave above the EU minimum requirements.

Although regulation 13 leave was originally derived from European legislation, it currently remains part of domestic employment law following the UK's exit from the EU.

Holiday entitlements are split into leave years. This can be defined by an agreement between workers and employers, such as the employment contract, and could, for example, mirror the calendar year (1st January to 31st December) or the financial year (1st April to 31st March). If there is no relevant agreement between the worker and the employer, the WTR regulation 13(3) governs the date on which the worker's leave year starts.

There is a calculator on GOV.UK designed to help employers calculate statutory holiday entitlement for some of the different types of working patterns and different lengths of time in employment.[2] There are separate rules to govern how much holiday a worker is entitled to take when they first start a job, which are covered in more detailed guidance available online.[3]

Although employers have some discretion over when their staff take holiday, in order to ensure business continuity, they must not prevent workers from taking holiday altogether, and they must allow workers to take holiday before the entitlement to it expires.

The WTR set out which holiday can be carried into the next leave year, and which cannot:

- Regulation 13 grants 4 weeks of holiday that cannot be carried forward under usual circumstances.
- Regulation 13A grants a further 1.6 weeks that may be carried into the next leave year if a relevant agreement between a worker and their employer provides for it to do so.

[2] https://www.gov.uk/calculate-your-holiday-entitlement
[3] https://www.gov.uk/holiday-entitlement-rights/calculate-leave-entitlement

If a worker clearly chooses not to use their entitlement to annual leave prior to it expiring, they lose the entitlement – otherwise known as 'use it or lose it'.

Holiday Pay

The Working Time Regulations and sections 221-224 of the Employment Rights Act 1996 set out how to calculate a worker's holiday pay. The overarching principle is that holiday pay should reflect a worker's usual rate of pay for periods of actual work.

Where a worker has a constant rate of pay, they should receive the same pay they would have received if they had been at work. If a worker has variable pay, their holiday pay is calculated based on an average from their earnings in a 52-week reference period. This reference period was increased from 12-weeks on 6th April 2020 to make workers' holiday pay fairer by better reflecting seasonal changes in pay and working hours. Whether a worker has normal working hours or not will dictate which weeks are included in the reference period. To aid employers and workers in calculating the correct holiday pay, the Government has produced detailed guidance available on GOV.UK.[4]

Recent case law has considered what must be included in holiday pay calculations. Where holiday pay had previously been calculated based on regular pay that workers received, it should include all components that form 'usual pay', including regular overtime, regular commission and regular bonuses. For example, in 2014 the Employment Appeal Tribunal ruled that regular overtime that employees were required to work by their employer should be factored into a worker's holiday pay.[5] This case law reaffirms the principle that, for the regulation 13 leave derived from EU law at least, holiday pay should be reflective of the pay that would have been earned if the worker was at work and working.

Workers must also be given the opportunity to take their statutory holiday entitlement. Employers cannot generally buy it back or replace holiday with financial compensation if the worker remains in continuing employment. This is known as payment in lieu and is only lawful when a worker leaves their employment. When a worker leaves employment, they must be paid for any untaken statutory holiday that they have accrued. This is currently the only situation in which payment in lieu of statutory holiday is permitted.

Current position on calculating holiday entitlement

Workers who are in employment for a full leave year are entitled to 5.6 weeks of paid annual leave. The WTR do not expressly set out how to calculate holiday entitlement for part-year workers on permanent contracts. This is the subject of a recent case, Harpur Trust v Brazel, which was heard by the Supreme Court in November 2021.[6] In the 2019 judgment on this

[4] https://www.gov.uk/Government/publications/calculating-holiday-pay-for-workers-without-fixed-hours-or-pay
[5] Bear Scotland Ltd and Others v Mr David Fulton and Others [2014] UKEATS 0047/13/0411
[6] Harpur Trust v Brazel [2022] UKSC 21. The Supreme Court judgment was handed down on 20 July 2022: https://www.supremecourt.uk/cases/uksc-2019-0209.html

case, the Court of Appeal defined part-year workers as permanent workers who only work for part of the year and are unpaid for the remainder of the year. In July 2022, the Supreme Court held that under the WTR, holiday entitlement for part-year workers should not be pro-rated so that it is proportionate to the amount of work they actually perform each year. Instead, the Court held that part-year workers on permanent contracts should receive 5.6 weeks of annual leave and that their holiday entitlement should be calculated using a 52-week holiday entitlement reference period. The judgment noted that in calculating entitlement the WTR "adopt a time-apportionment basis, not an apportionment on the basis of work actually done", as reflected in the arrangements for apportioning entitlement for workers joining part way through a leave year.[7]

Following the Supreme Court judgment, part-year workers are entitled to a larger annual paid holiday entitlement than part-time workers who work the same number of hours across the year but work fewer hours each week consistently across the year. This is demonstrated further on in Box 2.

The WTR also do not set out how to convert this into entitlement in days or hours for workers with irregular hours. Current Government guidance suggests that employers may wish to calculate average days or hours worked each week based on a representative reference period, although the WTR do not expressly provide for this.[8] In all cases, employers must ensure that each worker receives at least 5.6 weeks' annual leave per year.

The Government also recognises that the existing legislation on calculating holiday entitlement is complicated to apply to agency workers due to their complex contractual arrangements.

[7] Ibid [50].
[8] https://www.gov.uk/government/publications/calculating-holiday-entitlement-for-workers/how-to-calculate-holiday-entitlement-for-workers-on-different-types-of-contract

Questions

A 52-week reference period

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

Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree

Please explain your answer.

Community Union are very concerned by the nature of this consultation.

To us it is clear that the sole purpose is to undo the Supreme Court ruling in Brazel vs Harpur Trust on the flimsiest of arguments.

The UK already has the fewest number of Bank Holidays in Europe at eight, and considerably fewer than China (18) and even the US which has 13 public holidays each year. With just twenty other days of annual leave, it seems miserly to deny some workers the rights to their full entitlement, as exemplified in the findings of the Supreme Court.

The Employment Rights Act 1996 (ERA) defines a 'week's pay' as the worker's average weekly renumeration in the period of 52 weeks ending on the last day of a week on which the calculation is made. This section also states that week's where no payment has been made to a worker should be discounted from the calculation of a 'week's pay'.

It is also important to note that the Appeal Tribunal (2014) and the European Court of Justice (2016) determined, in regards to holiday pay and Statutory Annual Leave, that employers must also factor in any overtime, or commission regardless of whether or not this is guaranteed or non-guaranteed.

So, it is vital that the calculation of a week's pay is fair, correct and consistent. This is why the current reference period – which takes into account all variables – is necessary. For example, a seasonal worker who works longer in the summer would be disadvantaged if their holiday was calculated using a reference period which only considers the wintertime. Similarly, school staff who are not required to work during the summer school closure period would be disadvantaged by a summertime reference period.

The only way to correctly and fairly ascertain an average week's pay, is to consider the whole year. Therefore, the system of using a reference period of 52 paid weeks within the previous 104 calendar weeks, is the fairest for all workers.

The incorporation into the Working Time Regulations 1998 (WTR) of the definition of an average week's pay in the ERA for the purposes of determining holiday pay – including for those who work very irregular hours – was a choice made by Parliament and we recommend the definitions be retained as they currently apply.

Pro-rating holiday entitlement using the so-called *'conformity-principle'* is out of step with both the ERA and WTR since it could see workers receive less than the statutory minimum holiday entitlement. The decision of the Supreme Court does not prevent a state from making a more generous provision than the *'conformity principle'* would produce. Indeed, Community would argue that a well-rested workforce has the potential to be more productive and suffer less illness which is of benefit to all.

The amount of leave to which a part-year worker under a permanent contract is entitled is therefore not required to be, and under domestic law must not be, pro-rated to be proportional to that of a full-time worker. Therefore, the leave entitlement in WTR, of 5.6 weeks, is fixed and universal. It is not linked to the amount of work in fact done by the worker.

A slight favouring of workers with a highly atypical work pattern is not so absurd as to justify the wholesale revision of the statutory scheme which the any alternative methods might require.

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

Strongly agree	Agree	**Neither agree nor disagree**	Disagree	Strongly disagree

Please explain your answer.

As we have already stated, it is vital that the calculation of a week's pay is fair and correct. This is why a reference period which takes into account all variables is necessary. For example, a seasonal worker who works longer in the summer would be disadvantaged if their holiday was calculated using a reference period which only considered the wintertime. Similarly, school staff who are not required to work during the summer school closure would be disadvantaged by a summertime reference period.

The current methodology already does apply a fixed reference period, albeit a long one, as it requires employers to reference a worker's previous 52 paid weeks (within the previous 104 calendar weeks) to calculate what that worker should be paid for a week's leave. The beauty of this reference period is its simplicity. As long as accurate records of work are kept and maintained this method is not complicated and can be consistently and equally applied across all workers ensuring that no-one suffers detriment.

Workers themselves are able to keep their own records of holiday periods and unpaid time in order that checks and balances with the records of the employer can be made. This transparency allows errors to be quickly identified and easily rectified before becoming compounded.

The significant amount of time that might need to be taken by employer and worker to calculate holiday entitlement over a constantly changing fixed reference period places undue strain on the employer and increases the likelihood of error. Should a case be taken to tribunal the time that would need to be invested in determining actual hours worked, holiday leave and pay entitlement is considerable and likely to lead to an increase in tribunal time for each case which would significantly increase costs and reduce tribunal capacity.

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?

Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree

Please explain your answer.

Whilst it appears that holiday is accrued throughout the year on a day-by-day, month-by-month basis, this is not the legal case. Leave doesn't actually accrue (regulation 15A - first leave, does say that leave is "deemed" to accrue), but the entitlement to leave is just there, to be taken by everyone, from day one of each leave year. Workers in the UK are entitled to 5.6 weeks of leave each year. This was confirmed by the Supreme Court judgement (Brazel v Harpur Trust) and shows that leave is not linked to the amount of work done by the worker.

This actually makes distributing leave entitlement easier than trying to require workers to use their leave in a short window that might not suit them – for example taking 1 week off every 3 months might prevent workers from taking a longer break in the summertime but this might not be appropriate for all workers nor all employers and should be considered with care.

The administrative burden of calculating holiday entitlement each month should not be underestimated. Employers, workers, and ETs would face the spectre of needing to determine the hours worked by every worker, each month, to calculate the annual leave entitlement. This would require extensive and potentially complex record keeping which would be subject to errors. Where errors occur, they risk being compounded if they are not identified and corrected which could lead to significant rise in pay claims against employers who get it wrong.

Should cases, based on an accruing holiday entitlement, be brought before an employment tribunal, significant time and care would need to be taken by employer and worker to present their calculations of holiday entitlement for consideration. The time that would need to be invested by the tribunal, in determining actual hours worked, holiday leave and pay entitlement is considerable and likely to lead to an increase in tribunal time for each case which would significantly increase costs and reduce tribunal capacity.

It is important to note that the 5.6 weeks of annual leave set out in the Working Time Directive is only a minimum standard. And we should seek to improve upon this wherever possible.

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?

Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree

Please explain your answer.

Using a flat average working day, does not make it easier to calculate how much holiday is used. It would hugely increase the variability in average pay for anyone who has been employed for less than 52 weeks and introduce greater risk of errors being perpetuated because it would be based on assumptions and averages.

This could equally disadvantage workers who work flexibly meaning they could be paid a disproportionate or inaccurate amount of pay for the time they take off. For example, someone who works 35 hours each week spread over 5 days, but works fewer hours on a Friday, could lose holiday entitlement and potentially be overpaid if they took a Friday off work and this was recorded as a 'flat average day'.

Similarly, those who work zero hours contracts and are beholden to their employer for the number of hours they work at any given time, could find themselves working fewer hours in order to artificially lower the *average* during any reference period before having hours increased once that reference period has established the going rate.

Annual leave is not something which is designed to be used piecemeal in hourly chunks but to support wellbeing by ensuring workers have adequate time to rest.

Workforce studies have found that having regular holidays from work can really benefit mental health and wellbeing. By investing in rest and recuperation we can have a stronger, fitter and healthier workforce. Not only that but there are benefits to the employer:

- Improved morale
- Increased productivity
- Better employee retention
- Fewer unplanned absences

The Working Time Directive only lays down minimum requirements and is fixed and universal. The amount of leave to which a part-year worker under a permanent contract is entitled is therefore not required to be, and under domestic law must not be, pro-rated to be proportional to that of a full-time worker.

This concept is wide open to abuse by employers and must not be considered. We should be seeking to support the whole workforce with better leave entitlement rather than trying to claw back entitlement from a few, especially as in many instances 'the few' are amongst the most vulnerable and lowest paid workers.

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 agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree

Please explain your answer.

The Supreme Court clarified that the 12.07% accrual method, which was commonly used to calculate holiday entitlement for employees with variable working hours, is not accurate when applied to all "part-year" workers which includes workers on zero-hour contracts (assuming they don't work every week of the year).

This accrual method was developed to assist in the calculation and administration of holiday pay through payroll, although it should be noted that this was always simply a *rule of thumb* and was never set out in legislation. The Supreme Court decision confirmed that this 12.07% accrual method does not reflect the intention of the law and in some circumstances can cause incorrect results.

Therefore, the leave entitlement in WTR, of 5.6 weeks, is fixed and universal. It is not linked to the amount of work in fact done by the worker.

The use of any artificial formula to calculate annual leave goes against the working time regulations, and the protections set out in European and UK law. There is no doubt that some employers felt that applying a 12.07% accrual method would allow them to easily calculate leave entitlement, but they did not check that this was fair and reasonable when applied to all workers. In particular, when applied to those working irregular hours it led to discrimination under the part-time workers regulations, and for some workers to suffer detriment.

As we have already pointed out, the 5.6 weeks of leave is an entitlement to leave. It is not something which accrues. The entitlement to leave is just there, to be taken by everyone, from day one of each leave year. It is a minimum entitlement which each and every employer should be encouraged to better.

22.
Do you have any further comments about calculating holiday entitlement for agency workers?

Please explain your answer.

This consultation is very concerning, since it seems designed to undo the judgement of the Supreme Court and to cause agency workers, those on zero-hour contracts, and those who work part year or irregular hours, to suffer detriment. This must not be permitted.

The Supreme Court rejected the various alternative methods for calculating holiday pay, including the 12.07% method, as being "directly contrary to what is required by the statutory wording and the WTR". This should now be a closed matter. It is inconceivable that the Government should be seeking to overturn this decision so soon after it has been implemented to the detriment of workers.

The Government is concerned about the impact of the Brazel vs Harpur Trust judgment, as it creates a disparity between workers and additional cost for employers, but it does not consider the impact that this will have on workers who, by virtue of the jobs they are offered are disadvantaged. Many of those employed or working irregular hours are those who are in insecure employment, the gig economy and are often on lower rates of pay. This is especially the case for support staff working in schools and could be considered discriminatory on gender grounds, as the vast majority of those affected will be women.

General rules sometimes do produce anomalies.

As we have noted several times throughout this response, the entitlement to 5.6 weeks of annual leave is the *minimum* standard set out in law. There is nothing to stop employers exceeding this standard and this should be widely promoted as a solution to this issue. Many public sector employers already do offer enhanced annual leave above and beyond the minimum required in law and this model should be encouraged.

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This consultation is available from: www.gov.uk/government/consultations/calculating-holiday-entitlement-for-part-year-and-irregular-hours-workers

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